



HIGH COURT OF AUSTRALIA

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**IN THE HIGH COURT OF AUSTRALIA
QUEENSLAND REGISTRY**

BETWEEN:

BRENDAN CRAIG THOMS

Applicant

and

COMMONWEALTH OF AUSTRALIA

Respondent

10 **OUTLINE OF ORAL SUBMISSIONS OF THE COMMONWEALTH**

PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Proper construction of s 189 of the Migration Act (Cth [11]-[12])

2. Section 189 of the *Migration Act 1958* (Cth) (**Act**) uses the term “non-citizen” rather than “alien”. Subject to partial disapplication in the event of constitutional over-reach, this term provides a sufficient connection to s 51(xix) of the Constitution, and it reflects the Parliament’s choice, since 1984, to treat non-citizen and alien as synonymous.

20 • *Chetcuti* (2021) 95 ALJR 704 at [11] (**JBA 7, Tab 27**); *Lim* (1992) 176 CLR 1 at 25 (**JBA 3, Tab 10**)

3. As a matter of construction, s 189 authorises and requires the detention of persons who are not aliens, if there are objectively reasonable grounds to suspect that they are aliens.

• Migration Act, ss 166, 189, 190, 191 (**JBA 1, Tab 4**)

• *Ruddock v Taylor* (2005) 222 CLR 612 at [26]-[28] (**JBA 6, Tab 24**)

The decisions in *Re Patterson; Ex parte Taylor* and *Ruddock v Taylor* (Cth [13]-[24])

4. In *Re Patterson; Ex parte Taylor*, a majority of the High Court found that Mr Taylor was not an alien. While the precedential status of that decision was overruled in *Shaw*, a debate remained concerning whether Mr Taylor was himself required to be treated as a non-alien as a result of the holding on the facts of his case in *Re Patterson*.

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- *Re Patterson* (2001) 207 CLR 391 at [51], [53] (Gaudron J), [135]-[136] (McHugh J), [304], [318] (Kirby J), [377]-[378] (Callinan J) (**JBA 6, Tab 23**)
- *Shaw* (2003) 218 CLR 28 at [33], [38]-[39] (Gleeson CJ, Gummow and Hayne JJ) (**JBA 6, Tab 26**)

5. The validity of s 189 in its application to Mr Taylor was the subject of extensive argument in the Court of Appeal and the High Court.

- *Ruddock v Taylor* (2003) 58 NSWLR 269 at [1]-[2], [14]-[16] (Spigelman CJ), [67]-[68], [70]-[71], [80] (Meagher JA) (**JBA 7, Tab 33**)
- **Supp RBFM, Tabs 1-9**

10 6. *Ruddock v Taylor* is authority for the proposition that s 189 validly authorised and required Mr Taylor's detention in the period prior to the handing down of judgment in *Re Patterson* whether or not Mr Taylor was an alien (cf **AS [54]-[61]** and **Reply [11]**).

- *Ruddock v Taylor* (2005) 222 CLR 612 at [30]-[36], [51] (Gleeson CJ, Gummow, Hayne and Heydon JJ), [200], [203], [233]-[234] (Callinan J) (**JBA 6, Tab 24**)

Application of s 189 to the applicant's past detention (Cth [40]-[43])

7. What constitutes reasonable grounds for suspecting a person to be an unlawful non-citizen must be judged as at the time the suspicion was held.

- *Ruddock v Taylor* (2005) 222 CLR 612 at [38], [40], [49]-[51] (Gleeson CJ, Gummow, Hayne and Heydon JJ), [227]-[229] (Callinan J) (**JBA 6, Tab 24**)

20 8. The applicant's claim for false imprisonment relates to detention which occurred wholly prior to the judgment in *Love*. During that time, the three officers who detained the applicant each suspected he was an unlawful non-citizen (**CRB 37-38**), at a time when non-citizen had been held to be synonymous with alien. The officers' suspicion was reasonable at the time, and did not retrospectively cease to be reasonable due to *Love*.

Section 51(xix) supports s 189 in its application to non-aliens (Cth [26]-[39])

9. *Love* (2020) 270 CLR 152 (**Supp JBA Tab 34**) did not decide the question of whether s 189 could validly authorise the applicant's detention. Indeed, the parties had expressly agreed not to include that question in the special case that was referred to the Full Court,

and as a consequence no argument was addressed to it: **Cth [27] fn 57**. Following judgment in *Love*, that question was remitted to the Federal Court.

10. Section 51(xix) confers power to make laws with respect to aliens. As such, it supports any law that has more than an “insubstantial, tenuous or distant” connection with aliens. It obviously supports laws that are binding on aliens. However, a law may have a sufficient connection with s 51(xix) even if it alters the rights, duties or obligations of people who are not aliens (cf **Reply [12], [15]**).

- *Spence v Queensland* (2019) 268 CLR 355 at [57]-[58] (Kiefel CJ, Bell, Gageler and Keane JJ)

10 • *Cunliffe v Commonwealth* (1994) 182 CLR 272 (**JBA 4, Tab 13**)

11. Section 189, in its operation with respect to persons who are reasonably suspected of being aliens, has a sufficient connection with s 51(xix). In that operation, it furthers the purpose of the aliens power by preventing persons who are suspected on objectively reasonable grounds of having no right to enter the community from doing so while their status is ascertained.

- *Spence v Queensland* (2019) 268 CLR 355 at [59]-[60] (Kiefel CJ, Bell, Gageler and Keane JJ)

- *Milicevic v Campbell* (1975) 132 CLR 307 at 319-320 (Mason J), 321 (Jacobs J).

12. Due to its use of the word “non-citizen”, s 189 can apply in its terms to some people who, in the period since the decision in *Love*, cannot be reasonably suspected of being aliens. In that operation, s 189 lacks a sufficient connection to aliens and must be dis-applied pursuant to s 3A of the Act.

- *Clubb v Edwards* (2019) 267 CLR 171 at [150]-[152] (Gageler J), [415]-[433] (Edelman J) (**JBA 4, Tab 11**)

13. Following *Love*, officers should apply s 189 in accordance with its terms. However, in order to mould their behaviour to comply with the limits of their power, they may properly form an opinion as to whether, on the material available, a court would hold that the operation of s 189 is beyond constitutional power, and may act accordingly.

Dated: 9 March 2022

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Stephen Donaghue

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