HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN:

PHYLLIP JOHN JONES
Plaintiff

and

COMMONWEALTH OF AUSTRALIA
First Defendant

MINISTER FOR HOME AFFAIRS
Second Defendant

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
Third Defendant

PLAINTIFF'S SUBMISSIONS

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: ISSUES

2. The issues for resolution by this Court are the questions of law set out at [28] of the special case in the special case book dated 6 April 2023 (**SCB**) at page 30. The Court should hold that s 34(2)(b)(ii) of the *Australian* ***Citizenship Act*** *2007* (Cth) is invalid because (a) it is not supported by s 51(xix) of the Commonwealth *Constitution* ([10]–[38] below) and (b) it reposes in the Minister the exclusively judicial function of punishing criminal guilt ([39]–[52] below).

PART III: SECTION 78B NOTICE

3. The Plaintiff has issued notices under s 78B of the *Judiciary Act 1903* (Cth).

PART IV: MATERIAL FACTS

4. The material facts are set out in the special case at paragraphs [3]–[27] (**SCB 25–30**). Briefly, the Plaintiff was born in the United Kingdom and acquired the citizenship of the United Kingdom and Colonies by birth (SC [3]). He arrived in Australia on 13 January 1966 aged 15 (SC [4]). He was granted a certificate of Australian citizenship under the *Australian Citizenship Act 1948* (Cth) on 21 December 1988 (**1948 Citizenship Act**) (SC [5]).

5. On 27 May 2003, the Plaintiff was convicted of five offences contrary to Queensland laws, two of which were committed before 21 December 1988 (SC [8]). He was sentenced to a term of imprisonment of two and a half years for each offence (SC [8]). On 9 July 2018, the Minister for Home Affairs purportedly revoked his Australian citizenship relying upon s 34(2)(b)(ii) of the Citizenship Act (SC [9]).

PART V: ARGUMENT

A. Legislative framework

6. Section 34(2) of the Citizenship Act relevantly provides that the Minister may revoke a person's Australian citizenship if: "(a) the person is an Australian citizen under Subdivision B of Division 2"; "(b)(ii) the person has, at any time after making the

application to become an Australian citizen, been convicted of a serious offence within the meaning of section 34(5)"; and "(c) the Minister is satisfied that it would be contrary to the public interest for the person to remain an Australian citizen". A person will be "convicted of a serious offence" if: "(a) the person has been convicted of an offence against an Australian law … for which the person has been sentenced … to a serious prison sentence"; and "(b) the person committed the offence at any time before the person became an Australian citizen".[1] A "serious prison sentence" is "a sentence of imprisonment for a period of at least 12 months".[2]

7. Section 34(2) applies to persons who acquired Australian citizenship under the 1948 Citizenship Act (which the Citizenship Act calls the "old Act").[3] By operation of transitional provisions, s 34(2)(b)(ii):[4]

> applies as if it also referred to the person's conviction, at any time after the person made the application for the certificate of Australian citizenship under the old Act, of an offence referred to in section 21(1)(a)(ii) of the old Act that the person committed at any time before the grant of the certificate.

8. Section 21(1)(a)(ii) of the 1948 Citizenship Act provided that where:

> (a) a person who is an Australian citizen by virtue of a certificate of Australian citizenship:
>
> (ii) has, at any time after furnishing the application for the certificate of Australian citizenship (including a time after the grant of the certificate), been convicted of an offence against a law in force in a foreign country or against a law of the Commonwealth, a State or Territory for which the person has been sentenced to death or to imprisonment for life or for a period of not less than 12 months, being an offence committed at any time before the grant of the certificate (including a time before the furnishing of the application); …

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1 Section 34(5) of the Citizenship Act.
2 Section 3 of the Citizenship Act.
3 See ss 2(1), 3, 4(1)(b) (definition of "Australian citizen") of the Citizenship Act and item 2 in the table in s 2 (definition of "Commencement day"); see also items 1, 2(2) of Sch 3 to the *Australian Citizenship (Transitionals and Consequential) Act 2007* (Cth) (**Transitionals Act**).
4 See items 6(1), 6(3) in Sch 3 to the Transitionals Act.

> the Minister may, in the Minister's discretion, by order, deprive the person of his or her Australian citizenship, and the person shall, upon the making of the order, cease to be an Australian citizen.

9. Section 34(3) of the Citizenship Act provides that the Minister must not revoke a person's Australian citizenship under s 34(2) if the Minister is relying only upon the power in subparagraph (2)(b)(ii) and unless satisfied that the person would, if the Minister were to revoke the person's Australian citizenship, not become stateless.

B. Question 1(a) – s 34(2)(b)(ii) of the Citizenship Act is not supported by s 51(xix)

10. Section 51(xix) of the *Constitution* has two aspects. It is a "status" power, which enables Parliament to make laws with respect to persons having, or able to be attributed, the status of "alien". It is also an "activity" power, which enables Parliament to regulate the process by which an "alien" becomes a member of the Australian political community. The former aspect ("aliens") has received extensive treatment in this Court. The latter aspect ("naturalization") has not.

11. Insofar as s 51(xix) is concerned with "aliens", it is of particular breadth because it is "defined only by reference to a particular class of person for whom laws may be made under it", and therefore is "inherently less precise as to its permitted subject matter".[5] But insofar as it is concerned with "naturalization", it is defined by reference to a "class of activity" such that the "subject-matter of the grant of power is more or less apparent and identifiable on its face".[6]

B1. The essential meaning of "aliens" and "naturalization"

12. This Court has not spoken with one voice about the constitutional meaning of "aliens". The majority view in *Alexander* is that an "alien" is a person who lacks the qualifications prescribed for Australian citizenship.[7] But this is subject to a very significant exception, being Aboriginal Australians,[8] and must also be read subject to the limitation recognised in *Pochi v Macphee*,[9] which all members of the Court in

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5 See ***Koowarta*** *v Bjelke-Peterson* (1982) 153 CLR 168 at 209 (Stephen J).
6 *Koowarta* at 209 (Stephen J).
7 ***Alexander*** *v Minister for Home Affairs* (2022) 96 ALJR 560 at [33], [36]-[38] (Kiefel CJ, Keane and Gleeson JJ), [98] (Gageler J).
8 ***Love*** *v The Commonwealth* (2020) 270 CLR 152.
9 ***Pochi*** *v Macphee* (1982) 151 CLR 101 at 109 (Gibbs CJ).

Alexander repeated and endorsed.[10] Accordingly, it seems to remain true to say, as Gleeson CJ did in *Singh*, that "*[e]veryone agrees* that the term 'aliens' does not mean whatever Parliament wants it to mean".[11]

13. Consistent with *Love* and *Pochi*, "aliens" must be understood as having an essential meaning, or ordinary understanding, which is constitutional rather than statutory. Its essential constitutional meaning 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".[12] "Aliens" "conveys otherness, being an 'outsider', foreignness",[13] its essential meaning being "a foreigner to the Australian political community, and its antonym [being] a person who is a 'belonger' to that political community".[14]

14. The meaning of "naturalization" is informed by the meaning of "aliens", because "naturalization" is the process or activity by which a person loses the status of alienage. The essential meaning of "naturalization" is that it describes a process or activity by which a person is admitted to membership of the political community.[15]

15. "Naturalization" received cursory attention at the conventions.[16] Indeed, s 51(xix) seems to have been understood by prominent delegates as a power for the "naturalization ***of*** aliens".[17] At the time of Federation, according to Salmond, naturalization was "an agreement by which an alien is received into the permanent allegiance of the Crown".[18] At that time, the only legal category of membership

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10 *Alexander* at [35], [46] (Kiefel CJ, Keane and Gleeson JJ), [98] (Gageler J), [133] (Gordon J), [201], [215]-[216] (Edelman J), [291] (Steward J).

11 ***Singh*** *v Commonwealth* (2004) 222 CLR 322 at [5] (Gleeson CJ) (emphasis added).

12 ***Nolan*** *v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 189 (Gaudron J); *Love* at [18] (Kiefel CJ), [93] (Gageler J), [302] (Gordon J).

13 *Love* at [296] (Gordon J).

14 *Love* at [395] (Edelman J). See also *Alexander* at [184], [199] (and the authorities cited at footnote 279) (Edelman J).

15 *Alexander* at [138] (Gordon J), [209], [228] (Edelman J), [291] (Steward J).

16 Quick and Garran noted that s 51(xix) "was introduced in its present form in 1891, and was adopted in 1897-8 without debate": *The Annotated Constitution of the Australian Commonwealth* (Legal Books, 1995 ed) at 599.

17 As Dr Prince explains, s 51(xix) was understood by prominent delegates as a power with respect to the naturalization *of* aliens, not as a power to make any conceivable law about natural persons who happened to be 'aliens': 'Aliens in their own land' (2015, Thesis (PhD), ANU) available at <https://doi.org/10.25911/5d78d624005bb> at 141-145.

18 JW Salmond, 'Citizenship and Allegiance' (1902) 18 *LQR* 49 at 56.

under Imperial law was "British subject".[19] Whereas "naturalization" now occurs by the grant of Australian citizenship, that does not traverse the full constitutional meaning of the term because Australian citizenship did not exist at Federation.

B2. Section 51(xxvii)

16. At this point, it will be instructive to consider this Court's approach to the immigration power in s 51(xxvii) of the *Constitution*. It has been held that, because there is a logical end-point to the activity of "immigration", there is a limit on the kinds of conditions which a law supported by s 51(xxvii) may impose on a person.[20] This is instructive for understanding the scope of the naturalization aspect in s 51(xix) because, like "immigration", "naturalization" is a process or activity that is "transitory and prospective" and which "looks forward" to membership of the Australian community.[21]

17. In *O'Keefe v Calwell*, Williams J explained that s 51(xxvii) permits the Parliament "to fix a *reasonable period of probation* during which immigrants … should not be allowed to acquire the rights and privileges and immunity from deportation of members of the Australian community".[22] His Honour repeated this statement in *Koon Wing Lau v Calwell*, explaining that the reason a condition may "only fix a reasonable period of probation", and cannot prevent a person admitted otherwise than on a temporary basis "from ever becoming a member of the Australian community", is because an indefinite condition would "not [be] with respect to immigration, because the essence of immigration is the entry by a person into a country in order to make that country his permanent home".[23] In the same case, Dixon J stated that a law that allowed a person who had entered Australia as an immigrant to remain "liable for the rest of his life to expulsion … might perhaps conflict with the principle ... that the immigration power will not support a law for the deportation of persons

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19 See generally P Brazil, "Australian Nationality and Immigration", in KW Ryan (ed), *International Law in Australia* (2nd ed, 1984), 210 at 211-212.

20 See ***Ex parte Walsh and Johnson***; *In re Yates* (1925) 37 CLR 36 at 137 (Starke J).

21 PH Lane, 'Immigration Power' (1966) 39 *ALJ* 302 at 306.

22 (1949) 77 CLR 261 at 294 referring to *R v Macfarlane; ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518 at 533 (Knox CJ).

23 (1949) 80 CLR 533 at 589-590 (Rich J agreeing at 569-570); see also *R v Director-General of Social Welfare (Vic);* ***Ex parte Henry*** (1975) 133 CLR 369 at 373-374 (Gibbs J), 379-381 (Mason J), 385 (Jacobs J), 388 (Murphy J); see further ***Kuswardana*** *v Minister for Immigration and Ethnic Affairs* (1981) 35 FLR 186 at 341 (Bowen CJ), 345-347 (Fox J), 351-354 (Deane J).

who have settled in Australia so as to become members of the Australian community".[24]

18. In subsequent cases, there has been support for the proposition that s 51(xxvii) empowers Parliament to make a law permitting a Minister to deport an immigrant for any *reasonable* conditions within a *reasonable* period following entry. After the expiry of the reasonable period and integration of an immigrant into the Australian community, s 51(xxvii) will no longer support a law for the deportation of that person from Australia.[25]

19. This limit on s 51(xxvii) has been applied by lower courts. In *Ex parte Molinari*, for example, a condition imposing a five-year period of probation on an immigrant (such that they could be deported during that time) was held not to exceed the "qualification with regard to reasonableness" identified by members of this Court in the cases summarised at paragraph [17] above.[26] Similarly, in *Kuswardana*, Deane J queried whether an open-ended preservation of a person's immigrant status was within the legislative power conferred by s 51(xxvii).[27]

20. With reference to many of these authorities, and with the agreement of Steward J, Edelman J explained in *Alexander* that:[28]

> [t]here is much to commend about the approach, prior to 1982, which assumed that a like application, and like limits, would apply to the power to deport permanent residents of Australia whether they were aliens or immigrants. That application, which involved an approach that had been used consistently for decades, asked whether a person had been unconditionally absorbed into the Australian community.

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24 (1949) 80 CLR 533 at 577.

25 See *Salemi v MacKellar (No 2)* (1977) 137 CLR 396 at 430 (Stephen J); *Pochi* at 110-111 (Gibbs CJ). See also *Ex parte Walsh and Johnson* at 62 (Knox CJ), 137 (Starke J) and *Alexander* at [205] (Edelman J, with whom Steward J agreed on this point at [291]).

26 *R v the Governor of the Metropolitan Gaol;* ***Ex parte Molinari*** (1961) 2 FLR 477 at 496-497, 498, 501 (Sholl J).

27 *Kuswardana* at 354 (Deane J). See also ***Ex parte Black****; Re Marony (No 3)* [1965] NSWR 753 at 760 (Maguire J), where a condition was construed as subsisting only for "a reasonable time", so as not to "forever [prevent a person] from becoming absorbed into the Australian community" and passing beyond the scope of s 51(xxvii) (citing *Koon Wing Lau* at 576-577 (Dixon J)).

28 *Alexander* at [205] (Edelman J, with whom Steward J agreed on this point at [291]).

21. His Honour then set out three reasons in support of such an application[29] which, it is respectfully submitted, are consistent with the essential meanings of "aliens" and "naturalization" summarised above at paragraphs [12]–[13] and ought to be adopted.

B3. Section 51(xix) and denationalisation

22. Section 51(xix) permits Parliament "to create and define the concept of Australian citizenship"[30] and "to prescribe the conditions on which such citizenship may be acquired *and lost"*.[31] However, Parliament's power to deprive a person of citizenship is "not at large".[32] The subject matter of s 51(xix) limits the conditions upon which citizenship may be lost.[33] The aliens aspect of s 51(xix) does not permit Parliament to denationalise a person who "could not possibly answer the description of 'alien[]' in the ordinary understanding of the word".[34] Similarly, the naturalization aspect of s 51(xix) does not permit Parliament to denationalise a person where that is done pursuant to an unreasonable condition having insufficient connection with "naturalization".[35]

23. Consistent with its subject matter, s 51(xix) permits Parliament to enact a law depriving a person of Australian citizenship only in the following circumstances.

24. The ***first*** circumstance is if the person acts "so inimically to Australia's interests as to repudiate the obligations of citizenship on which membership of the people of the Commonwealth depends"[36] or acts in a manner that is, or takes steps that are, "indelibly inconsistent with allegiance and with membership of the Australian

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29 *Alexander* at [207]-[209] (Edelman J, with whom Steward J agreed on this point at [291]).

30 See *Alexander* at [36] (Kiefel CJ, Keane and Gleeson JJ, with whom Gageler J agreed at [98]) and the cases cited at footnote 40.

31 See *Alexander* at [36] and [38] (Kiefel CJ, Keane and Gleeson JJ with whom Gageler J agreed at [98]); see also [138]-[139] (Gordon J), [229] (Edelman J), [286] (Steward J).

32 See, for example, ***Re Patterson****; ex parte Taylor* (2001) 207 CLR at [47] (Gaudron J); *Re Minister for Immigration and Multicultural Affairs;* ***Ex parte Te*** (2002) 212 CLR 162 at [39] (Gleeson CJ), [54] (Gaudron J).

33 See, for example, ***Chu Kheng Lim*** *v Minister for Immigration* (1992) 176 CLR 1 at 54 (Gaudron J), 64 (McHugh J); *Ex parte Te* at [81] (McHugh J).

34 (1982) 151 CLR 101 at 109; see also *Singh* at [4]-[5] (Gleeson CJ), [36] (McHugh J), [153] (Gummow, Hayne and Heydon JJ); *Love* at [7] (Kiefel CJ), [83]-[87] (Gageler J), [305], [325]-[329] (Gordon J), [401] (Edelman J); ***Chetcuti*** *v The Commonwealth* (2021) 272 CLR 609 at [37] (Gordon J); *Alexander* at [151] (particularly footnote 184) (Gordon J), [189], [202], (Edelman J), [277]-[279], [286], [291] (Steward J).

35 *Alexander* at [138] (Gordon J); *Ex parte Henry* at 373 (Gibbs J).

36 *Alexander* at [46], [63] (Kiefel CJ, Keane and Gleeson JJ) (Gageler J agreeing at [98]).

community".[37] The ***second*** circumstance is where there are changes in sovereign identity or territory.[38] The ***third*** circumstance is where the person expressly renounces their allegiance to Australia.[39]

25. The ***fourth*** circumstance, relevantly for this case, is where a condition that was validly imposed on a person's naturalization is breached.[40] The Plaintiff submits that, by analogy with s 51(xxvii), such a condition will only be valid if it is reasonable. It must also be clearly expressed.[41] The requirement of reasonableness speaks to the sufficiency of the connection between the condition and the subject matter of s 51(xix), being admission to membership of the Australian political community.[42]

26. An example of a law imposing a reasonable condition in this sense would be a law that requires (either expressly or by necessary intendment) that a person not engage in fraud or similar criminal conduct in relation to their application to become an Australian citizen. A law that revokes a person's citizenship if that condition is breached would be supported by s 51(xix).[43] Having never been truthfully naturalized or admitted into the Australian community, the person legally remains outside the Australian community.[44]

27. It is neither possible nor necessary to define exhaustively when a condition is unreasonable. For present purposes, there are at least two circumstances that may render a condition unreasonable. The ***first*** is where the condition "permits a person *once naturalised* to be treated any differently from a person who was never an

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37 See *Alexander* at [233] (Edelman J) and [285], [290] (Steward J), [185] (Edelman J); see further at [142], [144] (Gordon J).

38 See *Re Patterson* at [225], [235]-[237] (Gummow and Hayne JJ); *Re Minister for Immigration and Multicultural and Indigenous Affairs;* ***Ex parte Ame*** (2005) 222 CLR 439 at [35], [37]-[38], [117] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ); *Alexander* at [137] (Gordon J).

39 See *Nolan* at 192 (Gaudron J); *Singh* at [197] (Gummow, Hayne and Heydon JJ); *Chetcuti* at [90] (Edelman J); *Alexander* at [139] (Gordon J).

40 See *Nolan* at 192 (Gaudron J); *Chu Kheng Lim* at 54 (Gaudron J); *Re Patterson* at [47] (Gaudron J); *Ex parte Te* at [54] (Gaudron J); *Alexander* at [141] (Gordon J).

41 *Alexander* at [229] (Edelman J).

42 *Re Patterson* at [47] (Gaudron J) cited in *Alexander* at [143] (Gordon J). See also *Ex parte Te* at [113] (Gummow J) referring to *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at [16] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

43 See, for example, s 34(1) of the Citizenship Act.

44 It could be said that the decision to grant them citizenship was no decision at all owing to the fraud: see by analogy *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at [53] (Gaudron and Gummow JJ), [63] (McHugh J).

alien",[45] or otherwise "places naturalised Australian citizens in a position of disadvantage relate to natural born Australian citizens".[46] The ***second*** is where the condition is unlimited as to time, such that a person is *forever* vulnerable to denationalisation and deportation regardless of the extent to which they have been integrated and absorbed into the political community. A law creating two distinct classes of Australian citizen, one of which is indefinitely denied unconditional membership of the Australian political community, prevents the person from becoming a *belonger*, and prevents the person from shedding the legal attributes of *otherness*. This is inconsistent with the inherent nature of "naturalization", which looks forward to full and unconditional membership of the community. Such conditions derogate to such an extent from membership of the community that they may lack a sufficient connection with "naturalization".

B4. *Meyer v Poynton* is not binding or should be overruled

28. In *Meyer v Poynton*, Starke J dismissed a motion for an interim injunction to restrain the defendants from proceeding in respect of the revocation of a certificate of naturalization that had been granted to the plaintiff.[47] His Honour observed that it was within the naturalization power for the Parliament to make laws withdrawing citizenship on "specified conditions".[48] It is arguable that the case supports the conditions upon which citizenship can be cancelled being "at large" because the law in that case permitted the Governor-General to revoke a certificate of naturalization "for any reason".[49] The absence of any discussion of the reasons for which the plaintiff's citizenship was revoked in that case means that *Meyer v Poynton* will not assist this Court in resolving the questions in this Special Case.

29. Alternatively, *Meyer v Poynton* should be re-opened and overturned.[50] It is a decision of a single judge, sitting alone, and the principle that naturalization may be revoked for *any* reason was not worked out in a significant series of cases and has

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45 *Alexander* at [211] (Edelman J) (emphasis original).
46 *Alexander* at [211] (Edelman J), [285] (Steward J) citing *Re Canavan* (2017) 263 CLR 284 at [53] (the Court).
47 (1920) 27 CLR 436 at 437.
48 (1920) 27 CLR 436 at 440.
49 (1920) 27 CLR 436 at 440.
50 See, e.g., *Johns v Federal Commissioner of Taxation* (1989) 166 CLR 416 at 438-439 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

not been applied since.[51] That broad principle is also at odds with observations of members of this Court which have recognised limits to the Parliament's power under the naturalization aspect of s 51(xix) to revoke a person's citizenship.[52]

B5. Section 34(2)(b)(ii) is invalid

30. Section 34(2)(b)(ii) of the Citizenship Act is not supported by s 51(xix) for the following reasons.

31. ***First***, s 34(2)(b)(ii) permits the Minister to revoke a person's citizenship if, at any time after making the application to become an Australian citizen, the person has been sentenced to a period of imprisonment of at least 12 months for an offence committed before they became a citizen. There is nothing in the section to limit the offence to one which involved fraud in the naturalization process, or acting inimically to Australia's interests or in a manner that is indelibly inconsistent with allegiance and with membership of the Australian community. The length of a person's sentence says nothing about the nature of the conduct for which they have been convicted, nor about its incompatibility with membership. To the extent that s 34(2)(b)(ii) captures conduct that does not meet that description, it exceeds the scope of s 51(xix).[53] The Plaintiff's offences were undoubtedly very serious but they were not inimical to Australia's interests or fundamentally repugnant to or inconsistent with membership of the Australian community.

32. ***Second***, s 34(2)(b)(ii) is unrelated to any changes in territory or sovereign identity.

33. ***Third***, s 34(2)(b)(ii) does not reflect any condition that was imposed upon the grant of the Plaintiff's citizenship. There was no requirement in the 1948 Citizenship Act when the Plaintiff applied for Australian citizenship that an applicant could not apply for a certificate of Australian citizenship if they had engaged in conduct that was not yet the subject of any criminal charge.

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51 Cf *Ex parte Walsh and Johnson* at 87-88 (Issacs J).

52 See, e.g., *Chu Kheng Lim* at 54 (Gaudron J); see also *Nolan* at 192 (Gaudron J); *Re Patterson* at [47] (Gaudron J); *Ex parte Te* at [54] (Gaudron J); *Alexander* at [138], [142] (Gordon J); [211], [228] (Edelman J), [291] (Steward J).

53 See *Alexander* at [155] (Gordon J).

34. ***Fourth***, s 34(2)(b)(ii) is, in two respects, not reasonable. *First,* it is not time-bound. This is shown by the fact that, here, it was purportedly exercised *17 years* after the Plaintiff's sentencing, and some 15 years after his re-entry to the community. The provision is insufficiently connected with naturalization insofar as it empowers a Minister to revoke a person's Australian citizenship notwithstanding the amount of time that has elapsed since the power was enlivened, during which the person will likely have deepened their ties to the Australian political community.

35. Moreover, s 34(2)(b)(ii) is not reasonable because it only applies to a person who is an Australian citizen under Subdiv B of Div 2 of Pt 2 of the Citizenship Act, being a person who is a naturalized citizen. It distinguishes between a naturalized citizen, who may have their Australian citizenship revoked in the circumstances that include being sentenced to a period of imprisonment for more than 12 months, and a natural-born citizen sentenced to the same period whose citizenship is not at risk of revocation.

B6. Alternatively, s 34(2)(b)(ii) is invalid in its application to the Plaintiff

36. Even if s 34(2)(b)(ii) is otherwise supported by s 51(xix), that power does not support its application to a person who is so deeply connected with the Australian body politic that they have passed beyond the boundary of the power. In *Alexander,* Gordon J observed that "a point [may be] reached, *regardless of the conditions imposed on entry into the Australian community [including by way of citizenship]*, where a person has become so connected to the Australian body politic that the connection cannot unilaterally be taken away by Parliament by converting the person into an alien".[54]

37. A person who is an Australian citizen and who has developed bonds of deep connection or attachment to the Australian political community is not an "alien". A person's connection or attachment with the Australian community is a question of fact to be determined in light of all the person's relevant circumstances.[55] Those include the time since citizenship was granted, together with the existence, exercise

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54 *Alexander* at [142], [144] (Gordon J); see also [205]-[206] (Edelman J) and [227]-[279] (Steward J).
55 See, for example, *Kuswardana* at 341 (Bowen CJ), 354 (Deane J).

and performance of the rights and duties of citizenship since that time.[56] Other circumstances include those that inform an immigrant's "absorption" for the purposes of s 51(xxvii),[57] like the length of residency in Australia, familial ties in the Australian community, participation in Australian civic life, the number and duration of absences from Australia, employment or the carrying on of business, the ownership of real property and other economic ties.[58]

38. As at 9 July 2018, being the time when the Minister purportedly revoked the Plaintiff's citizenship, every available factual indication is that the Plaintiff was so deeply connected with the Australian political community that s 34(2)(b)(ii), and other laws supported by s 51(xix), did not apply him. The Plaintiff had lived in Australia continuously for 52 years, had *never* returned to his country of birth (to which, subject to this proceeding, he will be deported), and had been an Australian citizen for 29 years (SC [4], [12]). He had voted in Australian elections, held an Australian passport, been in paid employment, run his own small businesses and paid Australian taxes (SC [19], [16]–[18]). He had been married to an Australian citizen, with whom he owned two homes (SC [15]). His parents had become Australian citizens (SC [14]), his eight siblings likewise became Australian citizens or permanent residents and he had contributed to civic life, including through clubs and charities (SC [20]–[23]). He offended against Australian laws, in a grave way. He was sentenced by an Australian court and served out his sentence in an Australian prison, before being rehabilitated and re-integrated into the Australian community. The Plaintiff is a *belonger*.

C. Question 1(b) – s 34(2)(b)(ii) of the Citizenship Act is contrary to Ch III

39. Even if s 34(2)(b)(ii) is supported by s 51(xix), it is invalid because it reposes in the Minister the exclusively judicial function of punishing criminal guilt. There are four propositions to be developed:

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56 Cf *Ex parte Ame* at [12], [22], [34] (Gleeson CJ, McHugh, Hayne, Callinan and Heydon JJ), [73], [75]-[76], [110]-[111] (Kirby J).

57 See *Kuswardana* at 351-352 (Deane J); *Nolan* at 196 (Gaudron J).

58 *Ex parte Black* at 758 (Maguire J); *Kuswardana* at 341 (Bowen CJ), 347 (Fox J), 349-350 (Deane J); *Johnson v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 136 FCR 494 at [44]-[46], [59]-[61] (French J); *Moore v Minister for Immigration and Citizenship* (2007) 161 FCR 236 at [49]-[54] (Gyles, Graham and Tracey JJ); *Toia v Minister for Immigration and Citizenship* (2009) 177 FCR 125 at [9], [13], [14], [29], [37] [68] (Stone and Jacobson JJ, Moore J agreeing).

a. ***first***, *Chu Kheng Lim* entrusts the adjudgment and punishment of criminal guilt exclusively to the courts, except in established exceptional cases;

b. ***secondly***, involuntary denationalisation is a form of punishment;

c. ***thirdly***, as such, when imposed as a response to criminal guilt, it may be imposed only by a court;

d. ***fourthly***, s 34(2)(b)(ii), however, invalidly purports to confer that function on a Minister.

40. These four propositions are now developed in turn. They are developed on the assumed basis that, contrary to ground 1(a) above, the Court holds that s 34(2)(b)(ii) is supported by s 51(xix). Ground 1(b) is thus a true alternative to ground 1(a).

41. ***First***, "adjudging and punishing criminal guilt is an exclusively judicial function".[59] *Each* of those functions – adjudgment and punishment – is itself exclusively judicial. Thus, in *Falzon*,[60] Kiefel CJ, Bell, Keane and Edelman JJ proceeded on the undisputed basis that the *Constitution* recognised an "exclusively judicial function of adjudging ***or*** punishing criminal guilt", consistently with the reasoning of Deane J to that effect in *Re Tracey; Ex parte Ryan*.[61] Likewise, Gageler and Gordon JJ referred in *Falzon* to "the exclusively judicial function of determining ***or*** punishing criminal guilt".[62] In *Alexander*, Edelman J pointed out that the Court had proceeded in *Falzon* on the basis that "the reference to adjudging and punishing criminal guilt was to two alternative functions, both of which are exclusively judicial", and said that that proposition "has much to commend it".[63] This should be accepted.

42. As McHugh J said in *Re Woolley*,[64] "a law may infringe [Ch III] even if the punitive or penal sanction is not imposed for breach of the law or the existence of the fact or reason for the punishment is not transparent. If the purpose of the law is to *punish* or *penalise* the detainee without identifying the fact, reason or thing which gives rise

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59 *Magaming v The Queen* (2013) 252 CLR 381 at [42] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
60 ***Falzon*** *v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at [16] (emphasis added).
61 (1989) 166 CLR 518 at 580, referred to in *Falzon* at [15].
62 (2018) 262 CLR 333 at [88] (emphasis added).
63 *Alexander* at [235].
64 ***Re Woolley****; Ex Parte Applicants M276/2003* (2004) 225 CLR 1 at [82].

to the punishment or penalty, then, as a matter of substance it gives rise to the strong inference that it is a disguised exercise of judicial power. Chapter III looks to the substance of the matter and cannot be evaded by formal cloaks". Put another way, a law which confers power on the executive to punish for breach of the law is invalid for that reason alone, irrespective of whether it also confers power to adjudge guilt.

43. Were it otherwise, the constitutional prohibition could be avoided by the device of conferring power to adjudge and power to punish on different organs. That would make a nonsense of the reasoning in *Chu Kheng Lim* itself, where the plurality held that "[i]t would, for example, be beyond the legislative power of the Parliament to invest the Executive with an arbitrary power to detain citizens in custody notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt".[65] That is, a law of that kind is invalid even though only conferring the function of *punishment* on the executive, divorced from the function of *adjudgment* of guilt. It follows that, subject to a short list of established exceptions falling within the acknowledged remit of the executive,[66] none of which apply here, the *Constitution* proscribes the legislative conferral of the functions of adjudging *or* punishing criminal guilt on the executive.

44. ***Secondly***, involuntary denationalisation is a form of punishment. Any doubt about that was conclusively resolved in *Alexander*.[67] It involves the "total destruction of the individual's status in organised society".[68] It has been described a "fate universally decried by civilized people" and as a form of civil death.[69] Judge Augustus Hand thought it to be "a dreadful punishment, abandoned by the common consent of all civilized peoples".[70] It cannot be seen as "anything other than forcing retribution from the offender – naked vengeance".[71]

45. The measure is inescapably punitive. As Kiefel CJ, Keane and Gleeson JJ held in *Alexander*, "the sanction of 'expatriation' is 'available for no higher purpose than to

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65 *Chu Kheng Lim* at 27 (Brennan, Deane and Dawson JJ).
66 *Chu Kheng Lim* at 28 (Brennan, Deane and Dawson JJ).
67 *Alexander* at [72]–[79] (Kiefel CJ, Keane and Gleeson JJ); [98], [113] (Gageler J), [167]–[172] (Gordon J), [247]–[250] (Edelman J).
68 *Alexander* at [248] (Edelman J), citing ***Trop v Dulles*** (1958) 356 US 86 at 101 (Warren CJ).
69 *Alexander* at [248] (Edelman J), citing *Trop v Dulles* at 102 (Warren CJ); *Newsome v Bower* (1729) 3 P Wms 37 at 38; *Elizabeth Farquhar v His Majesty's Advocate* (1753) Mor 4669 at 4670, 4671.
70 *Alexander* at [248] (Edelman J), citing *United States ex rel Klonis v Davis* (1926) 13 F 2d 630 at 630.
71 *Alexander* at [172] (Gordon J), citing *Trop v Dulles* at 112 (Brennan J); also 101 (Warren CJ).

curb undesirable conduct, to exact retribution for it, and to stigmatize it'".[72] For any organ other than a court to inflict this form of punishment on an Australian citizen is to controvert the citizen's "assurance that, *subject only to the operation of the criminal law administered by the courts*, he or she is entitled to be at liberty in this country and to return to it as a safe haven in need.[73]

46. ***Thirdly***, because involuntary denationalisation is a measure which is "penal or punitive in character", the constitutional consequence is that "under our system of government, [it] exists only as an incident of the *exclusively judicial* function of adjudging and punishing criminal guilt".[74] That is, it may be imposed by courts only.

47. That is the solution to the competing public interests raised by this case: by which is meant the preservation of the exclusivity of the judicial function of adjudgment and punishment of criminal guilt on one hand, and the legislatively perceived need on the other hand for a mechanism for revocation where an applicant for citizenship engages in criminal conduct before, but is convicted after, the grant. Subject to the law conferring it being supported by a head of power, it is not the Plaintiff's case that *no* branch of government can ever wield a power of the kind created by s 34(2)(b)(ii).[75] On the contrary, the Plaintiff wholly accepts that if supported by a head of power, such a power *could* be, and would indeed very appropriately be, conferred on a court.

48. There are a number of ways that that could be achieved. One way would be to legislate for involuntary denationalisation to be an additional sentencing option available to judges where the circumstances set out in s 34(2)(b)(ii) are satisfied. That would then expand the range of sentencing options available to the court at the time of sentencing, authorising the judge to impose this most severe of punishments in those cases where such a punishment was warranted by the nature of criminal offending found to have occurred. This could be supplemented by a statutory right of intervention on the part of the Minister to argue in favour of such a sentence, in cases where the Minister thought that to be appropriate.

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72 *Alexander* at [78] (Kiefel CJ, Keane and Gleeson JJ).

73 *Alexander* at [74] (Kiefel CJ, Keane and Gleeson JJ) (emphasis added), citing *Potter v Minahan* (1908) 7 CLR 277 at 305 (O'Connor J); *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462 at 469 (the Court).

74 *Chu Kheng Lim* at 27 (Brennan, Deane and Dawson JJ) (emphasis added).

75 Cf *Minister for Home Affairs v* ***Benbrika*** (2021) 272 CLR 68 (Kiefel CJ, Bell, Keane and Steward JJ).

49. Another solution would be an adaption of the scheme considered in *Emmerson*,[76] in which the Director of Public Prosecutions was empowered to apply to the Supreme Court of the Northern Territory for a declaration that a person was a drug trafficker, which, if made, would lead to the court making an order for the forfeiture of that person's property to the Territory. That legislation was held not to compromise the institutional integrity of the Supreme Court, precisely because the Court would not give automatic effect to a decision made by the executive, but instead, "the power will be exercised in accordance with standards characterising ordinary judicial processes".[77] Those processes include the adducing and "receipt of evidence sufficient to satisfy the civil standard of proof in respect of a person's requisite number of past convictions", the conducting of a hearing "in open court, in circumstances where an affected party has a right to be heard, may have legal representation, and may make submissions and receive reasons", and the availability of "[t]he usual rights of appeal".[78] Such a scheme affords all the protections of the judicial process. A similar scheme could be enacted here, replacing "forfeiture" with "denationalisation", and "drug trafficker" with a person who satisfies s 34(2)(b)(ii). That would then comply with *Chu Kheng Lim*.

50. The conferral of this power on the courts would be consonant with the repeated statements of members of this Court explaining the comparative institutional strengths and weaknesses of the judiciary and of the executive.[79] As Gleeson CJ observed in *Thomas v Mowbray*,[80] "the exercise of powers, independently, impartially and judicially, especially when such powers affect the liberty of the individual, would ordinarily be regarded as a good thing, not something to be avoided". Likewise in that case, Callinan J listed nine beneficial aspects of the way that courts operate, and then noted, by way of contrast, that "[t]his is not the way that any arm of the Executive conventionally operates".[81] These differences in the "skills

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76 *Attorney-General for the Northern Territory v* ***Emmerson*** (2014) 253 CLR 393.
77 *Emmerson* at [56]-[58] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).
78 *Emmerson* at[65]-[66] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).
79 See, e.g., ***Garlett*** *v Western Australia* (2022) 96 ALJR 888 at [172]–[173] (Gordon J).
80 (2007) 233 CLR 307 at [17] (Gleeson CJ), endorsed in *Palmer v Ayres* (2017) 259 CLR 478 at [92] (Gageler J). See, likewise *Benbrika* at [20] (Kiefel CJ, Bell, Keane and Steward JJ) ("Chapter III courts serve as the bulwark of liberty by virtue of the qualities of independence and impartiality that are secured by the separation of the judicial function from the other functions of government"). See also *Palmer v Ayres* (2017) 259 CLR 478 at [92] (Gageler J), endorsing Gleeson CJ's statement.
81 *Thomas v Mowbray* at [599] (Callinan J).

and professional habits"[82] of the executive and of the judiciary reinforce the proposition that power to order involuntary denationalisation is one of those powers which, "if they are to exist, should be exercised by the judiciary".[83] It is not a power to be given to a politician (still less an indefinite series of politicians).

51. ***Fourthly***, in breach of these principles, s 34(2)(b)(ii) invalidly purports to confer the power to impose involuntary denationalisation on a Minister, for these reasons:

a. As with s 36B of the Citizenship Act, declared invalid in *Alexander*, it is a purely discretionary power ("may") given to a Minister, requiring no more formality than that the Minister's decision is recorded in "writing" (s 36B(1); s 34(2)). The broad and open-textured nature of the discretion increases its risk of misuse when placed in the hands of a political actor; a risk lacking if the discretion is conferred on a court, with the extensive system of checks and balances that that the criminal justice system guarantees.

b. As with s 36B, the power hinges upon the Minister's satisfaction that the person has engaged in conduct capable of attracting criminal sanction (s 36B(1)(a); s 34(2)(b)(ii)). It matters not that that the executive may, in other contexts, visit consequences on people – e.g., the holders of a statutory privilege or licence – as a result of the executive's satisfaction that such conduct has occurred, for "the deprivation of citizenship by reason of [a] person's misconduct is punishment of a different order".[84]

c. As with s 36B, the kind of criminal conduct with which the power is concerned is that which is "serious" enough to warrant the denunciation and retribution of the Australian polity (ss 36A and 36B(1)(b); s 34(5)). Just as s 36B identified conduct "so reprehensible that it is radically incompatible with the values of the community",[85] to which it responded by deploying

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82 *Garlett* at [172] (Gordon J).

83 *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at [90] (Gageler J); see also [158] (Gordon J). While both judges were in dissent, the principles in these paragraphs cannot be doubted.

84 *Alexander* at [77] (Kiefel CJ, Keane and Gleeson JJ).

85 *Alexander* at [82] (Kiefel CJ, Keane and Gleeson JJ).

"notions of denunciation and deterrence",[86] so too does the selection of only "serious" offending in s 34(2)(b)(ii) achieve that same end.

d. *Worse* than s 36B, which used "conduct" as a proxy to get at criminal offending, s 34(2)(b)(ii) directly fastens upon the existence of a criminal ***conviction***, and then seeks to attach further consequences to that conviction beyond those which the sentencing court saw fit to impose as punishment.

e. *Worse* than s 36B, the power in s 34(2)(b)(ii) is available only where the offender has not only been convicted but has already been "sentenced" as well (s 34(5)(a)). That is, it operates only where the offender has already received the exact sentence that the court considered proportionate to the offending. That sentence is then in effect increased by the Minister. This occurs through a procedure that makes no provision for any further input from the sentencing judge, notwithstanding that the judge is the sole decision-maker with first-hand knowledge of the particulars of the criminal offending. This exposes the offender to double punishment, a prospect fundamentally antithetical to the administration of criminal justice by Australian courts: as Gibbs CJ, Mason, Aickin and Brennan JJ put it in *R v Hoar*, "a person should not be twice punished for what is substantially the same act".[87] Once a court has identified the punishment appropriate to the severity of the criminal conduct, and has sentenced the offender accordingly, that is the end of the matter. It cannot then be open to a Minister unilaterally to decree that the offender shall be subject to some additional punishment; much less one that is the most extreme and permanent punishment that our legal system may inflict.

52. The above matters combine to show s 34(2)(b)(ii) to be no less punitive than s 36B. Indeed, the punitive purpose is *more* apparent here, since the power is enlivened by nothing less than a criminal conviction, to which it purports to add further harsh consequences. In this respect, all five of the elements of punishment[88] are present in s 34(2)(b)(ii): (i) the imposition of harsh consequences; (ii) for an offence against legal rules or, put more generally, for a purpose of sanctioning proscribed conduct;

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86 *Alexander* at [82] (Kiefel CJ, Keane and Gleeson JJ).
87 (1981) 148 CLR 32 at 38.
88 See *Alexander* at [228] (Edelman J) and the references cited at footnote 339.

(iii) to an actual or supposed offender for that offence; (iv) intentionally administered by other human beings on the offender; and (v) imposed and administered by an authority constituted by a legal system against which the offence is committed.

53. The provision is fundamentally punitive in its nature, irrespective of whatever other purposes the Defendants will seek to assign to it. It follows that s 34(2)(b)(ii) is contrary to Ch III of the *Constitution* and invalid.

PART VI: ORDERS SOUGHT

54. The questions of law stated for the opinion of the Full Court be answered as follows:

(1) The questions should be answered:

10 (a) Yes

(b) Yes

(2) The following declarations should be made:

(a) Section 34(2)(b)(ii) of the Citizenship Act is invalid in whole, or alternatively in its application to the Plaintiff.

(b) The Plaintiff is an Australian citizen or, alternatively, is not an alien.

(3) The Defendants.

PART VII: ESTIMATE FOR HEARING

55. The Plaintiff estimates that he will need 2 hours for the presentation of his argument.

Date: 12 April 2023

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN:

PHYLLIP JOHN JONES
Plaintiff

and

COMMONWEALTH OF AUSTRALIA
First Defendant

MINISTER FOR HOME AFFAIRS
Second Defendant

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
Third Defendant

ANNEXURE TO THE SUBMISSIONS OF THE PLAINTIFF

Pursuant to paragraph 3 of *Practice Direction No.1 of 2019*, the Plaintiff sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No.	Description	Version	Provisions
Constitutional provisions			
1.	*Constitution*	Current	ss 44, 51(xix), 51 (xxvii), Ch III

No.	Description	Version	Provisions
Statutory provisions			
2.	*Australian Citizenship Act 1948* (Cth)	Compilation prepared on 1 July 2006	s 21
3.	*Australian Citizenship Act 2007* (Cth)	Compilation prepared on 9 July 2018	ss 2, 3, 4, 34
4.	*Australian Citizenship Act 2007* (Cth)	Current	s 36B
5.	*Australian Citizenship (Transitionals and Consequentials) Act 2007* (Cth)	As made	Items 1, 2 and 6 of Sch 3
6.	*Judiciary Act 1903* (Cth)	Compilation No 47	s 78B