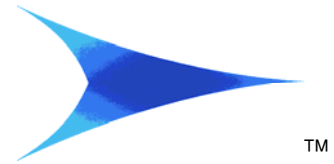


# **The Southern Cross Group**

*Promoting Mobility in the Global Community*

*www.southern-cross-group.org*



## **Discussion Paper**

### ***What's Still Wrong with Australian Citizenship Law***

***Proposals for Amendments to the Australian Citizenship Act 2007***

Brussels and Canberra

15 September 2008

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

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## Executive Summary

This discussion paper presents four scenarios of individuals in the Australian diaspora who are presently excluded from Australian citizenship under the *Australian Citizenship Act 2007* (the 2007 Act).

Although that legislation, which entered into force on 1 July 2007, provides significant numbers of people offshore with a new and direct route to Australian citizenship, the Southern Cross Group (SCG) has discovered a number of deserving cases which still fall between the cracks in the 2007 Act.

- **Scenario 1: Roger Allan**

62-year-old British-born Roger Allan never knew his Australian-born father who was shot down over Italy while serving in the RAAF in April 1945, a few months before Roger's birth. The fact that Roger's father died before 26 January 1949 means that Roger misses out on Australian citizenship under the 2007 Act.

- **Scenario 2: Dylan Zayonc**

Dylan Zayonc is 16 years old and was born in the US. His father Glenn was born in Sydney in 1958 but unwittingly and automatically lost his Australian citizenship in 1974 when he was 16 when his mother lost her citizenship on US naturalisation. Under the 2007 Act, Glenn can resume his Australian citizenship, but Dylan has no route to Australian citizenship. If his father had automatically lost his citizenship as an adult, and not a minor, Dylan would qualify to become "true blue".

- **Scenario 3: Joan Rinkus**

85-year-old Joan Rinkus was born in Plymouth, England in 1923 but settled in Western Australia at the age of 10 months. During WW2 she married a US submariner in Perth and in 1946 left to start a new life in America with him. She has never been an Australian citizen. Her mistake was that she left Australia before 26 January 1949. Her dilemma is compounded by the fact that British-born British subjects living in Australia prior to that date had no legal possibility or need to naturalise in Australia.

- **Scenario 4: Mei-Lin and Moli Conrad Fegan**

Hong-Kong born Mei-Lin and Moli Conrad Fegan were adopted in the US by expatriate Australian citizen Carol Fegan and her US-citizen husband in 1991. They miss out on Australian citizenship by descent because they did not have a natural Australian citizen parent at their dates of birth outside Australia. They also missed out on citizenship by naturalisation by ministerial discretion when they were minors due to incomplete advice received by their mother from Australian consular authorities in Washington. Now that they are adults, there is no immediate route to Australian citizenship for them in the 2007 Act.

The SCG urges the current Government to work towards fixing these omissions in the 2007 Act with the goal of achieving appropriate legislative amendments during its current term.

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## Introduction

The enactment by the Australian Parliament in March last year and the entry into force on 1 July 2007 of the *Australian Citizenship Act 2007* marked the beginning of a new era in Australia's relationship with its million-strong diaspora. The SCG estimates that 100,000 individuals living outside the country have been given a new right to apply for Australian citizenship. Although most have been closely connected to Australia throughout their lives due to their own birth there, or a parent's birth there, they had previously been formally excluded from enjoying the legal status of Australian citizen. Thousands in the diaspora waited years for these changes. Since 1 July 2007, many have made applications for Australian citizenship under the new Act and thousands more will do so in the years to come.

The Australian diaspora is primarily impacted by four key aspects of the 2007 Act:

- **Resumption of Australian Citizenship** is possible for people who were previously Australian citizens, but who lost their citizenship in various ways, simply by showing good character. The SCG estimates that there are approximately 50,000 people globally who are now eligible for resumption. The vast majority were born in Australia, but some were originally Australians by naturalisation or by descent. This group includes thousands of now elderly Australian-born women in the United States who married US servicemen during and just after World War II.<sup>1</sup>
- **Australian Citizenship by Descent** is possible for people born outside Australia on or after 26 January 1949 who had an Australian citizen parent at the time of their birth, regardless of their age now. Further, people born abroad before 26 January 1949 may apply for Australian citizenship by descent if their parent became an Australian citizen on 26 January 1949. The SCG estimates that in excess of 30,000 people around the world fall into this category, which includes the overseas-born children of many Australian-born married women.<sup>2</sup>
- **Conferral of Australian Citizenship** (naturalisation) is possible for people born outside Australia to a person who had automatically forfeited their Australian citizenship (due to the acquisition of another citizenship as an adult) prior to their birth. The SCG estimates that at least 15,000 individuals in the diaspora fall into this category.
- **Conferral of Australian Citizenship** is also possible for non-Australian spouses of Australian citizens while the couple lives abroad, where the non-Australian spouse has

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<sup>1</sup> SCG research indicates that as many as 15,000 Australian-born women went to the US as war brides in this period, although many are no longer alive. They automatically lost their Australian citizenship if they acquired US citizenship in the period 26 January 1949 to 4 April 2002.

<sup>2</sup> From 26 January 1949 until 30 April 1970, Australian law prevented married Australian-born women from passing Australian citizenship by descent to their overseas-born children. The child's father had to be an Australian citizen. If the child's parents were not married, the child could obtain Australian citizenship by descent based on the mother.

been an Australian permanent resident for the requisite period, can demonstrate a close and continuing association with Australia, and passes the Australian Citizenship Test.

All adult applicants for Australian citizenship must demonstrate good character. This is generally done by providing police clearances with the citizenship application to prove that the person has no criminal record.

Since 1 July 2007, the SCG has advised several thousand individuals globally of their eligibility under the new Act and its volunteers have personally assisted hundreds with the preparation of their citizenship applications. The SCG's website provides extensive guidance information for citizenship applicants in the diaspora.

Despite the major advances put in place by the 2007 Act, in the fourteen months since it came into force, the SCG has been confronted with a number of scenarios which the Act does not cover. Those situations are the subject of this discussion paper.

The SCG believes that most of these scenarios were simply never envisaged when the Act was being drafted. Probably for that reason alone, the legislation fails to take such individuals into account. Except for the "Section 18 offspring" scenario (Maltese children), the SCG has no evidence that the previous government had any deliberate intention to exclude from citizenship any individuals falling into the categories listed below. Many in the Australian community would probably reach the view, after consideration of the examples set out in this paper, that there is no sensible policy reason to continue to exclude such cases from Australian citizenship. Small amendments to the 2007 Act would "fix" most of these probably inadvertent omissions.

The SCG has been compiling details of "live cases" impacted by each gap in the 2007 Act as they come to hand in its citizenship advisory work. While the overall numbers of those excluded under the identified lacunae in the legislation will never compare to the large number of diaspora beneficiaries under the Act as it stands (in excess of 100,000 people), and while the SCG only has a handful of examples of each scenario on its books at present, the fact that such cases have already been identified in the short time since the Act came into force means that more examples will continue to come to light going forward. Some of the fixes sought by the SCG now, if enacted, would in the future benefit individuals not yet born.

The SCG ask readers of this discussion paper to give careful consideration to whether it is appropriate for Australia to continue to exclude people in the categories outlined below from Australian citizenship.

The SCG believes that these exclusions are unnecessary and undesirable, and urges the present government to put in place the legislative reforms necessary to overcome these various exclusions.

## Scenario 1

### Australian-born Parent Died before 26 January 1949 Individuals Born Outside Australia prior to 26 January 1949

#### Case Study: Roger Allan

Roger Allen, born in the UK, is 62 years old and lives just outside London with his wife Lucia. He is the product of a wartime romance between an Australian-born father and an English-born mother.

Roger's father Peter Douglas Allan was born on 12 May 1922 in Melbourne and enlisted in the RAAF at Ripponlea to fight for king and country during World War II as soon as he was old enough. He subsequently trained as a pilot in Canada and England. He met Roger's mother, Barbara Annie Bateman, born in the UK in 1920, in Egypt in 1944, where she was stationed as a Captain in the Queen Alexandra's Royal Army Nursing Corps. They married there in early 1945 and Barbara became pregnant with Roger.

Tragically, Flying Officer Peter Allan was killed in combat in his Kittyhawk while flying over the Argenta Gap near Imola in Italy on 19 April 1945, aged just 22. Barbara then returned to her parents in England where Roger was born on 29 September 1945.

Roger, now retired, has stayed in touch with his father's family in Australia all his life. His father's mother made the trip to England to visit him in 1953 when he was eight and Roger first went to Australia in 1970 and has visited several times since. He remains in close contact with his Australian cousins.

Although he had an Australian-born father who died serving his country, Roger has no route to Australian citizenship under the 2007 Act.

#### The Problem Explained

This scenario concerns individuals born outside Australia or New Guinea before 26 January 1949, the date that the concept of Australian citizenship was first introduced into Australian law.<sup>3</sup> Prior to 26 January 1949, those born and naturalised in Australia were simply "British subjects".

A fundamental principle in Australian citizenship law is that those born abroad to an Australian-born Australian citizen parent or a naturalised Australian citizen parent are entitled to apply for Australian citizenship by descent. The applicant's natural parent must have been an Australian citizen on the applicant's date of birth outside Australia.

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<sup>3</sup> *Nationality and Citizenship Act 1948*, later re-named *Australian Citizenship Act 1948*.

In the period 26 January 1949 to 30 June 2007, there were always various limitations in the law as to who could be registered as an Australian citizen by descent. Although the requirements have changed over the years to become gradually more inclusive,<sup>4</sup> the ongoing restrictions meant that many overseas-born individuals with Australian citizen parents missed out on Australian citizenship by descent. Often parents did not know that they only had a limited window in which to register their child, or they thought that their child was automatically an Australian citizen and didn't realise that registration was necessary.

From 1 July 2007, under Subsection 16(2) of the new Act, any person born outside Australia on or after 26 January 1949 who had an Australian-born Australian citizen parent or a naturalised Australian citizen parent on the date of their birth abroad can now apply for Australian citizenship by descent, regardless of their age now.

The situation has always been less straightforward for those born outside Australia to an Australian-born parent before 26 January 1949, simply because no one was an Australian citizen prior to that date.

The *Australian Citizenship Act 2007* attempts to address this difficulty by the introduction of a special "descent" provision for those born outside Australia prior to 26 January 1949, in the form of Subsection 16(3):

- 16(3) *A person born outside Australia or New Guinea before 26 January 1949 is eligible to become an Australian citizen if:*
- (a) *A parent of the person became an Australian citizen on 26 January 1949; and*
  - (b) *The parent was born in Australia or New Guinea or was naturalised in Australia before the person's birth; and*
  - (c) *The Minister is satisfied that the person is of good character at the time of the Minister's decision on the application.*

By way of example, since 1 July 2007 this provision has made it possible for many US-born children of Australian-born World War II war brides born during and just after the war (i.e. prior to 26 January 1949) to apply for Australian citizenship by descent. Indeed this subsection in the Act solves the dilemma of any overseas-born person born before 26 January 1949, as long as the Australian-born parent or naturalised parent survived until 26 January 1949.

On 26 January 1949, the date of entry into force of the *Nationality and Citizenship Act 1948*, any person born in Australia or naturalised in Australia as a British subject previously, automatically took on the new legal status of Australian citizen.

Individuals who had died before that date never became Australian citizens.

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<sup>4</sup> From 26 January 1949 to 30 April 1970, the birth had to be registered at an Australian consulate within one year of the birth or such further period as allowed by the Minister. If the parents were married, the father had to be an Australian citizen on the date of the child's birth. From 1 May 1970 to 21 November 1984, either parent could be Australian and the child had to be registered within five years of the birth. From 22 November 1984 until 30 June 2002, the child had to be registered before they turned 18. From 1 July 2002 until 30 June 2007, the person had to be registered before they turned 25.

Herein lies the difficulty for a small group of would-be citizenship-by-descent applicants such as Roger Allen born outside Australia before 26 January 1949. Although they had an Australian-born parent or parent naturalised in Australia, that parent was deceased by 26 January 1949. For that reason, such individuals cannot satisfy the requirement in Subsection 16(3)(a).

Roger and others like him are presently excluded from Australian citizenship by descent because of the unfortunate and random occurrence that their parent simply happened to die too soon.

### **The Solution**

This lacuna in the Act can be solved by legislative amendment. Such an amendment would need to be worded so that Subsection 16(3)(a) encompasses parents who had a citizenship status on their date of death prior to 26 January 1949 which would have lead to them becoming Australian citizens on that date if they had survived until that date.

## Scenario 2

### Parent Lost Australian Citizenship Automatically as a Minor Section 23 Offspring Cases

#### Case Study: Dylan Zayonc

Sixteen-year-old Dylan Zayonc was born in Orlando, Florida on 12 March 1992 and has an Australian-born father, but he has no immediate route to Australian citizenship available to him under the 2007 Act.

Dylan's father Glenn was born in Sydney in 1958 to an Australian mother (Joyce) and an American merchant seaman father (Joseph). Glenn was therefore an Australian citizen by birth and a US citizen through his father from his date of birth. In 1963 the family moved to the United States. Sadly, Joseph died in 1973. Joyce, faced with having to support herself, Glenn and his sisters Andrea and Fiona, then trained to become a nurse in the United States. In order to be able to take the State Nursing Board Examinations, she had to be a US citizen. She therefore had no choice but to take US citizenship in late 1974, thereby automatically forfeiting her Australian citizenship under the old Section 17 provision in the *Australian Citizenship Act 1948*.<sup>5</sup>

Glenn was still a minor, aged 16 when his mother lost her citizenship under Section 17. Unbeknownst to both Glenn and his mother at the time, Glenn automatically lost his Australian citizenship under Section 23 of the 1948 Act on the same day that Joyce lost under Section 17.

Glenn, an electrician living in Florida, can now apply to resume his Australian citizenship under the 2007 Act.<sup>6</sup> But scenarios such as Dylan's are not covered in the new legislation.

Dylan lives in Camarillo, California, loves sports and is also interested in cars, video games and cooking. He's never been to Australia, but looks forward to the day he can visit where his grandmother grew up and his father was born. He would like to become an Australian citizen because he feels it is part of his heritage. Dylan aspires to be a professional basketball player.

The irony is that if Glenn had lost under Section 17 as an adult rather than under Section 23 as a minor, Dylan would now be able to apply for Australian citizenship.<sup>7</sup>

#### The Problem Explained

This scenario, the so-called "Section 23 offspring" problem, has been addressed previously on a number of occasions by the SCG, most thoroughly in the Group's third supplementary submission

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<sup>5</sup> Section 17 was repealed with effect from 4 April 2002.

<sup>6</sup> Section 29(3)(a)(iv) of the *Australian Citizenship Act 2007*.

<sup>7</sup> Section 21(6) of the *Australian Citizenship Act 2007*.

dated 12 February 2006 made to the Senate's Legal and Constitutional Legislation Committee's inquiry into the *Australian Citizenship Bill*.<sup>8</sup>

The SCG's February 2006 submission explains how Section 23 of the 1948 Act operated over the years until it was repealed on 30 June 2007. As minor, dependent children, Section 23 victims such as Glenn had no control or influence over the actions of their parent that led to their loss of Australian citizenship. They were in every sense of the word wholly innocent victims.

The SCG also detailed in that submission its estimates of total Section 23 loss cases over the years, concluding that probably in the order of 19,000 individuals had lost under that provision.<sup>9</sup> Not all Section 23 loss cases are still alive, but many had children outside Australia who are still alive. Further, many Section 23 loss cases will go on to have children outside Australia in the future.

For the purposes of argument, if each person who lost under Section 23 of the 1948 Act had on average two children born outside Australia, as many as 38,000 "Section 23 offspring" cases may be present in the diaspora in total over a number of decades. Not all will have an interest in applying for Australian citizenship, but some with a continuing family association with Australia can be expected to come forward in the years to come as they explore whether they are eligible under the 2007 Act.

It is difficult to understand why "Section 17 offspring" are covered by the 2007 Act but Section 23 offspring are not. Section 21(6) of the *Australian Citizenship Act 2007* states:

- 21(6) *A person is eligible to become an Australian citizen if the Minister is satisfied that:*
- (a) The person was born outside Australia; and*
  - (b) a parent of the person was not an Australian citizen at the time of the person's birth; and*
  - (c) the parent had ceased to be an Australian citizen under section 17 of the old Act (about dual citizenship) before that time; and*
  - (d) the person is of good character at the time of the Minister's decision on the application.*

There is no material difference between loss under Section 17 and loss under Section 23. Both were automatically triggered. Australian citizenship was lost involuntarily under both provisions and in most cases, inadvertently. It is therefore unjust and simply illogical to distinguish now between children born abroad to Section 17 victims and children born abroad to Section 23 victims.

## **The Solution**

This problem can be solved by a very minor legislative amendment. All that is required is the insertion of the words "or 23" into Subsection 21(6)(c) of the 2007 Act after the words "section 17".

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<sup>8</sup> That submission can be downloaded at [http://www.southern-cross-group.org/archives/Dual%20Citizenship/2006/SCG\\_SuppSub3\\_CitBill\\_Inquiry\\_23Offspring\\_12\\_Feb\\_2006.pdf](http://www.southern-cross-group.org/archives/Dual%20Citizenship/2006/SCG_SuppSub3_CitBill_Inquiry_23Offspring_12_Feb_2006.pdf)

<sup>9</sup> Not all Section 23 victims were born in Australia. Some were Australian citizens by descent and not Australian citizens by birth.

## Section 20 Offspring

In amending Subsection 21(6)(c), consideration should also be given to the overseas-born offspring of those who lost under Section 20 of the 1948 Act.<sup>10</sup>

## Section 18 Offspring

Finally, the so-called “Section 18 offspring” cases should be flagged in this context, because the solution to that problem would also involve a small amendment to Subsection 21(6)(c). This is the “Maltese children” issue which the SCG has worked on for a number of years. A full study of the problem was undertaken in the SCG’s extensive primary submission to the Citizenship Bill inquiry in early 2006.<sup>11</sup> While most Section 18 renunciations happened in Malta, a number were recorded in other countries and therefore the occasional Section 18 offspring case can be expected to arise in other countries.

The previous government made a conscious decision to exclude children born abroad to an Australian-born person who had formally renounced their Australian citizenship under Section 18 of the 1948 Act. The Australian Labor Party, in opposition at the time, moved an unsuccessful amendment to include this estimated group of some 3,000 young people born in Malta as the 2007 Act was going through Parliament in 2006.

On 22 July 2008 the SCG wrote to the Minister for Immigration and Citizenship Senator the Hon Chris Evans on the Maltese children point, asking the new government to take steps to include Section 18 offspring in the 2007 Act in line with undertakings given while it was in opposition.<sup>12</sup>

A response was received from the Department of Immigration and Citizenship on 7 August 2008.<sup>13</sup> The SCG has been advised that the Department is preparing advice to the Minister to seek his views as to whether the Government would wish to pursue legislative change on the Section 18 offspring issue.

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<sup>10</sup> Until 8 October 1958, under Section 20 of the 1948 Act, it was possible for naturalised Australians to forfeit Australian citizenship as a result of residing outside Australia for seven years. Section 20 loss cases can now themselves resume Australian citizenship. But their children born overseas after the date of loss have no route to citizenship under the 2007 Act.

<sup>11</sup> See [http://www.southern-cross-group.org/archives/Dual%20Citizenship/2006/SCG\\_Submission\\_CitBill\\_Inquiry\\_20\\_Jan\\_2006.pdf](http://www.southern-cross-group.org/archives/Dual%20Citizenship/2006/SCG_Submission_CitBill_Inquiry_20_Jan_2006.pdf)

<sup>12</sup> That letter is available at [http://www.southern-cross-group.org/archives/Dual%20Citizenship/2007/SCG\\_Letter\\_to\\_Evans\\_Maltese\\_Kids\\_with\\_2\\_Annexes\\_22\\_July\\_2008.pdf](http://www.southern-cross-group.org/archives/Dual%20Citizenship/2007/SCG_Letter_to_Evans_Maltese_Kids_with_2_Annexes_22_July_2008.pdf)

<sup>13</sup> See [http://www.southern-cross-group.org/archives/Dual%20Citizenship/2007/Letter\\_from\\_DIAC\\_Maltese\\_Children\\_7\\_August\\_2008.pdf](http://www.southern-cross-group.org/archives/Dual%20Citizenship/2007/Letter_from_DIAC_Maltese_Children_7_August_2008.pdf)

## **Scenario 3**

### **Born in the UK or certain other Commonwealth Countries Legally Impossible to Naturalise in Australia prior to 26 January 1949 Departed Australia to Live Elsewhere prior to 26 January 1949**

#### **Case Study: Joan Rinkus**

Joan Rinkus née Murray was born in Plymouth, England on 23 June 1923. In 1924, at the age of 10 months she arrived in Western Australia with her parents and older siblings. Joan recalls the family living in barely more than a shanty as her parents worked to clear bushland in those early years after their arrival. The family later moved to Perth. Her British-born father joined the Australian Army when World War II broke out. He had previously fought in World War I in France and been wounded three times.

During World War II, while serving as an air raid warden, Joan met a handsome young US Navy submarine serviceman stationed in Fremantle, called Anthony Rinkus, at a canteen. They married in January 1944 in St George's Cathedral in Perth. A daughter Patricia was born in Perth in 1944 and another, Dale, in 1945. In 1946 Joan took her infant daughters to the United States to be reunited with her husband following his discharge from the US Navy. They had one further child, a son John, born in the US in 1951.

Today Joan is 85 and lives in Pennsylvania. She remains active and works four hours a day at a women's shelter near her home. Since leaving the UK in 1924, she has never returned there. She likes to say that she has never set foot in Britain because she learned to walk in Australia. She has always considered herself "Australian" through and through.

Technically, however, Joan has never been an Australian citizen, and the 2007 Act provides her no route to Australian citizenship. Further, her son John has no access to Australian citizenship by descent, because he did not have an Australian-citizen parent at the date of his birth in the US.

#### **The Problem Explained**

When Joan arrived in Australia in 1924, she was a "British subject", like everyone born in Australia. The legal concept of Australian citizenship did not exist at that time. In fact, it was impossible for people such as Joan and her parents and siblings to naturalise in Australia prior to 26 January 1949. They and others born in certain other countries of the British Empire at the time had the same citizenship status as people born in Australia.

People who settled in Australia prior to 26 January 1949 who were born in third countries (e.g. Italy, Greece), i.e. who did not have "British subject" status by birth, could legally naturalise in Australia and become British subjects.

On 26 January 1949, when the concept of Australian citizenship was introduced into Australian law for the first time, anyone born in Australia automatically became an Australian citizen. Further, those who had naturalised in Australia also turned into Australian citizens. British subjects born in the UK and Colonies, Canada, New Zealand, South Africa, Newfoundland, India, Pakistan, Southern Rhodesia and Ceylon automatically turned into Australian citizens only if they had been ordinarily resident in Australia for a period of at least five years immediately prior to 26 January 1949.

Joan's difficulty is that she departed Australia in 1946 to move to the United States. Further, it was a legal impossibility for her to naturalise in Australia in the 22 years she spent in Australia as a British subject.

The SCG has to date identified approximately ten "Australian" World War II war brides in the United States who, like Joan, were in fact not born in Australia but were British subjects in the pre-1949 period and lived in Australia from the time they were children until their moves to the US at the end of the war as young women. More such cases are expected to emerge in the years to come.

### **The Solution**

Again, a legislative change is required to provide people such as Joan with a path to Australian citizenship. The SCG submits that a special form of citizenship by conferral should be added to Section 21 of the 2007 Act to enable non-Australian-born individuals who spent a certain number of years in Australia prior to 26 January 1949 as British subjects to now apply for Australian citizenship. A solution for their overseas-born children should also be considered.

## Scenario 4

### **People Born Outside Australia and Adopted under the Laws of Other Countries by Australian Expatriates Adopted Person now aged 18 years or over**

#### **Case Study: Mei-Lin Conrad Fegan and Moli Conrad Fegan**

Mei-Lin and Moli Conrad Fegan are biological sisters, born in Hong Kong in 1984 and 1985. In 1987 they were placed with expatriate Australian citizen Carol Fegan and her US-citizen husband Daniel Conrad who were living in Maryland at the time. The girls' adoptions were finalised in 1989 under the laws of the United States. They became naturalised US citizens in 1991.

Their adopted mother Carol was born in Brisbane in 1945 and is an Australian citizen by birth. Carol has been a US permanent resident since 1966 but has never taken out US citizenship, so she never forfeited her Australian citizenship under the old Section 17 of the 1948 Act. Neither has she ever formally renounced her Australian citizenship.

In approximately 1991, Carol contacted the Australian Embassy in Washington, DC, expecting that she would be able to apply for Australian citizenship by descent for her two adopted daughters as she had previously done for Maralise, her natural daughter born in the US. She was told that citizenship by descent applications were not possible, because Mei-Lin and Moli had not had a natural Australian-citizen parent on their dates of birth outside Australia.

The Australian Embassy in Washington failed to advise Carol that she could apply under the 1948 Act for citizenship by grant (naturalisation) for the girls under a special Ministerial discretion provision available to minors.<sup>14</sup>

Carol only learned about the Ministerial discretion available for children after both girls were 18 or older. Now that Mei-Lin and Moli are adults, there is no direct route to Australian citizenship available to them in the 2007 Act.

Both girls went to university with the assistance of substantial scholarships based on their academic achievement and promise. Mei-Lin graduated with a BA in International Studies in 2006, and then went on to receive a Master's in Education in 2007. She is now a high school teacher in Baltimore. Moli also has a BA in International Relations and is currently working as a media planner for an advertising agency in L.A. For financial reasons, neither has had the opportunity to visit Australia to date, but both look forward to future visits and perhaps the opportunity to live and work there one day.

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<sup>14</sup> Section 13(9)(a) of the 1948 Act. The same ministerial discretion is available for persons under 18 in the 2007 Act in Section 21(5).

## **The Problem Explained**

This issue has been dealt with by the SCG in previous submissions to government, most notably in the Group's second supplementary submission to the Citizenship Bill inquiry in February 2006.<sup>15</sup>

The overseas-born adopted children of expatriate Australians, where they are now adults, should not be in a less favourable situation to the now-adult natural-born children of expatriate Australians.

As noted above, the 2007 Act gives anyone born abroad to an Australian-born parent or naturalised Australian on or after 26 January 1949 the right to apply today for Australian citizenship by descent, regardless of their age now. Section 16(2) of the 2007 Act seeks to put right the fact that many expatriate Australian parents did not realise that their natural children had to be registered with Australian consular authorities abroad within a certain window decades ago, and the fact that in many instances, the law simply prevented Australian citizenship by descent (e.g. in the case of Australian-born mothers prior to 1970).

Expatriate parents such as Carol and her adopted daughters should not continue to be penalised because Carol did not receive complete advice years ago and remained in ignorance of the legal possibility for Australian citizenship by conferral under Ministerial discretion while the girls were under 18.

Mei-Lin and Moli should be able to enjoy Australian citizenship so that they have the same citizenship status as Carol's natural-born children. In all other ways, they enjoy the same legal rights as Carol's other children.

## **The Solution**

Legislative amendments are needed to cater for individuals such as Mei-Lin and Moli. One solution would be to provide for a new Ministerial discretion in the Act which could be used for adult applicants. The use of that discretion could be limited by clearly-defined policy, but policy could be adapted from time to time without having to amend the Act. This solution would have the advantage that it could if necessary be called upon in other cases of exclusion from Australian citizenship under the 2007 Act which may arise in the future and seem worthy of prompt solution. The SCG submits that over time, more scenarios never envisaged when the Act was being drafted will emerge.

Another solution would be to insert a special form of citizenship by conferral into Section 21 of the 2007 Act just for now-adult overseas-born adopted persons who had an Australian citizen parent

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<sup>15</sup> See [http://www.southern-cross-group.org/archives/Dual%20Citizenship/2006/SCG\\_SuppSub2\\_CitBill\\_Inquiry\\_Adoption\\_8\\_Feb\\_2006.pdf](http://www.southern-cross-group.org/archives/Dual%20Citizenship/2006/SCG_SuppSub2_CitBill_Inquiry_Adoption_8_Feb_2006.pdf)

at the date of their adoption. It would be necessary to ensure that the adoption which occurred in a non-Australian jurisdiction was fully above board and had conferred upon the Australian-citizen parent full and irrevocable parental rights.

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### **Conclusion**

The four scenarios outlined in this discussion paper, illustrated by “live examples” drawn from the SCG’s day-to-day case load, are all situations which probably never entered the minds of those charged with drafting the 2007 Act in the 2005-2006 period.

The spirit of the *Australian Citizenship Act 2007* is one of inclusiveness towards Australia’s extensive, diverse and valuable diaspora. Some 100,000 people outside Australia enjoy a new right to apply for Australian citizenship since 1 July 2007. And yet small pockets of individuals continue to miss out under its provisions, for random reasons which are in most cases a matter of historical accident.

Roger Allan should be able to honour the memory of his father with citizenship of his father’s country of birth. Sixteen-year-old Dylan Zayonc has a father born in Australia but is penalised because his father automatically forfeited his citizenship as a minor rather than as an adult. Joan Rinkus spent 22 years growing up in Australia during a time when it was legally impossible for her to naturalise there, but through a quirk of fate met and married a US submariner and just happened to leave Australia three years too soon to enjoy Australian citizenship from 26 January 1949. Her US-born son is excluded from Australian citizenship as a result. And Mei-Lin and Moli Conrad Fegan are both talented and educated young women who are prevented from obtaining the citizenship always held by their adoptive mother.

The SCG urges the government to enact amendments to the *Australian Citizenship Act 2007* to solve these situations.