HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

JASON SHAW APPLICANT

AND

MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS RESPONDENT

Shaw v Minister for Immigration and Multicultural Affairs
[2003] HCA 72
9 December 2003
B99/2002

ORDER

1. *Answer the question reserved in the Case Stated as follows:*

   Question

   Was s 501(2) of the Migration Act *1958 (Cth) within the legislative powers of the Commonwealth to the extent that it authorised the respondent to cancel the applicant's visa on 17 July 2001?*

   Answer

   Yes.

2. *Costs of the proceeding in the Full Court to be the costs in the matter in the course of which the case was stated.*

Representation:

S J Hamlyn-Harris for the applicant (instructed by South Brisbane Immigration & Community Legal Service Inc)

D M J Bennett QC, Solicitor-General of the Commonwealth with M N Allars and B D O'Donnell for the respondent (instructed by Australian Government Solicitor)

CATCHWORDS

Shaw v Minister for Immigration and Multicultural Affairs

Constitutional law (Cth) – Powers of the Parliament – Naturalisation and aliens – Applicant born in United Kingdom – Applicant entered Australia in 1974 – Applicant did not acquire Australian citizenship – Cancellation of applicant's visa by Minister – Whether power of cancellation validly extended to applicant – Whether applicant an "alien" for purposes of s 51(xix) of the Constitution – Whether applicant's statutory status as "British subject" at time of entry into Australia inconsistent with classification as "alien" – Whether applicant a "subject of the Queen" for purposes of s 117 of the Constitution.

Constitutional law (Cth) – Powers of the Parliament – Whether applicant subject to removal under power with respect to immigration – Whether applicant subject to removal under power with respect to external affairs – Whether implied nationhood power relevant.

Constitution, ss 51(xix), (xxvii), (xxix), 117.

Citizenship Act 1948 (Cth), s 7.
Migration Act 1958 (Cth), ss 15, 501.

British Nationality Act 1948 (UK).
British Nationality and Status of Aliens Act 1914 (UK).

1 GLEESON CJ, GUMMOW AND HAYNE JJ. The principal issue raised by the Case Stated is whether the power of the Parliament conferred by s 51(xix) of the Constitution to make laws with respect to "naturalization and aliens" supported s 501(2) of the *Migration Act* 1958 (Cth) ("the Act") in the application of that provision to authorise the respondent ("the Minister") to cancel the applicant's visa on 17 July 2001. The issue should be resolved favourably to the Minister.

2 The power conferred by s 51(xix) supports legislation determining those to whom is attributed the status of alien; the Parliament may make laws which impose upon those having this status burdens, obligations and disqualifications which the Parliament could not impose upon other persons[1]. On the other hand, by a law with respect to naturalisation, the Parliament may remove that status, absolutely or upon conditions. In this way, citizenship may be seen as the obverse of the status of alienage.

3 The applicant was born to British parents on 27 December 1972 in the United Kingdom of Great Britain and Northern Ireland ("the UK"). He arrived in Australia on 17 July 1974 and has not left Australia since that date. The applicant has not become an Australian citizen pursuant to the *Australian Citizenship Act* 1948 (Cth) ("the Citizenship Act") and has not applied for Australian citizenship. He is not eligible to vote in this country.

4 That the applicant and his parents may have entered Australia under a Commonwealth programme of assisted passages, a factual matter as to which the Case Stated is silent, would not be inconsistent with his alien status.

5 The applicant was regarded by the Minister as the holder of a transitional (permanent) visa which, unless revoked according to law, permitted him to remain in Australia indefinitely. However, immediately prior to 17 July 2001, the applicant was deemed to have a "substantial criminal record" within the meaning of s 501(7) of the Act.

6 By reason of his criminal record, the applicant did not pass the "character test" specified in s 501(6). On 17 July 2001, the Minister cancelled the applicant's visa in exercise of a power under s 501(2) which was enlivened by the applicant's failure to pass the "character test". That cancellation, by force of s 15, rendered the applicant an "unlawful non-citizen" to whom there applied the provisions respecting removal and deportation in Pt 2 of the Act. The term

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1 *Re Minister for Immigration and Multicultural Affairs; Ex parte Meng Kok Te* (2002) 77 ALJR 1 at 5-7 [21]-[31], 13 [80], 18-19 [114], 33 [209]-[210]; 193 ALR 37 at 41-43, 53, 60-61, 81-82.

"non-citizen" is defined in s 5(1) of the Act as meaning "a person who is not an Australian citizen".

7 In *Cunliffe v The Commonwealth*[2], Toohey J, referring to *Nolan v Minister for Immigration and Ethnic Affairs*[3], said that:

> "an alien can generally be defined as a person born out of Australia of parents who were not Australian citizens and who has not been naturalized under Australian law or a person who has ceased to be a citizen by an act or process of denaturalization."

That statement would lead to the classification of the applicant as an alien at birth, when he entered Australia and at all times since.

8 However, the applicant contends that he was not an alien when he entered Australia and that nothing that occurred subsequently has placed him within the reach of the aliens power. The reasoning relied upon for this attribution of non-alien status depends upon a particular view of the relationship between this country and the UK at the time of the applicant's birth in 1972.

9 In *Pochi v Macphee*[4], Gibbs CJ said that the Parliament could not expand the power under s 51(xix) to include persons "who could not possibly answer the description of 'aliens' in the ordinary understanding of the word". The case presented by the applicant fixes upon the thought expressed in that statement. The "ordinary understanding" of the term "alien", correctly, is not said to be at large. Its appropriate use in Australia must have regard to the circumstances and conditions applicable to the individual in question. The applicant contends that the relevant circumstances and conditions include the political and constitutional relationship between the UK and Australia at the time of his birth and thereafter. That may be accepted, with the caveat that the relationship also is to be understood in the light of various provisions of the Constitution to which further reference will be made.

10 However, contrary to the submissions for the applicant, the result of such a consideration of his position is his classification as an alien for the purposes of s 51(xix) of the Constitution. Much of the applicant's argument proceeded from the premise that, because the expression "British subject" could be applied to

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2 (1994) 182 CLR 272 at 375.

3 (1988) 165 CLR 178 at 183-185.

4 (1982) 151 CLR 101 at 109.

him, he was not an alien. That premise is flawed. First, "British subject" is not a constitutional expression; it is a statutory expression. Secondly, and more fundamentally, if "British subject" was being used as a synonym for "subject of the Queen", an expression which is found in the Constitution, that usage would assume that there was at the time of federation, and there remains today, a constitutional and political unity between the UK and Australia which 100 years of history denies.

11 The status of subjects of the Crown derived from the mediaeval common law in England. The term "British subject" seems first to have appeared at the time of the Union with Scotland. Article IV of the Articles of Union ensured trade and navigation rights to "all the subjects of the United Kingdom of Great Britain"[5]. Thereafter, the *British Nationality and Status of Aliens Act* 1914 (UK) ("the 1914 UK Act") deemed to be "natural-born British subjects" those "born within His Majesty's dominions and allegiance" (s 1(1)). Hence the statement[6] that the 1914 UK Act "was based on the conception of a common British nationality of all subjects of the Crown throughout the Commonwealth and Empire, which had grown out of, and perpetuated, the common law doctrine of allegiance to the King".

12 In their commentary on the covering clauses of the Constitution, Quick and Garran rightly pointed out that[7]:

> "[t]he relation of the Commonwealth to the Empire, and the relation of the Federal and State Governments of the Commonwealth to one another, can hardly be appreciated apart from a sound study of the principle of sovereignty."

They distinguished between "legal sovereignty" (as, for example, the sovereignty of the British Parliament), "political sovereignty" (the sovereignty of the people), and "titular sovereignty" (the sovereignty of the Queen). As H W R Wade was later to point out, in 1955[8], there comes a point in debate about "sovereignty" and related concepts where the legal and the political intersect. As long ago as 1935, in *British Coal Corporation v The King*[9], Viscount Sankey LC said of the

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5 See *Union with Scotland Act* 1706, 5 Anne c 8.

6 *Halsbury's Laws of England*, 3rd ed, vol 1, par 1023.

7 *The Annotated Constitution of the Australian Commonwealth*, (1901) at 324-328.

8 "The Basis of Legal Sovereignty", (1955) *Cambridge Law Journal* 172.

9 [1935] AC 500 at 520.

possibility that the British Parliament might repeal the Statute of Westminster's provisions recognising or giving legislative independence to the dominions that it was "theory" and had "no relation to realities". The "realities" to which Lord Sankey referred were the political realities of the separation of the dominions from the UK which had occurred and which found reflection in the Statute of Westminster. These political realities informed the relevant body of law and are reflected in the later observation by Sir Robert Menzies that constitutional law combines elements of history, statutory interpretation and political philosophy[10].

13 In *Kirmani v Captain Cook Cruises Pty Ltd [No 1]*[11], Gibbs CJ said of the Statute of Westminster that:

> "[i]ts principal purpose was to give to the Dominions (Canada, Australia, New Zealand, the Union of South Africa, the Irish Free State and Newfoundland) that autonomy and equality of status with each other and with the United Kingdom which had been recognized by the Balfour Declaration of 1926. By a process of gradual development, the status of the Dominions had changed; as a matter of constitutional practice they had come to be regarded, not as colonies, but as sovereign communities."

14 The constitutional term "subject of the Queen" must be understood in the light of the development and evolution of the relationship between Australia and the UK and between the UK and those other countries which recognise the monarch of the UK as their monarch. In particular, the expression "subject of the Queen" can be given meaning and operation only when it is recognised that the reference to "the Queen" is not to the person but to the office. That recognition necessarily entails recognition of the reality of the independence of Australia from the UK.

15 At the time of his birth, the applicant was, by force of the UK statute then in force, the *British Nationality Act* 1948 (UK) ("the 1948 UK Act") (s 1(1))[12], a "citizen of the [UK] and Colonies" and "by virtue of" that citizenship he had "the status of a British subject". This status was the creation of and derivative from

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10 See *Plaintiff S157 v The Commonwealth* (2003) 77 ALJR 454 at 475 [108]; 195 ALR 24 at 52-53.

11 (1985) 159 CLR 351 at 363.

12 The 1914 UK Act had been relevantly repealed by s 34(3) of the 1948 UK Act. This in turn was repealed, so far as is material, by the *British Nationality Act* 1981 (UK), s 52(8).

UK statute law, because its existence was dependent upon the possession of UK citizenship, itself a statutory concept.

16 In Australia, by virtue of s 7 of the Citizenship Act, the applicant, "by virtue of" his citizenship of the UK, was classified as a "British subject"[13]. This Australian legislative status conferred on such persons certain advantages under other Australian statutes, such as those dealing with the franchise and the issue of passports[14].

17 The passage of the Citizenship Act and the 1948 UK Act and legislation in other Commonwealth countries followed negotiations between the governments concerned. The new arrangements reflected significant changes in the Imperial system which had taken place since federation. In *Halsbury*, the point was made as follows[15]:

> "The concept of a common British nationality as the only nationality known within the Commonwealth was difficult to reconcile with the complete legislative independence of the self-governing countries within the Commonwealth and tended to lead to complications in both the domestic and the international spheres."

18 One of the objectives of the new arrangements was to clarify the position with regard to diplomatic protection and to enable governments when making treaties with other countries to define with precision those who were the "persons belonging to its country and on whose behalf it [was] negotiating"[16].

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13 Section 7 stated:

> "(1) A person who, under this Act, is an Australian citizen or, by an enactment for the time being in force in a country to which this section applies, is a citizen of that country shall, by virtue of that citizenship, be a British subject.
>
> (2) The countries to which this section applies are the following countries, namely, the United Kingdom and Colonies, Canada, New Zealand, the Union of South Africa, Newfoundland, India, Pakistan, Southern Rhodesia and Ceylon."

14 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 440-441 [148]-[149], 442 [152].

15 *Halsbury's Laws of England*, 3rd ed, vol 1, par 1023.

16 British Nationality Bill, 1948, Summary of Main Provisions, Cmd 7326, par 7.

19 From the perspective of the UK, the House of Lords in *R v Secretary of State for Foreign and Commonwealth Affairs; Ex parte Ross-Clunis*[17] described the changes made in 1948 as follows:

> "The Act of 1948 introduced a new nationality regime the broad effect of which was that all British subjects were to become citizens either of the United Kingdom and Colonies or of one of the fully independent countries within the Commonwealth which are named in section 1(3) and which had then already introduced or were about to introduce their own separate citizenship laws."

Australia was one of the countries named in s 1(3) of the 1948 UK Act.

20 It may be that there never was a single nationality law throughout the British Empire[18]. In 1901, the Home Office in the UK established an inter-departmental committee to consider the state of the law of naturalisation in the British Empire[19]. That committee pointed to a number of difficulties that followed from disparate and local laws governing naturalisation throughout the British Empire[20]. These matters were taken up at Imperial conferences in 1902, 1907 and 1911, and in 1914 the UK Parliament enacted the 1914 UK Act to deal with some of the problems that were seen to have emerged. Even under that Act, however, the naturalising power was to be exercisable by the self-governing dominions without reference to the UK[21]. So much, of course, was entirely consistent with the provision of s 51(xix) of the Constitution by which the Parliament of the Commonwealth had power with respect to naturalisation and aliens. The 1914 UK Act and the 1948 UK Act both assumed that questions of naturalisation were within the powers of the dominion legislatures. The understanding of the expression "subject of the Queen", and the light which that

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17 [1991] 2 AC 439 at 444.

18 *Potter v Minahan* (1908) 7 CLR 277 at 304-305; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 439-440 [146]-[147]; Parry, *Nationality and Citizenship Laws of The Commonwealth and of The Republic of Ireland*, (1957) at 82.

19 Parry, *Nationality and Citizenship Laws of The Commonwealth and of The Republic of Ireland*, (1957) at 81.

20 Parry, *Nationality and Citizenship Laws of The Commonwealth and of The Republic of Ireland*, (1957) at 81-82.

21 s 9.

understanding casts on the ambit of the aliens power cannot, then, attribute significance to the adoption of the expression "British subject" in UK legislation. Rather, "subject of the Queen", with its implicit reference to notions of sovereignty, must recognise that at least by 1948 the subjects of the Queen to which reference was made were subjects of the monarch in right of Australia, not subjects of the monarch in right of the UK.

21 The Citizenship Act, then styled the *Nationality and Citizenship Act* 1948 (Cth), came into force on 26 January 1949. Undoubtedly, to a significant degree, that statute depended upon the aliens power. Under UK law, Irish citizens ceased to be British subjects on 1 January 1949[22]. Special provision, of a favourable nature, was made in s 8 of the Citizenship Act with respect to Irish citizens. In addition, Irish citizens might acquire Australian citizenship by following the procedures and conditions of s 12 which were less rigorous than those stipulated by s 15 for other aliens. Further, the statute created its own class of aliens which was narrower than the class of what might be called "constitutional aliens". This is apparent from the terms of the definition in s 5(1) of "alien" as meaning "a person who is not a British subject, *an Irish citizen* or a protected person" (emphasis added). It also should be noted that the "protected persons" spoken of included those in British protectorates who were aliens in the ordinary sense of the term but were taken out of that category for the purposes of the legislation[23].

22 The classification by s 7 of the Citizenship Act of the citizens of the UK, Canada, New Zealand, the Union of South Africa, Newfoundland, India, Pakistan, Southern Rhodesia and Ceylon, as British subjects in Australian law by virtue of that citizenship, also was an exercise of the legislative power with respect to aliens. The new statutory status rendered those persons a class of aliens with special advantages in Australian law, as mentioned above. It can hardly be said that, as the relevant political facts and circumstances stood in 1948, those citizens could not possibly answer the description of aliens in the ordinary understanding of that word.

23 The Constitution was, to use Isaacs J's expression[24], made not "for a single occasion", but for "the continued life and progress of the community". The

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22 *Kenny v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 42 FCR 330 at 341.

23 cf *Halsbury's Laws of England*, 3rd ed, vol 1, par 1025.

24 *The Commonwealth v Kreglinger & Fernau Ltd and Bardsley* (1926) 37 CLR 393 at 413.

Constitution took effect at a time when "the Crown" was said to be "indivisible" and when the common law notion of allegiance to that "Crown" informed the statutory use of the term "British subject". But, as was explained in *Sue v Hill*[25], in 1900 the term "the Crown" was used in constitutional theory in several distinct senses. In particular, the expression "the Crown in right of ..." was used to distinguish between the newly created governmental units within the Empire. Harrison Moore made the point[26] that, in the statutes establishing the Canadian and Australian federations, the Imperial Parliament had "unquestionably treated these entities as distinct persons". Further, as Windeyer J later observed[27], the words of the Constitution were to be read having in mind matters and circumstances in one sense external to Australia but in another bearing upon the meaning of expressions in the Constitution. The developments in Imperial relations after the commencement of the Constitution are an obvious example.

24 The development of the "autonomous Communities" recognised by the Imperial Conference of 1926[28] proceeded by steps and over periods which had different consequences for the reading of various provisions of the Constitution. To ask when Australia actually achieved complete constitutional independence or other questions phrased in similar terms is to assume a simple answer to a complex issue, rather than to attend to the particular matter arising under the Constitution or involving its interpretation which has arisen for decision. In that regard, Gaudron J said in *Sue v Hill*[29]:

> "To acknowledge that, in some constitutional provisions, some words and phrases are capable of applying to different persons or things at different times is not to change the meaning of those provisions. It is simply to give them their proper meaning and effect."

25 It will be recalled that the provisions of the Statute of Westminster fell short of achieving a full measure of legal autonomy for Australia, notably

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25 (1999) 199 CLR 462 at 497-503 [83]-[94].

26 "The Crown as Corporation", (1904) 20 *Law Quarterly Review* 351 at 359.

27 *Bonser v La Macchia* (1969) 122 CLR 177 at 223-224.

28 Summary of Proceedings, Cmd 2768 at 14. See also *R v Secretary of State for Foreign and Commonwealth Affairs; Ex parte Indian Association of Alberta* [1982] QB 892 at 916-917; *Kirmani v Captain Cook Cruises Pty Ltd [No 1]* (1985) 159 CLR 351 at 363, 373-374, 398-399, 422.

29 (1999) 199 CLR 462 at 526 [167].

because s 2 thereof did not apply to State legislation nor to State legislatures[30]. At times when elements of the UK government still participated or had the power to participate in Australian legislative, executive and judicial affairs, in particular until 1986 in the affairs of the States, it was difficult to classify the UK as a "foreign power" within the meaning of s 44(i) of the Constitution. The decision in *Sue v Hill*[31] proceeded on that footing.

26 On the other hand, s 34 of the Constitution acknowledges the possibility of change in the relationship between the UK on the one hand and Australia on the other. It does so by providing that the Parliament may alter the qualifications for elections so as to eliminate any requirement that candidates "be a subject of the Queen, either natural-born or for at least five years naturalised under a law of the United Kingdom". Further, in *Sue v Hill*[32], Gaudron J remarked:

> "Of greater significance is that, by s 51(xxxviii) of the Constitution, the Commonwealth has power to legislate with respect to 'the exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia'. It was pursuant to s 51(xxxviii) that the Parliament of the Commonwealth enacted the *Australia Act* 1986 (Cth)".

27 Once it be decided that the text of the Constitution contemplates changes in the political and constitutional relationship between the United Kingdom and Australia, it is impossible to read the legislative power with respect to "aliens" as subject to some implicit restriction protective from its reach those who are not Australian citizens but who entered Australia as citizens of the UK and colonies under the 1948 UK Act. It was unnecessary to reach that conclusion in *Re Patterson; Ex parte Taylor*[33], but it should now be reached.

28 References in argument to the statutory status of a "British subject" are apt to obscure the undoubted truth that, by 1948, the Imperial Crown, indivisible in nature, with an undivided allegiance, was no longer apparent, whether in this

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30 *Kirmani v Captain Cook Cruises Pty Ltd [No 1]* (1985) 159 CLR 351 at 373-374, 413-414.

31 (1999) 199 CLR 462 at 490 [59], 528 [173].

32 (1999) 199 CLR 462 at 525 [164].

33 (2001) 207 CLR 391 at 470 [240].

country or the UK. Such references also obscure the realisation that, in the pre-1948 law, the status of a natural-born British subject was statute based, particularly in the 1914 UK Act. There never was a common law notion of "British subject" rendered into an immutable element of "the law of the Constitution". This is so, whether that term be as understood to Diceyeans in the UK or to lawyers in this country.

29 Moreover, it is readily apparent from a consideration of *Joyce v Director of Public Prosecutions*[34], which was decided before the 1948 legislation, that "[a]llegiance and alienage are not mutually exclusive"[35]. Thus aliens may owe a measure of allegiance, but aliens they nevertheless continue to be.

30 It remains to refer to s 117 of the Constitution. This operates in favour of "[a] subject of the Queen, resident in any State". The Citizenship Act no longer provides for any status of "British subject"[36]. Nor has the law of the UK, since 1 January 1983, used the term as a status enjoyed in relation to citizenship[37]. Does this mean that, like the expression in the Schedule to the Constitution, "the United Kingdom of Great Britain and Ireland", s 117 is to be read as it would have been read in 1901? The answer must be "no", lest the section be deprived of any useful operation. The reading of the text should accommodate the evident purpose of s 117 in present conditions. That purpose is the protection of citizens (but not aliens) resident in one State against the relevant disability or discrimination in another State.

31 The conclusion reached is that the applicant entered Australia as an alien in the constitutional sense. *Re Minister for Immigration and Multicultural Affairs; Ex parte Meng Kok Te*[38] establishes that, this being so, he did not lose that status by reason of his subsequent personal history in this country. Upon the cancellation of his visa, he became an "unlawful non-citizen" within the meaning of the Act.

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34 [1946] AC 347. See *Re Minister for Immigration and Multicultural Affairs; Ex parte Meng Kok Te* (2002) 77 ALJR 1 at 20-21 [125]-[130]; 193 ALR 37 at 63-65.

35 *Re Minister for Immigration and Multicultural Affairs; Ex parte Meng Kok Te* (2002) 77 ALJR 1 at 6 [29]; 193 ALR 37 at 43.

36 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 442-443 [153].

37 *Halsbury's Laws of England*, 4th ed reissue, vol 4(2), par 9.

38 (2002) 77 ALJR 1; 193 ALR 37.

32 This case should be taken as determining that the aliens power has reached all those persons who entered this country after the commencement of the Citizenship Act on 26 January 1949 and who were born out of Australia of parents who were not Australian citizens and who had not been naturalised. The scope of any earlier operation of the power does not fall for consideration. However, it may be observed that, like the other powers of the Parliament, s 51(xix) is not to be given any meaning narrowed by an apprehension of extreme examples and distorting possibilities of its application in some future law[39].

33 In argument, various submissions were made as to the authority to be accorded the decision in *Patterson*. A plain ground for the making of the orders absolute in that case was the constructive failure by the Minister to exercise jurisdiction. It is with respect to the other ground, concerned with the scope of the aliens power, that difficulty is encountered. The determination of the proposition for which *Patterson* is authoritative on that subject is particularly of significance for other Australian courts.

34 *Long v Minister for Immigration and Multicultural and Indigenous Affairs*[40] illustrates the inconvenience and lack of useful result from *Patterson*. In *Long*, French J determined[41] that there was no binding principle in *Patterson* which assisted him to a decision in the instant case. His Honour decided the case by reference to the "minimum position" to be distilled from the various majority judgments in *Patterson*. French J said[42]:

> "I would add the observation that the more recent the date upon which it was possible for a person who was not an Australian citizen to be other than an 'alien' for constitutional purposes, the more recent the date upon which it would have to be said that Australia had not achieved independent nationhood in all its aspects."

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39 *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 380-381 [87]-[88]; *Egan v Willis* (1998) 195 CLR 424 at 505 [160]; *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 492 [16].

40 [2002] FCA 1422.

41 [2002] FCA 1422 at [40].

42 [2002] FCA 1422 at [40].

35 In *Re Minister for Immigration and Multicultural Affairs; Ex parte Meng Kok Te*[43], four members of the Court agreed that there was no single strain of reasoning in the majority judgments in *Patterson* which contains a binding statement of constitutional principle and that there were differing views in the majority as to what were the facts material to the decision. One of those four Justices, McHugh J, concluded that *Patterson* had no precedent value beyond its own facts[44].

36 Any consideration of the significance to be attached to *Patterson* must involve the determination whether *Patterson* was effective to take the first step of overruling the earlier decision in *Nolan v Minister for Immigration and Ethnic Affairs*[45]. In our view, the Court should be taken as having departed from a previous decision, particularly one involving the interpretation of the Constitution, only where that which purportedly has been overthrown has been replaced by some fresh doctrine, the elements of which may readily be discerned by the other courts in the Australian hierarchy. On that approach to the matter, and as *Long* indicates, the decision in *Patterson* plainly fails to pass muster.

37 The reasoning in this judgment upon the substantive question proceeds upon that footing respecting *Patterson*. It develops but is designedly harmonious with the reasoning in *Nolan*. In particular, in the joint judgment of six members of the Court in *Nolan*, it was said[46]:

> "The transition from Empire to Commonwealth and the emergence of Australia and other Dominions as independent sovereign nations within the Commonwealth inevitably changed the nature of the relationship between the United Kingdom and its former colonies and rendered obsolete notions of an indivisible Crown. A separate Australian citizenship was established by the *Nationality and Citizenship Act* 1948 (Cth), now known as the *Australian Citizenship Act* 1948. ... The fact that a person who was born neither in Australia nor of Australian parents and who had not become a citizen of this country was a British subject or a subject of the Queen by reason of his birth in another country could no

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43 (2002) 77 ALJR 1 at 4-5 [17]-[19], 14-15 [86]-[88], 22 [136], 33 [211]; 193 ALR 37 at 40-41, 55, 66, 82.

44 (2002) 77 ALJR 1 at 15 [87]; 193 ALR 37 at 55.

45 (1988) 165 CLR 178.

46 (1988) 165 CLR 178 at 184.

longer be seen as having the effect, so far as this country is concerned, of precluding his classification as an 'alien'."

38 For more abundant caution, the Solicitor-General of the Commonwealth, who appeared for the Minister, sought leave to re-open *Patterson* itself. The controlling principles recently were considered in *Esso Australia Resources Ltd v Federal Commissioner of Taxation*[47], with particular reference to the adoption in *John v Federal Commissioner of Taxation*[48] of what had been said by Gibbs CJ in *The Commonwealth v Hospital Contribution Fund*[49].

39 The decision in *Patterson* does not rest upon a principle carefully worked out in a significant succession of decisions; the contrary, as we have indicated, is the case. Secondly, the treatment of the aliens power in *Patterson* was not necessary for the decision, because there was a clear alternative basis for the decision. Thirdly, the inconvenience flowing from the existence of *Patterson* is indicated by reference to *Long*. Finally, the Minister has moved as quickly as may be in this Court to obtain a reconsideration of *Patterson*. That case henceforth should be regarded as authority for what it decided respecting s 64 of the Constitution and the constructive failure in the exercise of jurisdiction by the Minister.

40 The question reserved for the Full Court should be answered "yes". The costs of the proceeding in the Full Court should be the costs in the matter in the course of which the case was stated.

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47 (1999) 201 CLR 49 at 71 [55], 101-106 [152]-[167].

48 (1989) 166 CLR 417 at 438-439.

49 (1982) 150 CLR 49 at 55-58.

41 McHUGH J. The question in this case is whether the *Migration Act* 1958 (Cth) ("the Act") can constitutionally authorise the Minister for Immigration and Multicultural Affairs to deport a British citizen who has lived permanently in Australia since 1974 but who has never become an Australian citizen. In my opinion, although the Act in terms gave the Minister power to deport such a person, the Act was invalid in so far as it purported to apply to him.

Statement of the case

42 Jason Shaw, the applicant, migrated to Australia with his parents in 1974. He was then two years of age and a citizen of the United Kingdom. Along with his parents, he was granted a permanent entry permit. Under reg 4 of the Migration Reform (Transitional Provisions) Regulations (Cth), after 1 September 1994 the permanent entry permit held by the applicant continued in effect as a transitional (permanent) visa that permitted the applicant to remain in Australia indefinitely. He has never left Australia since arriving in 1974. However, he has never become an Australian citizen.

43 Section 501(2) of the Act authorises the Minister to cancel a visa. He may do so if he reasonably suspects that the holder of the visa does not pass the character test as defined in s 501(6) of the Act and the holder does not satisfy the Minister that he or she passes the character test. Section 501(6) provides that, for the purposes of s 501, a person does not pass the character test if that person has a substantial criminal record as defined by s 501(7). Section 501(7) defines a substantial criminal record to include a person who has been sentenced to a term of imprisonment of 12 months or more. Acting under the power conferred by s 501, the Minister has revoked the applicant's visa.

44 Since the age of 14, the applicant has followed a life of crime. He has been convicted on numerous occasions for offences that include stealing, breaking and entering and unlawfully using a motor vehicle. In 1998 he was sentenced to five years imprisonment for property offences; in the same year he was sentenced to two and a half years imprisonment for offences concerning drugs.

45 In July 2001, the Minister cancelled the applicant's visa on the ground that he had a substantial criminal record and did not pass the character test as defined by s 501(6).

Section 501 does not apply to British citizens who arrived in Australia before 3 March 1986

46 There are only two heads of federal constitutional power that could arguably extend the operation of s 501 to a person such as the applicant who is a

British citizen and who arrived in Australia in 1974. The first is the immigration power; the second is the aliens power[50]. A long line of authority establishes that the immigration power does not authorise the Parliament to make laws with respect to persons who have immigrated to Australia, made their permanent homes here and become members of the Australian community[51]. Accordingly, the immigration power did not authorise the enactment of s 501 in so far as it purports to apply to the applicant.

47 The aliens power, however, gives the Parliament greater power over immigrants than the immigration power. In *Nolan v Minister for Immigration and Ethnic Affairs*[52], this Court held that any immigrant who has not taken out Australian citizenship is an alien for the purpose of s 51(xix) of the Constitution. On that view of the aliens power, the Parliament can legislate for the deportation of persons who are British citizens and have been permanent residents of Australia for many years. In *Nolan*, the Court upheld an order of the Minister deporting Nolan, a citizen of the United Kingdom who had lived permanently in Australia since 1967 but who had not taken out Australian citizenship.

48 In *Re Patterson; Ex parte Taylor*[53], however, a majority of this Court held that *Nolan* should be overruled in so far as it held that *all* British citizens living in Australia who had not taken out Australian citizenship were aliens for the purpose of the Constitution. Taylor was a British citizen who had arrived in Australia in 1966 and had since lived here permanently. However, he had not taken out Australian citizenship. A majority of the Court held that s 501 of the Act could not constitutionally authorise the deportation of Taylor.

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50 Section 51 of the Constitution states:

> "The Parliament shall ... have power to make laws for the peace, order, and good government of the Commonwealth with respect to:-
>
> ...
>
> (xix) ... aliens:
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> ...
>
> (xxvii) Immigration and emigration:
>
> ..."

51 The line of cases commences with *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36.

52 (1988) 165 CLR 178.

53 (2001) 207 CLR 391.

49 As I pointed out in *Re Minister for Immigration and Multicultural Affairs; Ex parte Te*[54], *Re Patterson* has no *ratio decidendi.* The four majority Justices were Gaudron, Kirby and Callinan JJ and myself. Gaudron J held that Taylor was a member of the body politic that constituted the Australian community and that British citizens who were members of that body politic and had been in Australia before 1987[55], were not aliens within the meaning of the Constitution. Kirby J held that Taylor was not an alien when he arrived in Australia, that he "had been absorbed into the people of the Commonwealth"[56] and that the Parliament could not retrospectively declare him to be an alien. I held that British immigrants who settled in Australia before 1973 were subjects of the Queen of Australia and could not be "aliens" for the purpose of the Constitution. I selected 1973 as the earliest date on which the constitutional power to legislate with respect to aliens could apply to British immigrants. I did so because 1973 was the year in which the Parliament enacted the *Royal Style and Titles Act* 1973 (Cth). But I expressed the view that the relevant date "maybe later"[57]. Callinan J agreed with the reasoning of both Kirby J and myself.

50 Although *Re Patterson* has no *ratio decidendi*, "it still has precedential authority in respect of circumstances that 'are not reasonably distinguishable from those which gave rise to the decision[58]'." It is not possible, however, to say that the present case is not reasonably distinguishable from *Re Patterson*. The only material fact in *Re Patterson* that was common to all majority judgments was that Taylor had arrived in Australia in 1966. *Re Patterson* is therefore only an authority for the proposition that a British citizen is not an alien if that person arrived in Australia in or before 1966 and has lived here permanently since that time. Even if the relevant year be extended to 1973, it does not assist the applicant in this case: he did not migrate to Australia until 1974. Accordingly, the applicant cannot rely on *Re Patterson* as an authority that supports his claim that the Act cannot constitutionally authorise the Minister to revoke his visa and render him liable to deportation.

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54 (2002) 77 ALJR 1 at 14 [86]; 193 ALR 37 at 55.

55 Until 1987, s 5 of the *Australian Citizenship Act* 1948 (Cth) defined "alien" to mean "a person who [was] not ... a British subject ... an Irish citizen or a protected person".

56 (2001) 207 CLR 391 at 492 [304].

57 (2001) 207 CLR 391 at 436 [135].

58 (2002) 77 ALJR 1 at 15 [87]; 193 ALR 37 at 55.

51 Despite *Re Patterson* having no precedential value for the purpose of *this* case, I remain convinced that *Re Patterson* was correctly decided. Having read the reasons of Callinan J, I am also convinced that his Honour is correct in holding[59] that the evolutionary process by which the term "subject of the Queen" in s 117 of the Constitution became "subject of the Queen of Australia" was not completed until 3 March 1986[60]. Until that date, therefore, Australians, born or naturalised, and British citizens permanently residing in Australia owed their allegiance to the "Crown of the United Kingdom of Great Britain and Ireland"[61]. Until that date, they were subjects of the Queen of the United Kingdom of Great Britain and Ireland for the purpose of s 117 of the Constitution, and were entitled to the protection of that section. When the evolutionary process ended, British citizens then permanently residing in Australia became subjects of the Queen of Australia by the same evolutionary process that had transformed the Queen of the United Kingdom of Great Britain and Ireland into the Queen of Australia. For the reasons that I gave in *Re Patterson*, subjects of the Queen of Australia are not aliens for the purpose of the Constitution.

52 It follows that the applicant, who arrived in Australia in 1974 and was permanently living in Australia on 3 March 1986, is a subject of the Queen of Australia. He is not an alien within the meaning of s 51(xix) of the Constitution. The Parliament of the Commonwealth has no power to authorise his deportment from this country.

Order

53 The question reserved in the case stated should be answered "No", and the case should be remitted to a single judge to be determined consistently with that answer. The Minister should pay the applicant's costs in the Full Court.

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59 Reasons of Callinan J at [177].

60 With the passing of the *Australia Act* 1986 (UK) and the *Australia Act* 1986 (Cth).

61 Preamble to the Constitution.

54 KIRBY J. In *Calvin's Case*[62], Sir Edward Coke CJ held that a man born in Scotland after the accession of King James I to the English throne was not an "alien" to England. He appealed to many authorities. One of them involved Saul of Tarsus, later the Biblical Apostle St Paul[63]. Facing punishment for preaching his beliefs, Paul appealed to his Roman nationality. Although a Jew, he had been born a Roman citizen. By Roman law, he was entitled to be freed upon payment of a sum of money. Coke CJ remarked that "such a plea as is now imagined against Calvin might have made St Paul an alien to Rome"[64].

55 Just as the Emperor of Rome "had several ligeances for every several kingdom and country under his obedience"[65] so, when the people of Australia "agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution", they did so as "subjects of the Queen". Their status as British subjects defined their nationality. It was no more possible in law to treat a person, wherever born with allegiance to that Crown, as "alien" than it was to treat St Paul as an alien to Rome.

56 Mr Jason Shaw (the applicant) is a man far from sainthood. He was born in the United Kingdom in 1972. In 1974 he arrived in Australia with his parents as an immigrant. It was common ground that in 1901 he could not possibly have fallen within the "aliens" power conferred on the Federal Parliament by the Constitution[66]. Yet now the Minister for Immigration and Multicultural Affairs ("the Minister") asserts that the Minister is entitled under the *Migration Act* 1958 (Cth) ("the Act") to deport the applicant from Australia. The Minister seeks to do so, in substance, because the applicant has committed criminal offences in Australia which constitute a "substantial criminal record" within the Act[67]. The provisions upon which the Minister relies were enacted well after the applicant's arrival here[68].

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62 (1608) 7 Co Rep 1a [77 ER 377]; cf *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 429 [116].

63 *Calvin's Case* (1608) 7 Co Rep 1a at 24a [77 ER 377 at 406].

64 *Calvin's Case* (1608) 7 Co Rep 1a at 24a [77 ER 377 at 406].

65 *Calvin's Case* (1608) 7 Co Rep 1a at 24a [77 ER 377 at 406].

66 Constitution, s 51(xix).

67 The Act, s 501(7).

68 See *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 404-406 [23]-[27], 410 [42], 483-487 [277]-[286].

57 The applicant challenges the power of the Minister to act in this way. He asserts that, in so far as subsequently adopted provisions of the Act[69], and of subordinate legislation[70], made under federal law[71], purport to apply to him, they exceed the law-making power of the Commonwealth derived from the Constitution.

58 The Minister disputes the applicant's proposition. Necessarily, the Minister accepts that the consequence of the applicant's removal from Australia would be to part him from the only country he has known, in which he was educated and has grown up since infancy, from the family that brought him here and from his two children, each of them Australian citizens, born in Australia respectively in 1992 and 1996. This Court is not concerned with the merits of the Minister's decision, simply with its constitutional validity. The Minister points to a number of sources of constitutional power to sustain the validity of the laws under which the action is proposed.

59 Principally, the Minister contends that the applicant is an "alien" and thus subject to laws made under that constitutional head of legislative power[72]. The Minister also argues that the laws are supported by the federal legislative powers with respect to "immigration"[73] and "external affairs"[74]. *Sotto voce*, the Minister suggests that the laws are also sustained by the implied federal power to make laws concerning Australia's nationhood.

60 The applicant is entitled to succeed. The purported actions of the Minister are not sustained by any valid federal law. No more than if he were now an Australian citizen with a criminal record can the applicant be expelled from Australia on that ground. He is a member of the Australian community. He has been so since his arrival. Although not naturalised and thus not, as such, an Australian citizen, he was not on arrival, and could not thereafter lawfully be made, an "alien". As well, he has passed beyond the process of "immigration". His expulsion from Australia is an internal and not an external affair to this country. No implication of the Constitution supports the challenged laws in his

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69 The Act, s 501(2), (6) and (7).

70 Migration Reform (Transitional Provisions) Regulations (Cth), reg 4.

71 *Migration Reform Act* 1992 (Cth).

72 Constitution, s 51(xix).

73 Constitution, s 51(xxvii).

74 Constitution, s 51(xxix).

case. The Case Stated must be answered accordingly. In answering it, this Court should not use chance happenings affecting its composition to change its recent statements of the governing law.

The facts and applicable legislation

61 A fuller statement of the facts appears in other reasons[75]. Also appearing there are details of the legislation, under (or pursuant to) which the Minister has purported to alter the status of the applicant[76]. When, in 1974, at the age of two years, the applicant arrived in Australia, he was granted a permanent entry permit[77]. That permit immediately recognised the special nationality status of the applicant and his parents at that time. Such special status derived from the fact that the applicant and his parents were subjects of the Queen. Whereas under the Act, as it then stood, the Minister could, in the Minister's absolute discretion, cancel a *temporary* entry permit[78], issued to persons having a different nationality status, the Minister enjoyed no legal power to cancel a *permanent* entry permit[79]. The Minister had the power to deport aliens convicted of certain crimes. But under the Act, as it then stood, the term "alien" was defined in language that *inter alios* excluded British subjects such as the applicant from treatment as foreign nationals or "aliens"[80].

62 The hypothesis in the Minister's case is that, although at federation and for some time thereafter persons such as the applicant would not have been "aliens" for constitutional purposes and although on arrival and until 1984[81] (with effect from 1 May 1987) the applicant was not an "alien" under the Act, somehow the applicant (and inferentially the many thousands of persons in a like position)

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75 Reasons of Gleeson CJ, Gummow and Hayne JJ ("the joint reasons") at [3]-[6]; reasons of McHugh J at [42]-[45]; reasons of Callinan J at [130]-[138].

76 Reasons of Callinan J at [133]-[135].

77 Pursuant to the Act, s 6, as it then stood.

78 The Act, s 7(1).

79 Such a permit would not, however, have effect if it had been obtained improperly. See the Act, s 16, as it then stood.

80 The Act, s 5(1).

81 When the definition of "alien" was removed from the *Australian Citizenship Act* 1948 (Cth) by the *Australian Citizenship Amendment Act* 1984 (Cth). The definition of "alien" was removed from the Act itself by the *Migration Amendment Act* 1983 (Cth).

became constitutional "aliens", susceptible for that reason to new laws under which they could be expelled from Australia.

63 It is this thesis that lies at the heart of the issue presented for decision. Just to state the thesis is to indicate the gravity of the proposition being advanced. To establish the proposition, with its large consequences for the nationality of a substantial number of British subjects who came to Australia like the applicant enjoying a special status[82], the burden of persuasion is upon the Minister to demonstrate that such a change of status was lawfully achieved. It is the Minister who must show when the change happened. The Minister must justify a constitutional principle that has such serious results for the applicant and that could also validly affect the nationality status of so many people in a like position. The Minister must do so in the face of recent decisions of this Court that stand in the way.

The course of this Court's authority on deportation

64 *The immigration and other powers*: For a very long time Australian constitutional doctrine has accepted that the federal constitutional power with respect to "immigration"[83] is not open-ended. It does not permit the indefinite regulation by federal law of persons who once were (or whose parents or family were) immigrants. The applicable power is addressed, as such, to "immigration". This is a process. It is not addressed, as such, to "immigrants".

65 Thus, as early as 1925, in *Ex parte Walsh and Johnson; In re Yates*[84], Knox CJ, considering the deportation of two persons who were British subjects and who had immigrated to Australia in 1893 and 1910 respectively, concluded that the power over immigration "should not be construed as extending to persons who had made their homes in Australia and become part of its people". This Court held that the validity of a provision authorising deportation as a law with respect to immigration "depends on this conclusion"[85]. According to this approach, a point was reached where "a person who has immigrated into

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82 The number of persons affected by the "aliens" point was not identified with certainty. However, statistics presented to this Court in *Re Patterson; Ex parte Taylor* showed that the number of persons affected who arrived in Australia between 1959 and 1969 was half a million. If those who had arrived before 1959 and after 1969 but before 3 March 1986 or 1 May 1987 were included in this figure, the number would be even larger.

83 Constitution, s 51(xxvii).

84 (1925) 37 CLR 36 at 62. See also at 109, 112 per Higgins J.

85 *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 62.

Australia will pass beyond the range of the [immigration] power when the act of immigration is at an end – that is when that person has become a full member of the Australian community"[86]. No reliance was placed in that case upon the "aliens" power because each of the persons concerned was a subject of the King[87].

66 This test of "absorption into the Australian community" is concededly vague. The precise moment when it occurs may be a matter of dispute in a particular case[88]. But the concept of absorption, for the purposes of the immigration power, is so well established and so clearly grounded in the constitutional text that it is now beyond dispute.

67 By parity of reasoning, the classification of a subject matter of a law as one of "external affairs", for the purpose of the constitutional power with respect to that subject[89], postulates a dichotomy between affairs that are purely "internal" and those that are "external". Upon this basis the applicant disputed the invocation of the constitutional power with respect to "external affairs". For like reasons he rejected reliance on the implied nationhood power.

68 *Aliens and British subjects*: The constitutional head of power principally relied on by the Minister to sustain action against the applicant was none of the foregoing. Those heads of power were held in reserve to supplement, if necessary, the principal way in which the Minister advanced the case. This was that, constitutionally speaking, the applicant was an "alien". He was by birth a citizen of the United Kingdom, a foreign country[90]. Although he was also a "British subject" at the time of his birth[91], by that time such status no longer enjoyed a single, universal significance throughout the British dominions where, as in Australia, the Queen retained the role of constitutional monarch and

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86 *R v Director-General of Social Welfare (Vict); Ex parte Henry* (1975) 133 CLR 369 at 373 per Gibbs J.

87 *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 117.

88 *Re Minister for Immigration and Multicultural Affairs; Ex parte Meng Kok Te* (2002) 77 ALJR 1 at 6 [26]; 193 ALR 37 at 42-43.

89 Constitution, s 51(xxix).

90 *British Nationality Act* 1948 (UK), s 4; cf *Sue v Hill* (1999) 199 CLR 462 at 487-492 [48]-[65].

91 *British Nationality Act* 1948 (UK), s 1.

enjoyed the duty of allegiance as such[92]. Because the applicant personally, or his parents on his behalf, had not undertaken the process of naturalisation, and the applicant had not himself become an Australian citizen, according to the Minister, he was, in law, an "alien". For that reason, he was validly subject to any law of the Commonwealth with respect to "aliens" that authorised the Minister to remove him from Australia.

69 *Pochi and the dichotomy*: To some members of this Court, the proposition of the Minister is clearly correct. The ultimate foundation for that view, applicable at least in the recent decades in which it has been propounded, has been a dichotomous approach to alienage and Australian citizenship. If a person is not an Australian citizen, by birth or subsequent naturalisation, such a person is an "alien" for the purposes of the Constitution. He or she may be dealt with as such. *Cadit quaestio*. End of contest.

70 In support of this dichotomy, the Minister relied once again upon remarks made in this Court in *Pochi v Macphee*[93]. There, Gibbs CJ propounded, as a general proposition, that "the Parliament can … treat as an alien any person who was born outside Australia, whose parents were not Australians, and who has not been naturalized as an Australian"[94]. Although this proposition was stated more broadly in *Pochi* than any principle of law needed to reach the orders in that case (which concerned a person who was born outside the dominions of the Crown, was never a British subject but was at all times an Italian citizen), the remarks became the foundation for the central holding of this Court in *Nolan v Minister for Immigration and Ethnic Affairs*[95]. In such a way serious legal error is sometimes built upon overstated legal propositions.

71 Nolan endorses the dichotomy: As in this case, Nolan involved a person born in the United Kingdom who came to Australia as a child, lived here until his late twenties, committed offences and was then the subject of purported action on the part of the Minister to expel him as an "alien". The majority of this Court

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92 *Attorney-General for Ontario v Attorney-General for Canada* [1912] AC 571 at 581, 583-584, 589; *R v Secretary of State for Home Department; Ex parte Bhurosah* [1968] 1 QB 266 at 278, 284, 286; *R v Secretary of State for Foreign and Commonwealth Affairs; Ex parte Indian Association of Alberta* [1982] QB 892 at 916-917, 920-921.

93 (1982) 151 CLR 101. See also *Re Minister for Immigration and Multicultural Affairs; Ex parte Meng Kok Te* (2002) 77 ALJR 1 at 25-26 [158]-[163]; 193 ALR 37 at 70-71.

94 *Pochi v Macphee* (1982) 151 CLR 101 at 109-110.

95 (1988) 165 CLR 178.

upheld the constitutional power of the Minister to so act[96]. Only Gaudron J dissented[97]. Sweeping aside the history of nationality status under the Australian Constitution, the deliberate omission of an express constitutional status for Australian citizenship, the long course of assisted British migration to Australia[98] and the problem presented by the express reference in s 117 of the Constitution to "subject of the Queen"[99], the joint reasons of the majority in Nolan endorsed the dichotomous theory. For that majority, the word "aliens" in s 51(xix) of the Constitution, by 1988, included any person born outside Australia whose parents were not Australian citizens, and who had not been naturalised as an Australian citizen.

72 Whilst this meaning of "aliens" was accepted in *Nolan*, it was acknowledged that it would not have been adopted in 1901 when the Constitution commenced operation. Accordingly, the change was held to be implicit in "the emergence of Australia as an independent nation, the acceptance of the divisibility of the Crown which was implicit in the development of the Commonwealth … and the creation of a distinct Australian citizenship"[100]. The *ratio decidendi* of *Nolan* could thus not have been clearer. It expressed a constitutional rule that survived until it was challenged directly in this Court in *Re Patterson; Ex parte Taylor*[101].

73 *Re Patterson overrules the dichotomy*: Whatever else may be unclear about the holding of this Court in *Re Patterson*, this much is indisputable. *Re Patterson* overruled the dichotomous theory endorsed in *Nolan*. It returned the constitutional doctrine of this Court to a more complex notion of Australian nationality in keeping with the constitutional text and Australia's history. Correctly, the headnote writer in the authorised report of this Court's decision in *Re Patterson* states that *Nolan* was overruled[102]. The supposed dichotomy

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96 *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 186 per Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ.

97 *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 190-193.

98 See reasons of Callinan J at [141]-[145].

99 *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 186.

100 *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 185-186.

101 (2001) 207 CLR 391.

102 (2001) 207 CLR 391 at 392.

between Australian citizenship and "alien" status stood between Mr Taylor and success upon the issue on which the Court was narrowly divided (the constitutional validity of the Minister's deportation power in such a case). The holding on the point of the applicability of *Nolan* to the case was determinative of the orders ultimately made in *Re Patterson*. If *Nolan* had been endorsed by a majority of this Court, it would have followed, from the other holdings, that the Minister had the power to remove Mr Taylor from Australia. All other impediments to deportation decided in the case might have been cured by the Minister. But this one could not be. Mr Taylor stayed in Australia. He could not be deported as an "alien". This was so although he was certainly not a citizen. The supposed dichotomy was rejected.

74 *Te affirms rejection of the dichotomy*: In 2002, in *Re Minister for Immigration and Multicultural Affairs; Ex parte Meng Kok Te*[103], this Court returned once again to the constitutional word "aliens". Undaunted by the reverse in *Re Patterson*, the Minister argued in *Te* for a quick return to the rule in *Nolan*. Specifically, the Minister urged a revival of the dichotomy between alienage and Australian citizenship. Those who, in *Re Patterson*, had dissented from the Court's holding in that case, continued to find the Minister's invitation irresistible[104]. In my respectful opinion, adherence to the dichotomy involved a rejection of a clear principle for which the decision in *Re Patterson* stood as legal authority.

75 In *Te*, the particular issue that had arisen for decision in *Nolan* and *Re Patterson* (and which now arises in the present case) was not before this Court. *Te*, like *Pochi*, concerned persons who had been born outside the dominions of the Crown[105]. They were never British subjects or naturalised Australians. Thus, they were always within the concept of "aliens" as envisaged by s 51(xix) of the Constitution. It followed from the facts of *Te* (and the companion case of *Re Minister for Immigration and Multicultural Affairs; Ex parte Dung Chi Dang*) that none of the complications of the concept of nationality and of alienage that arose in *Nolan* and *Re Patterson* (and which now arise) had to be considered. Anything said in *Te* on those complications was therefore *obiter dicta*. The legal principle for which *Re Patterson* stands was unaltered. Nothing decided in *Te*

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103 (2002) 77 ALJR 1; 193 ALR 37.

104 *Re Minister for Immigration and Multicultural Affairs; Ex parte Meng Kok Te* (2002) 77 ALR 1 at 5 [19] per Gleeson CJ, 22 [133]-[136] per Gummow J, 33 [210]-[211] per Hayne J; 193 ALR 37 at 41, 65-66, 82.

105 Mr Te was born in Cambodia. Mr Dang, the applicant in the associated case, was born in Vietnam. See *Re Minister for Immigration and Multicultural Affairs; Ex parte Meng Kok Te* (2002) 77 ALJR 1 at 23 [142], [145]; 193 ALR 37 at 67.

changed in the slightest the holding in *Re Patterson* rejecting the dichotomy of alienage and citizenship favoured by the dissenting judges in *Re Patterson*. As a matter of legal authority, the holding in *Re Patterson* therefore applies to the present case. It is contrary to the applicable part of the *ratio decidendi* in *Re Patterson* to attempt, in this case, to reinstate the dichotomy between the status of "alien" and citizen.

76 *Stare decisis and constitutional law*: I recognise that, in respect of the meaning of the Constitution, the duty of each Justice is to the fundamental law of the nation. In the history of this Court the rule of obedience to a majority holding of the Court on a point of law has not been uniformly treated as applying in the same way to a constitutional ruling. Nevertheless, whilst adhering to (and often expressing) individual views concerning the meaning of the Constitution, it is normal for Justices of this Court to give effect to majority rulings on the Constitution, if only to avoid the spectacle of deliberate persistence in attempts to overrule recent constitutional decisions on identical questions on the basis of nothing more intellectually persuasive than the retirement of a member of a past majority and the replacement of that Justice by a new appointee who may hold a different view[106].

77 Those who recognise the stabilising element of the doctrine of precedent in our legal system (even to the extent of suggesting the need for leave of this Court to re-argue a matter determined by past authority[107]) will ordinarily accept a determination of a rule, especially where that determination is recent and concerns exactly the same legal issue. Otherwise, every important constitutional decision will be resubmitted for redetermination following new appointments until the dissenter gets his or her way[108]. The rejection of the dichotomy suggested *obiter* in *Pochi*, endorsed in *Nolan* but overruled in *Re Patterson* should not continue to revisit this Court awaiting the hoped for arrival of a majority to give effect to an opinion about the Constitution dismissed in the past in an authoritative decision on the point.

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106 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 597-600 [179]-[187] with reference to *Gould v Brown* (1998) 193 CLR 346.

107 cf *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311 at 316 per Gibbs CJ, Mason, Murphy, Wilson, Brennan and Dawson JJ; Deane J dissenting. See also *Allders International Pty Ltd v Commissioner of State Revenue (Vict)* (1996) 186 CLR 630 at 673.

108 *Western Australia v The Commonwealth* (1975) 134 CLR 201; cf *Queensland v The Commonwealth* (1977) 139 CLR 585 at 599-600 per Gibbs J, 603 per Stephen J; cf at 592-594 per Barwick CJ, 631 per Aickin J.

78 In the present case, so far as the nationality of non-citizen non-alien British subjects is concerned, it must be conceded that a difficulty arises in expressing the affirmative side of the decision in *Re Patterson* represented in its negative face by the rejection of the dichotomy. Amongst the majority in *Re Patterson* for overruling *Nolan*, there was no exact concurrence in the expression of a constitutional principle to replace the discarded dichotomy. The differences in the statements of the individual judges in the majority in *Re Patterson* were analysed in *Te*. Unfortunately, in the light of what has been said, it is necessary to return to that analysis.

79 Whilst those of the *Nolan* persuasion persisted in *Te* with a view that the reasoning of the majority in *Re Patterson* "was not soundly based"[109], with respect, that is what must be said of the reasoning of the minority in *Re Patterson* and *Te*. As Gaudron J consistently, and correctly, pointed out in *Nolan*, *Re Patterson* and *Te*[110]:

> "Citizenship is a statutory, not a constitutional concept. The relevant constitutional concepts with which this case are concerned are 'alien', the singular form of the word used in s 51(xix) of the *Constitution*, and, by way of constitutional distinction, 'non-alien'. Thus, the fact that the prosecutor is not an Australian citizen is irrelevant if he is not an alien."

80 Although this is a notion that the minority in *Re Patterson* and *Te* have been persistently unwilling to accept, it is the clear and repeated holding of four members of this Court. It is a holding that should be respected as a matter of legal precedent. It is also correct as a matter of basic constitutional principle. It is fatal to the Minister's principal argument.

81 *The criteria of alienage in Re Patterson*: In *Te*, McHugh J, one of the majority in *Re Patterson*, acknowledged the different ways in which the Justices constituting the majority in *Re Patterson* had expressed the criterion for alienage, once the *discrimen* of non-citizenship was rejected as a universal criterion[111]. These differences led McHugh J to an hypothesis that no *ratio decidendi* with respect to the "aliens" power could be extracted from the reasoning in *Re*

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109 (2002) 77 ALJR 1 at 22 [133] per Gummow J; 193 ALR 37 at 65.

110 *Re Minister for Immigration and Multicultural Affairs; Ex parte Meng Kok Te* (2002) 77 ALJR 1 at 10 [53]; 193 ALR 37 at 48.

111 (2002) 77 ALJR 1 at 14 [85]-[86]; 193 ALR 37 at 54-55.

Patterson[112]. This part of McHugh J's reasons is cited in the joint reasons in the present case[113].

82 However, the citation by their Honours does not state the entirety, or indeed the most important part, of McHugh J's analysis. His Honour also said that *Re Patterson* had "precedential authority in respect of circumstances that 'are not reasonably distinguishable from those which gave rise to the decision'"[114]. This additional part of McHugh J's reasoning should not be ignored. It involves an element of the doctrine of precedent as it applies in Australian law. Two principles stood as the authority of this Court before the present decision. The first was the negative principle that the absence of citizenship did not define alienage. The second, positive principle was emerging to meet the needs of the particular cases. So it does in the present case.

83 In my reasons in *Te*, I suggested (and it is still my view) that the difference between Gaudron J and McHugh J in *Re Patterson* was "essentially upon a matter of detail concerning the way in which a group of non-alien British subjects, resident in Australia, were formally associated with Australia although not citizens and never having been naturalised"[115]. McHugh J in *Re Patterson* had explained the position of this intermediate class by reference to the traditional common law concept of allegiance[116]. This led his Honour to attach significance to the *Royal Style and Titles Act* 1973 (Cth)[117]. By that Act, reserved for the Queen's pleasure in accordance with the Constitution[118], the Royal style and title of the monarch was, in Australia, henceforth to delete any reference to the United Kingdom such as had previously existed. Instead, it was to refer to Her Majesty as "Queen of Australia". That alteration was said to amount to "a formal recognition of the changes that had occurred in the constitutional relations

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112 *Re Minister for Immigration and Multicultural Affairs; Ex parte Meng Kok Te* (2002) 77 ALJR 1 at 14-15 [86]-[87]; 193 ALR 37 at 55.

113 The joint reasons at [35].

114 *Re Minister for Immigration and Multicultural Affairs; Ex parte Meng Kok Te* (2002) 77 ALJR 1 at 15 [87]; 193 ALR 37 at 55 citing *Midland Silicones Ltd v Scruttons Ltd* [1962] AC 446 at 479; *Re Tyler; Ex parte Foley* (1994) 181 CLR 18 at 37.

115 (2002) 77 ALJR 1 at 29 [182]; 193 ALR 37 at 75.

116 (2001) 207 CLR 391 at 432 [124].

117 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 436-437 [135].

118 Constitution, s 58.

between the United Kingdom and Australia"[119]. It was such a change, reflected in concurrent changes to the *Australian Citizenship Act* 1948 (Cth) in 1973[120], that convinced McHugh J that "the evolutionary process" had occurred by which "the subjects of the Queen born and living in Australia became subjects of the Queen of Australia"[121]. His Honour described the process as a "mystical" one. It was one by which, without formal naturalisation, British subjects living in Australia, some of whom were not Australian citizens, "became subjects of the Queen of Australia". Those who had been born in the United Kingdom "owed their allegiance to the Queen of Australia, not the Queen of the United Kingdom"[122].

84 In his reasons in *Re Patterson*, Callinan J agreed with McHugh J that the prosecutor in that case, "as a subject of the Queen resident in Australia at the end of the evolutionary process" to which his Honour had referred, "became a subject of the Queen of Australia"[123]. It was in such a way that Callinan J, like McHugh J, considered that the rights expressly conferred on a "subject of the Queen" by s 117 of the Constitution were protected[124].

85 Callinan J also agreed with my reasons in *Re Patterson* that persons in the position of Mr Taylor could not be treated as an "alien" for constitutional purposes[125]. My reasons were substantially the same as those of Gaudron J. We were prepared to accept that the repeal of the definition of the word "alien" in s 5 of the *Australian Citizenship Act* in 1984 (with effect from 1 May 1987) had a consequence from that time of recognising the "members of the Australian

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119 *Southern Centre of Theosophy Inc v South Australia* (1979) 145 CLR 246 at 261 per Gibbs J applied in *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 432 [123] per McHugh J.

120 By which a person seeking Australian citizenship was required to swear or affirm allegiance to the Queen as Queen of Australia. See *Australian Citizenship Act* 1973 (Cth), s 8 inserting s 15, which refers to the oath or affirmation of allegiance in Sched 2: see *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 431 [119].

121 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 432 [124].

122 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 432 [124].

123 (2001) 207 CLR 391 at 518 [378].

124 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 518 [378] referring to the reasons of McHugh J at 435 [131].

125 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 518 [377] by reference to my reasons at 485 [281], 491 [300]-[302], 493-494 [308], 495-496 [312].

community", as such membership by then had evolved for the constitutional purposes of alienage[126].

86 Clearly, by the principle that Gaudron J and I accepted (Callinan J agreeing with my reasons in this respect), the applicant in the present case was not an "alien" within the Constitution. Like thousands who had gone before, and who had arrived in Australia as British subjects at and about the time he arrived, the applicant enjoyed a special nationality position in Australia amounting to "the uniquely privileged status of non-citizen British subjects … who had migrated to this country"[127].

87 The question affecting the second binding rule to be derived from *Re Patterson*, applicable to the present case, is therefore whether the opinion stated by McHugh J, by reference to the *Royal Style and Titles Act*, requires a different and narrower conclusion to that adopted in *Re Patterson* by Gaudron and Callinan JJ and myself. In my view it does not.

The "aliens" power

88 *Alienage in an Australian context*: In approaching the meaning of the word "aliens" in the Constitution, it is important to note three points upon which, I should have thought, there can be no real dispute.

89 First, the word is a constitutional word appearing in the Constitution of the Australian Commonwealth. From the start of the nation's colonial history, through the debates that culminated in the adoption of the Constitution and up to the present time, the context is that of an immigrant country. Australia has, at all relevant times, been heavily dependent for its welfare, prosperity and security upon a constant flow of immigrants. In this sense, the context in which the word "aliens" appears in the Australian Constitution is different from the context in which alienage earlier arose to be interpreted in England in the times of the Stuart kings[128], in the England of the Hanoverian succession[129] or in the United States

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126 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 410 [44] per Gaudron J, at 493-494 [308], 495-496 [312] of my own reasons.

127 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 496 [314].

128 *Calvin's Case* (1608) 7 Co Rep 1a [77 ER 377].

129 *In re Stepney Election Petition; Isaacson v Durant* (1886) 17 QBD 54 at 59-60. See *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 411-412 [49], 430 [116].

immediately after the revolutionary wars[130]. Whilst the concept of "alienage" was one known to the common law (as earlier it had been known to Roman law) the meaning of the concept in the present context is one peculiarly Australian. So much follows from the fact that the task of this Court is to give meaning to the constitutional word "aliens" not for some other purpose but solely for the purpose of defining the operation of the fundamental law of the Australian nation and people.

90 *Change in alienage after 1901*: Secondly, any suggestion that "aliens" in the Constitution would, in 1901, have included a subject of the Queen born in the United Kingdom would have been treated as absurd. It would have been as self-evidently wrong as it would have been to suggest, at that time, that the United Kingdom was, for the purposes of s 44(i) of the Constitution, a "foreign power"[131]. Put simply, there were too many indications in the constitutional text and in social, political and economic facts at that time to the contrary[132].

91 The Minister did not contest this point. It follows that upon this argument, somewhere between 1901 and the present, a change occurred in the denotation of the word "aliens", or in the meaning of the word itself taken in the Australian constitutional context[133]. That change permitted, and required, a different meaning of the word "aliens" from that which would have applied when the Constitution was first adopted.

92 The view has been expressed by those who adhere doggedly to the dichotomous theory, that the reasoning in *Re Patterson* "inserts into the universe occupied by Australian citizens and aliens a third class formed by those who are identified as non-citizens but non-aliens"[134]. This, it is said, is why the reasoning

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130 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 482 [274] referring to *Jackson v Wright* (1809) NY 4 Johns 75 at 78-79; *Kelly v Harrison* (1800) 1 Am Dec 154 at 156; *Hollingsworth v Duane* (1801) 12 Fed Cas 356 at 358; *Inhabitants of Manchester v Inhabitants of Boston* (1819) 16 Mass 230 at 235.

131 *Sue v Hill* (1999) 199 CLR 462. See *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 495 [312].

132 Notably in the Preamble to and s 2 of the *Commonwealth of Australia Constitution Act* 1900 (Imp) (63 & 64 Vict c 12) and s 117 of the Constitution, together with the many references to the Queen in the Constitution and in the Schedule thereto.

133 cf *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 at 511-513 [76]-[80], 522-525 [110]-[118].

134 *Re Minister for Immigration and Multicultural Affairs; Ex parte Meng Kok Te* (2002) 77 ALJR 1 at 22 [133]; 193 ALR 37 at 65.

of the majority in *Re Patterson* is "not soundly based"[135]. However, with all respect to the minority analysis in that case, the majority's view in *Re Patterson* is based firmly in Australia's constitutional history. Indeed, it is grounded in the text of the Constitution itself, most notably s 117. It rests on the incontestable fact that, for decades in Australia during the twentieth century, nationality status for constitutional purposes in Australia involved, and involved only, the question of whether the person concerned was "a subject of the Queen [or King]". Once the statutory notion of citizenship was introduced after 1948, it was thus the Constitution, and not errant judges, that prevented what is termed the "third class". Unfortunately, it is the reasoning of those who ignore this simple truth that is "not soundly based". It is in error.

93 The best that the dichotomous theory can suggest is that the constitutional distinction between alienage and citizenship was created at some unspecified time after 1901 or was effected by federal legislation. But such legislation, whilst it may mirror and give effect to the deep undercurrents of constitutional change, cannot of its own alter the meaning and application of a constitutional word. Yet that is what the minority in *Re Patterson*, now forming a majority in the present case, suggest has occurred.

94 *The meaning of "aliens"*: Thirdly, because "aliens" is a constitutional word, it cannot have any meaning that the Federal Parliament may choose to give it[136]. Thus, it would not be open to the Parliament to state that every Aboriginal Australian was an "alien", or that every descendant of Australians of Chinese (or other) ethnicity was an "alien"[137]. The word is not devoid of a discoverable meaning. Although the exact content may alter, indeed has altered, over time – and is no longer a reflection of the original dichotomy between the status of British subjects in Australia and all others – it is not open-ended. History and past practice cannot chart the ultimate boundaries of the notion. The search is one for the essential character of the constitutional idea of alienage.

95 What then does that notion imply? In my view it refers to someone who is outside the Australian community and its fundamental loyalties, that is, outside Australian nationality. Applied today and for future application, I would accept

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135 *Re Minister for Immigration and Multicultural Affairs; Ex parte Meng Kok Te* (2002) 77 ALJR 1 at 22 [133]; 193 ALR 37 at 65.

136 *Pochi v Macphee* (1982) 151 CLR 101 at 109; cf *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 431 [121]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Meng Kok Te* (2002) 77 ALJR 1 at 32 [198]; 193 ALR 37 at 79-80.

137 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 491-492 [303].

that such community and such loyalties are marked off by citizenship of birth and descent, and citizenship by naturalisation. Indeed, so much is accepted by all members of the Court. Yet there was a time in the past, and not such a distant past, when a very large number of persons came to Australia and were fully accepted as partaking in the Australian community and sharing the loyalties referred to. They were fully accepted as enjoying Australian nationality.

96 This was so, notwithstanding that after 1948, when separate Australian citizenship was introduced by legislation, such persons did not procure such citizenship. In the case of the residual class of subjects of the Queen – most of them from the United Kingdom – such a formality was not at the time required or expected. Without it, members of their class were treated, and regarded, as full members of the Australian community. They enjoyed the nationality of this country. They were liable to jury service[138]. They were entitled as such to be employed in the public service as aliens were not[139]. They were obliged to perform national military service where others were exempt[140]. They were entitled to enrol for participation in federal and State elections and in constitutional referenda[141]. They had, by law and fact, the attributes that the Constitution itself continued to recognise as Australian nationality. Thus, they were, in the transitional years, nationals of Australia although not statutory citizens. They were not "aliens" either for statute law or for the Constitution.

97 The vast majority of this group of subjects of the Queen came from the United Kingdom, before the alteration of migration policy, on assisted passages, as indeed did selected aliens. Most of those from the United Kingdom arrived substantially at the cost of the Australian community and at its invitation[142].

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138 Conventionally, the *Jury Acts* throughout Australia provided for the qualification of jurors by reference to entitlement to be enrolled as an elector. See eg *Jury Act* 1929 (Q), s 6.

139 eg *Commonwealth Public Service Act* 1922 (Cth) s 33. The reference to "British subject" in provisions of the *Public Service Act* governing eligibility for appointment to the Public Service was removed in 1984 by the *Public Service Reform Act* 1984 (Cth), s 26, which substituted "an Australian citizen".

140 *National Service Act* 1951 (Cth), s 10(1)(a). The Act has since been repealed. See *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 487-488 [289].

141 *Commonwealth Electoral Act* 1918 (Cth), s 93(1)(b)(ii). See *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 487-488 [287]-[289]. The position of the applicant in relation to this legislation is explained by Callinan J at [176], fn 214.

142 Reasons of Callinan J at [141]-[145].

Whether assisted migrants or not[143], they were immediately welcomed into full membership of the Australian community. Nor did they see themselves as aliens. So far as they were concerned, they owed allegiance to the Queen. When her title in Australia was changed to Queen of Australia, they owed allegiance to her in that right. They did so by living here as full members of the Australian community and its people. History, including constitutional history, placed them at that time outside the constitutional power with respect to "aliens"[144].

98 If this was so when such persons arrived in Australia and for a time thereafter, the notion that retrospectively, by legislation, their status could be changed to "alien" within the Constitution would put in peril to such a unilateral alteration the constitutional status of a very large number of people in a category that dates back to the beginnings of European settlement of Australia and to the original notion of nationality in the Australian Constitution. The present case is thus not concerned merely with the constitutional position of persons such as Messrs Nolan, Taylor and Shaw, with their discouraging criminal records. If constitutional power exists to deport *them*, it would equally exist to expel *others* who, like them, came to this country and enjoyed the special status of a "subject of the Queen", recognised in the Constitution, that persisted well into the second half of the twentieth century. To render such a large and loyal section of the Australian community vulnerable to retrospective treatment as constitutional "aliens" would be an extremely grave step. It is one which this Court in *Re Patterson* held could not be taken conformably with the Constitution.

99 *Defining the point of change*: Much of the argument in the present case was addressed to defining the precise point at which the special nationality status of the residual class of non-citizen non-alien British subjects terminated for constitutional purposes. Those of the *Nolan* persuasion make much of the supposed difficulty, if the criterion of citizenship is not accepted, of fixing the exact point when non-citizen British subjects ceased to enjoy a constitutionally protected status of Australian nationality and became "aliens". But, with respect, this is no more than empty rhetoric. Once it is accepted that, in 1901, such British subjects were not "aliens", whichever theory of the meaning of the power over "aliens" is adopted, it obliges its adherents to propound some point on the journey since 1901 when the content of the constitutional notion of "aliens" changed.

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143 As the joint reasons point out, the Case Stated is silent upon whether the applicant's parents arrived in Australia as assisted migrants: the joint reasons at [4]. See also reasons of Callinan J at [145].

144 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 492 [304].

100 The dichotomy endorsed by the minority in *Re Patterson* drives its proponents back to a suggested alteration of the notion of Australian nationality by reference to the enactment of statutory citizenship. However, this is not only wrong in legal principle, as permitting legislation, in effect, to change the Constitution. It is also contradicted by historical facts evidenced, in turn, by the very language of the Act and much other contemporary legislation. Long after statutory citizenship was introduced in 1948, Australian law and practice, federal and State, continued to recognise the special nationality status of non-citizen subjects of the Queen who had joined the Australian community.

101 No theory of constitutional meaning can legitimately endorse the notion that the point of the change could be assigned by Australian legislation on its own[145]. Still less could British legislation have such a constitutional consequence for Australia at a time when the United Kingdom had no authority to alter Australia's constitutional law[146]. Even less persuasive is the appeal to the submissions or opinions of British Ministers[147] or of British scholars[148]. Such personages, distinguished though they may have been, would have insufficient understanding of the peculiar transitional Australian position of the significant number of British assisted immigrants who came to Australia as part of our community and enjoyed a special status in the nation because, at the time, they were regarded as sharing a common allegiance and a common membership of our community which had outlived even the bonds of the British Empire. Only those fully familiar with Australian constitutional facts, legal doctrine and history are in a position to describe accurately the "evolutionary" and "mystical" process by which that large category of immigrants was assimilated to Australian nationality although they did not procure Australian citizenship[149].

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145 Such as the *Nationality and Citizenship Act* 1948 (Cth), later known as the *Citizenship Act* 1948 (Cth) and later still as the *Australian Citizenship Act* 1948 (Cth). See *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 408 [35].

146 Such as by the passage of the *British Nationality Act* 1948 (UK); cf the joint reasons at [20]; cf *Attorney-General (WA) v Marquet* (2003) 202 ALR 233 at 282-283 [203].

147 Such as Sir Hartley Shawcross KC, the Attorney-General of England and Wales in *Joyce v Director of Public Prosecutions* [1946] AC 347 at 356-357 cited *Re Minister for Immigration and Multicultural Affairs; Ex parte Meng Kok Te* (2002) 77 ALJR 1 at 21 [127]-[128]; 193 ALR 37 at 64.

148 Such as Professor Hersch Lauterpacht in "Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens", (1947) 9 *Cambridge Law Journal* 330 at 333 cited *Re Minister for Immigration and Multicultural Affairs; Ex parte Meng Kok Te* (2002) 77 ALJR 1 at 21 [129]; 193 ALR 37 at 64.

149 cf *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 432 [124] per McHugh J.

102 By the 1970s, imperceptibly as McHugh J correctly pointed out in *Re Patterson*, things began to change. The first step in the change was not the adoption of Australian citizenship separate from the nationality status of British subject. For a much longer transitional period, Australian citizens continued by statute to enjoy a dual statutory status including that of British subject, in effect the same status as is recognised in s 117 of the Constitution and as had been enjoyed by Australians before and after federation[150]. For a long time, the Minister's predecessors were authorised by statute to issue Australian passports to Australian citizens "and to British subjects who are not Australian citizens"[151]. The latter words were not omitted from Australian law until 1984[152].

103 In *Re Patterson*, three members of this Court[153] were prepared to conclude that the amendments to the *Australian Citizenship Act* in 1984 (which commenced on 1 May 1987) evidenced the final completion of the process of constitutional evolution of the status of alienage by that time. There were many steps on the path to that evolution. Those steps were political, economic and social, as well as legislative. Because the issue affects the status of individuals and the duties of officers of the Commonwealth in relation to them, it is necessary as a matter of law, and certainly desirable, that there should be clarity about the point at which non-citizen non-alien British subjects lost the constitutional protection of Australian nationality. If the proposition that this occurred in 1948 is self-evidently erroneous, as I believe to be the case, the continuation of the residual status up to the present time is equally denied by contemporary Australian realities. The constitutional change happened somewhere in between.

104 I do not understand the reasoning of McHugh J, either in *Re Patterson* or in *Te*, to be inconsistent with the proposition that the final termination of the residual status of non-citizen British subjects should be taken to have been reached by the mid 1980s. Certainly, such a view would be compatible with the notion that McHugh J propounded, founded on the concept of allegiance. As his Honour explained in *Re Patterson*, that process was both evolutionary and

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150 This was preserved by the *Australian Citizenship Act* 1948 (Cth) as successively re-titled. See *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 485-487 [281]-[286].

151 *Passports Act* 1938 (Cth), s 7(1) following the *Passports Amendment Act* 1948 (Cth).

152 *Passports Amendment Act* 1984 (Cth), s 4.

153 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 412 [51] per Gaudron J, 518 [377] per Callinan J and 496 [313]-[315] of my own reasons.

mystical. It did not happen in an instant. It did not occur at the moment in 1973 when the *Royal Style and Titles Act* of that year was enacted. It continued to evolve as the separate identity of the Queen as Queen of Australia gained greater reflection in the practice of Australia, in the manifestations of the allegiance of its nationals and in the gradual elimination of special legal treatment of subjects of the Queen, as Queen of countries other than Australia.

105 A family, such as that of the applicant, arriving in Australia in 1974, owed allegiance to the Queen on their arrival. They should be taken by their actions at the time of entering and joining the Australian community, living here and participating in special civil rights and duties within it without need to change citizenship, to have gone through the same "evolutionary" and "mystical" process of transferring their allegiance to the Queen of Australia as those, like Mr Taylor's family, who had come a little earlier.

106 By the mid 1980s, the constitutional evolution to which the majority in *Re Patterson* referred, approached its completion. That completion was reflected in the moves to enact the 1984 amendments to the *Australian Citizenship Act*. It was when the end of the special status of British subjects was fully recognised in the Australian legislation commencing on 1 May 1987 that the process of constitutional development should, in my view, be taken to have been completed. Any such legislation did not *cause* the constitutional change. But it reflected and *evidenced* the fact that, by then, the change had occurred. Fixing the date of the change in the mid 1980s rather than 1948, accords much more closely with historical and constitutional facts and with the letter of much Australian statute law well after 1948.

107 *Australia Acts – a definitive moment?* The applicant invoked as determinative the resort of Australian legislators to the United Kingdom Parliament to procure the passage of the *Australia Act* 1986 (UK). That Act and the coordinate federal and State Acts[154] were said to amount to a formal recognition by all relevant legislatures of the final severance of "the remaining constitutional links between Australia and the United Kingdom"[155].

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154 See the *Australia Act* 1986 (Cth), *Australia (Request and Consent) Act* 1985 (Cth), *Australia Acts (Request) Act* 1985 (NSW), *Australia Acts (Request) Act* 1985 (Vic), *Australia Acts (Request) Act* 1985 (SA), *Australia Acts (Request) Act* 1985 (Q), *Australia Acts (Request) Act* 1985 (WA), *Australia Acts (Request) Act* 1985 (Tas).

155 Explanatory Memorandum to the Australia (Request and Consent) Bill 1985 (Cth) and Australia Bill 1986 (Cth).

108 In *Attorney-General (WA) v Marquet*[156] I expressed my reservations about the validity of the relevant parts of the *Australia Acts* invoked in that case. I contested the proposition that, in 1986, the United Kingdom Parliament had any legislative power to enact a law with respect to Australia's constitutional arrangements. Such power in my view belongs, and in 1986 belonged, only to the Australian people and their legislatures. So far as the federal Act is concerned, the stream could not rise higher than the source. It could not enlarge federal constitutional power or make it greater than it was. Nor, in my opinion, did s 51(xxxviii) of the Constitution provide a source for the validity of the federal Act[157]. That Act was subject to the provisions of Chs III and V of the Constitution, including provisions with respect to the States and the requirements of s 128 concerning alteration of the Constitution. However, in *Marquet*, my view was not adopted by the majority of this Court. Pending a greater enlightenment, I must accept this Court's holding that the *Australia Acts* are valid laws. Unlike others, I will in this case abide by the recent majority holding of the Court.

109 In his reasons in this case, Callinan J[158] has adopted as determinative of the change of status of people in the applicant's class 3 March 1986, being the date of the coming into force of the *Australia Acts* of that year by the Queen's Royal Assent, signified by Her Majesty personally in Canberra on that day. McHugh J has agreed in this conclusion[159]. It is appropriate for me to adopt the identical conclusion of McHugh J and Callinan J that the enactment of the *Australia Acts* in 1986 represented an important constitutional moment. Thereafter, the special residual status for non-citizen British subjects born in the United Kingdom or elsewhere was anomalous and inappropriate, both as a matter of statute and constitutional law.

110 It follows that, although I adhere to the opinion that I expressed in *Re Patterson*, it is desirable that the unseemly persistence in challenges to this Court's rulings upon this matter be brought to an end. This reinforces my resolve to surrender my own opinion and agree in the date that McHugh J and Callinan J have adopted. The difference in time reflected in the two views is trivial. It is irrelevant to the facts of this case, given that the applicant arrived in Australia as an infant in 1974.

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156 (2003) 202 ALR 233 at 282-284 [202]-[208].

157 cf *Sue v Hill* (1999) 199 CLR 462 at 490-493 [60]-[66].

158 Reasons of Callinan J at [177].

159 Reasons of McHugh J at [51].

111 I therefore concur in finding the applicable date for the termination of the status of non-citizen British subjects as being 3 March 1986. The process that had begun in the change in Australian nationality at an unspecified time after federation should be taken to have concluded on 3 March 1986. Persons arriving as immigrants in Australia as "subjects of the Queen" on and before that date were not "aliens". They cannot be deported as such under laws made pursuant to the "aliens" head of constitutional power.

112 Ultimately, only this Court can say when such a moment of constitutional change arrived. The Parliament could not do so. Nor did it purport to do so by introducing the statutory concept of citizenship[160]. Many more political, economic, social and legal changes had to occur before the constitutional notion of alienage would change in its content. But change it eventually did.

113 *Status of the applicant and others*: The result of this analysis is that, at the time the applicant arrived in Australia in 1974 as a boy of two years, he was not an "alien" for constitutional purposes. He could not thereafter, by legislation of the kind invoked, having retrospective operation, be turned into an "alien". Otherwise, every national, including every citizen and even those born in Australia would be vulnerable to statutory change of their nationality status without any renunciation of nationality or other action relevant to their status. Accordingly, the provisions of the Act, and of the regulations, pursuant to which the Minister purported to "cancel" the applicant's "visa" had no validity in their application to him under the constitutional power to make laws with respect to "aliens".

114 It follows that, to the extent that such laws purported to apply to the applicant, they were beyond the legislative power of the Federal Parliament and the regulation-making power of the federal Executive. The provisions of those laws should therefore be read down in their application to the applicant. He cannot be expelled from Australia any more than a citizen with a bad criminal record could be expelled. In the transitional class of non-citizen non-alien British subjects who are members of the Australian community, Australia must accept the applicant as an Australian "subject of the Queen". This status protects from expulsion a person with a bad criminal record such as his, on the basis that, doing so, acknowledges constitutional recognition and protection for the many thousands of persons in the residual class who arrived before March 1986 and who have become full and loyal members of the Australian community with

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160 cf Horrigan, "Paradigm Shifts in Interpretation: Reframing Legal and Constitutional Reasoning" in Sampford and Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions*, (1996) 31 at 35; Meagher, "Guided by Voices? – Constitutional Interpretation on the Gleeson Court", (2002) 7 *Deakin Law Review* 261 at 269-270, 280.

blameless records and civic fidelity. For the protection of their rights, tolerating the applicant who grew from boyhood to adulthood in Australia, is a small price to pay. In truth, the real legal principle at issue in this case is not the supposed alienage of the applicant but the suggested alienage (and therefore vulnerability to deportation) of thousands of members of the Australian community who arrived on a basis similar to the applicant before 3 March 1986. For them, as for him, the Constitution stands guardian.

The "immigration" power

115 *The process or activity of immigration*: Having reached the foregoing conclusion, it is necessary to consider the Minister's alternative constitutional propositions. The first of these was that the applicant could be deported under laws deriving their validity from the constitutional power over "immigration"[161].

116 As has been said, a long line of authority, dating back to this Court's earliest years[162], has recognised that, generally speaking, the power to make laws with respect to immigration is lost once an immigrant has arrived in Australia and become a member of the Australian community. This proposition has been repeatedly upheld[163]. It was a proposition effectively conceded by the Minister in *Re Patterson*[164]. It is a view of the constitutional power over immigration appropriate to a country so dependent upon that process. It is supported by the terms in which the power is conferred by the Constitution, being by reference to a continuous activity ("immigration") and not by reference to a status acquired by reason of participating in that activity ("immigrants").

117 This principle must be applied to the applicant. On the face of things, like Mr Taylor, the applicant is entitled to say that he arrived in Australia as an infant with his parents, has been here continuously without departure for 29 years, and has thus long since concluded his process of "immigration". He is therefore beyond the reach of federal law (at least of a coercive character) enacted by reference to the spent activity of immigration. This conclusion is reinforced, if

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161 Constitution, s 51(xxvii).

162 *Potter v Minahan* (1908) 7 CLR 277.

163 *R v Macfarlane; Ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518 at 531-533; *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 61-62, 109, 112; *R v Carter; Ex parte Kisch* (1934) 52 CLR 221 at 229; *R v Director-General of Social Welfare (Vict); Ex parte Henry* (1975) 133 CLR 369 at 378, 381-382, 383; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 295.

164 (2001) 207 CLR 391 at 397, 407 [32]. See also *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 193-195.

such reinforcement were necessary, by legislative provisions treating the process of absorption into the Australian community as complete at the end of five years[165].

118 On the face of things, the decision in *Re Patterson* appears to stand as specific authority against the proposition, advanced by the Minister, reliant upon the "immigration" power. However, the Minister sought to distinguish *Re Patterson* on the footing that the applicant had not been absorbed into the Australian community by the time the decision was made to cancel the applicant's visa. This argument was propounded on the basis that the process of "absorption" into the community could not commence in the case of an "immigrant child" until he or she attained adulthood. Only then would that person have the legal capacity, by affirmative decision, to change his or her nationality status. Such change of status required formalisation in a process of "naturalization" as envisaged by the Constitution[166] and given effect by legislation[167]. If these arguments were accepted, the Minister submitted that, not only had the applicant not formalised his change of nationality by naturalisation, but, by his repeated criminal conduct and by the periods of time spent in prison, he had acted in ways that were inconsistent with absorption into the Australian community, a point made in *Te*[168]. The Minister sought to distinguish *Re Patterson* on the basis that Mr Taylor's criminal record had not commenced, like that of the applicant, during adolescence and continued into adulthood.

119 *Differentiation of child immigrants*: The attempt to distinguish *Re Patterson* in this respect is unconvincing. Mr Taylor did not formalise a change of nationality when he became an adult. Like the applicant, he never acquired Australian citizenship, explaining that he did not think that it was necessary for persons in his position to do so. Because he arrived with his parents as an infant, and a member of a migrating family unit, he was treated, for the purposes of the "immigration" power as passing, in the same way as his parents had, beyond the entitlement of the Parliament to rely on that power to remove him. The notion

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165 The Act, s 14(2), as originally enacted. See *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 486 [284].

166 Constitution, s 51(xix).

167 *Australian Citizenship Act* 1948 (Cth), ss 13, 15. The naturalisation power in the Constitution was used immediately to enact the *Naturalization Act* 1903 (Cth), s 8. That provision provided for a certificate of naturalisation to be granted to a person thereby "entitled to all political and other rights powers and privileges and be subject to all obligations to which a natural-born *British subject* is entitled or subject in the Commonwealth" (emphasis added).

168 (2002) 77 ALJR 1 at 32 [201], 39 [227]; 193 ALR 37 at 80, 88-89.

that, for constitutional purposes, parents had completed the process of "immigration" but that their children did not, is one that was not even argued in *Re Patterson*. That was so because it is unpersuasive. Parents and child in both cases engaged in a single "process" of immigration. When that process was completed for the parents, it was completed for the child.

120 To differentiate, and to disadvantage, a child by postponing the conclusion of the process of "immigration" during minority runs counter to the realities of family immigration as a process and to the actual treatment of the applicant on his arrival in Australia as having a nationality status derivative from his parents. It is also inconsistent with the approach to the status of children as immigrants explained in *R v Director-General of Social Welfare (Vict); Ex parte Henry*[169]. It is one thing for the Parliament to enact a special provision for an "immigrant child" designed to provide for that child's welfare and to facilitate his or her full absorption into the Australian community as a child[170]. It is quite another, where the process of immigration of the child and its parents has concluded, to attempt, retrospectively, to impose on the child, by then a grown adult, laws justified by reference to the supposed postponement during childhood of the activity of immigration.

121 Neither by law nor in fact was there any such postponement in the applicant's case. Like Mr Taylor, he has long since passed beyond the reach of the immigration power. That power could not sustain, as valid, legislation or regulations with a retrospective effect by reference to the activity of immigration into Australia which, in his case, was completed. The first alternative argument to support the Minister's purported action therefore fails.

The "external affairs" and implied nationhood powers

122 *The external affairs power*: These conclusions leave only the final ways in which the Minister sought to uphold the application of the Act to the applicant. The first was by invocation of the "external affairs" power provided in the Constitution[171]. This was argued on the footing that the applicant came to Australia from a place "external" to the Commonwealth, was at the time a citizen of that place and was, by the Act, to be removed, presumably to the same place, "external" to Australia. In support of this argument, the Minister invoked once again the dissenting opinions in *Re Patterson*[172]. The invocation of the "external

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169 (1975) 133 CLR 369.

170 (1975) 133 CLR 369 at 374 per Gibbs J; cf at 388 per Murphy J.

171 Constitution, s 51(xxix).

172 (2001) 207 CLR 391 at 443-444 [157], 474-475 [253].

affairs" power in *Re Patterson* did not succeed. Otherwise, the order providing for Mr Taylor's deportation to the United Kingdom would have been confirmed; and it was not.

123 Turning to the majority opinions in *Re Patterson*, I remain of the view expressed there on this point. The assertion that the "external affairs" power is attracted to the applicant's case "begs the very question to be determined"[173]. If he has been absorbed into the Australian community and is no longer an "alien" or an "immigrant", the basis for providing for his removal from Australia, namely his criminal record in this country, "is no longer a feature 'external' to Australia. It is well and truly positioned as an 'internal' Australian matter" to do with the Australian community[174].

124 Neither the Parliament nor the Minister could retrospectively "create the facts which condition the power needed for [a law's] own support"[175]. As a matter of characterisation, such a law is not one with respect to an "external affair". The existence of facts in the applicant's case creating an historical connection with a country external to Australia does not sustain a law as based on this head. Were it otherwise, the Parliament could ignore all of the limitations imposed by the "aliens" and "immigration" powers and legislate for the expulsion from Australia of the great majority of the population. Such an interpretation is self-evidently untenable in the context of s 51 of the Constitution. It is an interpretation that would potentially enhance the scope for the exercise of expulsive power over millions of Australians. It should be rejected.

125 *The implied nationhood power*: That leaves, finally, the Minister's invocation of the implied nationhood power[176]. This was mentioned by me in passing, but without encouragement, in *Re Patterson*[177]. It was not argued in that case. It is not arguable in this case. Essentially this is so for the reasons that explain why the "external affairs" power is inapplicable. Where express powers are granted by the Constitution that are specifically relevant to the federal activity that is impugned and where such powers are subject to well developed limitations upon their exercise directly derived from the constitutional language

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173 (2001) 207 CLR 391 at 496-497 [316]-[317]. See also at 412-413 [52] per Gaudron J.

174 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 497 [317].

175 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 555.

176 See eg *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 614-616 [221]-[224] and cases there cited.

177 (2001) 207 CLR 391 at 477 [260], fn 295.

apt to that particular activity, no implied powers can cut a swathe through the Constitution to sustain an action otherwise beyond power.

Conclusion, transient majorities and orders

126 It follows that the applicant, having arrived in Australia as a migrant and permanent entrant and as a subject of the Queen before 3 March 1986 and who became a member of the Australian community with the requisite allegiance, is not an "alien". Nor is he the subject of any valid law based on any other head of constitutional power, express or implied, upon which the Minister could rely. Accordingly, in its application to him, s 501(2) of the Act was beyond the legislative powers of the Commonwealth to the extent that it purported to authorise the Minister to "cancel" the applicant's "visa" on 17 July 2001.

127 The success of the Minister's persistent submission in the conclusion of the new majority gathered in this case, following a change of membership of the Court, is a sharp reminder of the opinionative character of constitutional doctrine. Some citizens and some judges may wish that it were otherwise; but ultimately a case such as the present obliges us to face the facts. About such questions what matters in the end is the conclusion of a majority of this Court. Indeed, there could not be a clearer illustration of that truth. Reason, history, principle, words, adverse risks and legal precedent, all bend in the wind of transient majorities. One day, if a larger challenge comes than is presented by Mr Shaw's unhappy case, it may be hoped that a new majority in this Court will gather around the view of the Constitution favoured by the majority in *Re Patterson* and that that view will be restored[178].

128 The question reserved in the Case Stated should be answered "No". The Minister should pay the applicant's costs in this Court. The matter should be returned to a single judge of the Federal Court of Australia to be determined consistently with this answer.

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178 cf Gleeson, "Judicial Legitimacy", (2000) 20 *Australian Bar Review* 4 at 11: "The quality which sustains judicial legitimacy is … fidelity"; Hayne, "Letting Justice Be Done Without the Heavens Falling", (2001) 27 *Monash University Law Review* 12 at 17: "Faithful application of precedent is at the heart of the judicial task. The justice which a judge must do, is justice *according to law*." (original emphasis)

129 CALLINAN J. This is a case stated. It raises questions as to the validity of s 501(2) of the *Migration Act* 1958 (Cth) ("the Migration Act") in its application to an immigrant from the United Kingdom of persistent criminal inclination who has lived in Australia for about twenty-nine of the thirty-one years of his life.

The facts

130 The applicant was born in the United Kingdom on 27 December 1972 and arrived in Australia with his parents on 17 July 1974. They were citizens of the United Kingdom and Colonies, and British subjects. They entered this country on a permanent entry permit pursuant to s 6 of the Migration Act[179] as it then stood.

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179 Section 6 of the *Migration Act* 1958 (Cth) then provided:

> "(1) An immigrant who, not being the holder of an entry permit that is in force, enters Australia thereupon becomes a prohibited immigrant.
>
> (2) An officer may, in accordance with this section and at the request or with the consent of an immigrant, grant to the immigrant an entry permit.
>
> (3) An entry permit shall be in a form approved by the Minister and shall be expressed to permit the person to whom it is granted to enter Australia or to remain in Australia or both.
>
> (4) For the purposes of the last preceding sub-section, where a notation in a form approved by the Minister as a form of entry permit is made by an officer in a passport or other document of identity held by a person and the notation does not specify the name of any person as the person to whom it relates, the notation has effect as if it were expressed to relate to the person holding the passport or other document.
>
> (5) An entry permit may be granted to an immigrant before he enters Australia or after he has entered Australia (whether before or after the commencement of this Part).
>
> (6) An entry permit that is intended to operate as a temporary entry permit shall be expressed to authorize the person to whom it relates to remain in Australia for a specified period only, and such a permit may be granted subject to conditions.
>
> (7) A woman who enters Australia in the company of, and whose name is included in the passport of, or any other document of identity of, her husband shall be deemed to be included in any entry permit granted to her husband before his entry and written on that passport or other document of identity, unless the contrary is stated in the entry permit.

(Footnote continues on next page)

131 The applicant has not left Australia since 17 July 1974. He has not enrolled as an elector on the national electoral rolls, has never applied for, or obtained an Australian passport, and has not sought to become an Australian citizen pursuant to the *Australian Citizenship Act* 1948 (Cth).

132 Regulation 4 of the Migration Reform (Transitional Provisions) Regulations (Cth), which was made under the *Migration Reform Act* 1992 (Cth), provided that a permanent entry permit held by a non-citizen continues in effect after 1 September 1994 as a transitional (permanent) visa permitting the holder to remain indefinitely in Australia.

133 Such a visa however, is held subject to the respondent's power of cancellation under s 501(2) of the Migration Act, which may be exercised if he reasonably suspects that its holder does not pass the character test within s 501(6) of the Migration Act, and does not satisfy the respondent that he or she passes the character test.

134 Section 501(6) provides:

> "(6) For the purposes of this section, a person does not pass the *character test* if:
>
> (a) the person has a substantial criminal record (as defined by subsection (7)); or
>
> (b) the person has or has had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct; or
>
> (c) having regard to either or both of the following:
>
> (i) the person's past and present criminal conduct;
>
> (ii) the person's past and present general conduct;

> (8) A child under the age of sixteen years who enters Australia in the company of, and whose name is included in the passport of, or any other document of identity of, a parent of the child shall be deemed to be included in any entry permit granted to that parent before the entry of that parent and written on that passport or other document of identity, unless the contrary is stated in the entry permit."

the person is not of good character; or

(d) in the event the person were allowed to enter or to remain in Australia, there is a significant risk that the person would:

(i) engage in criminal conduct in Australia; or

(ii) harass, molest, intimidate or stalk another person in Australia; or

(iii) vilify a segment of the Australian community; or

(iv) incite discord in the Australian community or in a segment of that community; or

(v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way.

Otherwise, the person passes the *character test*."

135 Section 501(7) defines "substantial criminal record" as follows:

"(7) For the purposes of the character test, a person has a *substantial criminal record* if:

(a) the person has been sentenced to death; or

(b) the person has been sentenced to imprisonment for life; or

(c) the person has been sentenced to a term of imprisonment of 12 months or more; or

(d) the person has been sentenced to 2 or more terms of imprisonment (whether on one or more occasions), where the total of those terms is 2 years or more; or

(e) the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution."

136 The applicant's first offence was committed when he was only 14 years old, and has been followed by a life of persistent criminal conduct. The offences the applicant has committed have included stealing, breaking and entering, and the unlawful use of a motor vehicle. A number of custodial sentences were imposed for these crimes. In 1998, he was sentenced to five years imprisonment

for property offences. A further two and a half years term of imprisonment was imposed in 1998 for drug related offences.

137 On 17 July 2001, the respondent purported to cancel the applicant's visa on the ground that the applicant had a "substantial criminal record" and therefore did not pass the character test as stated in s 501(6).

138 The applicant sought a review of the decision of the respondent in the Federal Court of Australia.

The case stated

139 Before the applicant's application for review was heard in the Federal Court, the Attorney-General of the Commonwealth applied as of right under s 40(1) of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act") for the removal of the cause to this Court. Section 40(1) provides:

> "(1) Any cause or part of a cause arising under the Constitution or involving its interpretation that is at any time pending in a federal court other than the High Court or in a court of a State or Territory may, at any stage of the proceedings before final judgment, be removed into the High Court under an order of the High Court, which may, upon application of a party for sufficient cause shown, be made on such terms as the Court thinks fit, and shall be made as of course upon application by or on behalf of the Attorney-General of the Commonwealth, the Attorney-General of a State, the Attorney-General of the Australian Capital Territory or the Attorney-General of the Northern Territory."

140 On 9 October 2002, a Justice of this Court ordered that the whole of the cause pending in the Federal Court be removed to the Court. On 9 December 2002, his Honour Gummow J ordered that a case be stated for the consideration of the Full Court under s 18 of the Judiciary Act. The following question was reserved for the consideration of the Full Court:

> "Was subsection 501(2) of the *Migration Act 1958* (Cth) within the legislative powers of the Commonwealth to the extent that it authorised the respondent to cancel the applicant's visa on 17 July 2001?"

Post-war immigration from the United Kingdom

141 The historical context in which this case arises cannot be ignored[180]. As with many others, the applicant's family was induced to leave the United Kingdom and come to this country to live as permanent residents as participants in a broader programme designed to encourage migration to Australia by citizens of the United Kingdom.

142 Shortly after the Second World War, the Australian government embarked upon a programme of reconstruction and expansion. As part of it, a decision was made that immigrants should make up at least one percent of the total population. Priority was given to immigrants from the United Kingdom. In 1946 and 1947, the Australian and British governments entered into agreements to provide free and assisted passage to British ex-servicemen, selected civilians and their dependants. Other schemes to encourage migration from Britain included a campaign to "Bring Out a Briton" which started in 1957 and which encouraged employers and organisations to sponsor nominated families to assist them to settle in this country. The most dramatic increase in the Australian population of former residents of the United Kingdom occurred between 1961 and 1971. In 1971, the number of people living in Australia who had been born in the United Kingdom exceeded one million.[181]

143 The agreements reached between the respective governments set out the basis upon which they would cooperate[182]:

> "in order to assist suitable persons in the United Kingdom to proceed to Australia for *permanent settlement*." (emphasis added)

144 That the agreements envisaged long term residency in Australia of those whose passage was assisted is further illustrated by the following understanding[183]:

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180 The history which I summarize has as its source authoritative records and documents compiled by the department of government administered by the respondent.

181 Department of Immigration and Multicultural Affairs, *Immigration: Federation to Century's End 1901-2000*, (2001) at 33.

182 Australia/United Kingdom Assisted Passage [Migration] Agreement, ATS 1967 No 14 at 1.

183 Australia/United Kingdom Assisted Passage [Migration] Agreement, ATS 1967 No 14 at 2.

> "9. In the event of a migrant not remaining in Australia for a minimum period of two years after arrival, the Commonwealth Government shall be at liberty to require him to repay to the Commonwealth of Australia the difference between the cost of his passage and the amount contributed by him thereto. The Commonwealth Government may also require each migrant, prior to his departure for Australia, to sign an undertaking to make such repayment if he should depart within two years hereinbefore referred to."

145 The British government withdrew assistance to intending immigrants in 1972, but the Australian government continued to afford it until 1981. The overwhelming majority of those who came to Australia after the end of the Second World War did so under an assisted migration programme[184]. It may be safely assumed that most if not all of those immigrants were subjects of the Queen, a constitutional expression in this country[185], and would have continued so to regard themselves when they reached and settled in Australia. Whether this applicant or his parents were assisted migrants is beside the point. They entered this country as subjects of the Queen enjoying a special status in Australia in circumstances in which great encouragement was being held out to Britons to become Australians. The fact of that encouragement provides an indication that this country and its government also regarded the British entrants as people having a like status to those who were born in this country.

Interfering with status

146 The applicant's entitlement to permanent residency in Australia is a matter of "status". The concept of status was described by Griffith CJ in *Daniel v Daniel*[186]:

> "Without pretending to give an exhaustive definition, I apprehend that the term 'status' means something of this sort: a condition attached by law to a person which confers or affects or limits a legal capacity of exercising some power that under other circumstances he could not or could exercise without restriction."

147 In *Ford v Ford* Latham CJ said this[187]:

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184 Department of Immigration and Multicultural Affairs, *Immigration: Federation to Century's End 1901-2000*, (2001) at 34.

185 Constitution, ss 34 and 117.

186 (1906) 4 CLR 563 at 566.

187 (1947) 73 CLR 524 at 529.

> "A person may be said to have a status in law when he belongs to a class of persons who, by reason only of their membership of that class, have rights or duties, capacities or incapacities, specified by law which do not exist in the case of persons not included in the class and which, in most cases at least, could not be created by any agreement of such persons. An alien, for example, as distinct from a subject of the Crown, a married person as distinct from an unmarried person, a bankrupt as distinct from other persons generally, are all persons who have a particular status."

148 Courts have long been reluctant to alter the status of a person without a compelling reason to do so. In *In re Selot's Trust*[188], Farwell J expressed the need for caution in making such an alteration or reaching a conclusion about it. His Lordship said[189]:

> "the onus is on the person asserting that there has been a change in status to prove it ...".

The applicant's argument

149 The applicant contends that s 501(2) is beyond the legislative power of the Commonwealth Parliament to the extent that it authorised the respondent to cancel his visa. He argued that s 501(2) is not a valid exercise of the power of the Parliament under the Constitution to make laws with respect to "naturalization and aliens" (s 51(xix)) or "immigration and emigration" (s 51(xxvii)): or, that in any event it could have no application to him as a British subject who had first entered Australia in 1974 and had lived here for the whole of his life since then.

The immigration power

150 It is convenient to deal with the applicant's contention with regard to s 51(xxvii) first. It is submitted by the applicant that at the date of the cancellation of his visa, he had long been a member of the Australian community and had ceased to be an immigrant. He was therefore beyond the reach of the immigration power. In support of this proposition the applicant referred to *Ex parte Walsh and Johnson; In re Yates*[190]. In that case, Knox CJ said[191]:

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188 [1902] 1 Ch 488.

189 [1902] 1 Ch 488 at 492.

190 (1925) 37 CLR 36.

191 (1925) 37 CLR 36 at 64-65.

> "a person who has originally entered Australia as an immigrant may, in course of time and by force of circumstances, cease to be an immigrant and becomes a member of the Australian community. He may, so to speak, grow out of the condition of being an immigrant and thus become exempt from the operation of the immigration power. The power to make laws with respect to immigration would, no doubt, extend to enable Parliament either to prohibit absolutely or to regulate as it might think fit immigration into Australia, but, in my opinion, it does not extend to enable Parliament to prohibit or regulate anything which is not immigration, and the decision in *Potter v Minahan*[192] shows that, when the person seeking to enter the Commonwealth is a member of the Australian community, his entry is not within the power to make laws with respect to immigration."

151 In *Re Patterson; Ex parte Taylor*[193], a case of some similarity to this one, the respondent conceded, and rightly so, that the applicant there had been absorbed into the Australian community, and accordingly, s 501(3) of the Migration Act could have no valid application to him.

152 Precisely how long a period of residence must have passed, or what communal activities, or abstention from anti-social activities, must have taken place, for absorption into the Australian community to have occurred has not so far been settled by this Court. Gleeson CJ however, did point out in *Re Minister for Immigration and Multicultural Affairs; Ex parte Te*[194], that "absorption" identifies the point at which a person's status as an immigrant comes to an end:

> "The concept of absorption into the Australian community, vague as it may be, has been developed as a method of indicating that the activity of immigration in which a person has engaged has come to an end."

153 In the same case I pointed out[195], and I adhere to the view, that persistent serious criminal activity from soon after the inception of residence here is likely to be regarded as antipathetic to absorption into the general community.

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192 (1908) 7 CLR 277.

193 (2001) 207 CLR 391 at 407 [32].

194 (2002) 77 ALJR 1 at 6 [26]; 193 ALR 37 at 42.

195 (2002) 77 ALJR 1 at 39 [227]; 193 ALR 37 at 88-89.

154 The applicant in this case has been absorbed into the Australian community. His residence here for more than ten years with his parents before the commission by him of serious crime produced that result. He is therefore beyond the reach of the immigration power conferred upon Parliament by s 51(xxvii) of the Constitution. Section 501(2) of the Migration Act has no application in relation to this applicant.

The "aliens" power

155 The next question is whether the section can operate in relation to the applicant conformably with s 51(xix) of the Constitution. The answer depends on the proper construction of the word "alien".

156 The applicant contends that as he was born in the United Kingdom and entered Australia in 1974 he is not an alien. At the time of his birth and settlement in Australia with his parents, the applicant was a citizen of the United Kingdom and Colonies, and a British subject[196]. He was therefore a member of a class of persons who were "British subjects" for the purposes of s 7 of the *Nationality and Citizenship Act* 1948 (Cth) ("the Nationality and Citizenship Act"), and, later, a member of a class of persons having the "status of British subjects" following amendments to that Act in 1969 which renamed it the *Australian Citizenship Act* 1948 (Cth) ("the Citizenship Act"). Persons of that status were expressly excluded from the definition of "alien" for citizenship purposes. The position remained unchanged until amendments to the Citizenship Act were enacted in 1984 to commence on 1 May 1987[197].

157 By the time that the special status of British subjects as non-aliens was changed by the removal of the exception in their favour in the Citizenship Act, the applicant contends, he had become a member of the Australian community, a person who was, in effect, an Australian and not an alien, and therefore beyond the reach of the aliens power under s 51(xix) of the Constitution.

158 Alternatively, the applicant argues, he could not have been regarded as an alien until the commencement of the *Australia Act* 1986 (Cth) and the *Australia Act* 1986 (UK) on 3 March 1986 ("the Australia Acts"), at which point the United Kingdom became a foreign power for the first time.

159 The respondent, on the other hand, argues that the passage of the Nationality and Citizenship Act and the *British Nationality Act* 1948 (UK) ("the British Nationality Act") produced the result that Australia became then an

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196 *British Nationality Act* 1948 (UK), ss 1 and 4.

197 *Australian Citizenship Amendment Act* 1984 (Cth).

independent nation with its own citizens, and exclusive rules about entitlement to citizenship. On this argument, there was after 1949 a Queen of Australia distinct, in legal theory, from the Queen of the United Kingdom. Parliament and Parliament alone could determine that a person who was not born in Australia, or who did not have Australian parents (whether or not they were British subjects), was an alien absent a grant of Australian citizenship.

160 At federation, the term "alien" certainly did not extend to British subjects. As Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ observed in *Nolan v Minister for Immigration and Ethnic Affairs*[198]:

> "The word could not ... properly have been used in 1900 to identify the status of a British subject vis-à-vis one of the Australian or other colonies of the British Empire for the reason that those colonies were not, at that time, independent nations with a distinct citizenship of their own. At that time, no subject of the British Crown was an alien within any part of the British Empire."

161 The question accordingly is, at what point can a British subject who has not obtained formal Australian citizenship be regarded and treated as an alien. Several possibilities have been suggested: 1949, on the commencement of the Nationality and Citizenship Act and the British Nationality Act; some unidentifiable date before 1973; 1973 itself; some unidentifiable date after it and before 1986; 1986 itself on the commencement of the Australia Acts; and 1987 on the commencement of the amendments to the Citizenship Act to which I have referred.

162 This Court has held that there has been an evolutionary change in the meaning of the term "alien" but has not definitively stated the starting point or the terminus of that evolution. In *Nolan*, Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ said that following the creation of separate Australian citizenship by the Nationality and Citizenship Act[199]:

> "The fact that a person who was born neither in Australia nor of Australian parents and who had not become a citizen of this country was a British subject or a subject of the Queen by reason of his birth in another country could no longer be seen as having the effect, so far as this country is concerned, of precluding his classification as an 'alien'."

163 However, in *Patterson* the Court found that a British subject who was born in the United Kingdom and had come to live permanently in Australia in

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198 (1988) 165 CLR 178 at 183.

199 (1988) 165 CLR 178 at 184.

1966 was not an alien. McHugh J noted that the connotation of the term "alien" had remained the same since Federation, but that, along with the evolution of Australia as a sovereign state, the denotation of the term had changed[200]. That is, the term "alien" now refers to classes of persons who would not have been so regarded at federation, and may include British subjects who are not citizens of Australia. However his Honour held, for reasons I discuss below, that the denotation of the term had not changed sufficiently in the case of the applicant in that case to alter his status to that of an alien.

164 The Solicitor-General of the Commonwealth, who appeared for the respondent, sought leave to re-open *Patterson* and invited the Court to affirm its decision in *Nolan*[201]. It was argued that *Patterson* does not express a *ratio* concerning the class of British subjects who are neither Australian citizens nor aliens. As such, it was contended that *Patterson* offers no binding constitutional principle and need not be followed. Rather, the Court's earlier decision in *Nolan* should be followed.

165 An additional basis for preferring the decision in *Nolan*, it was argued, was inconvenience arising from seeking to apply *Patterson* in various circumstances. *Long v Minister for Immigration and Multicultural and Indigenous Affairs*[202] was cited as an example.

166 With respect to those who hold the contrary view, I do not agree. The difficulty that arises from *Patterson* is the lack of the statement of a definitive final milestone in the evolutionary process of complete independence, not the absence of an explicit statement by a majority of the Court that *Nolan* should be overruled. The decision in *Nolan*, as McHugh J said in *Patterson*[203]:

> "overlooked two significant matters. First, if the emergence of Australia as an independent nation had made Australians who were subjects of the Queen of the United Kingdom subjects of the Queen of Australia, there was no constitutional reason for distinguishing their position from that of British born subjects of the Queen of the United Kingdom living in Australia. Logically, the evolutionary process that converted persons born in Australia into subjects of the Queen of Australia must also have converted British born subjects living in Australia into subjects of the Queen of Australia. Secondly, although the joint judgment in *Nolan*

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200 (2001) 207 CLR 391 at 427-428 [111].

201 (1988) 165 CLR 178.

202 [2002] FCA 1422.

203 (2001) 207 CLR 391 at 421 [90].

> referred to s 117 of the Constitution, it failed to acknowledge and give effect to its implications and the light that those implications threw on who was an 'alien' for the purpose of s 51(xix) of the Constitution."

167 In *Sue v Hill* a majority of this Court held that, at least by the commencement of the Australia Acts, the United Kingdom was a foreign power for the purposes of s 44(1) of the Constitution[204]. It was not, however, necessary then for the Court to decide the precise time that the United Kingdom came to be so viewed.

168 I pointed out in *Sue v Hill* that there were problems in seeking to apply changing denotations of constitutional terms in tandem with an evolutionary theory of Australian independence[205]:

> "The great concern about an evolutionary theory of this kind is the doubt to which it gives rise with respect to peoples' rights, status and obligations as this case shows. The truth is that the defining event in practice will, and can only be a decision of this Court ruling that the evolutionary process is complete, and here, as the petitioners and the Commonwealth accept, has been complete for some unascertained and unascertainable time in the past."

I also thought that the evolutionary theory was one to be regarded with great caution[206].

169 While a precise date at which Australia actually achieved complete constitutional independence may not, in strict legal, or indeed historical theory, be able to be determined, it is highly desirable that a point in time by which it had occurred be nominated. To do so will give guidance to courts in applying the decision in *Patterson*. It is necessary, therefore, to consider the alternative dates that have been advanced.

170 The magic date is not, in my view, 1949 as contended by the respondent. It may be said that the enactment of citizenship legislation in Australia and the United Kingdom in 1948 reflected changes in the Imperial system. However, that legislation did not and could not alter the constitutional status of the Sovereign in this country. That some marked political evolution had taken place cannot be disputed, but it is not appropriate to cite political change in support of changes to the law. To do so would be to fall into the same sort of error as

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204 (1999) 199 CLR 462.

205 (1999) 199 CLR 462 at 571-572 [291].

206 (1999) 199 CLR 462 at 571 [290].

Viscount Sankey LC (delivering the opinion of the Judicial Committee) made in *British Coal Corporation v The King*[207] in treating politics as one and the same as the law. In that case, his Lordship said that the possibility that the British Parliament might repeal the recognition of the legislative independence of the dominions that the *Statute of Westminster* conferred on them, was "theory" and had no "relation to realities". Such a statement conflates political "realities" with the true legal position.

171 Nothing that I have said is to deny the importance of both politics and realpolitik in circumstances in which the Constitution and the legal arrangements that give it effect and validity have insufficient, or nothing that is definitive, to say about the constitutional issue to be decided. But this is not such a situation. Unlike in the case of Eire and the securing of its independence, there is no legal ambiguity about the cooperative arrangements between the United Kingdom and Australia by which the Australian federation was established and has moved towards independence. Nor at any stage has it been necessary for the people of this country in order to obtain their national independence, to resort, as happened in the colonies of North America, to arms and rebellion. The Australian people have since 1900 proceeded regularly, indeed scrupulously and overtly legally, in collaboration with the Parliament of the United Kingdom along the path to full and independent nationhood. There has never been and there is now no occasion to resort to political theory, or perhaps more accurately, realpolitik, in lieu of the combined legislative measures constituted by the joint endeavours of the States, the Commonwealth, and the United Kingdom[208]. Had Viscount Sankey LC been correct in 1935 there would have been no need for the elaborate mechanism of the Australia Acts. I would reject arguments in support of 1949 as the magic date for the same reason.

172 The British Nationality Act dealt with a number of matters concerning the citizenship of United Kingdom residents. It did not purport to deal with the status in Australia of Australian residents. Further inquiry into the effect of the English statute would require the Court to embark on the undesirable, and here unnecessary, exercise of construing the legislation of another country.

173 The argument that British immigrants who settled in Australia before 1973 are not aliens within the meaning of the Constitution is based on the fact of the

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207 [1935] AC 500 at 520.

208 See the *Australia Act* 1986 (Cth), *Australia Act* 1986 (UK), *Australia (Request and Consent) Act* 1985 (Cth), *Australia Acts (Request) Act* 1985 (Q), *Australia Acts (Request) Act* 1985 (NSW), *Australia Acts (Request) Act* 1985 (Vic), *Australia Acts (Request) Act* 1985 (Tas), *Australia Acts (Request) Act* 1985 (SA), *Australia Acts (Request) Act* 1985 (WA).

enactment in 1973 of the *Royal Style and Titles Act* 1973 (Cth) which adopted a new style for the Sovereign: Queen of Australia. McHugh J in *Patterson*, for example, accepted that "subject of the Queen" as that phrase appears in s 117 of the Constitution had evolved to mean "subject of the Queen of Australia"[209]. His Honour went on to hold that, by parity of reasoning, subjects of the Queen resident in Australia at the time that the evolutionary process came to an end, became subjects of the Queen of Australia irrespective of their place of birth[210]. The significance of this is that once a person is accepted as a subject of the Queen for the purposes of the Constitution, that person cannot be an alien for the purposes of the Constitution[211].

174 In my view, 1973 is not the appropriate date. The change to the Sovereign's style and title in Australia in 1973 rang no bell for British born subjects of the Queen who had settled in Australia: that, suddenly, notoriously and decisively they were now aliens. The applicant's status in this country should not be made a casualty of an unrecorded, unnoticed, unheralded, and undefined, in chronological terms, evolutionary denotational change in constitutional meaning.

175 In *Patterson*, Kirby J placed greater emphasis on the commencement in 1987 of amendments to the Migration Act and the Citizenship Act that were passed in 1983 and 1984 respectively[212]. His Honour said that[213]:

> "All immigrants, including non-citizen British subjects, arriving in Australia after May 1987 at the latest may be taken to be aware, or could be advised, that the privileged position accorded before that time to non-citizen British subjects was thenceforth terminated. However, such termination did not, in my view, operate retrospectively on the class of persons who arrived before that time. ... So far as the *Migration Act* was concerned, it did not have the power to do so, at least in respect of immigrants who have been absorbed into the community and are members of the people, and electors, of the Commonwealth."

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209 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 435 [131].

210 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 435 [131].

211 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 435 [132] per McHugh J.

212 *Migration Amendment Act* 1983 (Cth), s 4; *Australian Citizenship Amendment Act* 1984 (Cth), s 5.

213 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 496 [313].

176 I note that the applicant in the present case does not have the right to vote in Australia[214]. I would not understand Kirby J to have ruled that factor to be determinative. As Gleeson CJ said in *Re Minister for Immigration and Multicultural Affairs; Ex parte Te*[215], the right to vote is not necessarily inconsistent with alienage or vice versa.

177 In my opinion, the correct date for the change in status of a subject of the Queen in Australia can be no earlier than the coming into force of the Australia Acts: 3 March 1986.

178 The long title of the *Australia Act* 1986 (Cth) is:

> "An Act to bring constitutional arrangements affecting the Commonwealth and the States into conformity with the status of the Commonwealth of Australia as a sovereign, independent and federal nation."

It was this overt legislative act, mirroring simultaneous legislation in the United Kingdom, that gave voice to the completion of Australia's evolutionary independence. It was a formal declaration that the Commonwealth of Australia and the Australian states were completely constitutionally independent of the United Kingdom. Nothing can serve so well to give legitimacy to a nation and its constitutional integrity as a rare and complete consensus of governments of the kind that the enactment of the Australia Acts represents.

The respondent's alternative arguments

179 In addition to advancing the arguments that s 501(2) of the Migration Act is supported by both the immigration power and the power with respect to "aliens", the respondent argues that there are two other bases upon which the validity of the section can be supported. The first is that the section is a valid exercise of power with respect to external affairs under s 51(xxix) of the Constitution. The second is that an "implied nationhood" power supports legislation such as s 501(2) to control the entry, exit and removal of people from Australia.

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214 See s 93 of the *Commonwealth Electoral Act* 1918 (Cth). Former British subjects who are not Australian citizens have the right to vote in Australia if they were on the electoral roll before 26 January 1984. The applicant was a British subject resident in Australia before that date, but was not eligible to vote as he had not yet reached the age of 18 years.

215 (2002) 77 ALJR 1 at 6 [30]; 193 ALR 37 at 43.

180 I would reject the respondent's alternative arguments.

181 The legislative powers of the Commonwealth Parliament are to be found in the text of the Constitution, primarily, if not almost exclusively, in s 52. Constitutional implications may only be made in clear and unarguable cases of real necessity. There is nothing in the fact of a national government to justify an implied power to legislate for the removal of persons from Australia otherwise than pursuant to the ample but not absolutely unconfined powers enumerated in the text of the Constitution.

182 I would add this in relation to the external affairs power. "External affairs" is a simple and clear expression. It is concerned with events, places and people external to Australia and their relation to Australia. It is not an unbridled power. It must be read with the rest of the Constitution and in conformity with the concept that it embodies, of the sharing and allocation of powers between the central government and the state governments. This applicant is a longstanding resident of Australia who entered the country before it achieved absolute independence from the United Kingdom. The external affairs power has nothing to say about his right to continue to live in Australia.

The decision

183 I summarize my conclusions. The applicant does have a long history of criminal behaviour, beginning in 1987 when he was aged 14. The respondent relies on the decision of this Court in *Re Minister for Immigration and Multicultural Affairs; Ex parte Te*[216] as authority for the proposition that the commission of serious crimes against the community is inconsistent with a person's absorption into the community. I accept that to be generally so, but in this case the applicant had been living in Australia for more than 12 years before his first conviction, and that occurred when he was still a child. In my view the applicant had been absorbed into the Australian community by the time that he came to the notice of the criminal courts. And, in any event, I would not regard that first conviction, occurring as it did when he was so young, as putting him beyond the community of ordinary Australians. I reject the respondent's argument that a person cannot be absorbed into the Australian community until he has attained adulthood[217]. Absorption may not necessarily be a matter of choice. It is better gauged by actual presence and conduct.

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216 (2002) 77 ALJR 1; 193 ALR 37.

217 See *The Queen v Director-General of Social Welfare (Vict); Ex parte Henry* (1975) 133 CLR 369 at 374 per Gibbs J, 382 per Mason J.

184 That the applicant cannot vote in Australian elections is a factor, but standing alone, and in the case of a longstanding resident, does not detract from his integration in, and participation as, a member of the Australian community. The applicant is beyond the reach of the power of the Commonwealth Parliament to legislate with respect to immigration.

185 Nor do I consider that the applicant can be described as an "alien" for the purposes of the Constitution. At federation, a subject of the Sovereign of the United Kingdom was not an alien for the purposes of s 51(xix). There is authority of this Court to indicate that that is no longer the case. The precise time at which the Australian political and legal evolutionary process culminated in that outcome has not so far been definitively stated. However, in my view, it can be no earlier than the coming into effect of the Australia Acts in 1986.

186 It is clear that the applicant was absorbed into the Australian community at a time when subjects of the Sovereign of the United Kingdom were accorded special privileges and status in Australia indicating that they were not to be regarded or treated as aliens. Retrospectively, to alter that status at this late stage is unacceptable and without constitutional warrant.

187 As I have said, in my opinion, the correct date for the change in status of a subject of the Queen in Australia can be no earlier than the coming into force of the Australia Acts, the third day of March 1986. The applicant is not an "alien" for the purposes of s 51(xix) of the Constitution. Section 501(2) of the Migration Act is therefore not a valid exercise of the legislative powers of the Commonwealth under s 51(xix) in relation to him.

188 As attractive as a different answer might be in the case of this criminal who would, in consequence of my decision if it were to prevail, continue to be a charge upon the Australian people, I am bound to answer the question as follows:

> Q. Was subsection 501(2) of the *Migration Act 1958* (Cth) within the legislative powers of the Commonwealth to the extent that it authorised the respondent to cancel the applicant's visa on 17 July 2001?
>
> A. No.

189 The respondent should pay the applicant's costs of the application and the case stated.

190 HEYDON J. It was common ground between the applicant and the Solicitor-General of the Commonwealth that while it is now the case that British subjects who are not Australian citizens are aliens, in 1901 British subjects were not aliens. Hence the argument between the parties postulated the axiomatic correctness of the proposition that in 1901 British subjects were not aliens, and concentrated on the question of when and how the change occurred. Understandable though this approach is, there is an unsatisfactory element in it. It is not in fact self-evident that from 1 January 1901 all British subjects were not aliens, and inquiry into a subsequent date on which, or process by which, they became aliens tends to proceed on a false footing so far as it excludes the possibility that on 1 January 1901 some of them were aliens. Much has been said in this Court and elsewhere, and much more could be said, in denial of that possibility, but there are arguments that that possibility is correct, and its correctness should be left open until a case is heard in which the contrary is not simply assumed, but fully debated. The stance of the parties makes it inevitable that the Court must proceed on the assumption on which the case was argued. On that assumption, the orders proposed by Gleeson CJ, Gummow and Hayne JJ should be made for the reasons they give.