HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **DELIL ALEXANDER**
(BY HIS LITIGATION GUARDIAN BERIVAN ALEXANDER)
Plaintiff

and

MINISTER FOR HOME AFFAIRS
First Defendant

COMMONWEALTH OF AUSTRALIA
Second Defendant

SUBMISSIONS OF THE FIRST AND SECOND DEFENDANTS

PART I PUBLICATION

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 in the amended special case filed 22 October 2021 (**SC**) at [108] (**SCB 79-80**). Question (1)(d) reflected ground 4 of the plaintiff's application for a constitutional or other writ filed 23 July 2021 (SCB 11 [5]). That ground is not pressed by the plaintiff: see the plaintiff's submissions filed 12 November 2012 (**PS**) at [2]. Accordingly, question (1)(d) of the special case is not necessary to answer.

PART III NOTICE OF CONSTITUTIONAL ISSUE

3. The plaintiff has given notice under s 78B of the *Judiciary Act 1903* (Cth). The defendants do not consider that any further notice is required.

PART IV MATERIAL FACTS

4. The facts by reference to which the questions are to be answered are set out in the amended special case. It is necessary to address two broad matters relating to the plaintiff's summary of the facts.

(a) Inferences

5. The plaintiff's submissions summarise the facts in a manner that foregrounds various matters relating to his personal situation. While those facts might have been relevant in

a judicial review challenge to the Minister's determination (had such a challenge been advanced), this case is concerned *only* with the validity of s 36B of the *Australian Citizenship Act 2007* (Cth) (**Citizenship Act**). Facts as to the plaintiff's personal situation are of marginal, if any, significance to the validity of that provision. Yet the plaintiff repeatedly invites the Court to draw inferences with respect to his personal circumstances, without any explanation as to how those inferences are relevant to the question the Court must determine. Specifically, he submits that the Court should infer that: (i) he was tortured and forced to sign a document without reading it (PS [10]); (ii) he was pardoned in June 2021 (PS [10]); and (iii) ***the*** reason he remains imprisoned in Syria is because he is no longer an Australian citizen, and that if he is still an Australian citizen that may assist to secure his release (PS [13]). While the Court may draw from facts in the special case any inference that might have been drawn from them if proved at trial,[1] none of those inferences should be drawn.

6. *First*, given their irrelevance to the constitutional validity of s 36B of the Citizenship Act, there would be no purpose to drawing any of those inferences.

7. *Secondly*, to support the existence of each of the inferences sought, the plaintiff points only to passages in the special case that record second-hand (or even more remote) hearsay statements (SC [22], [24], [25] (SCB 52)). There is no way to test the accuracy of those statements. As such, the facts stated in the special case do not make it reasonably probable that the facts contended for by the plaintiff exist – they go no further than showing that there are "ground[s] for conjecturing". That is an insufficient foundation for the inferences sought.[2] Indeed, in the case of the cause of the plaintiff's imprisonment, the inference that is said to be available is expressed in terms far more categorical even than the hearsay statement relied on. Further, it is inherently unlikely that the loss of the plaintiff's Australian citizenship is ***the*** cause of his continuing imprisonment in Syria when he was detained prior to the cessation of his citizenship and he retains citizenship of another country (Turkey).

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1 *High Court Rules 2004* (Cth), r 27.08.5.

2 See *Carr v Baker* (1936) 36 SR (NSW) 301 at 306 (Jordan CJ, with Davidson and Stephen JJ agreeing at 309); *Nominal Defendant v Owens* (1978) 45 FLR 430 at 434 (Muirhead J, with St John J agreeing at 448); *Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Ltd* (2009) 179 FCR 169 at [117] (Jacobson J). See also *Jones v Dunkel* (1959) 101 CLR 298 at 304-305 (Dixon CJ, dissenting as to outcome but not as to principle).

8. Separately, the plaintiff also submits that the Court should infer – from the absence of any suggestion that the plaintiff was automatically deprived of his Australian citizenship by operation of the former ss 33AA and 35 of the Citizenship Act – that he neither entered nor remained in al-Raqqa Province, Syria after 12 December 2015: PS [7]. Again, that inference is irrelevant to the constitutional validity of s 36B. But in any event, no such inference is available. Its suggested foundation seems to be that, on and from 12 December 2015, ss 33AA and 35 of the Citizenship Act provided for automatic cancellation of a person's citizenship in certain circumstances (SC [82]–[83] (SCB 73)) including, relevantly, by engaging in foreign incursion. The plaintiff's reasoning is, apparently, that if he had remained in al-Raqqa Province after 12 December 2015, his citizenship would have been automatically cancelled pursuant to these provisions and, since that is not suggested, he must not have done so. That reasoning overlooks cl 17(7) and (9) of Sch 1 to the *Australian Citizenship Amendment (Citizenship Cessation) Act 2020* (Cth) (**2020 Act**), which provide that the operation of ss 33AA and 35 of the Citizenship Act in relation to conduct engaged in by a person before the commencement of the 2020 Act is to be disregarded for all purposes if, before commencement, the Minister: (i) did not give, or make reasonable attempts to give, the person a notice under s 33AA(10)(a) or s 35(5)(a) in relation to the conduct; and (ii) did not make a determination under s 33AA(12) or s 35(7) in relation to the conduct. The Minister did not do any of those things in relation to any conduct of the plaintiff prior to the commencement of the 2020 Act (SC [88] (SCB 74)). Accordingly, there is no basis to assume one way or the other whether the former provisions operated upon the plaintiff.

(b) ISIL and the plaintiff's activities in Syria

9. The plaintiff's submissions, by selectively quoting the special case, paint an implausibly benign picture of his past activities. Again, these submissions proceed as if this is a judicial review challenge to the decision to cancel his citizenship, rather than solely a challenge to the validity of s 36B. Nevertheless, to re-balance the depiction of these matters, the defendants emphasise the following points.

10. Islamic State (**ISIL**) has openly called for attacks against Australia (SC [35] (SCB 55)) and has used foreign fighters to carry out terrorist attacks in the West (SC [34], [36], [63] (SCB 54-55, 66)). ASIO assessed that the plaintiff ***had joined ISIL*** by August 2013: SCB 91-92. ASIO's reporting from June 2013 also indicated that: (i) the plaintiff's travel to Syria had been facilitated through a Sydney-based network developed by convicted

terrorist Hamdi Al Qudsi (SCB 92); (ii) the plaintiff was a "close associate" of Mohammed Ali Baryalei, a senior Syria-based Australian member of ISIL involved in the plot referred to at SC [53(a)] (SCB 61); and (iii) the plaintiff's joining of ISIL was discussed by Al Qudsi and Baryalei in an intercepted phone call (SC [16] (SCB 50-51)).

11. ASIO assessed that the plaintiff had likely engaged in foreign incursions and recruitment by entering or remaining in al-Raqqa Province on or after 5 December 2014. That date is relevant because the Minister for Foreign Affairs declared al-Raqqa Province to be a "declared area" for the purposes of s 119.3 of the *Criminal Code* (Cth) on 4 December 2014.[3] In March 2015, the Parliamentary Joint Committee on Intelligence and Security (**PJCIS**) concluded that the declaration was "appropriate" (SC [47] (SCB 59)), after being informed by Commonwealth security agencies that "there is a high level of confidence that ISIL controls the entire province" and "[t]here is absolutely no means of entering or exiting Al Raqqa without needing to transit some form of ISIL control" (SCB 195). Having regard to these facts, the assertion at PS [9] that the plaintiff is "not a 'foreign fighter'" strains credulity. He travelled to Syria to join ISIL, did so, and then entered an area of Syria that ISIL controlled as a member of ISIL. He did not stumble unwittingly into al-Raqqa Province.

12. In any case, ASIO assesses that the return of Australians who have spent time with Islamist extremist groups (not only "foreign fighters") in Syria or Iraq has the potential to exacerbate the Australian threat environment for many years to come (SC [77] (SCB 70)). While ASIO's 2018-19 report to Parliament does state that ISIL has been "crushed" to the extent it has pretensions of being a sovereign state, in the same paragraph it also states that "[r]emnants of ISIL … remain dangerous" and "[o]ur domestic terrorist threat environment has not significantly improved following [its] collapse … anticipated attempts by some terrorist fighters to return to Australia [remain] a matter of the gravest security concern": SCB 333. See, also to similar effect, SCB 128.

13. At PS [11] and [26] an attempt is made to suggest that it is significant that ASIO did not recommend cessation of the plaintiff's citizenship. Again, whether or not ASIO made a recommendation about the plaintiff can say nothing about the validity of s 36B. In any case, the submission misunderstands ASIO's function in respect of the cessation provisions in the Citizenship Act. Prior to the cessation of the plaintiff's citizenship,

[3] *Criminal Code (Foreign Incursions and Recruitment – Declared Areas) Declaration 2014 – Al Raqqa Province, Syria 2014* (Cth).

ASIO provided the Minister with a "qualified security assessment" (**QSA**) (SC [28] (SCB 53)). QSAs are one of two kinds of assessments that may be furnished by ASIO to Commonwealth agencies (including Ministers) containing material that is or could be prejudicial to the interests of a person, the other being "adverse security assessments" (**ASA**).[4] Unlike ASAs, QSAs do not contain recommendations that "prescribed administrative action" be taken: ASIO Act, s 35. There is no requirement for ASIO to make a recommendation to the Minister and no inference can be drawn from the absence of such a recommendation as to ASIO's views about security matters. Here, of course, the Minister's decision under s 36B turns upon ***both*** security issues and other issues (such as an assessment of repudiation of allegiance to Australia and the public interest).

PART V ARGUMENT

The text, purpose and context of the statutory provisions

14. The plaintiff adopts the well-worn "strategy of invalidation"[5] for litigants challenging the constitutionality of legislation by advancing submissions that seek to demonstrate that the impugned provision has a far broader and less calibrated operation than is in fact the case (eg PS [32], [55]-[59], [62]). The defendants emphasise the following points about the actual scope of s 36B.

15. ***A discretion based on three criteria.*** Section 36B replaced the automatic citizenship cessation regime that had been introduced into the Citizenship Act by the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth). Section 36B(1) provides that the Minister[6] may only determine in writing that a person aged 14 or older ceases to be an Australian citizen if satisfied of ***three*** conditions: (a) the person has engaged in the requisite conduct (as specified in s 36B(5));[7] (b) the conduct demonstrates

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4 *Australian Security Intelligence Organisation Act 1979* (Cth) (**ASIO Act**), s 37(1).

5 *Zhang v Commissioner of the Australian Federal Police* (2021) 95 ALJR 432 at [26], quoting *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 (***NAAJA v NT***) at [150] (Keane J).

6 Note that the Minister is required to make the determination under s 36B(1) personally (s 36B(9)) and the rules of natural justice do not apply to the making of a determination under s 36B(1) (s 36B(11)).

7 As the Plaintiff points out at PS [33], s 36B applies in relation to conduct specified in paras (5)(a) to (h) if it was engaged in on or after 29 May 2003: 2020 Act, Sch 1, item 18(1). That date is the day that Sch 1 to the *Criminal Code Amendment (Terrorism) Act 2003* (Cth) commenced. It re-enacted Pt 5.3 of the *Criminal Code* which contains many of the offences whose physical elements are specified in s 36B(5). Section 36B(5)(h), which is being considered in this case, concerns conduct that is dealt with in Div 119 of the *Criminal Code*. While Div 119 was not inserted into the *Criminal Code* by cl 110 of Sch 1 to the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) until 1 December 2014, it was in force

that the person has repudiated their allegiance to Australia; and (c) it would be contrary to the public interest for the person to remain an Australian citizen. Thus, that a person engaged in the conduct specified in s 36B(5) is only the first matter of which the Minister must be satisfied. The Minister must then go on to consider whether that conduct demonstrates a repudiation of allegiance and the public interest. The plaintiff substantially ignores the second and third conditions. Yet they are clearly important, as is underscored by s 36A, which states the purpose of the relevant Subdivision as follows:[8]

> This Subdivision 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.

16. ***Dual citizens.*** In addition to the three conditions identified above, the power conferred by s 36B is not available if the Minister is satisfied that the person would, if the Minister were to make the determination, become stateless: s 36B(2). The power is therefore available *only* if the Minister is satisfied that, in addition to being an Australian citizen, the person is also a citizen of a foreign country. Further, while the power turns on the Minister's state of satisfaction on this point, s 36K(1)(c) provides that a determination is taken to be revoked if a court finds that the person was not a national or citizen of a foreign country at the time the determination was made. Accordingly, in substance, the regime is limited to persons who are in fact dual citizens.

17. ***Conduct.*** The conduct precondition in s 36B(5) can be satisfied by serious conduct relating to terrorist activities[9] and organisations,[10] engaging in foreign incursions and recruitment (para (h)), and serving in the armed forces of a country at war with Australia

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during the period that the Plaintiff is assessed to have been in Al Raqqa (cf PS [33]). Accordingly, even if s 36B might be "retroactive" in relation to some persons, he is not entitled to raise that complaint as it has nothing to do with s 36B as it applies to him. Further, even if the plaintiff were permitted to raise this point, he would need to confront the fact that overlapping conduct constituted an element of an offence under s 6 of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) well prior to 29 May 2003.

8 This statement is consistent with the extrinsic materials for s 36B, and the automatic citizenship cessation regime that it replaced: Hansard, House of Representatives (Wednesday, 24 June 2015) at 7369-7370; Hansard, House of Representatives (19 September 2019) at 3602; Revised Explanatory Memorandum to the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 at 1 (SCB 858); Revised Explanatory Memorandum to the Australian Citizenship Amendment (Citizenship Cessation) Bill 2020 at 7-8.

9 Eg, "engaging in international terrorist activities using explosive or lethal devices" (para (a)); "engaging in a terrorist act" (para (b)); "providing or receiving training connected with preparation for, engagement in, or assistance in a terrorist act" (para (c)).

10 Eg, directing the activities of, recruiting for, fighting for, or being in the service of, a declared terrorist organisation (see paras (d), (e) and (i) respectively). "Declared terrorist organisation" is defined in s 36C.

(para (j)). It is given greater specificity by s 36B(6), which states that words and expressions in paras (5)(a) to (h), which relevantly include the "foreign incursions and recruitment" conduct, have the same meanings as in various provisions of the *Criminal Code*,[11] but do not include the "fault elements" which apply under the *Criminal Code*.

18. For s 36B(5)(h), the specified conduct will be the physical elements of any of the offences in Div 119 of the *Criminal Code*. Most relevantly, s 119.2 makes it an offence to enter, or remain in, an area that has been the subject of a declaration made under s 119.3. In order for such a declaration to be made, the Minister for Foreign Affairs must be satisfied that a "listed terrorist organisation[12] is engaging in a hostile activity[13]" in that area: s 119.3(1).[14] Section 119.2 was introduced "to deter Australians from travelling to areas where listed terrorist organisations are engaged in a hostile activity".[15] As noted in paragraph 11 above, al-Raqqa had been declared to be such an area. The enactment of this statutory mechanism for prescription of entry into declared areas responded to the fact that, for obvious reasons, it will commonly be difficult to obtain admissible evidence as to exactly what is done in such areas after entry.[16]

19. Though the fault element relevant to s 119.2 does not apply for the purposes of s 36B(5)(h), it does not follow that *any* instance where a person enters or remains in a declared area satisfies that paragraph (contra PS [32]). That is so for three reasons.

20. *First*, s 4.2(1) of the *Criminal Code* provides that conduct can only be a physical element for the purposes of the *Criminal Code* if it is "voluntary" in the sense explained in the balance of s 4.2. That is not a fault element; it is in terms an aspect of the physical element

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11 Those sections being Subdiv A of Div 72, ss 101.1, 101.2, 102.2, 102.4, 103.1 and 103.2 and Div 119.

12 An organisation will only be a "listed terrorist organisation" where it has been specified by regulation, which can only occur where a Minister is satisfied on reasonable grounds that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act, or advocates the doing of a terrorist act: *Criminal Code*, ss 100.1(1), 102.1, 117.1.

13 A person "engages in a hostile activity" if they engage in conduct in a foreign country with the intention of achieving one or more specified objectives, including overthrowing by force or violence a foreign government, intimidating the public or a section of the public, causing death or bodily injury to persons who hold public office, and unlawfully destroying or damaging government property: *Criminal Code*, s 117.1.

14 Note that the PJCIS may review such a declaration and report to Parliament: *Criminal Code*, s 119.3(7)-(8).

15 Revised Explanatory Memorandum to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 at [234].

16 See Hansard, Senate (24 September 2014) at 7001; Revised Explanatory Memorandum to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 at [896]; Independent National Security Legislation Monitor (James Renwick SC), *Sections 119.2 and 119.3 of the Criminal Code: Declared Areas* (September 2017) at [8.10].

of the offence.[17] Section 36B would thus not be engaged in the case of a person who was involuntarily taken to a declared area or a person who, already being in an area when it was declared, was then unable to leave.

21. *Secondly*, s 119.2 of the *Criminal Code* is subject to exceptions in sub-ss (3)-(4) for persons with legitimate purposes for being in the area (such as providing humanitarian aid, performing official duties for an Australian or foreign government or certain international organisations, and making a bona fide visit to a family member). Again, these are not fault elements; they are exceptions to the physical element of entering or remaining in a declared area.[18]

22. *Thirdly*, s 36B(8) provides that s 36B does not apply where a person is acting in the course of performance of certain Commonwealth, State or Territory functions or duties.

23. ***Repudiation of allegiance.*** The second condition to enliven s 36B is that the Minister is satisfied that a person has "repudiated … allegiance" to Australia. As explained further below, that language draws on historic notions of the obligation of fealty to direct the Minister to inquire whether the relevant conduct that is the subject of s 36B(1)(a) demonstrates a rejection of any continuing obligations to the Australian body politic. In effect, para (1)(b) is a requirement that the Minister must be satisfied that there is a clear reason to conclude that the citizen has acted inconsistently with their ongoing membership of the Australian body politic. While the focus is on the specific conduct that is the subject of s 36B(1)(a), the Minister may, of course, consider all of the circumstances in which that conduct took place. That is because those circumstances may bear on whether the conduct demonstrates the requisite repudiation of allegiance. That provides a further answer to the suggestion that involuntary conduct might enliven s 36B.

24. ***The public interest.*** The third condition to enliven s 36B is that the Minister is satisfied that it would be contrary to the public interest for the person to remain an Australian citizen. When considering that issue, the Minister must consider the relevant criteria identified in s 36E(2). Those criteria include matters relating to the person who would be the subject of the determination, such as: the severity of their conduct (para (a)); the degree of threat they pose to the Australian community (para (c)); their age (para (d)); if

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[17] *R v Abdirahman-Khalif* (2020) 94 ALJR 981 at [86] (Bell, Keane, Nettle and Gordon JJ). See also *Gore v Australian Securities and Investments Commission* (2017) 249 FCR 167 at [247] (Rares J).

[18] Note that the "physical element" here is "conduct" (s 4.1(1)) which is defined in s 4.1(2) to mean "an act, an omission to perform an act ***or a state of affairs***" (emphasis added). Section 36B(7) of the Citizenship Act contains similar exemptions applicable to s 36B(5)(i).

they are under 18, the best interests of the child as a primary consideration (para (e)); and their connection to the other country of which they are a national or citizen and the availability of the rights of citizenship of that country to them (para (g)). They also include whether the person is likely to be prosecuted for the relevant conduct (para (f)) and Australia's international relations (para (h)).

25. ***Discretion.*** Even when all three conditions are satisfied, the use of the word "may"[19] in s 36B(1) demonstrates that the Minister retains a discretion not to make a determination ceasing a person's citizenship.[20] That discretion – which must, of course, be exercised within the bounds of legal reasonableness – enables the Minister to consider, among other things, any circumstances favourable to the person that might not otherwise have been considered.

26. ***Judicial review.*** Both a determination under s 36B and a decision to refuse to revoke that determination under s 36H are subject to judicial review. The jurisdiction of this Court under s 75 of the Constitution, and of the Federal Court under s 39B of the *Judiciary Act*, is specifically noted in both sections (ss 36B(1), 36H(4)). The decisions are also subject to review pursuant to the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Section 13 of that Act gives a person a right to obtain reasons for a determination under s 36B, notwithstanding the absence of any other obligation to give reasons (contra PS [26]).

27. Finally, the defendants note that the plaintiff's submissions are generally expressed as entailing (with limited exceptions: see, eg, PS [32]) a challenge to s 36B as a whole. However, as the Court has recently emphasised on several occasions, the plaintiff is not permitted to "roam at large" over the relevant statute.[21] There must exist a state of facts that makes it necessary to decide validity.[22] For that reason, the plaintiff should be confined to challenging s 36B in its operation with respect of conduct captured by s 36B(5)(h) when read with s 119.2 of the *Criminal Code*. There is no occasion to decide the validity of other operations of s 36B.

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19 *Acts Interpretation Act 1901* (Cth), s 33(2A).

20 See, by analogy, *Waraich v Minister for Home Affairs* [2021] FCAFC 155 at [57], in the context of s 34 of the Citizenship Act.

21 *Knight v Victoria* (2017) 261 CLR 306 at [33]; *Mineralogy Pty Ltd v Western Australia* (2021) 95 ALJR 832 at [59] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), [99] (Edelman J).

22 *Lambert v Weichelt* (1954) 28 ALJ 282 at 283 (Dixon CJ); *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140 at [141] (Hayne, Kiefel and Bell JJ); *Duncan v New South Wales* (2015) 255 CLR 388 at [52]; *Brown v Tasmania* (2017) 261 CLR 328 at [170] (Gageler J).

Question 1(a): Is s 36B supported by a head of legislative power?

(i) The Aliens Power (s 51(xix))

Section 51(xix): general principles

28. For more than one hundred years this Court has recognized that it is "trite law that any community is entitled to determine by its Parliament of what persons the community is to be composed. Hence sub-s (xix) of s 51 of the Constitution."[23] In that operation, the aliens power is therefore "vital to the welfare, security and integrity of the nation".[24] It is particularly critical because, as this Court has recognised, at Federation the concept of alienage did not have an "established and immutable legal meaning".[25] Instead, "questions of nationality, allegiance and alienage were matters on which there were changing and developing policies, and which were seen as appropriate for parliamentary resolution".[26] Parliament required legislative power to answer those questions.

29. That context explains the now "settled understanding"[27] that the power to make laws with respect to "aliens" conferred by s 51(xix) has two aspects. The ***first*** is a power to define the circumstances in which a person will have the legal status of "alienage"[28] or, as sometimes expressed, a power to determine who will be admitted to formal membership of the Australian body politic.[29] The ***second*** aspect is the power to make laws with respect to persons who hold the legal status of "alien", as determined by application of the criteria prescribed by Parliament, including by specifying the consequences of that status (eg

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23 *Ferrando v Pearce* (1918) 25 CLR 241 at 253 (Barton J).

24 *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 (***Ex parte Te***) at [24] (Gleeson CJ).

25 *Koroitamana v Commonwealth* (2006) 227 CLR 31 (***Koroitamana***) at [9] (Gleeson CJ and Heydon J), citing *Singh v Commonwealth* (2004) 222 CLR 322 (***Singh***) at [30] (Gleeson CJ), [190] (Gummow, Hayne and Heydon JJ), [252] (Kirby J).

26 *Koroitamana* (2006) 227 CLR 31 at [9] (Gleeson CJ and Heydon J), quoting *Singh* (2004) 222 CLR 322 at [30] (Gleeson CJ). See, also, *Singh* (2004) 222 CLR 322 at [176]-[177] (Gummow, Hayne and Heydon JJ).

27 *Chetcuti v Commonwealth* (2021) 95 ALJR 704 (***Chetcuti***) at [12] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

28 *Chetcuti* (2021) 95 ALJR 704 at [12] (Kiefel CJ, Gageler, Keane and Gleeson JJ); *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 (***Shaw***) at [2] (Gleeson CJ, Gummow and Hayne JJ, with whom Heydon J agreed at [190]); *Singh* (2004) 222 CLR 322 at [4] (Gleeson CJ); *Koroitamana* (2006) 227 CLR 31 at [11] (Gleeson CJ and Heydon J), [28] (Gummow, Hayne and Crennan JJ); *Love v Commonwealth* (2020) 270 CLR 152 (***Love***) at [5] (Kiefel CJ), [83]-[86], [90], [94] (Gageler J), [166] (Keane J), [236] (Nettle J), [326] (Gordon J).

29 *Love* (2020) 270 CLR 152 at [62] (Bell J), [94] (Gageler J), and see also (implicitly) [18], [33] (Kiefel CJ), [177] (Keane J), [298] (Gordon J), [395], [438] (Edelman J); *Ex parte Te* (2002) 212 CLR 162 at [24], [39] (Gleeson CJ); *Koroitamana* (2006) 227 CLR 31 at [11] (Gleeson CJ and Heydon J); *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 (***Nolan***) at 189 (Gaudron J).

whether persons with that status must hold a visa, or have a right to vote, or can be deported or removed).

30. For the purposes of s 51(xix), and subject to the qualification in the next paragraph, an "alien" is no more and no less than a person who is not a formal member of the Australian body politic according to the test for membership prescribed by law. The persons who hold the status of "alien" can be identified ***only*** by reference to that test, which is now contained in the Citizenship Act, and which is supported by the first aspect of the power with respect to aliens referred to above. For that reason, while in one sense "citizenship" is a statutory concept,[30] it is a statutory concept with constitutional significance: it is a statutory status that is created by exercise of the first aspect of the power with respect to aliens in order to determine who has the status of "alien". When Parliament has exercised that power (as it has in the Citizenship Act) it is the absence of the statutory status of "citizen" that defines the class to whom the second aspect of the power applies.

31. The qualification to these propositions was identified by Gibbs CJ in *Pochi v Macphee* (***Pochi***): "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".[31] A majority of this Court in *Love* held that a certain category of Aboriginal Australians fall within that qualification. It may also encompass persons who were born in Australia, to two Australian persons, who are not citizens of any other country, and who have not renounced or repudiated their allegiance to Australia.[32] While the existence of the qualification identified in *Pochi* is not disputed, it is important to emphasise that it operates as a ***limit*** on Parliament's power under the ***first*** aspect of the aliens power – it constrains the laws that Parliament may validly enact in specifying the criteria for formal membership of the Australian body politic. But subject to this limit, there is a range of available criteria for "alienage" from which Parliament can validly select and the criteria actually selected by the Parliament will then be determinative. The *Pochi* qualification therefore does not provide any warrant to substitute the "ordinary meaning" of "alien" in place of Parliament's

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30 Eg *Chetcuti* (2021) 95 ALJR 704 at [105] (Steward J); *Love* (2020) 270 CLR 152 at [251], [280] (Nettle J), [292], [294], [299], [305]-[306], [389] (Gordon J).

31 (1982) 151 CLR 101 at 109. See also *Ex parte Te* (2002) 212 CLR 162 at [31], [39] (Gleeson CJ), [159] (Kirby J); *Love* (2020) 270 CLR 152 at [7] (Kiefel CJ); [50], [64] (Bell J); [168] (Keane J), [236], [244] (Nettle J); [326] (Gordon J), [433] (Edelman J).

32 See *Chetcuti* (2021) 95 ALJR 704 at [67] (Edelman J).

definition. Nor does it mean that whether someone is an alien is a matter of constitutional fact.[33] Rather, it has the quite different consequence that there is an identifiable group of people who can ***never*** be categorised as aliens by a statute enacted under the first aspect of the aliens power, ***unless*** they act in a way that repudiates their allegiance to Australia.

32. Subject to the above qualification, and reflecting Australia's status as an independent nation, s 51(xix) empowers the Parliament to define the criteria for membership of the Australian body politic. That power is "wide"[34] and must be construed "with all the generality which the words used admit".[35]

33. The question in this case is whether Parliament has, by enacting s 36B, specified an ***available*** criterion for membership of the Australian body politic. The answer to that question will be "yes" unless the criterion selected identifies persons that ***cannot possibly*** answer the description of "alien" on the ordinary meaning of the word. As s 36B applies only where, amongst other things: (i) the Minister is satisfied that a person has repudiated their allegiance to Australia; *and* (ii) that person also owes allegiance to a foreign sovereign power, for the reasons that follow it does not apply to persons who cannot possibly answer the description of "alien" on the ordinary understanding of the word. The Court should therefore conclude that s 36B is supported by the first aspect of the aliens power, without any need to attempt to chart the outer limits of that aspect of the power.

Pre-Federation law creating the potential for loss of citizenship

34. At common law, allegiance is "the obligation of fidelity and obedience which the individual owes to the government under which he [or she] lives, or to his [or her] sovereign in return for the protection he [or she] receives".[36] The common law doctrine of allegiance "ha[d] its roots in the feudal idea of a personal duty of fealty to the lord from whom land is held".[37] Under that doctrine, a person's status as a subject of the Crown was determined by whether they were born within the territory over which the Crown

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33 *Love* (2020) 270 CLR 152 at [88] (Gageler J).

34 *Koroitamana* (2006) 227 CLR 31 at [11] (Gleeson CJ and Heydon J).

35 *Singh* (2004) 222 CLR 322 at [155] (Gummow, Hayne and Heydon JJ); see also *Love* (2020) 270 CLR 152 at [131] (Gageler J), [168] (Keane J), [236], [244] (Nettle J).

36 *Carlisle v United States* 83 US 147 (1872) at 154 (Field J), quoted in *Ex parte Te* (2002) 212 CLR 162 at [123] (Gummow J) and *Love* (2020) 270 CLR 152 at [428] (Edelman J).

37 Holdsworth, *A History of English Law* (1944), vol 9 at 72.

exercised dominion. Moreover, that status was indelible.[38] As such, the common law did not recognise the possibility that a person's status as a subject could change by renunciation or repudiation.

35. By the mid-nineteenth century the occurrence of mass migration[39] gave rise to widespread appreciation that the common law's doctrine of indelible subjecthood was "neither reasonable nor convenient".[40] The 1869 Report of the *Royal Commissioners for Inquiring into the Law of Naturalization and Allegiance* (**1869 Report**) stated that "this doctrine … is at variance with those principles on which the rights and duties of a subject should be deemed to rest".[41] The *Naturalization Act 1870* (Imp) (**1870 Act**) directly responded to the 1869 Report.[42] It dramatically altered English law, including by abrogating the indelibility rule[43] by providing that a British subject: (i) could renounce their British nationality (provided they had a connection to another body politic) (s 4); and (ii) would automatically cease to be a British subject if naturalized in a foreign State (s 6) or, for women, if they married a foreign subject (s 10(1)). These acts were understood in law as representing "a voluntary withdrawal of allegiance".[44]

36. The 1870 Act thus definitively re-framed the English law of nationality by establishing for the first time that the conduct of individuals could be directly relevant to whether they remained members of the body politic.[45] Specifically, by allowing for renunciation, which it deemed to occur if the subject acted in particular ways specified by the Parliament, the 1870 Act altered nationality law in a manner that accorded with social contract theory.[46] It made actual loyalty (or, at least, the absence of acts by which persons

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38 *Kenny v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 42 FCR 330 at 339 (Gummow J); *Singh* (2004) 222 CLR 322 at [64] (McHugh J); *Love* (2020) 270 CLR 152 at [246] (Nettle J); Salmond, "Citizenship and Allegiance" (1902) 18 *Law Quarterly Review* 49 at 50.

39 *Singh* (2004) 222 CLR 322 at [190] (Gummow, Hayne and Heydon JJ).

40 *Report of the Royal Commissioners for Inquiring into the Law of Naturalization and Allegiance* (1869) at v.

41 1869 Report at v, quoted in *Singh* (2004) 222 CLR 322 at [173]-[174] (Gummow, Hayne and Heydon JJ). See also Salmond, "Citizenship and Allegiance" at 57.

42 *Singh* (2004) 222 CLR 322 at [174] (Gummow, Hayne and Heydon JJ).

43 *Re Canavan* (2017) 263 CLR 284 at [36]; *Singh* (2004) 222 CLR 322 at [174] (Gummow, Hayne and Heydon JJ).

44 Helen Irving, "The Concept of Allegiance in Citizenship Law and Revocation: An Australian Study" (2019) 23(4) *Citizenship Studies* 372 at 375.

45 Irving, "The Concept of Allegiance in Citizenship Law and Revocation: An Australian Study" at 382.

46 See, David Wishart, "Allegiance and Citizenship as Concepts in Constitutional Law" (1986) 15 *Melbourne University Law Review* 662 at 667, citing JJ Rousseau, *The Social Contract* (1968) at Bk II, Ch 10 and MM Goldsmith, *Allegiance* (1971) at 21.

chose to associate themselves with a different polity) a condition of membership of the British body politic.[47]

37. Accordingly, by the time of Federation, for 30 years it had been the law of the United Kingdom (which relevantly applied in Australia[48]) that a person could: (i) be naturalized as a British subject; (ii) expressly renounce that status (whether or not it was acquired through naturalization); and (iii) impliedly renounce that status by engaging in conduct that Parliament identified in legislation as inconsistent with ongoing membership of the British body politic. Against this state of the law, "it would be surprising" if the legislative power with respect to "naturalization and aliens" in s 51(xix) "did not extend [to] … regulating renunciation of allegiance … [and] altering the criteria which are to determine whether the necessary connection between the individual and (to personify the concept) the Crown exists"[49] just as much as it extends to regulating the process of naturalization.[50] Were it otherwise, s 51(xix) would be a curious and imbalanced head of power, inapt to its purpose.

38. For the above reasons, the first aspect of the aliens power includes power to make laws "to prescribe the conditions on which … citizenship may be acquired ***and lost***".[51] Indeed, in contrast with laws that confer citizenship on the basis of the *jus soli* or *jus sanguinis* theories, which "endeavour to identify the feature of a relationship between the individual and a nation on the basis of which loyalty and membership could generally be *imputed*",[52] laws that remove citizenship when a person engages in conduct that Parliament has identified as inconsistent with ongoing membership of the body politic fix upon evidence of actual disloyalty (or, at least, choice to prefer allegiance to another).

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47 It is for this reason unsurprising that, in its reciprocal operation with respect to persons who chose to be naturalized as British subjects, s 9 of the 1870 Act contained an "oath of allegiance" in a similar form to that still included in the Citizenship Act, ss 26-28.

48 *Re Canavan* (2017) 263 CLR 284 at [36]; *Love* (2020) 270 CLR 152 at [96] (Gageler J).

49 *Singh* (2004) 222 CLR 322 at [197] (Gummow, Hayne and Heydon JJ). See, also, *Love* (2020) 270 CLR 152 at [218] (Keane J).

50 See *Ex parte Walsh; In re Yates* (1925) 37 CLR 36 at 87-88 (Isaacs J): "[w]hatever the Federal Parliament can do or permit, it can undo or recall".

51 *Ex parte Te* (2002) 212 CLR 162 at [31] (Gleeson CJ) (emphasis added).

52 *Singh* (2004) 222 CLR 322 at [252] (Kirby J) (emphasis added), citing Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws* (1896) at 173-177 and *United States v Wong Kim Ark* 169 US 649 (1898) at 655-658.

Renunciation of citizenship by conduct

39. The Parliament has exercised the power identified above over many decades. In addition to statutes providing for renunciation of nationality by declaration or application,[53] and revocation of certificates of naturalization due to fraud,[54] the Parliament has at various times provided that Australians will lose their nationality or citizenship by: (i) becoming naturalized in a foreign state (if sane and of full age);[55] (ii) in the case of women, by marrying aliens;[56] and (iii) in the case of citizens by registration and naturalized persons, by residing outside Australia for a continuous period of seven years without giving notice of an intention to retain citizenship.[57] Those examples highlight that there is nothing exceptional about Parliament providing for the loss of Australian citizenship as a result of voluntary acts that Parliament treats as indicative of loyalty to a foreign state, even if those acts fall far short of demonstrating disloyalty to Australia.

40. Given the above, it is hardly surprising that Australian law has long provided that persons who engage in conduct that can reasonably be characterised as involving actual disloyalty to Australia (most notably by fighting against Australia, or assisting her enemies in other ways) may lose their Australian nationality or citizenship. Initially such laws applied only to persons who had been naturalized, but they were later extended. Thus:

    a) s 7 of the *Naturalization Act 1917* (Cth) amended s 11 of the *Naturalization Act 1903* (Cth) to provide that the Governor-General was empowered to revoke a certification of naturalization where "the Governor-General is satisfied that it is desirable for any reason that a certificate of naturalization should be revoked" (emphasis added);[58]

    b) s 12(2)(a) of the *Nationality Act 1920* (Cth) empowered the Governor-General[59] to revoke a certificate of naturalization if satisfied that: (i) the person to whom it had

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53 See *Nationality Act 1920* (Cth), s 22; *Nationality and Citizenship Act 1948* (Cth), s 18; Citizenship Act, s 33.

54 See *Naturalization Act 1917* (Cth), s 7; *Nationality Act 1920* (Cth), s 12(1); *Nationality and Citizenship Act 1948* (Cth), s 21(1)(c).

55 See *Nationality Act 1920* (Cth), s 21; *Nationality and Citizenship Act 1948* (Cth), s 17.

56 See *Nationality Act 1920* (Cth), s 18.

57 *Nationality and Citizenship Act 1948* (Cth), s 20.

58 Section 11 of the *Naturalization Act 1903-1917* (Cth) was unsuccessfully challenged in *Meyer v Poynton* (1920) 27 CLR 436, in which Starke J said (at 441): "… if the power given by the *Naturalization Act* to admit to Australian citizenship is within the power to make laws with respect to naturalization, so must authority to withdraw that citizenship … be also within power".

59 Section 7 of the *Nationality Act 1922* (Cth) later provided that this power was to be exercised by a Minister rather than the Governor-General.

been granted had "during any war in which His Majesty is engaged unlawfully traded or communicated with the enemy or with the subject of an enemy state, or been engaged in or associated with any business which is to his knowledge carried on in such manner as to assist the enemy in such war"; and (ii) the "continuance of the certificate is not conducive to the public good";

c) s 19 of the *Nationality and Citizenship Act 1948* (Cth) provided that ***any*** Australian citizen (not merely one who obtained citizenship by naturalization) who: (i) was also a national or citizen of another country; and (ii) served in the armed forces of a country at war with Australia, automatically ceased to be an Australian citizen upon commencing that service;[60] and

d) s 21(1) of the same Act empowered the Minister to deprive a person who was an Australian citizen by registration or naturalization of their citizenship if satisfied that the person had: (i) shown themselves to be "disloyal or disaffected towards His Majesty"; or (ii) during any war in which Australia was engaged, unlawfully traded or communicated with the enemy or been engaged on or associated with any business which to his knowledge assisted an enemy in that war.[61]

41. Australia is not unusual in having enacted laws of this kind. Provisions depriving persons of citizenship for service in a foreign army have long[62] existed in Canada,[63] France,[64]

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60 This provision responded to cases that came under notice during the Second World War "in which persons possessing dual British and (eg) German nationality served in enemy forces", as it was "considered desirable that in such circumstances Australian citizenship should automatically be lost". It was modelled on a similar provision included in the *Canadian Citizenship Act*, SC 1946, c 15, s 17(2): Explanatory Memorandum to the Nationality and Citizenship Bill 1948 at 8. An equivalent provision remained law until the enactment of the 2020 Act: Citizenship Act, s 35. The Australian Citizenship Council, chaired by Sir Ninian Stephen, recommended its retention in 2000: Australian Citizenship Council, *Australian Citizenship for a New Century* (February 2000) at 66-67. Conduct captured by this historic provision would now engage the Minister's citizenship cessation powers by reason of s 36B(5)(j).

61 Section 21 was repealed by s 7 of the *Nationality and Citizenship Act 1958* (Cth), which replaced it with a new s 21 which provided that the Minister may, by order, deprive a person of Australian citizenship where the person was convicted of an offence against s 50 of the Act in relation to an application for a certificate of registration or naturalization, and where the Minister was satisfied that it would be contrary to the public interest for the person to continue to be an Australian citizen.

62 Such provisions have existed for many decades: see United Nations General Assembly, "National Legislation Concerning Grounds for Deprivation of Nationality", UN Doc A/CN.4/66 (6 April 1953) <https://legal.un.org/ilc/documentation/english/a_cn4_66.pdf>.

63 *Canadian Citizenship Act*, SC 1946, c 15, s 17(2).

64 *Civil Code* (France), Art 23-8. See, also, Gerard-René de Groot and Maarten Peter Vink, "A Comparative Analysis of Regulations on Involuntary Loss of Nationality in the European Union" (CEPS Paper in Liberty and Security in Europe No 75, December 2014) <https://www.files.ethz.ch/isn/187052/No%2075%20ILEC%20Loss%20of%20citizenship%20final%20MAP.pdf> at 21-22 for historic and present day summary of laws of this kind in France, Germany, Italy and the Netherlands.

Germany,[65] Italy,[66] the Netherlands[67] and the United States.[68]

42. Section 36B of the Citizenship Act is of the same genus as the laws described in paragraph 40 above. It represents a development from those earlier statutory provisions only to the extent that it recognises the analogy between fighting with the armed forces of another State against Australia, and a willingness to act on extremist values by engaging in terrorist activities or participating in a conflict in a foreign country.[69] Parliament was entitled to conclude that both forms of conduct may be inconsistent with – indeed antithetical to – the safety and "shared values"[70] of the Australian body politic, and thus inconsistent with a person's ongoing membership of the Australian body politic.[71] To the extent that s 36B extends the historical provisions summarised above:

a) it reflects the fact that "[t]errorism poses a singular threat to civil society"[72] and that "[p]ower of a kind that was once the exclusive province of … nation states may now be exerted in pursuit of political aims by groups that do not constitute a nation state"[73] (but who, like ISIL, might well have pretentions to becoming so);

b) it accords with the notion, which has long been emphasised in statute,[74] that citizenship is a "common bond" requiring loyalty to Australia and commitment to certain values, including democracy. These ideas were expressly referred to when

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65 *Law on the Acquisition and Loss of Confederative and State Citizenship of 1870* (North German Reichstag), § 22 <https://germanhistorydocs.ghi-dc.org/pdf/eng/523_Law%20Natnlty%20Citznshp_166_JNR.pdf>.

66 See de Groot and Vink, "A Comparative Analysis of Regulations on Involuntary Loss of Nationality in the European Union" at 21-22, 25.

67 *Nationality Act of 1892* (Netherlands), Art 7(4).

68 *Nationality Act of 1940*, 8 USC §§ 501ff (1940), § 801(c).

69 This Court has recently re-affirmed the legitimacy of analogical development of constitutional principles in the context of threats posed by terrorist activities to the Australian community: *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 (***Benbrika***) at [36] (Kiefel CJ, Bell, Keane and Steward JJ).

70 Citizenship Act, s 36A.

71 See John Finnis, "Nationality, alienage and constitutional principle" (2007) 123 *Law Quarterly Review* 417 at 445: "the deeper challenge to constitutional order and theory [is] posed by *nationals* who regard their nationality as a form of alienage because … they believe their true Nation lies altogether beyond – but is ordained to have dominion over – the bounds and territories, and the constitutional principles and rights, that frame and structure our nation's common good" (emphasis in the original, footnote omitted).

72 *Benbrika* (2021) 95 ALJR 166 at [36] (Kiefel CJ, Bell, Keane and Steward JJ).

73 *Thomas v Mowbray* (2007) 233 CLR 307 (***Thomas***) at [438] (Hayne J).

74 Citizenship Act, Preamble. See, also the pledge of commitment in ss 26-28: "From this time forward, I pledge my loyalty to Australia and its people, whose democratic beliefs I share, whose rights and liberties I respect, and whose laws I will uphold and obey." Pledges of this kind are a long-standing feature of Australian nationality statues: see *Nationality Act 1920* (Cth), ss 7(4), 31, Sch 3.

s 36B and its predecessor regime were enacted,[75] and have repeatedly found expression in Australian political discourse[76] and the decisions of this Court;[77] and

c) it reflects similar extensions in the legislation of other liberal democracies, including the United Kingdom,[78] New Zealand,[79] France,[80] Germany[81] and the Netherlands,[82] which have all introduced laws that may operate to deprive foreign fighters of citizenship.[83]

43. As explained in paragraphs 17 to 22 above, s 36B(5) tightly confines the categories of conduct that are capable of engaging the Minister's citizenship cessation powers under s 36B(1). The conduct captured by s 36B(5)(h), when read with ss 119.2 and 119.3 of the *Criminal Code* (which are the relevant provisions in this case), is inherently suggestive of the absence of a continuing commitment to the Australian body politic. But even if that were not the case, the cessation power is not available unless the Minister is satisfied that the conduct in question *does* demonstrate that the person has repudiated their allegiance to Australia.[84] And, even then, the Minister must *also* be satisfied that citizenship cessation is in the public interest. When those three cumulative conditions are considered in light of the history of laws of this kind, and in the context of similar laws in other liberal democracies, it is not open to conclude that a person to whom s 36B applies "cannot possibly" answer the description of an alien within the ordinary meaning of that word.

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75 See Citizenship Act, s 36A and the sources identified in fn 8 above.

76 See, eg, Commonwealth Parliament – Joint Standing Committee on Migration, *Australian All: Enhancing Australian Citizenship* (September 1994) at [2.27]-[2.31], [3.32]; Australian Government, *Australian Citizenship: Our Common Bond* (2009) at 3, 17, 20-21; Australian Government, *Australian Citizenship: Your Right, Your Responsibility (The National Consultation on Citizenship Final Report)* (2015) at 3, 7, 11; Hon Malcolm Turnbull MP, "National Security Statement" (13 June 2017). See, also, the discussion in Irving, "The Concept of Allegiance in Citizenship Law and Revocation: An Australian Study" at 382-383.

77 *Ex parte Te* (2002) 212 CLR 162 at [26] (Gleeson CJ); *Roach v Electoral Commissioner* (2007) 233 CLR 162 (***Roach***) at [12] (Gleeson CJ); *Love* (2020) 270 CLR 152 at [16] (Kiefel CJ).

78 *British Nationality Act 1981* (UK), s 40. See SC [93]-[98] (SCB 75-77) concerning this provision.

79 *Citizenship Act 1977* (NZ), s 16(a) (SCB 1143-1146).

80 *Civil Code* (France), Arts 23-8, 25 (SCB 1149, 1150-1151).

81 *Nationality Act of 22 July 1913* (Germany), ss 17(1)(5), 28(1) (SCB 1158-1159).

82 *Nationality Act of 1984* (The Netherlands), Art 14(4) (SCB 1161).

83 Canada also formerly had laws providing for disloyalty-based citizenship revocation: see *Strengthening Canadian Citizenship Act*, SC 2014, c 22.

84 Where that satisfaction exists, there is necessarily a clear reason to conclude that the citizen in question has severed their connection to the Australian body politic: cf *Love* (2020) 270 CLR 152 at [101] (Gageler J).

Foreign citizenship

44. The above conclusion is powerfully reinforced by the fact that, by reason of s 36B(2) and 36K(1)(c), s 36B can only ever apply to a person who is a citizen of a foreign country, and who therefore by definition "belong[s] to another".[85] This Court has repeatedly recognised the significance of citizenship of a foreign country in determining the reach s 51(xix).[86] That is not to deny that, if such a person is *also* an Australian citizen, then they also belong to Australia and therefore are not an alien (cf PS [29]). It is, however, to recognise that, pursuant to the first aspect of the aliens power, it is open to Parliament to prohibit dual citizenship either generally or in specific circumstances. So much is illustrated by the fact that, between 26 January 1949 and 4 April 2002, Australian citizens lost that citizenship if they voluntary acquired the citizenship of another country.[87] That history demonstrates that dual citizenship is not an entitlement – "[i]ts permission … since 2002 does not render it anything like traditional".[88] The fact that s 36B applies only to persons who are citizens of foreign countries therefore reinforces the conclusion that it applies only to persons that it is within Parliament's legislative power to exclude from membership of the body politic pursuant to the first aspect of the aliens power.

45. For the above reasons, s 36B – in providing that a person who is also a foreign citizen ceases to be an Australian citizen if the Minister is satisfied that the person has engaged in conduct of specified kinds concerning terrorism, engaging in hostile activity in a foreign country, or service in the armed forces of a country at war with Australia, and where the Minister is further satisfied that: (i) that conduct demonstrates that the person has repudiated their allegiance to Australia; and (ii) that it would be contrary to the public interest for the person to remain an Australian citizen – plainly does not treat as an alien

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85 *Nolan* (1988) 165 CLR 178 at 183 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ); *Singh* (2004) 222 CLR 322 at [190] (Gummow, Hayne and Heydon JJ).

86 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439 at [35] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ); *Singh* (2004) 222 CLR 322 at [30], [32] (Gleeson CJ), [200], [205] (Gummow, Hayne and Heydon JJ). See also *Love* (2020) 270 CLR 152 at [16] (Kiefel CJ), [59] (Bell J), [89] (Gageler J), [170] (Keane J), [245] (Nettle J), [311], [316], [322] (Gordon J), [430]-[431] (Edelman J).

87 See *Nationality and Citizenship Act 1948* (Cth), s 17, which provided that an adult ceased to be an Australian citizen if they were outside Australia and acquired the citizenship of another country by some voluntary and formal act other than marriage. That section was repealed by s 13 of the *Australian Citizenship Amendment Act 1984* (Cth), which was in force between 22 November 1984 and 4 April 2002, and provided that if a person acquired the citizenship of another country they ceased to be an Australian citizen if the "sole or dominant purpose" of their actions was to acquire the other citizenship.

88 Independent National Security Legislation Monitor (Bret Walker SC), *Annual Report* (28 March 2014) at 54.

a person who cannot possibly answer that description. It falls near the heart of the first aspect of the aliens power.

(ii) Other heads of power

46. For the reasons addressed in paragraph 30 above, while in one sense "citizenship" is a statutory concept, it is a statutory concept with constitutional significance. When that statutory status derives from a law enacted in the exercise of the first aspect of the aliens power, it is the persons who do not hold the statutory status of "citizen" who constitute the class to whom the second aspect of the aliens power applies (subject only to the exception held to exist in *Love*).

47. If the Court were to find that the first aspect of the aliens power does *not* support s 36B, it may be that the Parliament could, by another law supported by heads of power other than s 51(xix), specify conditions upon which statutory status as a citizen would cease. The cessation of citizenship pursuant to such a law may have consequences under other Commonwealth or State statutes that attribute significance to holding the status of "Australian citizen" (including, for example, the right to vote, to hold certain public offices, and to receive social security). It would not, however, have the constitutional significance identified in the previous paragraph for the reach of the second aspect of the aliens power. Such a law would therefore fracture the unity that presently exists (again, subject only to the exception held to exist in *Love*) between status as a non-citizen and status as an alien. For that reason, the defendants withdraw their foreshadowed reliance on other heads of power to support s 36B of the Citizenship Act.

Question 1(b): Implied limit precluding deprivation of citizenship

48. The plaintiff submits that there is an implied limitation on Commonwealth legislative power which prevents the Parliament from depriving one of the "people of the Commonwealth" of that status: PS [41].

49. The plaintiff's primary contention is that there is an ***absolute*** limit to the effect that the Parliament has no power to deprive a person of their citizenship: PS [41]-[46]. In asserting such a limit, the plaintiff fails to grapple with the matters set out in paragraphs 35 to 40 above, which demonstrate that s 51(xix) includes power to "determine the legal basis by reference to which Australia deals with matters of nationality … to create and define the concept of Australian citizenship [and] to prescribe the conditions on which

such citizenship may be acquired ***and lost***".[89] The plaintiff's submission that the authorities recognising the power to prescribe the conditions on which citizenship may be lost are "properly understood as being limited to" fraud, the right to change nationality, and changes in sovereignty is mere assertion: cf PS [31], [50]. That submission fails to explain the much wider power governing the loss of status as a British subject that existed under the 1870 Act. As the laws summarized in paragraphs 39–40 above reveal, for over 100 years the Federal Parliament has legislated on the basis that it has the same power.

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50. If there is "an implied limitation in s 51(xix), which prevents the Parliament from turning a citizen into an alien" (PS [30]), then all of the provisions summarized in those paragraphs must also have been invalid (including the long-standing provisions – modelled on the 1870 Act – whereby an application for foreign citizenship caused the loss of British subject status). Further, the argument "lacks coherence",[90] not least because no principled basis is advanced to explain why s 51(xix) supports a law that specifies the criteria by which a citizen may voluntarily renounce Australian citizenship (which the plaintiff accepts: PS [50]), but does not support a law that characterises particular voluntary conduct as an implied renunciation of citizenship. Such a proposition "sits uncomfortably with any notion of allegiance that is bilateral".[91]

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51. In its submissions on this aspect of the case, in substance the plaintiff invites the Court to identify a new implied limit on Commonwealth legislative power. It is, however, well settled that implications limiting Commonwealth legislative power will be drawn only if, and to the extent that, the implication is necessary to give effect to the text or structure of the Constitution.[92] It is not enough to show that the suggested implication is reasonable or desirable.[93] The necessity test poses a high bar, it being the clear intention of the

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89 *Ex parte Te* (2002) 212 CLR 162 at [31] (Gleeson J) (emphasis added), cited with approval in *Koroitamana* (2006) 227 CLR 31 at [48] (Gummow, Hayne and Crennan JJ), which also cites *Ex Parte Te* (2002) 212 CLR 162 at [58] (Gaudron J), [90] (McHugh J), [108]-[109] (Gummow J), [193]-[194] (Kirby J), [210]-[211] (Hayne J), [229] (Callinan J). See also *Shaw* (2003) 218 CLR 28 at [2] (Gleeson CJ, Gummow and Hayne JJ, Heydon J agreeing at [190]); *Singh* (2004) 222 CLR 322 at [4] (Gleeson CJ) and [197] (Gummow, Hayne and Heydon JJ).

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90 *Love* (2020) 270 CLR 152 at [218] (Keane J).

91 *Singh* (2004) 222 CLR 322 at [198] (Gummow, Hayne and Heydon JJ), quoted in *Love* (2020) 270 CLR 152 at [218] (Keane J).

92 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567; *Re Gallagher* (2018) 263 CLR 460 at [24] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

93 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at [32]-[33] (Gleeson CJ and Heydon J), [389] (Hayne J, citing *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 134 (Mason CJ)).

framers of the Constitution to confer wide powers upon the Commonwealth Parliament, and to leave it to the people of Australia to protect rights through the democratic process.[94]

52. The references in ss 7 and 24 of the Constitution to "the people" do not support implication that the Parliament cannot legislate for the cessation of citizenship: cf PS [42]-[44]. The fact that the framers rejected a proposal to include a power to make laws with respect to Commonwealth citizenship does not suggest otherwise: cf PS [30].[95] The argument reverses the correct order of analysis. It is pursuant to the first aspect of the aliens power that the Parliament gives meaning to the expression "the people". It may do so by admitting people as members of the Australian body politic, or by excluding them as members (subject to the limits discussed above). If the plaintiff were correct that "the constitution and character" of the people of the Commonwealth is "unalterable by Parliament" (a proposition advanced in PS [44] and supported only, "by analogy", by *Kirk*), that would deny a core function of the aliens power in empowering Parliament to define the criteria for membership of the body politic. The true position is that, as Gageler J said in *Love*, it is pursuant to the aliens power that the Parliament is able to: [96]

> … bring a measure of precision to the identification of those to whom the Constitution refers to as "the people", by laying down criteria for determining with specificity which persons were and which persons were not to have the legal status of members of the body politic of the Commonwealth of Australia.

53. Consistently with the above, this Court has accepted that citizenship is a permissible basis for discriminating between those who are and are not entitled to vote.[97] Indeed, the proposition that a person who has ever been one of "the people of the Commonwealth" cannot cease to be a citizen would prove too much, for it would prevent Parliament providing for people to give up their citizenship voluntarily, or from providing for the loss of citizenship by people who actively fight for foreign states against Australia.

54. As to the plaintiff's arguments based on the rights that attach to citizenship (PS [45]), the plaintiff again reverses the correct order of analysis. Citizenship is a status that, once

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94 *Attorney-General (Cth) (Ex rel McKinlay) v Commonwealth* (1975) 135 CLR 1 at 24 (Barwick CJ), 71 (Murphy J); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 182-183 (Dawson J), 228-229 (McHugh J); *Roach* (2007) 233 CLR 162 at [1] (Gleeson CJ).

95 *Singh* (2004) 222 CLR 322 at [31] (Gleeson CJ), [192] (Gummow, Hayne and Heydon JJ), [247] (Kirby J).

96 *Love* (2020) 270 CLR 152 at [94].

97 *Bennett v Commonwealth* (2007) 231 CLR 91; *Roach* (2007) 233 CLR 162 at [8] (Gleeson CJ); see also *Commonwealth Electoral Act 1918* (Cth) s 93(1)(b).

granted, results in the conferral of rights, duties and privileges.[98] It is circular to take rights that arise from holding that status, and to argue that the fact of holding those rights provides a guarantee of maintenance of the status from which the rights derive.

55. The plaintiff advances an alternative submission that there is a ***qualified*** limitation on the power of the federal Parliament to deprive an Australian citizen of that status, the qualification being that such deprivation cannot occur "otherwise than through an exercise of judicial power under Ch III of the Constitution": PS [47], [48]. That submission must amount to the assertion that the cancellation of citizenship is an *exclusively* judicial power, because otherwise the argument would not explain why the power cannot be conferred on the Minister. Yet the basis for that assertion is not revealed. Instead, the plaintiff submits that the qualified limitation derives textual support from s 44(ii) of the Constitution, which disqualifies a person from being chosen or sitting as a member in Parliament if the person is (inter alia) "attainted of treason": PS [47]. Specifically, the plaintiff submits that s 44(ii) "may be … a constitutional recognition of the incompatibility between status as one of the 'people of the Commonwealth' and treasonous conduct": PS [47]. The argument is difficult to follow, for s 44 says nothing to support the proposition that the cancellation of citizenship is an exclusively judicial function. Further, if it were the case that the criteria for disqualification in s 44 of the Constitution inform the content of the "people of the Commonwealth" in ss 7 and 24, then that would in fact indicate that s 36B did not apply *at all* to the "people of the Commonwealth", because s 36B applies only to dual citizens (who are disqualified from being chosen or sitting in Parliament by s 44(i) of the Constitution).[99] That illustrates that s 44 says nothing about the content of the "people of the Commonwealth", for were it otherwise dual citizens would be constitutionally prevented from voting.

56. In the further alternative, the plaintiff submits that exclusion from citizenship must be supported by "substantial reasons": PS [49]. Again, reliance on jurisprudence that relates to voting rights is misconceived for similar reasons to those identified in paragraphs 53 and 54 above. Consideration of the principles that underpin the "substantial reason" test further demonstrate the error. That test requires provisions excluding people from the franchise to be "reasonably appropriate and adapted to serve an end which is consistent

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98 *Love* (2020) 270 CLR 152 at [95] (Gageler J). As to the meaning of "status" in this context, see also *Ford v Ford* (1947) 73 CLR 524 at 529 (Latham CJ).

99 *Re Canavan* (2017) 263 CLR 284 at [25].

or compatible with the maintenance of the constitutionally prescribed system of representative government".[100] Such a test is appropriate when assessing the validity of a law that seeks to regulate the franchise, for it serves to ensure that a restriction of the franchise is tailored to, and serves a purpose, that is consistent with the system of direct election established by the Constitution.[101] It is not, however, appropriate to determine the validity of a law specifying criteria to determine whether a person should be permitted to become or remain a member of the Australian body politic. Such a law is properly concerned with a wider range of considerations. A law that deprives a person of citizenship is not a law with respect to the franchise, notwithstanding the fact that the right to vote will be lost as one amongst many consequences of the loss of that status. Accordingly, while the law that confines the franchise to Australian citizens[102] must be (and plainly is) "consistent or compatible with the maintenance of the constitutionally prescribed system of representative government", that test has no relevance to the anterior question of the validity of the criteria that determine Australian citizenship.

57. Further and alternatively, the defendants submit that, even if the "substantial reason" test is relevant, it will be satisfied whenever a person loses their right to vote in consequence of loss of citizenship under s 36B. The object of s 36B is to recognise 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: s 36A. Repudiation of allegiance, at least in the confined circumstances in which s 36B(1) is engaged, justifies permanent exclusion from the Australian community.[103] Section 36B is reasonably appropriate and adapted to that object because, while an exercise of power under that section may have serious consequences, the power is enlivened only in circumstances of correlative gravity. Further, any complaint that a determination under s 36B(1) was made in circumstances that did not meet the legislative requirements can be subject to judicial review, with the benefit of reasons both for the initial determination and any refusal to revoke it. If

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100 *Roach* (2007) 233 CLR 162 at [85] (Gummow, Kirby and Crennan JJ); cf *Love* (2020) 270 CLR 152 at [101] (Gageler J).

101 *Roach* (2007) 233 CLR 162 at [8] (Gleeson CJ); *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at [23] (French CJ).

102 *Commonwealth Electoral Act* 1918 (Cth) s 93(1)(b).

103 See, by analogy, *Roach* (2007) 233 CLR 162 at [12] (Gleeson CJ).

necessary, it should therefore be concluded that s 36B only enables the Minister to deprive a person of citizenship, and therefore of the right to vote, for a substantial reason.

Question 1(c): Substantial reason for disenfranchisement

58. The plaintiff's submissions on this ground are, to a large extent, premised on the same misconception as that addressed in the section above: ie that a right that exists only as a *consequence* of status as a citizen thereafter prevents *removal* of that status. That criticism is not a submission about form over substance: cf PS [53]. The substance of a law that deprives a person of Australian citizenship is quite different to that of a law that deprives an Australian citizen of the right to vote, notwithstanding that one consequence of a law of the former kind is to deprive the person of the right to vote (as one amongst *many consequences* of exclusion from membership of the Australian body politic). A law about membership of the body politic is permissibly concerned with matters of a quite different kind to those that are relevant to the extent of the franchise. Accordingly, there is no constitutional basis to apply the "substantial reason" test to a law such as s 36B, which concerns membership of the Australian body politic.

59. Nevertheless, on the premise that the "substantial reason" test is relevant to the validity of s 36B, the plaintiff submits that s 36B is not reasonably appropriate and adapted to serve an end that is compatible with the maintenance of the constitutionally prescribed system of representative government: PS [54]. Specifically, he submits that s 36B is over-inclusive, permanent in operation and unjustified given the prior state of the law. Even if the substantial reason test is relevant to the validity of s 36B, each of those submissions should be rejected.

60. ***Over-inclusiveness:*** The plaintiff submits that s 36B(5) captures conduct that is "quite innocent" because it does not import the "fault element" from the *Criminal Code*: PS [55]-[59]. He goes so far as to submit that it extends to "the mere act of travelling overseas" (PS [56]) and to "banal and quotidian acts involving ***no repudiation of civic responsibility*** at all, let alone of a kind that could warrant the temporary withdrawal of the right to vote": PS [62] (emphasis added). That submission should be rejected. The conduct that falls within s 36B(1)(a) and (5) is more narrowly tailored than the plaintiff asserts (see paragraphs 17 to 22 above). But more critically, the plaintiff makes a fundamental error in focusing on s 36B(5) to the exclusion of the balance of the section. Citizenship can cease under s 36B only if the Minister is satisfied that a person has

engaged in the conduct specified in s 36(5) ***and also*** that that conduct demonstrates that the person has repudiated their allegiance to Australia and that it would be contrary to the public interest for the person to remain an Australian citizen. The plaintiff's submissions entirely fail to address s 36B(1)(b) and (c), or the public interest criteria in s 36E, which together deny the possibility that loss of citizenship may result from "the mere act of travelling overseas": PS [56].

61. ***Permanence***: The plaintiff's submissions at PS [63]ff are premised on the misconstruction of s 36B identified in the previous paragraph. They also overlook that the deprivation of citizenship is not necessarily permanent, as it may be revoked on application by the affected person (s 36H) or on the Minister's own motion (s 36J). Further, even if the cessation of citizenship *is* permanent, the narrowness of the criteria in s 36B ensures that in circumstances where it applies the resultant loss of the right to vote will have occurred for substantial reasons. The plaintiff's submission that there is *no legitimate end* that could justify permanently denying the right to vote is simply another way of asserting that Parliament can never remove a person's citizenship: cf PS [64]. That assertion should be rejected for the reasons set out in answer to Question 1(b).

62. ***Prior state of the law:*** The plaintiff's submissions at PS [65]-[72] involve hyperbolic rhetoric that grossly mischaracterise the operation of s 36B. To the extent that they advance legal propositions at all, those propositions are so far removed from the actual terms or operation of s 36B that they warrant no answer (see, in particular, the first and last sentences of PS [66], [67] and the second sentence of [71]).

Question 1(e): Judicial power

63. The function of "adjudging and punishing criminal guilt" is undoubtedly "exclusively judicial".[104] In the specific case of laws that involve detention in custody, there is a "default characterisation"[105] that such laws are penal or punitive, which can be displaced only if they are shown to serve a non-punitive purpose. Unless such a purpose exists, a law that involves detention in custody is treated, as a matter of substance, as imposing

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104 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 (***Lim***) at 27 (Brennan, Deane and Dawson JJ); see also *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 (***Falzon***) at [15].

105 *NAAJA v NT* (2015) 256 CLR 569 at [98] (Gageler J). See, also, *Falzon* (2018) 262 CLR 333 at [24] (Kiefel CJ, Bell, Keane and Edelman JJ); *Benbrika* (2021) 95 ALJR 166 at [40] (Kiefel CJ, Bell, Keane and Steward JJ), [73] (Gageler J).

punishment of a kind that under Ch III of the Constitution can be imposed only by a court as an incident of the exclusively judicial function of adjudging and punishing criminal guilt. That was the holding in *Lim*,[106] and it has been applied many times since. Critically, however, *Lim* says nothing about laws that do *not* involve detention in custody.[107]

64. Neither the legal nor practical operation of s 36B involves detention in custody.[108] Accordingly, the plaintiff's Ch III challenge to that provision must establish – without the assistance of any default characterisation – that s 36B purports to confer power of an *exclusively judicial kind* upon the Minister. In accordance with ordinary principles, that requires close attention to the particular features of the power conferred by s 36B that are said to give it an exclusively judicial character.[109]

65. Neither *Lim*,[110] nor any other authority of this Court, holds that it is an exclusively judicial function to take any step that inflicts involuntary hardship or detriment on a person. As Gleeson CJ explained in *Re Woolley; Ex Parte Applicants M276/2003*:[111]

> The proposition that, ordinarily, the involuntary detention of a citizen by the State is penal or punitive in character was not based upon the idea that all hardship or distress inflicted upon a citizen by the State constituted a form of punishment, although colloquially that is how it may sometimes be described. Taxes are something said, in political rhetoric, to be punitive. That is a loose use of the term. *Punishment, in the sense of the inflicting of involuntary hardship or detriment by the State, is not an exclusively judicial function.*

66. In any case, the deprivation of citizenship does not necessarily inflict any hardship or detriment. As already noted, s 36B applies only to dual citizens, and some dual citizens may be free to reside in the country of their other citizenship and may suffer no hardship or detriment as a result of doing so. For other individuals, loss of Australian citizenship may cause detriment or hardship, including separation from family or employment. But such hardship or detriment, if it occurs, is the result of particular individual circumstances.

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106 *Lim* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ), 10 (Mason CJ agreeing).

107 See *Thomas* (2007) 233 CLR 307 at [18] (Gleeson CJ), [114]-[121] (Gummow and Crennan JJ), [600] (Callinan J, agreeing with Gummow and Crennan JJ), [651] (Heydon J, agreeing with Gleeson CJ and Gummow and Crennan JJ).

108 If such detention occurs, that can only be the result of some other law (such as s 189 of the *Migration Act 1958* (Cth)), the validity of which could be tested against the *Lim* principle.

109 *Visnic v Australian Securities and Investments Commission* (2007) 231 CLR 381 (***Visnic***) at [10] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ). See, also, *Palmer v Ayres* (2017) 259 CLR 478 at [47] (Gageler J); *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542 (***Alinta***) at [10] (Gummow J), [160] (Crennan and Kiefel JJ); *R v Davison* (1954) 90 CLR 353 at 369-370 (Dixon CJ and McTiernan J).

110 (1992) 176 CLR 1.

111 (2004) 225 CLR 1 (***Re Woolley***) at [17] (emphasis added); *Minogue v Victoria* (2019) 268 CLR 1 at [31] (Gageler J); *Pollentine v Bleijie* (2014) 253 CLR 629 at [70] (Gageler J); *Kamha v Australian Prudential Regulation Authority* (2005) 147 FCR 516 at [69] (Emmett, Allsop and Graham JJ).

The variable and idiosyncratic nature of any such hardship points against characterising that possible consequence of loss of citizenship as punishment, let alone as punishment that can be imposed only by a court following a determination of criminal guilt.

67. An examination of the text and operation of s 36B confirms that it does not purport to confer judicial power on the Minister. As explained in paragraph 15 above, the power conferred by s 36B(1) is to make a determination that a person's citizenship ceases upon the Minister's satisfaction of three criteria: defined past conduct, the characterisation to be afforded to that past conduct, and public interest criteria.

68. Chapter III does not preclude executive decision-makers from being empowered to ascertain facts and apply a rule or standard to those facts. That is so even if the power in question involves terminating a right or status, created by statute, by reference to past conduct.[112] A power of that kind is not inherently judicial.[113] While it bears some of the hallmarks of judicial power, it lacks others, including the often central feature of deciding of a controversy between parties as to the existence of present rights and obligations.[114] Powers of that kind commonly take their character from that of the person or body on which they are conferred.[115]

69. Turning specifically to the conduct criteria in s 36B(1)(a), there is nothing inherently judicial about the Minister forming a state of satisfaction about whether conduct has occurred, including where the conduct is defined by reference to one element of a criminal offence. As this Court explained in *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd*,[116] "it is not offensive to principle that an administrative body is empowered to determine whether a person has engaged in conduct that constitutes a criminal offence as a step in the decision to take disciplinary or other action". That being

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112 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 (***Tasmanian Breweries***) at 397-398 (Windeyer J); *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350 (***Albarran***) at [29] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ).

113 *Albarran* (2007) 231 CLR 350 at [29] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ).

114 *Alinta* (2008) 233 CLR 542 at [93]-[94] (Hayne J); *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357 (Griffith CJ).

115 See *White v Director of Military Prosecutions* (2007) 231 CLR 570 at [48] (Gummow, Hayne and Crennan JJ); *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 at [15] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 (***Precision Data***) at 189; *R v Hegarty; Ex parte the Corporation of the City of Salisbury* (1981) 147 CLR 617 at 628 (Mason J), 632 (Murphy J); *R v Quinn; Ex parte Consolidated Food Corporation* (1977) 138 CLR 1 at 18 (Aickin J); *R v Davison* (1954) 90 CLR 353 at 368-369 (Dixon CJ and McTiernan J).

116 (2015) 255 CLR 352 at [33] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

so, it would be wrong to construe s 36B(1) as purporting to confer judicial power on the Minister simply because it requires the Minister to be satisfied that conduct has occurred where that conduct is an element of a criminal offence.

70. Further, the public interest criteria in s 36B(1)(c) poses a considerable hurdle to characterising s 36B as purporting to confer exclusively judicial power, because the "public interest is a concept which attracts indefinite considerations of policy that are more appropriate to law-making than to adjudication according to existing law".[117] That is particularly so where the exercise of the power will involve consideration of Australia's international relations (see s 36E(2)(h)), that being quintessentially an executive function.

71. Having regard to the three criteria that enliven s 36B, a determination under that section will not involve any finding that a criminal offence has been committed, let alone the imposition of punishment for such an offence. It is not a determination of extant rights,[118] nor a final and conclusive quelling of a controversy.[119] It plainly will not result in the rights and obligations the subject of that controversy merging in a judgment,[120] and will not give rise to issue estoppel or merger.[121] It may not even cause an individual to suffer hardship or distress. But, even if it does, that cannot properly be characterised as a result that is permissible only in the exercise of exclusively judicial power in consequence of a finding of criminal guilt. To the contrary, historically loss of citizenship of the kind that can result from s 36B has been the result of the exercise of legislative or executive power, not judicial power (see paragraph 40 above). For all of those reasons, it is not a power of a kind that can be conferred only upon a court.

72. The plaintiff's submissions at PS [76]-[78], which identify historical instances of the imposition of "denationalisation" as punishment, do not advance his case. The fact that deprivation of citizenship has sometimes been imposed as punishment (particularly when imposed on people who are *not* dual citizens) does not have the consequence that it will

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117 *Tasmanian Breweries* (1970) 123 CLR 361 at 400 (Windeyer J); see also *Alinta* (2008) 233 CLR 542 at [1], [6] (Gleeson CJ), [9] (Gummow J), [95]-[96] (Hayne J), [106], [166]-[169], [176] (Crennan and Kiefel JJ); *Albarran* (2007) 231 CLR 350 at [29] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ). See also *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2015) 255 CLR 231 at [18] (the Court); *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at [42].

118 *Precision Data* (1991) 173 CLR 167 at 189.

119 *New South Wales v Kable* (2013) 252 CLR 118 at [34] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *Abebe v The Commonwealth* (1999) 197 CLR 510 at [118] (Gaudron J).

120 *Tomlinson v Ramsay Food Processing Pty Ltd* (2015) 256 CLR 507 at [20] (French CJ, Bell, Gageler and Keane JJ); *Alinta* (2008) 233 CLR 542 at [158]-[159] (Crennan and Kiefel JJ).

121 *Pearce v The Queen* (1998) 194 CLR 610 at [59]-[61].

always be imposed as a form of punishment for criminal offending, any more than detention[122] or the exaction of a monetary sum[123] will always constitute punishment for criminal offending. So much is illustrated by the laws that for many years provided for the loss of citizenship upon the voluntary acquisition of the citizenship of a foreign country or upon marriage to a foreign national.

73. Finally, contrary to the plaintiff's submission that s 36B is a "radical power with no precedence in Australia legal history" (PS [79]), provisions in the general nature of s 36B were first enacted in Australia in 1917 and have remained in Australian citizenship legislation, in one form or another, ever since (see paragraph 40 above). The balance of the submissions at PS [79] again entirely ignore s 36B(1)(b) and (c), and as a result grossly mischaracterise the effect of s 36B.

Answers to questions

74. The questions in the special case should be answered: (1)(a): No. (1)(b): No. (1)(c): No. (1)(d): Not necessary to answer. (1)(e) No. (2): None. (3): The plaintiff.

PART VI ESTIMATE OF TIME

75. The defendants estimate that it will require approximately 3.5 hours for the presentation of oral argument.

Dated: 10 December 2021

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[122] *Lim* (1992) 176 CLR 1 at 25, 33 (Brennan, Deane and Dawson), 10 (Mason CJ agreeing). See, also, *Benbrika* (2021) 95 ALJR 166 at [41] (Kiefel CJ, Bell, Keane and Steward JJ): "This Court has consistently held, and most recently in *Fardon*, that detention that has as its purpose the protection of the community is not punishment" (footnote omitted).

[123] *Re Woolley* (2004) 225 CLR 1 at [17] (Gleeson CJ).

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **DELIL ALEXANDER**
(BY HIS LITIGATION GUARDIAN BERIVAN ALEXANDER)
Plaintiff

and

MINISTER FOR HOME AFFAIRS
First Defendant

COMMONWEALTH OF AUSTRALIA
Second Defendant

ANNEXURE TO THE SUBMISSIONS OF THE FIRST AND SECOND DEFENDANTS

Pursuant to paragraph 3 of the *Practice Direction No 1 of 2019*, the First and Second Defendants set out below a list of the particular constitutional provisions and statutes referred to in their submissions.

No	Title	Provision(s)	Version
Commonwealth			
1.	*Acts Interpretation Act 1901* (Cth)	s 33(2A)	Current (Compilation No. 36, 20 December 2018 – present)
2.	*Administrative Decisions (Judicial Review) Act 1977* (Cth)	s 13	Current (Compilation No. 115, 1 September 2021 – present)
3.	*Australian Citizenship Act 2007* (Cth)	Preamble, ss 26-28, 33, 34, 36A, 36B, 36E(2), 36H, 36J, 36K(1)(c)	Current (Compilation No. 29, 18 September 2020 – present)
4.	*Australian Citizenship Act 2007* (Cth)	ss 33AA and 35	As at 17 September 2020 (Compilation No. 28, 6 September 2020 – 17 September 2020)
5.	*Australian Citizenship Amendment Act 1984* (Cth)	s 13	As made (25 October 1984)
6.	*Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth)	Whole Act	As made (11 December 2015)
7.	*Australian Citizenship Amendment*	Sch 1, cls 17(7), (9),	As made (17

	(Citizenship Cessation) Act 2020 (Cth)	18(1)	September 2020)
8.	*Australian Security Intelligence Organisation Act 1979* (Cth)	s 37(1)	Current (Compilation No. 64, 1 September 2021 – present)
9.	*Commonwealth Electoral Act 1918* (Cth)	s 93(1)(b)	Current (Compilation No. 71, 3 September 2021 – present)
10.	*Constitution*	ss 7, 24, 44, 51(xix), Ch III, 75	Current (Compilation No. 6, 29 July 1977 – present)
11.	*Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth)	Sch 1, cl 110	As made (3 November 2014)
12.	*Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth)	s 6	As made (14 April 1978)
13.	*Criminal Code* (Cth)	ss 4.1(1), (2), 4.2(1), 100.1(1), 101.1, 101.2, 102.1, 102.2, 102.4, 103.1, 103.2, 117.1, 119.2, 119.3	As at 3 July 2021 (Compilation No.138, 28 March 2021 – 31 August 2021)
14.	*Criminal Code Amendment (Terrorism) Act 2003* (Cth)	Sch 1	As made (27 May 2003)
15.	*Criminal Code (Foreign Incursions and Recruitment – Declared Areas) Declaration 2014 – Al Raqqa Province, Syria 2014* (Cth)	Whole instrument	As made (4 December 2014)
16.	*High Court Rules 2004* (Cth)	r 27.08.5	Current (Compilation No. 24, 21 December 2019 – present)
17.	*Judiciary Act 1903* (Cth)	ss 39B, 78B	Current (Compilation No. 48, 1 September 2021 – present)
18.	*Migration Act 1958* (Cth)	s 189	Current (Compilation No. 152, 1 September 2021 – present)
19.	*Nationality Act 1920* (Cth)	ss 7(4), 12(1), (2)(a), 18, 21, 22, 31, Sch 3	As made (2 December 1920)
20.	*Nationality Act 1922* (Cth)	s 7	As made (18 October 1922)
21.	*Nationality and Citizenship Act 1948* (Cth)	ss 17, 18, 19, 20, 21(1), (4)-(5), 50	As made (21 December 1948)

22.	*Nationality and Citizenship Act 1958* (Cth)	s 7	As made (8 October 1958)
23.	*Naturalization Act 1903* (Cth)	s 11	As made (13 October 1903)
24.	*Naturalization Act 1917* (Cth)	s 7	As made (20 September 1917)
Foreign			
25.	*Canadian Citizenship Act*, SC 1946, c 15	s 17(2)	As made (27 June 1946)
26.	*Citizenship Act 1977* (NZ)	s 16(a)	Current (1 December 2020 – present)
27.	*Civil Code* (France)	Arts 23-8, 25	Current (26 August 2021 – present)
28.	*Law on the Acquisition and Loss of Confederative and State Citizenship of 1870* (North German Reichstag)	Art 22	As made (1 June 1870)
29.	*Nationality Act of 1892* (Netherlands)	Art 7(4)	As made (12 December 1892)
30.	*Nationality Act of 22 July 1913* (Germany)	ss 17(1)(5), 28(1)	As at 20 November 2019
31.	*Nationality Act of 1940*, 8 USC §§ 501 and following (1940)	§ 801(c)	As made (14 October 1940)
32.	*Nationality Act of 1984* (Netherlands)	Art 14(4)	Current (1 April 2020 – present)
33.	*Naturalization Act 1870* (Imp)	ss 4, 6, 7, 10(1), 16	As made (12 May 1870)
34.	*Strengthening Canadian Citizenship Act*, SC 2014, c 22	Whole Act	As made (19 June 2014)