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**THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA**

**HOUSE OF REPRESENTATIVES**

**AUSTRALIAN CITIZENSHIP AMENDMENT (SPECIAL RESIDENCE REQUIREMENTS)  
BILL 2013**

**EXPLANATORY MEMORANDUM**

(Circulated by authority of the Minister for Immigration and Citizenship,  
the Hon. Brendan O'Connor MP)

## **Australian Citizenship Amendment (Special Residence Requirements) Bill 2013**

### **OUTLINE**

The Australian Citizenship Amendment (Special Residence Requirements) Bill 2013 (the Bill) amends the *Australian Citizenship Act 2007* (the Act) to provide the Minister for Immigration and Citizenship (the Minister) with personal, non-compellable powers to apply alternative residence requirements in favour of an applicant for Australian citizenship by conferral who requires Australian citizenship to engage in an activity that is of benefit to Australia or who is engaged in work of a specified kind which is of benefit to Australia and for which the person is required to regularly travel outside Australia but who does not meet the residence requirements for citizenship by conferral in the current *Australian Citizenship Act 2007*.

### **CONSULTATION**

Consultation has taken place with various Commonwealth agencies including the Attorney-General's Department, the Office of Parliamentary Counsel and the Office of Best Practice Regulation. The Australian Government Solicitor has also been consulted on the Bill.

### **FINANCIAL IMPACT STATEMENT**

The financial impact of these amendments is low. The estimated costs associated with the implementation of the proposed amendments will be met from within the Department's existing funding.

### **REGULATION IMPACT STATEMENT**

The Office of Best Practice Regulation has been consulted and has advised that no Regulation Impact Statement is required. The advice reference is 14955.

### **STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS**

A Statement of Compatibility with Human Rights has been completed in relation to the amendments in this Bill and assesses that the amendments are compatible with Australia's human rights obligations. A copy of the Statement of Compatibility with Human Rights is at [Attachment A](#).

**AUSTRALIAN CITIZENSHIP AMENDMENT (SPECIAL RESIDENCE  
REQUIREMENTS) BILL 2013**

**NOTES ON INDIVIDUAL CLAUSES**

**Clause 1                      Short title**

1. Clause 1 inserts the short title by which the Act may be cited.
2. Clause 1 of the Bill provides that this Act may be cited as the *Australian Citizenship Amendment (Special Residence Requirements) Act 2013*.

**Clause 2                      Commencement**

3. Clause 2 provides that this Act commences on the day after this Act receives the Royal Assent.

**Clause 3                      Schedule(s)**

4. Clause 3 provides that each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.
5. The purpose of this clause is to clarify that Schedule 1 to the Bill sets out the amendments to the Act, and that the particular provisions mentioned in that Schedule are amended in accordance with the particular items in that Schedule.

## Schedule 1-Amendments

### *Australian Citizenship Act 2007*

#### **Item 1           After subsection 22A(1)**

6. This item inserts new subsections 22A(1A) and 22A(1B) after existing subsection 22A(1) of the *Australian Citizenship Act 2007* (“the Act”).
7. Section 22A of the Act deals with the special residence requirements for persons engaging in activities that are of benefit to Australia.
8. Subsection 22A(1) of the Act provides:

Subject to this section, for the purposes of section 21 a person (the ***applicant***) satisfies the ***special residence requirement*** if:

- the following apply:
  - the applicant is seeking to engage in an activity specified under subsection 22C(1);
  - the applicant’s engagement in that activity would be of benefit to Australia;
  - the applicant needs to be an Australian citizen in order to engage in that activity;
  - in order for the applicant to engage in that activity, there is insufficient time for the applicant to satisfy the general residence requirement (see section 22); and
- the head of an organisation specified under subsection 22C(2), or a person whom the Minister is satisfied holds a senior position in that organisation, has given the Minister a notice in writing stating that the applicant has a reasonable prospect of being engaged in that activity; and
- the applicant was present in Australia for a total of at least 180 days during the period of 2 years immediately before the day the applicant made the application; and
- the applicant was present in Australia for a total of at least 90 days during the period of 12 months immediately before the day the applicant made the application; and
- the applicant was ordinarily resident in Australia throughout the period of 2 years immediately before the day the applicant made the application; and

- the applicant was a permanent resident for the period of 2 years immediately before the day the applicant made the application; and
  - the applicant was not present in Australia as an unlawful non-citizen at any time during the period of 2 years immediately before the day the applicant made the application.
9. Section 21 of the Act sets out the requirements for a person to be eligible to become an Australian citizen by conferral. Subsection 21(2) provides that, in addition to other specified matters, a person is eligible to become an Australian citizen if the Minister is satisfied that the person satisfies the general residence requirement (see section 22) or the special residence requirement (see section 22A or 22B), or has completed relevant defence service (see section 23), at the time the person made the application.
10. New subsection 22A(1A) of the Act provides that the Minister may, by writing, determine that paragraphs 22A(1)(d) to 22A(1)(g) do not apply in relation to an applicant if:
- the Minister is satisfied that paragraphs 22A(1)(a), 22A(1)(b) and 22A(1)(c) apply in relation to the applicant; and
  - the Minister is satisfied that the applicant satisfies:
    - paragraphs 21(2)(a), (b), (d), (e), (f), (g) and (h); or
    - paragraphs 21(3)(a), (b), (d), (e) and (f); or
    - paragraphs 21(4)(a), (b), (c), (e) and (f); and
  - the applicant was a permanent resident throughout the period of 90 days immediately before the day the applicant made the application; and
  - the applicant was not present in Australia as an unlawful non-citizen at any time during the period of 180 days immediately before the day the applicant made the application; and
  - the applicant has given the Minister an undertaking, in a form approved by the Minister under subsection (8), that, if the applicant becomes an Australian citizen in circumstances where the Minister exercises the power under this subsection:
    - the applicant will be ordinarily resident in Australia throughout the period of 2 years beginning on the day the applicant becomes an Australian citizen; and
    - the applicant will be present in Australia for a total of at least 180 days during that 2-year period; and

- the applicant has declared, in the undertaking, that the applicant understands the effect of section 34A (which is inserted by this Schedule).
11. New subsection 22A(1B) of the Act provides that if the Minister exercises the power under subsection 22A(1A) in relation to the applicant, then, for the purposes of section 21, the applicant is taken to satisfy the *special residence requirement*.
  12. The purpose of the amendments made by this item is to provide an alternative pathway to Australian citizenship for a small number of people in special circumstances. These amendments provide the Minister with a power to apply alternative residence requirements in favour of an applicant for Australian citizenship by conferral who requires Australian citizenship to engage in an activity that is of benefit to Australia but who does not meet the residence requirements for citizenship by conferral in the current Act.
  13. These amendments provide a clear legal framework to ensure that this Ministerial power is only used in circumstances where a person has spent some time in Australia and has demonstrated an ongoing commitment to Australia. This will ensure that this power is used appropriately and only in those circumstances clearly provided for in new subsection 22A(1A) of the Act.
  14. These amendments also ensure that the person in whose favour the discretion is exercised would still need to meet the other relevant requirements under section 21 of the Act for being approved as an Australian citizen by conferral, including those concerning character and identity.

**Item 2            Subsection 22A(4)**

15. This item inserts the words “or (1A)(c)” after the words “paragraph (1)(f)” in subsection 22A(4) of the Act.
16. This amendment is consequential to the amendment made by item 1 above, which inserts new subsection 22A(1A) in the Act.
17. Subsection 22A(4) of the Act currently provides that for the purposes of paragraph 22A(1)(f), the Minister may treat a period as one in which the applicant was a permanent resident if the Minister considers that, because of an administrative error, the applicant was not a permanent resident during that period.
18. The effect of this amendment is for subsection 22A(4) of the Act to provide that for the purposes of paragraph 22A(1)(f) or 22A(1A)(c), the Minister may treat a period as one in which the applicant was a permanent resident if the Minister considers that, because of an administrative error, the applicant was not a permanent resident during that period.

**Item 3            Subsection 22A(5)**

19. This item inserts the words “or (1A)(d)” after the words “paragraph (1)(g)” in subsection 22A(5) of the Act.

20. This amendment is consequential to the amendment made by item 1 above, which inserts new subsection 22A(1A) in the Act.
21. Currently, subsection 22A(5) of the Act provides that for the purposes of paragraph 22A(1)(g), the Minister may treat a period as one in which the applicant was not present in Australia as an unlawful non-citizen if the Minister considers the applicant was present in Australia during that period but, because of an administrative error, was an unlawful non-citizen during that period.
22. The effect of this amendment is for subsection 22A(5) of the Act to provide that for the purposes of paragraph 22A(1)(g) or 22A(1A)(d), the Minister may treat a period as one in which the applicant was not present in Australia as an unlawful non-citizen if the Minister considers the applicant was present in Australia during that period but, because of an administrative error, was an unlawful non-citizen during that period.

**Item 4            At the end of section 22A**

23. This item adds new subsections (6), (7), (8), (9), (10) and (11) at the end of section 22A of the Act.
24. These new subsections provide the rules relating to the exercise of the power under new subsection 22A(1A) of the Act.
25. New subsection 22A(6) of the Act provides that the power under new subsection 22A(1A) may only be exercised by the Minister personally.
26. The purpose of this amendment is to put beyond doubt that the Minister must exercise the power in subsection 22A(1A) of the Act personally, and that this power cannot be delegated.
27. New subsection 22A(7) of the Act provides that the Minister does not have a duty to consider whether to exercise the power under new subsection 22A(1A), whether he or she is requested to do so by the applicant or by any other person, or in any other circumstances.
28. The purpose of this amendment is to put beyond doubt that the Minister cannot be compelled to consider the exercise of this power in favour of a person in any circumstances, regardless of whether the exercise of the power is requested by the person themselves, or by another person on their behalf.
29. New subsection 22A(8) of the Act provides that the Minister may, by writing, approve a form for the purposes of new paragraph 22A(1A)(e).
30. The purpose of this amendment is to enable the Minister to approve a form for the purposes of new paragraph 22A(1A)(e) of the Act. New paragraph 22A(1A)(e) requires the applicant has given the Minister an undertaking, in a form approved by the Minister under subsection (8) that, if the applicant becomes an Australian citizen in circumstances where the Minister exercises the power under subsection 22A(1A):

- the applicant will be ordinarily resident in Australia throughout the period of 2 years beginning on the day the applicant becomes an Australian citizen; and
  - the applicant will be present in Australia for a total of at least 180 days during that 2-year period.
31. New subsection 22A(9) of the Act provides that if the applicant becomes an Australian citizen in circumstances where the Minister exercised the power under subsection 22A(1A), the Minister must cause to be tabled in each House of the Parliament, within 15 sitting days of that House after the day the applicant becomes an Australian citizen, a statement that:
- states that the Minister has exercised the power under subsection 22A(1A); and
  - states the activity mentioned in paragraph 22A(1)(a); and
  - sets out the reasons for the Minister’s exercise of that power, including why the Minister considers that engagement in that activity would be of benefit to Australia.
32. The purpose of this amendment is to require the Minister to table a statement before both Houses of Parliament when the Minister has exercised the power under new subsection 22A(1A) of the Act. This ensures that the exercise of this power will be subject to parliamentary scrutiny.
33. New subsection 22A(10) of the Act provides that however, a statement under new subsection 22A(9) is not to include the name of the applicant.
34. The purpose of this amendment is to make it clear that where the Minister tables a statement before both Houses of Parliament, this statement must not include the name of the applicant. This is to protect the privacy of the applicant.
35. New subsection 22A(11) of the Act provides that a determination under new subsection 22A(1A) is not a legislative instrument.
36. This amendment makes it clear that a determination under new subsection 22A(1A) is not a legislative instrument. This provision is declaratory and is not intended as an exemption to the *Legislative Instruments Act 2003* but is included to assist readers in the interpretation of this provision.

**Item 5            After subsection 22B(1)**

37. This item inserts new subsections 22B(1A) and 22B(1B) after existing subsection 22B(1) of the Act.
38. Section 22B of the Act deals with the special residence requirements for persons engaging in work of a kind specified under subsection 22C(3) for which the person is required to regularly travel outside Australia.
39. Subsection 22B(1) of the Act currently provides:



Subject to this section, for the purposes of section 21 a person satisfies the *special residence requirement* if:

- at the time the person made the application, the person is engaged in work of a kind specified under subsection 22C(3) and the person is required to regularly travel outside Australia because of that work; and
- the following apply:
  - the person was engaged in that kind of work for a total period of at least 2 years during the period of 4 years immediately before the day the person made the application;
  - for the whole or part of that 4 year period when the person was engaged in that kind of work, the person regularly travelled outside Australia because of that work; and
- the person was present in Australia for a total of at least 480 days during the period of 4 years immediately before the day the person made the application; and
- the person was present in Australia for a total of at least 120 days during the period of 12 months immediately before the day the person made the application; and
- the person was ordinarily resident in Australia throughout the period of 4 years immediately before the day the person made the application; and
- the person was a permanent resident for the period of 12 months immediately before the day the person made the application; and
- the person was not present in Australia as an unlawful non-citizen at any time during the period of 4 years immediately before the day the person made the application.

40. New subsection 22B(1A) of the Act provides that the Minister may, by writing, determine that paragraphs (1)(c) to (g) do not apply in relation to a person if:

- the Minister is satisfied that paragraphs 22B(1)(a) and (b) apply in relation to the person; and
- the Minister is satisfied that the person's engagement in the kind of work concerned is of benefit to Australia; and
- the Minister is satisfied that the person satisfies:
  - paragraphs 21(2)(a), (b), (d), (e), (f), (g) and (h); or
  - paragraphs 21(3)(a), (b), (d), (e) and (f); or
  - paragraphs 21(4)(a), (b), (c), (e) and (f); and

- the person was present in Australia for a total of at least 180 days during the period of 2 years immediately before the day the person made the application; and
  - the person was a permanent resident throughout the period of 90 days immediately before the day the person made the application; and
  - the person was not present in Australia as an unlawful non-citizen at any time during the period of 180 days immediately before the day the person made the application; and
  - the person has given the Minister an undertaking, in a form approved by the Minister under subsection (8), that, if the person becomes an Australian citizen in circumstances where the Minister exercises the power under this subsection:
    - the person will be ordinarily resident in Australia throughout the period of 2 years beginning on the day the person becomes an Australian citizen; and
    - the person will be present in Australia for a total of at least 180 days during that 2-year period; and
  - the person has declared, in the undertaking, that the person understands the effect of section 34A (which is inserted by this Schedule).
41. New subsection 22B(1B) of the Act provides that if the Minister exercises the power under subsection 22B(1A) in relation to the person, then, for the purposes of section 21, the person is taken to satisfy the *special residence requirement*.
42. The purpose of the amendments made by this item is to provide an alternative pathway to Australian citizenship for a small number of people in certain circumstances. These amendments provide the Minister with a power to apply alternative residence requirements in favour of an applicant for citizenship by conferral who is engaged in work of a kind specified under subsection 22C(3) of the Act and who is required to regularly travel outside Australia because of that work, but who does not meet the residence requirements for citizenship by conferral in the current Act. Further, the Minister can only exercise that discretion if the Minister is satisfied that the person's engagement in that kind of work is of benefit to Australia.
43. These amendments provide a clear legal framework to ensure that this Ministerial power is only used in circumstances where a person has spent some time in Australia and has demonstrated an ongoing commitment to Australia. This will ensure that this power is used appropriately and only in those circumstances clearly provided for in new subsection 22B(1A) of the Act.
44. These amendments also ensure that the person in whose favour the discretion is exercised would still need to meet the other relevant requirements under section 21 of the Act for being approved as an Australian citizen by conferral, including those concerning character and identity.

**Item 6            Subsection 22B(2)**

45. This item repeals current subsection 22B(2) of the Act and substitutes new subsection 22B(2).
46. The amendments made by this item are consequential to the amendments made by item 5 above which inserts new subsection 22B(1A) in the Act.
47. Currently, subsection 22B(2) of the Act provides that the person is taken not to satisfy paragraph 22B(1)(c) (which requires the person to have been present in Australia for a total of at least 480 days during the period of 4 years immediately before the day the person made the application) if, at any time during the 4 year period mentioned in that paragraph, the person was:
  - confined in a prison; or
  - confined in a psychiatric institution by order of a court made in connection with proceedings for an offence against an Australian law in relation to the person.
48. Subsection 22B(2) of the Act is subject to subsection 22B(3) which enables the Minister to decide that subsection 22B(2) does not apply in relation to the person if, taking into account the circumstances that resulted in the person's confinement, the Minister is satisfied that it would be unreasonable for that subsection to apply in relation to the person.
49. New subsection 22B(2) of the Act provides that subject to subsection 22B(3), the person is taken not to satisfy:
  - paragraph 22B(1)(c) if, at any time during the 4-year period mentioned in that paragraph; or
  - paragraph 22B(1A)(d) if, at any time during the 2-year period mentioned in that paragraph;the person was:
  - confined in a prison; or
  - confined in a psychiatric institution by order of a court made in connection with proceedings for an offence against an Australian law in relation to the person.

**Item 7            Subsection 22B(4)**

50. This item inserts the words “or (1A)(e)” after the words “paragraph (1)(f)” in subsection 22B(4) of the Act.
51. This amendment is consequential to the amendment made by item 5 above, which inserts new subsection 22B(1A) in the Act.

52. Subsection 22B(4) of the Act currently provides that for the purposes of paragraph 22B(1)(f), the Minister may treat a period as one in which the person was a permanent resident if the Minister considers that, because of an administrative error, the person was not a permanent resident during that period.
53. The effect of this amendment is for subsection 22B(4) of the Act to provide that for the purposes of paragraph 22B(1)(f) or 22B(1A)(e), the Minister may treat a period as one in which the person was a permanent resident if the Minister considers that, because of an administrative error, the person was not a permanent resident during that period.

**Item 8            Subsection 22B(5)**

54. This item inserts the words “or (1A)(f)” after the words “paragraph (1)(g)” in subsection 22B(5) of the Act.
55. This amendment is consequential to the amendment made by item 5 above, which inserts new subsection 22B(1A) in the Act.
56. Currently, subsection 22B(5) of the Act provides that for the purposes of paragraph 22B(1)(g), the Minister may treat a period as one in which the person was not present in Australia as an unlawful non-citizen if the Minister considers the person was present in Australia during that period but, because of an administrative error, was an unlawful non-citizen during that period.
57. The effect of this amendment is for subsection 22B(5) of the Act to provide that for the purposes of paragraph 22B(1)(g) or 22B(1A)(f), the Minister may treat a period as one in which the person was not present in Australia as an unlawful non-citizen if the Minister considers that the person was present in Australia during that period but, because of an administrative error, was an unlawful non-citizen during that period.

**Item 9            At the end of section 22B**

58. This item adds new subsections (6), (7), (8), (9), (10) and (11) at the end of section 22B of the Act.
59. These new subsections provide the rules relating to the exercise of the power under new subsection 22B(1A) of the Act.
60. New subsection 22B(6) of the Act provides that the power under new subsection 22B(1A) may only be exercised by the Minister personally.
61. The purpose of this amendment is to put beyond doubt that the Minister must exercise the power in new subsection 22B(1A) of the Act personally, and that this power cannot be delegated.
62. New subsection 22B(7) of the Act provides that the Minister does not have a duty to consider whether to exercise the power under new subsection 22B(1A), whether he or

she is requested to do so by the person or by any other person, or in any other circumstances.

63. The purpose of this amendment is to put beyond doubt that the Minister cannot be compelled to consider the exercise of this power in favour of a person in any circumstances, regardless of whether the exercise of the power is requested by the person themselves, or by another person on their behalf.
64. New subsection 22B(8) of the Act provides that the Minister may, by writing, approve a form for the purposes of new paragraph 22B(1A)(g).
65. The purpose of this amendment is to enable the Minister to approve a form for the purposes of new paragraph 22B(1A)(g) of the Act. New paragraph 22B(1A)(g) requires that the person has given the Minister an undertaking, in a form approved by the Minister under subsection (8), that, if the person becomes an Australian citizen in circumstances where the Minister exercises the power under this subsection:
  - the person will be ordinarily resident in Australia throughout the period of 2 years beginning on the day the person becomes an Australian citizen; and
  - the person will be present in Australia for a total of at least 180 days during that 2-year period.
66. New subsection 22B(9) of the Act provides that if the person becomes an Australian citizen in circumstances where the Minister exercised the power under subsection 22B(1A), the Minister must cause to be tabled in each House of the Parliament, within 15 sitting days of that House after the day the person becomes an Australian citizen, a statement that:
  - states that the Minister has exercised the power under subsection 22B(1A); and
  - states the kind of work covered by paragraph 22B(1)(a); and
  - sets out the Minister's reasons for the exercise of that power, including why the Minister considers that engagement in that kind of work is of benefit to Australia.
67. The purpose of this amendment is to require the Minister to table a statement before both Houses of Parliament when the Minister has exercised the power under new subsection 22B(1A) of the Act. This ensures that the exercise of this power will be subject to parliamentary scrutiny.
68. New subsection 22B(10) of the Act provides that, however, a statement under new subsection 22B(9) is not to include the name of the person.
69. The purpose of this amendment is to make it clear that where the Minister tables a statement before both Houses of Parliament, this statement must not include the name of the person. This is to protect the privacy of the person.

70. New subsection 22B(11) of the Act provides that a determination under subsection 22B(1A) is not a legislative instrument.
71. This amendment makes it clear that a determination under new subsection 22B(1A) of the Act is not a legislative instrument. This provision is declaratory and is not intended as an exemption to the *Legislative Instruments Act 2003* but is intended to assist readers in the interpretation of this provision.

**Item 10**                      **After subsection 24(2)**

72. This item inserts new subsection 24(2A) after current subsection 24(2) of the Act.
73. New subsection 24(2A) of the Act provides that if the Minister exercised the power under new subsection 22A(1A) or 22B(1A) in relation to the person, the decision under subsection (1) of this section must be made by the Minister personally.
74. Subsection 24(1) of the Act provides that if a person makes an application under section 21, the Minister must, by writing, approve or refuse to approve the person becoming an Australian citizen.
75. These amendments make it clear that where the Minister has exercised the power under new subsection 22A(1A) or 22B(1A) of the Act to determine that a person satisfies the special residence requirement, the Minister must personally approve or refuse to approve the person becoming an Australian citizen.
76. This power cannot be delegated. This ensures that the Minister must personally be satisfied that an applicant meets all criteria to be eligible for citizenship by conferral, not just the residence requirements. This is intended to avoid split decision making on an application for citizenship between the Minister and a delegate of the Minister.

**Item 11**                      **Subsection 29(2) (note 2)**

77. This item inserts the words “, 34A” after the word “34” in Note 2 at the end of subsection 29(2) of the Act.
78. The amendment made by this item is consequential to the amendments made by item 15 below.
79. Subsection 29(2) of the Act provides that a person is eligible to become an Australian citizen again under this Subdivision if:
- the person ceased to be an Australian citizen under:
    - section 33 (about renunciation) in order to acquire or retain the nationality or citizenship of a foreign country or to avoid suffering significant hardship or detriment; or
    - section 36 (about children); and

- if the person is aged 18 or over at the time the person made the application – the Minister is satisfied that the person is of good character at the time of the Minister’s decision on the application.
80. Note 2 to subsection 29(2) of the Act currently makes it clear that a person who ceases to be an Australian citizen under section 34 (about revocation for offences or fraud) or 35 (about automatic loss of citizenship) may apply to become an Australian citizen again under Subdivision A, AA or B of Division 2 of Part 2 of the Act.
81. The effect of this amendment is that Note 2 at the end of subsection 29(2) of the Act now provides that a person who ceases to be an Australian citizen under the new revocation provision in section 34A may also apply to become an Australian citizen again under Subdivision A, AA or B.

**Item 12                      Section 32A**

82. This item omits the words “4 ways” and substitutes the words “5 ways” in section 32A of the Act.
83. The amendments made by this item are consequential to the amendments made by item 15 below.
84. Section 32A of the Act provides a simplified outline of Division 3 of Part 2 of the Act.
85. The simplified outline in section 32A of Division 3 of Part 2 of the Act currently provides:
- There are 4 ways in which you can cease to be an Australian citizen:
- you may renounce your Australian citizenship: see section 33; or
  - if you did not automatically become an Australian citizen, the Minister can revoke your citizenship: see section 34; or
  - you serve in the armed forces of a country at war with Australia: see section 35; or
  - if you are the child of a responsible parent who ceases to be an Australian citizen, the Minister can revoke your citizenship in some situations: see section 36.
86. This item amends the simplified outline to clarify that there are 5 ways in which a person can cease to be an Australian citizen.

**Item 13                      Section 32A**

87. This item omits the second dot point in the simplified outline in section 32A of the Act and substitutes two new dot points.
88. The amendments made by this item are consequential to the amendments made by item 15 below.

89. The second dot point in section 32A of the Act currently provides:
- if you did not automatically become an Australian citizen, the Minister can revoke your citizenship: see section 34.
90. The two new dot points provide:
- if you did not automatically become an Australian citizen, the Minister can revoke your citizenship in circumstances involving offences or fraud: see section 34; or
  - if you did not automatically become an Australian citizen and the Minister exercised the power under subsection 22A(1A) or 22B(1A), the Minister can revoke your citizenship in circumstances involving a failure to comply with special residence requirements: see section 34A.

**Item 14      Section 34 (heading)**

91. This item repeals the heading to section 34 of the Act and substitutes a new heading.
92. The amendments made by this item are consequential to the amendments made by item 15 below.
93. The current heading to section 34 of the Act reads:
- 34      Revocation by Minister**
94. The new heading to section 34 of the Act reads:
- 34      Revocation by Minister – offences or fraud**
95. The new heading makes a clear distinction between the grounds for revocation in existing section 34 of the Act and the ground for revocation in new section 34A.

**Item 15      After section 34**

96. This item inserts new section 34A after section 34 of the Act.
97. This item also inserts a new heading:
- 34A Revocation by Minister – special residence requirements**
98. New subsection 34A(1) of the Act provides that the Minister may, by writing, revoke a person's Australian citizenship if:
- the person is an Australian citizen under Subdivision B of Division 2; and
  - the person became an Australian citizen in circumstances where the Minister exercised the power under subsection 22A(1A) or 22B(1A); and



- the Minister is satisfied that:
    - the person will not be, or was not, ordinarily resident in Australia throughout the period of 2 years beginning on the day the person became an Australian citizen; or
    - the person will not be, or was not, present in Australia for a total of at least 180 days during that 2-year period.
99. The purpose of this amendment is to provide the Minister with the power to revoke a person's citizenship where the person became an Australian citizen in circumstances where the Minister exercised the power under new subsection 22A(1A) or subsection 22B(1A) of the Act and where the person has not complied with their undertaking in new paragraph 22A(1A)(e) or new paragraph 22B(1A)(g) and in the circumstances where the person has declared, in that undertaking, that they understand the effect of new section 34A (paragraphs 22A(1A)(f) or 22B(1A)(h)).
  100. New subsection 34A(2) of the Act provides that, however, the Minister must not decide under subsection 34A(1) to revoke a person's Australian citizenship if the Minister is satisfied that the person would, if the Minister were to revoke the person's Australian citizenship, become a person who is not a national or citizen of any country.
  101. The purpose of this amendment is to ensure that the Minister cannot revoke a person's citizenship if this would result in that person becoming stateless.
  102. New subsection 34A(3) of the Act provides that the power under subsection 34A(1) may only be exercised by the Minister personally.
  103. The purpose of this amendment is to put beyond doubt that the Minister must exercise the power under subsection 34A(1) of the Act personally, and that this power cannot be delegated.
  104. New subsection 34A(4) of the Act provides that if the Minister revokes a person's Australian citizenship, the person ceases to be an Australian citizen at the time of the revocation.
  105. The purpose of this amendment is to clarify when a person whose Australian citizenship has been revoked under new subsection 34A(1) of the Act ceases to be an Australian citizen.
  106. This item also inserts a note at the end of subsection 34A(4) of the Act which provides that a child of the person may also cease to be an Australian citizen: see section 36.
  107. This note clarifies that if a person has their citizenship revoked under new subsection 34A(1) of the Act, a child of that person may also cease to be an Australian citizen. This is consistent with section 36 of the Act, as amended by this Schedule.

**Item 16**                      **Paragraph 36(1)(a)**

108. This item inserts the words “, 34A” after the words “34” in paragraph 36(1)(a) of the Act. Section 36 deals with the children of responsible parents who cease to be Australian citizens.
109. The amendment made by this item is consequential to the amendment made by item 15 above.
110. Subsection 36(1) of the Act currently provides that if:
- a person ceases to be an Australian citizen at a particular time ( the *cessation time*) under section 33, 34 or 35; and
  - at the cessation time, the person is a responsible parent of a child aged under 18;
- then:
- the Minister may, by writing, revoke the child’s Australian citizenship; and
  - if the Minister does so – the child ceases to be an Australian citizen at the time of the revocation.
111. The amendment made by this item makes it clear that if a person ceases to be an Australian citizen at a particular time under new section 34A, and at the cessation time, the person is a responsible parent of a child aged under 18, then the Minister may, by writing under section 36, revoke the child’s Australian citizenship. The Minister must not revoke a child’s citizenship in circumstances where there is or was another responsible parent of the child who is an Australian citizen or if there ceases to be such a responsible parent – any time after the death of that parent (subsection 36(2)), or where revocation of citizenship would result in the child becoming stateless. If the Minister does revoke the child’s citizenship, the child ceases to be an Australian citizen at the time of the revocation.

**Item 17**                      **Paragraph 38(1)(a)**

112. This item inserts the words “or 34A” after the word “34” in paragraph 38(1)(a) of the Act. Section 38 deals with the surrender of the evidentiary notice of Australian citizenship.
113. The amendment made by this item is consequential to the amendment made by item 15 above.
114. Currently, subsection 38(1) of the Act provides that if:
- the Minister makes a decision under section 34 to revoke a person’s Australian citizenship; and

- at the time of the revocation, there is in force a notice under section 37 in relation to the person;

the Minister may request the person to surrender the notice to the Minister.

115. Section 37 of the Act deals with evidence of Australian citizenship. Subsection 37(2) provides that the Minister may give the person a notice stating that the person is an Australian citizen at a particular time.
116. The amendment made by this item makes it clear that if the Minister makes a decision under section 34A to revoke a person's Australian citizenship, and at the time of revocation, there is in force a notice under section 37 in relation to the person, the Minister may request the person to surrender the notice.

#### **Item 18                                  At the end of section 52**

117. This item inserts new subsection (3) at the end of section 52 of the Act. Section 52 deals with the review of decisions under the Act.
118. New subsection 52(3) of the Act provides that for the purposes of the Administrative Appeals Tribunal reviewing a decision of a kind referred to in paragraph 52(1)(b):
- the Tribunal must not exercise the power under subsection 22A(1A) or 22B(1A); and
  - the Tribunal must not review any exercise of the power or any failure to exercise the power.
119. Paragraph 52(1)(b) of the Act provides that an application may be made to the Administrative Appeals Tribunal for review of a decision under section 24 to refuse to approve a person becoming an Australian citizen.
120. Section 24 of the Act deals with the Minister's decision to approve or refuse to approve a person becoming an Australian citizen by conferral.
121. The purpose of the amendments made by this item is to make it clear that if the Administrative Appeals Tribunal reviews a decision under paragraph 24(1)(b) of the Act to refuse to approve a person becoming an Australian citizen, it must not exercise the power under subsection 22A(1A) or 22B(1A) in respect of the person, or review any exercise of the relevant power or failure to exercise the relevant power in respect of the person by the Minister.
122. It is not appropriate for the Administrative Appeals Tribunal to review a decision by the Minister under subsection 22A(1A) or 22B(1A) (that is, a decision in relation to whether the alternative special residence requirements in either provision apply to an applicant). Nor is it appropriate for the Administrative Appeals Tribunal to exercise either of those powers on its own account. This is because the Minister alone can exercise the discretion as to whether the alternative special residence requirements in either provision have been met (as well as the other relevant requirements in subsection 21(2), (3) or (4), including those relating to the character and identity of the applicant).

123. Further, the power in new subsection 22A(1A) of the Act will only be exercised by the Minister personally in very rare cases where the Minister is satisfied that the person is engaging in activities that would be of benefit to Australia and that the person needs to be a citizen to do so. The power in new subsection 22B(1A) of the Act will only be exercised by the Minister personally in very rare cases where the Minister is satisfied that the person's engagement in the relevant work specified under subsection 22C(3) is of benefit to Australia.
124. Finally, decisions by the Minister under new subsections 22A(1A) and 22B(1A) of the Act will be subject to judicial review, and to parliamentary scrutiny due to the tabling requirements in new subsections 22A(9) and 22B(9) where the relevant power has been exercised.

### **Item 19                      Application Provision**

125. This item provides that the amendments made by items 1 to 10 of this Schedule to the Bill apply in relation to:
- applications made under section 21 of the *Australian Citizenship Act 2007* on or after the commencement of those items; and
  - applications made under that section before that commencement and not decided by the Minister before that commencement.
126. The purpose of this provision is to make it clear that new subsections 22A(1A), 22B(1A) 22A(1B), 22B(1B), 22B(2), 22A(4), 22B(4), 22A(5), 22B(5), 22A(6), 22B(6), 22A(7), 22B(7), 22A(8), 22B(8), 22A(9), 22B(9), 22A(10), 22B(10), 22A(11), 22B(11) and 24(2A) apply in relation to applications made under section 21 of the Act, which are made on or after the commencement of these amendments, or applications which were made under that section before the commencement of these amendments and not decided by the Minister before that commencement.
127. This item ensures that the Minister is able to exercise the new non-delegable and non-compellable powers in subsections 22A(1A) and 22B(1A) of the Act in relation to those applicants who apply for citizenship by conferral under section 21 on or after the commencement of these amendments, as well as those applicants who have made an application prior to the commencement of these amendments but whose application has not yet been decided by the Minister.

## ATTACHMENT A

### **Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

#### **Australian Citizenship Amendment (Special Residence Requirements) Bill 2013**

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of Bill**

The purpose of this Bill is to provide an alternate pathway for certain persons to satisfy special residence requirements to obtain Australian citizenship by conferral.

The Bill gives the Minister a non-compellable, non-delegable discretion to waive the residence requirements in paragraphs 22A(1)(d)-(g) and 22B(1)(c)-(g) of the *Australian Citizenship Act 2007* (Cth) (the Act) in certain circumstances. This discretion could only be exercised if the applicant:

- had been a permanent resident for the 90 days prior to application, had been physically present in Australia for at least 180 days in the previous two years and had not been an unlawful non-citizen in the 180 days prior to application; and
- gives an undertaking to be ordinarily resident in Australia for two years after acquisition of citizenship, including 180 days of physical presence in Australia.

The Bill gives the Minister an additional discretion to personally revoke the person's citizenship if they do not comply with this residence obligation. The Minister would also be able to revoke the citizenship of any child of that person if the child's citizenship was approved as a consequence of the discretion being applied in favour of their parent. The discretion to revoke must not be used if it would render the adult or child stateless, or if the child has another responsible parent who is an Australian citizen.

#### **Human Rights Implications**

The following amendments have been assessed as engaging human rights.

##### **Prospective residence obligation** (*Schedule 1, Item 1*)

One of the policy objectives behind all of the residence requirements in the Act is to ensure that potential citizens have sufficient time in Australia to understand the nature of Australian citizenship and the commitment that they make on becoming a citizen. This Bill would enable a person to become a citizen after a short period of residence in Australia, however it provides for this connection to Australia by obliging the applicant to give an undertaking in writing that they will be ordinarily resident in Australia for a particular period of time after acquiring citizenship.

*International Covenant on Civil and Political Rights (ICCPR)*

The proposal engages Article 12 of the ICCPR, which provides for freedom of movement. Article 12 provides:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.

Under Article 12(1) persons lawfully in Australia have a right to choose their residence, but this applies to choosing a residence within the territory of Australia, not choosing whether to reside in Australia or any other country.

The prospective residence obligation engages Article 12(2) concerning freedom to leave Australia, however it has a legitimate policy objective and is reasonable, necessary and proportionate. The requirement is that a person is "ordinarily resident" in Australia for a period of two years, but physically present for 180 days within that two years. "Ordinarily resident" is defined in section 3 of the Act as:

a person is taken to be *ordinarily resident* in a country if and only if:

- (a) he or she has his or her home in that country; or
- (b) that country is the country of his or her permanent abode even if he or she is temporarily absent from that country.

However, the person is taken not to be so resident if he or she resides in that country for a special or temporary purpose only.

Thus, the concept of ordinary residence allows for temporary absences from Australia. This is further confirmed by the requirement that the required period of physical presence be 180 days. This therefore allows for 550 days of absence from Australia within that two year period. This requirement is proportionate as it allows a person to travel outside Australia for reasonable periods of time for engagement in the activity for which they have been given citizenship, such as representing Australia in sporting activities, and for personal reasons such as family commitments.

The prospective residence obligation also engages Article 12(3). However, for the reasons discussed above, this has a legitimate policy objective and is reasonable, necessary and proportionate in achieving this objective.

### **Residence Restriction** (*Schedule 1, Item 2*)

The Act currently provides that periods of time will not count towards any residence requirement if the applicant was confined in a prison; or confined in a psychiatric institution by order of a court made in connection with proceedings for an offence against an Australian law in relation to the applicant (see, for example, subsections 22A(2) and 22B(2)).

The Bill proposes to update the Act to apply this restriction to the alternative residence requirement. It therefore amends section 22B to include reference to the alternative requirement of physical presence in Australia over a period of two years (new paragraph 22B(1A)(c)). It does not need to update the reference to paragraph 22A(1)(c) as that two year period has not changed.

#### *ICCPR and Convention of the Rights of Persons with Disabilities (CRPD)*

This requirement engages Article 26 of the ICCPR and Article 5 of the CRPD. Article 26 of the ICCPR provides:

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.

The United Nations Human Rights Committee has not attempted to define 'other status', but has decided it on a case-by-case basis. Decisions by the Committee suggest that a clearly definable group of people linked by their common status is likely to fall under the definition of 'other status'. Among others, the following statuses have been held to qualify as prohibited grounds – age, nationality, marital status, disability, place of residence within a country and sexual orientation.

Articles 5(1) and (2) of CRPD provides:

- (1) States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
- (2) States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

The amendments provide for differential treatment on the basis of a criminal record and therefore engage the rights to equality and non-discrimination in both Article 26 of the ICCPR and Article 5 of the CRPD. This requirement aims to ensure the Minister cannot use his discretion for applicants who have been confined in a prison; or confined in a psychiatric institution by order of a court made in connection with proceedings for an offence against an Australian law in relation to the applicant, when exercising the discretion to waive residence requirements in paragraphs 22B(1)(c)-(g).

While this restriction engages the above human rights, it is reasonable, necessary and proportionate to ensure applicants for citizenship derive no benefit from the commission of

an offence against Australian law. Importantly, the Minister may decide that that this requirement does not apply in relation to the applicant if, taking into account the circumstances that resulted in the applicant’s confinement, the Minister is satisfied that it would be unreasonable for that subsection to apply in relation to the applicant.

**Revocation provision – main applicant** (*Schedule 1, Items 7-11*)

The Bill allows the Minister to revoke the citizenship of a person who does not comply with their undertaking to be resident in Australia for a certain period of time following their acquisition of citizenship through the exercise of ministerial discretion under new subsections 22A(1A) or 22B(1A). In keeping with the other revocation provisions in the Act (section 34), this revocation provision may only be exercised by the Minister personally.

*ICCPR*

Article 12 of the ICCPR provides:

12(2) Everyone shall be free to leave any country, including his own.

12(4) No one shall be arbitrarily deprived of the right to enter his own country.

Should the Minister revoke citizenship under the new Bill, due to the person failing to meet the prospective residence obligation, this would be based on the required period of physical presence in Australia not being met and consideration of the section 3 definition of ‘ordinarily resident’. Further, it is a discretion, which means that the Minister can take into account the circumstances of the case before deciding whether or not to revoke the person’s citizenship. We note also that the Minister must not revoke a person’s citizenship if it would render them stateless. While revoking a person’s citizenship engages Article 12(2) and Article 12(4) of ICCPR, in light of the benefit provided to the person, it is reasonable, necessary and proportionate to provide the Minister with the power to revoke citizenship.

Should the Minister revoke citizenship under the new Bill, the person would receive an ‘exit visa’ under section 35 of the *Migration Act 1958* (Cth). This is a permanent visa.

**Provisions affecting children** (*Schedule 1, Items 12-13*)

The Act already provides that if a person ceases to be a citizen at a particular time and they are a responsible parent of a child aged under 18, the Minister may revoke that child’s citizenship (section 36). The Bill therefore amends this section to allow the Minister to revoke a child’s citizenship if their responsible parent ceases to be a citizen under the new revocation provision in section 34A. However, this provision does not breach the child’s human rights.

*Convention on the Rights of the Child (CRC) and ICCPR*

The Bill engages, but does not limit rights set out in either the CRC or the ICCPR. Article 24(3) of the ICCPR and Article 7(1) of the CRC both provide that a child has the right to acquire a nationality. It is noted that “in international law, the terms ‘nationality’ and ‘citizenship’ are used interchangeably” and the right to a nationality “does not necessarily require countries to give their nationality to every child born in their territory.” (Human Rights Guidance Papers, *Right to a name and acquire a nationality*).



If the child is born in Australia the nationality obligations under Article 7 are already given effect by the Act, as a child born in Australia to permanent residents or Australian citizens is entitled to Australian citizenship by operation of law (section 12 of the Act). This would apply to a child born to a person who acquired citizenship through the exercise of the new Ministerial discretion.

For children born overseas, as a starting basis the Department notes that no human rights obligations arise for Australia until the child is in Australia's jurisdiction. However, for children born overseas to Australian citizen parents, access to Australian citizenship is provided for under section 16 of the Act and this would also apply to children of those who acquire citizenship through the new ministerial discretion.

Article 3 of the CRC provides that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

However, we note that the best interests of the child may be outweighed by countervailing considerations. It is accepted that States are permitted to determine and prescribe citizenship criteria (noting that the acquisition of citizenship is not a right) provided those criteria accord with their international obligations.

Children would not unreasonably lose their citizenship through the new revocation provision as it is a discretion, allowing individual circumstances to be taken into account. In particular, the Minister would take into account the best interests of the child in the process of deciding whether or not to exercise the discretion to revoke.

Further, the provision would not be applied to deprive a child born in Australia of their citizenship if their parent's citizenship was revoked for failing to comply with the prospective residence obligation. The revocation provision would be applied if the child had obtained their citizenship as a result of the parent acquiring citizenship through the new discretion. In addition, there is an inbuilt protection, such that the Minister must not revoke a child's citizenship if they have another responsible parent who is an Australian citizen.

Article 8 of the CRC provides that:

States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

The Bill prevents the Minister from revoking a child's citizenship if such revocation would render the child stateless. Furthermore, this is clearly articulated in current subsection 36(3) of the Act which relates to children of parents who cease to be citizens, in that the Minister must not revoke a child's Australian citizenship if the Minister is satisfied that the child would then become a person who is not a national or citizen of any country.

## **Conclusion**

The Bill is compatible with human rights the stated above because, to the extent that it may engage human rights, those limitations are reasonable, necessary and proportionate.