HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	B56/2021
File Title:	Thoms v. Commonwealth of Australia
Registry:	Brisbane
Document filed:	Form 27D - Respondent's submissions
Filing party:	Defendant
Date filed:	12 Nov 2021

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IN THE HIGH COURT OF AUSTRALIA
QUEENSLAND REGISTRY

BETWEEN: **BRENDAN CRAIG THOMS**

Applicant

and

COMMONWEALTH OF AUSTRALIA

Respondent

SUBMISSIONS OF THE RESPONDENT

PART I FORM OF SUBMISSIONS

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

PART II CONCISE STATEMENT OF ISSUES

2. The separate question reserved by the Federal Court,[1] which has now been removed into this Court pursuant to s 40(1) of the *Judiciary Act 1903* (Cth),[2] concerns the lawfulness of the applicant's detention between 28 September 2018 and 11 February 2020. The only issue is whether s 189(1) of the *Migration Act 1958* (Cth) (**Migration Act**) authorised his detention during that period. That issue turns upon the consequences of the decision in *Love v Commonwealth*[3] (***Love/Thoms***) for the operation of s 189(1) of the Migration Act.

3. The Commonwealth advances the following propositions. ***First***, a law may have a sufficient connection with s 51(xix) even if it applies to non-aliens (including Australian citizens). ***Second***, as *Ruddock v Taylor*[4] illustrates, s 189(1) of the Migration Act has such a connection with respect to persons whom it is reasonable to suspect are aliens, with the result that it can validly authorise and require the detention of a non-alien (which Mr Taylor had been held to be). ***Third***, in the rare cases that s 189(1) purports to authorise and require the detention of an unlawful non-citizen in circumstances where there are not

1 See orders of Jagot J dated 6 July 2021 [**CRB 30**].
2 See orders of Keane J dated 11 October 2021 [**CRB 154**].
3 (2020) 94 ALJR 198.
4 (2005) 222 CLR 612.

objectively reasonable grounds to suspect that that non-citizen is an alien, it exceeds the legislative power conferred by s 51(xix) and must be partially disapplied to that extent (that being the reason s 189(1) no longer required the applicant to be detained following *Love/Thoms*). ***Fourth***, whether there are objectively reasonably grounds to suspect that a person is an alien must be judged against what was known or reasonably capable of being known at the time. For that reason, prior to this Court delivering judgment in *Love/Thoms*, the applicant's detention (like the detention of the non-alien Mr Taylor in *Ruddock v Taylor*) was authorised and required by s 189(1) of the Migration Act.

PART III SECTION 78B NOTICE

4. The applicant has issued a notice under s 78B of the *Judiciary Act 1903* (Cth).

PART IV MATERIAL FACTS IN DISPUTE

5. There are no facts in dispute. The parties have agreed on a statement of agreed facts under s 191 of the *Evidence Act 1995* (Cth).[5]

PART V ARGUMENT

A. THE ALIENS POWER

6. Section 51(xix) of the Constitution empowers the Parliament to make laws with respect to "naturalization and aliens". A law that authorises the detention of an alien is plainly such a law, because that law will operate directly upon the class of persons that are the subject of this head of power.[6] Albeit "Proposition 1" at **AS [24]** is framed more generally in respect of the Migration Act as a whole, there is no disagreement between the parties as to that proposition. It is, however, appropriate to focus only on ss 189 and 196, because

5 See Exhibit NLM-8 to the affidavit of Niamh Lenagh-Maguire [**CRB 37-152**].

6 See, eg, *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 (***Lim***) at 19; *Al-Kateb v Godwin* (2004) 219 CLR 562 at [1], [4] (Gleeson CJ), [40] (McHugh J), [110], [139] (Gummow J); *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at [138] (Crennan, Bell and Gageler JJ); *Plaintiff M96A v Commonwealth* (2017) 261 CLR 582 at [21] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ); *Commonwealth v AJL20* (2021) 95 ALJR 567 (***AJL20***) at [72] (Kiefel CJ, Gageler, Keane and Steward JJ).

other aspects of the Migration Act may be supported by additional heads of power. That issue does not arise for determination.

7. This Court has held on a number of occasions that one aspect of the power conferred by s 51(xix) is the power to determine the circumstances in which a person will have the legal status of an "alien".[7] The Parliament has exercised that power by enacting the *Australian Citizenship Act 2007* (Cth) and its predecessors, and ss 13 and 14 of the Migration Act, which create a binary distinction between citizens and non-citizens. The text of the Migration Act — which since 2 April 1984[8] has relied for its validity on s 51(xix)[9] — does not use the word "alien" at all (except in its long title). Instead, it uses the term "non-citizen", which was thought to be synonymous with "alien" for most of the period since 2 April 1984.[10] *Love/Thoms* must be understood as creating only a limited exception to the previously established identity between the concepts of "alien" and "non-citizen",[11] rather than breaking that link entirely, for otherwise all the provisions in the Migration Act concerning the rights, duties and liabilities of "non-citizens" would be invalid on the ground that they lack a sufficient connection to s 51(xix) (with the consequence that many prior decisions of this Court would have been wrongly decided).

8. In *Love/Thoms*, a majority of this Court held that, as the applicant satisfies the tripartite test set out in *Mabo v Queensland (No 2)*,[12] Parliament was not entitled to treat him as an alien.[13] The Commonwealth has sought leave to challenge the correctness of *Love/Thoms* in another proceeding that has been removed into this Court.[14] If that challenge succeeds,

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7 *Love/Thoms* (2020) 94 ALJR 198 at [131] (Gageler J), [168] (Keane J), [236], [244] (Nettle J); *Chetcuti v Commonwealth* (2021) 95 ALJR 704 (***Chetcuti***) at [12] (Kiefel CJ, Gageler, Keane and Gleeson JJ); *Shaw v Minister for Immigration and Multicultural Affairs* (***Shaw***) (2003) 218 CLR 28 at [2] (Gleeson CJ, Gummow and Hayne JJ; Heydon J agreeing).

8 On the commencement of the *Migration Amendment Act 1983* (Cth).

9 See *Chetcuti* (2021) 95 ALJR 704 at [11] (Kiefel CJ, Gageler, Keane and Gleeson JJ); *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at [10], [13] (Gummow and Hayne JJ), [102] (Heydon and Crennan JJ; Gleeson CJ agreeing).

10 *Lim* (1992) 176 CLR 1 at 25; *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 183-184 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ); *Cunliffe v Commonwealth* (1994) 182 CLR 272 (***Cunliffe***) at 313 (Brennan J), 375 (Toohey J); *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 (***Re Woolley***) at [14]-[15] (Gleeson CJ); *Shaw* (2003) 218 CLR 28 at [2] (Gleeson CJ, Gummow and Hayne JJ; Heydon J agreeing).

11 See *Chetcuti* (2021) 95 ALJR 704 at [13]-[14] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

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

13 *Love/Thoms* (2020) 94 ALJR 198 at [81] (Bell J).

14 See *Montgomery v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Ors* (Case No S173/2021).

the issue that arises in this proceeding could not arise again. However, because this Court has already determined that the applicant is a non-alien, the Commonwealth accepts that the applicant's claim for damages for alleged false imprisonment in the past must be determined on that basis. There is therefore no disagreement about "Proposition 2" in **AS [25]**.

9. It does not follow from the fact that the applicant is a non-alien that s 189(1) can have no application to him. While s 51(xix) confers legislative power with respect to a class of persons (ie aliens),[15] it is well established that it is capable of supporting laws that affect the rights and obligations of persons who are not aliens.[16] Like other heads of power, s 51(xix) "carries with it authority to legislate in relation to acts, matters and things the control of which is found necessary to effectuate its main purpose, and thus carries with it power to make laws governing or affecting many matters that are incidental or ancillary to the subject matter".[17] That is why, for example, the Migration Act can validly impose immigration clearance obligations on all persons who enter Australia,[18] even though many of those persons are Australian citizens. In that operation, the Migration Act is sufficiently connected to s 51(xix) because, as the Court observed in another context, immigration clearance is "necessary, in the public interest, to enable the entry of non-citizens to be prevented or controlled and to enable proper administrative records and procedures to be kept or followed in relation to the arrival and departure of citizens and non-citizens alike".[19]

10. It is not at all unusual for a legislative power with respect to persons of an identified kind to support laws that affect the rights, duties or liabilities of persons who are not in the identified class. For example, in *New South Wales v Commonwealth (Work Choices Case)*, a majority of this Court accepted that s 51(xx) – which is the other main "person"

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15 *Cunliffe* (1994) 182 CLR 272 at 315 (Brennan J). See also *New South Wales v Commonwealth (Work Choices Case)* (2006) 229 CLR 1 at [163], [321] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); *Actors & Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 181 (Gibbs CJ), 206-207 (Mason J).

16 As is demonstrated by *Cunliffe* (1994) 182 CLR 272 at 295 (Mason CJ), 317–318 (Brennan J), 334–335 (Deane J), 358–359 (Dawson J), 374–375 (Toohey J), 387 (Gaudron J) and 394 (McHugh J).

17 *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 77 (Dixon CJ, McTiernan, Webb and Kitto JJ); *Cunliffe* (1994) 182 CLR 272 at 296 (Mason CJ), 312 (Brennan J), 354 (Dawson J), 373-374 (Toohey J).

18 Migration Act, s 166.

19 *Air Caledonie Investments v Commonwealth* (1988) 165 CLR 462 at 470.

power in s 51 of the Constitution – is not confined to laws that have constitutional corporations as their object of command.[20] Instead, it extends to laws that regulate anyone whose conduct is capable of affecting the activities, functions, relationships or business of such corporations.[21] By the same process of reasoning, a law can have a sufficient connection with the aliens power even if in some operations it imposes obligations on non-aliens. That process of characterisation has nothing to do with, and plainly does not contravene, any principle established in *Australian Communist Party v Commonwealth*[22] [**cf AS [39]**].

B. *RE PATTERSON; EX PARTE TAYLOR* AND *RUDDOCK v TAYLOR*

11. The drafting of s 189(1) of the Migration Act makes plain that its operation is not confined to persons who are, in fact, non-citizens or aliens (**cf AS [46]**). As Gleeson CJ, Gummow, Hayne and Heydon JJ observed in *Ruddock v Taylor*:[23]

> Had it been intended that those who were to be subject to detention by an officer should be confined to those who are in fact unlawful non-citizens, s 189 would have been much simpler. The section would have read, "an officer shall detain an unlawful non-citizen". The reference to an officer's state of mind is explicable only if the section is understood as not confined in operation to those who are, in fact, unlawful non-citizens. Further, the condition upon which the obligation to detain is premised … is not to be read as excluding from its reach the case where an officer is subjectively convinced that a person is an unlawful non-citizen but later examination reveals that opinion to have been legally flawed.

12. The work done by the words "reasonably suspects" in s 189(1) is to require officers to detain a person while the relevant suspicion exists, even if it turns out that the person detained is not in fact an unlawful non-citizen (whether because the person turns out to be an Australian citizen or a lawful non-citizen). As a matter of characterisation, s 189(1) has a sufficient (ie more than a tenuous[24]) connection to s 51(xix) because it requires there to be objectively reasonable grounds for that suspicion.[25] Where such grounds exist, s 189(1) affects the rights of people whom it is reasonable to suspect do not have a right to be in the community, by allowing such people to be separated from the community

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20 (2006) 229 CLR 1 at [143], [198].
21 (2006) 229 CLR 1 at [178]-[179].
22 (1951) 83 CLR 1.
23 (2005) 222 CLR 612 at [27].
24 See, eg, *The Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 at [16].
25 *George v Rockett* (1990) 170 CLR 104 at 112; *Guo v Commonwealth* (2017) 258 FCR 31 at [35(6)].

until it is determined either that they have a right to be in the community, or they can be removed from Australia.[26] That purpose exists even if it is ultimately ascertained that the person does have a right to be in the community, and therefore cannot be removed.[27] That is no doubt the reason why, notwithstanding the fact that s 189(1) expressly authorises and requires the detention of persons who may not in fact be aliens, the many challenges to its constitutional validity have failed.[28] Indeed, those challenges almost invariably focus on Ch III, it being plain as a matter of characterisation that a law providing for the detention of a person pending a determination about whether they have a right to be in the community or removal is a law with respect to aliens.[29]

10 13. The operation of s 189(1) in circumstances that are very closely analogous to those now before the Court is illustrated by *Re Patterson; Ex parte Taylor*[30] (***Re Patterson***) and *Ruddock v Taylor*.[31] Contrary to **AS [58]-[59]**, a fair reading of *Re Patterson* shows that *Ruddock v Taylor* cannot be distinguished on the basis that this Court was concerned only with the legality of detention following a conclusion that a visa cancellation decision was affected by jurisdictional error.

14. In *Re Patterson*, a majority of this Court held that, despite the fact that Mr Taylor was not an Australian citizen, he was not an alien.[32] The majority Justices relied on that conclusion in granting prohibition to prevent the Minister from further proceeding on the decision to cancel Mr Taylor's visa. Both Gaudron J (at [53]) and Kirby J (at [318])
20 expressly held that the order for prohibition was based on their conclusion that Mr Taylor was not an alien. Kirby J held that this conclusion also sustained the order for certiorari to quash the visa cancellation decision (at [318]). Justice Callinan expressly agreed with parts of Kirby J's judgment (at [377]) which, while not expressly including [318], did include [308] (on which Kirby J's conclusion at [318] was based). Finally, McHugh J

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26 *AJL20* (2021) 95 ALJR 567 at [20]-[21], [45] (Kiefel CJ, Gageler, Keane and Steward JJ); *Re Woolley* (2004) 225 CLR 1 at [224] (Hayne J; Heydon J agreeing), see also at [4] (Gleeson CJ), [36] (McHugh J), [127] (Gummow J).

27 Cf *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 385 ALR 405 (***McHugh***) at [51] (Allsop CJ); AS [48].

28 Most recently in *AJL20* (2021) 95 ALJR 567 at [45] (Kiefel CJ, Gageler, Keane and Steward JJ).

29 See *AJL20* (2021) 95 ALJR 567 at [20]-[21] (Kiefel CJ, Gageler, Keane and Steward JJ); *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 555 (Latham CJ; McTiernan J agreeing); *Al-Kateb v Godwin* (2004) 219 CLR 562 at [45] (McHugh J); *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at [138] (Crennan, Bell and Gageler JJ).

30 (2001) 207 CLR 391.

31 (2005) 222 CLR 612.

32 (2001) 207 CLR 391 at [51] (Gaudron J), [136] (McHugh J), [304] (Kirby J), [377]-[378] (Callinan J).

(with whom Callinan J also agreed) expressed himself (at [136]) in a way that indicated that his conclusion that Mr Taylor was not an alien was a sufficient and independent basis for the relief granted, notwithstanding that his Honour also agreed with Gummow and Hayne JJ that the respondent had made an unrelated jurisdictional error.

15. The existence of the category of non-citizen non-alien was short lived. In *Shaw v Minister for Immigration and Multicultural Affairs* (***Shaw***), the Court revisited *Re Patterson*, recognising that the "determination of the proposition for which *Patterson* is authoritative [as to the scope of the aliens power] is particularly of significance for other Australian courts".[33] The majority went on to suggest that, having regard to divisions in the majority reasoning, *Re Patterson* had not been effective to overrule *Re Nolan*.[34] But the majority also accepted an application by the Commonwealth (made for "more abundant caution") to re-open *Re Patterson*, and held that it "henceforth should be regarded as authority for what it decided respecting s 64 of the Constitution and the constructive failure in the exercise of jurisdiction by the Minister".[35]

16. As the passages just quoted make clear, *Shaw* overruled *Re Patterson* for the purposes of the doctrine of precedent in so far as it concerned the existence of a category of non-citizen non-aliens, with the majority expressly holding that "citizenship may be seen as the obverse of the status of alienage".[36] However, as a matter of res judicata, *Shaw* could not (and did not purport to) disturb the actual holding in *Re Patterson* that Mr Taylor himself was not an alien.[37]

17. Mr Taylor had been held in immigration detention under s 189(1) of the Migration Act for periods of 161 days and 155 days following two decisions to cancel his visa, both of which were quashed. He sued for false imprisonment with respect to those periods, and at trial was awarded damages of $116,000. An appeal to the NSW Court of Appeal against that judgment was unanimously dismissed. Chief Justice Spigelman (with whom

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33 (2003) 218 CLR 28 at [33].

34 (1988) 165 CLR 178 at 184.

35 (2003) 218 CLR 28 at [39]. As to the application to re-open, see at [38].

36 (2003) 218 CLR 28 at [2].

37 See *Ruddock v Taylor* (2005) 222 CLR 612 at [129], [169]-[170] (Kirby J) (dissenting in the result). Cf *McHugh* (2020) 385 ALR 405 at [49], where Allsop CJ assumed (without explanation) that the overruling of *Re Patterson* had somehow affected Mr Taylor's own status.

Ipp JA agreed) said, in discussing the effect of the High Court's judgment and order in *Re Patterson*, that:[38]

> Each of their Honours in the majority stated that s 501 could not apply to the respondent for constitutional reasons … The trial judge held that this conclusion necessarily meant that s 189 could also have no application. I agree.
>
> … If the definition of an "unlawful non-citizen" in s 15 cannot constitutionally apply to the respondent, s 189 can have no application either. In my opinion, that necessarily follows from the majority judgments in the High Court.
>
> When the High Court quashed the cancellation decision on the basis that the power to cancel could not constitutionally apply to the respondent, it necessarily decided that any other direct consequence of the cancellation could not constitutionally apply to him. In the circumstances of this case … detention was such a direct consequence.

18. Justice Meagher (with whom Ipp JA also agreed) said, again discussing *Re Patterson*:[39]

> The order of the High Court requires some elaboration. Until that case it was ordinarily assumed that if you were not a citizen you were an alien …. That that assumption seemed correct is confirmed by the circumstance that the High Court of Australia in *Nolan* … so decided. …
>
> *Re Patterson* … overruled *Nolan's* case, by a four-three majority … The central concept of the new doctrine enunciated in *Re Patterson* … was that there were no longer simply two categories, citizen and alien; there was a third category, viz, a non-citizen non-alien; Mr Taylor fitted into this third category …
>
> Armed with this curial decision, Mr Taylor commenced proceedings … for damages for wrongful imprisonment.

19. Later in his judgment, Meagher JA observed that in argument:[40]

> [t]here was some discussion whether, as a result of the High Court decision in *Re Patterson* …, ss 189, 196 and 501 of the Migration Act (Cth) were valid. It was suggested they were invalid because unconstitutional, not being supported by any head of legislative power. That they were inapplicable to the present case is clear enough, after the High Court decision, but that does not mean they are invalid. I can see no reason why they are not perfectly valid quoad unlawful non-citizens.

20. The passages quoted above demonstrate that the NSW Court of Appeal had unanimously proceeded on the basis that, as a result of *Re Patterson*, s 189 of the Migration Act could

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38 *Ruddock v Taylor* (2003) 58 NSWLR 269 at [15]-[18].

39 (2003) 58 NSWLR 269 at [67]-[68], [71].

40 (2003) 58 NSWLR 269 at [80] (emphasis added).

not authorise Mr Taylor's decision for constitutional reasons. That is important context in understanding the High Court's judgment allowing an appeal against that decision.

21. In *Ruddock v Taylor*,[41] this Court held that Mr Taylor's detention was authorised by s 189. Having summarised the reasoning of the NSW Court of Appeal quoted above,[42] Gleeson CJ, Gummow, Hayne and Heydon JJ observed that the "premise which underpinned the attention given in the Court of Appeal to whether the Ministers' decisions caused the respondent's detention is flawed. *Patterson* did not establish that s 189 could have no valid application to the respondent".[43] After pointing out that, in *Shaw*, the authority of *Patterson* had been confined, their Honours observed that "altogether apart from the subsequent consideration of these matters in *Shaw*, the Court in *Patterson* did not examine, let alone decide, any question about the validity of s 189 in its application to the present respondent".[44] Their Honours then said:[45]

> Even if *Patterson* were to be understood as holding that s 501 was invalid in that operation, it by no means follows that the respondent was beyond the valid operation of other provisions of the Act. Indeed, his holding a visa demonstrates why that is not so. And, in particular, whether or not the respondent was a person whose visa might lawfully be cancelled, and thus a person who might be removed from Australia as an unlawful non-citizen, it does not follow that s 189 could never have valid application to him.

22. The plurality then recorded that the respondent did not submit that s 189 was invalid (and had not done so below – contrary to Meagher JA's observations above). However, in the same paragraph in which that statement is made, their Honours immediately went on to say that it was "necessary to say something further about the suggestion that *Patterson* decided that the respondent was a person to whom s 189 could have no application".[46] The plurality then emphasised that "*Patterson* did not consider, and did not decide, any issue about the constitutional validity of s 189", before observing that it was not "useful to ask whether the Act, as a whole, applied to the respondent when the relevant question

41 (2005) 222 CLR 612 at [33]-[34], [36].
42 (2005) 222 CLR 612 at [30].
43 (2005) 222 CLR 612 at [33] (emphasis added).
44 (2005) 222 CLR 612 at [33].
45 (2005) 222 CLR 612 at [34] (emphasis added).
46 (2005) 222 CLR 612 at [35].

is whether a particular provision of the Act (s 189), when properly construed, validly applied to authorise and require the respondent's detention".[47]

23. In light of that framing of the "relevant question", and the multiple references in the plurality judgment to the "valid application"[48] or "valid operation" of s 189 to Mr Taylor, the holding in *Ruddock v Taylor* that Mr Taylor's detention was "lawful and required by the Act"[49] strongly supports the conclusion that the Court saw no reason to doubt that s 189 has a sufficient connection to s 51(xix) even in its application to a non-alien. The contrary proposition would require the conclusion that this Court allowed an appeal against a judgment of the NSW Court of Appeal that turned on the proposition that s 189 could not apply for constitutional reasons, while at the same time leaving that very point open. That is not a plausible reading of the judgment (cf **AS [54], [59]**). Instead, as Jagot J put it in *Guo v Commonwealth*,[50] "*Ruddock v Taylor* inescapably stands for the proposition that any person, citizen or not, may lawfully be detained provided that the detaining officer reasonably suspects the person of being an unlawful non-citizen".

24. For the above reasons, it does not follow from this Court's holding in *Love/Thoms* that the applicant is a non-alien that he is beyond the reach of s 189(1). "Proposition 3" in **AS [26]-[45]** should be rejected. The applicant is in the same position as was Mr Taylor following judgment in *Re Patterson*. His prior detention was authorised and required by s 189(1) of the Migration Act, notwithstanding his status as a non-alien.

25. Such detention does not contravene Ch III. Even if a non-alien could not be removed from Australia under s 198 of the Migration Act, his or her detention can be authorised under ss 189 and 196 without contravening Ch III once the purpose of that detention is more fully and accurately described than the description in **AS [47]**. As the majority accepted in *AJL20*, a constitutionally permissible purpose of immigration detention is separation from the community pending a determination that a person is permitted to be within the community or, if not so permitted, until removal.[51] A person who cannot ultimately be removed from Australia under s 198 (for example because they are actually

47 (2005) 222 CLR 612 at [36] (emphasis added).
48 In addition to [33], [34] and [36] quoted above, see also (2005) 222 CLR 612 at [37].
49 (2005) 222 CLR 612 at [51].
50 (2017) 258 FCR 31 at [71] (emphasis added). Cf *McHugh* (2020) 385 ALR 405 at [49] (Allsop CJ).
51 (2021) 95 ALJR 567 at [25], [28], [44], [61] (Kiefel CJ, Gageler, Keane and Steward JJ).

a citizen) can be detained under s 189 until their permission to remain in the community is confirmed.[52] "Proposition 4" in **AS [46]-[48]** (and also **AS [43]-[44]**) should be rejected.

C. PARTIAL DISAPPLICATION AND SECTION 189

26. The applicant points to statements in some judgments in *Love/Thoms*[53] that one or other of s 14[54] or s 189(1)[55] must be "read down" to accommodate the result in that case: see **AS [26]-[33]**. To "read down" s 14 so that it does not apply to non-aliens would confine the operation of the Migration Act more than is required to keep that Act within legislative power, given that a law may have a sufficient connection to s 51(xix) even in its operation with respect to persons who are not aliens. It would mean, for example, that non-citizens who satisfy the tripartite test could not be granted visas.[56] That may have adverse legal and practical significance in a number of ways, including for ease of entry and departure from Australia, entitlements to social security etc. As the proposed "reading down" of s 14 would confine the operation of the Migration Act more than is necessary to respect the limits of Commonwealth legislative power, that "reading down" is not authorised by either s 15A of the *Acts Interpretation Act 1901* (Cth) (**Acts Interpretation Act**) or s 3A of the Migration Act (both of which are discussed below). Attention should therefore be focused on s 189(1).

27. The question whether s 189(1) must be "read down", and the extent of any such reading down, was not decided by *Love/Thoms*: cf **AS [26]-[33]**. Indeed, the part of the cases that raised that very question (being the part of the case that is now before the Court) was expressly and deliberately excluded from the referral to the Full Court.[57] For that reason,

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52 As is expressly contemplated in *Ruddock v Taylor* (2005) 222 CLR 612 at [34].

53 See *Love/Thoms* (2020) 94 ALJR 198 at [145] (Keane J), [241] and [285] (Nettle J), [293] and [390] (Gordon J), [398] (Edelman J); *AJL20* (2021) 95 ALJR 567 at [35] (and fn 35) (Kiefel CJ, Gageler, Keane and Steward JJ); *Chetcuti* (2021) 95 ALJR 704 at [14] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

54 *Love/Thoms* (2020) 94 ALJR 198 at [241], [285] (Nettle J). See also *McHugh* (2020) 385 ALR 405 at [28]-[29], [33] (Allsop CJ).

55 See *Love/Thoms* (2020) 94 ALJR 198 at [293], [390] (Gordon J); *McHugh* (2020) 385 ALR 405 at [30]-[33], [51] (Allsop CJ).

56 Contrary to *Ruddock v Taylor*, which indicates that visas can validly be granted to a non-alien: see (2005) 222 CLR 612 at [34] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

57 See *Love v Commonwealth; Thoms v Commonwealth* [2018] HCATrans 250 at lines 44-46, identifying what was at that time the second proposed question reserved as follows: "If no to question 1, did section 189 of the Migration Act validly authorise and require the detention of the plaintiff between 10 August 2018 and 27 September 2018, whether or not he is an alien?". Edelman J raised

no argument was directed to that issue, and any observations on the point in the judgment should not be regarded as authoritative.[58]

28. The Commonwealth accepts that *Love/Thoms* requires some reading down or partial disapplication of s 189(1). That is so because, on the assumption that *Love/Thoms* is correct, it is possible for a person to be reasonably suspected (indeed, known) to be an unlawful non-citizen even if the person could not be reasonably suspected of being an alien. That is, in some potential operations, s 189(1) purports to require the detention of a person who is neither an alien nor reasonably suspected of being an alien. In those operations, s 189(1) lacks a sufficient connection with the aliens power. That does not, however, mean that s 189(1) is wholly invalid. It means only that its operation must be confined pursuant to s 3A of the Migration Act and s 15A of the Acts Interpretation Act to the minimum extent necessary to ensure that it does not exceed the legislative power in s 51(xix). So much was noted in *Chetcuti*,[59] as **AS [34]** points out, but the Court was not there required to consider how s 15A applies in the light of *Love/Thoms*, or indeed s 3A of the Migration Act, which reinforces a particular method of "reading down" that we refer to below as "partial disapplication". These are the very issues that this case presents for determination.

(i) Partial disapplication – General principles

29. Section 3A of the Migration Act provides:

> **3A Act not to apply so as to exceed Commonwealth power**
>
> (1) Unless the contrary intention appears, if a provision of this Act:
>
> (a) would, apart from this section, have an invalid application; but
>
> (b) also has at least one valid application;
>
> it is the Parliament's intention that the provision is not to have the invalid application, but is to have every valid application.

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the possibility that this question may turn on contested facts (lines 49-51, 183-205). As a result, at the next directions hearing proposed question 2 had been removed, which Edelman J indicated had addressed his concerns: *Love v Commonwealth; Thoms v Commonwealth* [2019] HCATrans 1 (7 January 2019) at lines 49-53 and 179-180 (and see also 176-177, where Mr Keim QC said "the other point is of course the impact of that question on section 189 in this case is a matter that has been left out").

58 *CSR Ltd v Eddy* (2005) 226 CLR 1 at [13] (Gleeson CJ, Gummow and Heydon JJ).

59 (2021) 95 ALJR 704 at [11] (Kiefel CJ, Gageler, Keane and Gleeson JJ). See also *AJL20* (2021) 95 ALJR 567 at fn 35 (Kiefel CJ, Gageler, Keane and Steward JJ).

(2) Despite subsection (1), the provision is not to have a particular valid application if:

(a) apart from this section, it is clear, taking into account the provision's context and the purpose or object underlying this Act, that the provision was intended to have that valid application only if every invalid application, or a particular invalid application, of the provision had also been within the Commonwealth's legislative power; or

(b) the provision's operation in relation to that valid application would be different in a substantial respect from what would have been its operation in relation to that valid application if every invalid application of the provision had been within the Commonwealth's legislative power.

(3) Subsection (2) does not limit the cases where a contrary intention may be taken to appear for the purposes of subsection (1).

(4) This section applies to a provision of this Act, whether enacted before, at or after the commencement of this section.

(5) In this section:

application means an application in relation to:

(a) one or more particular persons, things, matters, places, circumstances or cases; or

(b) one or more classes (however defined or determined) of persons, things, matters, places, circumstances or cases.

invalid application, in relation to a provision, means an application because of which the provision exceeds the Commonwealth's legislative power.

valid application, in relation to a provision, means an application that, if it were the provision's only application, would be within the Commonwealth's legislative power.

30. This is a more specific elaboration of s 15A of the Acts Interpretation Act, which provides:

> Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power.

31. The jurisprudence on s 15A assists in understanding the operation of s 3A. Section 15A can be given effect in different ways, which have often been collected under the general rubric of "reading down" or "severance". Edelman J has proposed the nomenclature of

"severance", "reading down", and "partial disapplication",[60] which we adopt below, although the argument does not depend on these labels. On that nomenclature:

31.1. "Reading down" is the process of the court preferring an interpretation of a statutory provision that renders the provision constitutionally valid over one which would render it invalid. It "applies ordinary language techniques by which the essential meaning of the words of a statutory clause is understood".[61] It results in a construction of a term that applies consistently in all cases, even where that results in a provision having a narrower operation than would be required by the limits of constitutional power.[62]

10 31.2. "Severance" permits a court "to strike down part of a statute that is beyond power, leaving the remainder of the statute operative."[63] It is relevant where "it is found that particular clauses, provisos or qualifications which are the subject of distinct or separate expression, are beyond the power of the legislature".[64] By this technique, words or clauses or entire sections or parts may be struck out (or blue-pencilled), leaving the balance of a statute to operate in accordance with its terms.

31.3. "Partial disapplication"[65] (which is sometimes called "reading down" or severance after giving a provision a "distributive operation") is relevant where "a provision which, in relation to a limited subject matter or territory, or even class of person, might validly have been enacted, is expressed to apply generally without the
20 appropriate limitation, or to apply to a larger … class of person than the power allows".[66] Partial disapplication does not alter the "essential meaning" of a provision, but simply confines its application.[67] In other words, it does not "alter the statement of the obligation", but simply takes some cases "outside the scope of

60 *Clubb v Edwards* (2019) 267 CLR 171 (***Clubb***) at [415], [422] (Edelman J).

61 *Clubb* (2019) 267 CLR 171 at [417] (Edelman J).

62 As is illustrated, for example, by *Coleman v Power* (2004) 220 CLR 1 at [188]-[200] (Gummow and Hayne JJ), [254]-[256] (Kirby J), as discussed by Gageler in *Clubb* (2019) 267 CLR 171 at [142].

63 *Clubb* (2019) 267 CLR 171 at [418] (Edelman J).

64 *Clubb* (2019) 267 CLR 171 at [141] (Gageler J).

65 *Clubb* (2019) 267 CLR 171 at [429], [431]-[433] (Edelman J).

66 *R v Poole; Ex parte Henry [No 2]* (1939) 61 CLR 634 at 652 (Dixon J), quoted in *Clubb* (2019) 267 CLR 171 at [141] (Gageler J), [340] (Gordon J), each using the terminology of severance. See also *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at [250] (Gummow, Crennan and Bell JJ).

67 *Clubb* (2019) 267 CLR 171 at [425] (Edelman J).

its operation".[68] Thus, where a provision is partially disapplied, that does not affect the application of that provision to persons, subject-matters or circumstances to which it continues to apply.[69]

32. Although various terms have been used to describe it,[70] the technique of partial disapplication is not new, and it has been applied in cases where some operations of a statute are invalid as a matter of characterisation (rather than solely because of an express or implied limitation on power). For example, in *Newcastle and Hunter River Steamship Co Ltd v Attorney-General (Cth)* (***Newcastle***),[71] the Court recognised that s 135 of the *Navigation Act 1912* (Cth) in terms applied broadly to the owner of every steamship registered in Australia or engaged in the coasting trade. That captured four categories of ship, but the legislative power of the Commonwealth extended to only two of those categories. The Court found that the statutory command in s 2(2) of the *Navigation Act 1912* (Cth), which was relevantly identical to s 15A,[72] had the effect that the Act operated "in respect of all ships to which they might lawfully be applied".[73] By similar reasoning, in *R v Hughes*, the words "functions and powers" in s 47(1) of the *Corporations Act 1989* (Cth) were treated as limited to functions and powers in respect of matters within Commonwealth legislative power.[74] Similarly, in *Jumbunna*, O'Connor J examined the breadth of the term "associations" and restricted the operation of the relevant subsection to "associations party to a dispute within the meaning of s 51(xxxv) of the Constitution".[75] There are other examples.[76]

(ii) Partial disapplication – Application

33. Of the various techniques described above, the language of s 3A of the Migration Act directs courts to adopt a partial disapplication approach. Partial disapplication is

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68 *Clubb* (2019) 267 CLR 171 at [151] (Gageler J); see also [347] (Gordon J), [442] (Edelman J).
69 *Clubb* (2019) 267 CLR 171 at [429] (Edelman J).
70 *Clubb* (2019) 267 CLR 171 at [415], [422] (Edelman J).
71 (1921) 29 CLR 357.
72 See *Clubb* (2019) 267 CLR 171 at [427] (Edelman J).
73 *Newcastle* (1921) 29 CLR 357 at 370.
74 (2000) 202 CLR 535 at [43] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).
75 *Jumbunna Coal Mine, NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 364.
76 See *Coleman v Power* (2004) 220 CLR 1 at [110] (McHugh J); *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at [66] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ); *Comcare v Banerji* (2019) 267 CLR 373 at [209]-[211] (Edelman J).

particularly apt because s 189(1) is expressed in terms that purport to apply to a larger class of persons (those who are reasonably suspected of being non-citizens) than can be sustained by s 51(xix) (which supports s 189(1) only to the extent that it applies to those who could reasonably be suspected of being aliens).[77]

34. On the assumption that *Love/Thoms* is correct, the need for some partial disapplication of s 189(1) is illustrated by the applicant's position after this Court delivered judgment in that case. Even after judgment was delivered, in its terms s 189(1) purported to require the applicant to remain in detention, because he remained a person who was reasonably suspected of being an unlawful non-citizen (because he is not a citizen and does not hold a visa). However, this Court's decision having established that he is not an alien, the objective circumstances were such that he could not reasonably have been suspected of being an alien thereafter. The applicant being neither an alien, nor a person who could reasonably be suspected of being an alien, in its purported application to the applicant s 189(1) went beyond what was authorised by s 51(xix), and the applicant was released.

35. Importantly, neither s 3A of the Migration Act nor s 15A of the Acts Interpretation Act provides any warrant to disapply s 189(1) with respect to all non-aliens. As explained in Section B above, to confine s 189(1) in that way would go well beyond what is required to ensure that it does not exceed the limits of s 51(xix), and thus well beyond what is authorised by s 3A or s 15A. It would also have the perverse outcome that in some cases s 189(1) could validly authorise the detention of citizens, but not the detention of non-aliens. There is no reason to conclude that Parliament intended that outcome, and reading down as a technique depends on giving effect to imputed legislative intention.

36. What, then, is the extent of the partial disapplication that is required in order to ensure that s 189(1) does not exceed the limits of s 51(xix) of the Constitution, bearing in mind that partial disapplication does not affect the meaning of a provision in the cases to which it can validly apply?[78]

37. The Commonwealth submits that s 189(1) authorises and requires officers to detain every person they reasonably suspect is an unlawful non-citizen, unless on the facts and law known to the officer at the time the person could not reasonably be suspected of being an

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77 *Clubb* (2019) 267 CLR 171 at [141] (Gageler J).

78 *Clubb* (2019) 267 CLR 171 at [425] (Edelman J).

alien. That qualification is necessary not because partial disapplication changes the statutory test that officers must apply (those officers still being required subjectively to suspect on reasonable grounds that the person is an unlawful non-citizen), but because it identifies the point at which s 3A of the Migration Act (and also s 15A of the Acts Interpretation Act) requires the partial disapplication of s 189(1) in order to prevent it from exceeding the legislative power in s 51(xix) of the Constitution.

38. Provided the objective circumstances are such that it is open reasonably to suspect that a person is an alien, s 189(1) will have a sufficient connection with s 51(xix) because it will require the detention of persons who it is objectively reasonable to suspect do not have a right to enter or remain in the Australian community, thereby advancing the purposes of the Migration Act.[79] By contrast, however, where the objective circumstances are such that it would not be open to an officer reasonably to suspect that a person is an alien, that nexus does not exist, and s 189(1) must be partially disapplied. It is on that basis that, since judgment was delivered in *Love/Thoms*, the Commonwealth has released unlawful non-citizens if the detaining officers conclude that they probably satisfy the tripartite test.

39. While they do not fall for decision in this case, difficult questions arise as to the extent to which partial disapplication of s 189 is required with respect to unlawful non-citizens who claim to satisfy the tripartite test, but where the veracity of that claim has not been determined by a court. Plainly enough, the mere fact that an unlawful non-citizen asserts that he or she is an Aboriginal Australian cannot in itself be sufficient to displace the "reasonable suspicion" that enlivens the duty to detain under s 189.[80] Nor can the fact that an unlawful non-citizen claims to satisfy some, but not all, of the limbs of the tripartite test. However, where the facts are such that a detaining officer could not reasonably suspect that an unlawful non-citizen is an alien (because, for example, the available evidence reveals that the person probably satisfies the tripartite test) then in that operation s 189(1) would exceed the reach of s 51(xix), and would be partially disapplied to that extent.[81] Importantly, however, that should be understood as a test to determine

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79 *AJL20* (2021) 95 ALJR 567 at [20]-[21].

80 See *McHugh* (2020) 385 ALR 405 at [98] (Besanko J).

81 Cf *McHugh* (2020) 385 ALR 405 at [340] (Mortimer J); see also at [66] (Allsop CJ), [76] (Besanko J), holding that post *Love/Thoms*, in cases where a person discharges the evidential onus of raising a question as to whether they are an Aboriginal Australian, s 189(1) will authorise detention only if the detaining officer has "a reasonable suspicion that [the person] was not an Aboriginal Australian". That said, the relevant issues were not fully argued in *McHugh*: see at [51]-[52] and [69]. To the

the circumstances in which partial disapplication of s 189(1) may be required. It should not be understood as suggesting that s 189(1) is to be construed as requiring officers to turn their mind to whether an unlawful non-citizen is an Aboriginal Australian in every case, such that a failure to do so would render detention unlawful whether or not there are objectively reasonably grounds to suspect that the person is an alien. To hold otherwise would be to redraft the statute.

(iii) No disapplication is required with respect to detention prior to *Love/Thoms*

40. The detention of the applicant that is in issue in this case occurred prior to this Court delivering judgment in *Love/Thoms*. That is important because, as the plurality observed in *Ruddock v Taylor*, "[w]hat constitutes reasonable grounds for suspecting a person to be an unlawful non-citizen must be judged against what was known or reasonably capable of being known at the relevant time."[82] Having made that point, the plurality immediately pointed to the law as understood in *Nolan*, before stating that, even if *Re Patterson* were to be understood as overruling *Nolan*, "what were reasonable grounds for effecting the respondent's detention did not retrospectively cease to be reasonable upon the Court making its orders in *Patterson* or upon the Court later publishing its reason in that case".[83] To the same effect, Callinan J said that s 189:[84]

> … does not require for its operation that persons act under it only upon the basis that they know and correctly understand in absolute terms all of the relevant facts and law. All it requires for its operation is that persons acting under it, hold a reasonable suspicion of a particular state of affairs, that is, that the person in question is an unlawful non-citizen. And as to that, the evidence and inferences from it are all one way, and in the appellants' favour. ...
>
> True it may be, with hindsight, that the respondent can be seen to have been detained upon a basis that has turned out to be erroneous, but the basis was nonetheless a lawful one, because it did not require for its lawfulness, absolute certitude of the precise legal status of the respondent.

41. *Ruddock v Taylor* is not distinguishable: see also [13]-[14] above. Like Mr Taylor, the applicant's constitutional status was only revealed by a judgment of this Court, but his claim for false imprisonment concerns detention that occurred prior to the handing down

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extent that *McHugh* requires officers subjectively to hold the suspicion identified above, that involves an alteration of the statutory test (rather than partial disapplication), and should not be followed.

82 *Ruddock v Taylor* (2005) 222 CLR 612 at [40] (Gleeson CJ, Gummow, Hayne and Heydon JJ) (emphasis added).

83 *Ruddock v Taylor* (2005) 222 CLR 612 at [40] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

84 *Ruddock v Taylor* (2005) 222 CLR 612 at [228]-[229] (emphasis added).

of that judgment. Just as it did not follow from *Re Patterson* that s 189(1) had not authorised Mr Taylor's past detention, it does not follow from *Love/Thoms* that s 189(1) did not authorise the applicant's past detention. At all times when the applicant was detained, this Court had held that "citizenship may be seen as the obverse of the status of alienage".[85] Accordingly, at all relevant times to ask whether it was reasonable to suspect that the applicant was a non-citizen, or whether it was reasonable to suspect that the applicant was an alien, was to ask exactly the same question. Officers could not have directed their minds to one question but not the other, because "alien" and "non-citizen" had been held to be synonymous.[86] *Love/Thoms*, in breaking the link between those words in the case of non-citizens who satisfy the tripartite test, revealed that the officers who detained the applicant did so on the basis of a mistake of law. But such a mistake has no effect on what was "known or reasonably capable of being known at the relevant time".[87] That is so even though the mistake was one of constitutional law; there is no reason to distinguish between types of mistakes of law: cf **AS [50], [54], [59], [61]**.

42. An alternative way of putting the point is that, as in other areas of the law, s 189(1) operates upon officers' knowledge or suspicion of the facts that engage the provision, rather than their knowledge or suspicion of how those facts are characterised in the language of the statute.[88] Here, the officers who detained the applicant knew or suspected was that he (a) was not an Australian citizen and (b) did not hold a visa.[89] From 5 November 2018, they also knew that (c) the applicant claimed to be an Australian

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85 *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 183-184 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ); *Shaw* (2003) 218 CLR 28 at [2] (Gleeson CJ, Gummow and Hayne JJ, Heydon J agreeing).

86 In *Lim* (1992) 176 CLR 1 at 25 (Brennan, Deane and Dawson JJ, Mason CJ agreeing), it was said that in *Nolan* it was recognised that "alien" "had become synonymous with 'non-citizen'".

87 *Ruddock v Taylor* (2005) 222 CLR 612 at [40] (Gleeson CJ, Gummow, Hayne and Heydon JJ). See also *George v Rockett* (1990) 170 CLR 104 at 112; *Guo v Commonwealth* (2017) 258 FCR 31 at [35(6)].

88 The issue arises in criminal law (see, eg, *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 572 (Brennan J); *Giorgianni v The Queen* (1985) 156 CLR 473 at 481 (Gibbs CJ), 494 (Mason J), 505 (Wilson, Deane and Dawson JJ); *R v LK* (2010) 241 CLR 177 at [117] (Gummow, Hayne, Crennan, Kiefel and Bell JJ; Heydon J agreeing)), accessorial liability under statute (see, eg, *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53 at [48] (Gummow, Hayne and Heydon JJ)) and conspiracy in both criminal law and tort (see, eg, *R v Churchill* [1967] 2 AC 224 at 237 (Viscount Dilhorne); *Belmont Finance Corp v Williams Furniture Ltd [No 2]* [1980] 1 All ER 393 at 404 (Buckley LJ; Goff and Waller LLJ agreeing)). It can also be seen to arise where a decision-maker mistakes his or her source of power, in which case a decision will be valid so long as an alternative source of power was in fact available: see, eg, *Brown v West* (1990) 169 CLR 195 at 203 (Mason CJ, Brennan, Deane, Dawson, Toohey JJ).

89 See Agreed facts paragraphs [7] (Neamonitakis), [10] (Pereira), [13] and [23] (Ellis) [**CRB 38-40**].

Aboriginal[90] but, on the understanding of the law at the time, that could not reasonably have been thought to affect his status. Their knowledge of his claim and the basis for that claim did not render their suspicion unreasonable: **cf AS [70]-[75]**. While that understanding of the law proved to be erroneous once this Court handed down judgment in *Love/Thoms*, it was only after this Court did so and its implications could be assessed that a suspicion under s 189(1) might cease to be reasonable. And, of course, the applicant was released shortly after the High Court's decision.

43. None of this is to say that the officers' mistake of law operates as a defence to false imprisonment. The relevance or otherwise of a mistake arises at the anterior stage of ascertaining whether there is legal authority to detain. In the context of s 189, *Ruddock v Taylor* establishes that a reasonable mistake does not deprive officers of their duty and authority to detain. Detention being authorised, there was never any false imprisonment and therefore there was no need for a "defence". It is no part of the Commonwealth's case that a mistake operates as a defence to false imprisonment, even if there was no authority to detain. "Proposition 6" in **AS [62]-[68]** is therefore entirely beside the point.

E. CONCLUSION

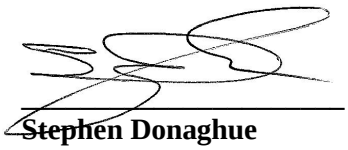
44. The separate question "Was the detention of the applicant between 28 September 2018 and 11 February 2020 unlawful?" should be answered "No".

45. The Commonwealth has agreed to pay the applicant's reasonable costs in this Court.

PART VI ESTIMATE OF TIME FOR ORAL ARGUMENT

46. Two hours will be required for the presentation of the Commonwealth's oral argument.

Dated: 12 November 2021



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[90] Agreed facts paragraph [15] [**CRB 39**].

IN THE HIGH COURT OF AUSTRALIA
QUEENSLAND REGISTRY

BETWEEN: **BRENDAN CRAIG THOMS**

Applicant

and

COMMONWEALTH OF AUSTRALIA

Respondent

10

ANNEXURE

A LIST OF STATUTES AND PROVISIONS REFERRED TO IN THE RESPONDENT'S SUBMISSIONS

20 *Constitution* s 51(xix)

Acts Interpretation Act 1901 (Cth) s 15A (current).

Judiciary Act 1903 (Cth) s 40 (current)

Migration Act 1958 (Cth) ss 3A, 13, 14, 166, 189, 196, 198 (current)

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