

# The Southern Cross Group

*Promoting Mobility in the Global Community*



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## **Australian-born Individuals Who Lost British Subject Status Prior to 26 January 1949**

Dear Minister

In the context of the forthcoming entry into force of the *Australian Citizenship Act 2007*, we seek clarification from you concerning the status under Australian citizenship law of Australian-born individuals who lost their British subject status prior to 26 January 1949.

The following case is one of several that has come to the attention of the Southern Cross Group, and serves to illustrate the nature of our inquiry. The names have been changed but the dates are those of a real family.

Alice Smith was born in Australia in 1925. During World War II she met and married a US serviceman in Australia, Tom Brown. In 1945 Alice went to live with Tom in the United States. Alice had one child, a daughter, Betty, born in the US in 1946. On 13 January 1949 Alice became a naturalised United States citizen. She had a second child, a son, Cyril, born in the US in 1950. Alice, Betty and Cyril are all still alive and all want to know what rights, if any, they have to apply for Australian citizenship under the *Australian Citizenship Act 2007*.

### **Philip Milham's Enquiry – War Bride Monica Swick**

In early May 2007, your office was contacted by Mr Philip Milham of Wellington NSW, who was inquiring as to the position under the 2007 Act of his war bride aunt Mrs Monica Swick, who lives in California. The person in your office who spoke to Mr Milham left him with the impression that his aunt would not be entitled to apply for Australian citizenship under the 2007 Act. This seemed to be based on the assumption that Mrs Swick had become a US citizen before 26 January 1949. This is despite the fact that your advisor failed to ask for or obtain from Mr Milham any relevant particulars concerning his aunt which would have allowed a proper legal assessment to be done. Your advisor did not ask Mr Milham for information as to Mrs Swick's date and country of birth, and most particularly, did not ask for her date of US naturalisation.

Disappointed to learn that his aunt would probably have no entitlement, Mr Milham requested that the verbal advice be confirmed in writing. He subsequently received a letter from Ms Mary-Anne Ellis, Assistant Secretary of DIAC's Citizenship Branch, dated 8 May 2007. Ms Ellis also failed to obtain any further particulars about Mrs Swick from Mr Milham in advance of writing the letter which would have enabled DIAC to give specific advice as to whether Mrs Swick would be able to apply to resume her Australian citizenship or not under the 2007 Act. Ms Ellis' letter to Mr Milham is attached as **Annex 1**.

Ms Ellis' letter does not adequately grapple with Mr Milham's original query. Mr Milham was left none the wiser as to whether his aunt would be able to resume Australian citizenship under the 2007 Act, but with the impression that she probably could not. He subsequently turned to the SCG for help.

The SCG immediately got in touch with Mrs Swick and has ascertained that she became a naturalised US citizen in August 1950. We have therefore now advised Mrs Swick that she will be entitled to apply to resume her Australian citizenship under Section 29(3)(a)(i) of the 2007 Act. Being born in Australia, Mrs Swick became an Australian citizen on 26 January 1949, and then lost her Australian citizenship under Section 17 of the 1948 Act in August 1950.

Although we have now resolved Mrs Swick's query, Ms Ellis' letter of 8 May 2007 is nonetheless revealing as to the Department's understanding of the law concerning the loss of British subject status by war brides before 26 January 1949. Ms Ellis writes to Mr Milham:

*If your aunt had lost her status as a British subject by becoming a citizen of the United States, she would not have become an Australian citizen on 26 January 1949. The Australian Citizenship Act 2007 makes no provision for such people.*

This statement by Ms Ellis implies that it is presently the Department's view that an Australian-born war bride, who was married to a US citizen, and who took US citizenship before 26 January 1949 did not become an Australian citizen on 26 January 1949. The SCG believes that this is an erroneous conclusion in law.

### **The SCG's Query of November 2005**

In previous correspondence with the Department dated 18 November 2005, we had already raised the question of whether an Australian-born World War II war bride who became a naturalised United States citizen before 26 January 1949 would have a right to apply for Australian citizenship under the new legislation. The SCG's query to the Department of November 2005 is attached in full as **Annex 2** (covering e-mail and one-page attachment).

### **The Department's Response of 12 January 2006**

We received a response from the Department on 12 January 2006 from Mr Greg Macek, then Acting Director of Citizenship & Language Services Branch. Mr Macek's e-mail answered a number of queries that had been sent by the SCG to the Department in late 2005. The part of his e-mail dealing with this particular issue is extracted and attached as **Annex 3**.

In view of the fact that the SCG now has several confirmed cases of war brides who became US citizens before 26 January 1949, and having recently seen Ms Ellis' 8 May 2007 letter to Mr Milham, we have now carried out a legal review of the advice given by Mr Macek in January 2006. It is our opinion that Mr Macek's advice, and Ms Ellis' assumption, are incorrect.

Taking Mr Macek's January 2006 advice paragraph by paragraph, we make the following comments:

#### **First Paragraph – Effect of Acquisition of Another Citizenship by Act of Marriage**

We do not disagree with the first paragraph of Mr Macek's advice in itself, describing Section 18 of the *Nationality Act 1920* (as amended and extended in 1936 and 1946) and women who became citizens of another country by reason their marriage alone. However, Mr Macek's first paragraph is wholly irrelevant in determining the eligibility for citizenship of Australian-born WWII war brides who married US servicemen. These women were generally marrying in the period 1943 – 1946. The act of marriage, by itself, did not strip them of their British subject status, under either US law or Australian law at that time.

**Under US law**, marriage to a US citizen in those years did not automatically confer US citizenship on the non-US spouse. The 1922 United States *Cable Act* (Act of 22 September 1922, Pub.L. 67-346, 42 Stat. 1021) provided that:

*The right of any woman to become a naturalized citizen of the United States shall not be denied or abridged because of her sex or because she is a married woman.*

The *Cable Act* further provided, in Section 2:

*That any woman who married a citizen of the United States after the passage of this Act, or any woman whose husband is naturalized after the passage of this Act, shall not become a citizen of the United States by reason of such marriage or naturalisation; but, if eligible to citizenship, she may be naturalized upon full and complete compliance with all requirements of naturalization laws, with the following exceptions:*

- (a) *No declaration of intention shall be required;*  
 (b) *In lieu of the five-year period of residence within the United States and the one-year period of residence within the State or Territory where the naturalization court is held, she shall have resided continuously in the United States, Hawaii, Alaska, or Porto Rico for at least one year immediately preceding the filing of the petition.<sup>1</sup>*

It is therefore clear that an Australian-born woman who married a US citizen during or after World War II did not automatically acquire her husband's citizenship under US law simply by the act of marriage.

An Australian-born woman marrying a US citizen in the mid 1940s also kept her British subject status under **Australian law** at the time when the marriage occurred.

Section 18 of the *Nationality Act 1920* originally provided that:

*The wife of a British subject shall be deemed to be a British subject, and the wife of an alien shall be deemed to be an alien.*

This could of course leave a woman stateless, if she did not acquire her husband's citizenship under the law of his country on marriage. An Australian-born woman who married a US citizen after the entry into force of the *US Cable Act* in 1922 while Section 18 remained in force in its original form (i.e. until 1936) would have found herself without any nationality on her marriage. The *Nationality Act 1920* in its original form is attached as **Annex 4**.

In 1936, the original Section 18 of the *Nationality Act 1920* was repealed and replaced by Section 6 of the *Nationality Act 1936* (Act No. 62 of 1936, attached as **Annex 5**.) Section 18(1) then read:

*Subject to the provisions of this section, the wife of a British subject shall be deemed to be a British subject, and the wife of an alien shall be deemed to be an alien.*

Section 18(2) was introduced in 1936 to solve the statelessness dilemma:

(2) *Where a woman has (whether before or after the commencement of this Act) married an alien, and was immediately before her marriage a British subject, she shall not, by reason only of her marriage, be deemed to have ceased to be a British subject unless, by reason of her marriage, she acquired the nationality of her husband.*

As Australian-born WWII war brides who married US citizens in the mid 1940s did not acquire US citizenship (by virtue of the *US Cable Act*) by reason simply of their marriage, they therefore remained British subjects on their marriages.

The 1936 legislation also introduced a new Section 18A into the 1920 Act:

*18A (1) This section shall apply to every woman who at the time of her marriage to an alien, whether before or after the commencement of this section, was a British subject and who, by reason of her marriage, has acquired the nationality of her husband.*

Section 18A allowed such a woman to make a declaration that she desired to retain the rights of a British subject while in Australia or any Territory.

However, Section 18A was not applicable to Australian-born war brides who married US servicemen during or after World War II because they did not acquire the nationality of their husbands by reason of their marriage.

In 1946, the 1920 Act was again amended with the introduction of a new Section 18B (Section 3 of the *Nationality Act 1946*, Act no. 9 of 1946, attached as **Annex 6**). Section 18B provided:

*18B(1) Notwithstanding anything contained in this Act, every woman who at the time of her marriage to an alien, whether before or after the commencement of this section, was resident in Australia and was a British subject shall, by force of this section, while in Australia or any Territory –*

<sup>1</sup> The *Cable Act* was amended by an Act of 24 May 1934, Pub.L. 73-250, 48 Stat. 797, to require that a petition for US naturalization could not be filed until the person had resided continuously in the US, Hawaii, Alaska or Porto Rico for at least three years immediately filing the petition.

- (a) *if the marriage was celebrated before the commencement of this section – be a British subject; or*
- (b) *if the marriage is celebrated after the commencement of this section – continue to be a British subject,*

*unless she makes a declaration that she desires to retain or acquire the nationality of her husband.*

- (2) *Nothing in this section shall operate to deprive any woman of British nationality retained by her by force of any other provision of this Act.*

Section 18B(1) was not relevant to Australian-born war brides who married US servicemen. They retained their British nationality even once they had moved to live in the United States by virtue of Section 18(2) (which remained in the Act after the 1946 amendments). Therefore, due to Section 18B(2), Section 18B(1) did not limit their British subject status only to the time that they were physically present in Australia or any Territory.

Rather, an Australian-born woman who married a US citizen and then moved to the US remained a British subject. If Section 18B(1) were to have applied in isolation, without the proviso in Section 18B(2), the war bride would have found herself stateless on taking up residence in the United States, a nonsensical result. Almost all Australian-born war brides moved to the United States around the time that the war ended. The US *Cable Act* dictated that they could not become naturalised US citizens until they had been residing in the United States for a certain period.<sup>2</sup> Therefore, no war bride could become a US citizen while she remained living in Australia. And the taking up of residence in itself in the US did not confer US citizenship on her.

Mr Macek also comments at the end of his first paragraph that a woman with British subject status who ceased to be a British subject by reason that on her marriage to an alien she acquired the nationality of her husband, was deemed to be a British subject immediately before the commencement of the 1948 Act. The SCG does not deny that this is a true statement in itself. The fourth bullet point of paragraph 1.7.8 of the *Australian Citizenship Instructions* states that Section 27 of the 1948 Act provided for the restoration of British subject status to women who lost that status solely by reason of their marriage. But again, this is not relevant to the war bride scenario we have outlined, because marriage by itself to a US citizen after 1922 did not under US law confer US citizenship on the war bride.

Second Paragraph – Women who did not acquire husband’s citizenship on marriage and who did not voluntarily naturalize prior to 26 January 1949

Mr Macek states in the second paragraph of his response dated 12 January 2006 that:

*A woman with British subject status who married an alien and who did not acquire the citizenship of her husband by virtue of her marriage and prior to 26/01/49, and who did not acquire the citizenship of another country by a voluntary act and prior to 26/01/49, did not cease to be a British subject.*

The SCG agrees that it is clear that an Australian-born woman who married a US citizen after the entry into force of the US Cable Act took US citizenship after 26 January 1949 did not cease to be a British subject. The abovementioned example of Mrs Monica Swick is a case in point. Her naturalisation in the US occurred in August 1950. She therefore became an Australian citizen on 26 January 1949, losing her Australian citizenship under Section 17 of the 1948 Act in August 1950. She therefore qualifies to resume her Australian citizenship under the 2007 Act.<sup>3</sup>

However, the SCG does not agree with the premise in Mr Macek’s second paragraph that a war bride who naturalised in the US voluntarily before 26 January 1949 ceased to be a British subject.

Mr Macek’s error seems to arise from an assumption expressed in his third paragraph.

<sup>2</sup> The 1934 Amendment to the *Cable Act* stated that foreign women had to be resident in the United States for three years before they could petition for US citizenship. However, several surviving Australian-born war brides have recently reported to the SCG that their US naturalization applications were “speeded up” and that they were able to obtain US citizenship in the late 1940s after only two years residence.

<sup>3</sup> The SCG has also identified a number of Australian-born war brides who moved to the US in the mid 1940s and who have never naturalised in the US, either before or after 26 January 1949. They became Australian citizens on 26 January 1949 and (unless they lost under a provision of the 1948 Act other than Section 17) have remained Australian citizens ever since.

### Third Paragraph – Assumption that Married Woman had Same Status as Men

In his third paragraph, Mr Macek states:

*The position of a woman who did not acquire the citizenship of another country by virtue of her marriage to an alien was the same as that of men prior to the commencement of the Act. As such, women or men who acquired the citizenship of another country by a voluntary act prior to 26/01/49, ceased to be British subjects (section 21 of the Nationality Act 1920).*

We submit that Mr Macek has failed to fully understand the terms of Section 21 of the *Nationality Act 1920* in this context. Section 21 as enacted in 1920 remained in force until the 1920 Act was repealed by the 1948 Act. Section 21 stated:

*A British subject who, when in any foreign state and not under a disability, by obtaining a certificate of naturalization or by any other voluntary and formal act, becomes naturalized therein, shall thenceforth be deemed to have ceased to be a British subject.*

The key here is to understand who was under a disability. Section 5(1) of the 1920 Act defined the terms as follows:

*“Disability” means the status of being a married woman, or a minor, lunatic or idiot.*

This definition of “disability” in the original 1920 Act was never amended while that Act was in force.

It is therefore clear that Section 21 of the 1920 Act could not have operated to strip a married woman of her British subject status when she voluntarily naturalised in the United States (or anywhere else) before 26 January 1949. Married women were under a “disability” and therefore Section 21 did not apply to them. Section 21 only applied to adult British subject men, and adult British subject women who were not married.

Hence, the statement in Mr Macek’s third paragraph is incorrect. Married women who naturalised abroad before 26 January 1949 were not in the same position as men.

Our conclusion tallies with the first bullet point of paragraph 1.7.8 of the *Australian Citizenship Instructions* which states:

*British subject status could be lost in any one of the following ways:*

- *by naturalization in a foreign State, if the person concerned was sane, of full age, and was not a married woman; ...*

We therefore conclude that in the example given on page 1 of this letter, Alice Brown nee Smith became an Australian citizen on 26 January 1949 because even though she became a US citizen on 13 January 1949, that did not lead to the loss of her British-subject status. Section 25(1) of the 1948 Act provided for people who were British subjects immediately prior to 26 January 1949 to immediately become Australian citizens if they were born in Australia. Alice has therefore enjoyed dual citizenship since the date of her US naturalisation.<sup>4</sup>

This result leads to the further conclusion that Alice’s daughter Betty, born in the US in 1946, will qualify under Section 16(3) of the 2007 Act to apply for Australian citizenship by descent.

Further, Alice’s son Cyril, born in the US in 1950, will be able to apply for Australian citizenship by descent under Section 16(2) of the 2007 Act, as he had an Australian-citizen mother at the time of his birth.

### Fourth Paragraph – Declarations of Alienage

Mr Macek goes on to refer to Section 22 of the 1920 Act in the fourth paragraph of his response of 12 January 2006. However, the SCG submits that Section 22(1) could not apply to the war bride scenario outlined above because both subsections (1) and (2) of that Section only apply to those who are not under a disability. The SCG notes that such declarations of alienage were not mandatory, but optional (use of the word “may”). Further, as the *Australian Citizenship Instructions* note in paragraph 1.7.8 second bullet point, such declarations of alienage were in fact very few in number.

<sup>4</sup> Unless of course she subsequently lost her Australian citizenship at a later point in time under any provision of the 1948 Act, e.g. by naturalization in a third country before 4 April 2002, which would have triggered a Section 17 loss.

#### Fifth Paragraph – Transition Provisions of the 1948 Act premised on British Subject Status

The SCG does not disagree with the last paragraph of Mr Macek's advice, but submits, as outlined above, that Australian-born WWII war brides who naturalised in the US before 26 January 1949 were still British subjects on that date.

#### **Affected Numbers**

To date, the SCG has identified four confirmed cases of Australian-born war brides who naturalised in the United States prior to 26 January 1949. We have a number of further cases in our database where the war bride's naturalization date is not yet known and where the war bride or her family are presently following up to try to find their mother's original US naturalization certificate.

Based on the limited sample of total war bride families in its database, the SCG estimates that approximately 4% of all WWII war brides from Australia would have become naturalised US citizens before 26 January 1949. If there were approximately 15,000 Australian-born women who went to the United States as war brides in that period as best estimates suggest, then this would mean that approximately 600 war brides fall into this particular category. Although not all of them are alive today, if the Department's legal view is correct, their early naturalization date will nevertheless haunt their US-born children under the 2007 Act, preventing such children from making valid applications under either Section 16 or Section 21(6). If we estimate that each war bride had on average three children, this would mean that probably in the order of 1800 US-born war bride children are impacted. If we estimate that half of the war brides are still alive, this would mean that the citizenship status/entitlements of some 2400 people in total are at issue.

For this reason, the SCG would ask the Minister to review this matter at his earliest convenience. The families concerned deserve to be given clarity as soon as possible as to their entitlements under the 2007 Act.

We look forward to your prompt response.

Kind regards,

Anne MacGregor  
Co-founder

#### **Attachments**

- Annex 1: Letter from Mary-Anne Ellis to Philip Milham, 8 May 2007
- Annex 2: Query from SCG to DIAC, 18 November 2005
- Annex 3: Extract of E-mail from Greg Macek to SCG, 12 January 2006
- Annex 4: *Nationality Act 1920* (unamended)
- Annex 5: *Nationality Act 1936*
- Annex 6: *Nationality Act 1946*

Cc: Mr Tony Burke, MP  
Shadow Minister for Immigration, Integration and Citizenship

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