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Submission to the Parliamentary Joint Committee on
Intelligence and Security

Inquiry into the Australian Citizenship Amendment
(Allegiance to Australia) Bill 2015

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This submission from the Castan Centre for Human Rights Law to the Parliamentary Joint Committee on Intelligence and Security addresses the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (hereafter ‘the Bill’). It is opposed to the passage of the Bill.

The reasons for this opposition are because the Bill is inconsistent with Australian Constitutional principle, and arguably with the Australian Constitution.

**Relevant Constitutional Provisions**

The Constitution confers upon the Parliament power to enact laws with respect to naturalisation and aliens.\(^1\) However, this power is not an unlimited power for Parliament to decide who is an alien and who is not.

In the case of *Pochi v McPhee*, Gibbs CJ stated that:

> the Parliament cannot, simply by giving its own definition of ‘alien’, expand the power under s.51(xix) to include persons who could not possibly answer the description of ‘aliens’ in the ordinary understanding of the word.... [T]he Parliament can in my opinion treat as an alien any person who was born outside Australia, whose parents were not Australians, and who has not been naturalized as an Australian.

This passage has been affirmed on multiple occasions in subsequent High Court decisions.\(^2\)

It is clear from the decision in *Singh* that the second sentence quoted from Gibbs CJ does not set the outer limits of the Parliament’s power. In *Singh*, a majority of the High Court upheld the validity of the deportation of a child born into Australia to non-Australian parents. The majority held that, despite the geographical circumstances of her birth, it was permissible for Australian law, enacted by the Parliament, to deem her a non-citizen and to therefore treat her as an alien. Part of the reason for this was that her Indian citizenship was seen as a basis on which she might be marked out as owing allegiance to a foreign country, and hence an alien.\(^3\)

The Bill is limited in its operation to Australians who are ‘national[s] or citizen[s]n of a country other than Australia’.

In *Singh*, the joint judgment of Gummow, Hayne and Heydon JJ stated that

\(^1\) Section 51(xix).


\(^4\) Sections 33AA(1), 35(1)(a), 35A(1)(b) that would be enacted by Items 3, 4 and 5 of Schedule 1 of the Bill.
The power to make laws with respect to naturalization plainly extends to making a law prescribing the circumstances in which, and the procedures by which, an alien ceases to hold that status and becomes ‘naturalized’.

If the power [in section 51(xix)] extends to regulating renunciation of allegiance, the power extends, at least in this respect, to altering the criteria which are to determine whether the necessary connexion between the individual and (to personify the concept) the Crown exists. But the power stated in the second paragraph is not unlimited. Nothing in Singh establishes an unlimited power to revoke the citizenship of Australians who have been naturalised as Australian, or who have been born in Australia and enjoyed citizenship as a result of the fact of their birth. That is the point of the first sentence of Gibbs CJ remarks quoted above, and it was similarly stated by Gleeson CJ in Singh, that ‘Parliament cannot, simply by giving its own definition of “alien”, expand the power under s 51(xix) to include persons who could not possibly answer the description of “aliens” in the Constitution.’ In other words, legislation depriving Australian citizens of that citizenship must act upon some factual basis that actually speaks to the fact of their allegiance to Australia. Allegiance is not a concept that the Parliament is free to define for itself. The Bill appears to recognise this in its statement of purpose (clause 4), which provides that

This Act is enacted because the Parliament recognises that Australian citizenship is a common bond, involving reciprocal rights and obligations, and that citizens may, through certain conduct incompatible with the shared values of the Australian community, demonstrate that they have severed that bond and repudiated their allegiance to Australia.

However, the notion of allegiance performs no operative role in the provisions that the Bill would enact. Nor is there anything in the Australian constitutional framework to suggest that ‘shared values’ of the Australian community are a basis for expulsion from that community, particularly not ‘shared values’ defined by a combination of legislation and executive action (via the listing of organisations and the issuing of notices of exemption).

The cases of Roach10 and Rowe11 affirm that the provisions of the Constitution mandating that the members of Parliament shall be directly chosen by the people preclude the

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7 See also the remarks of Gaudron J in Nolan that an alien is ‘a person who is not a member of the community which constitutes the body politic of the nation state from whose perspective the question of alien status is to be determined’: (1988) 165 CLR 178, 189.

8 Section 35(4) that would be enacted by Item 4 of Schedule 1 of the Bill.

9 Sections 33AA(7), 35(6), 35A(6) that would be enacted by Items 3, 4 and 5 of Schedule 1 of the Bill.

10 Roach v Electoral Commissioner [2007] HCA 43.
Parliament legislating so as to remove the franchise on an arbitrary basis. Similar considerations must apply to attempts to expel Australians from the people on the basis that they have repudiated their allegiance.

Levying war on the Commonwealth, or serving in enemy armed forces, are forms of conduct (and also criminal offences) which arguably sever that link. The other elements of conduct and offences picked out in the Bill lack that character, however. For instance, the variety of conduct that could amount to a terrorist offence under Australian law is so varied (and includes service in many foreign armed forces, given that many such forces are organisations that are engaged in, preparing or planning for the use of lethal force for political reasons so as to intimidate other governments, or perhaps sections of the public). The idea that damaging Commonwealth property might sever a citizen’s allegiance to Australia is ridiculous.

The Bill ought to be withdrawn. Any similar Bill ought to be redrafted completely fresh, having regard to the relevant constitutional principles that govern the relationship between Australians and the polity to which they belong.

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12 Sections 7 and 24.


14 Criminal Code (Cth) ss 80.1, 80.1AA.

15 See the definition of ‘terrorist act’ and ‘terrorist organisation’ in sections 100.1 and 102.1 of the Criminal Code (Cth).

16 Section 29 of the Crimes Act 1914 (Cth) is listed in section 35A(3) that would be enacted by Item 5 of Schedule 1 of the Bill.