HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	B47/2022
File Title:	Jones v. Commonwealth of Australia & Ors
Registry:	Brisbane
Document filed:	AMENDED Form 27E - Reply
Filing party:	Plaintiff
Date filed:	17 May 2023

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN:

PHYLLIP JOHN JONES
Plaintiff

and

COMMONWEALTH OF AUSTRALIA
First Defendant

MINISTER FOR HOME AFFAIRS
Second Defendant

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
Third Defendant

PLAINTIFF'S AMENDED SUBMISSIONS IN REPLY

PART I: CERTIFICATION

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

PART II: REPLY

2. These submissions reply to the Defendants' submissions of 2 May 2023 in this proceeding (**DSJ**), and also to [20]-[46] and [52]-[56] of the Defendants' submissions of 2 May 2023 in *Benbrika* (M90/2022) (**DSB**) (which are adopted at DSJ [7]). This Reply adopts defined terms from the Plaintiff's submissions dated 12 April 2023 (**PS**).

A Section 34(2)(b)(ii) is not "protective" of the naturalization process

3. Although the assessment of "purpose" may differ depending on what constitutional doctrine is in play,[1] the purpose of s 34(2)(b)(ii) of the Citizenship Act is central to the Defendants' response to both grounds of constitutional challenge. Accordingly, it will be convenient to deal with purpose at the outset. ***Six*** features of the statutory text and context disclose a significant disconformity between the operation of s 34(2)(b)(ii) of the Citizenship Act and the protective purpose postulated by the Defendants.

4. ***First***, s 34(2)(c) requires consideration not of whether the person was of good character at the time of grant (then or now), or whether granting citizenship was a "mistake", but instead whether it is presently in the "public interest" for the person to remain a citizen. The "public interest" criterion permits consideration of a broad range of matters having nothing to do with good character or naturalization.

5. The point is powerfully illustrated by the fact that the Plaintiff was purportedly denaturalised by the then-Minister because of a conclusion that: "if Mr Jones were to reoffend in a similar manner, it would result in grave harm to a member of the Australian community", which was deemed to be an "unacceptable risk"; and also having considered "the need for general deterrence and the community's views of sexual offending involving children": SCB, p.23 [25]-[26]. There is nothing in the reasons for decision remotely concerned with protecting the naturalization process. Instead, the Minister's preoccupation was with the "traditional aims of punishment – retribution and deterrence".[2]

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1 *Alexander* at [104] (Gageler J).

2 *Alexander* at [78] (Kiefel CJ, Keane and Gleeson JJ) citing *Kennedy v Mendoza-Martinez* 372 US 144, 168 (1963); *Alexander* at [240] (Edelman J).

6. ***Second***, the application of s 34(2)(b)(ii) is indifferent to the integrity of the naturalization process in that it applies whether or not the conduct to which the offence relates was disclosed at the time of the application, and whether or not the applicant was even invited to make disclosure of such matters at the time. It might be otherwise if s 34(2)(b)(ii) required the power to grant citizenship to be re-exercised.[3] But here, as the Defendants accept, the power may be enlivened "even if the relevant offending is not directly causative of a person's acquisition of Australian citizenship": DSJ [10], our emphasis. The Special Case does not suggest there was fraud or concealment during the Plaintiff's naturalization application, and such a serious matter would not be lightly inferred.[4]

7. ***Third***, the absence of a time limit shows that s 34(2)(b)(ii) is not properly protective. A time limit from the date of conviction would show that the provision was aimed at enabling the Minister to respond to new information which calls the grant of citizenship into question. Where the power to revoke is of unlimited duration, that tells against the protective purpose because s 34(2)(b)(ii) enables denationalization to occur even where (as here) the fact of the criminal conviction and sentence have been a matter of public record for decades. Indeed, the DSJ studiously ignores that, in the present case, the Plaintiff remained a citizen for 15 years after his conviction. For 15 years, the Plaintiff's conviction and sentence was a matter of public record, and for 15 years a long succession of Ministers, each of whom had the power to revoke the Plaintiff's citizenship, did not see fit to do so. The only thing that changed in 2018 was the identity of the Minister, and that Minister focussed not on the granting of citizenship on false premises or by mistake, but instead on penal concepts of retribution and deterrence. This shows that the purpose of s 34(2)(b)(ii) is ~~not performative~~ penal rather than protective; it enables the Minister to expel a class of naturalized persons deemed at the time of exercise of the power to be undesirable.

8. ***Fourth***, s 34(2)(b)(ii) is revealed not to be protective because it is enlivened by a broad range of offending conduct having no necessary connection to the naturalization process. Nor is it limited to "conduct that is so reprehensible as to be deserving of the dire

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3 See DSJ fn 26.

4 In the United States, a denaturalisation proceeding places upon the Government a heavy onus of proof: *Costello v United States*, 365 US 265 at 269 (1961). This is in recognition of the fact that citizenship is "the highest hope of civilised men", and denaturalization in its consequences is "more serious than a taking of one's property, or the imposition of a fine or other penalty": *Schneiderman v United States* 320 US 118 at 112 (1942).

consequence of deprivation of citizenship and the rights, privileges and immunities and duties associated with it".[5]

9. ***Fifth***, the protective purpose which the Defendants ascribe to s 34(2)(b)(ii) is already pursued by other provisions. Offences relating to false statements and concealment (s 50 of the Citizenship Act) and false and misleading information (ss 137.1 and 137.2 of the Criminal Code (Cth)) enliven the denaturalisation power in s 34(2)(b)(i) of the Citizenship Act. Provision of "false documents", "misleading information", "deception", "general dishonesty", "conspiracy to defraud", "false or misleading statements" and other dishonest conduct enlivens the denaturalisation power in s 34(2)(b)(iii) of the Citizenship Act. Third-party frauds (see s 34(8)) enliven the denaturalisation power in s 34(2)(b)(iv) of the Citizenship Act. If s 34(2)(b)(ii) were directed only to concealment, fraud, or dishonesty, then it would be otiose, as extensive provision for precisely that kind of conduct is already made by other provisions. Section 34(2)(b)(ii) has its own special sphere of operation alongside those other provisions. Section 34(2)(b)(ii) will be available principally where there was no fraud, dishonesty or material concealment in the naturalization process.

10. ***Sixth***, the legislative history of s 34(2)(b)(ii) confirms that it is not concerned with the integrity of the naturalization process. The earliest antecedent to s 34(2)(b)(ii) is in fact s 21(1)(e) of the 1948 Citizenship Act, which empowered the denaturalization of a person who had "within five years after that date [of naturalization], been sentenced in any country to imprisonment for a term of twelve months or more" (s 21(1)(e)). At the same time, Parliament enacted a distinct power to denaturalise where a person was "registered or naturalized by means of fraud, false representation or the concealment of some material circumstance" (s 21(1)(c)), or where a person "was not, at the date on which he was registered or naturalized, of good character" (s 21(1)(d)). Section 21 therefore distinguished between fraud, character at time of grant, and subsequent convictions. Section 21 was redrafted in 1958, with the stated purpose of eliminating discrimination between naturalized and natural born citizens, and to remove all grounds for deprivation other than fraud.[6] From 1958, denaturalization was possible only after conviction of an

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5 *Alexander* at 583 [116] (Kiefel CJ, Keane and Gleeson JJ).

6 See Hansard, House of Representatives (26 August 1958) at 711 ("We propose to erase from [the 1948 Citizenship Act] every discrimination, except one, between naturalized Australians and people born in Australia. For some time there has been resentment amongst certain of our European settlers against the power inherent in the Minister for Immigration to deprive naturalized Australians of their citizenship on the grounds set out in sections 21 and 22 the existing act... it is the presence of this power, rather than its exercise, which hurts; and the Government in a desire to welcome our new citizens with speed, sincerity and warmth into our

offence against s 50 of the 1948 Act (the equivalent of s 34(2)(b)(i)).[7] The precursor to s 34(2)(b)(ii) was then re-introduced to the statute book in 1984.[8] In doing so, the Parliament did not alter the treatment of fraud. Instead, it revived an equivalent of the former s 21(1)(e) (subsequent convictions) while choosing not to revive s 21(1)(d) (character at time of grant).[9] This history suggests that s 34(2)(b)(ii) serves a different purpose to the fraud/concealment ground. It is not a "direct descendent" of the provisions listed in DSJ [28]. If it be necessary to identify a purpose,[10] the Court should find that the purpose of s 34(2)(b)(ii) is to permit the Minister an opportunity to excise undesirable naturalized (not natural-born) citizens from the Australian political community.

B Question 1(a): The head of power challenge

B.1 The distinct limbs of s 51(xix)

11. The Defendants submit that the Plaintiff's challenge to s 34(2)(b)(ii) is contrary to "settled authority" of this Court: DSJ [31], [6]. This submission appears to assume that s 34(2)(b)(ii) is valid under s 51(xix) merely because it can be seen to prescribe criteria upon which citizenship can be "lost": eg, DSJ [26]. But *Alexander* is not authority for the proposition that s 51(xix) will support any denationalisation law. The reasoning of the Court means nothing, indeed is an exercise in futility, if there is an unlimited power to denationalise. The same is true of the reasoning in the cases summarised in PS [22]-[25].

12. The ratio of *Alexander*, referable to s 51(xix), is that an Australian citizen who has repudiated their allegiance is not a person who "could not possibly answer the description

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national life asks the House to delete it from the statute book... In their stead, one simple proposition is put forward... Where a person is convicted of obtaining his naturalization by false statements or by concealing a material circumstance, and the Minister is satisfied it would be contrary to the public interest for such person to continue to be an Australian citizen, then the Minister may deprive him of his citizenship"); Hansard, House of Representatives (17 September 1948) at 1317, 1323; Hansard, Senate (30 September 1958) at 722.

7 *Nationality and Citizenship Act 1958* (Cth), s 7.

8 By the *Australian Citizenship Amendment Act 1984* (Cth), s 15.

9 The legislative history of the British enactments which the 1948 Citizenship Act "paralleled" (see *Chetcuti* at [18]-[22] (Kiefel CJ, Gageler, Keane and Gleeson JJ)) also reveals the drawing by that Parliament of clear distinctions between fraud, character at time of grant and subsequent convictions. Section 7 of the *British Nationality and Status of Aliens Act 1914* (UK) had permitted deprivation for fraud, character at time of grant and subsequent convictions. Section 20 of the *British Nationality Act 1948* (UK) removed character at time of grant, while retaining fraud and subsequent convictions. This continued in s 40 of the *British Nationality Act 1981* (UK) until the subsequent convictions ground was removed by s 4 of the *Nationality, Immigration and Asylum Act 2002* (UK) while retaining fraud. See *Secretary of State for the Home Department v Hicks* [2006] EWCA Civ 400 at [8], [13]-[20] (Pill LJ, Rix and Hooper LJJ agreeing).

10 Cf *Bank of NSW v Commonwealth (Bank Nationalization Case)* (1948) 76 CLR 1 at 354 (Dixon J): "the end or purpose of the provision, if discernible, will give the key" (emphasis added).

of 'aliens' in the ordinary understanding of the word".[11] As a necessary element in reasoning to that conclusion, the Court rejected the "once a citizen always a citizen" contention advanced in that case. But there is no repudiation concept deployed in defence of s 34(2)(b)(ii). Unlike s 36D (the subject of *Benbrika*), s 34(2)(b) involves no "normative judgment about the consequences of a person's proven criminality for their ongoing membership of the Australian body politic": cf DSB [30]. It does not operate only upon offences inherently suggestive of absence of a continuing commitment to the Australian body politic: cf DSB [50].

13. There is nothing in s 34(2)(b)(ii) to ensure that it applies only to people to whom it could validly apply under the "aliens" limb of s 51(xix). To the contrary, s 34(2)(b)(ii) applies only to naturalized Australian citizens, including (like the Plaintiff) of very long standing, who cannot on any "ordinary understanding" be described as "aliens".[12] And s 34(2)(c) means that the power can be exercised by reference to "indefinite considerations of policy".[13]

14. The Defendants seek to support s 34(2)(b) by reference to what they call the "naturalization limb" of s 51(xix). The real issue is whether the "naturalization limb" will support s 34(2)(b). The Defendants (implicitly) acknowledge that the "naturalization limb" is relatively untested: DSJ [27]. This falsifies the suggestion that the Plaintiff's arguments are contrary to settled authority. Indeed, the only "naturalization limb" authority cited by the Defendants is *Meyer v Poynton*, where Starke J said that "whatever the Federal Parliament can do or permit, it can undo or recall":[14] DSJ [23] and [34]. If this statement is intended to suggest that any naturalized Australian citizen can be denaturalised for any reason, then it discriminates against naturalized citizens and is offensive to the very concept of membership which underpins s 51(xix). In any event, that statement cannot be reconciled with the accepted limits on s 51(xix): Parliament can admit any person it wants to membership of the Australian community, but it cannot afterwards "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".[15]

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11 Eg *Alexander* at [35] citing *Pochi*; see also [63] (Kiefel CJ, Keane and Gleeson JJ), [98] (Gageler J), [233]-[234] (Edelman J), [289]-[290] (Steward J).

12 See *Love* at [303]-[311] (Gordon J), [437] (Edelman J).

13 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 400 (Windeyer J).

14 *Meyer v Poynton* at 441.

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

15. Contrary to DSJ [30], the role that s 34(3) plays in limiting the application of s 34(2)(b)(ii) does not "reinforce the conclusion that the provision applies only to persons who can possibly answer the description of aliens". That provision is clearly directed towards Australia complying with its obligation under Art 8(1) of the *Convention on the Reduction of Statelessness* "not [to] deprive a person of its nationality if such deprivation would render him stateless".[16] That obligation does not exist "where the nationality has been obtained by misrepresentation or fraud" (see Art 8(2)(b)), which is consistent with s 34(3) only applying to subparagraph (2)(b)(ii) and not any other subparagraph in s 34(2).

B.2 The character of s 34(2)(b)(ii)

16. Section 51(xix) has not been regarded to date as a purposive power. It would therefore be conventional to characterise s 34(2)(b)(ii) by reference to the rights, duties, liabilities etc which it changes, regulates or abolishes.[17] In response to the head of power challenge, the Defendants instead seek to characterise the law by what they claim is its purpose, namely "to protect the integrity of the naturalisation process": DSJ [7], [20], [28], [29], [39], [50].

17. Whilst it can be accepted that s 51(xix) would support a law protective of the naturalization process, such a law must still have a direct legal operation on the subject of the power.[18] The Court's analysis in *Spence* suggests that: (1) "purpose" is to be determined by reference to what the "effect and operation [of the law] are 'appropriate and adapted' to achieve";[19] and (2) where the purpose is "protection of something that is encompassed within the subject matter", its "breadth and intensity of the impact" on other matters may show that it is "insufficiently adapted to achieve that purpose."[20]

18. If that be the applicable analysis, for reasons given under heading **(A)** above, the effect and operation of s 34(2)(b)(ii) are not appropriate and adapted to achieve the protection of the integrity of the naturalization process.

B.3 The limitations on s 51(xix)

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16 When reintroducing the precursor s 34(2)(b)(ii) to s 21 of the 1948 Citizenship Act in 1984, the precursor to s 34(3) was also inserted – s 23D(3A). Its express purpose was to ensure compliance with Australia's international obligations. Hansard, House of Representatives (7 December 1983) at 3384 ("The powers of deprivation of citizenship are made subject to Australia's international obligations to prevent statelessness.")

17 Eg *Spence v the Commonwealth* (2010) 241 CLR 118 at [57].

18 *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1983) 105 CLR 169 at 206 (Mason J).

19 *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 319 (Brennan J); *Leask v The Commonwealth* (1996) 187 CLR 579 at 591 (Brennan CJ); *Spence*, [61].

20 *Spence* at [62].

19. Contrary to DSJ [35], s 34(2)(b)(ii) is not sufficiently connected with "naturalization" to be characterised as a law with respect to that process or activity. Section 34(2)(b)(ii) is not tied to the matters a Minister was required to consider before granting citizenship under s 13 of the 1948 Citizenship Act.[21] In contrast, s 34(2)(b)(ii) concerns the Minister's view of the public interest at the time the power is exercised, a wholly different inquiry "import[ing] a discretionary value judgment to be made by reference to undefined factual matters".[22]

20. In response to DSJ [37]-[39], the requirement of "reasonableness" simply draws attention to the need for a sufficient connection between a law and a head of power (see PS [25]). A law, for example, that permitted a Minister to revoke the citizenship of naturalized citizen with blue eyes would not be a law that would engage the power in s 51(xix). Such a law would have nothing to do with the relationship between the individual and the Australian body politic. It would not be an event "in the life of an individual" or the nation that would "affect the relationship between the individual and the Australian body politic so as to engage the power conferred on the Parliament to make laws with respect to 'naturalization and aliens'".[23]

21. At DSJ [40]-[44], the Defendants submit this Court should not accept the limit to s 51(xix) considered by Gordon J in *Alexander*: that regardless of conditions on membership, with the passage of time, a citizen or other member who has developed bonds of deep connection or attachment to the community is outside the ambit of either of its aspects. Contrary to the Defendants' argument, this limit involves no confusion of statutory and constitutional statuses. It simply recognises that, after a point, the naturalization process has so long ago completed that the person passes beyond the legitimate boundary of the power. In the Plaintiff's case, that point had been reached by no later than the date of the Revocation Decision.

C Question 1(b): The Ch III challenge

22. The Defendants advance two principal responses to the Ch III challenge.

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21 Section 13(1)(f) concerns the Minister's opinion of a person's character at the time of the grant of membership: *Irving v Minister of State for Immigration, Local Government & Ethnic Affairs* (1996) 68 FCR 422 at 424-425, 427-428 (Davies J), 431 (Lee J).

22 See *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216 (Brennan, Dawson and Gaudron JJ). As much is illustrated by the Minister's reasons for the Revocation Decision, at SC-3.

23 *Alexander* at [39], also [42] (Kiefel CJ, Keane and Gleeson JJ).

C.1 The purpose claim

23. ***First***, the Defendants simply assert, without attempting to demonstrate it by reference to the text of the provision, that the "principal purpose"[24] of s 34(2)(b)(ii) is protective, not punitive. For reasons developed under heading **(A)** above, this submission should be rejected. Alternatively, even if there is a latent protective purpose, s 34(2)(b)(ii) pursues "that purpose in a manner incompatible with the doctrine".[25]

24. There is a constitutionally meaningful distinction between s 34(2)(b)(ii) and the fraud/concealment powers. The former is an open-ended, discriminatory power to expel certain naturalized citizens. The latter operate to unwind something that should never have occurred in the first place. The US cases discussed at DSJ [52]-[53] concern powers of the latter variety. They do not concern a power like s 34(2)(b)(ii), and are therefore of no assistance in determining the purpose of s 34(2)(b)(ii). The US cases treat a fraud or material non-disclosure as something which renders the naturalization certificate illegally procured. To set aside something which is fraudulently or illegally procured is no punishment at all, because it is merely to "remedy a past fraud by taking back a benefit to which the alien is not entitled and thus restoring the status quo ante".[26] Were it otherwise, there would be "a premium on the successful perpetuation of frauds against the nation".[27] Because s 34(2)(b)(ii) does not operate upon fraud or material non-disclosure, the syllogism in the US cases lacks the any logical force when applied to s 34(2)(b)(ii).

25. Further, it is noteworthy that the US cases involved a denaturalization proceeding, before a Court,[28] in what is described as a "suit in equity"[29] or a "new form of judicial review",[30] having special principles including: (a) a "heavy burden of proof";[31] and (b) requiring materiality of the fraud or non-disclosure.[32] Two points arise from this. *First*, no difficulty seems to have been felt about courts making "determinations of a kind ill-adapted to the judicial process": cf DSB [45]. *Second*, since the identity of the person wielding the

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24 *Alexander* at [75] (Kiefel CJ, Keane and Gleeson JJ).
25 *Alexander* at [106] (Gageler J); see also [246] (Edelman J).
26 *United States v Phattey* 943 F 3d 1277 at 1283 (2019).
27 *Knauer v United States*, 328 US 654 at 674 (Douglas J) (1946).
28 Eg § 15 of the *Act of June 29, 1906* – considered in *Johannessan v United States* 225 US 227 (1912); § 338 of the Nationality Act of 1940 (54 Stat. 1137, 1158, 8 U. S. C. § 738) – considered in *Baumgartner v United States* 322 US 665 (1944); § 340 (a) of the *Immigration and Nationality Act 1952* – considered in *Fedorenko v United States* 449 US 490 (1981).
29 *Fedorenko v United States* 449 US 490 at 516-518 (1981).
30 *Johannessan v United States* 225 US 227 at 241 (Pitney J) (1912).
31 *Costello v United States* 365 US 265 at 269 (1961).
32 Eg *Chaunt v United States* 364 US 350 at 355 (1960).

denaturalization power can be relevant to its penal character,[33] this may assist in explaining the conclusion in the US cases that the provisions in question are non-penal.

C.2 The *Lim* solecism

26. ***Second***, the Defendants submit that the prohibition recognised in *Lim* is conjunctive: it operates only to prevent the executive from being invested with the function of "adjudgment and punishment of criminal guilt". Despite it being common ground in *Falzon* and *Alexander* that the reference to adjudging and punishing criminal guilty was to two alternative functions, both of which are exclusively judicial,[34] the Defendants now submit that the imposition of "punishment" without concomitant adjudication is not "punishment of a kind within the exclusive power of the judiciary": DSB [52]. The submission is flawed: grammatically, jurisprudentially and doctrinally.

27. It is flawed grammatically because "and" is not only conjunctive: it can also be disjunctive, depending on context:[35] "[t]he use of the word 'and' can sometimes suggest a conjunctive relationship between two activities, but not necessarily so. It can have a disjunctive use."[36]

28. It is flawed jurisprudentially because it ignores what the plurality in *Lim* said immediately after the sentence on which the Defendants rely. Immediately after stating at 27 that "the function of the adjudgment and punishment of criminal guilt" is exclusively entrusted to the courts, the plurality then gave an example of a law that would infringe the prohibition. The example given was a law empowering the executive "to detain citizens in custody notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt". Such a law involves no adjudgment of guilt; only punishment. Yet it was held that this would be invalid. It follows that their Honours' use of "and" in the preceding sentence can only have been disjunctive.

29. It is flawed doctrinally because it seeks to construe the words of a judgment as though it were a statute, and fails to grapple with the unacceptable consequences of the statement of principle that that construction produces. An unacceptable consequence of the Defendants'

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33 *Alexander* at [252] (Edelman J).

34 *Alexander* at [235] (Edelman J).

35 *Stroud's Judicial Dictionary of Words and Phrases* (Sweet & Maxwell, 9th ed), vol 1, 123: "Sometimes, however … ["and"] is, by force of a context, read as 'or'"; *Attorney-General of New Zealand v Brown* [1917] AC 393 at 397 (Lord Buckmaster): "it is plain from the use of the word 'and' in the phrase [in question] … that 'and' must be regarded as 'or'"; *Words and Phrases Legally Defined* (LexisNexis 5th ed) vol 1, p 158; *Schafer v Commissioner of Police* [2019] QCA 292 at [18] fn 20 (North J, Sofronoff P and Philippides JA agreeing): "'and' can be read disjunctively"; Herzfeld and Prince, *Interpretation* (Thomson Reuters, 2nd ed) [5.260].

36 *Blackpool Borough Council v Howitt* [2008] EWHC 3300 (Admin) at [17].

submission is that a Commonwealth law will not contravene Ch III so long as it confers on the executive the function of punishing criminal guilt alone, isolated from adjudgment. If correct, that would mean that the executive can be empowered to engage in sentencing functions in relation to criminal convictions. For example, on this view, there would be no constitutional impediment to a Commonwealth law which empowered a court to determine whether a person was guilty of a terrorism-related offence, and for the matter then to be referred to the Minister for Home Affairs for sentencing. Plainly, that cannot be. The function of punishing criminal guilt is constitutionally committed to the courts alone.

30. Aside from the *Lim* solecism, the Defendants are also incorrect to submit that the plurality reasons in *Alexander* are authority only for the proposition that "the 'power to determine the facts that enliven the power to impose' citizenship cessation is exclusively judicial": DSB [43], our emphasis. contraryThat does not seem to be a fair reading of the plurality's reasons. As summarised at [70], the plurality concluded that the power in s 36B(1) was required to be exercised by a Ch III Court not because it involved fact-finding, but instead because of: (a) the consequences of a determination under s 36B for the citizen; (b) the legislative policy informing the operation of s 36B; and (c) a comparison of s 36B with s 36D "(which authorises the same consequences for the citizen only upon conviction after a trial)".

Date: 16 May 2023

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ANNEXURE TO THE REPLY SUBMISSIONS OF THE PLAINTIFF

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

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

No.	Description	Version	Provisions
Statutory provisions			
2.	*Australian Citizenship Act 1948* (Cth)	As made (21 December 1948) As at 2 September 1988	s 21 ss 13, 21, 23D
3.	*Australian Citizenship Amendment Act 1984 (Cth)*	As made (25 October 1984)	ss 21, 23D
4.	*Australian Citizenship Act 2007* (Cth)	Current	ss 2, 3, 4, 34, 36B
5.	*Nationality and Citizenship Act 1958* (Cth)	As made (8 October 1958)	s 7
Foreign			
6.	*British Nationality and Status of Aliens Act 1914* (UK)	As made (7 August 1914)	s 7
7.	*British Nationality and Status of Aliens Act 1918* (UK)	As made (8 August 1918)	s 1
8.	*British Nationality Act 1948* (UK)	As made (30 July 1948)	s 20
9.	*British Nationality Act 1981* (UK)	As made (30 October 1981) Current	s 40 s 40
10.	*Nationality, Immigration and Asylum Act 2002* (UK)	As made (7 November 2002)	s 4