

By Marian Wheatley

# Discretion to cancel Australian passports

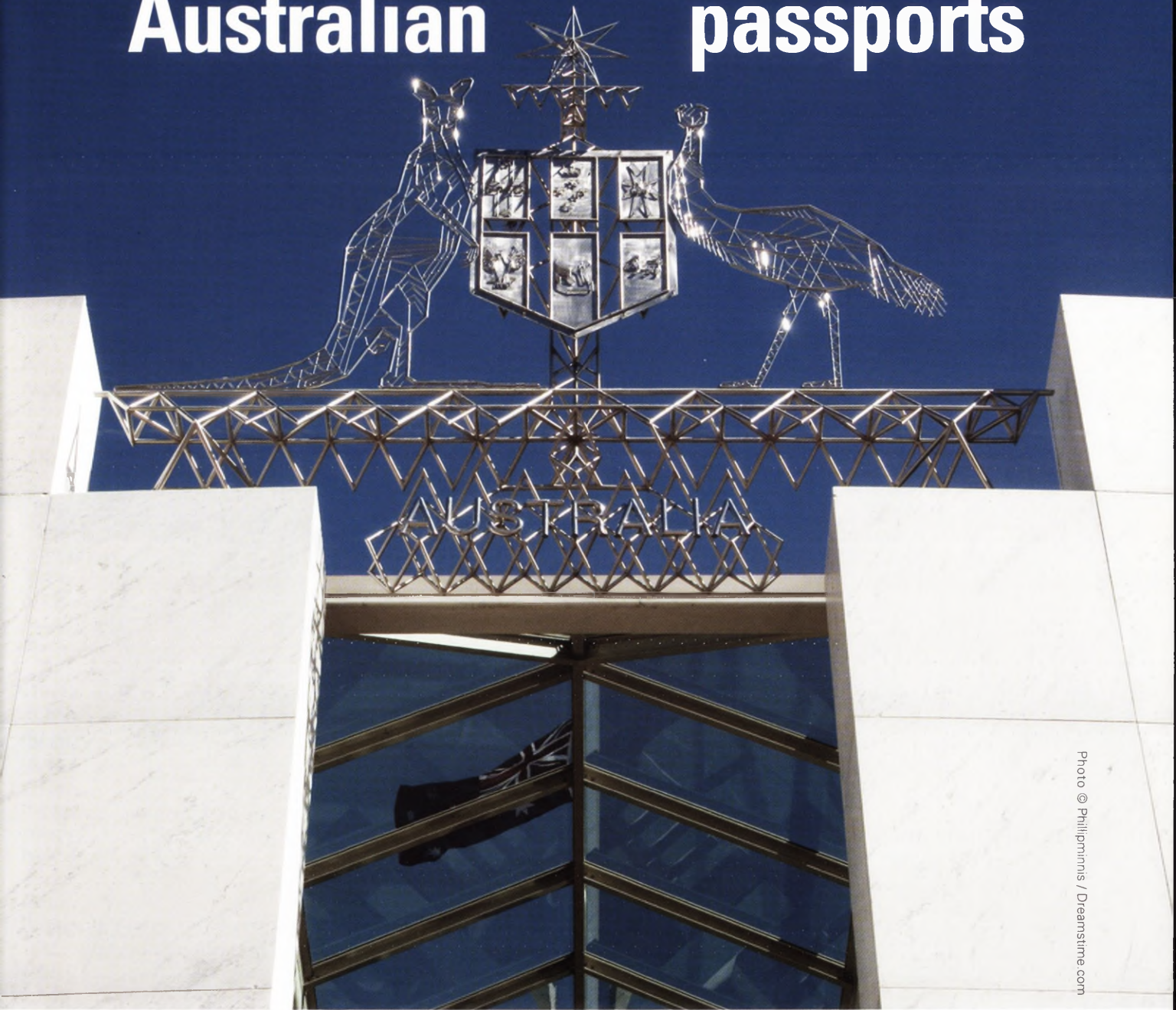


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The statement made by federal attorney-general, Robert McClelland, that he would consider cancelling the passport of Julian Assange,<sup>1</sup> following the release of the leaked US diplomatic cables by Wikileaks, highlights the ever-present potential for Australians abroad to be stripped of their Australian identity documentation. What constitutes sufficient grounds for the government to revoke the entitlement of an Australian citizen to a passport, and how robust is the law in ensuring that a cancellation or refusal of an Australian passport is justified?

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## INTERNATIONAL LAW ENFORCEMENT OBJECTIVES

The legislation covering cancellation of Australian passports resides exclusively in the *Australian Passports Act 2005* (Cth) which replaced the *Passports Act 1938*. According to the *Explanatory Memorandum*,<sup>2</sup> the new passports system would ensure that passport law complemented national security, border protection, Australian law enforcement measures and international law enforcement co-operation. Provisions of the Anti-terrorism Bill (No. 3) 2004<sup>3</sup> also required that substantive changes be made to the *Passports Act 1938*.

The 2005 Act gives the minister for foreign affairs new powers to demand, confiscate and seize foreign travel documents if a person is the subject of an arrest warrant issued in Australia or in a foreign country; if a person is prevented from travelling internationally by force of an order of an Australian or a foreign court; or if a person is suspected of engaging in harmful conduct.<sup>4</sup>

Under the international law enforcement co-operation provisions (s13), a passport can be cancelled if the holder is believed to have been issued with an arrest warrant by a foreign country for a serious foreign offence. The described aim of s13 was to 'complement Australian law enforcement objectives to offer full and reciprocal assistance to counterparts around the world in enforcing foreign laws'.<sup>5</sup>

### A SERIOUS FOREIGN OFFENCE

The Bill was championed by the minister of foreign affairs as an important tool to prevent 'specific serious crimes', which included child sex tourism, people-smuggling, sexual slavery and terrorism.<sup>6</sup> Section 13 is not specific however, but broad in its scope for application. The definition of a 'serious foreign offence' is drawn from the definition of an 'extradition offence' in the *Extradition Act 1988* (s5).<sup>7</sup> A serious foreign offence is defined as 'an offence against the law of a foreign country for which the maximum penalty is death or imprisonment, or other deprivation of liberty, for a period of not less than 12 months'.<sup>8</sup>

Conduct constituting a serious foreign offence may not necessarily carry the same penalty under Australian criminal law – and Australians typically travel to many countries with unjust legal systems and unreasonable laws.

This ultimately gives the discretion as to what conduct constitutes a serious foreign offence to the lawmakers of a foreign country and such conduct may not necessarily carry the same penalty under Australian criminal law. The Castan Centre for Human Rights Law at Monash University warned that this interpretation of a serious offence could have profound consequences because Australians travel to many countries with unjust legal systems and unreasonable laws. They urged that sufficient grounds for cancellation should be limited to a warrant, a court order, bail or a parole condition issued in relation to a matter considered a serious offence under Australian law.<sup>9</sup>

### THE REFUSAL/CANCELLATION PROCESS

The process for passport cancellations and refusals has also changed. Under s18, a 'competent authority' can put a request to the minister under one of ss12(1), 13(1), 14(1), or 16(1) that deal with reasons for cancellation. Following such a request, the

minister may cancel or refuse the passport under subsection 22(2)(d). A 'competent authority' is defined to be variously a person with either responsibility for the circumstance, or with powers, duties or functions in relation to the circumstance; an APS employee of DFAT; a member of diplomatic staff of an Australian diplomatic mission; an Australian consulate consular officer; or any Commonwealth employee specified in a minister's determination as a competent authority in relation to the circumstance.<sup>10</sup> In March 2010, according to *The Australian* newspaper, a DFAT spokesperson claimed officials had made 507 requests to the minister to cancel or refuse to reissue passports under s13 since 2005.<sup>11</sup>

To make a request under s13(1), the competent authority must *reasonably believe* either that a serious foreign offence has been committed, or that an arrest warrant has been issued for one. The Australian Human Rights Commission expressed concern about the fact that the executive can accept an arrest warrant or a foreign court order as grounds to order a person to surrender their travel documents without further scrutiny.<sup>12</sup> To restore proportionality, they argued, some inquiry (preferably judicial) into the basis for, or circumstances surrounding, the arrest warrant or foreign court order should be required before it could be relied upon. Further, they argued, the individual concerned should have the opportunity to make submissions on the circumstances before their freedom of movement can be restricted.

### PRE-EMPTIVE CANCELLATION FOR SECURITY PURPOSES

For Australians with past criminal convictions, especially for any of the specific serious crimes listed as reasons for the legislation (for example, child sex tourism), a request to cancel or refuse a passport for the reason of 'potential for harmful conduct' can be made under s14(1), which provides: '(a) if an Australian passport were issued to a person, the person would be likely to engage in conduct that:

(v) might constitute an indictable offence against a law of the Commonwealth, being an offence specified in a Minister's determination; and

(b) the person should be refused an Australia passport in order to prevent the person from engaging in the conduct;

Requests under s14(1)(a)(v) are generally made by the Australian Federal Police (AFP).

Section 14 can also be used to deny a passport to a person with no prior criminal convictions. Amendments made in 1985 to the *Passports Act 1938* provided a grounds for a cancellation where there is a suspected potential for harmful conduct. It gave the minister the power to cancel a passport after having formed the opinion that the person was *likely* to engage in conduct that:

- might prejudice the security of Australia or of a foreign country;
- might endanger the health or physical safety of other persons; or
- might interfere with the rights and freedoms of others.<sup>13</sup>

These provisions remain in the current Act in subsections 14(1)(a)(i) to (iii). Requests under 14(1)(a)(i) are generally made by ASIO.

To make a cancellation request under s14(1), the competent authority has to *suspect*, on *reasonable grounds*, that the person would be *likely* to engage in such conduct. If a s14(1) request is made, the minister can accept the request and refuse to issue the passport under s14(2). The courts have determined that, in exercising the discretionary power, the minister is required to make a truly independent decision.<sup>14</sup>

According to a DFAT report, in the years 2005 to 2006 the minister for foreign affairs cancelled 80 Australian travel documents for reasons relating to Australian and international law enforcement, security and potentially harmful conduct.<sup>15</sup> ASIO has revealed that it issued eight adverse security assessments against Australian passport-holders in 2009-10. The agency also cleared 10 Australians, whose passports had previously been cancelled, concluding that they no

longer posed a threat.<sup>16</sup>

A pre-emptive cancellation has the potential for profound consequences, as was evidenced by the events surrounding the cancellation of the Australian passport of Shyloh Giddins, a convert to Islam and a resident of Yemen. After a request made by ASIO officers, the minister of foreign affairs cancelled her passport.<sup>17</sup> According to DFAT, the cancellation of a passport is followed up by alerting border police.<sup>18</sup> The Yemeni police detained Ms Giddins for questioning, and put her young children (aged seven and five years) under house arrest. Ms Giddins was held in detention for over three weeks although she was never charged and, once freed, she was allowed to return with her children to Australia.<sup>19</sup>

### REVIEWS AND APPEALS

The decision of the minister to cancel or refuse a passport is reviewable,<sup>20</sup> but reviews of ministerial refusals stemming from requests by competent authorities under ss13(1) and 14(1) are problematic, especially if the request is made by ASIO.

The AAT may review decisions made by the minister,<sup>21</sup> but s50(3) of the Act explicitly limits the AAT's powers under s43 of the *Administrative Appeals Tribunal Act 1975* where the

decision made is on request from a competent authority under either 13(1) or 14(1). The minister may certify that the decision 'involved matters of international relations or criminal intelligence'<sup>22</sup> and, if the minister has given such a certificate, the AAT may affirm the minister's decision or remit the decision to the minister for reconsideration only 'in accordance with any directions or recommendations of the Tribunal' (s50(3)).

### *Hussain v Minister of Foreign Affairs and Trade [2008]* FCAFC 128

When Syed Mustapha Hussain, an Australian citizen studying for a bachelor of medical science degree, went to Saudi Arabia on a scholarship then returned to Australia in 2003, he was interviewed by ASIO officers and given an adverse security assessment. On ASIO's request, the minister subsequently cancelled his passport and he was refused a new one. Hussain requested a review of the decision in the AAT.<sup>23</sup> Disclosure of substantial material considered to be adverse to Hussain was restricted by the attorney-general, who issued a security certificate under ss39A and 39B of the *Administrative Appeals Tribunal Act* >>

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Where an administrative decision is based primarily on evidence that cannot be revealed either to the recipient of that decision or their legal representative, challenging that decision is nigh impossible.

1975 (Cth) and certified that disclosure would be contrary to public interest because it would prejudice Australian security. The tribunal affirmed the decision based on evidence in the closed material. Hussain appealed the decision on grounds that, in conducting its review, the tribunal erred in law in preventing his legal representatives from accessing all evidence as well as legal submissions made by the minister and the director-general (of ASIO); and/or that the security certificates issued by the attorney-general were invalid to the extent that they denied access; or alternatively that ss36, 39A and 39B of the AAT Act were invalid to the extent they deny that access. The appeal failed. The court found no error of law in the way the tribunal had conducted the review mainly because Hussain had not challenged the validity of the security certificates at his tribunal hearing. Their validity not being challenged meant a presumption of regularity applied to the tribunal's having regard to them.

Significantly, the court found that the Security Appeals Division of the AAT operates under a statutory regime without rules of procedural fairness—natural justice having been intentionally withdrawn by the legislature. It commented that:

'...a legislative regime which authorises the making of a decision refusing to issue a passport upon the basis of information which may not be disclosed in its entirety to an applicant is truly worrying. An adverse decision may be made upon the basis of information which may well be susceptible to explanation if exposed to scrutiny.'<sup>24</sup>

**Habib v Minister of Foreign Affairs and Trade [2010] FCA 1203**

Mamdouh Habib is an Australian citizen who was picked up after 9/11 by US agents while in Pakistan, flown to Egypt and then held in detention in Guantanamo before being released without charge and returned to Australia. Habib was refused a passport following a s14(1) request made by ASIO. Habib did not seek a review but, instead, challenged the legality of the decision under the *Administrative Decisions (Judicial Review) Act* on the no evidence rule<sup>25</sup> or, alternatively, on grounds of an improper exercise of power because the minister had exercised his discretion at the behest of another. The appeal failed. The court concluded that there was sufficient evidence for the minister to have made the decision even without the evidence that was withheld from Habib on national security grounds, and that the question of the factual basis of the evidence was outside the jurisdictional considerations of the court and a matter for an AAT review. The court also found that the minister, in acting on the request, had made an independent (and therefore legally valid) decision.

**CAN A REFUSAL/CANCELLATION BE SUCCESSFULLY CHALLENGED?**

Neither the minister nor the AAT (the AAT by virtue of s33(1)(c) of the AAT Act) is bound by the formal rules of evidence and may inform themselves as they think fit when determining the reasonableness of a request to cancel a passport. As a consequence, any legal challenge on grounds that there

is insufficient proof of a particular fact upon which a decision was based is going to be difficult. This is especially so for decisions made on s14(1) cancellation requests – requests that are founded on a mere 'suspicion' where the proof required is significantly less than the proof necessary to reasonably ground a 'belief'.<sup>26</sup>

Some hope for achieving a reversal of a passport refusal or cancellation stemming from a s14(1) cancellation request comes from obiter in *Habib v Director-General of Security*. Commenting on the correct interpretation to be given to the word 'likely', the Federal Court noted that it was not necessarily in agreement with the tribunal's interpretation.<sup>27</sup> The Tribunal has consistently interpreted 'likely' in s14 of the Act to mean 'real possibility'. This obiter suggests a preference by the court for the alternative, an interpretation of 'likely' which requires a test of *probability* rather than a test of *possibility*.

This point of law remains to be tested, but should a challenge result in a new interpretation and the AAT and the minister directed to consider the probability of an offence occurring rather than the possibility, obtaining a reversal of a decision to refuse/cancel either by way of a review or legal challenge will have a better chance of success. The most likely circumstances where a refusal might be reversed would be those where the suspicion that an offence will occur if a passport is granted is based entirely on a past conviction and the offender can successfully demonstrate that they have since been rehabilitated and there is no evidence of any offending conduct in their recent past.

**A CALL FOR A RESTORATION OF NATURAL JUSTICE**

The worrying aspects of the legislative regime to which their Honours referred in *Hussain* have come about as a result of anti-terrorism legislation. Where an administrative decision can be made based primarily on evidence that cannot be revealed either to the recipient of that decision or their legal representative, any legal challenge to that decision has almost no hope of success. Furthermore, there is a real risk that biased or

fraudulent behaviour, either on the part of the decision-maker or (in the case of passports administration) the competent authority, will go unchecked. The integrity of government is severely challenged and, perhaps more worrying, the value and trust that the Australia public places in its judicial system may be eroded. Ironically, the very security that the legislation seeks to protect then becomes less attainable. There are many flaws in the current passport legislation, but none requires more urgent attention than that of restoring natural justice to the process of administrative decision-making when it affects an Australian citizen's entitlement to a passport. ■

**Notes:** **1** D Welch, 'Authorities step up pursuit of Assange', *Sydney Morning Herald*, 4 December 2010. **2** *Australian Passports Bill 2004, Explanatory Memorandum*, House of Representatives, Parliament of the Commonwealth of Australian 2004. **3** Schedule 1, *Anti-*

*Terrorism Bill* (No. 2) 2004, passed into law 24 June 2004. The Senate passed the *Anti-Terrorism Bill* (No. 2) 2004 and the *Anti-Terrorism Bill* (No. 3) 2004 on 13 August 2004. **4** *Australian Passports Act* 2005 (Cth) ss12, 13, and 14. **5** Note 2 at cl 57. **6** A Downer, 'Passport Measures Help Secure Australia', Media Release, FA88 - 23 June 2004. **7** Note 2 at cl 56. **8** *Australian Passports Act* 2005 (Cth) s6. **9** Submission to Inquiry into the Provisions of the *Anti-Terrorism Bill* (No. 2) 2004. **10** *Australian Passports Act* 2005 (Cth) Division 2, Subdivision B Law enforcement and security, subs14(3)(a) and (b); subs 13 (3)(a). **11** N Berkovic, '500 Aussies have passports confiscated or denied', *The Australian*, 26 March 2010. **12** Australian Human Rights Commission, '2.2 Legislative Developments, Anti-Terrorism Bill (No. 2) 2004 and Anti-Terrorism Bill (No. 3) 2004, Passports Amendments', *Legal Bulletin*, Vol. 9 May - July 2004. **13** *Passports Act* 1938 (Cth) s8(1B) (repealed). **14** *Habib v Minister of Foreign Affairs and Trade* [2010] FCA 1203 at 80 per Flick J. **15** DFAT, '2.1.2 Passport Services , Overview', *Annual Report* 2005/2006, [http://www.dfat.gov.au/dept/annual\\_reports/05\\_06/performance/2/2.1.2.html](http://www.dfat.gov.au/dept/annual_reports/05_06/performance/2/2.1.2.html). **16** P Maley and M Dodd, 'Spy agency cancels jihadists' passports', *The Australian*, 22 October 2010. **17** 'Australian woman freed from Yemen', *Associated*

*Press*, 11 June 2010. **18** Australian Government Department of Foreign Affairs and Trade, Australian Passport Office, *Lost or Stolen Passports*, July 2010, p2. **19** 'Detained Aussie woman to be sent home from Yemen', *The Australian*, 8 June 2010. **20** *Australian Passports Act* 2005 (Cth) s48(b), (c). **21** *Ibid*, s(50)(1)(a). **22** *Ibid*, s50(2). **23** Under s44 of the *AAT Act* 1975 (Cth). **24** *Hussain v Minister for Foreign Affairs* [2008] FCAFC 128 at [135], 169 FCR 241 at 274 per Weinberg, Bennett and Edmonds JJ. **25** Sections 5(1)(h), 6(1)(h), qualified by ss5(3) and 6(3)(b): 'the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist'. **26** *George v Rockett* (1990) 170 CLR 104 at 112 at 115. **27** [2009] FCAFC 48, Black CJ, Ryan and Lander JJ at 12.

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