

## **CHAPTER 3 – CITIZENSHIP BY DESCENT**

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## **OVERVIEW**

Part 2 Division 2 Subdivision A of the *Australian Citizenship Act 2007* (the Act) provides that a person may be registered as an Australian citizen by descent if they were born overseas to at least one parent who was either an Australian citizen at the time of birth or, if the birth occurred prior to 26 January 1949, became an Australian citizen on 26 January 1949.

Attachment A outlines the provisions for Australian citizenship by descent between 26 January 1949 and 30 June 2007.

If the Australian citizen parent is a citizen by descent, a person cannot be registered as an Australian citizen by descent unless the parent had been present in Australia lawfully for a total of two years at some time prior to the application, or unless the person is not a national or citizen of another country and has never been a national or citizen of another country.

If the person was born prior to 26 January 1949, a parent must have been either born in Australia or naturalised prior to the child's birth.

An application must be refused if the decision maker is not satisfied of the person's identity, if the person has been assessed by ASIO as a risk to national security, or if the person has ceased to be an Australian citizen within the 12 months prior to application (cessation).

The Act requires that applicants aged 18 years and over be of good character. Policy provides that applicants aged 16 years and over and under 18 years also be of good character.

All evidentiary documentation must be closely examined. Where necessary, DNA testing may be used to verify the claimed parentage of the applicant.

Extreme caution should be exercised in cases where the child may be the product of offshore surrogacy arrangements. There must be a genetic link between the Australian citizen parent and the child.

## **DIVISION 2 OF THE ACT**

### **Acquisition of Australian citizenship by application**

#### ***Subdivision A - Citizenship by descent***

#### **ELIGIBILITY**

#### ***Application and eligibility for citizenship Section 16***

*“(1) A person may make an application to the Minister to become an Australian citizen.*

*Note: Section 46 sets out application requirements (which may include the payment of a fee).*

*Persons born outside Australia on or after 26 January 1949*

*(2) A person born outside Australia on or after 26 January 1949 is eligible to become an Australian citizen if:*

*(a) a parent of the person was an Australian citizen at the time of the birth; and*

*(b) if the parent was an Australian citizen under this Subdivision or Subdivision AA, or section 10B, 10C or 11 of the old Act (about citizenship by descent), at the time of the birth:*

*(i) the parent has been present in Australia (except as an unlawful non-citizen) for a total period of at least 2 years at any time before the person made the application; or*

*(ii) the person is not a national or a citizen of any country at the time the person made the application and the person has never been such a national or citizen; and*

*(c) 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.*

*Persons born outside Australia or New Guinea before 26 January 1949*

(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. "*

Subsection 16(2) provides that people born on or after 26 January 1949 may be registered as citizens by descent provided they were born overseas and:

- a parent was an Australian citizen at the time of the person's birth; and
- the person is of good character if 18 years and above; and
- if the parent is an Australian citizen by descent at the time of the birth:
  - the parent has been lawfully present in Australia for a total of at least two years; or
  - the person is not a national or citizen of another country at the time of application and has never been a national or citizen of another country.

Other requirements are that:

- the decision maker is satisfied of the identity of the person (ss 17(3) – see Chapter 11 – Personal Identifiers);
- the person has not been assessed by ASIO as a risk to national security (ss 17 (4) – see Chapter 12 – National Security);
- if the person is stateless, the person has not been convicted of a national security offence (ss17 (4A));
- if the person is a former Australian citizen, at least 12 month has passed since the person ceased to be an Australian citizen (ss17(5));
- if the parent was originally an Australian citizen by descent, ceased to be an Australian citizen and then resumed their Australian citizenship, the parent must have been lawfully present in Australia for a total of at least two years (subsection 32(2) provides that a person resumes the same kind of citizenship as that held before ceasing to be an Australian citizen).

Policy is that applicants aged 16 years and over and under 18 years also be of good character.

If the application is approved the person becomes an Australian citizen by descent at the time of approval. Their details must then be registered.

The law makes it clear that if a person never had a parent who was an Australian citizen they are taken to never have been an Australian citizen by descent – even if they were approved and registered.

Subsection 16(3) provides that people born before 26 January 1949 may be eligible to be registered as a citizen by descent provided they were born outside Australia or New Guinea and:

- a parent became an Australian citizen on 26 January 1949; and
- the parent was born in Australia or New Guinea or was naturalised in Australia before the person's birth; and
- the person is of good character.

Other requirements are that:

- the decision maker is satisfied of the identity of the person (ss 17(3) – see Chapter 11 – Personal Identifiers);
- the person has not been assessed by ASIO as a risk to national security (ss 17 (4) – see Chapter 12 – National Security);
- if the person is stateless, the person has not been convicted of a national security offence (ss17 (4A));
- if the person is a former Australian citizen, at least 12 month has passed since the person ceased to be an Australian citizen (ss17(5)).

The law makes it clear that if a person never had a parent who became an Australian citizen on 26 January 1949 they are taken to never have been an Australian citizen by descent – even if they were approved and registered.

If the applicant is approved, the person becomes an Australian citizen by descent at the time of approval. Their details must then be registered.

## APPLICATION REQUIREMENTS

### ***Application requirements Section 46***

*“(1) An application under a provision of this Act must:*

- (a) be on the relevant form approved by the Minister for the purposes of that provision; and*
- (b) contain the information required by the form; and*
- (c) be accompanied by any other information or documents prescribed by the regulations; and*
- (d) be accompanied by the fee (if any) prescribed by the regulations.*

#### *Children aged under 16*

*(2A) An application under a provision of this Act by a child aged under 16 must be set out:*

- (a) on a form that contains no other application; or*
- (b) on a form that also contains an application by 1 responsible parent of the child.*

#### *Remission, refund or waiver of fees*

*(3) The regulations may make provision for and in relation to the remission, refund or waiver of any fees of a kind referred to in paragraph (1)(d).”*

Applications must be on the form approved by the Minister, contain the information required by the form, be accompanied by any other information prescribed by the regulations and be accompanied by a fee (if any) prescribed by the regulations.

The approved form for applications for citizenship by descent is the Form 118 “*Application for Australian citizenship by descent*”.

Policy provides that if an applicant is under 16 years of age a responsible parent is to sign the application form. Responsible parent is defined in section 6 of the Act (see Chapter 1 – Preliminary and Definitions).

The application must be made in the current legal name of the applicant. The following documents should support the application:

- the applicant's full birth certificate;
- official evidence of any change of name by the applicant;
- evidence that a parent was an Australian citizen when the applicant was born;
- the Australian citizen parent's birth certificate; **or**
- evidence of Australian citizenship if parent was not born in Australia;
- official evidence of any change of name by the Australian citizen parent.
- Policy requires applicants aged 16 and over to provide penal clearance certificates from all countries they have lived in (including Australia if application lodged at an overseas post) since the age of 16. The certificates assist with an assessment of their character.

Official translations of documents in languages other than English must be provided. In Australia, translators should be accredited by the National Accreditation Authority for Translators and Interpreters (NAATI) as qualified to do official translations from the other language into English. For overseas lodged applications the current guidelines for translations in that post apply.

If the applicant is overseas and the application is lodged in Australia by an authorised person, the person should be informed that the application will be sent for processing to the overseas post closest to the applicant's country of residence for processing.

***Information, documents and fees to accompany applications  
Regulation 12***

*“(1) For paragraph 46(1)(c) of the Act, if information or a document accompanying an application for citizenship is not originally in English, the information or document must be accompanied by an original English translation.*

*(2) For paragraph 46(1)(d) of the Act, an application of the kind mentioned in an item in Schedule 3 must be accompanied by the fee mentioned in the item.”*

Documents not in English must be accompanied by an official translation. In Australia, translations should be done by National Accreditation Authority of Translators and Interpreters (NAATI) accredited translators. For overseas lodged applications the current guidelines for translations in that post apply.

**“Fees to accompany applications Schedule 3**

*(subregulation 12(2))*

<b>Item</b>	<b>Application</b>	<b>Fee</b>
1	<i>Applications made at the same time under section 16 by 2 or more the applications siblings</i>	<i>\$110 for the application by the first sibling, and \$85 for made by the second and subsequent siblings</i>
2	<i>An application under section 16, other than an application mentioned in item 1”</i>	<i>\$110</i>

If two or more siblings make applications at the same time, the fee for the first sibling is \$110 and the fee for second and subsequent siblings is \$85. The fee for all other applications is \$110.

**Refund of fees (Act subs 46 (3)) Regulation 13**

*“(1) The Minister may refund the whole or part of a fee that is payable under sections 16, 19C, 21 and 29 of the Act:*

- (a) if a person has previously lodged an application under the same section and a decision on that application has not been made; or*
- (b) if a person has lodged the application as a result of incorrect advice given by the Department; or*
- (c) if a person is an Australian citizen; or*
- (d) if a person has paid an incorrect fee with the original application.”*

## DECISION MAKING

### ***Minister's decision Section 17***

*“(1) If a person makes an application under section 16, the Minister must, by writing, approve or refuse to approve the person becoming an Australian citizen.*

*(1A) The Minister must not approve the person becoming an Australian citizen unless the person is eligible to become an Australian citizen under subsection 16(2) or (3).*

*(2) Subject to this section, the Minister must approve the person becoming an Australian citizen if the person is eligible to become an Australian citizen under subsection 16(2) or (3).*

#### *Identity*

*(3) The Minister must not approve the person becoming an Australian citizen unless the Minister is satisfied of the identity of the person.*

*Note: Division 5 contains the identity provisions.*

#### *National security*

*(4) If the person is not covered by subsection (4B), the Minister must not approve the person becoming an Australian citizen at a time when an adverse security assessment, or a qualified security assessment, in respect of the person is in force under the Australian Security Intelligence Organisation Act 1979 that the person is directly or indirectly a risk to security (within the meaning of section 4 of that Act).*

*(4A) If the person is covered by subsection (4B), the Minister must not approve the person becoming an Australian citizen if the person has been convicted of a national security offence.*

*(4B) A person is covered by this subsection if:*

*(a) at the time the person made the application under section 16, the person:*

*(i) is not a national of any country; and*

- (ii) is not a citizen of any country; and*
- (b) at the time of the person’s birth, the person had a parent who was an Australian citizen.*

#### *Cessation of citizenship*

- (5) If the person has at any time ceased to be an Australian citizen, the Minister must not approve the person becoming an Australian citizen during the period of 12 months starting on the day on which the person ceased, or last ceased, to be an Australian citizen. ”*

An application must be approved or refused.

If an applicant meets the eligibility requirements and there is no prohibition on approval, they must be approved. They must also be given notice of the decision.

#### **Registration Section 18**

*“If the Minister approves the person becoming an Australian citizen, the Minister must register the person in the manner prescribed by the regulations.”*

If the person is approved to become an Australian citizen by descent their details must be registered in the department’s data storage system.

#### **Day citizenship begins Section 19**

*“A person becomes an Australian citizen under this Subdivision on the day on which the Minister approves the person becoming an Australian citizen.”*

A person becomes a citizen by descent on the day the application is approved.

However, section 19A of the Act provides that even if an application is approved, a person does not become a citizen unless their parent was either an Australian citizen at the time of birth (on or after 26 January 1949) or became an Australian citizen on 26 January 1949 (where the birth occurred before that date).

### ***Notification of Decisions Section 47***

*“(1) If the Minister makes a decision under this Act in relation to a person, the Minister must give the person notice of the decision.*

#### *Child*

*(2) If the person is a child, the Minister satisfies the requirement in subsection (1) if the Minister gives a parent of the child notice of the decision.*

#### *Reasons for adverse decision*

*(3) If the decision is an adverse decision, the notice must include the reasons for the decision.*

#### *Form of notice*

*(4) The Minister must give the notice in the manner prescribed by the regulations (which includes electronic form).*

#### *Procedural defect does not affect validity of decision*

*(5) A failure to comply with subsection (3) or (4) does not affect the validity of the decision.”*

A person must be given notice of the decision on their application. If the decision is a refusal, the notice must include the reasons for the decision. Policy requires the notification include information on any review right.

### **Review of decisions Section 52**

*“(1) An application may be made to the Administrative Appeals Tribunal for review of the following decisions:*

- (a) a decision under section 17 to refuse to approve a person becoming an Australian citizen;”*

A decision to refuse an application for Australian citizenship by descent can be reviewed by the Administrative Appeals Tribunal (AAT).

### **Revocation by Minister Section 34**

*“Citizenship by descent or for persons adopted in accordance with the Hague Convention on Intercountry Adoption*

*(1) The Minister may, by writing, revoke a person’s Australian citizenship if:*

- (a) the person is an Australian citizen under Subdivision A or AA of Division 2 (including because of the operation of section 32); and*
- (b) either of the following apply:*
  - (i) the person has been convicted of an offence against section 50 of this Act, or section 137.1 or 137.2 of the Criminal Code, in relation to the person’s application to become an Australian citizen;*
  - (ii) the person obtained the Minister’s approval to become an Australian citizen as a result of third-party fraud within the meaning of subsection (8); and*
- (c) the Minister is satisfied that it would be contrary to the public interest for the person to remain an Australian citizen.”*

See Chapter 8 - Cessation.

## ATTACHMENT A

### ***AUSTRALIAN CITIZENSHIP ACT 1948 (OLD ACT)***

#### **People born outside Australia on or after 26 January 1949 to an Australian citizen parent**

##### ***26 January 1949 to 21 November 1984***

A person born overseas to an Australian citizen parent became an Australian citizen when the birth was registered at an Australian consulate. The requirements during the time were:

Between 26 January 1949 and 30 April 1970, section 11 of the old Act required that:

- at the time of the birth, the person's father was an Australian citizen or, if a person was born out of wedlock, the mother was an Australian citizen or British subject ordinarily resident in Australia or New Guinea; and
- the birth was registered at an Australian consulate within one year after the birth, or such further period as allowed by the Minister. As a matter of policy, registrations were allowed after the one year period.

except if:

- they were born in a Commonwealth country (listed in the then s 7) and became a citizen of that country by birth; and
- the relevant parent was not ordinarily resident in Australia or New Guinea.

Until 15 September 1975 the Territory of Papua was part of Australia for the purposes of the old Act.

Between 30 April 1970 and 21 November 1984, section 11 of the old Act required that:

- if the child was born in wedlock, the child's father or mother was an Australian citizen at the time of the birth;

- if the child was born out of wedlock, the child's mother was an Australian citizen or a British subject ordinarily resident in Australia or New Guinea at the time of the birth; and
- the birth was registered at an Australian consulate within five years after the birth, or such further period as allowed by the Minister. As a matter of policy, registrations were allowed after the five year period.

Until 15 September 1975 the Territory of Papua was part of Australia for the purposes of the old Act.

Between 22 November 1984 and 30 June 2007, section 10B of the old Act required that a person born overseas to an Australian citizen parent be registered before the age of 18 years. From July 2002, the age limit for registration was 25 years.

Between 1991 and 30 June 2007, section 11 of the old Act provided for registration by descent for people born overseas between 26 January 1949 and 15 January 1974.

#### People born out of wedlock

If a person was born out of wedlock, the registration referred only to the mother. If the birth was later legitimated under the *Marriages Act 1961, regulation 12*, the person could be re-registered

The provision for the registration of people born to Australian mothers in wedlock was made retrospective, and allowed registration of people born to Australian mothers between 26 January 1949 and 30 April 1970.

#### **People born outside Australia or New Guinea before 26 January 1949 to a father who became an Australian citizen on 26 January 1949.**

#### Who became a citizen on 26 January 1949?

When the old Act came into effect on 26 January 1949, some people automatically became Australian citizens (section 25). The repeal of this provision on 1 May 1987 did not affect the citizenship status of such people.

Subsection 25(1) provided that a person became an Australian citizen if they were a British subject immediately prior to 26 January 1949 and had been:

- (a) born in Australia, provided that at the time of the person's birth their father was not in Australia as a diplomatic representative of another country; **or**
- (b) born in New Guinea prior to 26 January 1949; **or**
- (c) naturalised as a British subject in Australia. This includes:
  - children whose names were included in a parent's certificate; and
  - women who made declarations that they desired to acquire British nationality under the *Nationality Act 1920-1946*. These people are recorded in ICSE; **or**
- (d) ordinarily resident in Australia and/or New Guinea for the five year period between 26 January 1944 and 25 January 1949. This includes people whose home was in Australia, or Australia was their place of permanent abode (notwithstanding temporary absence).

#### Descent provisions

Subsection 25(3) provided that British subjects born outside Australia and New Guinea before 26 January 1949, to a father who acquired Australian citizenship under paragraphs 25(1)(a), (b) or (c) became Australian citizens if they arrived in Australia:

- before 26 January 1949 on an unrestricted basis (citizenship commenced on 26 January 1949);
- between 26 January 1949 and 6 May 1966 on an unrestricted basis (citizenship commenced on the date of entry); **or**
- between 6 May 1966 and 30 April 1987 on an unrestricted basis and were a British subject on arrival (citizenship commenced on the date of entry).

**People born outside Australia or New Guinea before 26 January 1949 to a mother who became an Australian citizen on 26 January 1949.**

People born overseas before 26 January 1949 to a mother who became an Australian citizen on 26 January 1949, were not eligible for citizenship by descent. However, between 18 June 1991 and 17 June 1996 inclusive, a person born outside Australia and New Guinea before 26 January 1949 to a mother born in Australia or New Guinea, or naturalised in Australia, could apply for citizenship. The requirements that:

- the applicant was present in Australia for any time before 1 May 1987;  
and
- the applicant was of good character.