HIGH COURT OF AUSTRALIA

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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

10 and

MINISTER FOR HOME AFFAIRS
First Defendant

COMMONWEALTH OF AUSTRALIA
Second Defendant

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PLAINTIFF'S SUBMISSIONS

Part I: Certification

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

Part II: Issues

2. This proceeding concerns the constitutional validity of s 36B of the *Australian Citizenship Act 2007* (Cth) (**Citizenship Act**). The Plaintiff contends that s 36B of the Citizenship Act is constitutionally invalid, on grounds set out at vol 1 tab 1 (**1/1**), p.3 of the Special Case Book (**SCB**). Ground 4 is not pressed.

Part III: Section 78B Notice

3. The Plaintiff issued s 78B notices to all Attorneys-General on 23 July 2021 (SCB 1/2).

Part IV: Facts

4. The Plaintiff is a natural-born Australian citizen (SC [8]).[1] He was born in Sydney on 5 August 1986, at a time when the Citizenship Act provided that any person born in Australia was a citizen.[2] Because the Plaintiff's parents were citizens of Turkey, he also acquired Turkish citizenship at birth under Turkish law (SC [9]).

5. On 16 April 2013, at age 26, the Plaintiff departed Australia, indicating on his outgoing passenger card that his destination was Turkey (SC [12]). Seventeen days later, on 3 May 2013, the Plaintiff was married in Idlib, Syria (SC [16]).

6. In a Qualified Security Assessment of the Plaintiff dated 16 June 2021 (**QSA**, SC-3), ASIO assessed that the Plaintiff had joined the Islamic State by August 2013 (SC [19]), by which time Islamic State had been listed as a terrorist organisation (SC [41]). The Plaintiff has applied for judicial review of the QSA (SC [31A]).

7. On 29 June 2014, an Islamic caliphate was announced (SC [43]). Between 4 December 2014 and 27 November 2017, al-Raqqa Province in Syria was a "Declared Area" for the purposes of s 119.3 of the *Criminal Code* (Cth) (SC [32], [44], [49]). It is an agreed fact that ASIO "assesses" that the Plaintiff "*likely* entered or remained in al-Raqqa Province in Syria on or after 5 December 2014" (SC [19]). The basis for this assessment is not in evidence, and the Plaintiff has not been told *when* it is alleged that he entered or remained in al-Raqqa Province. Since it is not suggested that the Plaintiff was

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1 Amended Special Case dated 22 October 2021 (**SC**), [8]. The SC is at vol 1 tab 5 (**1/5**) of the SCB.
2 *Australian Citizenship Act 1948* (Cth), s 10(1).

automatically deprived of citizenship (see SC [83]), the Court should infer that the "foreign incursion" occurred prior to 12 December 2015.

8. Islamic State lost the last of its territory in March 2019 (SC [38]). ASIO has reported to the Commonwealth Parliament that ISIL's caliphate "has been crushed and it has lost its safe havens and organised military capability" (SC-23, p.333, our emphasis). As at May 2021, Islamic State is waging a "low level insurgency across Syria and Iraq, with an estimated force of 8-16,000 fighters", with a "limited ability to hold terrain or launch complex attacks", and having as its main activities "intimidation and financial shakedowns of local merchants and farmers" (SC [40]).

9. The Special Case contains a detailed discussion of "foreign fighters" (SC [55]-[81]), a term which is defined by ASIO as "Australians who have participated in foreign conflicts or undertaken training with extremist groups overseas" (SC [56], our emphasis). The Plaintiff is not a "foreign fighter" according to this definition: there is no evidence that the Plaintiff "participated" in the conflict or undertook training with extremist groups. The Special Case is devoid of facts of that kind.

10. In November 2017, the Plaintiff was arrested by Kurdish militia in a place in Syria which was not a Declared Area (SC [20]). There have been reports of this occurring arbitrarily, simply because the person is "*perceived* to be" an opponent of the State (SC [21]). The Court should infer that the Plaintiff was tortured and forced to sign a document without reading it (SC [22]). He was then transferred to Syrian custody (SC [20]), and convicted of unspecified offences against the Syrian Penal Code (SC [23]). On 21 January 2019, the Plaintiff was sentenced to 15 years' imprisonment, later reduced to five years' imprisonment (SC [23]). The Court should infer that, in June 2021, having served around 18 months of his term, the Plaintiff was pardoned (SC [24]).

11. Shortly thereafter, on 16 June 2021, the Director-General of Security, ASIO, furnished a classified QSA to the Minister, for the purpose of providing "security advice to the [Minister] on whether it would be consistent with the requirements of security for prescribed action to be taken under the [Citizenship Act] in respect of [the Plaintiff]" (SC [28], our emphasis). Importantly, ASIO did not recommend citizenship cancellation or any other prescribed action (SC-3, p.91 [3]),

12. On 2 July 2021, the First Defendant determined that the Plaintiff "ceases to be an Australian citizen" (SC-5) (the **Decision**). Apart from its proximity to the pardon, the timing of the Decision is unexplained. In making the Decision, the Minister "relied in

part on the classified QSA", but was not required to and did not provide reasons (SC [29]). On 7 July 2021, the First Defendant sent a letter to an address in a suburb of Sydney notifying the Plaintiff of the decision.[3]

13. Following the Decision, the Plaintiff was transferred to the Branch 235 prison in Damascus, Syria, which is operated by Syrian intelligence (SC [25]). Since then, the Plaintiff's family and lawyers have been unable to contact him (SC [25]), with the result that this proceeding is being conducted by and through a litigation guardian. The Court should infer that the reason the Plaintiff remains in detention in Branch 235 is that he is no longer an Australian citizen, and that if he is still an Australian citizen it may assist him in obtaining release from custody (SC [25]). It is an agreed fact that the detention of prisoners in government-controlled prisons in Syria has been associated with serious human rights violations including torture, and there are reports of prisoners dying in government-controlled prisons in Syria as a result of torture and ill treatment (SC [21]).

Part V.1: Ground 1

14. Ground 1 is that s 36B of the Citizenship Act is not supported by any head of legislative power. The Defendants rely on four placita. Before addressing them, two threshold matters arise.

15. *First*, the Citizenship Act is not itself concerned with creating rights, privileges, immunities, or duties.[4] Australian citizenship creates a status, which controls the operation *both* of constitutional rights and protections,[5] *and* of federal and state legislation that operates to confer or deny rights, privileges, immunities or duties.[6] Of principal importance in the present case are the right to enter and remain in Australia,[7] the (qualified) entitlement to an Australian passport,[8] and the right and duty to vote in federal elections.[9]

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3 The letter incorrectly stated that the decision was made on 2 June 2021 (SC-6), which was corrected by letter dated 9 July 2021 (SC-7). Nothing turns on the error.

4 *Hwang v The Commonwealth* (2005) 222 ALR 83 (***Hwang***) at [13] (McHugh J).

5 Eg *Love v Commonwealth* (2020) 94 ALJR 198 (***Love***) at [95] (Gageler J), referring to s 117 of the Constitution; see also *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 (***Chu Kheng Lim***) at 29 (Brennan, Deane and Dawson JJ) referring to the "protection which Ch III of the Constitution provides, in the case of a citizen, against imprisonment otherwise than pursuant to judicial process."

6 See generally Pillai, "The Rights and Responsibilities of Australian Citizenship: A Legislative Analysis" (2014) 37(3) *Melbourne University Law Review* 736 at 751ff.

7 *Love* at [95] (Gageler J), [440] (Edelman J); *Migration Act 1958* (Cth), ss 4 and 42.

8 *Australian Passports Act 2005* (Cth), s 7. The entitlement is subject to Pt 2 Div 2.

9 *Commonwealth Electoral Act 1918* (Cth), s 93(1)(b)(i).

16. *Secondly*, it is relevant to characterisation that s 36B is a "peculiar" or "drastic" measure, and that it pursues "an extreme course".[10] A notable feature of the drafting of s 36B is that it speaks in the passive voice of a person "*ceas[ing]* to be an Australian citizen". This rhetorical feature does not obscure that s 36B is a measure which achieves the denationalisation and banishment of an Australian citizen. Banishment is a "fate universally decried by civilised people."[11] It was regarded historically as a form of "civil death",[12] and involves "the total destruction of the individual's status in organized society", destroying for the individual "the political existence that was centuries in the development."[13] These are punishments of the gravest kind.

Part V.1(a): The Defence Power (s 51(vi))

17. Section 36B of the Citizenship Act is not supported by s 51(vi) of the Constitution: *first*, because it is not properly characterised as a defence measure; *secondly*, because it fails the reasonable proportionality test; and, *thirdly*, to the extent that it authorises outcomes exceeding the permissible boundary of s 51(vi).

18. Section 36B is not a defence measure. The "purpose" of a law for which support is claimed under s 51(vi) is to be collected from the instrument, the facts to which it applies and the circumstances (including the "character of the war") which it calls forth.[14] The purpose of s 36B (as stated in s 36A of the Citizenship Act) is unrelated to defence: it is a symbolic or normative purpose.[15] Section 36B is not limited in its operation to foreign fighters, and only one of the nine "public interest" factors is relevant to defence: s 36E(2)(c). Section 36E(2)(c) has a relatively *modest* operation in that, there being no hierarchy or weighting in s 36E(2), it is for the Minister to determine how much or how little weight to give to it.[16] As drafted, provided the matter was considered, s 36B could

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10 *R v Foster* (1949) 79 CLR 43 at 96-97 (Latham CJ, Rich, Dixon, McTiernan, Williams and Webb JJ); *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 261 (Deane J).

11 *Tropes v Dulles* 356 U.S. 86 (1958) at 102 (Warren CJ), see also at 110-111 (Brennan J).

12 *Newsome v Bowyer* (1729) 24 ER 959 at 960. *Elizabeth Farquhar v His Majesty's Advocate* (1753) Mor 4669, 4670: "a person who is banished the realm for life, is considered as dead with regard to every benefit he enjoys by the municipal law of his country".

13 *Tropes v Dulles* 356 U.S. 86 (1958) at 101 (Warren CJ).

14 *Stenhouse v Coleman* (1944) 69 CLR 457 at 471 (Dixon J); *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 592 (Brennan J).

15 Pillai and Williams, "The Utility of Citizenship Stripping Laws in the UK, Canada and Australia" (2017) 41 *Melbourne University Law Review* 845 at 880-881, arguing that it is "difficult to see how Australia's new citizenship revocation laws will be of more than marginal practical utility from a security perspective", which is "reinforced by the fact that, during the debate over the legislation, no clear case was made that it was needed to fill a particular gap in Australian law."

16 Eg *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41 (Mason J).

be validly exercised even where there is *no* threat posed to the Australian community[17] (and, in the present case, see [11] above). In its practical operation, s 36B is not restricted to "foreign fighters" but instead applies to a person reasonably suspected of committing the *conduct* element of offences (s 36B(5)) which include *mere presence* in a declared place (s 119.2 of the Criminal Code (Cth)). Further, Australia is not at war.

19. Denationalisation and banishment could never properly be characterised as defence measures. The defence power is conferred with respect to "the naval and military defence of the Commonwealth", which here means "the community united as a nation".[18] In the identification of "who or what is to be defended",[19] the body politic "cannot sensibly be treated apart from those who are bound together by that body politic".[20] Australian citizens are critical elements of *that which is to be defended*. To defend the body of citizens by banishing one of them is like "the defence which King Stork extended to the frogs who invoked his assistance".[21]

20. Section 36B fails the reasonable proportionality test. Banishment of citizens plainly does not within the "central conception"[22] of the defence power. Accordingly, it is necessary to apply a "sub-test"[23] of proportionality. It is not settled which test is to be applied,[24] and the test may even depend upon the threat environment.[25] Some judges have favoured a "reasonable necessity" test.[26] In the present case, the nature of the threat environment and the drastic nature of the measure (see [16] above) support the application of the reasonable necessity test. Other judges have favoured a "high

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17 Eg *Bat Advocacy NSW Inc v Minister for Environment Protection Heritage and the Arts* [2011] FCAFC 59 at [44].

18 *R v Sharkey* (1949) 79 CLR 121 at 153 (Dixon J).

19 *Thomas v Mowbray* (2007) 233 CLR 307 (***Thomas v Mowbray***) at 359 [134] (Gummow and Crennan JJ).

20 *Thomas v Mowbray* at 362 [142] (Gummow and Crennan JJ).

21 See *Farey v Burvett* (1916) 21 CLR 433 (***Farey***) at 465 (Gavan Duffy and Rich JJ), referring to Aesop's fable.

22 *Thomas v Mowbray* at 359 [134] (Gummow and Crennan JJ).

23 *Leask v Commonwealth* (1996) 187 CLR 579 at 616 (McHugh J).

24 *Private R v Cohen* (2020) 383 ALR 1 at 24 [94] (Gageler J).

25 *Farey* at 455 (Isaacs J): "If there were no war, and no sign of war, the position would be entirely different"; *Marcus Clark & Co Ltd v Commonwealth* (1952) 87 CLR 177 at 240 (Williams J): "I cannot think that these tests are appropriate to times of peace".

26 *Farey* at 468 (Gavan Duffy and Rich JJ); *Stenhouse v Coleman* (1944) 69 CLR 457 at 466 (Starke J); *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 (***Communist Party Case***) at 226 (Williams J); *Thomas v Mowbray* at 504 [588] (Callinan J); *Private R v Cohen* (2020) 383 ALR 1 at 36 [129]-[130] (Nettle J).

threshold proportionality test".[27] It has been said that this test is "less strenuous"[28] than the "appropriate and plainly adapted" test, which has also been applied to s 51(vi).[29] In the alternative that either of those tests is applied, s 36B nonetheless fails those tests.

21. The proportionality analysis begins with an identification of the "basic facts which give rise to the extension of the power."[30] Here, the Islamic State has been "crushed" (see [8] above). What remains is a residual concern, namely foreign fighters returning to Australia who "may pose an ongoing terrorist threat" (SC [64]; although it is also true that "the distinction between 'home-grown' and 'foreign' terrorist fighters is becoming increasingly blurred").[31] Returned foreign fighters undoubtedly present monitoring and security challenges (SC [80]), but it is also true that the responsible law enforcement agencies have very significant resources at their disposal (SC [81]). There are only 50 returned foreign fighters presently in Australia, only "some" of whom remain of ongoing security relevance, and there are only 65 Australian foreign fighters who remain in Syria or Iraq (SC [76]). Accordingly, the "factors that give such a wide scope to the defence power in a desperate conflict are for the most part wanting".[32]

22. Section 36B will fail the *reasonable necessity* test because there are obvious and compelling alternatives having a less severe impact. Since September 2001, the Commonwealth Parliament has passed at least 92 laws for the stated purpose of combatting the threat of terrorism, in a trend of anti-terrorism "hyper-legislation" far outpacing that of similar democracies.[33] The Commonwealth's powers include: (1) temporary exclusion orders, preventing Australian citizens from re-entering the country;[34] (2) cancelling passports;[35] (3) preventative detention orders;[36] (4) continuing detention orders;[37] and (5) control orders.[38] These powers are complemented by, *inter*

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27 *Communist Party Case* at 199 (Dixon J); see also *Farey* at 442 (Griffith CJ), 449 (Barton J), 455 (Isaacs J), 460 (Higgins J); *Marcus Clark & Co Ltd v Commonwealth* (1952) 87 CLR 177 at 216 (Dixon CJ), 227 (McTiernan J), 247 (Webb J); other references are collected in Herzfeld and Prince, *Interpretation* (2nd ed, 2020), p.401 fn 90.

28 *Richardson v Forestry Commission* (1988) 164 CLR 261 at 312 (Deane J); compare *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 321 (Brennan J).

29 See eg *Wertheim v Commonwealth* (1945) 69 CLR 601 at 605 (Latham CJ).

30 *Communist Party Case* at 254 (Fullagar J).

31 Addendum to the Hague-Marrakech Memorandum; SC-29, p.370.

32 *Communist Party Case* at 203 (Dixon J).

33 Hardy, Ananian-Welsh and McGarrity, "Open Democracy Dossier: Secrecy and Power in Australia's National Security State" (independent research report, September 2021) <https://cdn.getup.org.au/2836-GetUp-Democracy-Dossier.pdf> at p.33, and see Appendix 1.

34 *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth).

35 As occurred here: SCB 52 [27].

36 *Criminal Code* (Cth), Division 105.

37 *Criminal Code* (Cth), Division 105A.

38 *Criminal Code* (Cth), Division 104.

alia, a rule against bail where a person is charged with terrorism offences (unless exceptional circumstances exist),[39] and further protections afforded by State and Territory anti-terrorism laws.[40] By the combined application of these provisions, the Commonwealth (in conjunction with the States and Territories) already possesses ample power to control the circumstances in which the Plaintiff would be permitted to return to Australia, let alone to be at large in the community.

23. For these and the following further reasons, s 36B will also fail the "high threshold" proportionality test. Here, the question is whether denationalisation and banishment of an Australian citizen could "*reasonably be thought* conducive or relevant"[41] to the purpose of defence. Framing the question that way reveals that a question of human dignity is involved – an Australian citizen must be treated "as an end, not as a means to achieve the ends of others".[42] In 1943, at the height of war, it was said that the defence power would never authorise the execution or "cremation" of a person thought to be a security risk.[43] Why then should s 51(vi) be capable of supporting denationalisation and banishment? In the Plaintiff's submission, it does not support such measures (see [19] above). Even if it could support such measures in relation to the most extreme cases, s 36B(1) is not limited to extreme cases, and indeed is not even limited to "foreign fighters" (see [18] above).

24. The following matters also indicate that s 36B of the Citizenship Act is not capable of being considered a reasonable response. The UN Security Council has resolved that Member States are obliged to "ensure" that terrorists are "brought to justice" (SC [68]), and has urged States to develop and implement "prosecution, rehabilitation and reintegration strategies" (SC [69], [71(b)]). Denationalisation under s 36B(1) puts it beyond Australia's power to achieve these things. Section 36B will frequently maroon the former-Australian citizen offshore (SC [65]) – making the person another nation's problem. Here, the other nation is Syria, which is detaining over 1,000 foreign fighters but without the resources, capacity or support to do so indefinitely (SC [67]). Syria, which has no connection to the Plaintiff, and apparently has little regard for human rights of detainees (SC [21]), continues to detain the Plaintiff, notwithstanding that his

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39 See, eg, *Crimes Act 1914* (Cth), s 15AA(1) and (2)(a).
40 See, eg, *Terrorism (High Risk Offenders) Act 2017* (NSW).
41 *Communist Party Case* at 199 (Dixon J, emphasis added).
42 *Clubb v Edwards* (2019) 267 CLR 171 at [51] and [60] (Kiefel CJ, Bell and Keane JJ), quoting Aharon Barak, *The Judge in a Democracy* (2006) at 86.
43 *Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth* (1943) 67 CLR 116 at 152 (Starke J), 162 (Williams J).

prison term has expired, under conditions preventing him from speaking to his lawyers or family (SC [24]-[25]). The UN Security Council has also "welcomed" the adoption of the Hague-Marrakech Memorandum Addendum (SC [71(a)]), which brought together diverse practitioners and policymakers to develop policy responses to the foreign terrorist fighter threat (SC-29, p.361). The Memorandum propounds nineteen "Good Practices" for dealing with foreign fighters, including five addressed to "challenges for detecting, intervening and engaging with returnees" (SC-29, p.367). Denationalisation and banishment are not mentioned; they are the antithesis of the "Good Practices" propounded in the Memorandum.

25. Section 36B is not supported by the defence power to the extent that it authorises a range of outcomes exceeding the boundary of s 51(vi). The vice of s 36B as a measure under s 51(vi) is that, as noted at [18] above, it can apply even to a person who poses no threat to Australian security. It contains "no objective test of the applicability of the power".[44]

26. That difficulty is not capable of being overcome by the availability of judicial review, for three reasons. *First*, whether there is a "constitutional basis for the legislation" is a matter for this Court[45] and that duty cannot be avoided or answered by the possibilities, *either* that the Minister may only exercise the power in s 36B in conformity with the defence power, *or* that a court on judicial review may detect that a decision exceeded the defence power. *Secondly*, judicial review is ineffective to police the constitutional boundary because of certain features of the legislation. Critically, theree is no duty to give reasons under s 36B. In the present case, this Court does not know why, despite ASIO not recommending it, the Minister made the Decision or whether the Decision was within s 51(vi). Whilst there is a duty to give reasons under s 36H, the focus of that provision is inverted,[46] and the Court will not be furnished with the classified information which is likely to be determinative to validity under s 51(vi). *Thirdly,* judicial review is ineffective because the practical outcome of denationalisation "will frequently be to situate the individuals offshore" (SC [65]). This has serious implications for the availability and conduct of litigation. Being situated offshore may prevent a person from making an application under s 36H within 90 days (s 36H(2)(a)), for example because the person did not receive the written notice which can be provided

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44 *Communist Party Case* at 193 (Dixon J).
45 *Communist Party Case* at 222 (Dixon J).
46 In that the onus to persuade the Minister of the matters in s 36H(3) is on the applicant.

by post to their last known address in Australia (s 36F(2)).[47] Being situated offshore may, and in this case did, have a very serious impact on the individual. The Plaintiff has been moved to an intelligence prison, where he is being held, notwithstanding that his prison term has expired, under conditions preventing him from speaking to his lawyers or family (SC [24]-[25]).

27. The Plaintiff conducts this litigation only through a litigation guardian: he cannot provide instructions, including factual instructions of a kind that would enable a meaningful application under s 36H or the conduct of appropriate judicial review on his behalf to ensure that constitutional boundaries were not transgressed. There is no reason to think that the Plaintiff's position is unique in this respect. Thus, s 36B carries within it an unacceptable possibility that a range of constitutionally unsupportable decisions would be functionally immune from judicial review. For this reason, the failure to limit s 36B to constitutionally permissible outcomes, ie to incorporate textually the requirement for constitutional justification, results in invalidity.[48]

Part V.1(b): The Aliens Power (s 51(xix))

28. Section 36B of the Citizenship Act is not supported by s 51(xix)[49] because an Australian citizen is not an "alien". There has been widespread support[50] in this Court for the proposition that Parliament "cannot, simply by giving its own definition of 'alien', expand the power under s 51(xix) to include persons who could not possibly answer the description of 'aliens' in the ordinary understanding of the word."[51] A natural-born Australian citizen is a person who cannot possibly answer the description of "alien". Alienage describes a lack of formal legal relationship with the community or body politic,[52] whereas a citizen is a person who is recognised as a formal member of the community.[53]

29. Section 36B is apt to be characterised as a law about status (see [15] above). But two premises in its drafting are fatal to its validity under s 51(xix). The *first* premise is that

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47 In the present case, the notice was sent to an address in Glebe, which the Plaintiff cannot have occupied at least since he departed this country in 2013.

48 See generally Stellios, *Zine's The High Court and the Constitution* (6th ed, 2015), Ch 11.

49 Cf Response to Application for Constitutional or Other Writs filed 20 August 2021 at [15(b)].

50 See *Love* at [433] fn 667 (Edelman J); *Chetcuti v Commonwealth* [2021] HCA 25 (***Chetcuti***) at [66] (Edelman J).

51 *Pochi v Macphee* (1982) 151 CLR 101 at 109 (Gibbs CJ).

52 *Love* at [18] (Kiefel CJ), [93] (Gageler J), [302] (Gordon J); *Chetcuti* at [53], [59] (Edelman J).

53 *Roach* at [7] (Gleeson CJ); *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 183 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ); *Love* at [131] (Gageler J), [172] (Keane J), [393], [432] (Edelman J).

membership of the body politic is a social-contract, having reciprocity and conditionality an essential features.[54] A key quality of the statutory social contract is the notion that repudiation of allegiance can attract the status of alien. Section 36B uses "repudiation"[55] in the sense of a fundamental breach of contract justifying termination.[56] But principles respecting allegiance can provide "no sufficient discrimen between subjects and aliens".[57] Further, the dangers of analogising citizenship with a private law contract are "self-evident":[58] the allegiance of a natural-born citizen is owed from birth,[59] is "absolute and permanent",[60] and cannot be unilaterally divested.[61] The element of voluntariness, which is of the essence of contract as a class of obligations,[62] is wanting. The *second* premise is that a person can be *both* an alien *and* an Australian citizen at the same time: the person *becomes* an "alien" because of the repudiatory conduct, but *remains* an Australian citizen (in the Plaintiff's case, for some 5-6 years), until the Minister (as the arbiter of citizenship) determines that citizenship has "ceased". But alienage and citizenship are dichotomous, or mutually exclusive categories; indeed, a dominant view is that citizenship is the *obverse* or *antonym* of alienage.[63] The two statuses cannot be held simultaneously.

30. The framers deliberately omitted to confer a power over "citizenship" or "denationalisation". Section 51(xix) was enacted in its form because delegates to the Conventions feared that Parliament could exercise the power "to deprive a person of his or her citizenship".[64] The Court should now recognise an implied limitation in s 51(xix),

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54 Cf *Love* at [109] (Gageler J); see Wishart, "Allegiance and Citizenship as Concepts in Constitutional Law" (1986) 15 *Melbourne University Law Review* 662 at 667.

55 The word itself is ambiguous: see eg *Shevill v Builders Licensing Board* (1982) 149 CLR 620 at 625.

56 For the private law concept, see *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115 at [44].

57 *Ex parte Te* at 196 [121] (Gummow J); *Love* at [428]-[431] (Edelman J).

58 Compare *Williams v Commonwealth* (2012) 248 CLR 156 at 254 [204] (Hayne J).

59 *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 (***Ex parte Te***) at 198 [126] (Gummow J).

60 *Ex parte Te* at 196 [123] (Gummow J), citing *Carlisle v United States* (1872) 83 U.S. 147 at 154 (Field J).

61 See eg *Kenny v Minister for Immigration* (1993) 42 FCR 330 at 339 (Gummow J).

62 *Astley v Austrust Ltd* (1999) 197 CLR 1 at [84] (Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ); *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95 at 105 (Gaudron, McHugh, Hayne and Callinan JJ), quoting *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424 at 457 (Dixon CJ, Williams, Webb, Fullagar and Kitto JJ).

63 *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 (***Shaw***) at [2] (Gleeson CJ, Gummow and Hayne JJ); *Love* at [5], [18] (Kiefel CJ), [53] (Bell J), [172], (Keane J), [251] (Nettle J); cf *Love*, [295] (Gordon J), [394] (Edeleman J); cf *Chetcuti* at [38] fn 73 (Gordon J).

64 *Official Record of the Debates of the Australasian Federal Convention*, (Third Session, Melbourne), 2 March 1898, vol 2, p.1765-1768; *Singh v Commonwealth* (2004) 222 CLR 322 at [105] (McHugh J); Rubenstein, "Citizenship and the Constitutional Convention Debates: A Mere Legal Inference" (1997) 25 *Federal Law Review* 295 at 303.

which prevents the Parliament from turning a citizen into an alien. Section 51(xix) permits Parliament to impose "burdens, obligations and disqualifications which the Parliament could not impose upon other persons".[65] This includes places in which they may or may not work[66] (eg whether they can practise as barristers),[67] their ownership of real property and their access to legal remedies.[68] The power is basically "unlimited unless the Constitution otherwise prohibits the making of the law".[69] If the aliens power permitted Parliament to *convert* a person into an alien, then it would permit the Parliament to "defeat all the principles inserted elsewhere in the Constitution, and, in fact, to play ducks and drakes with it."[70]

10 31. Statements in this Court that s 51(xix) confers power to prescribe the conditions on which citizenship may be lost[71] are properly understood as being limited to measures concerning: (a) fraud in the naturalisation process; (b) a citizen's right to change nationality;[72] or (c) recognition of changes in sovereignty.[73]

32. Alternatively, s 36B(5)(h) is invalid. The *conduct element* alone of the offence against s 119.2 of the Criminal Code is not capable of repudiating allegiance. The citizen may not have known that it was a Declared Place, may have been taken there against his or her will, may have been visiting family, may have been performing humanitarian work, or unable to leave. If alienage can be attracted by *conduct*, it could only be conduct having such an extreme and repugnant character that it is objectively incompatible with
20 and capable of rupturing the citizen-state relationship. Without the mental element, entering a Declared Place is not of that kind.

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65 *Shaw* at [2] (Gleeson CJ, Gummow and Hayne JJ).

66 Eg *Union Colliery Company of British Columbia Ltd v Bryden* [1899] AC 580 at 587 (Lord Watson) saying that a law prohibiting from a workplace "Chinamen who are aliens or naturalised subjects" was within the exclusive legislative competence of the Dominion Parliament.

67 *Ex parte Karten* (1941) 59 WN (NSW) 29.

68 See eg *Jackson v Wright* (1809) NY 4 Johns 75 at 78-79; cited *Re Patterson; Ex parte Taylor* (2001) 207 CLR 31 at [274] fn 324 (Kirby J)

69 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 31 at [100] (McHugh J).

70 *Official Record of the Debates of the Australasian Federal Convention*, (Third Session, Melbourne), 2 March 1898, vol 2, p.1765.

71 *Ex Parte Te* at [31] (Gleeson CJ), [54] (Gaudron J); *Singh v Commonwealth* (2004) 222 CLR 322 at 329 [4] (Gleeson CJ), 397-398 [197] (Gummow, Hayne and Crennan JJ); see also *Chetcuti* at [69] (Edelman J) (citizenship is "not a constitutional ratchet").

72 Universal Declaration of Human Rights, Art 15(2): "No one shall be … denied the right to change his nationality"; cf *Naturalisation Act 1870* (33 and 34 Vict., c. 14), ss 3, 4 and 6.

73 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Ame* (2005) 222 CLR 439 at [34]; *Chetcuti* at [53] (Edelman J).

33. Further, s 51(xix) cannot support the retroactive operation of s 36B. Section 36B was enacted in September 2020, yet it applies to any conduct specified in s 36B(5)(a)-(h) engaged in on or after 29 May 2003.[74] Yet in its retroactive operation it deems conduct which, at the time it occurred was not in breach of the social-contract and was therefore incapable of "repudiating" allegiance, *afterwards* as being incompatible with citizenship. This appears to be what has occurred in relation to the Plaintiff (see [7] above). This is invalid because s 36B "cannot create the facts which condition the power needed for its own support."[75]

Part V.1(c): The External Affairs Power (s 51(xxix))

34. Section 36B of the Citizenship Act cannot be characterised as a law with respect to external affairs. The status of an Australian citizen under Australian law is inherently a domestic matter. It concerns the relationship between a citizen and the body politic. That relationship does not take on the character of an external affair merely because the citizen happens to be overseas. For this reason, the external affairs power "cannot extend to removing the citizenship or nationality that arises from being born in Australia."[76] Were it otherwise, Parliament has the power to denationalise and banish any Australian citizen merely because (or, perhaps, for so long as) he or she is overseas.

35. The power in s 36B is available to be exercised only where the person engaged in certain conduct "*while outside Australia*" (s 36B(1)(a)(i)), or where the person "*has since left Australia*" (s 36B(1)(a)(ii)).[77] This appears to be an attempt to engage the "geographic externality" principle. The attempt fails because these are preconditions to the exercise of the power, which do not impact or relevantly bear upon the rights, duties, liabilities, etc, that s 36B modifies. The preconditions to the exercise of the power do not control the character of the law.

36. The "modern doctrine" is that s 51(xxix) extends to "places, persons, matters or things" which lie "outside the geographical limits of the country".[78] But this cannot be taken to assert that *any* subject-matter is within the external affairs power, provided only that the

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74 *Australian Citizenship Amendment (Citizenship Cessation) Act 2020* (Cth), Sch 1, cl 18.
75 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 555 (Brennan J).
76 *Singh v Commonwealth* (2004) 222 CLR 322 at [135] (McHugh J).
77 This leaves a strange lacuna in the operation of Subdivision C: a person who engages in proscribed conduct *in Australia* cannot be deprived of their citizenship unless and until the person later *departs* Australia.
78 *Victoria v The Commonwealth* (1996) 187 CLR 416 at 485 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *XYZ v The Commonwealth* (2006) 227 CLR 532 at 539 [10] (Gleeson CJ), 548 [38] (Gummow, Hayne and Crennan JJ).

person to whom the law applies, or some conduct of that person, are or were at some point outside of Australia. This is obvious when regard is had to the geographic externalities to which the "doctrine" has previously been applied, including such matters as: the territorial sea and continental shelf,[79] shipwrecks situated outside Australia,[80] the area of the Timor Gap (and the exploration for and exploitation of petroleum resources within that area),[81] and off-shore crimes by Australian citizens.[82] Each of these things is "in its nature … external to the continent of Australia".[83] This is not a constitutional gateway to regulating (for example) the local property rights of an overseas Australian citizen; much less Australian citizenship itself.

37. In relation to off-shore crimes by Australian citizens, the external affairs power is enlivened *not* by the mere presence of the person overseas, but *instead* by the "externality of *the conduct* which the law prescribes as the foundation of the criminal offence".[84] Thus, "the 'matter or thing' which lies outside the geographical limits of Australia is the *conduct proscribed* by the terms of ss 50BA and 50BC of the *Crimes Act*."[85] Overseas conduct can be regulated because overseas conduct is in its nature external. Section 36B is not a law proscribing conduct of Australian citizens overseas – here, that function is relevantly performed by s 119.2 of the Criminal Code (Cth). That the person happens to be overseas when the power is exercised, or happens to have engaged in conduct whilst overseas, supplies a connection with the power which is "insubstantial, tenuous or distant".[86]

Part V.1(d): The Nationhood Power

38. Section 36B of the Citizenship Act is not supported by the nationhood power. Although the nationhood power might support some "modest power"[87] over citizenship, this is explicable on the basis that "one of the most important attributes of self-government" is the right "to determine who shall and who shall not become members of the

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79 *New South Wales v Commonwealth* (*Seas and Submerged Lands Case*) (1975) 135 CLR 337 at 360 (Barwick CJ), 470-471 (Mason J), 497-498 (Jacobs J).
80 *Robinson v Western Australian Museum* (1977) 138 CLR 283 at 294 (Barwick CJ), 335 (Mason J).
81 *Horta v The Commonwealth* (1994) 181 CLR 183.
82 *Viro v The Queen* (1978) 141 CLR 88 at 162 (Murphy J); *Tasmanian Dam Case* at 170 (Murphy J); *Polyukhovich v The Commonwealth* (1991) 172 CLR 501; *XYZ v The Commonwealth* (2006) 227 CLR 532.
83 *Seas and Submerged Lands Case* (1975) 135 CLR 337 at 360 (Barwick CJ).
84 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 531 (Mason CJ).
85 *XYZ v The Commonwealth* (2006) 227 CLR 532 at 547 [31] (Gummow, Hayne and Crennan JJ) (our emphasis).
86 *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 369 (McHugh J); citing *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 at 79 (Dixon J).
87 *Singh v Commonwealth* (2004) 222 CLR 322 at [134] (McHugh J).

community."[88] A power to denationalise and banish cannot be sustained as an implied attribute of sovereignty, particularly where it was deliberately withheld by the framers, because it is *the people* who are sovereign under the Constitution, and "the Government cannot sever its relationship to the people".[89]

39. If the nationhood power is to be extrapolated from s 61 and s 51(xxxi),[90] it is necessary to ask whether s 36B falls within executive power.[91] Plainly, it is no part of the executive power to banish or expel Australian citizens. In 1797, Coke said that banishment or exile would require parliamentary authority.[92] Likewise, naturalisation could be achieved only by statute.[93] Section 36B cannot be described as *incidental* to the executive power. Nor does s 36B fall within the very limited area[94] in which the nationhood power will support coercive laws.[95] Coercive laws must be supported by "some enumerated power".[96]

40. Alternatively, the nationhood power is a purposive power[97] and s 36B fails the proportionality test – see [20]–[24] above.

Part V.2 Ground 2

41. The Plaintiff submits that there is an implied limitation on Commonwealth legislative power which prevents the Parliament from depriving one the "people of the Commonwealth" of that status. The Plaintiff submits that the limitation is absolute, subject only to the matters at [50] below. Alternatively, the implied limitation is qualified in either or both of the ways developed at [47]-[49] below.

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88 *Robtelmes v Brennan* (1906) 4 CLR 395 at 417 (O'Connor J, emphasis added).

89 *Afroyim v Rusk* (1966) 287 US 253 at 257 (Black J); *Singh v Commonwealth* (2004) 222 CLR 322 at [135] (McHugh J), 71-72 [125] (Kirby J), see also 85 [181] (Callinan J).

90 Eg *Davis v Commonwealth* (1988) 166 CLR 79 at 102 (Wilson and Dawson JJ), 107 (Brennan J) saying that the executive power is the "lynchpin of the legislative power".

91 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 89 [232] (Gummow, Crennan and Bell JJ).

92 Coke, *The Second Part of the Institutes of the Laws of England*, (1797), 47; in Sheppard (ed), *The Selected Writings and Speeches of Sir Edward Coke* (Liberty Fund, 2003), vol 2, 852: "no man can be exiled, or banished out of his native Countrey, but either by authority of Parliament, or in case of abjuration for felony by the Common Law."

93 *Pochi v McPhee* (1982) 151 CLR 101 at 111 (Gibbs CJ).

94 An exception (although these cases would presumably now be decided under the defence power) is where "there is some prejudice to the security of the Federal organs of government to be feared": *R v Sharkey* (1949) 79 CLR 121 at 148 (Dixon J).

95 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 24 [10] (French CJ).

96 *Tasmanian Dam Case* (1983) 158 CLR 1 at 203 (Wilson J); citing *Bank of NSW v Commonwealth* (1948) 76 CLR 1 at 184 (Latham CJ).

97 *Davis v Commonwealth* (1988) 166 CLR 79 at 99-100 (Mason CJ, Deane and Gaudron JJ); *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 322 (Brennan J).

42. Textually, the limitation is implicit in the constitutional concept of a community of people, described as "the people of the Commonwealth".[98] The preamble commences with the words "Whereas the people … have agreed to unite in one indissoluble Federal Commonwealth", and proclaims that the Constitution is "founded on the will of the people whom it is designed to unite and govern."[99] The preambular reference to "the people" describes the political body or "body politic", and the reference to their having "agreed" makes "distinct and emphatic reference to the consensus of the people", expressed through the popular ratification procedures, which means that the Constitution is "legally the work as it will be for all time the heritage, of the Australian people."[100] Covering clause 3 states that "[t]he people … shall be united", which indicates that "the fundamental principle of the whole plan of government" is a "union of the people considered as citizens of various communities".[101]

43. The structural importance of the concept of the "people of the Commonwealth" is evident in ss 7 and 24 of the Constitution.[102] These provisions necessarily limit governmental power:[103] the "people of the Commonwealth" are required to have and to exercise "a free and informed choice as electors",[104] and cannot be disenfranchised otherwise than for a "substantial reason".[105] But the "people of the Commonwealth" also include "the body of subjects … regarded collectively as a unity or whole and the sum of those subjects regarded individually".[106] These people, who are members of the Australian community, are "entitled to regard the part of the earth occupied by that community as a place to which [they] may resort".[107] The people of the Commonwealth

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98 See, generally, *Hwang* at [17]-[18] (McHugh J).

99 Quick and Garran, *Annotated Constitution of the Australian Commonwealth* (1901) (**Quick and Garran**), 285; see also *Victoria v Commonwealth* (1971) 122 CLR 353 at 370 (Barwick CJ) noting that the Constitution expresses the "agreement" or "compact" of the people.

100 Quick and Garran, 290.

101 Quick and Garran, 332.

102 *Roach v Electoral Commissioner* (2007) 233 CLR 162 (***Roach***); *Rowe v Electoral Commissioner* (2010) 243 CLR 1 (***Rowe***).

103 Eg *Unions NSW v New South Wales* (2013) 252 CLR 530 at [103] (Keane J).

104 *McCloy v State of New South Wales* (2015) 257 CLR 178 (***McCloy***) at [42] (French CJ, Kiefel, Bell and Keane JJ).

105 Eg *Roach* at [7] (Gleeson CJ).

106 *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 35 (McTiernan and Jacobs JJ).

107 *Potter v Minahan* at 289 (Griffiths CJ).

do not lose that character by "sojourning in foreign countries".[108] It is in "the people"[109] that political sovereignty resides.[110]

44. Once it is acknowledged that the Constitution contemplates the continued existence of a body of people fitting the description of the "people of the Commonwealth", then it follows that the constitution and character of that body of people is unalterable by Parliament[111] - much less by an individual Minister exercising statutory executive power. In the nature of "our free society", it is "completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship."[112] The relationship between a citizen and the Commonwealth is between a citizen and the legal body whose membership is constituted by the political community of the people. There are "inherent limits" on the Parliament's ability to "fracture the membership of the political community of the body politic, such as by exclusion of those people who were, and remain, necessary members of the body politic".[113] This is consistent with the intention of the framers.[114]

45. Structurally, the limitation is necessary to prevent the Parliament from abridging the constitutional rights conferred by the Constitution upon the "people of the Commonwealth". One example is the right in s 117 of the Constitution, which operates only in relation to a "subject of the Queen", which is synonymous with the term "Australian citizen".[115] If Parliament could denude a person of their citizenship, it could control the operation of s 117. Another example is the right to vote. The requirement of a "substantial reason" could be undermined and eroded if a person were able to be deprived of citizenship. The precise point is illustrated at R[21], where the Defendants assert that "the limitation of the Commonwealth's power to restrict the right of citizens to vote at federal elections says nothing about the circumstances in which persons may validly be deprived of their status as citizens."

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108 Quick and Garran, 957–8.
109 See eg *Tajjour v New South Wales* (2014) 254 CLR 508 at [197] (Keane J).
110 *Tajjour v New South Wales* (2014) 254 CLR 508 at [225] (Keane J); *Brown v Tasmania* (2017) 261 CLR 328 at [88] (Kiefel CJ, Bell and Keane JJ).
111 See, by analogy, *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at 580 [96].
112 *Afroyim v Rusk* (1966) 287 US 253 at 268 (Black J).
113 *Hocking v Director-General of the National Archives of Australia* (2020) 94 ALJR 569 at [212] (Edelman J); see also *Love* at [444] (Edelman J).
114 Above note 64.
115 *Street v Queensland Bar Association* (1989) 168 CLR 461 at 525 (Deane J), 541 (Dawson J); *Ex parte Te* (2002) 212 CLR 162 at 196 [122] (Gummow J).

46. There is also a federal imperative for the implication. In addition to the "people of the Commonwealth", the Constitution also contemplates the continued existence of the "people of the State" (see ss 7 and 24, among others). At Federation, the people of the colonies undoubtedly regarded the Constitution they were making as a "a mechanism for moving to a higher and more beneficial plane the powers of self-government of those people".[116] But the Constitution does not confer upon the Commonwealth the right to determine who shall remain one of "the people of the State".

47. A Qualified Limitation: In the alternative, for substantially the same reasons and in circumstances where the Constitution under which "the people" united was one characterised by a strict separation of powers between the Commonwealth Parliament, Executive and Judicature (see Chapters I, II and III of the Constitution), the Plaintiff submits that there is an implied limitation preventing the Commonwealth Parliament from depriving a person of their status as one of the "people of the Commonwealth" otherwise than through an exercise of judicial power under Ch III of the Constitution. Textually, a qualified limitation of this kind derives support from the reference in s 44(ii) of the Constitution to a person "attainted of treason". Under the doctrine of attainder, an Australian subject of the Queen could be deprived of status, "generally referred to as civil death".[117] The doctrine has since been modified by statute[118] and is now obsolete.[119] It may be that s 44(ii) is a constitutional recognition of the incompatibility between status as one of the "people of the Commonwealth" and treasonous conduct, eg in the form of service in the armed forces of a country at war with Australia.[120] Attainder of treason has the constitutional consequence of permanent disqualification from elected office. It may permit the Parliament to impose a punishment of denationalisation following a conviction. Such an implication is necessary to guarantee that loss of constitutional status cannot be achieved by the political branches.

48. Section 36B contravenes this implied limitation in circumstances where it confers the power of denationalisation on the Minister, who is not subject to the rules of natural

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116 SJ Gageler SC, "Beyond the Text: A Vision of the Structure and Function of the Constitution", 2009 Sir Maurice Byers Address (Bar News, Winter 2009) 37 at 34.
117 *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583 at 610 (Murphy J), 601-602 (Jacobs J).
118 *Potier v Attorney General in and for the State of New South Wales* (2015) 89 NSWLR 284 at [55] (Leeming JA).
119 *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583 at 605 (Jacobs J).
120 The *Australian Citizenship Act 1948* (Cth), s 19, provided that an Australian citizen who was a dual national and served in the armed. forces of a country at war with Australia shall, upon commencing to serve, cease to be an Australian citizen.

justice and is not required to give reasons for the determination, with denationalisation taking effect "at the time the determination is made". The circumstances in which the Plaintiff has been denuded of his citizenship plainly bear no relationship to what would be required by Ch III of the Constitution.

49. In the further alternative, the Plaintiff submits that any exclusion from citizenship must be supported by "substantial reasons".[121] For reasons developed in relation to Ground 3 below, there are no "substantial reasons" here.

50. Whether it be absolute or qualified, the implied limitation does not restrict the power inherent in the "naturalisation" aspect of s 51(xix) to deal with fraud in the naturalisation process, nor does it operate upon a citizen's right to change nationality,[122] or prevent changes in citizenship consequent upon and in recognition of changes in sovereignty.[123]

Part V.3 Ground 3

51. The Commonwealth Parliament cannot make laws disenfranchising a person or group of persons entitled to the benefit of universal adult suffrage, otherwise than for a "substantial reason". This was described by Gleeson CJ as a "constitutional protection of the right to vote";[124] a formulation referred to with evident approval by at least four Justices in *Rowe*.[125] A person whose citizenship is cancelled under s 36B is automatically and permanently disenfranchised. That is the consequence of s 93(1)(b) of the *Electoral Act 1918* (Cth), which provides that only Australian citizens (and British subjects enrolled before 1984) shall be entitled to enrolment.

52. In the case of persons present in Australia when they receive a s 36B determination, this is also the consequence of s 93(7)(b) of the *Electoral Act*, which provides that an "unlawful non-citizen" within the meaning of the *Migration Act 1958* (Cth) is not entitled to enrolment.[126] The result is that an Australian citizen lawfully present in this country – *their* country – who receives a s 36B determination will immediately become an unlawful non-citizen, losing their entitlement to vote (and, in the same moment, their

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121 *Love* at [101] (Gageler J).
122 Above note **Error! Bookmark not defined.**.
123 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Ame* (2005) 222 CLR 439 at [34]; *Chetcuti* at [53] (Edelman J).
124 *Roach* at 174 [7] (Gleeson CJ).
125 *Rowe* at 19 [20] (French CJ); 48–49 [123] (Gummow and Bell JJ); 107 [328], 115 [357] (Crennan J).
126 Section 14(1) of the *Migration Act* provides that "[a] non-citizen in the migration zone who is not a lawful non-citizen is an unlawful non-citizen".

liberty, as s 189(1) of the *Migration Act* requires unlawful non-citizens in Australia to be taken into immigration detention).

53. The Defendants' assertion that "the limitation of the Commonwealth's power to restrict the right of citizens to vote at federal elections says nothing about the circumstances in which persons may validly be deprived of their status as citizens"[127] reads *Roach* and *Rowe* as being concerned only with the form of any impugned laws, rather than their substance, contrary to principle.[128] Regard must be had not only to the legal, but also to the practical, operation of the impugned law.[129] Parliament may not do indirectly what it is prohibited from doing directly.[130] If the Defendants' assertion were correct, Parliament could have achieved the result decried in *Roach* by temporarily denationalising Mr Roach. Section 36B must, therefore, be recognised as a law that, in substance and in effect, disenfranchises those to whom it is applied.

54. Next, is that disenfranchisement for a "substantial reason"?[131] The question to be asked of the impugned law is as follows: "is it reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government?"[132] The legislative scheme of s 36B is out of all such proportion. At R[21], the Defendants claim that the scheme is justified by reference to three ends: first, responding to a repudiation of membership of the Australian community; second, protection of that community; and third, deterrence. For the following reasons, the justification cannot be made good.

55. ***Over-inclusiveness:*** The immediate difficulty with these notions is that the conduct specified in s 36B(5) is over-inclusive. While it no doubt *includes* conduct that engages the three ends envisaged at R[21], it extends well beyond that, capturing conduct that is quite innocent. This is because s 36B(6) provides that the words and expressions used in s 36B(5)(a)-(h) take their meaning from the corresponding provisions of the *Criminal Code*, but that critically, "this does not include the fault elements that apply … to those provisions …" Yet, by importing the *physical* elements of those offences alone, and not

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127 SCB 38 [21].
128 *Ha v New South Wales* (1997) 189 CLR 465 at 498 (Brennan CJ, McHugh, Gummow and Kirby JJ).
129 *Rowe* at 56 [151] (Gummow and Bell JJ).
130 *New South Wales v Commonwealth (Work Choices Case)* (2006) 229 CLR 1 at 103–104 [228] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).
131 *Roach* at 174 (Gleeson CJ); 198–199 (Gummow, Kirby and Crennan JJ).
132 *Murphy v Electoral Commissioner* (2016) 261 CLR 28 (***Murphy***) at 49–50 [31]–[33] (French CJ and Bell J); 67 [85] (Gageler J); 107 [245] (Keane J); 121–122 [293], 129 [328] (Gordon J); see also *Roach* at 199 [85] (Gummow, Kirby and Crennan JJ); *Rowe* at 58–59 [160]–[161] (Gummow and Bell JJ).

the *fault* elements, s 36B excludes the very characteristics that could justify the ends at R[21].

56. For example, s 36B(5)(h) refers to "engaging in foreign incursions and recruitment". As that term is not defined in the *Criminal Code*, it would appear to call up the various offences set out in Division 119 of the *Criminal Code*, headed "Foreign incursions and recruitment". That Division begins with the offence created by s 119.1(1), which makes it an offence where an Australian citizen, *inter alia*, "enters a foreign country *with the intention of engaging in a hostile activity in that or any other foreign country*". Obeying the command in s 36B(6) to read "engaging in foreign incursions and recruitment" as referring only to the conduct element of this offence, and not the fault element – that is, the words specifying a particular intention[133] – the conduct thus referred to is the simple act of entering a foreign country; nothing more. Stripped of its fault element, the conduct to which s 119.1(1) refers is the mere act of travelling overseas. Such conduct alone will not necessarily – or even likely – amount to conduct so antithetical to Australia's interests as to justify the deprivation of that person's citizenship, or even capable of being construed as repudiatory.

57. Likewise, s 119.4(2) makes it an offence where an Australian citizen (inter alia), whether within or outside Australia, "accumulates, stockpiles or otherwise keeps", among other things, "poisons". Section 119.4(2)(b) then describes the fault element: "the person engages in that conduct with the intention that an offence against s 119.1 will be committed (whether by that or any other person)". Stripped of its fault element, the conduct is simply the keeping of poisons: something done by every pharmacist. Likewise, the conduct element of s 119.5, stripped of the fault element in s 119.5(1)(c), is committed every time the owner of any café, library, or other public space permits any group of people to meet or assemble at their premises for any purpose.

58. Even s 119.2, said to be engaged in the present case, has this same problem. The offence is committed only where a person *intentionally* enters or remains in a foreign country (s 119.2(1)(a), read with s 5.6(1)). But stripped of that fault element, s 36B(5) would be even engaged even where a person was kidnapped and taken to a foreign country against their will, or arbitrarily detained in or remanded to custody in the Declared Place and thus *remained* there against their will.

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[133] Which is a fault element: see *Criminal Code*, ss 5.1(1) and 5.2.

59. It is unnecessary to multiply examples. Examination of the provisions referenced in s 36B(6) reveals that, *first*, many of them contain fault elements; and *secondly*, for a number of those offences, the fault element is the only thing that makes the conduct blameworthy; such conduct without the fault element may, in those cases, be quite innocent.

60. Section 36B exhibits the same vice as the law struck down in *Roach*. The vice of that law was that by denying prisoners serving a sentence of *any* length the right to vote, the disenfranchisement it effected was arbitrary, because it applied irrespective of whether there had been conduct sufficiently grave to warrant the removal of that right. As Gummow, Kirby and Crennan JJ noted, "manslaughter is a striking example of an offence which involves an extensive range of moral culpability down to little more than negligence".[134] The difficulty their Honours had was with "the scope thereby provided for the particularly capricious denial of the exercise of the franchise".[135] The impugned provisions were declared invalid, because they operated "without regard to the seriousness of the offence committed as an indicium of culpability and temporary unfitness to participate in the electoral process".[136]

61. Gleeson CJ noted that "[a]n arbitrary exception would be inconsistent which choice by the people".[137] Rather than an arbitrary exception, his Honour continued, there must be a "rational connection" between the person's exclusion from civic participation and the identification of community membership for the purpose of franchise, which "might be found in conduct which manifests such a rejection of civic responsibility as to warrant temporary withdrawal of a civic right".[138]

62. The range of conduct specified by s 36B(5) does not answer that description, as it extends 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.

63. ***Permanence:*** Much less could such conduct warrant the *permanent* withdrawal of the right to vote. *Roach* allows that serious criminal offending could justify *temporary* withdrawal of that right,[139] but as Gummow, Kirby and Crennan JJ explained, by

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134 *Roach* at 202 [94] (Gummow, Kirby and Crennan JJ).
135 Ibid.
136 *Roach* at 203 [98] (Gummow, Kirby and Crennan JJ).
137 *Roach* at 174 [8] (Gleeson CJ).
138 Ibid (emphasis added); and see *Rowe* at 20 [23] (French CJ).
139 *Roach* at 175 [8], 177 [12], 179 [18]–[19], 182 [23] (Gleeson CJ); 203 [98] (Gummow, Kirby and Crennan JJ).

reference to long established law and custom, convictions for certain offences warranted the removal of the right to vote "*at least until* the sentence had been served or a pardon granted".[140] Implicit in this, and in Gleeson CJ's reference to the "*temporary* withdrawal of a civic right", is a recognition that no offence is so serious as would warrant permanent disenfranchisement. Even serious offenders, having served their sentence, regain both their liberty and their right to participate in civic society.

64. The Defendants contend that s 36B is nonetheless a proportionate measure, disenfranchising its targets for a "substantial reason", on the basis that it furthers the three ends outlined above. But proportionality is not shown merely because an impugned measure can further a legitimate end to some (unspecified) extent. The benefit must be weighed against the burden on the relevant right. Here, the burden on the right to vote is total: that right is permanently destroyed. It is difficult to imagine any legitimate end, however desirable according to the legislators of the day, that could justify permanently denying a person their constitutional right to participate in the democratic process.

65. ***Prior state of the law:*** Moreover, proportionality falls to be assessed having regard to existing measures apt to achieve similar ends. An extraordinary range of such measures is already to be found throughout Australian statute books: see [22] above. The justification for adding a 93rd anti-terrorism law to the arsenal must be strictly scrutinised, especially since modern Australian experience teaches that once the controversy concerning novel anti-terrorism powers has faded away, they are then often expanded into non-terrorism contexts for the policing of ordinary crime.[141]

66. Where near total control over a person's movements and liberty is already made possible by the existing suite of laws, power to take away a person's civic rights is unjustifiable. Section 93(8)(b) of the *Commonwealth Electoral Act 1918* (Cth) already denies enrolment to any person who "has been convicted of treason or treachery and has not been pardoned". That provision is well-tailored and reflects an appropriate recognition of the extreme nature of depriving a person of the right to vote, because (1) it is limited to a single, extreme, *sui generis* offence, and (2) it operates only where there has been a

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140 *Roach* at 200–201 [90] (emphasis added).

141 McGarrity and Williams, "When Extraordinary Measures Become Normal: Pre-emption in Counter-terrorism and Other Laws" in Lynch A, McGarrity N and Williams G (eds), *Counter-terrorism and Beyond: The Culture of Law and Justice After 9/11* (Routledge, Oxford, 2010) 131; Ananian-Welsh and Williams, "The New Terrorist: The Normalisation and Spread of Anti-Terror Laws in Australia" (2014) 38 *Melbourne University Law Review* 362.

conviction (and no subsequent pardon). With the enactment of s 36B, this calibrated balance is swept aside by a broad executive discretion permanently to extinguish the civic rights of any member of the Australian community, exercisable on the Minister's satisfaction that any of a wide range of "conduct" has occurred, without assessment of any fault element.

67. Section 36B provides to the Minister a power to determine which Australian dual nationals enter and remain in Australia or are to be deported as aliens from Australia. It shares this quality with (eg) s 501 of the *Migration Act 1958* (Cth), which confers the power to cancel visas. If valid, s 36B converts Australian citizenship into "a license that expires upon misbehaviour."[142] Australian citizenship is not so insecure.

68. It has often been said that the Constitution eschews any guarantee of individual liberties in the form of constitutionally entrenched rights, leaving it instead to "the people", acting collectively through the democratic process, to provide for such realisation of those rights as they see fit. In similar vein, it has been said that "unlike the case of the American Constitution, the Australian Constitution is built upon confidence in a system of parliamentary Government with ministerial responsibility".[143] Similarly, in *Australian Capital Television Pty Ltd v Commonwealth* (***ACTV***), Dawson J observed that the Australian Constitution deliberately does not seek to establish personal liberty by constitutional restrictions upon the exercise of governmental power, *because* "in this country the guarantee of fundamental freedoms does not lie in any constitutional mandate but in the capacity of a democratic society to preserve for itself its own shared values".[144]

69. So too, as McHugh J noted in *ACTV*, approving Professor Harrison Moore's observation, in our Constitution, "the individual is deemed sufficiently protected by that share in the government which the constitution ensures him".[145] That protection is secured, as Deane and Toohey JJ recognised in *Nationwide News*, by the principle that "all citizens of the Commonwealth who are not under some special disability are entitled to share equally in the exercise of those ultimate powers of governmental control".[146]

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142 *Tropes v Dulles* 356 U.S. 86 (1958) at 92 (Warren CJ).
143 *Attorney-General (Cth); ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 24 (Barwick CJ); and see 71 (Murphy J).
144 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 182–183 (Dawson J).
145 Ibid at 228–229 (McHugh J); and see, similarly, *McCloy v State of New South Wales* (2015) 257 CLR 178 (***McCloy***) at 202 [27] (French CJ, Kiefel, Bell and Keane JJ).
146 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 71 (Deane and Toohey JJ).

The political sovereignty of the people the Commonwealth has been emphatically reaffirmed by this Court in recent times.[147]

70. Seizing on this aspect of our constitutional design, the Commonwealth has been known in constitutional cases to argue that "the remedy against an erroneous exercise of legislative power lies in the ballot box and not in the Courts".[148] Often, that will be right. But it is *not* right where the exercise of legislative power endangers the democratic process itself. The rationale that rights are sufficiently protected by democratic self-reliance avails only insofar as the efficacy and integrity of the democratic system can safely be assumed, and is no answer to the need for judicial vigilance in cases where "political accountability is either inherently weak or endangered".[149]

71. Responsible government demands that elected Ministers be accountable to Parliament, while representative democracy demands that Parliament be accountable to the people. Section 36B inverts this position, by empowering an elected Minister to determine which of the people shall and shall not be entitled to vote, and thereby hold their representatives accountable. It treats electors as merely another "topic of juristic classification",[150] for the Parliament to manipulate and control as it sees fit. But electors are a special class: Parliament does not choose its voters; the voters choose their Parliament. While the Constitution confers power to make laws regarding the qualification of electors and the conduct of elections, inherent in that conferral of power is the "potential for that legislative authority to be exercised to exclude from the political process persons whose participation is unwanted by, or inconvenient to, those who currently form majorities in the Senate and the House of Representatives".[151]

72. Although only one individual is implicated in the presently impugned determination, what can be done to one can be done to many. The anti-democratic threat posed by s 36B is inchoate, and might not be fully realised until after a period of "creeping

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147 *Unions NSW v New South Wales* (2013) 252 CLR 530 at 571 [104], 578 [135], 583 [158] (Keane J); *Tajjour v New South Wales* (2014) 254 CLR 508 at 598 [196]–[197], 601 [225] (Keane J); *McCloy* at 207 [45]–[46] (French CJ, Kiefel, Bell and Keane JJ); 257 [215]–[217] (Nettle J); *Murphy* at 86 [176], 88 [183] (Keane J); *Clubb v Edwards* (2019) 267 CLR 171 at 191 [29], 196 [51], 198–199 [60], 204 [82], 208–209 [98]–[99] (Kiefel CJ, Bell and Keane JJ).

148 *Australian Capital Television Pty Ltd v Commonwealth*, supra, at 233 (McHugh J).

149 SJ Gageler SC, "Beyond the Text: A Vision of the Structure and Function of the Constitution", 2009 Sir Maurice Byers Address (Bar News, Winter 2009) 30 at 44.

150 *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 at 455 [14].

151 *Murphy* at 70–71 [95] (Gageler J).

normalisation" of the use of the power,[152] but that does make the threat any less real. As Professor Laurence Tribe has observed, "[f]ew prospects are so antithetical to the notion of rule by the people as that of a temporary majority entrenching itself by cleverly manipulating the system through which the voters, in theory, can register their dissatisfaction by choosing new leadership".[153] Section 36B carries within it that potential.

Part V.4 Ground 4

73. The Plaintiff does not press Ground 4.

Part V.5 Ground 5

74. Involuntary denationalisation is intrinsically penal or punitive in character, and as such, Ch III of the Constitution will not suffer it to be inflicted upon a citizen otherwise than as a sequel to the adjudgment and punishment of criminal guilt by a court. Nor does it fall within any established exception bringing within the acknowledged remit of the Executive.

75. Much of the jurisprudence that has grown up around *Chu Kheng Lim*[154] deals with *detention* by the Executive, and the circumstances in which that can be non-punitive. At R[25], the Defendants observe that s 36B does not require any person to be detained in custody, and assert that this means *Chu Kheng Lim* has no operation. But *Chu Kheng Lim* does not state a principle merely about detention; it states a principle about *punishment*, of which detention is but one example. The principle in *Chu Kheng Lim* would be quite anaemic if it denied the Executive the ability to impose one kind of punishment for criminal offending, but permitted it to impose any other. As Brennan, Deane and Dawson JJ held, it is "the adjudgment *and punishment* of criminal guilt" that is "essentially and exclusively judicial in character", with Ch III precluding "any law purporting to vest *any part of that function* in the Commonwealth Executive".[155] Detention is one function generally entrusted to the judiciary alone because it "is penal or punitive character";[156] but it is not unique on that count.

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152 *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 277 [145] (Gageler J).
153 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 237-238 [157] (Gummow and Hayne JJ); *Murphy* at 70-71 [95] (Gageler J).
154 *Chu Kheng Lim.*
155 *Chu Kheng Lim* at 27.
156 Ibid.

76. Denationalisation is a punishment, and has long been recognised as such. It is not to the point that this punishment is not currently to be found in any Australian statute book; nor are capital punishment, flogging and other forms of corporal punishment; yet clearly they are punitive. It is because of its penal or punitive character that denationalisation has been rejected as unconstitutional in many countries, including the United States, Germany and Poland.[157] It has a long history as a punishment in various forms, including the English punishments of banishment, exile, outlawry, and abjuration; the Greek punishment of ostracism; and the Roman punishments of *exilium* and *deportatio*.[158] Thus it has been held or observed:

10 (a) by Theodore Plucknett, that "[t]he device of thrusting out of the group those who have broken its code is very ancient and constitutes the most fearful fate which primitive law could inflict";[159]

(b) by Judge Augustus Hand, that "exile [is a] a dreadful punishment, abandoned by the common consent of all civilized peoples";[160]

(c) by a majority of the United States Supreme Court, that "denationalization … is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development" and "strips the citizen of his status in the national and international political community";[161] and

20 (d) by Brennan J, concurring in that same case, that "the punishment of expatriation ... constitutes the very antithesis of rehabilitation, for instead of guiding the offender back into the useful paths of society it excommunicates him and makes him, literally, an outcast";[162] and

(e) by Professor Shai Lavi, in a scholarly analysis of this question, that "[t]he revocation of citizenship is an extraordinarily harsh punishment", as it "excludes

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157 Shai Lavi, "Citizenship Revocation as Punishment: On the Modern Duties of Citizens and their Criminal Breach" (2011) 61 *Universtiy of Toronto Law Journal* 783 at 785, 809 (***Lavi***).

158 See, eg, Theodore Plucknett, "Outlawry" (1933) 11 *Encyclopedia of the Social Sciences* 505–508; Myron Banks, "Criminal Law – Banishment" (1954) 32 *North Carolina Law Review* 221 at 221–223; Michael F. Armstrong, "Banishment: Cruel and Usual Punishment" (1963) 111 *University of Pennsylvania Law Review* 758 at 758–759; Lee H. Bowker, "Exile, Banishment and Transportation" (1980) 24(1) *International Journal of Offender Therapy and Comparative Criminology* 67 at 67–68; Katherine Beckett and Steve Herbert, "Penal Boundaries: Banishment and the Expansion of Punishment" (2010) 35(1) *Law & Social Inquiry* 1 at 2–3.

159 Theodore Plucknett, "Outlawry" (1933) 11 *Encyclopedia of the Social Sciences* 505–508.

160 *United States ex rel Klonis v Davis*, 13 F.2D 630 at 631 (2d Cir 1926).

161 *Tropes v Dulles* 356 US 86 at 101 (1958).

162 *Tropes v Dulles* 356 US 86 (1958).

a person from the political community, deprives her of active membership in the political sphere, and makes her vulnerable to deportation".[163]

77. So, too, a long line of English cases recognises the punitive nature of this measure.[164] For instance, 400 years ago in *Dr Hussey v Moor*, the Court of King's Bench identified the existence of three kinds of punishment: "pecuniary, corporal and exile". In respect of a statute imposing all three, it was held: "the same gives damages, corporal punishment, and exile, to lose his country, and if this be not a penal law, I do not know what law is penal".[165] In Sir Edward Coke's report of the case, the King's Bench is recorded as holding that "the law will not for this disability inflict *so great a punishment as perpetual banishment*".[166]

78. The punitive nature of this measure has also been recognised in Australia. Indeed, in *Chu Kheng Lim* itself, McHugh J affirmed that "no free man should be imprisoned, dispossessed, *outlawed, or exiled* save by the judgment of his peers or by the law of the land",[167] echoing Higgins J's earlier statement that "[n]o freeman shall be seized or imprisoned or dispossessed or *outlawed or exiled (exuletur, banished, forced to abjure the realm against one's consent)* … except by the legal judgment of his peers or by the law of the land".[168] Likewise, in *Robtelmes v Brenan*,[169] Barton J applied authority holding that "banishment" refers to "the expulsion of a citizen from his country *by way of punishment*".

79. Punishment of the kind made possible by s 36B cannot readily be located within any established non-punitive exception. It is a radical power with no precedent in Australian legal history – even in times of the greatest peril. It empowers the Minister permanently to exclude from the Australian community a citizen that she alone considers has engaged in criminal conduct (without regard to fault), without any requirement that the person

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163 Lavi, "Citizenship Revocation as Punishment: On the Modern Duties of Citizens and their Criminal Breach" (2011) 61 *Universtiy of Toronto Law Journal* 783 at 809.

164 *John and Magnus Arthur v Geddies and Wallets* (1590) 1 Bro Sup 124 at 124; *Dr Hussey v More* (1616) 79 ER 353 at 354; *Dr Hussey v Moor* (1616) 81 ER 232 at 236; *Sir Robert Murray v Murray of Bruchtoun* (1672) Mor 4799 at 4810; *Dr Sibbald v Lady Rosyth* (1685) Mor 13976 at 13978; *Alexander Stuart v Patrick Haliburton* (1713) Mor 6829 at 6829; *Newsome v Bowyer* (1729) 24 ER 959 at 960; *Bontein v Bontein* (1731) Mor 14043 at 14044; *Procurator-Fiscal of Edinburgh v Archibald Campbell* (1736) Mor 9400 at 9401; *Cochran v Bar and Spence* (1739) Mor 3441 at 3441; *Marishal v Semple* (1752) Mor 3447 at 3447; *Farquhar v His Majesty's Advocate* (1753) Mor 4669 at 4670; *Small v Sir James Clerk of Pennycuik* (1764) Mor 11782 at 11783; *Re Dalrymple* (1809) 161 ER 802 at 863; *Macneill v Macgregor* (1828) 4 ER 1178 at 1203; *Newton v Boodle* (1847) 115 ER 1538 at 1541.

165 *Dr Hussey v Moor* (1616) 81 ER 232 at 236.

166 *Dr Hussey's Case* (1611) 77 ER 838 at 840; 9 Co Rep 71 at 73a (emphasis added).

167 *Chu Kheng Lim* at 63.

168 *R v Macfarlane; Ex parte O'Flanagan* (1923) 32 CLR 518 at 567 (emphasis added).

169 *Robtelmes v Brenan* (1906) 4 CLR 395 at 416 (emphasis added).

first be convicted of an offence, and even if the person has been *acquitted* of an offence in respect of the conduct in question. The power enables the Minister to set up her own parallel system of criminal justice and punishment entirely outside the courts. That is the very vice that Ch III prohibits.

Part VI: Orders sought

80. The Plaintiff seeks orders that the questions of law stated for the opinion of the Full Court be answered as follows:

Question 1: Yes.

Question 2: The following relief should be granted:

(a) Declare that s 36B of the *Australian Citizenship Act 2007* (Cth) is invalid in whole, alternatively in its application to the Plaintiff.

(b) Declaration that the Plaintiff is an Australian citizen.

(c) A writ of certiorari directed to the First Defendant quashing the decision purportedly made under s 36B of the Act on 2 July 2021 in respect of the Plaintiff.

(d) A writ of prohibition directed to the Defendants, prohibiting them and their delegates, servants, or agents from acting upon or giving effect to the decision purportedly made by the First Defendant under s 36B of the Act on 2 July 2021 in respect of the Plaintiff.

Question 3: The Defendants.

Part VII: Estimate for hearing

81. The Plaintiff estimates that he will require 5 hours in oral submissions including reply.

DATED: 12 November 2021

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ANNEXURE – CONSTITUTIONAL AND STATUTORY PROVISIONS

Australian Constitution

Preamble

WHEREAS the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established:

3 Proclamation of Commonwealth

It shall be lawful for the Queen, with the advice of the Privy Council, to declare by proclamation that, on and after a day therein appointed, not being later than one year after the passing of this Act, the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, and also, if Her Majesty is satisfied that the people of Western Australia have agreed thereto, of Western Australia, shall be united in a Federal Commonwealth under the name of the Commonwealth of Australia. …

7 The Senate

The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate.

24 Constitution of House of Representatives

The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth …

51 Legislative powers of the Parliament

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

…

(vi) the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth;

…

(xix) naturalization and aliens;

(xxix) external affairs;

(xxxix) matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

117 Rights of residents in States

A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

Australian Citizenship Act 2007 (Cth) – current as at September 2020.

36B Citizenship cessation determination for certain conduct

Cessation of citizenship on determination by Minister

(1) The Minister may determine in writing that a person aged 14 or older ceases to be an Australian citizen if the Minister is satisfied that:

(a) the person:

(i) engaged in conduct specified in subsection (5) while outside Australia; or

(ii) engaged in conduct specified in any of paragraphs (5)(a) to (h) while in Australia, has since left Australia and has not been tried for an offence in relation to the conduct; and

(b) the conduct demonstrates 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 (see section 36E).

Note: A person may seek review of a determination made under this subsection in the High Court of Australia under section 75 of the Constitution, or in the Federal Court of Australia under section 39B of the Judiciary Act 1903. See also section 36H of this Act (revocation of citizenship cessation determination on application to Minister).

(2) However, the Minister must not make a determination if the Minister is satisfied that the person would, if the Minister were to make the determination, become a person who is not a national or citizen of any country.

(3) The person ceases to be an Australian citizen at the time the determination is made.

(4) Subsection (1) applies to a person who is an Australian citizen regardless of how the person became an Australian citizen (including a person who became an Australian citizen upon the person's birth).

(5) For the purposes of paragraph (1)(a), the conduct is any of the following:

(a) engaging in international terrorist activities using explosive or lethal devices;

(b) engaging in a terrorist act;

(c) providing or receiving training connected with preparation for, engagement in, or assistance in a terrorist act;

(d) directing the activities of a terrorist organisation;

(e) recruiting for a terrorist organisation;

(f) financing terrorism;

(g) financing a terrorist;

(h) engaging in foreign incursions and recruitment;

(i) fighting for, or being in the service of, a declared terrorist organisation (see section 36C);

(j) serving in the armed forces of a country at war with Australia.

Note 1: A determination may be made in relation to conduct specified in subsection (5) that was engaged in before the subsection commenced (see item 18 of Schedule 1 to the Australian Citizenship Amendment (Citizenship Cessation) Act 2020).

Note 2: This section does not apply to conduct of Australian law enforcement or intelligence bodies, or to conduct in the course of certain duties to the Commonwealth (see subsection (8)).

(6) Words and expressions used in paragraphs (5)(a) to (h) have the same meanings as in Subdivision A of Division 72, sections 101.1, 101.2, 102.2, 102.4, 103.1 and 103.2 and Division 119 of the Criminal Code, respectively. However (to avoid doubt) this does not include the fault elements that apply under the Criminal Code in relation to those provisions of the Criminal Code.

(7) For the purposes of paragraph (5)(i) and without limitation, a person is not in the service of a declared terrorist organisation to the extent that:

(a) the person's actions are unintentional; or

(b) the person is acting under duress or force; or

(c) the person is providing neutral and independent humanitarian assistance.

(8) This section does not apply to conduct engaged in by:

(a) a person in the proper performance of a function of a body, agency or organisation of the Commonwealth, or of a State or Territory, that is responsible for, or deals with, law enforcement, criminal intelligence, criminal investigation, fraud, security intelligence, foreign intelligence or financial intelligence; or

(b) a person acting in the course of the person's duty to the Commonwealth in relation to the defence, security or international relations of Australia.

General provisions relating to Minister's powers

(9) The powers of the Minister under this section may only be exercised by the Minister personally.

(10) Section 47 (notification of decisions) does not apply to a decision of the Minister under this section (see section 36F instead).

(11) The rules of natural justice do not apply in relation to making a decision or exercising a power under this section.

(12) A determination made under subsection (1) is not a legislative instrument.