



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
CANBERRA REGISTRY

BETWEEN: **GOVERNMENT OF THE RUSSIAN FEDERATION**
Plaintiff

and

10 **COMMONWEALTH OF AUSTRALIA**
Defendant

PLAINTIFF'S SUBMISSIONS

PART I: FORM OF SUBMISSIONS

1. These submissions are suitable for publication on the internet and adopt the terms defined in the Special Case filed on 14 March 2025.¹

20 **PART II: ISSUES IN THE SPECIAL CASE**

2. This proceeding concerns the validity of the *Home Affairs Act 2023* (Cth) (the **Act**) which purports to terminate the Plaintiff's Lease over the Land.
3. For the reasons advanced below, the Act is invalid as it is not supported by a Commonwealth head of power.
4. If, notwithstanding the matters referred to above, the Act is supported by a Commonwealth head of power, "*just terms*" under section 51(xxxi) of the *Constitution* must be provided to the Plaintiff.

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¹ Special Case Book (SCB) at page 33

PART III: SECTION 78B NOTICE

5. The Plaintiff served section 78B notices on 28 June 2023.²

PART IV: MATERIAL FACTS

The Plaintiff

6. The Plaintiff is the body politic of a foreign country. No state of war exists as between the Plaintiff and the Commonwealth.
7. The Plaintiff has, at all material times, maintained diplomatic relations with the Commonwealth, and a diplomatic mission within the Commonwealth's territory, within the meaning of the Vienna Convention on Diplomatic Relations as given the force of Commonwealth law by section 7 of the *Diplomatic Privileges and Immunities Act 1967* (Cth).

The Land

8. A history of the Land is set out at [6] to [15] of the Special Case.
9. Relevantly:
- a. the Land is, and has been at all relevant times, designated for use as a Diplomatic Mission in the National Capital Plan under Part III of the PLM Act;³
 - b. the area designated for use as Diplomatic Missions in the National Capital Plan is adjacent to the area designated for use as the Parliamentary Zone;⁴
 - c. the Land is one of a number of diplomatic missions of other foreign countries or States which are located nearby the Parliamentary Precincts within the meaning of section 4 of the *Parliamentary Precincts Act 1988* (Cth);⁵ and
 - d. following the purported termination of the Lease pursuant to the provisions of the Act, the Land remains designated for use as a Diplomatic Mission in the National Capital Plan.⁶

² SCB at page 25

³ Special Case at [13]

⁴ SCB at page 57

⁵ SCB at pages 44, 46 and 57

The Lease

10. On 16 April 2008, the Commonwealth offered the Plaintiff a lease of the Land to enable it to construct a new diplomatic mission on the site.⁷

11. On 24 December 2008, the Plaintiff and the Commonwealth entered into the Lease for a term of 99 years,⁸ the Plaintiff having paid the Commonwealth the relevant land premium of \$2,750,000 and associated fees⁹ the day prior to the commencement of the Lease.

10 12. The Lease included the following terms or covenants¹⁰:

- a. the Land was to be used for diplomatic, consular or the official purposes of the Plaintiff;
- b. the rent for the Land was \$0.05 per annum (payable within 1 month of any demand) and the Plaintiff was to pay all rates and charges in respect of the Land; and
- c. on paying the rent and observing and performing the obligations and stipulations in the Lease, the Plaintiff was to be granted quiet enjoyment of the Land without interruption by the Commonwealth.

20 13. The Lease was granted by the Commonwealth pursuant to the 1925 Ordinance.¹¹ From 1 April 2022, pursuant to clauses 62 and 63 of the 2022 Ordinance, the Lease continued in force subject to the terms, conditions and covenants applying to the Lease immediately before 1 April 2022 and had effect as if it had been granted under the 2022 Ordinance.¹²

14. Following the commencement of the Lease, the Plaintiff embarked upon the process of designing and constructing the new diplomatic mission.¹³

⁶ Subsection 7(3) of the Act and [23] of the *Explanatory Memorandum* to the Act at page 77 of the SCB

⁷ Special Case at [17]

⁸ Special Case at [19]

⁹ Special Case at [18]

¹⁰ SCB at page 28

¹¹ Special Case at [20]

¹² Special Case at [21] and [22]

¹³ Special Case at [23]

15. At no time prior to the passage of the Act, had the Lease been terminated, whether under clause 48(1) of the 2022 Ordinance or otherwise.

PART V: ARGUMENT

No head of power

16. The Act is not supported by a Commonwealth head of power.

17. A Commonwealth law must be supported by a head of power. In *Grain Pool (WA) v The Commonwealth* [2000] HCA 14; (2000) 202 CLR 479 the plurality (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ) explained at [16],
10 (citations omitted):

The general principles which are to be applied to determine whether a law is with respect to a head of legislative power such as s 51(xviii) are well settled. They include the following. First, the constitutional text is to be construed “with all the generality which the words used admit” ... Secondly, the character of the law in question must be determined by reference to the rights, powers, liabilities, duties and privileges which it creates. Thirdly, the practical as well as the legal operation of the law must be examined to determine if there is a sufficient connection between the law and the head of power.
20 Fourthly, as Mason and Deane JJ explained in *Re F; Ex parte F*:

In a case where a law fairly answers the description of being a law with respect to two subject-matters, one of which is and the other of which is not a subject-matter appearing in s 51, it will be valid notwithstanding that there is no independent connexion between the two subject-matters.

Finally, if a sufficient connection with the head of power does exist, the justice and wisdom of the law, and the degree to which the means it adopts are necessary or desirable, are matters of legislative choice.

18. The Act is concerned with the termination of “*the relevant lease*”¹⁴. Section 4 of the
30 Act defines “*relevant lease*” to mean “*any lease owned or held in respect of the land at the commencement of this Act*”. It also defines “*land*” to mean “*Block 26,*

¹⁴ Special Case at [25]

Section 44 in the Division of Yarralumla, as delineated on Deposited Plan Number 10486 in the Office of the Registrar of Titles at Canberra in the Australian Capital Territory”.

19. The Act does not state the reason for the termination, identify the lessee or identify any other relevant matters. In particular, it neither specifies nor refers to any concerns regarding the defence of the Commonwealth or the desire to abide by any international obligation.

10 20. It is clear that:

- a. the Commonwealth cannot “*recite itself*” into power”; and
- b. where the Commonwealth passes an Act which, on its face, bears no relation to any head of legislative power, there is no presumption of validity and the Act cannot be found to be valid except on the basis of facts, proved or judicially noticed, to connect it with power,

(Australian Communist Party v The Commonwealth [1951] HCA 5; (1951) 83 CLR 1 at 189-197 and 199-201 (Dixon J), 205-206 (McTiernan J), 223-224 (Williams J) 261-266 (Fullagar J)).

20 21. Public statements made by the Commonwealth at the time of the passage of the Act¹⁵ and the first reading speech of the Bill in the Senate¹⁶, identify that the Commonwealth sought to justify the termination of the Lease and, as such, the Act, on “*national security*” grounds.

22. The heads of power that are said to be relevant to “*national security*” grounds are the defence power in section 51(vi), the external affairs power in section 51(xxix) and/or the implied nationhood power.

30 23. However, there are no constitutional facts or evidence that support the termination of the “*relevant lease*” on “*national security*” grounds: *Andrews v Howell* (1941)

¹⁵ Special Case at [27]

¹⁶ Special Case at [28]

65 CLR 255 at 278 (Dixon J); *Commonwealth v Tasmania* [1983] HCA 21; (1983) 158 CLR 1 at 101 (Gibbs CJ).

24. Whilst the Land is located within the Australian Capital Territory:

a. there is not a sufficient nexus or connection between the Act and the Commonwealth's territories power under section 122 of the *Constitution* in that the Act is not a law with respect to the government of the Australian Capital Territory; and

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b. in any event, section 122 is subject to the constitutional guarantee of “*just terms*”: *Commonwealth of Australia v Yunupingu* [2025] HCA 6 at [2] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ) at [114] and [202] (Gordon J), [372] (Edelman J) and [373] (Steward J).

25. Section 51(xxxi) gives the Commonwealth Parliament power to make laws with respect to “*the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws*”.

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26. The power conferred on the Commonwealth pursuant to section 51(xxxi) of the *Constitution* is confined to the making of laws with respect to the acquisition of property for some purpose related to a need for or proposed use or application of the property to be acquired: *Attorney-General of the Commonwealth v Schmidt* [1961] HCA 21; (1961) 105 CLR 361 at 372 (Dixon CJ) and *Clunies-Ross v The Commonwealth* [1984] HCA 65; (1984) 155 CLR 193 at 200-202 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ).

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27. At all relevant times, the Commonwealth has been the owner of “*the land*” (as that term is defined in section 4 of the Act). It is also accepted by the Commonwealth that its purpose for terminating “*the relevant lease*”, through the introduction of the Act, was not related to it having a need for, or proposed use or application of, the Land itself.¹⁷

¹⁷ Special Case at [26]

28. It is clear from the history of the Commonwealth's ownership of, and the planning regulations concerning, the Land that its permitted use (consistent with that stipulated by the terminated Lease) is for use as a Diplomatic Mission. That is, the purpose of using the Land as a diplomatic mission was already fully served by the pre-existing state of affairs concerning the Commonwealth's ownership of the Land and its regulatory control over it. It cannot be said the Act, being subsequent to all of those matters, was with respect to those matters given they were fully established before the passage of the Act.

- 10 29. In light of the matters referred to above, it cannot be said that any heads of power support the Act in circumstances where:
- a. The Act does not seek to terminate the Plaintiff's diplomatic presence in Australia but rather just terminate its interests in the parcel of Land.
 - b. There is no evidence that the Plaintiff was planning an internal attack such that termination of the Lease was for the purpose of protecting Australia from an internal attack: *Thomas v Mowbray* [2007] HCA 33; (2007) 233 CLR 307 at [7] (Gleeson CJ), [140]-[141] (Gummow and Crennan JJ), [434]-[435], [437] (Hayne J), [583] (Callinan J) and [611] (Heydon J).
 - 20 c. There is no evidence that the law affects Australia's relationships with other countries: *R v Sharkey* [1949] HCA 46; (1949) 79 CLR 121 at 136-137 (Latham CJ), 149 (Dixon J), 157 (McTiernan J), 163 (Webb J); *Thomas v Mowbray* at [151] (Gummow and Crennan JJ) with Gleeson CJ agreeing on this point.
 - d. Notwithstanding the fact that the termination of the Lease has resulted in the Plaintiff being in litigation with the Commonwealth as the Defendant, it cannot be seriously suggested that the Act is within the provisions of section 51(xxix) of the *Constitution*.
 - e. The Land has, at all material times, been designated for use as "*Diplomatic Mission*" and remains so designated. That means the land remains available
30 for use by a foreign nation.
 - f. As land adjacent to the Land is leased to other foreign nations, it cannot be said that "*national security*" interests are engaged merely because the Land is near Parliament.

- g. Neither House of Parliament nor this Court have been informed of the facts which purport to justify why the Plaintiff was singled out for the termination of its Lease.
- h. Were the Commonwealth to suggest that facts necessary to determine the head of power invoked to justify the legislation were to be found in [28] of the Special Case, serious questions as to public interest immunity (and the extent to which the information the subject of the immunity can be used by either party for any purpose) will arise: *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* [2008] HCA 4; 234 CLR 532 at [22]-[24] (Gummow, Hayne, Heydon and Kiefel JJ); *HT v The Queen* [2019] HCA 40; (2019) 269 CLR 403 at [32] (Kiefel CJ, Bell and Keane JJ).
- i. No constitutional fact, thus, is presented to this Court which would allow it to ascertain whether the Act is within a head of legislative power.

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Just terms

30. If, notwithstanding the matters referred to above, the Act is supported by a Commonwealth head of power, “*just terms*” pursuant to section 51(xxxi) of the *Constitution* need to be provided.

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31. In light of *Yunupingu and Wurridjal v Commonwealth* [2009] HCA 2; (2009) 237 CLR 309 at 388 – 390 (Gummow and Hayne JJ), the Plaintiff accepts that section 6 of the Act provides “*just terms*”.

32. The Act acquires property for the purposes of section 51(xxxi) of the *Constitution* because:

- a. the Commonwealth, being the reversioner, terminates the “*relevant lease*” (which is property); and
- b. it goes beyond merely extinguishing the leaseholder’s rights and gives the Commonwealth the benefit of “*the land*” unencumbered by the Lease (which is an “*acquisition*”),

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(*JT International v The Commonwealth* [2012] HCA43; (2012) 250 CLR 1 at [42] (French CJ), [147] (Gummow J), [167], [169] (Hayne and Bell JJ), [277]

(Crennan J) and [357] (Kiefel J); *cf Georgiadis v Australian and Overseas Telecommunications Corporation* [1994] HCA 6 (1994) 179 CLR 297 at 306).

PART VI: THE PRECISE FORM OF ORDERS SOUGHT

33. The Plaintiff contends that the Court should answer the questions stated in the Special Case in the following manner:

Question 1:

10 Is the *Home Affairs Act 2023* (Cth) invalid in its entirety on the ground that it is not supported by a head of Commonwealth power?

Answer: Yes

Question 2:

If the answer to Question 1 is “no”, does the operation of the *Home Affairs Act 2023* (Cth) result in the acquisition of property from the Plaintiff to which section 51(xxxi) of the Constitution applies?

Answer: Yes

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Questions 3:

If the answer to Question 2 is “yes”, is the Commonwealth liable to pay to the Plaintiff a reasonable amount of compensation pursuant to section 6(1) of the *Home Affairs Act 2023* (Cth)?

Answer: Yes

Question 4:

Who should pay the costs of the special case?

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Answer: The Commonwealth.

PART VII: ESTIMATE OF TIME

34. The Plaintiff seek approximately 1.5 hours to present its oral submissions, including reply.

Dated: 17 April 2025

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