



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

No. C9/2023

BETWEEN:

GOVERNMENT OF THE RUSSIAN FEDERATION

Plaintiff

AND:

COMMONWEALTH OF AUSTRALIA

Defendant

OUTLINE OF ORAL SUBMISSIONS OF THE DEFENDANT

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

The *Home Affairs Act 2023* (Cth) is supported by s 122 of the Constitution (CS [14]–[17])

10 2 The sole operation of the *Home Affairs Act 2023* (Cth) concerns a block of land located within the Australian Capital Territory. For that reason, it has the sufficient nexus or connection to a Territory that enlivens the legislative power conferred by s 122: *Bennett v Commonwealth* (2007) 231 CLR 91 at [43] (**Vol 3, Tab 14**); *New South Wales v Commonwealth* (2006) 229 CLR 1 at [8], [335], [337], [343] (**Vol 4, Tab 19**); *Commonwealth v Yunupingu* (2025) 99 ALJR 519 at [21], [22], [179] (**Vol 5, Tab 23**).

The purpose of the *Home Affairs Act* (CS [38]–[39])

3 The purpose of a law is to be identified at the appropriate level of generality, by reference to what it is designed to achieve in fact. There is a distinction between the purpose of a law and the means by which that purpose is effected: *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137 at [40] (**Vol 4, Tab 20**).

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4 The purpose of the *Home Affairs Act* was to remove the national security threat presented by the plaintiff's occupation of land very close to Parliament House. The means adopted to achieve that purpose was to deprive the plaintiff of its legal entitlement to occupy that land pursuant to the lease that was terminated by s 5 of the Act: SCB 35 [5], 46; Press

Conference (SC [27] (SCB 40)); Explanatory Memorandum (**Vol 6, Tab 28**) pp 2, 4; Second Reading Speech (House) (**Vol 6, Tab 26**) p 4459.

- 5 It is agreed that the purpose of the Act was not related to the Defendant having a need for, or proposed use or application of, that land: SC [26] (SCB 40).

Home Affairs Act is not a law with respect to s 51(xxxi)

- 6 Section 51(xxxi) is, first and foremost, a grant of legislative power: *Commonwealth v Yunupingu* (2025) 99 ALJR 519 at [41] (**Vol 5, Tab 23**). If the Act is a law that enlivens that head of power, it follows that the plaintiff's challenge to the validity of the Act fails.

- 7 If the Act is not a law with respect to that head of power, then s 51(xxxi) does not abstract
10 the power to enact the Act from any other head of power (including s 122): *Yunupingu* (2025) 99 ALJR 519 at [17] (**Vol 5, Tab 23**); *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 169 and 185 (**Vol 3, Tab 18**); *Attorney-General v Schmidt* (1961) 105 CLR 361 at 372 (**Vol 3, Tab 13**). In that event, the Act is supported by s 122, and there is no requirement to provide compensation under s 6(1) of the Act.

- 8 The plaintiff has submitted that the Act is not a law to which s 51(xxxi) applies: PS [26]. That submission should be accepted for the reason it gives, and for an additional reason.

(a) Section 51(xxxi) only applies where property is acquired for use (CS [22]–[27])

- 9 The plaintiff submits that s 51(xxxi) is confined to laws which acquire property “for some
20 purpose related to a need for or proposed use or application of the property to be acquired”, and that the *Home Affairs Act* is not such a law: PS [26]–[27]. Those submissions should be accepted. The first submission is supported by statements of high authority in this Court: *Clunies-Ross v Commonwealth* (1984) 155 CLR 193 at 198–201 (**Vol 3, Tab 15**); *Attorney-General v Schmidt* (1961) 105 CLR 361 at 372 (**Vol 3, Tab 13**); *W H Blakeley & Co Pty Ltd v Commonwealth* (1953) 87 CLR 501 at 518–519 (**Vol 4, Tab 22**). Just terms are required where property is acquired so that it can be used (whether actively or passively). That is one reason why s 51(xxxi) has no application to laws that simply deprive a person of property: *Mutual Pools* (1994) 179 CLR 155 at 185 (**Vol 3, Tab 18**).

- 10 The purpose of the *Home Affairs Act* was not related to the Defendant having a need for, or proposed use or application of, the relevant land: SC [26] (SCB 40). That being so, it is
30 not a law with respect to the acquisition of property for a purpose in respect of which the Parliament has power to make laws. It therefore is not supported by s 51(xxxi).

(b) Payment of just terms would be incongruous (CS [32]–[42])

- 11 Section 51(xxxi) “does not mean that property can never pass to or become vested in the Commonwealth ... except under a law made in pursuance of s 51(xxxi)”: *Attorney-General v Schmidt* (1961) 105 CLR 361 at 372 (**Vol 3, Tab 13**). The phrase “acquisition of property on just terms”, when read in its entirety, indicates that s 51(xxxi) applies only to acquisitions of a kind that permit just terms, and not to laws where the provision of “just terms” is an incongruous notion: *Theophanous v Commonwealth* (2006) 225 CLR 101 at [56]–[57], [60] (**Vol 4, Tab 21**); *Schmidt* (1961) 105 CLR 361 at 367–373 (**Vol 3, Tab 13**).
- 12 In considering whether the provision of just terms is incongruous, the fact that the property
10 that was acquired was held by a government and not an individual can be relevant: *Grace Brothers Pty Ltd v Commonwealth* (1946) 72 CLR 269 at 290–291 (**Vol 3, Tab 16**).
- 13 It would be incongruous to require the Commonwealth to pay compensation to a foreign state because it terminated a lease held by that state in order to prevent a risk to the security of Parliament House that would otherwise be caused by that very state. It is neither fair nor just for Australia to compensate a foreign state in those circumstances, which are altogether outside the scope of s 51(xxxi).

Date: 6 August 2025



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