

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, GORDON, EDELMAN, STEWARD AND GLEESON JJ

FREDERICK CHETCUTI

APPELLANT

AND

COMMONWEALTH OF AUSTRALIA

RESPONDENT

Chetcuti v Commonwealth of Australia

[2021] HCA 25

Date of Hearing: 11 May 2021

Date of Judgment: 12 August 2021

M122/2020

ORDER

Appeal dismissed with costs.

On appeal from the High Court

Representation

G L Schoff QC with G A Costello QC and K E Slack for the appellant
(instructed by Lawson Bayly)

S P Donaghue QC, Solicitor-General of the Commonwealth, and
C L Lenehan SC with Z C Heger for the respondent (instructed by Australian
Government Solicitor)

M J Wait SC, Solicitor-General for the State of South Australia, with
J F Metzger for the Attorney-General for the State of South Australia,
intervening (instructed by Crown Solicitor's Office (SA))

Notice: This copy of the Court's Reasons for Judgment is subject to
formal revision prior to publication in the Commonwealth Law
Reports.

CATCHWORDS

Chetcuti v Commonwealth of Australia

Constitutional law (Cth) – Powers of Commonwealth Parliament – Naturalisation and aliens – Deportation – Where appellant entered Australia before commencement of *Nationality and Citizenship Act 1948* (Cth) – Where appellant born in Malta and entered Australia as British subject – Where appellant became citizen of United Kingdom and Colonies in 1949 and citizen of Malta in 1964 – Where appellant had not applied to become Australian citizen by registration under *Nationality and Citizenship Act* – Where appellant's visa cancelled following conviction – Whether appellant entered Australia as alien – Whether within power of Parliament to treat appellant as alien within meaning of s 51(xix) of *Constitution*.

Words and phrases – "alien", "alienage", "aliens power", "allegiance", "Australian independence", "British subject", "citizen", "citizenship", "Crown in right of Australia", "non-citizen", "treat as an alien".

Constitution, s 51(xix).

British Nationality and Status of Aliens Act 1914 (UK), s 1(1)(a).

Nationality Act 1920 (Cth), ss 5(1), 6(1)(a).

Nationality and Citizenship Act 1948 (Cth), ss 12, 24, 25.

1 KIEFEL CJ, GAGELER, KEANE AND GLEESON JJ. This is an appeal as of
right from a final judgment given by Nettle J¹ after a trial on agreed facts in a
proceeding in the original jurisdiction of the High Court in which the appellant
challenged his detention under the *Migration Act 1958* (Cth) on the ground that he
is not within the reach of the legislative power with respect to aliens conferred by
s 51(xix) of the *Constitution*. His Honour concluded that the appellant is within the
reach of that power and so gave judgment for the respondent.

2 The conclusion reached by Nettle J was correct. The appeal must be
dismissed.

The appellant's circumstances

3 The appellant was born on 8 August 1945 in Malta, then still a Colony of
the United Kingdom. By virtue of his birth in Malta, the appellant had from birth
the status of a British subject under the *British Nationality and Status of Aliens Act*
1914 (UK) and from 1 January 1949 the status of a citizen of the United Kingdom
and Colonies under the *British Nationality Act 1948* (UK). At the commencement
of the *Malta Independence Act 1964* (UK) on 21 September 1964, the appellant
ceased to have the status of a citizen of the United Kingdom and Colonies, and
acquired in its place the status of a citizen of the State of Malta under the
Constitution of Malta. When the State of Malta became the Republic of Malta on
13 December 1974, he continued to have the status of a Maltese citizen under
Maltese law.

4 The appellant arrived in Australia on 31 July 1948. He has not since left
Australia other than to visit Malta for several months between 1958 and 1959.

5 At the time of his arrival in Australia, the appellant had the status of a
British subject under the *Nationality Act 1920* (Cth) by virtue of his birth "within
His Majesty's dominions and allegiance"². At the commencement of the *Australian*
Citizenship Act 1948 (Cth)³ on 26 January 1949, the appellant had the status of a
British subject under that Act by virtue of his citizenship of the United Kingdom

1 *Chetcuti v The Commonwealth* (2020) 95 ALJR 1; 385 ALR 1.

2 See s 5(1) (definition of "British subject") and s 6(1)(a) of the *Nationality Act*.

3 Originally known as the *Nationality and Citizenship Act 1948* (Cth) and now
superseded by the *Australian Citizenship Act 2007* (Cth).

Kiefel CJ
Gageler J
Keane J
Gleeson J

2.

and Colonies⁴. Cessation of that citizenship on 21 September 1964 resulted in simultaneous cessation of that status.

6 The appellant appears to have regained the status of a British subject under the *Australian Citizenship Act* on 15 January 1965⁵. From then he appears to have retained that status until abolition of that status altogether on the commencement of relevant provisions of the *Australian Citizenship Amendment Act 1984* (Cth) on 1 May 1987⁶.

7 Following a trial by jury in the Supreme Court of New South Wales, the appellant was convicted in 1993 of murder and sentenced to a term of imprisonment of 24 years.

8 At the commencement of relevant provisions of the *Migration Legislation Amendment Act 1994* (Cth) on 1 September 1994, the appellant was taken to be granted an Absorbed Person visa under the *Migration Act*⁷.

9 In 2017, by reference to the appellant's conviction in 1993, the Minister for Immigration and Border Protection made a decision to cancel his Absorbed Person visa under the *Migration Act*⁸. The appellant was soon afterwards taken into detention under the *Migration Act*. There he remains.

4 See s 5(1) (definition of "British subject") and s 7(1) and (2) of the *Australian Citizenship Act*.

5 See s 5 of the *Nationality and Citizenship Act 1958* (Cth), which repealed and replaced s 7(2) of the *Australian Citizenship Act*, inserting a regulation making power for the purposes of that section; reg 1 of the *Regulations under the Nationality and Citizenship Act 1948-1960* (Cth); s 6 of the *Citizenship Act 1969* (Cth), which repealed and replaced s 7(1) and (2) of the *Australian Citizenship Act*.

6 See s 7 of the *Australian Citizenship Amendment Act*. No party sought to argue that Malta becoming a republic on 13 December 1974 affected the appellant's status as a British subject under the *Australian Citizenship Act*.

7 See s 8 of the *Migration Legislation Amendment Act*, which inserted s 26AB, now s 34 of the *Migration Act*.

8 See s 501 of the *Migration Act*.

3.

10 The initial decision to cancel the appellant's visa was set aside by consent on judicial review by the Federal Court, following which the Minister for Immigration and Border Protection immediately made another decision to cancel the visa. That further cancellation decision was upheld at first instance on judicial review by the Federal Court in 2018 but set aside on appeal to the Full Court of the Federal Court in 2019⁹. The Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs then immediately made yet another decision to cancel the visa. That further cancellation decision was at the time Nettle J gave judgment the subject of an undetermined application to the Federal Court for judicial review.

The appellant's argument

11 Since 2 April 1984¹⁰, the Commonwealth Parliament has relied on the legislative power with respect to aliens to sustain the *Migration Act*. Subject to providing through s 15A of the *Acts Interpretation Act 1901* (Cth) for the *Migration Act* to have a distributive and severable operation to the extent of any constitutional overreach¹¹, the Parliament has done so treating all non-citizens as aliens. And since 1 September 1994¹², it has done so creating a clear-cut distinction between lawful non-citizens, being non-citizens who hold visas permitting them to enter and remain in Australia¹³, and unlawful non-citizens, being non-citizens who

9 *Chetcuti v Minister for Immigration and Border Protection* (2019) 270 FCR 335.

10 The date of commencement of the *Migration Amendment Act 1983* (Cth). See generally *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 574-575 [10], [13].

11 *Pochi v Macphee* (1982) 151 CLR 101 at 110.

12 The date the *Migration Reform Act 1992* (Cth) fully came into force. See generally *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 575-576 [15].

13 Section 13 of the *Migration Act*.

Kiefel CJ
Gageler J
Keane J
Gleeson J

4.

do not hold visas¹⁴ and who are in consequence liable to detention and to removal from Australia¹⁵.

12 In challenging his detention on the ground that he is not within the reach of the aliens power, the appellant does not seek to disturb the settled understanding that the aliens power encompasses both power to determine who is and who is not to have the legal status of an alien and power to attach consequences to that status¹⁶. Nor does the appellant seek to disturb the settled understanding that, in determining who is and who is not to have the legal status of an alien, it is in general open to the Parliament to "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"¹⁷.

13 Seeking to build on the recognition by the majority in *Love v The Commonwealth*¹⁸ of an exception in respect of a person who is an Aboriginal Australian according to the tripartite test in *Mabo v Queensland [No 2]*¹⁹, the appellant argues for recognition of a further exception. The further exception is in respect of a person who was a natural born British subject and who commenced residing permanently in Australia before 26 January 1949. The appellant argues that the status of a non-alien attaches indelibly to a person in that category either by reason of the person having been born within the allegiance of an as yet

14 Sections 14 and 15 of the *Migration Act*.

15 Sections 189, 196 and 198 of the *Migration Act*.

16 *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 170-172 [21]-[26], 219-220 [209]-[210]; *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 35 [2], 87 [190]; *Koroitamana v The Commonwealth* (2006) 227 CLR 31 at 38 [11], 46 [48]. See earlier Brazil, "Australian Nationality and Immigration", in Ryan (ed), *International Law in Australia*, 2nd ed (1984) 210 at 217 explaining *Pochi v Macphee* (1982) 151 CLR 101 at 109-110.

17 *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 185, quoting *Pochi v Macphee* (1982) 151 CLR 101 at 109-110.

18 (2020) 94 ALJR 198; 375 ALR 597.

19 (1992) 175 CLR 1 at 70.

5.

undivided Imperial Crown or by reason of the Parliament having once and for all determined the person not to be an alien under the *Nationality Act*.

The answer to the appellant's argument

14 The answer to the appellant's argument is to be found in the reasons for judgment of the majority in *Shaw v Minister for Immigration and Multicultural Affairs*²⁰, from which the holding of the majority in *Love v The Commonwealth* does not depart except in respect of an Aboriginal Australian according to the tripartite test in *Mabo v Queensland [No 2]*.

15 The conclusion of the majority in *Shaw* was confined in its terms to a determination that "the aliens power has reached all those persons who entered this country after the commencement of [the *Australian 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"²¹. The reasoning employed by the majority to reach that conclusion nevertheless equally supports the conclusion that the aliens power has reached all those persons who entered this country before 26 January 1949 who did not then or did not afterwards become Australian citizens.

16 Essential to the reasoning of the majority in *Shaw* were the propositions that: (i) "[t]here never was a common law notion of 'British subject' rendered into an immutable element of 'the law of the Constitution'"²²; (ii) the Commonwealth Parliament exercised the aliens power in establishing by the *Australian Citizenship Act* the status of an Australian citizen on and from 26 January 1949²³; (iii) on and from which date persons who have not had the status of Australian citizens have been aliens, persons having the status of British subjects but not the status of Australian citizens forming a class of aliens on whom special privileges were for some time afterwards conferred²⁴; and (iv) by which date the development of Australian sovereignty had been such that the constitutional term "subject of the

20 (2003) 218 CLR 28.

21 (2003) 218 CLR 28 at 43 [32], 87 [190].

22 (2003) 218 CLR 28 at 42 [28], 87 [190].

23 (2003) 218 CLR 28 at 40 [21]-[22], 87 [190].

24 (2003) 218 CLR 28 at 40 [21]-[22], 87 [190].

Kiefel CJ
Gageler J
Keane J
Gleeson J

6.

Queen"²⁵ could no longer be taken to refer to a subject of an Imperial Crown but to a subject of the Crown in right of Australia, being an Australian citizen²⁶.

17 The significance of that reasoning to the status on and from 26 January 1949 of a person who entered Australia before that date and who did not on that date or afterwards become an Australian citizen is best appreciated by noting at the outset observations as early as 1906²⁷ and as late as 1936²⁸ that there was no such thing as a distinct "Australian nationality". The *Nationality Act* – itself an exercise of the aliens power – did no more than restate the common law²⁹ as replicated in the *British Nationality and Status of Aliens Act*³⁰ (which appears in relevant part to have applied in Australia by paramount force³¹) in so far as it provided that "[a]ny person born within his Majesty's dominions and allegiance" was to be deemed to be a natural born British subject³² so as to be included within the statutory definition of British subject³³ and for that reason excluded from the statutory definition of alien³⁴.

18 Even at the time of enactment of the *Nationality Act* in 1920, political and demographic forces within the British Empire were fracturing the consensus reached at the Imperial Conference of 1911 that "Imperial nationality should be

25 See ss 34 and 117 of the *Constitution*.

26 (2003) 218 CLR 28 at 37-38 [13]-[14], 39-40 [20], 42 [28], 87 [190].

27 *Attorney-General for the Commonwealth v Ah Sheung* (1906) 4 CLR 949 at 951.

28 *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 650.

29 See *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 183-184.

30 Section 1(1)(a) and s 27(1) (definitions of "British subject" and "alien") of the *British Nationality and Status of Aliens Act*.

31 See *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 440 [148].

32 Section 6(1)(a) of the *Nationality Act*.

33 Section 5(1) (definition of "British subject") of the *Nationality Act*.

34 Section 5(1) (definition of "alien") of the *Nationality Act*.

7.

worldwide and uniform"³⁵ which had underpinned the enactment in 1914 of the *British Nationality and Status of Aliens Act*³⁶. Following on from the Balfour Declaration of the Imperial Conference of 1926 to the effect that the United Kingdom and its Dominions were "autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations"³⁷, the Imperial Conference of 1930 not only agreed to the principles of the *Statute of Westminster 1931* (UK), ultimately adopted by the Commonwealth Parliament in the *Statute of Westminster Adoption Act 1942* (Cth), but concluded that "it is for each Member of the Commonwealth to define for itself its own nationals"³⁸.

- 19 On the understanding that the expression "a member of the community" of a Member of the Commonwealth of Nations was "intended to have a rather technical meaning, as denoting a person whom that Member of the Commonwealth has, either by legislative definition of its nationals or citizens or otherwise, decided to regard as 'belonging' to it, for the purposes of civil and political rights and duties, immigration, deportation, diplomatic representation, or the exercise of extra-territorial jurisdiction", the Imperial Conference of 1937 went on to resolve that it was for each Member of the Commonwealth of Nations "to decide which persons have with it that definite connection ... which would enable it to recognize them as members of its community"³⁹. The resolution continued⁴⁰:

35 Great Britain, *Minutes of Proceedings of the Imperial Conference, 1911* (1911) [Cd 5745] at 267.

36 Parry, *Nationality and Citizenship Laws of The Commonwealth and of The Republic of Ireland* (1957) at 82-89.

37 Australia, Parliament, *Imperial Conference, 1926: Summary of Proceedings* (1927) at 10.

38 Great Britain, *Imperial Conference, 1930: Summary of Proceedings* (1930) Cmd 3717 at 19, 22.

39 Great Britain, *Imperial Conference, 1937: Summary of Proceedings* (1937) Cmd 5482 at 25.

40 Great Britain, *Imperial Conference, 1937: Summary of Proceedings* (1937) Cmd 5482 at 26.

Kiefel CJ
Gageler J
Keane J
Gleeson J

8.

"Each Member of the Commonwealth would in the normal course include as members of its community: –

- (a) persons who were born in, or became British subjects by naturalisation in, or as a result of the annexation of, its territory and still reside there, and
- (b) persons who, coming as British subjects from other parts of the Commonwealth, have identified themselves with the community to which they have come.

As regards those mentioned under (b) it is for each Member to prescribe the conditions under which any British subject coming from another part of the Commonwealth will be considered to have so identified himself with the new community to which he has resorted as to become a member thereof."

20 Prompted by the enactment of the *Canadian Citizenship Act 1946* (Can), the British Commonwealth Conference on Nationality and Citizenship of 1947 agreed upon a system for the working out of the resolution of the Imperial Conference of 1937 by which each Member of the Commonwealth of Nations "shall by its legislation determine who are its citizens, shall declare those citizens to be British subjects and shall recognise as British subjects the citizens of the other countries"⁴¹. Enacted in 1948 and commencing sequentially in 1949, the *British Nationality Act* and the *Australian Citizenship Act* implemented that agreed legislative pattern.

21 Professor Parry authoritatively⁴² explained⁴³:

"What the [*British Nationality Act*], and the parallel enactments elsewhere, did was to create a new, statutory concept of citizenship of each country concerned and to render the traditional and familiar status of a British subject ... a derivative status, capable of enjoyment, transitional cases apart, only in virtue of possession of the citizenship of one or more of the local

41 *British Commonwealth Conference on Nationality and Citizenship* (London, February 1947): *Report with Appendices* (1947) at 3 [9].

42 See *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 441 [151].

43 Parry, *Nationality and Citizenship Laws of The Commonwealth and of The Republic of Ireland* (1957) at 92 (footnote omitted).

communities of the Commonwealth. The concept of allegiance, which had been the foundation of the status of a subject, was not imported into the rules governing local citizenship but was altogether swept away, together with all other rules of the common law respecting nationality."

22 To similar effect, Gibbs CJ said of the *British Nationality Act* and the *Australian Citizenship Act* in *Pochi v Macphee*⁴⁴:

"The principles to which this legislation gave effect were that the peoples of each of the countries of the Commonwealth should have separate citizenship, but that all citizens of Commonwealth countries should have the common status of British subjects. ... [T]he *Australian Citizenship Act* gave effect to this common status, which was, of course, derivative, being dependent on the possession of citizenship."

23 Through the operation of s 2(2) of the *Statute of Westminster* as adopted by the Commonwealth Parliament in the *Statute of Westminster Adoption Act*, the *Australian Citizenship Act* would have prevailed over the *British Nationality and Status of Aliens Act* if and to the extent that there had been any inconsistency⁴⁵. In the co-ordinated sequence of events that occurred, however, no inconsistency arose. The *British Nationality and Status of Aliens Act* was repealed in relevant part on the commencement of the *British Nationality Act* on 1 January 1949⁴⁶. The *Australian Citizenship Act* then commenced on 26 January 1949 and on that date repealed the *Nationality Act*⁴⁷.

24 Part II of the *Australian Citizenship Act* provided for the status of British subject to be conferred on and from 26 January 1949 on an Australian citizen⁴⁸ as well as on a person who "by an enactment for the time being in force" in a specified

44 (1982) 151 CLR 101 at 108.

45 *Phonographic Performance Co of Australia Ltd v The Commonwealth* (2012) 246 CLR 561 at 573 [21], citing *Kirmani v Captain Cook Cruises Pty Ltd [No 1]* (1985) 159 CLR 351 at 375-377, 403-404, 423-424.

46 Section 34(3) of and the Fourth Schedule to the *British Nationality Act*.

47 Section 3 of and the First Schedule to the *Australian Citizenship Act*.

48 Section 7(1) of the *Australian Citizenship Act*.

Kiefel CJ
Gageler J
Keane J
Gleeson J

10.

country was a citizen of that country⁴⁹. The countries specified were some (but not all) of the Members of the Commonwealth of Nations. They included "the United Kingdom and Colonies"⁵⁰, which were "deemed to constitute one country"⁵¹. The term "alien" was relevantly defined to mean a person who was not a British subject⁵².

25 Part III of the *Australian Citizenship Act* provided for the acquisition of Australian citizenship on and from 26 January 1949 to be by birth⁵³, by descent⁵⁴, by registration⁵⁵ or by naturalisation⁵⁶. On and from 26 January 1949 a citizen of a specified country who was thereby a British subject could become an Australian citizen on application through registration, generally after residing in Australia for a period of five years⁵⁷. But an alien who was not a British subject could become an Australian citizen only through naturalisation⁵⁸.

26 The *Australian Citizenship Act* did not ignore the position of persons who had been British subjects under the *Nationality Act* and who had resided in Australia before 26 January 1949. Part IV was headed "Transitional Provisions".

27 Within Pt IV, s 24 provided:

"In this Part, 'British subject' includes a person who was, immediately prior to the date of commencement of this Act, entitled in Australia or a Territory

49 Section 7(1) and (2) of the *Australian Citizenship Act*.

50 Section 7(2) of the *Australian Citizenship Act*.

51 Section 5(3)(d) of the *Australian Citizenship Act*.

52 Section 5(1) (definition of "alien") of the *Australian Citizenship Act*.

53 Section 10 of the *Australian Citizenship Act*.

54 Section 11 of the *Australian Citizenship Act*.

55 Sections 12 and 13 of the *Australian Citizenship Act*.

56 Sections 14-16 of the *Australian Citizenship Act*.

57 Section 12(1)(b) of the *Australian Citizenship Act*.

58 Section 14 of the *Australian Citizenship Act*.

11.

to all political and other rights, powers and privileges to which a natural-born British subject was then entitled."

28 Section 25(1) went on to provide:

"A person who was a British subject immediately prior to the date of commencement of this Act shall, on that date, become an Australian citizen if –

- (a) he was born in Australia and would have been an Australian citizen if ... this Act had been in force at the time of his birth;
- (b) ...
- (c) he was a person naturalized in Australia; or
- (d) he had been, immediately prior to the date of commencement of this Act, ordinarily resident in Australia ... for a period of at least five years."

29 No less than Pts II and III, Pt IV of the *Australian Citizenship Act* was enacted in the exercise of the aliens power. The power that supported the creation of the new status of an Australian citizen to be conferred prospectively by reference to legislatively established criteria supported as well the transitional conferral of that new status by reference to essentially the same criteria.

30 The following statement of the majority in *Nolan v Minister for Immigration and Ethnic Affairs*⁵⁹ was restated by the majority in *Shaw*⁶⁰:

"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 ... *Australian Citizenship Act* ... 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

59 (1988) 165 CLR 178 at 184.

60 (2003) 218 CLR 28 at 44-45 [37], 87 [190].

Kiefel CJ
Gageler J
Keane J
Gleeson J

12.

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

31 The final sentence of that statement is as much applicable to a person who entered Australia before 26 January 1949 and who on 26 January 1949 failed to meet the criteria for the acquisition of Australian citizenship set out in s 25(1) of the *Australian Citizenship Act* as it is applicable to a person who entered Australia on or after 26 January 1949 and who then and thereafter failed to meet the criteria for the acquisition of Australian citizenship set out in Pt III of the *Australian Citizenship Act*.

32 The *British Nationality and Status of Aliens Act* having been repealed on the commencement of the *British Nationality Act* on 1 January 1949, the appellant's status in Australia as a British subject immediately before the commencement of the *Australian Citizenship Act* on 26 January 1949 was conferred solely by operation of the *Nationality Act*. His status in Australia as a British subject on and from 26 January 1949 was conferred solely by operation of the *Australian Citizenship Act*. The appellant being a person born outside Australia whose parents were not Australians, it was open to the Parliament in the exercise of the aliens power through prescription of the criteria for the conferral of Australian citizenship set out in s 25(1)(d) of the *Australian Citizenship Act* to deny him the status of an Australian citizen and thereby to treat him as an alien in the transition that occurred on 26 January 1949.

33 The appellant missed out on becoming an Australian citizen on 26 January 1949 through operation of s 25(1)(d) of the *Australian Citizenship Act* only because, having arrived in Australia on 31 July 1948, he had then been ordinarily resident in Australia for a period of less than five years. His position, however, was not irremediable. After he had resided in Australia for a period of five years – that is, after 31 July 1953 – it was open to him under the *Australian Citizenship Act* by virtue of his new citizenship of the United Kingdom and Colonies to apply to become an Australian citizen by registration. That course of action remained available to him until the provision for obtaining Australian citizenship by registration was removed from the *Australian Citizenship Act* at the commencement of relevant provisions of the *Australian Citizenship Act 1973* (Cth)

on 1 December 1973⁶¹. His problem is that he did not take that available course of action.

34 The conclusion that the appellant was and remains within the reach of the aliens power can therefore be arrived at, as in *Shaw*, without need to explore common law notions of allegiance and alienage⁶² and without attempting to pinpoint the precise time prior to 26 January 1949 when there emerged a distinct Crown in right of Australia⁶³. There is also no need to explore the position before 26 January 1949, touched on in *Shaw*⁶⁴, of a person not born within the dominions and allegiance of the Imperial Crown who acquired under local naturalisation legislation in one part of the British Empire the status of a British subject not recognised in other parts⁶⁵. Even less is there need to re-examine the present position of an Aboriginal Australian according to the tripartite test in *Mabo v Queensland [No 2]*, recently examined in *Love v The Commonwealth*.

Disposition of the appeal

35 The appeal is to be dismissed with costs.

61 Section 2(3) of the *Australian Citizenship Act 1973*; *Commonwealth of Australia Gazette*, No 140, 4 October 1973.

62 (2003) 218 CLR 28 at 42-43 [29].

63 (2003) 218 CLR 28 at 41 [24]. See earlier *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 477-478; *Sue v Hill* (1999) 199 CLR 462 at 498 [85].

64 (2003) 218 CLR 28 at 39-40 [20].

65 See *Ex parte Lau You Fat* (1888) 9 LR (NSW) (L) 269; *R v Francis*; *Ex parte Markwald* [1918] 1 KB 617; *Markwald v Attorney-General* [1920] 1 Ch 348.

36 GORDON J. I agree with Kiefel CJ, Gageler, Keane and Gleeson JJ that, in light of the reasoning of the majority in *Shaw v Minister for Immigration and Multicultural Affairs*⁶⁶, this appeal must be dismissed.

37 While I accept that one aspect of the power in s 51(xix) of the *Constitution* with respect to "naturalization and aliens", as well as of the "immigration" power in s 51(xxvii), is the power to define a concept of "citizenship"⁶⁷, I remain of the view that Parliament's "power to define, for some purposes, who are members of the Australian community does not constitute a power to define the scope of the aliens power under s 51(xix)"⁶⁸. The qualification identified by Gibbs CJ in *Pochi v Macphee*⁶⁹ that "Parliament cannot, simply by giving its own definition of 'alien', 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" is important because "[t]o suggest that Parliament has the power, *under* the aliens power, to define alienage status, risks circularity – it presupposes, as the basis for validity of the law, that the people to whom the law applies are aliens within the constitutional meaning"⁷⁰.

38 Relatedly, citizenship is a matter that is *relevant to* alienage, but it is not *determinative of* alienage⁷¹. "Aliens" is a constitutional term, whereas "citizenship"

66 (2003) 218 CLR 28.

67 *Love v The Commonwealth* (2020) 94 ALJR 198 at 262-263 [325]; 375 ALR 597 at 676-677.

68 *Love* (2020) 94 ALJR 198 at 263 [326]; 375 ALR 597 at 677.

69 (1982) 151 CLR 101 at 109. See also *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 186; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 435-436 [132], 469-470 [238], 490 [297], 491-492 [303]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 173 [31], 175 [39], 205 [159]; *Shaw* (2003) 218 CLR 28 at 36 [9]; *Singh v The Commonwealth* (2004) 222 CLR 322 at 329 [4], 382-383 [151], 383 [153]; *Koroitamana v The Commonwealth* (2006) 227 CLR 31 at 54-55 [81].

70 *Love* (2020) 94 ALJR 198 at 263 [327]; 375 ALR 597 at 677.

71 *Love* (2020) 94 ALJR 198 at 259-261 [303]-[311], especially at 259 [303]; 375 ALR 597 at 672-674, especially at 672.

is a purely statutory concept⁷². "Non-citizen" is not a synonym for "alien"⁷³. It is not the case that, on and from the commencement of the *Australian Citizenship Act 1948* (Cth)⁷⁴ on 26 January 1949, all persons who have not had the status of Australian citizens have been aliens. Indeed, the majority holding in *Love v The Commonwealth* was to the contrary⁷⁵.

39 It is, however, unnecessary in this case to chart the metes and bounds of the constitutional concept of "alien". Mr Chetcuti was a "natural-born British subject" under the *British Nationality and Status of Aliens Act 1914* (UK) by reason of his birth in present day Malta, "within His Majesty's dominions and allegiance"⁷⁶, and when he arrived in Australia on 31 July 1948 he had the status of a "British subject" under the *Nationality Act 1920* (Cth)⁷⁷. It is sufficient to dispose of this appeal that, in accordance with the majority's reasoning in *Shaw*⁷⁸, "[i]t can hardly be said that, as the relevant political facts and circumstances stood" when Mr Chetcuti arrived in Australia in 1948, persons who were British subjects born out of Australia of parents who had not been naturalised in Australia "could not possibly answer the description of aliens in the ordinary understanding of that word". The following aspects of the majority's reasoning in *Shaw* are both relevant and determinative.

40 First, "[t]he 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'"⁷⁹ (emphasis added).

72 *Love* (2020) 94 ALJR 198 at 258 [300], 259 [305]; 375 ALR 597 at 671, 672.

73 See *Pochi* (1982) 151 CLR 101 at 109; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 54; *Re Patterson* (2001) 207 CLR 391 at 435-436 [132], 491 [300]; *Ex parte Te* (2002) 212 CLR 162 at 179 [53]; *Shaw* (2003) 218 CLR 28 at 61 [94]; *Singh* (2004) 222 CLR 322 at 382 [149]-[150]; *Love* (2020) 94 ALJR 198 at 258 [295], [300], 259-261 [304]-[311], 283-285 [432]-[437]; 375 ALR 597 at 670-674, 703-705.

74 Originally enacted as the *Nationality and Citizenship Act 1948* (Cth).

75 (2020) 94 ALJR 198 at 218 [81]; 375 ALR 597 at 616.

76 *British Nationality and Status of Aliens Act 1914* (UK), s 1(1)(a).

77 *Nationality Act 1920* (Cth), ss 5(1) definition of "British subject" and 6(1)(a).

78 cf (2003) 218 CLR 28 at 40 [22]; see also 42 [27]-[28], 43 [32], 87 [190].

79 *Shaw* (2003) 218 CLR 28 at 40-41 [23].

But, "[t]here never was a common law notion of 'British subject' rendered into an immutable element of 'the law of the Constitution'"⁸⁰.

41 Indeed, in 1900 the term "the Crown" was used in several distinct senses, including "the Crown in right of" a government when identifying the powers of the United Kingdom (the parent state) in relation to its dependencies (the newly created and evolving political units)⁸¹. And, in the statute establishing the Australian federation, the Imperial Parliament "unquestionably" treated Australia as a distinct entity⁸². It is apparent, albeit not explicit, that the majority in *Shaw* considered that the *Constitution* itself implicitly recognised that the notion of the "indivisible" Imperial Crown was in a state of flux at federation⁸³.

42 Second, the text of the *Constitution* "contemplates changes in the political and constitutional relationship between the United Kingdom and Australia" and it is, therefore, "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 United Kingdom and colonies under the [*British Nationality Act 1948* (UK)]"⁸⁴ (emphasis added).

43 The majority's reference in *Shaw* to persons entering Australia "as citizens of the United Kingdom and colonies" reflects that Mr Shaw had that status when he entered Australia⁸⁵; it does not mean that their Honours' reasoning is incapable of applying to a person (like Mr Chetcuti) who entered Australia in 1948, prior to the commencement of the *British Nationality Act 1948* (UK), as a "British subject" under the *British Nationality and Status of Aliens Act 1914* (UK). As will be explained next, this is because the *British Nationality Act 1948* (UK) and the

80 *Shaw* (2003) 218 CLR 28 at 42 [28].

81 *Shaw* (2003) 218 CLR 28 at 40-41 [23]. See also *Sue v Hill* (1999) 199 CLR 462 at 499 [88], 501 [90].

82 *Shaw* (2003) 218 CLR 28 at 40-41 [23], quoting Moore, "The Crown as Corporation" (1904) 20 *Law Quarterly Review* 351 at 359. See also *Sue v Hill* (1999) 199 CLR 462 at 501 [90].

83 See, similarly, *Nolan* (1988) 165 CLR 178 at 185-186; *Sue v Hill* (1999) 199 CLR 462 at 525-526 [165]-[166].

84 *Shaw* (2003) 218 CLR 28 at 42 [27]; see also 38 [14], 42 [26], 43 [30]. See also *Sue v Hill* (1999) 199 CLR 462 at 525 [164]; *Re Patterson* (2001) 207 CLR 391 at 467 [229].

85 (2003) 218 CLR 28 at 35 [3], 38 [15]; see also 73 [130].

Australian Citizenship Act 1948 (Cth) did not, in and of themselves, have any transformative effect in respect of either the relationship between the United Kingdom and Australia, or the divisibility of the Imperial Crown. "The transition from Empire to Commonwealth and the emergence of Australia and other Dominions as independent sovereign nations within the Commonwealth"⁸⁶ was the result of various constitutional and political changes that took place, especially after federation.

44 The relevant constitutional and political changes included: the Balfour Declaration of the Imperial Conference of 1926⁸⁷; the *Statute of Westminster 1931* (UK)⁸⁸; and negotiations between the governments of the United Kingdom and other Commonwealth countries about nationality and citizenship, which culminated in the enactment of the *British Nationality Act 1948* (UK) and the *Australian Citizenship Act 1948* (Cth)⁸⁹.

45 Those changes that had taken place *by 1948*, and the development and evolution of the relationship between Australia and the United Kingdom, had rendered any notion of an "indivisible" Crown obsolete⁹⁰. As the majority said in *Shaw*, it is an "undoubted truth that, *by 1948*, the Imperial Crown, indivisible in nature, with an undivided allegiance, was no longer apparent, whether in this country or the United Kingdom"⁹¹ (emphasis added).

46 Understood in light of those facts and matters, references in the *Constitution* to "the Queen" must be to the "office" (not to the person)⁹², and the constitutional term "'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

86 See *Shaw* (2003) 218 CLR 28 at 44-45 [37], quoting *Nolan* (1988) 165 CLR 178 at 184.

87 *Shaw* (2003) 218 CLR 28 at 41 [24].

88 *Shaw* (2003) 218 CLR 28 at 37-38 [12]-[13]; see also 41 [25].

89 *Shaw* (2003) 218 CLR 28 at 38 [17]; see also 39 [18]-[19]. See also reasons of Kiefel CJ, Gageler, Keane and Gleeson JJ at [18]-[22].

90 *Shaw* (2003) 218 CLR 28 at 42 [28]; see also 44-45 [37], quoting *Nolan* (1988) 165 CLR 178 at 184. See also *Minister for Works (WA) v Gulson* (1944) 69 CLR 338 at 350-351.

91 (2003) 218 CLR 28 at 42 [28].

92 *Shaw* (2003) 218 CLR 28 at 38 [14].

was made were subjects of the monarch in right of Australia, not subjects of the monarch in right of the United Kingdom"⁹³ (emphasis added).

47 The *British Nationality Act 1948* (UK) and the *Australian Citizenship Act 1948* (Cth) put in place new arrangements which "reflected [the] significant changes in the Imperial system which had taken place since federation"⁹⁴ (emphasis added). Those Acts did not *create* any fundamental shift in the relationship between the United Kingdom and Australia, nor did their commencement result in the division of the Imperial Crown. And, consistent with the significant changes which had taken place by 1948, the *Australian Citizenship Act 1948* (Cth) "[u]ndoubtedly, to a significant degree, ... depended upon the aliens power"⁹⁵. The expression "British subject" was "not a constitutional expression; [but] a statutory expression"⁹⁶ in the *Australian Citizenship Act 1948* (Cth). It is irrelevant that "British subjects" did not fall within the *statutory definition* of "alien" in s 5(1) of the *Australian Citizenship Act 1948* (Cth) or within the former definition of "[a]lien" in s 5(1) of the *Nationality Act 1920* (Cth). By 1948, "British subjects" were aliens in the constitutional sense; albeit a "class of aliens with special advantages in Australian law"⁹⁷.

48 There is no principled basis for suggesting that the Commonwealth Parliament would have lacked power to enact the *Australian Citizenship Act 1948* (Cth) – which, as noted, depended "to a significant degree" upon the aliens power⁹⁸ – some months earlier than it did, with a commencement date shortly prior to Mr Chetcuti's arrival in Australia. Once that is accepted, it is difficult to see how the commencement of that Act on 26 January 1949, when combined with the significant changes which had taken place by 1948, could be characterised as transforming the constitutional status of British subjects.

93 *Shaw* (2003) 218 CLR 28 at 40 [20]. See also *Re Patterson* (2001) 207 CLR 391 at 467 [229].

94 *Shaw* (2003) 218 CLR 28 at 38-39 [17]. See also *Nolan* (1988) 165 CLR 178 at 184; *Re Patterson* (2001) 207 CLR 391 at 467 [229].

95 *Shaw* (2003) 218 CLR 28 at 40 [21]; see also 40 [22]. See also *Kenny v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 42 FCR 330 at 346.

96 *Shaw* (2003) 218 CLR 28 at 36 [10]; see also 42 [28].

97 *Shaw* (2003) 218 CLR 28 at 40 [22].

98 *Shaw* (2003) 218 CLR 28 at 40 [21].

In truth, as the majority in *Shaw* recognised⁹⁹, the necessary transformation had already taken place.

49 For these reasons, Mr Chetcuti, like Mr Shaw, arrived in Australia as an "alien" in the constitutional sense and he has not lost that status by reason of his subsequent personal history in Australia¹⁰⁰. He did not acquire Australian citizenship automatically under s 25(1) of the *Australian Citizenship Act 1948* (Cth) and he did not subsequently apply to become an Australian citizen by registration under s 12(1) of that Act by reason of his citizenship of the United Kingdom and Colonies.

50 It is unnecessary to determine in this case, and the majority in *Shaw* did not address, whether *all persons* born outside of Australia of parents who had not been naturalised in Australia, who had entered Australia before 26 January 1949 and who, on that date, did not meet the criteria for the acquisition of Australian citizenship in s 25(1) of the *Australian Citizenship Act 1948* (Cth) are "aliens". Indeed, the majority in *Shaw* focussed on the constitutional and political changes that had taken place *by 1948*¹⁰¹, being changes to which reference has just been made, and their ultimate conclusion was confined to dealing with persons "who entered this country *after* ... 26 January 1949"¹⁰² (emphasis added). Neither *Shaw* nor this appeal addressed any larger question.

⁹⁹ (2003) 218 CLR 28 at 38-39 [17]. See also *Nolan* (1988) 165 CLR 178 at 184; *Re Patterson* (2001) 207 CLR 391 at 467 [229].

¹⁰⁰ cf *Shaw* (2003) 218 CLR 28 at 43 [31].

¹⁰¹ (2003) 218 CLR 28 at 38 [17], 40 [20], [22], 42 [28].

¹⁰² (2003) 218 CLR 28 at 43 [32].

EDELMAN J.

Is Mr Chetcuti an alien?

51 Mr Chetcuti was born on 8 August 1945. He arrived in Australia on 31 July 1948 from his birthplace in Malta. He arrived as a British subject. Apart from spending approximately eight months in Malta as a teenager, he has remained in Australia for 73 years. He has voted in local, State, and federal elections. He was registered in the birthday ballot for compulsory military service during the Vietnam war. He was employed for seven years as a teacher by the New South Wales Education Department. And he has spent 24 years in an Australian prison for murder.

52 In 2017, as a result of his conviction and sentence of imprisonment in 1993, the Minister for Immigration and Border Protection purported to cancel Mr Chetcuti's Absorbed Person visa under s 501 of the *Migration Act 1958* (Cth), following which Mr Chetcuti was detained in immigration detention under s 189 of the *Migration Act* pending removal to Malta. In his claim before the primary judge in this Court, Mr Chetcuti sought relief including a declaration that his detention was unlawful, a declaration that he is not an alien within s 51(xix) of the *Constitution*, and damages for false imprisonment. The primary judge rejected Mr Chetcuti's claim. This appeal concerns whether Mr Chetcuti falls within the scope of the constitutional meaning of "alien" in s 51(xix) of the *Constitution* and therefore whether he is within the application of the *Migration Act* such that he can lawfully be detained or removed from Australia. Mr Chetcuti submits that (i) he arrived in Australia as a British subject outside the constitutional conception of alien and (ii) his non-alien status continued as he became a subject of the Queen of Australia upon the bifurcation of the Crown, in effect rendering his status almost indelible so that, absent renunciation, he could never fall within the meaning of an "alien" in s 51(xix).

53 The unchanging, essential meaning of an "alien" in s 51(xix) of the *Constitution* is a foreigner to the Australian political community. But the application of this meaning, like the application of the meaning of all constitutional terms, can change over time. The application can be affected by changes in political and social facts and circumstances. Based on the political and social facts and circumstances of 1948, there is some force in the first aspect of Mr Chetcuti's submission. In 1948, when Mr Chetcuti arrived in Australia as a British subject, no legislation existed recognising Australian citizenship. The *Nationality Act 1920* (Cth) defined an "alien" as "a person who is not a British subject"¹⁰³. At that time, many Australians may have been surprised by a suggestion, consistently with one of the Commonwealth's submissions, that the Commonwealth had power to treat a British subject as an alien, particularly where the British subject: was living

103 *Nationality Act 1920* (Cth), s 5(1).

in Australia; was eligible for a passport; and, when old enough, was eligible to vote in Australian elections, to be elected to the Commonwealth Parliament, and to be conscripted to fight wars.

54 There is less force in the second aspect of Mr Chetcuti's submission, which requires consideration of the application of the constitutional meaning of "alien" according to the political and social facts and circumstances since 2017. In *Pochi v Macphee*¹⁰⁴, this Court rejected the notion that an alien could become a non-alien by absorption into the Australian community. That conclusion was not challenged on this appeal, so matters such as the length of Mr Chetcuti's stay in Australia and the strength of any of his general bonds to the community must be put to one side. That leaves for consideration Mr Chetcuti's submission that, in the application of the constitutional meaning of "alien" since 2017, the Commonwealth Parliament has no power to treat him as an alien even though: he is a Maltese citizen; he has never been a citizen of Australia; he was not born in Australia; and he does not have Australian parents.

55 This Court has previously been confronted with cases where the parties' submissions raised the two issues of (i) a person's status upon arrival in Australia and (ii) that person's status as at a relevant later time. In *Sue v Hill*¹⁰⁵, a majority of this Court decided the case on the basis that whatever the status of Ms Hill was when she migrated to Australia from the United Kingdom in 1971, as at the time of her nomination for election as a senator for the State of Queensland on 4 September 1998 her British citizenship meant that she was a subject or citizen of a foreign power within the meaning of s 44(i) of the *Constitution*. By contrast, in *Shaw v Minister for Immigration and Multicultural Affairs*¹⁰⁶, a majority of this Court decided the case on the basis that when Mr Shaw arrived in Australia as a British subject on 17 July 1974 he fell within the scope of the aliens power in s 51(xix) of the *Constitution*, which extended at least to people who had entered Australia on or after 26 January 1949 and who were born outside of Australia to parents who were not Australian citizens. There was no suggestion that any change in political or social facts or circumstances since 17 July 1974 had removed Mr Shaw from the scope of the aliens power.

56 In the present appeal, the only question that needs to be decided is whether Mr Chetcuti was a constitutional alien at the time at which he is said to fall within the application of the *Migration Act*. Whatever his status might have been almost seven decades earlier upon his arrival in Australia, that status was not

104 (1982) 151 CLR 101 at 111. See also *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 295.

105 (1999) 199 CLR 462 at 503 [97], 529 [176].

106 (2003) 218 CLR 28 at 43 [32], 87 [190].

cryogenically frozen and impervious to the application of the *Constitution* to new political and social facts and circumstances. In light of the many changes in political and social facts and circumstances since 31 July 1948, the contemporary application of the aliens power in s 51(xix) of the *Constitution* leads to the conclusion that Mr Chetcuti was within the scope of the aliens power at least from 2017.

The meaning of "alien" in s 51(xix) of the *Constitution*

Essential meaning and application

57 Putting to one side the effect of judicial decisions and other constitutional practices that, metaphorically, "divert[] the flow of constitutional law into new channels"¹⁰⁷, for more than a century it has been "beyond controversy"¹⁰⁸ or "beyond question"¹⁰⁹ that, whilst the application of the terms of the *Constitution* might change, the essential meaning or, perhaps less accurately, the "connotation" of a constitutional term cannot change: "whatever it meant in 1900 it must mean so long as the Constitution exists"¹¹⁰. As Windeyer J said, and as has been reiterated numerous times subsequently in this Court¹¹¹:

"We must not, in interpreting the Constitution, restrict the denotation of its terms to the things they denoted in 1900. The denotation of words becomes enlarged as new things falling within their connotations come into existence or become known. But in the interpretation of the Constitution the connotation or connotations of its words should remain constant."

107 *Victoria v The Commonwealth* ("the Payroll Tax Case") (1971) 122 CLR 353 at 396.

108 *King v Jones* (1972) 128 CLR 221 at 229.

109 *Lansell v Lansell* (1964) 110 CLR 353 at 366.

110 *R v Barger* (1908) 6 CLR 41 at 68. See also *Andrews v Howell* (1941) 65 CLR 255 at 278; *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 195, 199, 274; *Attorney-General (Vict) v Ex rel Black v The Commonwealth* (1981) 146 CLR 559 at 578.

111 *Ex parte Professional Engineers' Association* (1959) 107 CLR 208 at 267. See also *Street v Queensland Bar Association* (1989) 168 CLR 461 at 537; *McGinty v Western Australia* (1996) 186 CLR 140 at 200; *Eastman v The Queen* (2000) 203 CLR 1 at 45 [142]-[143]; *Re Patterson*; *Ex parte Taylor* (2001) 207 CLR 391 at 426-427 [108]-[109].

58 Since the *Constitution* is a foundational document which was intended to endure "for the continued life and progress of the community"¹¹², the essential meaning of a constitutional term should be expressed at a level of generality, and with sufficient abstraction from specific detail, to permit the term to be applied to new circumstances and with the benefit of developed understandings with due fidelity to the unchanged purposes underlying both the term and the *Constitution*. Hence, when interpreting the meaning of the term "foreign power" in s 44(i) of the *Constitution*, that expression has been accurately understood as "an abstract concept apt to describe different nation states at different times according to their circumstances"¹¹³. As McHugh J said in *Re Patterson; Ex parte Taylor*¹¹⁴, "[t]his method of interpretation is equally applicable to the term 'aliens' in s 51(xix) of the *Constitution*".

59 If the meaning of "alien" were defined at too granular a level of generality then the flexibility needed for its application over the long-term operation of the *Constitution* would be undermined. Such a granular definition would frustrate the long-term fulfilment of the purpose of the power conferred upon Parliament over both naturalisation and aliens. When the term "alien" in s 51(xix) is interpreted at the appropriate level of generality, both as a matter of etymology¹¹⁵ and as a matter of legal meaning¹¹⁶, it means a person who does not belong to the Australian political community. As Griffith CJ said in *Potter v Minahan*¹¹⁷, "every human being (unless outlawed) is a member of some community, and is entitled to regard the part of the earth occupied by that community as a place to which he may resort when he thinks fit". But although the meaning of "alien" can be simply stated, this

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

113 *Sue v Hill* (1999) 199 CLR 462 at 524-525 [162].

114 (2001) 207 CLR 391 at 427 [111].

115 *Love v The Commonwealth* (2020) 94 ALJR 198 at 208 [18], 215 [61]; 375 ALR 597 at 602, 612.

116 *Love v The Commonwealth* (2020) 94 ALJR 198 at 259 [302], 276 [403]; 375 ALR 597 at 672, 694.

117 (1908) 7 CLR 277 at 289.

case is yet another demonstration of the difficulty in the application of that meaning, as it evolves over time, in relation to British subjects¹¹⁸.

Alienage cannot be applied solely by reference to non-allegiance or non-citizenship

60 The meaning of "alien" in s 51(xix) does not correspond precisely with the concepts of either (i) non-subjecthood or non-allegiance or (ii) non-citizenship. To set the meaning by reference to either non-allegiance or non-citizenship would be to ascribe too narrow a scope for the evolution of application of that constitutional term. It is necessary to reiterate why "alien" was not, and is not, the simple antonym of either (i) a person who, as a subject, owes allegiance to the relevant sovereign or (ii) a person who is an Australian citizen.

61 One stable, but overly narrow, essential meaning of "alien" might have been that taken by Quick and Garran, who asserted in 1901 that an alien was "a person who owes allegiance to a foreign State, who is born out of the jurisdiction of the Queen, or who is not a British subject"¹¹⁹. On that approach, every British subject, born in a Dominion, who did not owe a foreign allegiance, was a non-alien. Similarly, in his dissenting judgment in *Singh v The Commonwealth*¹²⁰, McHugh J said that "the essential meaning – the connotation – of the term 'alien' was a person who did not owe permanent allegiance to the Crown". That essential meaning should not be adopted. To ascribe to the term "alien" the essential meaning of "non-subject" or, at an even greater level of specificity, "non-subject of the Queen" or "person not owing permanent allegiance to the Crown", would be to define the term at too great a level of specificity. Norms concerning subjecthood and allegiance were in a state of flux at the time of Federation, particularly due to the Royal Commission in 1868¹²¹. As the joint judgment in *Shaw* said, "[t]here never

118 See also *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391; *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28.

119 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 599.

120 (2004) 222 CLR 322 at 343 [38].

121 Great Britain, *Report of the Royal Commissioners for Inquiring into the Laws of Naturalization and Allegiance* (1869). See also *In re Stepney Election Petition; Isaacson v Durant* (1886) 17 QBD 54; Parry, *British Nationality* (1951) at 7; Parry, *Nationality and Citizenship Laws of The Commonwealth and of The Republic of Ireland* (1957) at 78-79.

was a common law notion of 'British subject' rendered into an immutable element of 'the law of the Constitution'"¹²².

62 The early understandings of how "alien" would be applied, and the early applications by this Court, were inconsistent with such an essential meaning that equated "alien" merely with a person not owing permanent allegiance to the Crown. Those applications in the Convention debates and in early decisions of this Court were underpinned by the very slippery, perhaps incoherent, notion of race even of persons who owed permanent allegiance to the Crown¹²³. Hence, in *Shaw*, Heydon J, a member of the majority, observed that "[i]t 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"¹²⁴.

63 An example of the way in which the slippery, possibly incoherent, notion of race underpinned this Court's understanding of the concept of alienage is the decision in *Robtelmes v Brennan*¹²⁵. The question before the Court was whether any head of power, including s 51(xix), of the *Constitution* supported s 8 of the *Pacific Island Labourers Act 1901* (Cth), which permitted the deportation from Australia of all Pacific Island labourers whose employment had concluded. Griffith CJ said of Pacific Islanders, including the appellant in that case, that "[t]hey are aliens; that is indisputable"¹²⁶. Barton J also said that it was "undeniable" that the aliens power extended to deporting Pacific Islanders¹²⁷. And O'Connor J began his judgment by comparing the exclusion of Pacific Islanders with the exclusion of those who were ethnically Chinese as aliens, in each case without regard to whether they were British subjects¹²⁸. This decision was reached by application of the concept of alienage through a racial lens, irrespective of considerations of British subjecthood. As Dr Prince observed of the racially based approach taken by this

122 (2003) 218 CLR 28 at 42 [28].

123 *Love v The Commonwealth* (2020) 94 ALJR 198 at 276-278 [404]-[409]; 375 ALR 597 at 694-697.

124 (2003) 218 CLR 28 at 87 [190].

125 (1906) 4 CLR 395.

126 (1906) 4 CLR 395 at 403.

127 (1906) 4 CLR 395 at 415.

128 (1906) 4 CLR 395 at 417.

Court¹²⁹, many Pacific Islanders were British subjects, including Torres Strait Islanders, those from British colonies such as Fiji and, after 1888, British New Guinea. And many others came from British protectorates such as the Solomon Islands and the Gilbert Islands or had been born in Queensland or married British subjects.

64 Although British subjecthood, embodying allegiance to the Queen, did not control the meaning of the term "alien" in s 51(xix), that concept nevertheless had a substantial effect on the early application of the meaning of "alien" as a person who is a foreigner to the Australian political community. The effect of allegiance on the application of the meaning of "alien" began to fade after the commencement of the *Nationality and Citizenship Act 1948* (Cth) ("the 1949 Act")¹³⁰. As I explained in *Love v The Commonwealth*¹³¹ by reference to the observations of Professor Parry, the 1949 Act was said to have had the effect that the concept of allegiance was "altogether swept away, together with all other rules of the common law respecting nationality".

65 Any suggestion that the essential meaning of "alien" is "non-citizen" has far less to commend it. In 1902, Salmond wrote that "[t]here are citizens in France and in the United States of America, but the law and language of England know of subjects only"¹³². The founders of the *Constitution* had also consciously rejected any constitutional notions of citizenship, in part because of the uncertainty of that concept¹³³. As Barton explained, "[c]itizens' is an undefined term, and is not

129 Prince, "'Australia's Most Inhumane Mass Deportation Abuse': *Robtelmes v Brennan* and Expulsion of the 'Alien' Islanders" (2018) 5(1) *Law and History* 117 at 133-134.

130 Subsequently renamed as the *Australian Citizenship Act 1948* (Cth) before being repealed and replaced by the *Australian Citizenship Act 2007* (Cth): see *Australian Citizenship (Transitional and Consequential) Act 2007* (Cth), Sch 1, item 42.

131 (2020) 94 ALJR 198 at 282-283 [430]; 375 ALR 597 at 703, referring to *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 441-442 [151].

132 Salmond, "Citizenship and Allegiance" (1902) 18 *Law Quarterly Review* 49 at 49.

133 *Love v The Commonwealth* (2020) 94 ALJR 198 at 283-284 [434]; 375 ALR 597 at 704, referring, amongst other matters, to *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 3 March 1898 at 1788, 1797, *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 8 February 1898 at 677, 2 March 1898 at 1751, and *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 2 March 1898 at 1761.

known to the Constitution"¹³⁴. Although, as explained below, norms of citizenship can have a strong effect on the *application* of the meaning of an "alien", to re-define the essential meaning of "alien" as "non-citizen" would effectively be a judicial amendment to the *Constitution*. It would also be contrary to basic constitutional principle.

66 In *Love v The Commonwealth*¹³⁵, multiple members of this Court acknowledged the existence of a constitutional limit upon the extent to which Parliament could affect the meaning of "alien" by legislation. This limit, which Gibbs CJ (with whom Mason and Wilson JJ agreed) had earlier regarded as clear in *Pochi v Macphee*¹³⁶ and which many other members of this Court have reiterated¹³⁷, was that the Commonwealth Parliament cannot "simply by giving its own definition of 'alien', 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". Whether such Commonwealth legislation involves a definition of "alien" or a definition of "citizen", the limit ensures that it is for the judiciary, and not for Parliament, to provide the final interpretation and application of the meaning of the *Constitution*. This is the principle of law recognised in *Marbury v Madison*¹³⁸ that is deeply embedded in the foundations of the *Constitution*.

67 In *Love v The Commonwealth*¹³⁹, as in this case, the Solicitor-General of the Commonwealth gave an example of a person who, whatever their status under statutory citizenship laws, would be beyond the aliens power due to the strength of that person's connection with the Australian political community. His example, which should be accepted as correct, is a person born in Australia, to two parents

134 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 3 March 1898 at 1786.

135 (2020) 94 ALJR 198 at 206 [7], 212 [50], 233 [168], 243 [236], 260 [310], 283 [433], 291 [466]; 375 ALR 597 at 600, 609, 636, 651, 673-674, 703-704, 714-715.

136 (1982) 151 CLR 101 at 109.

137 *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 185-186; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 435-436 [132], 469-470 [238], 490 [297], 491-492 [303]; *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 36 [9]; *Singh v The Commonwealth* (2004) 222 CLR 322 at 329 [4], 382-383 [151]; *Koroitamana v The Commonwealth* (2006) 227 CLR 31 at 54-55 [81].

138 (1803) 5 US 137.

139 (2020) 94 ALJR 198 at 273 [395], 286-287 [444]; 375 ALR 597 at 691, 708.

who are Australian citizens, who is not a citizen of another country, and who has not renounced their allegiance to Australia. Another example, recognised by a majority of this Court in *Love v The Commonwealth*, is Aboriginal Australians.

68 In *Pochi v Macphee*, Gibbs CJ considered that the limit on Parliament's ability to legislate over aliens would not be exceeded if Parliament treated as an alien a person who was born outside Australia, to parents who were not "Australians", and who had not been naturalised as an "Australian"¹⁴⁰. The Chief Justice was not considering the position of Aboriginal Australians. Rather, his point, correctly made, was that the meaning of a constitutional term is not dictated by the fluctuating content of legislation on a related subject.

69 Even putting to one side the error in defining the essential meaning of a constitutional term ("alien") by reference to a notion that (i) at best, was little understood and was evolving at Federation and (ii) conflates constitutional meaning with an exercise of legislative power (ie the statutory rules governing persons who are eligible to be citizens), there is a degree of circularity in treating a constitutional power to legislate over aliens as co-extensive with, and defined by, a power to legislate over anyone who is not a citizen. The power to legislate over citizens is itself derived "to a significant degree"¹⁴¹ from the constitutional power with respect to aliens¹⁴². Hence, the Commonwealth Parliament could not recite itself into power by using the *Australian Citizenship Act 2007* (Cth) to deny citizenship to "every Aboriginal Australian ... or ... every descendant of Australians of Chinese (or other) ethnicity"¹⁴³ and thereby acquire power over these groups under the aliens power. Nor is the grant of statutory citizenship a constitutional ratchet so that, unless a person renounces their citizenship, the grant under statute of citizenship becomes irrevocable, taking the person beyond the power over naturalisation and aliens. In short, the meaning of "alien" in the *Constitution* is not, and has never been, "any person who has not received Australian citizenship". Instead, the constitutional meaning requires a "search ... for the essential character

140 (1982) 151 CLR 101 at 109-110.

141 *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 40 [21].

142 See also *Love v The Commonwealth* (2020) 94 ALJR 198 at 283 [433]; 375 ALR 597 at 704, citing *Hwang v The Commonwealth* (2005) 80 ALJR 125 at 128 [10]; 222 ALR 83 at 86-87 and *Singh v The Commonwealth* (2004) 222 CLR 322 at 374-375 [124].

143 *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 61 [94].

of the constitutional idea of alienage"¹⁴⁴. That essential character is absence of membership of the Australian political community.

Norms that influence the application of the aliens power

70 Although neither non-allegiance nor non-citizenship is part of the essential meaning of "alien" and hence neither can dictate whether or not a person can be treated as falling outside the membership of the Australian political community, the scope of application of the aliens power over time has been heavily influenced by the concept of allegiance and, later, the concept of citizenship, particularly a person's place of birth (*ius soli*) and the citizenship of a person's parents (*ius sanguinis*)¹⁴⁵. The aliens power is also a partial source for the power to create statutory citizenship, which, in turn, assists to define the membership of the Australian political community.

71 At the time of Federation, the concepts of allegiance and subjecthood were powerful factors in the application of whether a person was a member of the Australian political community, notwithstanding that the concept of allegiance was complicated by a strong racial lens through which it was initially understood and applied. On this appeal, Mr Chetcuti relied heavily upon the concept of allegiance to assert that since he had arrived in Australia as a British subject with an allegiance to the Crown, and since (as he claimed) the Crown had not yet divided, he could not have been an alien when he arrived in Australia. The submissions of the parties therefore attempted to identify a point in time at which Australia achieved independence from the United Kingdom. These reasons follow the approach of the parties, but three points should be emphasised.

72 First, there is no magic date when independence was suddenly achieved by Australia. The move towards independence had a slow and incremental character. It is an example of "the gradualness, the extreme gradualness, of inevitability"¹⁴⁶. Secondly, although the relevant date in *Shaw* was said to be at the latest 26 January 1949, it is arguable that the Crown had divided earlier, so that by the time Mr Chetcuti arrived in Australia on 31 July 1948 he arrived as a British subject to a country where the sovereign had separate identity in relation to Australia. But the further back that a date on which Australian independence, and the division of the Crown, is said to have occurred, the more care must be taken that history is not being revised contrary to the political and social facts and

144 *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 61 [94].

145 See *Love v The Commonwealth* (2020) 94 ALJR 198 at 285-287 [441]-[446]; 375 ALR 597 at 706-708.

146 *R v Hush; Ex parte Devanny* (1932) 48 CLR 487 at 518.

circumstances at the time. Thirdly, and in any event, allegiance was only a factor in the application of the meaning of "alien". The factors governing the application of constitutional meaning can change over time. From 26 January 1949, the factor of allegiance began to be overtaken by a focus on citizenship.

Australian independence and the absence of any magic date

73 There is no magic date when, like Cinderella at midnight, all British subjects who had no other connection to Australia which was capable of taking them outside s 51(xix) suddenly became capable of being treated as aliens in Australia. Rather, the process of Australian independence from the United Kingdom, as the special case before the primary judge pointed out in painstaking detail, involved incremental development marked by a number of significant political and legal steps following Federation in 1901.

74 The incremental development was, in large part, political. In 1917, a constitutional resolution at the Imperial War Conference recognised that readjustment of the constitutional recognition of the different parts of the British Empire should be based upon "a full recognition of the Dominions as autonomous nations of an Imperial Commonwealth". On 30 July 1918, the Imperial War Cabinet resolved that the Prime Ministers of the Dominions "have the right of direct communication with the Prime Minister of the United Kingdom and vice versa". That resolution was described the same year by Pollock as the beginning of "the building" of a new constitution which would treat the Dominions as "partners on an equal footing"¹⁴⁷. Following the Treaty of Versailles, Viscount Grey described the "self-governing Dominions" as "free communities, independent as regards all their own affairs, and partners in those that concern the Empire at large"¹⁴⁸. At the Imperial Conference of 1930 it was resolved that the King would act in appointing a Governor-General of a Dominion by advice of his Ministers in the Dominion concerned. In 1931, when Sir Isaac Isaacs was appointed as the Governor-General of Australia under s 2 of the *Constitution*, the appointment was therefore made by the King on the advice of his Australian Ministers.

¹⁴⁷ Pollock, "Notes: The League of Nations" (1918) 34 *Law Quarterly Review* 344 at 346.

¹⁴⁸ "Occasional Notes" (1920) 149 *The Law Times* 200 at 200.

75 Part of this political evolution was the gradual recognition of the division of the Crown with respect to the Commonwealth of Australia¹⁴⁹. On 28 June 1919, the Treaty of Versailles was signed on behalf of the British Empire but also contained indented signatures for the Dominions, including a signature for the Commonwealth of Australia by the Prime Minister and Minister for the Navy. In 1926, the Balfour Declaration declared the Dominions to be "autonomous Communities within the British Empire, equal in status, in no way subordinate one to another ... though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations"¹⁵⁰. Other aspects of the Balfour Declaration were less clear in their recognition of Australian independence¹⁵¹. It might be said that, although the Balfour Declaration was the "declaration of independence" of the Dominions, the Imperial Conference "recognised that this principle was still not reflected in reality"¹⁵². At that time there also remained strongly held views of the unity of the Crown¹⁵³. However, the recognition of Her Majesty as the Queen of Australia in the *Royal Style and Titles Act 1973* (Cth)¹⁵⁴ was a formal recognition of a division of the Crown in relation to Great Britain and the Commonwealth of Australia¹⁵⁵.

76 Despite these large strides in political theory towards Australian independence, there was still a substantial degree of practical integration between Australia and the United Kingdom at the time that the 1949 Act came into effect on 26 January 1949. Immediately prior to that date, there was no statutory concept of an Australian citizen. At that time, Australian passports could be issued to

149 Compare the different evolution of the arguably independent Crown in relation to the States discussed in Twomey, *The Australia Acts 1986: Australia's Statutes of Independence* (2010) at 461-472.

150 Imperial Conference, *Summary of Proceedings* (1926) at 10.

151 Winterton, "The Evolution of a Separate Australian Crown" (1993) 19 *Monash University Law Review* 1 at 7-8.

152 Twomey, "*Sue v Hill* – The Evolution of Australian Independence", in Stone and Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (2000) 77 at 83-84.

153 See Winterton, "The Evolution of a Separate Australian Crown" (1993) 19 *Monash University Law Review* 1 at 13-16, referring to the views of Berriedale Keith, Leo Amery, Sir Robert Garran, Sir Cecil Hurst, Sir John Latham, and Philip Noel Baker.

154 Passed in accordance with s 58 of the *Constitution*.

155 *Southern Centre of Theosophy Inc v South Australia* (1979) 145 CLR 246 at 261.

British subjects¹⁵⁶ and a relevant qualification for election to the House of Representatives was that the person "must be a subject of the King, either natural born or for at least five years naturalized under a law of the United Kingdom or of the Commonwealth"¹⁵⁷. Even after 26 January 1949, when statutory qualifications for election were amended on 22 April 1949, this requirement was replaced with a requirement that the person "must be a British subject"¹⁵⁸. And the issue of Australian passports remained possible for British subjects who were not Australian citizens¹⁵⁹.

77 Further, although Australia might in theory have had the power to make a declaration of war¹⁶⁰, on 3 September 1939 Prime Minister Menzies announced that Great Britain was at war with Germany and that "as a result, Australia is also at war". On the other hand, on 9 December 1941 Prime Minister Curtin independently announced that Australia had declared war against the Japanese Empire following accession by the King the previous day to the Prime Minister's request for assignment to the Governor-General of the power to declare and proclaim a state of war between the Commonwealth of Australia and Finland, Hungary, Rumania, and the Japanese Empire¹⁶¹.

78 Apart from the legislation already discussed, the incremental development of Australian sovereignty over this period also included: the *Nationality Act 1920* (Cth); the *Commonwealth Public Service Act 1922* (Cth); the *Statute of Westminster 1931* (UK); and the *Aliens Deportation Act 1946* (Cth). These legislative steps to complete independence were arguably not wholly concluded until the passage of the *Australia Acts 1986* (Cth and UK). But a significant legislative step, which was the focus of this appeal, was the enactment of the 1949 Act.

156 *Passports Act 1938* (Cth), s 7(1).

157 *Commonwealth Electoral Act 1918* (Cth), s 69(1)(b), as amended by *Commonwealth Electoral Act 1925* (Cth), s 4. See also *Constitution*, s 34.

158 *Commonwealth Electoral Act 1918* (Cth), s 69(1)(b), as amended by *Commonwealth Electoral Act 1949* (Cth), s 5(a).

159 *Passports Act 1938* (Cth), s 7(1), as amended by *Passports Act 1948* (Cth), s 4.

160 Compare Twomey, "Sue v Hill – The Evolution of Australian Independence", in Stone and Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (2000) 77 at 86.

161 *Commonwealth of Australia Gazette*, No 104, 7 April 1942 at 859.

The 1949 Act and the *Shaw* decision

79 As explained earlier in these reasons, in *Shaw* a majority of this Court held that British subjects who entered Australia as citizens of the United Kingdom and colonies after the 1949 Act took effect, and who had not fulfilled the criteria to be Australian citizens, were capable of being treated as falling within s 51(xix) as aliens to the Australian community. No party challenged that conclusion, although Mr Chetcuti submitted that the date could not be pushed further back from 26 January 1949 to the date of his arrival on 31 July 1948.

80 The genesis of the 1949 Act was the British Commonwealth Conference on Nationality and Citizenship in February 1947, which itself had followed consideration in 1945 of the creation of Australian citizenship and the creation of Canadian citizenship in 1946¹⁶². The Report of that conference recorded the general view of the conference that it would be desirable to adopt a scheme of legislation which combined two matters: first, the ability of each country to determine who are its citizens; and secondly, the maintenance of the common status of British subjects throughout the Commonwealth by recognition of the citizens of particular countries of the Commonwealth as British subjects¹⁶³. Most Commonwealth countries subsequently adopted this model in domestic legislation.

81 Consistently with this model, the 1949 Act created the new concept of an Australian citizen, with citizenship broadly arising from categories of birth, descent, registration, and naturalisation¹⁶⁴, and with Australian citizenship being lost in circumstances including the acquisition of foreign citizenship¹⁶⁵. There were express assurances in the second reading speech of the 1949 Act that British subjects would "continue to be free from the disabilities and restrictions that apply to aliens"¹⁶⁶. Section 5(1) of the 1949 Act defined an alien as a "person who is not a British subject, an Irish citizen or a protected person". By s 7, which was common

162 See Australia, House of Representatives, *Parliamentary Debates* (Hansard), 30 September 1948 at 1060, 1062 and the *Canadian Citizenship Act 1946* (Can).

163 *British Commonwealth Conference on Nationality and Citizenship* (London, February 1947): *Report with Appendices* (1947) at 3 [8]-[9].

164 See *Love v The Commonwealth* (2020) 94 ALJR 198 at 285 [441]; 375 ALR 597 at 706-707.

165 *Nationality and Citizenship Act 1948* (Cth), s 17.

166 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 30 September 1948 at 1062.

to the model applied by most Commonwealth countries that adopted the model¹⁶⁷, a person was a British subject if the person was an Australian citizen or, by an enactment in a relevant country, was a citizen of that country. The relevant countries were: the United Kingdom and colonies, Canada, New Zealand, the Union of South Africa, Newfoundland, India, Pakistan, Southern Rhodesia, and Ceylon¹⁶⁸.

82 The 1949 Act contained a transitional provision, s 25, which, subject to an exception not presently relevant, conferred Australian citizenship on all British subjects who: (i) were born in Australia and would have been an Australian citizen under s 10 at the time of birth if that section had been in force; (ii) were born in New Guinea; (iii) were naturalised in Australia; or (iv) had been, immediately prior to the date of commencement of the 1949 Act, ordinarily resident in Australia or New Guinea (or partly resident in both), for a period of at least five years.

83 The gap in the transitional provision meant that not all British subjects became Australian citizens. In broad terms, the new Australian citizenship was not automatically conferred upon British subjects who had migrated to Australia less than five years before 26 January 1949. Those persons could become Australian citizens only by registration, subject to conditions including at least five years of residence in Australia¹⁶⁹. British subjects could not be naturalised. Naturalisation was reserved for aliens or protected persons¹⁷⁰.

84 Despite the gap in the transitional provision, and consistently with the intention of the 1949 Act that British subjects would continue to be free from the restrictions that applied to aliens, those British subjects who were not Australian citizens could still be issued with Australian passports¹⁷¹. Indeed, approximately a decade after the 1949 Act, the legislation was still seen as not having had the effect

167 Parry, *Nationality and Citizenship Laws of The Commonwealth and of The Republic of Ireland* (1957) at 93.

168 1949 Act, s 7(2).

169 1949 Act, s 12(1)(b).

170 1949 Act, s 14(2).

171 *Passports Act 1938* (Cth), s 7(1), as amended by *Passports Act 1948* (Cth), s 4.

of making any British subject an alien. As Professor Parry observed in 1957 of the s 7 common clause¹⁷²:

"And though not every country of the Commonwealth has enacted this clause [(ie not South Africa or Ceylon)], the situation has at least been produced that no citizen of any country of the Commonwealth is an alien in any other. Where, therefore, under the law of any such country, the distinction between subject and alien – or between non-alien and alien – is drawn, the British subject who is not a local citizen, equally with the local citizen, is not to be classed as an alien."

Professor Parry concluded that the introduction of local citizenship in Commonwealth countries "did not of itself prejudice the non-citizen [British] subject", but he observed that "this is a situation which cannot remain constant"¹⁷³.

85 The conclusion of the majority of this Court in *Shaw* – that British subjects were capable of being treated as aliens within s 51(xix) of the *Constitution* since the 1949 Act took effect on 26 January 1949 – did not, however, rest upon the erroneous premise that the content of the constitutional term "alien" had been defined by the new legislative creation of Australian citizenship by the 1949 Act. Instead, referring to the list of Commonwealth countries from which people might be British subjects, the joint judgment in *Shaw* said that it could "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"¹⁷⁴.

86 To express the conclusion of the majority in *Shaw* in other words, their Honours were saying that by at least the time the 1949 Act took effect the prior political and social facts and circumstances were such that the 1949 Act could combine with those facts and circumstances with the effect that all British subjects who did not otherwise have any strong connection to Australia to take them outside s 51(xix) were capable of being treated as aliens. Contrary to the views that Professor Parry had expressed approximately a decade after the commencement of the 1949 Act, the combination of political and social facts and circumstances in Australia's progression to independence had coalesced at the latest by 26 January 1949 to such a degree of independence that from at least that date

172 Parry, *Nationality and Citizenship Laws of The Commonwealth and of The Republic of Ireland* (1957) at 93.

173 Parry, *Nationality and Citizenship Laws of The Commonwealth and of The Republic of Ireland* (1957) at 94.

174 (2003) 218 CLR 28 at 40 [22].

British subjecthood, by itself, was not a sufficient basis to resist being treated as an alien.

The dangers of revisionist history

87 It can be accepted that from 26 January 1949 the relevant political and social facts and circumstances meant that, without other factors to take them outside s 51(xix), all British subjects were capable of being treated as aliens within s 51(xix) of the *Constitution*. But as this date is pushed back further – the Commonwealth's alternative submissions being 1942, 1931, 1926, or 1901 – there is a corresponding increase in the likelihood of this Court retrospectively revising the historical political and social facts and circumstances that determined those who fell outside the conception of an alien at the time in question.

88 The notion of an Australian political community existed long before statutory citizenship came into existence in 1949. It is in this sense of an independent Australian political community that, from the time of Federation and long before the concept of Australian citizenship had been legislated, members of this Court spoke loosely of "Australian citizens"¹⁷⁵ to describe what Isaacs J called "the community known as the Australian people"¹⁷⁶. In the early years after Federation, that conception was one that was strongly associated with British subjecthood and was not generally distinguished from it, albeit that the membership of the Australian political community was sometimes applied through a racial lens. This Court said in 1906 that it was not "disposed to give any countenance to the novel doctrine that there is an Australian nationality as distinguished from a British nationality"¹⁷⁷. But in 1929 it was observed in the Report of the Conference on the Operation of Dominion Legislation that the common status as a British subject "is in no way inconsistent with the recognition within and without the Commonwealth of the distinct nationality possessed by the nationals of the individual states of the British Commonwealth"¹⁷⁸. And, as

175 *R v Sutton* (1908) 5 CLR 789 at 807; *The Commonwealth v Kreglinger & Fernau Ltd and Bardsley* (1926) 37 CLR 393 at 414; *Ex parte Nelson [No 2]* (1929) 42 CLR 258 at 275; *Gonzwa v The Commonwealth* (1944) 68 CLR 469 at 476; *Attorney-General (Vict) v The Commonwealth* (1945) 71 CLR 237 at 276.

176 *Potter v Minahan* (1908) 7 CLR 277 at 308.

177 *Attorney-General for the Commonwealth v Ah Sheung* (1906) 4 CLR 949 at 951.

178 *Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation, 1929* (1930) Cmd 3479 at 25 [78]. The Australian representatives at the Conference were Sir William Harrison Moore and Major Casey.

discussed above, from the time that the 1949 Act took effect the relevance of British nationality and the concept of allegiance were, at least, in steep decline.

89 In the early stages of the inexorable progression towards Australian independence from the United Kingdom, and whether or not through the racial lens with which the Australian political community was often seen at that time, it would have been thought absurd to suggest that all British subjects could be treated as foreigners to the Australian political community; that is, as aliens within s 51(xix) of the *Constitution*. But it is unnecessary in this case to ask how much earlier than 26 January 1949, if at all, a British subject could be treated by the Commonwealth Parliament as an alien within s 51(xix). The reason it is unnecessary to ask that question in this case, and the reason it may be unnecessary to ask it in any other case, lies in the difference between essential constitutional meaning and its application, to which reference was made earlier in these reasons. The essential meaning of "alien" in s 51(xix) is a foreigner to the Australian political community. The application of that essential meaning will depend upon the relevant facts and circumstances that exist at the time of application; here, the time of application being the point at which Mr Chetcuti was detained under s 189 of the *Migration Act* following the cancellation of his visa in 2017.

90 There is no person whose constitutional status with respect to alienage is immune from any change in facts and circumstances and is therefore indelible. Even a person who today is outside the application of s 51(xix), such as an Aboriginal Australian or a person born in Australia to two Australian citizen parents, might tomorrow be within the application of that power. In the former example, a person might cease to identify or be recognised as an Aboriginal Australian. In the latter example, the person might renounce their Australian citizenship conferred by statute¹⁷⁹ and accept foreign citizenship, thereby ending their membership of the Australian political community.

91 This point is equally true of other changes in political and social facts and circumstances. The circumstance that at some time before 26 January 1949 at least some British subjects were incapable of being treated as aliens within s 51(xix) is not immutable. Allegiance had ceased to be understood as indelible shortly before

179 See *Australian Citizenship Act 2007* (Cth), s 12(1)(a). See also s 33.

Australian Federation¹⁸⁰. The essence of the reasoning of the majority in *Shaw* was therefore as follows¹⁸¹:

"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 United Kingdom and colonies under the [*British Nationality Act 1948* (UK)]."

Back to Mr Chetcuti

92 Whether or not Mr Chetcuti fell within the conception of an alien in s 51(xix) of the *Constitution* when he arrived in Australia on 31 July 1948 is not critical to the resolution of this appeal. The issue is whether he was within that conception when the Minister purported to apply the terms of the *Migration Act* to him in 2017.

93 The gap in the transitional provision in the 1949 Act meant that Mr Chetcuti did not become an Australian citizen on 26 January 1949 because he had not been resident in Australia for five years before the commencement of the 1949 Act. Mr Chetcuti never became registered as an Australian citizen under the 1949 Act. In 1964, Mr Chetcuti became a citizen of Malta on the occurrence of Maltese independence¹⁸². He did not subsequently become a citizen of this country under the *Australian Citizenship Act 2007* (Cth).

94 In 2017, therefore, Mr Chetcuti's relevant circumstances were as follows: he was born outside Australia; he had no Australian parents; he was not an Australian citizen given that he had never been registered as an Australian citizen and had not been naturalised; and he was a citizen of a foreign country. On an application since at least 2017 of the meaning of "alien" – a foreigner to the Australian political community – he was capable of being treated as an alien within s 51(xix) and was therefore a person to whom the *Migration Act* could apply.

180 See Great Britain, *Report of the Royal Commissioners for Inquiring into the Laws of Naturalization and Allegiance* (1869) at v; *Naturalization Act 1870* (UK). See also Wishart, "Allegiance and Citizenship as Concepts in Constitutional Law" (1986) 15 *Melbourne University Law Review* 662 at 698-699.

181 (2003) 218 CLR 28 at 42 [27].

182 *Constitution of Malta 1964*, s 23(1).

39.

Conclusion

95 The appeal must be dismissed with costs.

96 STEWARD J. Some constitutional issues require consideration of "a unique mixture of history, statutory interpretation, and some political philosophy"¹⁸³. History looms large in this appeal.

97 This Court has previously acknowledged that in 1900 no subject of the British Crown was an alien within any part of the British Empire¹⁸⁴. At that time, a "subject" of the British Crown referred to a status held by a person independently from any Act of the Imperial Parliament or any colonial parliament. As Quick and Garran observed in 1901¹⁸⁵: "[t]he rule of the common law is that every person born out of the British Dominions is an alien, and that every person born within British Dominions is a British subject".

98 This state of affairs continued after federation. In *Nolan v Minister for Immigration and Ethnic Affairs*, the majority said¹⁸⁶:

"Even after federation, Australia did not immediately enjoy the international status of an independent nation. The terms 'British subject' and 'subject of the Queen' were essentially synonymous. The British Empire continued to consist of one sovereign State and its colonial and other dependencies with the result that there was no need to modify either the perception of an indivisible Imperial Crown or the doctrine that, under the common law, no subject of the Queen was an alien in any part of Her Majesty's dominions: see, eg, Co Litt 129a, 129b; Bract 427b; *Blackstone's Commentaries*, 8th ed, vol 1, p 366."

183 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 514 [108] per Callinan J, quoting Sir Robert Menzies, *Afternoon Light* (1967) at 320.

184 *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 183 per Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ.

185 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 599.

186 (1988) 165 CLR 178 at 183-184 per Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ.

99 Thus, in 1906 Griffith CJ, Barton and O'Connor JJ observed¹⁸⁷:

"We are not disposed to give any countenance to the novel doctrine that there is an Australian nationality as distinguished from a British nationality".

100 At some point following federation, British subjects, not born in Australia, became aliens of this country. That is because they owed allegiance to the Crown in right of the United Kingdom as opposed to the Crown in right of Australia¹⁸⁸. This occurred when the indivisible Imperial Crown manifested itself as the Crown in right of Australia. It is impossible to identify any bright line as to when this took place; in fact, it took place over time. As the majority in *Nolan* also said¹⁸⁹:

"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*. That Act and statutes of other Commonwealth countries, particularly the *British Nationality Act 1948* (UK), reflected and formalized the diminished importance of the notion of 'British subject'. It became accepted as a 'truism' that, although 'there is only one person who is the Sovereign ... , ... in matters of law and government the Queen of the United Kingdom ... is entirely independent and distinct from' the Queen of (eg) Canada or Australia: per May LJ, *Reg v Foreign Secretary; Ex parte Indian Association*." (footnote omitted)

101 Nonetheless, in *Shaw v Minister for Immigration and Multicultural Affairs*¹⁹⁰ a bright line was identified by this Court. A date was chosen. It was 26 January 1949¹⁹¹. On that day, the *Nationality and Citizenship Act 1948* (Cth)

187 *Attorney-General for the Commonwealth v Ah Sheung* (1906) 4 CLR 949 at 951.

188 See, eg, *Sue v Hill* (1999) 199 CLR 462 at 503 [96] per Gleeson CJ, Gummow and Hayne JJ.

189 *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 184 per Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ.

190 (2003) 218 CLR 28.

191 *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 43 [32] per Gleeson CJ, Gummow and Hayne JJ.

("the 1948 Citizenship Act") came into effect. That Act created, for the first time, the statutory concept of Australian citizenship. From that date, a British subject arriving in Australia did so as an alien. Gleeson CJ, Gummow and Hayne JJ said¹⁹²:

"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." (footnote omitted)

102 The 26th of January 1949 should be accepted as a necessary and sufficient date for the emergence of the Crown in right of Australia. No earlier date should be accepted.

103 In *Pochi v Macphee*, Gibbs CJ described the breadth of the aliens power in s 51(xix) of the *Constitution* in the following terms¹⁹³:

"the Parliament can in my opinion 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."

104 Because of Australian history, the foregoing statement of power requires two qualifications. First, in 1900, an alien was a person born outside the British Empire, rather than Australia. Secondly, British subjects entering Australia prior to 26 January 1949 are not aliens for the purposes of the *Constitution*. Those subjects "could not possibly answer the description of 'aliens' in the ordinary understanding of the word"¹⁹⁴. For the reasons that follow, Mr Chetcuti was not an alien when he arrived in Australia in 1948. Nor did he subsequently become an alien on 26 January 1949. He falls within the foregoing qualifications and is therefore excluded from the reach of the aliens power.

192 *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 43 [32].

193 (1982) 151 CLR 101 at 109 (Mason and Wilson JJ agreeing).

194 *Pochi v Macphee* (1982) 151 CLR 101 at 109 per Gibbs CJ (Mason and Wilson JJ agreeing).

105 In that respect, Mr Chetcuti's status as a non-alien is not denied because he is not an Australian citizen. The concepts of alienage and non-citizenship may overlap, but they are not synonymous¹⁹⁵. For example, for a period of time, persons born in Papua New Guinea were citizens of Australia, but that status did not entitle Papuans to enter or permanently reside in Australia¹⁹⁶. In *Singh v The Commonwealth*, Gummow, Hayne and Heydon JJ observed that the "central characteristic" of the status of an alien is "owing obligations (allegiance) to a sovereign power other than the sovereign power in question (here Australia)"¹⁹⁷. In Australia, the sovereign power may, in colloquial terms, be expressed as the Commonwealth of Australia. But as a matter of the law of alienage, allegiance to a sovereign power is expressed as allegiance to the Queen in right of Australia¹⁹⁸. In that respect, the reference to a "subject of the Queen" in s 117 of the *Constitution* is now necessarily a reference to the Queen in right of Australia¹⁹⁹.

Background

106 Mr Chetcuti was born in Malta in 1945. He arrived in Australia, before 26 January 1949, on 31 July 1948. Until it obtained independence in 1964, Malta was a British colony²⁰⁰. Its people had only recently received the George Cross for their gallantry during the Second World War. Mr Chetcuti was thus a British

195 See *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 54 per Gaudron J; *Singh v The Commonwealth* (2004) 222 CLR 322 at 374 [122] per McHugh J, 382 [149]-[150] per Gummow, Hayne and Heydon JJ.

196 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439 at 445 [1], 447 [6], 449 [12], 454-455 [22] per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ, 471 [76] per Kirby J.

197 (2004) 222 CLR 322 at 383 [154], 398 [200].

198 cf *Sue v Hill* (1999) 199 CLR 462 at 498-499 [84]-[85] per Gleeson CJ, Gummow and Hayne JJ.

199 *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 186 per Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 432 [123], 435 [131] per McHugh J, 495 [311] per Kirby J.

200 Her Majesty the Queen remained Malta's Head of State for a further 10 years until 1974, when Malta transitioned from a monarchical to a Republican constitution: *Constitution of Malta*, s 1(1).

subject²⁰¹. He was also not an "alien" when he arrived in Australia for the purposes of the *Nationality Act 1920* (Cth) or the *Aliens Act 1947* (Cth). Pursuant to the former Act, an "alien" was defined to be "a person who is not a British subject"; a "British subject" was, amongst other things, defined to mean "a person who is a natural-born British subject"²⁰². The definition of "alien" in the latter Act also excluded British subjects²⁰³. As properly conceded by the Solicitor-General of the Commonwealth, upon arrival in Australia Mr Chetcuti was, under Australian law, the same "British subject" as a person who had been born in this country.

107 On 30 July 1948, the day before Mr Chetcuti's arrival in Australia, the Imperial Parliament passed the *British Nationality Act 1948* (UK). When that Act took legal effect, on 1 January 1949, Mr Chetcuti also became a citizen of the United Kingdom. Shortly thereafter, the *1948 Citizenship Act* came into effect. That Act also defined the word "alien" as, amongst other things, "a person who is not a British subject"²⁰⁴. By s 7(1), a person who, under the *1948 Citizenship Act*, was an Australian citizen was also "by virtue of that citizenship ... a British subject". In addition, pursuant to ss 7(2) and 8(1), persons who were citizens of the "United Kingdom and Colonies, Canada, New Zealand, the Union of South Africa, Newfoundland, India, Pakistan, Southern Rhodesia and Ceylon" and Ireland²⁰⁵, were also, by reason of their citizenship, British subjects. The purpose of this arrangement is explained below.

108 In 1964, Mr Chetcuti automatically became a citizen of Malta²⁰⁶. He never became an Australian citizen, but in 1994 Mr Chetcuti was "taken to have been

201 British subjecthood was initially conferred on Mr Chetcuti from birth pursuant to the *British Nationality and Status of Aliens Act 1914* (UK). However, it was an agreed fact that he ceased to be a British subject from 1964, by virtue of s 2 of the *Malta Independence Act 1964* (UK), to 1970, when he regained his status as a British subject pursuant to s 6 of the *Citizenship Act 1969* (Cth).

202 *Nationality Act 1920* (Cth), s 5(1).

203 *Aliens Act 1947* (Cth), s 4.

204 *Nationality and Citizenship Act 1948* (Cth), s 5(1).

205 Provided that the Irish citizen gave "notice in the prescribed form and manner to the Minister claiming to remain a British subject" on certain grounds.

206 Section 23(1) of the *Constitution of Malta* relevantly provided that every person born in Malta, and who was "a citizen of the United Kingdom and Colonies" on the day before 21 September 1964, became a Maltese citizen.

granted an absorbed person visa"²⁰⁷. In 2019, his absorbed person visa was cancelled pursuant to s 501 of the *Migration Act 1958* (Cth)²⁰⁸. The issue for determination is whether he is an "alien" for the purposes of the *Constitution* and therefore subject to Div 8 of Pt 2 of the *Migration Act*. If he is an "alien", he may be removed to Malta as an unlawful non-citizen pursuant to s 198 of that Act, provided that his removal is otherwise lawful.

109 Whilst the *1948 Citizenship Act* categorised Mr Chetcuti as a "British subject", and accorded him certain rights and privileges as such, he was, and otherwise remained, a British subject because he was a natural-born British subject²⁰⁹. That status, as described in *Nolan*²¹⁰, did not depend upon any Act of the Federal or Imperial Parliament.

110 In the years that immediately followed the enactment of the *1948 Citizenship Act*, those British subjects in Australia who were not Australian citizens, as in the case of Mr Chetcuti, were: eligible to vote²¹¹, eligible to sit as members of the House of Representatives or in the Senate²¹², eligible to become

207 *Migration Act 1958* (Cth), s 34, formerly, in 1994, s 26AB as inserted by the *Migration Legislation Amendment Act 1994* (Cth).

208 However, Mr Chetcuti's visa had been considered for cancellation on character grounds on five occasions. He has been detained in immigration detention since 2017 following the first purported cancellation of his absorbed person visa.

209 When he arrived, Mr Chetcuti was also a British subject by reason of the *British Nationality and Status of Aliens Act 1914* (UK).

210 *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 183-184 per Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ. See also *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 428-429 [114]-[115] per McHugh J, 440-441 [148]-[149] per Gummow and Hayne JJ, 481-482 [273] per Kirby J.

211 *Commonwealth Electoral Act 1949* (Cth), s 3. From 1987, eligibility was limited to Australian citizens and those British subjects on the electoral roll before 26 January 1984: *Statute Law (Miscellaneous Provisions) Act (No 2) 1985* (Cth), Sch 1.

212 *Commonwealth Electoral Act 1918* (Cth), s 69 as amended by *Commonwealth Electoral Act 1949* (Cth), s 5. See also Australia, House of Representatives, *Parliamentary Debates* (Hansard), 30 September 1948 at 1062.

public servants²¹³, required to register for national service from 1951²¹⁴, and eligible to be issued with an Australian passport²¹⁵. Prior to 1976, a person's nationality was recorded in the census as either "British" or "foreign"²¹⁶. It is not wholly accurate to describe those attributes merely as "special advantages" conferred on a "class of aliens"²¹⁷; rather, for the reasons set out below, those attributes reflected the status, as an historical fact, of British subjects who had arrived in Australia before 26 January 1949 and for a period of time after.

111 Two issues arise for consideration. First, had the sovereign power of the United Kingdom and Australia already divided when Mr Chetcuti arrived in 1948? In other words, had Australia become an independent sovereign nation *before* 26 January 1949? Secondly, if it had not, when that division took place subsequently, did Mr Chetcuti then become an alien? The learned primary judge answered the first question by concluding that Australia became an independent sovereign nation, with its own King, when the Commonwealth Parliament enacted, in 1942, the *Statute of Westminster Adoption Act 1942* (Cth)²¹⁸. On that basis, it followed that Mr Chetcuti, who was born in Malta in 1945, and thus was a British subject owing allegiance to the Crown in right of the United Kingdom as opposed to the Crown in right of Australia, had arrived in Australia as an alien²¹⁹.

213 *Commonwealth Public Service Act 1922* (Cth), s 33(1)(a). In 1984, this requirement was changed to that of being an Australian citizen: *Public Service Reform Act 1984* (Cth), s 26(b).

214 *National Service Act 1951* (Cth), s 10; *Defence Act 1965* (Cth), s 17. From 1992, this requirement was omitted: *Defence Legislation Amendment Act 1992* (Cth), s 6.

215 *Passports Act 1948* (Cth), s 4. Australia stopped issuing passports to British subjects in 1984: *Passports Amendment Act 1984* (Cth), s 4.

216 See, eg, *Census of the Commonwealth of Australia 1911, Vol I – Statistician's Report* at 62, 118.

217 *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 40 [22] per Gleeson CJ, Gummow and Hayne JJ.

218 *Chetcuti v The Commonwealth* (2020) 95 ALJR 1 at 10-11 [49] per Nettle J; 385 ALR 1 at 12.

219 *Chetcuti v The Commonwealth* (2020) 95 ALJR 1 at 12 [52] per Nettle J; 385 ALR 1 at 14.

Was Mr Chetcuti an alien on his arrival in 1948?

112 One must commence first with the language of the *Constitution*. It makes no reference to a citizen or to a non-citizen; these are statutory concepts found in, for example, the *Australian Citizenship Act 2007* (Cth) and the *Migration Act*. Indeed, it is well established and accepted that an express citizenship power was not included in s 51 of the *Constitution*²²⁰. Instead, the *Constitution* relevantly refers to an "alien" (s 51(xix)) and to a person who is a "subject of the Queen" (s 117)²²¹. In 1901, the "Queen" meant the "Crown of the United Kingdom of Great Britain and Ireland"²²². At that time, a "subject of the Queen" was, therefore, a reference to one of Her Majesty's subjects within one indivisible British Empire. So much was confirmed in *Nolan*²²³.

113 For these reasons, and with respect, the Commonwealth's notice of contention that a British subject, not born in Australia, could be treated as an alien upon arrival in Australia from the date of federation, must be rejected. It was put by the Commonwealth that once a new Australian body politic came into existence in 1901, with a "separate distinct membership", it followed that the "Commonwealth Parliament must have had the power to define the criteria for the membership of that body politic". With respect, that submission may be logical, but it pays insufficient attention to history. In 1901, there was no "separate distinct membership" of the body politic comprising federated Australia. Rather, there was "separate distinct membership" of the British Empire, and its members comprised, not citizens of diverse British Dominions, but subjects of the Queen²²⁴.

220 See, eg, *Singh v The Commonwealth* (2004) 222 CLR 322 at 341 [31] per Gleeson CJ, 345 [45], 366-367 [101]-[105] per McHugh J, 395-396 [191]-[192] per Gummow, Hayne and Heydon JJ, 407 [231] per Kirby J, 423 [289]-[292] per Callinan J; Rubenstein, *Australian Citizenship Law in Context* (2002) at 30; *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 3 March 1898 at 1780-1802.

221 In different contexts, the *Constitution* also refers, in a number of provisions, to the "people" of the various States and of Australia: see, eg, covering cl 3.

222 Preamble to the *Constitution*.

223 *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 183-184 per Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ.

224 See *Attorney-General for the Commonwealth v Ah Sheung* (1906) 4 CLR 949 at 951 per Griffith CJ, Barton and O'Connor JJ; *Nolan v Minister for Immigration and*

114 Nothing had changed by 1920. The Crown remained "one and indivisible". In *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*, Knox CJ, Isaacs, Rich and Starke JJ said²²⁵:

"The Constitution was established by the Imperial Act 63 & 64 Vict c 12. The Act recited the agreement of the people of the various colonies, as they then were, 'to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established.' 'The Crown,' as that recital recognizes, is one and indivisible throughout the Empire. Elementary as that statement appears, it is essential to recall it, because its truth and its force have been overlooked, not merely during the argument of this case, but also on previous occasions. Distinctions have been relied on between the 'Imperial King,' the 'Commonwealth King' and the 'State King.' It has been said that the Commonwealth King has no power to bind the first and the last, and, reciprocally, the last cannot bind either of the others. The first step in the examination of the Constitution is to emphasize the primary legal axiom that the Crown is ubiquitous and indivisible in the King's dominions. Though the Crown is one and indivisible throughout the Empire, its legislative, executive and judicial power is exercisable by different agents in different localities, or in respect of different purposes in the same locality, in accordance with the common law, or the statute law there binding the Crown." (citations omitted)

115 In 1944, four years before Mr Chetcuti's arrival in Australia and subject to adoption of the *Statute of Westminster 1931* (UK) (as to which, see below), nothing again would appear to have changed. In *Minister for Works (WA) v Gulson*, Rich J observed that "[i]t has been decided by the highest authority that, in constitutional theory, the Crown is one and indivisible"²²⁶. His Honour referenced an earlier advice of the Privy Council in *Williams v Howarth*²²⁷. That case concerned an action by a soldier of the second New South Wales contingent, who had served in the Boer War, to recover 10 shillings per day said to be owed to him by the New South Wales Government (he had otherwise been paid his 10 shillings in part from

Ethnic Affairs (1988) 165 CLR 178 at 183-184 per Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ.

²²⁵ (1920) 28 CLR 129 at 152. See also *Theodore v Duncan* (1919) 26 CLR 276 at 282 per Viscount Haldane; [1919] AC 696 at 706; *Pirrie v McFarlane* (1925) 36 CLR 170 at 199-200 per Isaacs J.

²²⁶ (1944) 69 CLR 338 at 356.

²²⁷ [1905] AC 551.

that Government and in part in the form of "Imperial pay"; the soldier claimed, however, that the latter payment did not discharge New South Wales' obligation). The Lord Chancellor refused recovery and said it did not matter whether the soldier had been paid by the colony or the "Mother Country"²²⁸ since his employer was the Crown. His Lordship said²²⁹: "[t]he Government in relation to this contract is the King himself. The soldier is his soldier".

116 Williams J was also of the view in *Gulson* that the Crown is "one and indivisible throughout the Empire"²³⁰. It follows that in 1944, it could not be said that there was a separate King in right of Australia²³¹.

117 The foregoing is consistent, by way of illustration only, with the service by Australian men and women in the British Army, Royal Air Force and Royal Navy during the Second World War. Flight Lieutenant Les Knight, born in Camberwell in the State of Victoria and an officer in the Royal Australian Air Force, did not serve a King different from that of his fellow members of the British "Dambusters" squadron, when he flew his Royal Air Force Lancaster aircraft to breach the Eder Dam. The same might be said of his fellow squadron member, "Micky" Martin from New South Wales. At that time, they both, together with the other members of their famous squadron, served, like the Boer War veteran in *Howarth*, the same King.

118 The Commonwealth relied upon certain documents relating to the declaration of war by Australia upon Finland, Hungary, Rumania and the Japanese Empire in 1941 and 1942. The documents showed that King George VI, acting on the advice of the Federal Executive Council, assigned to the Governor-General of the Commonwealth of Australia, by means of Royal Instruments, the power to declare and proclaim war against those countries²³². The Commonwealth also relied upon minutes of a meeting of the Australian War Cabinet held on 8 December 1941, which resolved that the "situation" at that time involved a state

228 *Williams v Howarth* [1905] AC 551 at 554.

229 *Williams v Howarth* [1905] AC 551 at 554.

230 *Minister for Works (WA) v Gulson* (1944) 69 CLR 338 at 366, quoting *Theodore v Duncan* (1919) 26 CLR 276 at 282 per Viscount Haldane; [1919] AC 696 at 706.

231 The indivisibility of the Crown was assumed by this Court to still exist in 1952: *Wong Man On v The Commonwealth* (1952) 86 CLR 125 at 128 per Fullagar J.

232 See, eg, *Commonwealth of Australia Gazette*, No 104, 7 April 1942; Prime Minister's Department, Cablegrams to High Commissioner, London, 8 December 1941.

of war against Japan. That "situation" included Japanese attacks against Malaya, Hawaii and the Philippines²³³.

119 These documents support the continuing emergence of the Commonwealth of Australia as a fully independent sovereign power. But they do not justify the conclusion that during the war the Imperial Crown transformed itself into the Crown in right of Australia. The Commonwealth Gazette, which published the Royal Instruments, described the Style and Titles of King George VI as follows²³⁴:

"George VI, by the Grace of God of Great Britain, Ireland and the British Dominions beyond the Seas King, Defender of the Faith, Emperor of India."

Australia is not mentioned in this Royal Style and Titles. The Gazette also records that each Royal Instrument was sealed with the "Great Seal of the Realm" rather than the "Great Seal of the Commonwealth of Australia"²³⁵. As to the War Cabinet meeting minutes, the first "situation" these record, before adverting to Japanese actions, is the following message from the "Admiralty": "[c]ommence hostilities against Japan repetition Japan at once"²³⁶. The "Admiralty", I infer, is a reference to the British Government department then responsible for the command of the Royal Navy. It follows that the war documents relied upon by the Commonwealth do not unambiguously assert the existence of a Crown in right of Australia. Rather, they show growing steps towards independence.

120 Nothing took place after 1944, and prior to the enactment and coming into effect of the *1948 Citizenship Act*, that led to a divisible Crown. The materials before the Court demonstrate that the *1948 Citizenship Act* was the product of a British Commonwealth Conference on Nationality and Citizenship, which took place in London in 1947. Australian representatives attended this Conference, together with representatives of the other British Dominions and the United Kingdom.

121 The minutes of the first meeting record that the peoples of these countries belonged "not only to their own country, but also to the wider association of

233 Minutes of War Cabinet Meeting, Melbourne, 8 December 1941 at 217.

234 *Commonwealth of Australia Gazette*, No 104, 7 April 1942.

235 *Commonwealth of Australia Gazette*, No 104, 7 April 1942.

236 Minutes of War Cabinet Meeting, Melbourne, 8 December 1941 at 216.

countries comprising the Commonwealth"²³⁷. This had led to the adoption by most of the British Dominions of "the principle of the common status"²³⁸. Under this principle, "every person recognised by the law of one [British Dominion] as belonging to the Commonwealth should be so recognised by the laws of all the [British Dominions]"²³⁹. In the past, this had been achieved by each country enacting a "common code" which defined the class of person, or persons, "who had the common status"²⁴⁰.

122

The "common code" had been created by the *British Nationality and Status of Aliens Act 1914* (UK)²⁴¹. Amongst other things, that Act defined a natural-born British subject to be "[a]ny person born within His Majesty's dominions and allegiance"²⁴². However, this "common code" practice was considered by the Conference members to have the disadvantage that if one British Dominion wished to make a change to its nationality laws, it was obliged to consult with the other Commonwealth countries²⁴³. This inconvenience, it was thought, might lead to

237 Minutes of the First Meeting of the British Commonwealth Conference on Nationality and Citizenship, London, 3 February 1947 at 3.

238 Minutes of the First Meeting of the British Commonwealth Conference on Nationality and Citizenship, London, 3 February 1947 at 3.

239 Minutes of the First Meeting of the British Commonwealth Conference on Nationality and Citizenship, London, 3 February 1947 at 3. See also Australia, House of Representatives, *Nationality and Citizenship Bill 1948*, Explanatory Memorandum at 1 [2].

240 Minutes of the First Meeting of the British Commonwealth Conference on Nationality and Citizenship, London, 3 February 1947 at 3.

241 *British Commonwealth Conference on Nationality and Citizenship* (London, 26 February 1947): *Report with Appendices* (1947) at 1.

242 *British Nationality and Status of Aliens Act 1914* (UK), s 1(a).

243 Minutes of the First Meeting of the British Commonwealth Conference on Nationality and Citizenship, London, 3 February 1947 at 3. See also Australia, House of Representatives, *Nationality and Citizenship Bill 1948*, Explanatory Memorandum at 1 [3].

"unilateral action" that would impair "the common code and possibly ... the common status"²⁴⁴.

123 A solution was proposed, inspired by the passing of Canada's *Canadian Citizenship Act 1946* (Can)²⁴⁵. Under that Act, as understood by the Conference members, the qualifications for being a Canadian citizen were first defined, and then it was provided that each such citizen was also to have the "common status" of being a British subject²⁴⁶. The Conference members proposed that all self-governing countries of the Commonwealth enact similar legislation²⁴⁷. A subsequent report prepared by the Conference thus recommended the following "system"²⁴⁸:

"that each of the countries shall by its legislation determine who are its citizens, shall declare those citizens to be British subjects and shall recognise as British subjects the citizens of the other countries."

124 The foregoing explains the applicable structure of the *1948 Citizenship Act*, which provided that all Australian citizens were to be British subjects and recognised the citizens of the specified British Dominion countries also to be British subjects²⁴⁹. As Mr Calwell, the then Minister for Information and Minister

244 Minutes of the First Meeting of the British Commonwealth Conference on Nationality and Citizenship, London, 3 February 1947 at 3.

245 Minutes of the First Meeting of the British Commonwealth Conference on Nationality and Citizenship, London, 3 February 1947 at 3.

246 Minutes of the First Meeting of the British Commonwealth Conference on Nationality and Citizenship, London, 3 February 1947 at 3. See also Australia, House of Representatives, *Nationality and Citizenship Bill 1948*, Explanatory Memorandum at 1 [4].

247 Minutes of the First Meeting of the British Commonwealth Conference on Nationality and Citizenship, London, 3 February 1947 at 3. See also *British Commonwealth Conference on Nationality and Citizenship (London, 26 February 1947): Report with Appendices* (1947) at 3; Australia, House of Representatives, *Nationality and Citizenship Bill 1948*, Explanatory Memorandum at 1-2 [5].

248 *British Commonwealth Conference on Nationality and Citizenship (London, 26 February 1947): Report with Appendices* (1947) at 3.

249 *Nationality and Citizenship Act 1948* (Cth), s 7.

for Immigration, observed in the second reading speech for the *Nationality and Citizenship Bill 1948*²⁵⁰:

"The bill which I have the honour to present this evening seeks to establish for the first time the principle of Australian citizenship, while maintaining between the component parts of the British Commonwealth of Nations the common bond of British nationality ...

The bill is not designed to make an Australian any less a British subject, but to help him to express his pride in citizenship of this great country ... To say that one is an Australian is, of course, to indicate beyond all doubt that one is British". (emphasis added)

125 Agreeing to a change in the "common code" at the Conference held in 1947 did not have the effect of transforming the Imperial Crown into a divided Crown. That is because, whilst the Conference recommended that each British Dominion should create its own rules for citizenship, it was also agreed to continue with the principle of "common status". In that respect, it was recommended that each British Dominion pass a law whereby citizenship in that Dominion conferred upon a person the status of British subject²⁵¹. The adoption of the Canadian scheme was not intended to divide the Commonwealth and Empire or the Imperial Crown; rather it was to avoid, as described above, a particular disadvantage found in the old "common code". Citizens of each British Dominion otherwise expressly retained their status as British subjects.

126 Another relevant event was the enactment of the *Royal Style and Titles Act (Australia) 1947* (Cth). Pursuant to that Act, the Parliament of the Commonwealth assented to the omission from the Royal Style and Titles of the words "Indiae Imperator" and "Emperor of India"²⁵². Seeking in this way the assent of the Federal Parliament was another step towards the emergence of the Crown in right of Australia. But in 1947, the Royal Style and Titles still did not refer to Australia.

250 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 30 September 1948 at 1060.

251 See, eg, *Nationality and Citizenship Act 1948* (Cth), s 7. See also Australia, House of Representatives, *Nationality and Citizenship Bill 1948*, Explanatory Memorandum at 1-2 [5]-[7].

252 *Royal Style and Titles Act (Australia) 1947* (Cth), s 3; Australia, Senate, *Parliamentary Debates* (Hansard), 27 November 1947 at 2796.

The first reference to Australia only appeared in 1953²⁵³. The reference to the United Kingdom in the Royal Style and Titles was only deleted in 1973²⁵⁴.

127 With very great respect to the learned primary judge, it should not be accepted that the Imperial Crown was transformed, relevantly into the Crown in right of Australia, from the enactment of the *Statute of Westminster Adoption Act* in 1942. It may be accepted that Australia's adoption of the *Statute of Westminster* was a pivotal step towards Australia's independence; but it was not *the* step that completed that process. The preamble to the *Statute of Westminster* affirms that the British Dominions remained "united by a common allegiance to the Crown"²⁵⁵. The *Statute of Westminster* legally affirmed what probably already existed (due to the forbearance of the Imperial Parliament), namely, the relationship of equality that existed as between each British Dominion Parliament and the Parliament at Westminster. But, critically, it did not alter the constitutional relationship between each British Dominion and the Crown. That relationship was expressed to be one of "common allegiance"²⁵⁶. That quality of commonality is not consistent with a divided Crown; indeed, it is entirely inconsistent with it.

128 Similar expressions of unity may be found in the Balfour Declaration of the Imperial Conference of 1926²⁵⁷. Again, the purpose of the Balfour Declaration was to acknowledge the equality in status and power of certain of the British Dominions, including Australia. But that Declaration in no way authorised, recognised or established that the Imperial Crown was a divided monarchy in 1926. On the contrary, the Declaration expressly recognised the continuation of a "united" allegiance to the Crown by all British subjects throughout the United Kingdom and the British Dominions²⁵⁸. For example, the Imperial Conference included a "message" to the King and Queen, which expressed the hope that their Majesties "may long be spared to strengthen the ties of affection and devotion

253 *Royal Style and Titles Act 1953* (Cth), Schedule.

254 *Royal Style and Titles Act 1973* (Cth), Schedule.

255 Preamble to the *Statute of Westminster 1931* (UK).

256 Preamble to the *Statute of Westminster 1931* (UK).

257 See, eg, Australia, Parliament, *Imperial Conference, 1926: Summary of Proceedings* (1927) at 10.

258 Australia, Parliament, *Imperial Conference, 1926: Summary of Proceedings* (1927) at 10.

which unite the peoples of the British Commonwealth under the Crown"²⁵⁹. Under the heading "STATUS OF GREAT BRITAIN AND THE DOMINIONS", the British Dominions are described in the Balfour Declaration in the following way²⁶⁰:

"They are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations."
(emphasis in original)

The expression of "common allegiance" is again inconsistent with the existence in 1926 of a divided Crown and is entirely consistent with the statements made by this Court in 1920²⁶¹ and in 1944²⁶², set out above.

129 The foregoing accords with Sir Owen Dixon's analysis of the *Statute of Westminster*. Writing extra-judicially in 1935, Sir Owen Dixon made several observations about that Statute. One of these concerned the supremacy of the Crown and the proposition that the Crown became "the visible sign of national power"²⁶³. Sir Owen Dixon then observed²⁶⁴: "[t]he Sovereign remains at the head of each member of the British Commonwealth and its powers of government are exercised in his name".

130 Whilst the ultimate decision in *Shaw* was carefully expressed to be confined to those British subjects who had arrived in Australia after 26 January 1949 (Mr Shaw had arrived in 1974), it should be accepted that the reasoning of the

259 Australia, Parliament, *Imperial Conference, 1926: Summary of Proceedings* (1927) at 9.

260 Australia, Parliament, *Imperial Conference, 1926: Summary of Proceedings* (1927) at 10.

261 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 152 per Knox CJ, Isaacs, Rich and Starke JJ.

262 *Minister for Works (WA) v Gulson* (1944) 69 CLR 338 at 356 per Rich J, 366 per Williams J.

263 Sir Owen Dixon, "The Law and the Constitution", in *Jesting Pilate and Other Papers and Addresses* (1965) 38 at 59.

264 Sir Owen Dixon, "The Law and the Constitution", in *Jesting Pilate and Other Papers and Addresses* (1965) 38 at 59-60.

plurality was premised on the likelihood that the Crown in right of Australia had emerged before that date. As Gleeson CJ, Gummow and Hayne JJ observed²⁶⁵:

"The classification by s 7 of the Citizenship Act of the citizens of the United Kingdom, 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.*" (emphasis added)

131 However, no earlier date for the emergence of the Crown in right of Australia was identified by the plurality and the ultimate decision was confined to 26 January 1949. Moreover, the observation about the circumstances in 1948 was heavily qualified; all that was said was that the citizens of, for example, the United Kingdom could "possibly" answer the description of an alien in 1948. In any event, and with great respect, a different view of the "relevant political facts and circumstances" can be taken. For the reasons set out above, this Court acknowledged in 1944²⁶⁶ the existence of an undivided Crown, but nothing took place thereafter, and before the *1948 Citizenship Act* came into effect, which supports the emergence of the Crown in right of Australia.

132 By reason of the foregoing, it may also be doubted whether the passing of the *1948 Citizenship Act* itself justified the conclusion that the Crown in right of Australia had, by then, finally emerged as the Australian Head of State with Australians henceforth owing allegiance to a distinct King²⁶⁷. It may be that history justifies a later date²⁶⁸. The plurality in *Shaw* recognised the difficulty in

265 *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 40 [22].

266 *Minister for Works (WA) v Gulson* (1944) 69 CLR 338 at 356 per Rich J, 366 per Williams J.

267 The constitutional meaning of "alien" is, of course, not susceptible to legislative alteration.

268 In *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, McHugh J identified the date of the commencement of the *Royal Style and Titles Act 1973* (Cth), being 19 October 1973, as the date on which the Crown in right of Australia became manifest: at 421

identifying any particular moment of division. Gleeson CJ, Gummow and Hayne JJ said²⁶⁹:

"The development of the 'autonomous Communities' recognised by the Imperial Conference of 1926 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." (footnote omitted)

133 In *Nolan*, the emergence of the Crown in right of Australia was described as a "truism"²⁷⁰ arising from the change in relations between Australia and the United Kingdom. Australia's independence as a sovereign power was not the product of any one specific legislative change; nor was it the product of any declaration or international meeting. Rather, it was a gradual process comprising political and cultural changes that the law over time, and following these changes, came to recognise as fulfilled. The most important political change was the decision of the Imperial Parliament to cease to pass laws concerning any of the Empire's Dominions. Other changes included the entry into the Washington Naval Treaty²⁷¹ in 1922 and the fall of Singapore in 1942. Legal recognition of Australia's emerging independence then appeared from, amongst other things, the Balfour Declaration, the *Statute of Westminster Adoption Act* and the *1948 Citizenship Act*. Critically, the process of independence did not call for, or depend upon, any positive act, or assent, on the part of the Australian people. It was, as McHugh J has described, a "mystical process"²⁷².

134 Nonetheless, as already mentioned, the plurality in *Shaw* drew a bright line by selecting 26 January 1949 as the date by which the Imperial Crown relevantly divided. That bright line is a necessary and convenient constitutional fiction which

[91], 431-432 [121]-[123], 436 [135]; Callinan J preferred the passing of the *Australia Acts 1986* (Cth and UK): at 518 [375].

269 *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 41 [24].

270 *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 184 per Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ.

271 Also known as the Five-Power Treaty or Washington Treaty.

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

should not now be disturbed. In that respect, the correctness of the decision in *Shaw* (as distinct from some of the plurality's reasoning) was not challenged by Mr Chetcuti. It follows that it may be accepted, for the disposition of this appeal, that British subjects who arrived in Australia after 26 January 1949 did so as aliens in the constitutional sense. As it happens, nothing here turns upon whether the time at which the Crown divided was in 1949, or some later date²⁷³. All that matters is that the division took place at some point after Mr Chetcuti's arrival in Australia.

135 It follows that when Mr Chetcuti arrived in Australia, before 26 January 1949, he did so as a British subject and as a non-alien. That accords, if it matters, with the application to him of both the *Nationality Act* and the *Aliens Act* then in force in 1948.

Did Mr Chetcuti subsequently become an alien?

136 The next issue for determination is whether Mr Chetcuti became an alien after 26 January 1949 when, in light of the foregoing, the Crown must be taken to have become the Crown in right of Australia. That issue must be determined in accordance with the principle that a person may acquire the status or character of alienage by reason of supervening constitutional and political events not involving any positive act or assent on the part of the person concerned²⁷⁴. It is also possible for supervening constitutional and political events to have the effect of rendering someone who was an alien into a non-alien, and further, to have the effect of maintaining a person's status as a pre-existing non-alien.

137 An important element of the emergence of a distinctly Australian Crown was the transfer of allegiance from the Imperial Monarch to an Australian Head of State²⁷⁵. This took place as part of the "mystical process"²⁷⁶. "By parity of reasoning"²⁷⁷, when the allegiance of citizens of Australia was transferred to the Queen of Australia, so too was the allegiance of those British subjects living at that time in Australia who, when they arrived, were the same British subjects as

273 See fn 268 above.

274 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 468-469 [235] per Gummow and Hayne JJ.

275 *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 191 per Gaudron J; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 421 [90], 434-435 [130]-[131] per McHugh J, 517 [372]-[373] per Callinan J.

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

277 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 435 [131] per McHugh J.

Australians who had been born in Australia. As McHugh J said in *Re Patterson; Ex parte Taylor*²⁷⁸:

"Logically, it must follow that, upon the completion of the evolutionary process, the subjects of the Queen born and living in Australia became subjects of the Queen of Australia. Henceforth, by a mystical process, they owed their allegiance to the Queen of Australia, not the Queen of the United Kingdom. In *Pochi v Macphee*, Gibbs CJ said that '[t]he allegiance which Australians owe to Her Majesty is owed not as British subjects but as subjects of the Queen of Australia'.

But upon what legal or logical basis can this Court distinguish between subjects of the Queen of the United Kingdom born in Australia and those subjects of the Queen born outside, but living in, Australia when the evolutionary process was complete? I can see none. Birth within the sovereign's territories was the criterion by which the common law distinguished the subject of the sovereign from the alien. But that fact provides no ground for a court distinguishing between the subjects of the evolutionary process. It is also true that subjects of the Queen born in the United Kingdom continued to owe allegiance to the Queen in right of the United Kingdom. But that was not incompatible with them also owing allegiance to the Queen of Australia *as subjects of that Queen* while they continued to live in Australia. Whether or not they were aliens, they were under the protection of and owed allegiance to the Queen of Australia as long as they lived here. If they were subjects of the Queen living here immediately before the end of the evolutionary process, there is no constitutional reason why they could not become subjects of the Queen of Australia as well as subjects of the United Kingdom. *Sue v Hill* holds that this dual allegiance prevents them from being members of the federal Parliament. But nothing in the Constitution indicates that allegiance to the Queen in two capacities makes a person born in the United Kingdom an alien for the purpose of the Constitution. Indeed s 117 of the Constitution strongly supports the opposite conclusion." (emphasis in original; footnotes omitted)

138 McHugh J was initially of the view in *Patterson* that British subjects became subjects of the Queen in right of Australia in 1973 upon the passing of the *Royal Style and Titles Act 1973* (Cth). From that time, the Royal Style and Titles of Her Majesty the Queen in this country became: "Elizabeth the Second, by the

278 (2001) 207 CLR 391 at 432-433 [124]-[125].

Grace of God Queen of Australia and Her other Realms and Territories, Head of the Commonwealth". His Honour said²⁷⁹:

"no attempt was made to assert the sovereignty of the Queen of Australia until the passing of the *Royal Style and Titles Act* 1973. Until the commencement of that Act – and maybe later – all British subjects resident in Australia, whether born here or overseas, owed their allegiance to the Queen of the United Kingdom. That being so, those British subjects, born in the United Kingdom, who were living in Australia at the commencement of the *Royal Style and Titles Act* 1973 became subjects of the Queen of Australia as well as subjects of the Queen of the United Kingdom. Accordingly, they were not and did not subsequently become aliens within the meaning of s 51(xix) of the Constitution."

139 Callinan J was of a similar opinion. His Honour said²⁸⁰:

"For a long time, it could not seriously be doubted that a British subject of the Queen living permanently in Australia was also an Australian. The majority in *Sue v Hill* accepted however, that the relationship between Australia and the United Kingdom (and their citizens) might alter by an evolutionary process, or by a process of transformation. In *Nolan v Minister for Immigration and Ethnic Affairs* a majority of this Court said that 'subject of the Queen' in s 117 of the Constitution by then meant subject of the Queen of Australia ...

In the same way as the evolutionary process, to which the majority in *Sue v Hill* referred, transformed the meaning of the monarch as used in the Constitution, that process should also have transformed a subject of the monarch born in the United Kingdom – but having lived permanently as a subject of the monarch in this country for the period that this prosecutor has – into one of the people of Australia and a citizen of this country." (footnotes omitted)

140 Later, in *Shaw*, McHugh J expressed the view that the evolutionary process by which the Queen became the Queen of Australia was only completed upon the passing of the *Australia Acts 1986* (Cth and UK)²⁸¹. As already mentioned, it

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

280 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 517 [372]-[373].

281 This had been the view of Callinan J in *Patterson: Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 48 [51].

should now be accepted that this evolutionary process to an Australian Crown was completed by 26 January 1949.

141 The correctness of the foregoing reasoning did not need to be considered by the plurality in *Shaw*. Their Honours did not comment on it because when Mr Shaw arrived in Australia in 1974, he was already an alien.

142 Nettle J, sitting as the primary judge in the decision below, disagreed with the foregoing reasoning of McHugh and Callinan JJ in *Patterson*. His Honour said²⁸²:

"But, with respect, there was a logical basis of distinction between those classes of persons in that non-citizen subjects of the Queen born outside Australia continued to owe obligations of allegiance to the Queen in right of the United Kingdom, and so continued to owe allegiance to what, as a result of the process of evolution, had become a foreign sovereign power. Of course, that did not mean that Parliament was *bound* to treat such persons as aliens – as the later emergent ubiquity of dual citizenship attests. But the completion of that evolution does mean that it was *open* to Parliament to do so on the basis laid down in *Nolan*: that a non-citizen born abroad, to parents who were not Australians, and thus owing allegiance to a foreign power, is, generally speaking, not beyond the scope of Commonwealth legislative power with respect to 'aliens', in the ordinary, contemporary understanding of that term." (emphasis in original; footnotes omitted)

143 With great respect, I disagree. That is for two reasons. First, because of McHugh J's observation in *Patterson* – leaving aside disqualification as a member of Parliament²⁸³ – nothing in the *Constitution* indicates that allegiance to the Queen in *two* capacities makes a person, who has arrived in Australia as a non-alien British subject, an alien for the purpose of the *Constitution* after 26 January 1949. Secondly, and more fundamentally, it is difficult to accept that British subjects, resident in Australia, retained any allegiance to the Queen in right of the United Kingdom when they took up allegiance to the Queen in right of Australia. The better view is that, together with all Australian citizens, one allegiance replaced the other. This conclusion is consistent with the legal proposition that the Crown in right of Australia, when exercising duties within this country, should be considered "present"²⁸⁴ in Australia. Following completion of the "mystical

282 *Chetcuti v The Commonwealth* (2020) 95 ALJR 1 at 7 [32]; 385 ALR 1 at 7-8.

283 *Constitution*, s 44. See also *Sue v Hill* (1999) 199 CLR 462.

284 *In re Holmes* (1861) 2 Johns & Hem 527 at 543 per Sir William Page Wood V-C [70 ER 1167 at 1174], quoted in *R v Secretary of State for Foreign and*

process"²⁸⁵, the Crown in right of the United Kingdom ceased entirely to be "present" in Australia. In such circumstances, it should not be accepted that British subjects, who arrived as non-alien and have lived permanently in Australia ever since, retained any allegiance to that Crown.

144 Such a conclusion may perhaps more readily be drawn in the case of Mr Chetcuti, who arrived in Australia at the age of three and has lived here ever since²⁸⁶.

145 It follows that Mr Chetcuti is not an alien for the purposes of the *Constitution* and the Commonwealth has no constitutionally valid power to remove him to Malta. The foregoing conclusion is not inconsistent with the usually accepted definition of "alien" as propounded by Gibbs CJ in *Pochi v Macphee*²⁸⁷ and set out above. That expression of principle was not intended to be an exhaustive statement of the power conferred by s 51(xix) of the *Constitution*²⁸⁸. Moreover, the question of who is an alien had not then been "fully explored" before the Court²⁸⁹. Nor was Gibbs CJ required to decide whether a person in the position of Mr Chetcuti was an alien. It follows, for the reasons already given, that the principle expressed by Gibbs CJ must necessarily be qualified. It does not apply to British subjects who arrived in Australia before 26 January 1949 as non-alien, who have since lived here as Australians, who thus owe allegiance to the Queen of Australia, and who have not otherwise renounced that allegiance.

Mr Chetcuti's Maltese citizenship

146 In 1964, Maltese citizenship was conferred automatically on Mr Chetcuti. The Commonwealth submitted that this was sufficient to render him an alien, as it was demonstrative of allegiance to a foreign power. The Commonwealth relied upon *Singh*, where a child, born in Australia in 1998 of Indian parents, and who was thereby automatically an Indian citizen, was found to be an alien. *Singh* may be distinguished because Mr Chetcuti did not arrive in Australia as an "alien", and

Commonwealth Affairs; Ex parte Indian Association of Alberta [1982] QB 892 at 922 per Kerr LJ.

²⁸⁵ *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 432 [124] per McHugh J.

²⁸⁶ Save for a temporary absence between November 1958 and July 1959.

²⁸⁷ (1982) 151 CLR 101 at 109-110 (Mason and Wilson JJ agreeing).

²⁸⁸ *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 374-375 per Toohey J.

²⁸⁹ *Pochi v Macphee* (1982) 151 CLR 101 at 109 per Gibbs CJ, 112 per Murphy J.

has not, for the reasons I have given, since become an alien. His allegiance, by reason of his birth in Malta in 1945 and his arrival in Australia as a British subject in 1948, at first to the Crown generally and thereafter to the Crown in right of Australia, distinguishes him from the plaintiff in *Singh*, whose *only* allegiance was to the Republic of India. Mr Chetcuti's allegiance to the Crown was not broken because in 1964 the *Constitution of Malta* rendered automatically every person born in Malta a Maltese citizen²⁹⁰. Nor is there here anything like the express regulation, considered in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame*²⁹¹, whereby new citizens of Papua New Guinea ceased to be Australian citizens²⁹². For the reasons already explained, citizenship is not the same legal concept as that of being a non-alien. The remote and automatic conferral of Maltese citizenship on Mr Chetcuti did not deny or preclude the continued existence of his allegiance to the Australian Crown²⁹³. No specific right, privilege or obligation conferred on Mr Chetcuti by reason of him being a Maltese citizen was ever identified which supported the presence of an allegiance to the Republic of Malta²⁹⁴. In that respect, Mr Chetcuti stands in the same position as Australian dual citizens; it has never been suggested by this Court that such citizens are aliens because of an allegiance to a foreign power.

147

I would allow the appeal.

290 *Constitution of Malta*, s 23(1).

291 (2005) 222 CLR 439.

292 *Papua New Guinea Independence (Australian Citizenship) Regulations 1975* (Cth), reg 4.

293 cf *Sykes v Cleary* (1992) 176 CLR 77 at 107 per Mason CJ, Toohey and McHugh JJ.

294 cf *Re Canavan* (2017) 263 CLR 284 at 329 [134] per Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ.