HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **FREDERICK CHETCUTI**
Appellant

and

COMMONWEALTH OF AUSTRALIA
Respondent

OUTLINE OF THE APPELLANT'S ORAL SUBMISSIONS

Part I: Publication

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

Part II: Outline of Argument

2. Today, Australia is an independent nation with its own sovereign head of state and parliamentary power to deal with matters of nationality, subject only to the qualification that some people cannot possibly answer the description of "alien".

3. Whether the appellant is an alien is 'fundamentally a question of otherness'[1]; is he one of the people of the Commonwealth (a 'belonger'[2]) or is he not? In addition to the category of 'belongers' identified in ***Love*** (2020) 94 ALJR at 241 and the category acknowledged by the Commonwealth at RS[8][3], there is a third category of persons who cannot possibly answer the description of "alien". Namely: natural-born subjects of the Queen, who arrived in Australia and took up residence here prior to the commencement of the 1948 Act and did not subsequently renounce their allegiance. As the Appellant has these characteristics, he is a 'belonger' and is beyond the aliens power.

Meaning of 'subject of the Queen' at Federation

4. At Federation a common law understanding of British subject governed the meaning of the constitutional term 'subject of the Queen' and restricted the Commonwealth's 'aliens' power *at least* until such time as Australia had its own unique form of citizenship.

5. From Federation (AS [18]-[21]) until at least 26 January 1949 (AS [24]-[27]) when the 1948 Act commenced (after the Appellant's arrival here), British subjects, born in any of the Dominions and resident in Australia, were subjects of the undivided Imperial Queen (that is, they were the subject of the Queen within the Constitutional meaning of that term) and the aliens power did not reach them.

The importance of the introduction of an Australian citizenship

6. Each time this Court has considered if a British subject is an alien: ***Nolan*** (1988) (AS [36]-[38]), ***Re Patterson*** (2001) (AS [39]-[43]) and ***Shaw*** (2003) (AS [44]-[45]), commencement of the 1948 Act has been of paramount importance, as with Gibbs CJ's foundational judgment in ***Pochi*** (1982) at 111 and reinforced in ***Love*** (2020) (AS [46]).

7. The 1948 Act established a distinct Australian citizenship, but it did not alter the 'nationality' status of British subjects or their allegiance to the Queen. Provisions of the 1948 Act concerning 'nationality' (or allegiance) make this plain. Rather, the 1948 Act

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1 ***Love*** (2020) 94 ALJR 198 at 116 [333] (Gordon J).
2 ***Love*** (2020) 94 ALJR 198 at 134 [394] (Edelman J).
3 Those born in Australia to Australian parents, who are not foreign citizens and have not renounced their allegiance to Australia.

reflected that citizens were all subjects of the undivided Imperial (British) Crown and that common Imperial status remained the qualification for the fullest form of membership of the Australian body politic. From 26 January 1949 onwards, Australia's own local citizenship was merely a qualification for British subjecthood (AS [28]-[32]; ARS [8]-[9]).

8. 'British subject' remained a qualification for membership of the Australian body politic until 1 May 1987 when references to British subject were removed and Australian statutory citizenship became the sole statutory description (AS [54]). The *Commonwealth Electoral Act 1918* (Cth) required, until 1989, British subjecthood as a qualification for election to Parliament (s 69 *Commonwealth Electoral Act 1918* (Cth) (JBA Vol 2 p 105); s 4 *Commonwealth Electoral Act 1925* (Cth) (JBA Vol 2 p 108); s 5 *Commonwealth Electoral Act 1949* (Cth) (JBA Vol 2 p 111); s 51 *Electoral and Referendum Amendment Act 1989* (Cth) (JBA Vol 2 p 124). On the Commonwealth's case -absurdly- such people would be subjects of a foreign Queen (ARS [18]).

9. From 1901 onwards, the process of division of the Crown was gradual. On the basis of all of the facts that form part of the march of history (***Sue v Hill*** (1999) 199 CLR 462 at 487 [50] (Gleeson CJ, Gummow and Hayne JJ), no date before 3 March 1986 represents a reliable separation date from the Imperial Crown (AS [48]-[56]). At the very least, the progressively dividing Crown did not divide for the purposes of s 51(xix) of the *Constitution* until Australia had its own distinct citizenship.

Allegiance to the Crown in right of Australia

10. Upon the Crown's division, the Appellant became, like all other Australian-born British subjects then resident in Australia, a subject of the Australian Queen. He did not subsequently alienate himself; his status is vulnerable only to renunciation (AS [62]-[64]).

Indelibility of non-alien status

11. The appellant's pre-1949 non-alien status is indelible (AS [67]-[69]). The addition of a supplementary pathway to membership by registration in the 1948 Act did not disturb his status and he has done nothing to renounce it.

12. Australian statutory citizenship does not cover the field of 'non-alien'. Neither the Citizenship Act nor the Migration Act made Australian citizenship the exclusive criterion for admission to membership of the community constituting Australia's body politic. As recognised in ***Love,*** non-citizens can be beyond the reach of the aliens power.

13. The appellant's actions have been ever consistent with his permanent allegiance– he and his family were invited and encouraged to reside here having travelled to Australia under the Assisted Passage Migration Scheme, he voted in our elections, was employed in the public

service, enrolled in the Vietnam conscription ballot and did not take any steps to take up the Maltese citizenship which was automatically bestowed by dint of a foreign law. His mere receipt of Maltese citizenship did not redirect his allegiance to Malta and did not impact his status as an Australian constitutional citizen (AS [65]-[66]).

Acquisition of Maltese citizenship did not alienate the Appellant

14. The Appellant being bestowed Maltese citizenship is not determinative. Possession of foreign citizenship does not bring a person within the scope of the aliens power, as was resolved in ***Love*** (AS [57]-[61]; ARS [6]).

15. The framers of the *Constitution* understood that subjects of the Queen who were eligible to be members of Parliament might have dual allegiance (*Constitution* ss 16, 34 and 44(i)). The consequence is that they cannot stand as candidates, not that they are aliens (ARS [7]).

Alternative argument

16. It is incorrect to conclude, as Nettle J did at first instance, that the only way to alter non-alien status is to take up Australian citizenship. In the 1920 and 1948 Acts, by declaring British subjects to be non-aliens and conferring upon them various rights and privileges, Parliament exercised its power under s 51(xix) to formally admit British subjects to the body politic (AS [72]; ARS [15]-[16]). As a British subject he met the prevailing test for membership of the Australian body politic prescribed by law (RS[7]).

17. Unlike the applicant in ***Te*** and others who entered Australia on visas granted under the Migration Act with conditional entry, the Appellant's entry was not conditional - upon taking up residence here, he became one of the people of the Commonwealth (AS [73]).

Orders sought

18. The appellant seeks orders allowing the appeal, setting aside the orders of Nettle J and costs. The question of law set out in the case stated should be answered in the negative.

Dated: 11 May 2021

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