HIGH COURT OF AUSTRALIA

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File Number:	M122/2020
File Title:	Chetcuti v. Commonwealth of Australia
Registry:	Melbourne
Document filed:	Form 27E - Reply by respondent to submissions of SA
Filing party:	Respondent
Date filed:	22 Apr 2021

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

ON APPEAL FROM A SINGLE JUSTICE OF THE HIGH COURT

BETWEEN: **FREDERICK CHETCUTI**

Appellant

AND: **COMMONWEALTH OF AUSTRALIA**

Respondent

RESPONDENT'S SUBMISSIONS IN REPLY TO SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA, INTERVENING

PART I PUBLICATION

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

PART II REPLY

2. The submissions of the Attorney-General for the State of South Australia (**South Australia**) are addressed to Nettle J's conclusion that, by reason of the *Statute of Westminster Adoption Act 1942* (Cth) (**Adoption Act**), "Australia became sufficiently independent of the United Kindgom to be regarded as an independent sovereign nation and that the relevant constitutional conception of the Crown … thereupon became the Crown in right of Australia": at [49]. South Australia does not take issue with that conclusion if the Commonwealth Parliament's power to enact the Adoption Act derived from the *Statute of Westminster 1931* (UK) (**Statute of Westminster**): SA [33]. If, however, the source of Parliament's power was the Constitution, South Australia submits that the Adoption Act could not have had the effect of dividing the Crown without offending s 106 of the Constitution and/or the *Melbourne Corporation*[1] principle: SA [32].

[1] *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 at 83 (Dixon J).

3. The Commonwealth submits that any potential inconsistency between the Adoption Act and s 106 and/or the *Melbourne Corporation* principle does not arise, for three reasons.

4. *First*, Parliament's power to enact the Adoption Act was supported by the Statute of Westminster, s 10(1) of which provided that none of ss 2, 3, 4, 5 or 6 extended to certain Dominions, including Australia (s 10(3)), "unless that section is adopted by the Parliament of the Dominion, and any Act of that Parliament adopting any section of this Act may provide that the adoption shall have effect either from the commencement of this Act or from such later date as is specified in the adopting Act". In *Kirmani*,[2] Gibbs CJ observed that s 10 "itself conferred on the Dominions to which it applied all the power necessary to adopt ss 2, 3, 4, 5 and 6 of the *Statute of Westminster*". Justice Brennan likewise concluded that s 10 "implicitly conferred" the power to adopt those sections,[3] while Deane J concluded that the "simple answer" was that the Statute of Westminster "plainly conferred" that power.[4] The other members of the Court did not address the point.

5. For completeness, the Commonwealth submits that the Adoption Act is also supported by the "nationhood" power[5] and by the external affairs power (because it concerns relations between the United Kingdom and Australia).[6] However, unless the Court finds it necessary to address those alternative heads of power, the constitutional points raised by South Australia do not arise: SA [33].

6. *Secondly*, even if the Constitution provided the only source of power to enact the Adoption Act, that still would not engage s 106 or the *Melbourne Corporation* principle. The only substantive provision of the Adoption Act – section 3 – provides that ss 2, 3, 4, 5 and 6 of the Statute of Westminster "are adopted". The Schedule then reproduces the

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2 *Kirmani v Captain Cook Cruises Pty Ltd [No 1]* (1985) 159 CLR 351 (***Kirmani***) at 367 (Gibbs CJ).

3 *Kirmani* (1985) 159 CLR 351 at 398 (Brennan J).

4 *Kirmani* (1985) 159 CLR 351 at 443 (Deane J).

5 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at [133] (French CJ), [232]-[233] (Gummow, Crennan and Bell JJ), [337] (Hayne and Kiefel JJ); *Victoria v Commonwealth* (1975) 134 CLR 338 at 398 (Mason J); *Davis v Commonwealth* (1988) 166 CLR 79 at 93-95 (Mason CJ, Deane and Gaudron JJ), 110-111 (Brennan J). See also Anne Twomey, 'Pushing the Boundaries of Executive Power — *Pape*, the Prerogative and Nationhood Powers' (2010) 34 *Melbourne University Law Review* 313 at 313-314.

6 *R v Sharkey* (1949) 79 CLR 121 at 136-137 (Latham CJ) (noting that the power extended to the relations between Australia and other Dominions of the Crown), 149 (Dixon J), 157 (McTiernan J), 163 (Webb J). See also *Kirmani* at 381 (Mason J), 385 (Murphy J) and 436-438 (Deane J) (each of whom concluded that a law repealing an Imperial Act that had applied in Australia was a law with respect to external affairs); cf at 371 (Gibbs CJ), 396 (Wilson J), 458-459 (Dawson J) (each concluding to the contrary).

Statute of Westminster. In those circumstances, the Adoption Act does not itself enact ss 2, 3, 4, 5 and 6 of the Statute of Westminster into Australian law. Its effect was merely to satisfy the condition precedent in s 10(1) of the Statute of Westminster[7] such that, upon the commencement of the Adoption Act, the Statute of Westminster then operated of its own force with respect to Australia[8] (as it plainly did from the time of its commencement in relation to the Dominions not listed in s 10(3)). That is, it was the Statute of Westminster that altered the constitutional relationship between the United Kingdom and Australia. Section 106 and the *Melbourne Corporation* principle could not constrain the effect of that Act, as South Australia implicitly accepts: SA [6].

7. *Thirdly*, this appeal is not concerned with the abstract question of when the Crown divided, or when Australia had achieved independence for all purposes. Instead, if this limb of the argument is reached at all,[9] the relevant question is whether Australia was sufficiently independent from the United Kingdom by 31 July 1948 such that, notwithstanding the Appellant's status as a "British subject", it was open to Parliament to treat him as an alien from the date of his arrival: see Commonwealth's submissions (**CS**) at [31]-[32], [38]. South Australia accepts that, if that is the relevant question, the Court need not consider the date on which the Crown relevantly divided (and, implicitly, that the Court need not consider the suggested constraints upon that process insofar as it concerns the States): SA [16]. That concession is appropriate, because the answer to the question as framed above (concerning the scope of the aliens power) does not appear to have any implications for the constitutional arrangements of South Australia.

8. Framing the question as one of "sufficient independence" for the purpose of enlivening the aliens power is appropriate because it acknowledges that the acquisition of independence may occur gradually, with the relevant body politic acquiring in stages the

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7 A condition precedent included in the Statute of Westminster at the request of Australia: see Anne Twomey, "*Sue v Hill* – The Evolution of Australian Independence", Stone and Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (2000) 77 at 94.

8 *Kirmani* (1985) 159 CLR 351 at 378 (Mason J), 443-444 (Deane J). In this respect the *Statute of Westminster Adoption Act 1942* (Cth) operated in a similar way to the *Copyright Act 1912* (Cth). Section 25(1) of the *Copyright Act 1911* (Imp) had provided that the Imperial Act would not extend to a self-governing dominion "unless declared by the Legislature of that dominion to be in force therein". Such a declaration having been made in s 8 of the *Copyright Act 1912* (Cth), the Imperial Act then applied in Australia as Imperial legislation of paramount force: *Copyright Owners Reproduction Society Ltd v EMI (Australia) Pty Ltd* (1958) 100 CLR 597 at 604 (Dixon CJ), 613-614 (Taylor J), 616-617 (Menzies J); see also *Gramophone Co Ltd* v *Leo Feist Incorporated* (1928) 41 CLR 1.

9 The submissions concerning the Adoption Act arise only if the Court reaches the alternative path of reasoning in support of Proposition 2, being the argument developed in CS [26]-[38].

ability to act independently in certain respects and for certain purposes.[10] For present purposes the relevant body politic is "the Commonwealth of Australia" ("the one indissoluble Federal Commonwealth" that was created by the Constitution[11]), it being the Commonwealth (not the States) that is the body politic "from whose perspective the question of alien status is to be determined".[12] The staged process by which that body politic acquired independence is illustrated by history: by 1919, it had capacity to sign the Treaty of Versailles (SC [24]); by 1930, it had capacity to decide the identity of its own Governor-General (SC [34]-[35]); and, by 1942, it had capacity to issue its own declaration of war against Japan (SC [50]-[52]). To recognise that, by 31 July 1948, the body politic known as the Commonwealth of Australia was sufficiently independent of the United Kingdom that the Appellant could be treated as an "alien" from the moment of his arrival in Australia is not inconsistent with simultaneously recognising that the States, at that time, retained important constitutional links to the United Kingdom.

9. Even if the question of independence is approached from the perspective of the "division of the Crown", similar considerations apply. The "division" of the Crown is also something that occurred at different times for different purposes. As early as 1908, O'Connor J observed that "[f]or some purposes the King, as representing the executive power of the Empire, is the same juristic person throughout the whole of his Dominions… But, except for those purposes, he is not the same juristic person throughout the whole of his Dominions".[13] As already noted, the relevant question for this appeal is when, for the purposes of s 51(xix), the sovereign to whom allegiance was owed by members of the Australian body politic became the King or Queen "of Australia". The answer to that question is not illuminated by reference to functions performed by the sovereign of the United Kingdom in relation to the States. The contrary could be true only if there was a single "one size fits all" answer to all questions concerning independence.

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10 *Shaw v Minster for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at [24] (Gleeson CJ, Gummow and Hayne JJ).

11 *State Chamber of Commerce & Industry v Commonwealth (Second Fringe Benefits Tax Case)* (1987) 163 CLR 329 at 357.

12 *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 189 (Gaudron J).

13 *R v Sutton* (1908) 5 CLR 789 at 804-805. For example, for the purposes of revenue, the Crown had divided even before the Balfour declaration in 1926, it having been held in 1925 that a claim could not be brought against the King in the United Kingdom for contractual liabilities then owed by the Irish Free State (a body politic of which the King was also the sovereign): *Attorney-General v Great Southern and Western Railway Company of Ireland* [1925] AC 754, particularly at 779-780; applied by Dixon J in his reasons in *Faithorn v Territory of Papua* (1938) 60 CLR 772 at 792.

10. That is why it is of no relevance to the present appeal that, well after 1948, the United Kingdom continued to have some authority in relation to the States: see SA [27]-[28]. Indeed, even if the "cessation of authority" approach outlined at SA [25]-[28] were to be accepted, long before 1948 the United Kingdom had ceased to have unilateral authority to legislate for the relevant body politic, being the Commonwealth of Australia: as noted at CS [37], by 1926 the convention was that the United Kingdom would not legislate for Australia without its consent and in 1942 that became the formal legal position with the enactment of the Adoption Act. That is sufficient for the purposes of this appeal.

11. For the reasons given above, the Court need not (and therefore should not[14]) consider whether the Adoption Act is inconsistent with s 106 or the *Melbourne Corporation* principle. If, however, the Court concludes that those issues do need to be addressed, the Commonwealth respectfully submits that the validity of the Adoption Act is a matter of sufficient constitutional significance that it warrants more detailed submissions than is possible to make within the constraints of these reply submissions (or that it will be possible to advance orally, given the time allocated to the hearing of the appeal). Accordingly, in the event that the Court decides that it is necessary to address the validity of the Adoption Act in order to determine the present appeal, the Commonwealth seeks an opportunity to address more detailed submissions to that issue, in such manner as is most convenient to the Court.

Dated: 22 April 2021

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[14] South Australia apparently accepts that any invalid operation of the Adoption Act could be avoided by application of s 15A of the *Acts Interpretation Act 1901* (Cth) (see South Australia's notice under s 78B of the *Judiciary Act 1903* (Cth) at [7]). That is a further reason why the issues should not be decided in this appeal: see *Knight v Victoria* (2017) 261 CLR 306 at [6] and [37]; *Clubb v Edwards* (2019) 267 CLR 171 at [141] (Gageler J) and [429], [431]-[433] (Edelman J); *R v Poole; Ex parte Henry [No 2]* (1939) 61 CLR 634 at 652 (Dixon J); *Palmer v Western Australia* (2021) 95 ALJR 229 at [219]-[220], [227]-[228] (Edelman J).