HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

B56/2021

BRENDAN CRAIG THOMS

Applicant

and

COMMONWEALTH OF AUSTRALIA

Respondent

REPLY SUBMISSIONS OF THE APPLICANT

Part I: Certification

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

Part II: Reply

Introduction[1]

2. The Commonwealth's submissions must be understood in the context of the legislative provisions whose application to Mr Thoms, a member of the Australian community as a result his status as a First Nations Australian (who satisfies the tripartite test in *Mabo (No 2)*)[2], is being considered for constitutional validity.
3. The use by the legislature of the mechanism of a reasonable suspicion (or knowledge) as to a person's alien status as a criterion for detention is not in question in this case. The problem for the constitutional validity of ss 189 and 196 of the Migration Act, *inter alia*, as they apply to Mr Thoms, is not that they rely on an officer's reasonable suspicion but,

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1 The Commonwealth's submissions (**RS**) make reference to another matter pending before this Court, namely, *Montgomery v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Ors* (Case No S173/2021). On 15 November 2021, SC Derrington J of the Federal Court delivered judgment in *Montgomery v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1423 granting the relief sought by Mr Montgomery including a writ of habeas corpus, an order that Mr Montgomery be released from immigration detention, forthwith, and that a writ of certiorari issue quashing the Minister's decision not to revoke the mandatory cancellation of Mr Montgomery's visa.

2 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 70.

rather, that the content of the reasonable suspicion has no relevance to Mr Thoms' rights as a constitutional non-alien not to be detained.

4. Mr Thoms is and has been, at all relevant times, an unlawful non-citizen. However, as the Commonwealth has acknowledged, by releasing him in facial breach of s 196(3), his statutory status as an unlawful non-citizen bears no relationship to his right to remain free in the Australian community.

5. Section 189 continues to have constitutional effect in respect of those suspected and actual unlawful non-citizens who are not First Nations Australians who satisfy the tripartite test in *Mabo (No 2)*. Section 189 would not have to be read down if it were substantively amended to provide for the detention of persons who were reasonably suspected to be unlawful non-citizens and reasonably suspected not to be First Nations Australians who satisfy the tripartite test in *Mabo (No 2)*. But that is not its content and, during the whole of Mr Thoms' detention, no officer purported to form any opinion that he was not a First Nations Australian who satisfied the tripartite test in *Mabo (No 2)*.

Incidentalism

6. The argument that it is necessary, to effectuate the government function of deporting unlawful aliens, to detain non-alien members of the Australian community by reference to a criterion that has no relevance to their status as non-aliens[3], has only to be stated to be rejected.

7. That is quite different from asserting that it may be so necessary to detain, at least temporarily, some persons who are not susceptible to be removed or deported (or who already have a valid visa) because an officer formed a reasonable suspicion as to a relevant criterion which suspicion turned out, as in *Ruddock v Taylor* (***Ruddock***)[4], to be in error.

8. The factual situations said by the Commonwealth[5] to connect heads of power with regulation of persons or conduct not, in themselves, constituting the subject of the head of power bear no comparison to the present case.[6]

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3 *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 77 cited at RS [9].

4 (2005) 222 CLR 612.

5 RS [9]-[10].

6 In *Cunliffe v Commonwealth* (1994) 182 CLR 272, the legislation was directed at regulating migration agents, persons who give assistance to aliens in their visa applications (compare Mason CJ at 295 in respect of the immigration power); in *New South Wales v Commonwealth (Work Choices Case)* (2006) 229 CLR 1, as the Commonwealth points out at RS [10], the object of the law was to regulate persons whose conduct is capable of affecting constitutional corporations; *Actor's and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169, 181 (per Gibbs CJ) who explained that the legislation was directed at conduct intended to cause harm to a constitutional corporation and likely to have that effect; and in *Air Caledonie Investments v Commonwealth* (1988) 165 CLR 462 at 470, immigration clearance was treated as purely a matter of convenience

9. It follows that the conclusory statement[7] that a law can have a sufficient connection with the aliens power even if it imposes obligations on non-aliens is of no assistance to the Court.

The Lessons of Ruddock

10. The Commonwealth's second, third and fourth propositions[8] are based on a misreading of ***Ruddock***.[9] It suffices to consider the claim[10] that the Court in ***Ruddock*** acted on the basis that Mr Taylor was, as a matter of res judicata, a non-alien.[11] The comments of Kirby J relied upon for this were focussed only on the continuing effect, post-*Shaw v Minister for Immigration and Multicultural Affairs* (***Shaw***)[12], of the orders made in Mr Taylor's favour in *Re Patterson; ex parte Taylor* (***Re Patterson***).[13] There was no order declaring Mr Taylor to be a non-alien. The orders of the Court comprised orders absolute for writs of certiorari and prohibition addressed to the second of the visa cancellation decisions.[14] Mr Taylor had the continuing benefit of visa cancellation orders being void ab initio, but there is no basis for the suggestion that he continued to be regarded in law and fact as a non-alien.[15] The conclusory statements[16] that Mr Thoms and Mr Taylor are in the same legal and factual position – and that Mr Thoms' continued detention was, as a result, validly authorised by s 189 – are without foundation.

11. The statements of the plurality in ***Ruddock***[17], said to be critical of the NSW Court of Appeal[18], may be best understood as a reminder that questions of constitutional validity are best considered at the level of the provision rather than the statute as a whole and an observation that the provision considered in ***Re Patterson*** was s 501 and not any other provision. They do not support the claim that the plurality in ***Ruddock*** decided that s 189 is constitutionally valid to detain a non-alien Australian by reference to a suspicion that

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for Australian non-aliens who choose to go overseas. The point of the decision in the latter case was that the immigration clearance service charge was, in constitutional terms, a tax because immigration clearance could not be seen as a service to persons who were not immigrants to Australia but, rather, were persons who had a right to return to Australia as non-aliens.

7 RS [10].
8 RS [3].
9 ***Ruddock*** (2005) 222 CLR 612.
10 RS [16]
11 Relying on comments by Kirby J at (2005) 222 CLR 612 at [129] and [169]-[170].
12 (2003) 218 CLR 28.
13 (2001) 207 CLR 391.
14 (2001) 207 CLR 391 at 519: the first of the visa cancellation decisions had been set aside by consent.
15 This, no doubt, explains why no arguments going to constitutional invalidity of s 189 were argued.
16 RS [24].
17 ***Ruddock*** (2005) 222 CLR 612 at [30]-[36] (Gleeson CJ, Gummow, Heydon and Hayne JJ).
18 RS [20]-[22].

that person may be an unlawful non-citizen.[19] The claim flies in the face of the clear statements of the plurality that constitutional questions were not in issue in ***Ruddock***[20] and the plurality's substantive grounds for deciding that appeal[21].

Disapplication

12. The Commonwealth's third proposition[22] is flawed in the manner in which it seeks to define the circumstances in which s 189 should be read down or disapplied. Section 189 is premised upon only one suspicion, namely, whether Mr Thoms is an unlawful non-citizen. Whether that suspicion is categorised as reasonable or not or whether it rises, even, to knowledge, it has no constitutional relevance to Mr Thoms' alienage status. The suspicion (reasonable or otherwise) that a person is within the scope of a class of persons that the Commonwealth Parliament has no power to regulate is simply irrelevant. In application to Mr Thoms, s 189 is unsupported by s 51(xix) and must be read down so as not to apply to Mr Thoms. Mr Thoms' detention was unsupported by any valid law.
13. To postulate that an incursion of rights as serious as detention[23] can depend on something not touched upon in the section (whether it is objectively reasonable for an officer to treat unlawful non-citizenship as a marker of alienage) is not to read down s 189 but, rather, to rewrite it in some detail. It also has the effect of making the reach of s 51(xix) of the *Constitution* depend on an officer's perception of the content of that section at any point in time.[24] It also follows that the Commonwealth's fourth proposition[25] should be wholly rejected.[26] The Court would hesitate to embrace a legal doctrine that expanded official

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19 RS [23].

20 ***Ruddock*** (2005) 222 CLR 612 at [14], [23], [35], [39] and [47] (Gleeson CJ, Gummow, Heydon and Hayne JJ).

21 ***Ruddock*** (2005) 222 CLR 612 at [37]-[51] (Gleeson CJ, Gummow, Heydon and Hayne JJ). The suggestion also flies in the face of this Court's practice to avoid deciding constitutional questions where it is unnecessary to do so for the purpose of deciding the case. See, for example, the judgment of Nettle J in *Clubb v Edwards* (2019) 267 CLR 171 (particularly at [237]).

22 That s 189(1) must be partially disapplied where it purports to authorise and require the detention of unlawful non-citizens where objectively reasonable grounds to suspect that the non-citizen is an alien do not exist.

23 When it comes to the deprivation of liberty, the common law is a vigilant guardian: see, the comments of Jagot J in *Guo v Commonwealth* (2017) 258 FCR 31 (***Guo***) at [35(6)]. The Commonwealth's reliance on ***Guo*** at RS [23] does not support the Commonwealth's argument because ***Guo*** concerned an alien and, it was decided at a time when no group of people was recognised as coming within the *Pochi v Macphee* (1982) 151 CLR 101 limit.

24 There must be objectively determinable criteria for detention. Parliament cannot avoid judicial scrutiny of the legality of detention by legislating criteria which are too vague. This would include an attempt to make the length of detention dependent upon the unconstrained and unascertainable opinion of the executive: *Plaintiff M96A/2016 v The Commonwealth* (2017) 261 CLR 582 at 597 [31] cited in *Commonwealth v AJL20* (2021) 95 ALJR 567 at [30] (Kiefel CJ, Gageler, Keane and Steward JJ).

25 Whether there are objectively reasonable grounds to suspect that a person is an alien must be judged against what was reasonably capable of being known at the time: RS [3].

26 The applicant repeats his observation that there is no rule by which a decision as to the constitutionality of a law only operates prospectively: see, AS [67].

powers of detention or arrest sourced not to a constitutional head of power but to opinion, beliefs or suspicions (reasonable or otherwise) of public officials.[27]

14. Nothing in *Commonwealth* v *AJL20* (***AJL20***)[28] detracts from the *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*[29] principles or the need for the purpose of detention to be strictly confined within the categories articulated in that case. ***AJL20*** does not sanction some generalised separation from the community (independent of alien status) pending a determination that a person is permitted to be within the community.[31] ***AJL20*** restated and affirmed[32] that detention could only be for one or other of the purposes of segregation pending receipt, investigation and determination of any visa application and removal. The ratio in ***AJL20*** was that the purpose of removal was satisfied in that case notwithstanding matters going to non-refoulement.

Conclusion

15. Section 189, in its application to Mr Thoms, is, and always was, invalid. As a constitutional non-alien, he is not within the category of persons described in s 51(xix) as an 'alien'. A suspicion (reasonable or otherwise) of an officer as to whether he is an unlawful non-citizen is irrelevant. To conclude otherwise would permit the Commonwealth to exercise powers in respect of persons that it 'reasonably suspects' to be in the constitutional class (despite the true constitutional position being otherwise).

Stephen Keim SC
Higgins Chambers
T: (07) 3229 0381
s.keim@higginschambers.com.au

Kate Slack
Higgins Chambers
T: (07) 3221 2182
kslack@qldbar.asn.au

Arron Hartnett
John Jerrard Chambers
T: (07) 3211 2109
ahartnett@qldbar.asn.au

27 ***Ruddock*** (2005) 222 CLR 612 at [178] (per Kirby).
28 (2021) 95 ALJR 567.
29 (1992) 176 CLR 1. See, AS [46]-[48].
31 RS [25].
32 (2021) 95 ALJR 567 at [25]-[30] (Kiefel CJ, Gageler, Keane and Steward JJ).

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ANNEXURE TO APPLICANT'S REPLY SUBMISSION

Constitutional provisions	s 51(xix)
Statutes	*Migration Act 1958* (Cth) (current)