

# HIGH COURT OF AUSTRALIA

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

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DELIL ALEXANDER (BY HIS LITIGATION GUARDIAN  
BERIVAN ALEXANDER) PLAINTIFF

AND

MINISTER FOR HOME AFFAIRS & ANOR DEFENDANTS

*Alexander v Minister for Home Affairs*  
[2022] HCA 19  
*Date of Hearing: 16 & 17 February 2022*  
*Date of Judgment: 8 June 2022*  
S103/2021

## ORDER

*The questions of law stated for the opinion of the Full Court in the amended special case filed on 22 October 2021 be answered as follows:*

1. *Is s 36B of the Australian Citizenship Act 2007 (Cth) invalid in its operation in respect of the plaintiff because:*

(a) *it is not supported by a head of Commonwealth legislative power;*

*Answer, "No".*

(b) *it is inconsistent with an implied limitation on Commonwealth legislative power preventing the involuntary deprivation of Australian citizenship;*

*Answer, "Unnecessary to answer".*

(c) *it effects a permanent legislative disenfranchisement which is not justified by a substantial reason;*



2.

*Answer, "Unnecessary to answer".*

- (d) *it effects a permanent disqualification from being chosen or from sitting as a senator or a member of the House of Representatives, otherwise than in the circumstances contemplated by ss 34 and 44 of the Constitution;*

*Answer, "Unnecessary to answer".*

- (e) *it reposes in the Minister for Home Affairs the exclusively judicial function of punishing criminal guilt?*

*Answer, "Yes".*

2. *What, if any, relief should be granted to the plaintiff?*

*Answer, "It should be declared that:*

- (a) *s 36B of the Australian Citizenship Act 2007 (Cth) is invalid;*  
*and*  
(b) *the plaintiff is an Australian citizen".*

3. *Who should pay the costs of the special case?*

*Answer, "The defendants".*

## **Representation**

D J Hooke SC and S H Hartford Davis with S G Lawrence and D J Reynolds for the plaintiff (instructed by Australian Criminal and Family Lawyers)

S P Donaghue QC, Solicitor-General of the Commonwealth, and P D Herzfeld SC with J D Watson and L G Moretti for the defendants (instructed by Australian Government Solicitor)

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



## CATCHWORDS

### **Alexander v Minister for Home Affairs**

Constitutional law (Cth) – Powers of Commonwealth Parliament – Power to make laws with respect to naturalisation and aliens – Cessation of Australian citizenship – Where s 36B of *Australian Citizenship Act 2007* (Cth) provided Minister for Home Affairs may make determination that person ceases to be Australian citizen if satisfied, among other matters, that person engaged in specified conduct demonstrating repudiation of allegiance to Australia – Where plaintiff Australian citizen by birth and Turkish citizen by descent – Where, after departing Australia, plaintiff entered and remained in al-Raqqa Province in Syria – Where al-Raqqa Province a "declared area" for purposes of terrorism-related offence in *Criminal Code* (Cth) – Where Australian Security Intelligence Organisation ("ASIO") reported in June 2021 that plaintiff joined Islamic State of Iraq and the Levant ("ISIL") by August 2013 and likely engaged in foreign incursions and recruitment by entering or remaining in al-Raqqa Province – Where ISIL a designated "terrorist organisation" for purposes of terrorism-related offences in *Criminal Code* (Cth) – Where Minister determined pursuant to s 36B, relying in part on ASIO report, that plaintiff ceased to be Australian citizen – Whether s 36B valid exercise of legislative power under s 51(xix) of *Constitution*.

Constitutional law (Cth) – Judicial power of Commonwealth – Where plaintiff's conduct relevant to Minister's determination under s 36B of *Australian Citizenship Act 2007* (Cth) amounted to conduct element of terrorism-related offence under s 119.2 of *Criminal Code* (Cth) – Whether provision providing for cessation of citizenship on determination by Minister on terrorism-related grounds penal or punitive in character – Whether s 36B contrary to Ch III of *Constitution* for conferring upon Minister exclusively judicial function of adjudging and punishing criminal guilt.

Words and phrases – "adjudging and punishing criminal guilt", "alien", "banishment", "citizen", "citizenship", "citizenship cessation", "denationalisation", "deprivation of liberty", "exercise of judicial power", "exile", "foreign incursions and recruitment", "hardship or detriment", "protective purpose", "punitive character", "reciprocal rights and obligations", "repudiation of allegiance to Australia", "retribution", "shared values of the Australian community", "terrorism", "terrorism-related grounds".

*Constitution*, s 51(xix), Ch III.

*Australian Citizenship Act 2007* (Cth), ss 36A, 36B, 36D.



1 KIEFEL CJ, KEANE AND GLEESON JJ. The plaintiff ("Mr Alexander") was born in Australia on 5 August 1986. As a result, by operation of s 10(1) of the *Australian Citizenship Act 1948* (Cth) ("the 1948 Citizenship Act"), he became an Australian citizen. He also acquired Turkish citizenship by descent at birth under the law of the Republic of Turkey, as his parents were Turkish citizens. Mr Alexander remains a Turkish citizen.

2 In July 2021, the Minister for Home Affairs ("the Minister") made a determination pursuant to s 36B of the *Australian Citizenship Act 2007* (Cth) ("the Citizenship Act"), as amended by the *Australian Citizenship Amendment (Citizenship Cessation) Act 2020* (Cth) ("the 2020 Amending Act"), that Mr Alexander ceased to be an Australian citizen. At that time, Mr Alexander was in prison in Syria, where he remains.

3 In these proceedings, brought in the original jurisdiction of this Court, Mr Alexander seeks, among other relief, declarations that s 36B of the Citizenship Act is invalid and that he is an Australian citizen. Several grounds are advanced in support of Mr Alexander's challenge; but his challenge may be decided, and his rights determined, by addressing his contentions that s 36B is invalid: first, because it is not within the power of the Parliament to make laws with respect to "naturalization and aliens" under s 51(xix) of the *Constitution*; and, secondly, because the exercise of the power reposed in the Minister to deprive him of his citizenship is an exclusively judicial function under Ch III of the *Constitution*. While the first of these contentions should be rejected, the second must be accepted. Section 36B of the Citizenship Act is invalid to that extent, and Mr Alexander remains an Australian citizen.

### **Mr Alexander's plight**

4 On 16 April 2013, Mr Alexander departed Australia for Turkey, indicating on his outgoing passenger card that he would be overseas for three months. He had informed his family that he intended to arrange a marriage and that he would return to Australia. Having entered Turkey, at some point Mr Alexander travelled to Syria, where he married his wife.

5 The Australian Security Intelligence Organisation ("ASIO") reported in June 2013 that Mr Alexander's travel to Syria was facilitated through a Sydney-based network developed by Mr Alqudsi, who had previously been charged with terrorism-related offences<sup>1</sup>. Mr Alexander was reported to be part of a group that was taken to Syria by a senior Syria-based Australian member of the

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1 See *R v Alqudsi* (2015) 328 ALR 517 at 519 [4]; *Alqudsi v The Commonwealth* (2015) 91 NSWLR 92 at 95 [1].

Islamic State (also known as "ISIL" or "ISIS"). At this time, the Islamic State had been designated in the *Criminal Code* (Cth) (under various names) as a terrorist organisation. ASIO later reported that it was "likely" that Mr Alexander had joined ISIL by August 2013, and that he had "likely engaged" in foreign incursions and recruitment by entering or remaining in al-Raqqa Province in Syria on or after 5 December 2014.

6 In November 2017, Mr Alexander was apprehended by Kurdish militia in the village of Ziban in Deir El-Zour Province in Syria (which was not a declared area). In March 2018, he was transferred to the custody of Syrian authorities and was subsequently charged by Syrian prosecutors with offences against the Syrian Penal Code.

7 On 31 January 2019, Mr Alexander was convicted and sentenced by a Syrian court to a term of imprisonment for 15 years – subsequently reduced to five – on the strength of admissions he had made during an interrogation. However, Mr Alexander's sister, who appears as his litigation guardian in these proceedings, stated that Mr Alexander told her that he was tortured and forced to sign a paper while in the custody of the Kurdish militia and Syrian authorities without reading its contents.

8 By reason of a pardon from the Syrian government, Mr Alexander's term of imprisonment has expired. However, he remains in detention for a number of reasons, including that he cannot be released into the Syrian community, nor can he be repatriated to Turkey or Australia.

9 On 13 July 2020, Mr Alexander was moved to the prison known as Far' Falastin, or Branch 235, which is located in Damascus and operated by Syrian intelligence authorities. For the duration of the conflict in Syria, there have been reports of government forces arbitrarily detaining persons simply for being perceived to be opponents of the State, including in Kurdish territory where persons are suspected of affiliation with the Islamic State. The detention of prisoners in government-controlled prisons in Syria has been associated with serious human rights violations, including torture.

10 Since 15 July 2021, neither Mr Alexander's family nor his lawyers have been able to contact him. Mr Alexander claims that, according to his Syrian lawyer, the fact that he is no longer an Australian citizen is a reason for his continuing detention.

### **The Australian government's decisions about Mr Alexander**

11 Following Mr Alexander's arrival in Syria, the Australian government made several decisions in relation to him leading up to the determination of his



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citizenship. On 5 September 2013, the then Acting Minister for Foreign Affairs decided to cancel Mr Alexander's passport under s 22(2)(d) of the *Australian Passports Act 2005* (Cth). That was on the basis that ASIO suspected on reasonable grounds that "if an Australian passport were issued to [Mr Alexander], [Mr Alexander] would be likely to engage in conduct that might prejudice the security of Australia or a foreign country"<sup>2</sup>. This decision did not affect his status as an Australian citizen, or any entitlement that he may have had to Australian citizenship or consular assistance.

12           On 19 June 2020, the Minister made a Temporary Exclusion Order ("TEO") in respect of Mr Alexander, pursuant to the *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth). The effect of the TEO was to prevent Mr Alexander from entering Australia while it remained in force, which was until 30 January 2022.

13           On 16 June 2021, the Director-General of Security at ASIO provided a Qualified Security Assessment ("QSA") of Mr Alexander to the Minister. The purpose of the QSA was to advise whether it would be consistent with the requirements of security for prescribed administrative action to be taken under the Citizenship Act in respect of Mr Alexander. Although ASIO, in the QSA, did not make any recommendation in relation to Mr Alexander's citizenship, it stated that, if the Minister were satisfied that Mr Alexander had engaged in specified conduct and that conduct demonstrated that he had repudiated his allegiance to Australia, the Minister might make a determination in writing that he ceased to be an Australian citizen.

14           The QSA stated that, based on "substantial classified reporting and some unclassified corroborating information", ASIO assessed that Mr Alexander "likely engaged in foreign incursions and recruitment by entering or remaining in al-Raqqa Province in Syria, a declared area, on or after 5 December 2014" and "likely travelled to Syria in early-to-mid-2013, and had joined the Islamic State of Iraq and the Levant ... by August 2013".

15           On 2 July 2021, the Minister determined, pursuant to s 36B(1) of the Citizenship Act, that Mr Alexander ceased to be an Australian citizen. The determination stated that the Minister was satisfied that: Mr Alexander had engaged in foreign incursions while outside Australia<sup>3</sup>, which demonstrated a

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2     See *Australian Passports Act 2005* (Cth), s 14(1)(a)(i).

3     s 36B(5)(h) of the Citizenship Act.

repudiation of his allegiance to Australia<sup>4</sup>; that it would be contrary to the public interest for Mr Alexander to remain an Australian citizen<sup>5</sup>; and that Mr Alexander would not become stateless by reason of the determination<sup>6</sup>. In making that determination, the Minister relied, in part, on the QSA. The Minister was not required to, and did not, give a statement of reasons for the determination.

### **The proceedings in this Court**

16 The proceedings in this Court were commenced on 13 July 2021. On 26 October 2021, Steward J made orders, including that Ms Alexander be appointed as Mr Alexander's litigation guardian pursuant to r 21.08.6 of the *High Court Rules 2004* (Cth).

17 The parties filed an amended special case pursuant to r 27.08 of the *High Court Rules*, in which they agreed to state a number of questions for the opinion of the Full Court of this Court. As already noted, it is not necessary to decide all those questions "in order to do justice in [this] case and to determine the rights of the parties"<sup>7</sup>. It is sufficient for the determination of Mr Alexander's challenge to the validity of s 36B to deal with the questions whether s 36B is invalid in its operation in respect of Mr Alexander because it is not supported by a head of Commonwealth legislative power, and, alternatively, whether it is invalid because it reposes in the Minister the exclusively judicial function of adjudging and punishing criminal conduct.

18 While it will be necessary later in these reasons to notice other provisions inserted into the Citizenship Act by the 2020 Amending Act, it is sufficient, for the first of these questions, to summarise the terms of s 36B and its ancillary provisions.

### **Section 36B**

19 Section 36B is part of a suite of provisions in Subdiv C of Div 3 of Pt 2 of the Citizenship Act which effect the "cessation of citizenship" on terrorism-related

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4 s 36B(1)(b) of the Citizenship Act.

5 s 36E(2) of the Citizenship Act.

6 s 36B(2) of the Citizenship Act.

7 *Lambert v Weichelt* (1954) 28 ALJ 282 at 283; *Mineralogy Pty Ltd v Western Australia* (2021) 95 ALJR 832 at 846 [56]; 393 ALR 551 at 565.

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grounds. It, and its companion provisions, were introduced into the Citizenship Act by the 2020 Amending Act to replace the scheme previously enacted by the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) ("the Allegiance to Australia Act")<sup>8</sup>. It maintains the focus of the previous legislation on the notion of a repudiation of allegiance to Australia<sup>9</sup>.

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Section 36B provides relevantly as follows:

*"Cessation of citizenship on determination by Minister*

(1) The Minister may determine in writing that a person aged 14 or older ceases to be an Australian citizen if the Minister is satisfied that:

(a) the person:

(i) engaged in conduct specified in subsection (5) while outside Australia; or

(ii) engaged in conduct specified in any of paragraphs (5)(a) to (h) while in Australia, has since left Australia and has not been tried for an offence in relation to the conduct; and

(b) the conduct demonstrates that the person has repudiated their allegiance to Australia; and

(c) it would be contrary to the public interest for the person to remain an Australian citizen (see section 36E).

Note: A person may seek review of a determination made under this subsection in the High Court of Australia under section 75 of the Constitution, or in the Federal Court of Australia under section 39B of the *Judiciary Act 1903*. See also section 36H of this Act (revocation of citizenship cessation determination on application to Minister).

(2) However, the Minister must not make a determination if the Minister is satisfied that the person would, if the Minister were to make the

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8 Independent National Security Legislation Monitor, *Report to the Attorney-General: Review of the operation, effectiveness and implications of terrorism-related citizenship loss provisions contained in the Australian Citizenship Act 2007*, Report No 7 (2019) at 58 [6.90].

9 s 36A of the Citizenship Act.

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determination, become a person who is not a national or citizen of any country.

- (3) The person ceases to be an Australian citizen at the time the determination is made.
- (4) Subsection (1) applies to a person who is an Australian citizen regardless of how the person became an Australian citizen (including a person who became an Australian citizen upon the person's birth).
- (5) For the purposes of paragraph (1)(a), the conduct is any of the following:

...

- (h) engaging in foreign incursions and recruitment".

21 As to s 36B(5)(h), the expression "foreign incursions and recruitment" has the same meaning as in s 119.2 of the *Criminal Code* (Cth) (which relevantly makes it an offence for an Australian citizen to enter, or remain in, a declared area in a foreign country), but it does not include the fault elements that apply in relation to that offence<sup>10</sup>. It should also be noted that a determination may be made in relation to conduct specified in s 36B(5) that was engaged in prior to its commencement<sup>11</sup>.

22 The powers of the Minister under s 36B may only be exercised by the Minister personally<sup>12</sup>. The rules of natural justice do not apply in relation to making a decision or exercising a power under that section<sup>13</sup>. A determination made under s 36B(1) is not a legislative instrument<sup>14</sup>.

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10 s 36B(6) of the Citizenship Act.

11 See 2020 Amending Act, Sch 1, item 18.

12 s 36B(9) of the Citizenship Act.

13 s 36B(11) of the Citizenship Act.

14 s 36B(12) of the Citizenship Act.

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23            A determination made under s 36B(1) may be revoked on application to the Minister by the person the subject of the determination<sup>15</sup>, on the Minister's own initiative<sup>16</sup>, or automatically by operation of law<sup>17</sup>. Unless a determination is revoked by one of those means, the person can never become an Australian citizen again<sup>18</sup>.

24            In relation to the assessment of the public interest for the purposes of a determination under s 36B(1), or whether to revoke such a determination under s 36J, s 36E(2) relevantly provides:

"The Minister must have regard to the following matters:

(a)    in deciding whether to make a determination under subsection 36B(1) or revoke such a determination – the severity of the conduct to which the determination relates;

...

(c)    the degree of threat posed by the person to the Australian community;

(d)    the age of the person;

(e)    if the person is aged under 18 – the best interests of the child as a primary consideration;

(f)    in deciding whether to make a determination under subsection 36B(1) or revoke such a determination – whether the person is being or is likely to be prosecuted in relation to conduct to which the determination relates;

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**15**    s 36H of the Citizenship Act.

**16**    s 36J of the Citizenship Act.

**17**    s 36K of the Citizenship Act.

**18**    s 36L of the Citizenship Act.

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- (g) the person's connection to the other country of which the person is a national or citizen and the availability of the rights of citizenship of that country to the person;
- (h) Australia's international relations;
- (i) any other matters of public interest."

25 When a determination has been made under s 36B(1), the Minister is required to give written notice of the determination to the person in accordance with the requirements in s 36F. Again, the rules of natural justice do not apply in relation to making a decision or exercising a power under that section<sup>19</sup>. The exception to the requirement to give notice is where the Minister is satisfied that giving the notice could prejudice the security, defence or international relations of Australia, or Australian law enforcement operations<sup>20</sup>.

26 The practical effect of the exercise by the Minister of the power conferred by s 36B(1) is that the person affected has no right to return to Australia and be at liberty in this country, because the *Migration Act 1958* (Cth) would require that (save in the unlikely event that the person were granted a visa) the person be taken into detention for the purposes of deportation<sup>21</sup>.

### **Section 51(xix) of the *Constitution***

27 Section 51(xix) of the *Constitution* empowers the Commonwealth Parliament to make laws with respect to "naturalization and aliens". The defendants confined their arguments in support of s 36B as a valid exercise of the legislative power of the Commonwealth to reliance upon s 51(xix).

28 Mr Alexander submitted that s 36B is not supported by s 51(xix) in its application to him because, as a person who became an Australian citizen at birth by virtue of s 10 of the 1948 Citizenship Act, he could not thereafter be regarded as an "alien". Mr Alexander's contention is that once a person attains the status of an Australian citizen, the operation of s 51(xix) is "spent" so that Parliament cannot make a law that would transform a non-alien into an alien.

29 Mr Alexander also argued that s 36B(5)(h) is invalid, because the conduct element of the offence against s 119.2 of the *Criminal Code* (Cth) is, of itself,

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19 s 36F(7) of the Citizenship Act.

20 s 36G of the Citizenship Act.

21 *Migration Act 1958* (Cth), s 189.

incapable of being regarded as the repudiation of the allegiance owed by a citizen to Australia. It was said that without a mental element of intention to engage in that conduct, the mere act of entering a "declared area" was not so extreme and repugnant as to be objectively incompatible with, and capable of rupturing, the citizen-State relationship. It was also said that s 51(xix) could not support the retroactive operation of s 36B, as it had been applied to Mr Alexander.

30 Mr Alexander's submissions on this first issue should not be accepted. Those submissions may now be addressed in turn.

### *Citizens and aliens*

31 Citizenship, as formal membership of the national community, is a statutory concept<sup>22</sup>. It is the grant of Australian citizenship that creates the status which attracts constitutional protections and engages federal and State legislation that confers or denies rights, privileges, immunities or duties<sup>23</sup>. Relevantly for Mr Alexander, the status of Australian citizenship includes the right to enter and remain in Australia<sup>24</sup>, the entitlement to an Australian passport<sup>25</sup>, and the right and duty to vote in federal elections<sup>26</sup>.

32 Citizenship is not a concept used in the *Constitution* (save for s 44(i), which is concerned with foreign citizenship). The *Constitution*, in contrast to the first clause of the Fourteenth Amendment to the Constitution of the United States, does not contemplate that individuals born here are citizens of Australia, much less that they are indelibly so. This Court's decisions in *Singh v The Commonwealth*<sup>27</sup> and

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22 *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 183; *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 174 [7]; *Love v The Commonwealth* (2020) 270 CLR 152 at 263 [300], 264 [305]; *Chetcuti v The Commonwealth* (2021) 95 ALJR 704 at 711-715 [14]-[34], [38]; 392 ALR 371 at 375-380, 381.

23 *Hwang v The Commonwealth* (2005) 80 ALJR 125 at 129 [13]; 222 ALR 83 at 87.

24 *Potter v Minahan* (1908) 7 CLR 277 at 305; *Love v The Commonwealth* (2020) 270 CLR 152 at 198 [95]; *Migration Act 1958* (Cth), ss 4, 42.

25 *Australian Passports Act 2005* (Cth), s 7 (subject to Pt 2, Div 2).

26 *Commonwealth Electoral Act 1918* (Cth), s 93(1)(b)(i).

27 (2004) 222 CLR 322.

*Koroitamana v The Commonwealth*<sup>28</sup> would be plainly misconceived if, as a matter of constitutional law, a person born in Australia has for that reason, and quite apart from any law of the Parliament, a right to live here. Mr Alexander's counsel made no attempt to challenge the correctness of *Singh* and *Koroitamana*.

33 While alienage, describing a lack of formal legal relationship with the community or body politic, is a constitutional concept<sup>29</sup>, the *Constitution* leaves it to Parliament to decide who shall be granted the status of citizenship and what that status may mean in terms of the rights, privileges, immunities and duties of citizens. In this regard, s 51(xix) of the *Constitution* empowers the Parliament to "create and define the concept of Australian citizenship"<sup>30</sup>, to select or adopt the criteria for citizenship or alienage<sup>31</sup> and to attribute to any person who lacks the qualifications prescribed for citizenship "the status of alien"<sup>32</sup>. In *Chetcuti v The Commonwealth*<sup>33</sup>, Kiefel CJ, Gageler, Keane and Gleeson JJ said 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 status".

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28 (2006) 227 CLR 31.

29 *Chetcuti v The Commonwealth* (2021) 95 ALJR 704 at 718 [53], 720 [59]; 392 ALR 371 at 384, 386.

30 *Koroitamana v The Commonwealth* (2006) 227 CLR 31 at 46 [48], citing *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 173 [31], 180 [58], 188-189 [90], 192 [108]-[109], 215-216 [193]-[194], 219-220 [210]-[211], 229 [229].

31 *Singh v The Commonwealth* (2004) 222 CLR 322 at 397-398 [197]; *Koroitamana v The Commonwealth* (2006) 227 CLR 31 at 37 [9], 46 [50], 49 [62].

32 *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 35 [2].

33 (2021) 95 ALJR 704 at 710 [12]; 392 ALR 371 at 374.



34 It has been said in this Court that the terms "citizen" and "alien" are antonyms<sup>34</sup>. Recently, the majority of this Court in *Love v The Commonwealth*<sup>35</sup> held that Aboriginal Australians who satisfy the tripartite test in *Mabo v Queensland [No 2]*<sup>36</sup> constitute a separate category of non-citizen, non-alien, and that "non-citizen" is not inevitably and always synonymous with "alien". But in *Chetcuti*, Kiefel CJ, Gageler, Keane and Gleeson JJ observed that this Court's decision in *Shaw v Minister for Immigration and Multicultural Affairs*<sup>37</sup> (from which the holding of the majority in *Love* does not depart, except in respect of an Aboriginal Australian according to the tripartite test in *Mabo [No 2]*) establishes that the aliens power supports a law of the Commonwealth which determines who shall have the status of Australian citizenship, and which provides that persons who do not share that status are aliens<sup>38</sup>.

35 In *Pochi v Macphee*<sup>39</sup>, Gibbs CJ said 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". It does not stretch the ordinary understanding of the expression "alien" to include within that category an individual who has engaged

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34 See *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 at 35 [2].

35 (2020) 270 CLR 152 at 192 [81], 244 [252], 247 [260], 253-254 [271]-[272], 261-262 [295], 263 [300], 264-266 [304]-[311], 305-308 [432]-[437]. See *Pochi v Macphee* (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; Ex parte Taylor* (2001) 207 CLR 391 at 435-436 [132], 491 [300]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 179 [53]; *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 61 [94]; *Singh v The Commonwealth* (2004) 222 CLR 322 at 382 [149]-[150].

36 (1992) 175 CLR 1.

37 (2003) 218 CLR 28.

38 *Chetcuti v The Commonwealth* (2021) 95 ALJR 704 at 711 [14]-[17]; 392 ALR 371 at 375-376.

39 (1982) 151 CLR 101 at 109, cited with approval in *Singh v The Commonwealth* (2004) 222 CLR 322 at 329 [4].

in conduct exhibiting such extreme enmity to Australia as to warrant being excluded from membership of the Australian community. The Parliament has the power under s 51(xix) to attribute the constitutional status of alien to a person who has lost the statutory status of citizenship. By the same power, Parliament can define the circumstances in which that occurs.

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There is ample support in authority for the view that the scope of s 51(xix) extends to permit Parliament to "determine the legal basis by reference to which Australia deals with matters of nationality ... to create and define the concept of Australian citizenship [and] to prescribe the conditions on which such citizenship may be acquired *and lost*"<sup>40</sup>. Mr Alexander's contention that a person who becomes an Australian citizen is thereby beyond the scope of the power that permits Parliament to make laws that deprive that person of citizenship is distinctly inconsistent with the following passage in *Nolan v Minister for Immigration and Ethnic Affairs*<sup>41</sup>, where Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ said:

"As a matter of etymology, 'alien', from the Latin *alienus* through old French, means belonging to another person or place. Used as a descriptive word to describe a person's lack of relationship with a country, the word means, as a matter of ordinary language, 'nothing more than a citizen or subject of a foreign state': *Milne v Huber*<sup>42</sup>. Thus, an 'alien' has been said to be, for the purposes of United States law, 'one born out of the United States, who has not since been naturalized under the constitution and laws'<sup>43</sup>. That definition should be expanded to include a person who has ceased to be a citizen by an act or process of denaturalization and restricted to exclude a person who, while born abroad, is a citizen by reason of parentage. Otherwise, it constitutes an acceptable general definition of the word 'alien' when that word is used with respect to an independent country with its own distinct citizenship."

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<sup>40</sup> *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 173 [31] (emphasis added), cited with approval in *Koroitamana v The Commonwealth* (2006) 227 CLR 31 at 46 [48].

<sup>41</sup> (1988) 165 CLR 178 at 183.

<sup>42</sup> (1843) 17 Fed Cas 403 at 406.

<sup>43</sup> (1843) 17 Fed Cas 403 at 406.

37 This passage supports the proposition that the status of alien may be attributed by the Parliament to a person who was previously an Australian citizen by a law providing for "an act or process of denaturalization". That proposition cannot stand with Mr Alexander's "once a citizen always a citizen" contention. To the extent that doubt was cast upon the decision in *Nolan* by the decision in *Re Patterson; Ex parte Taylor*<sup>44</sup>, the latter decision was itself disapproved, and the authority of *Nolan* affirmed, in *Shaw*<sup>45</sup>.

38 One may conclude this section of the discussion by noting a fundamental difficulty in Mr Alexander's argument on this issue, which was revealed starkly in his counsel's inability, during the course of argument, to provide a satisfactory answer to the question as to the source of Parliament's power to enact s 10 of the 1948 Citizenship Act, that being the law by which Mr Alexander became an Australian citizen. As a general principle, where the Parliament may confer rights by the exercise of legislative power, it may also take them away<sup>46</sup>. Once it is accepted, as it must be, that the statute conferring citizenship is the source of Mr Alexander's rights as a citizen, it must also be accepted that (the present version of) that statute may limit those rights, including by providing for the circumstances in which they may be lost. A person who has forfeited the rights of citizenship is no less accurately described as an alien than a person who has never enjoyed those rights.

*"Naturalization and aliens" at Federation*

39 Events in the life of an individual and the nation may affect the relationship between the individual and the Australian body politic so as to engage the power conferred on the Parliament to make laws with respect to "naturalization and aliens".

40 It was only upon the enactment of the *Naturalization Act 1870* (UK) with its provision for "the severing of the connection of a British subject established by birth within the Crown's dominions" and the British Crown that English law acknowledged the possibility of bringing to an end the relationship between

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44 (2001) 207 CLR 391.

45 *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 45 [39], 87 [190]. See also *Ruddock v Taylor* (2005) 222 CLR 612 at 619-620 [15]-[17], 625 [36].

46 *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 355-356 [12]-[14], 372 [57].

subject and sovereign<sup>47</sup>. Until then, under the common law, the connection between a British subject and the Crown was "indelible"<sup>48</sup>. The common law principle was abandoned by the *Naturalization Act*, which provided by s 4 that any person, who was a natural-born subject of the Crown and at birth became a foreign subject under the laws of another state, may make a "declaration of alienage" and thereby cease to be a British subject. Under s 6 of the *Naturalization Act*, a British subject who voluntarily became naturalised in a foreign state was deemed to have ceased to be a British subject and was to be regarded as an alien, as was, by virtue of s 10, a woman who, upon marriage, became a subject of the foreign state of which her husband was a subject<sup>49</sup>.

41 There can be no doubt that the provisions of the *Naturalization Act* were before the framers of the *Constitution* when they drafted s 51(xix). As Gummow, Hayne and Heydon JJ said in *Singh*<sup>50</sup>:

"Given the state of British law at the time of Federation, and in particular the provisions of the *Naturalisation Act 1870* permitting renunciation of allegiance<sup>51</sup>, it would be surprising if the power with respect to naturalisation and aliens did not extend this far."

42 It would be no less surprising if the power conferred by s 51(xix) did not extend to support the making of a law identifying the circumstances in which a person who is currently a citizen may become an alien by reason of the Commonwealth's response to that person's repudiation of the ties of allegiance.

### *The people*

43 Section 7 of the *Constitution* provides that the Senate "shall be composed of senators for each State, directly chosen by the people of the State". Section 24 of the *Constitution* provides that the House of Representatives "shall be composed of members directly chosen by the people of the Commonwealth". These provisions have been said to establish for the people of the Commonwealth

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47 *Singh v The Commonwealth* (2004) 222 CLR 322 at 389 [173].

48 *Singh v The Commonwealth* (2004) 222 CLR 322 at 389-390 [173].

49 See *Romein v Advocate General for Scotland* [2018] AC 585 at 590 [4].

50 *Singh v The Commonwealth* (2004) 222 CLR 322 at 397 [197].

51 *Naturalization Act 1870* (UK), ss 3, 4, 6.

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"[e]quality of opportunity to participate in the exercise of political sovereignty [which] is an aspect of the representative democracy guaranteed by our *Constitution*"<sup>52</sup>.

44 While ss 7 and 24 of the *Constitution* establish that it is the choice by the people of the Commonwealth that is the source of the democratic legitimacy of the Commonwealth Parliament, the *Constitution* does not state the qualifications for the exercise of the franchise by the "people of the Commonwealth". This responsibility was left to the Parliament. Section 51(xix) empowers the Parliament to give practical content to the expression "the people". As Gageler J said in *Love*, the aliens power permits Parliament to<sup>53</sup>:

"bring a measure of precision to the identification of those to whom the *Constitution* refers as 'the people', by laying down criteria for determining with specificity which persons were and which persons were not to have the legal status of members of the body politic of the Commonwealth of Australia."

45 Mr Alexander submitted that a limitation on the power in s 51(xix) is to be found by regarding a power to denaturalise a citizen as exercisable only for "substantial reasons". Mr Alexander submitted that the intention of the framers of the *Constitution*, and the existence of the "people of the State" and the "people of the Commonwealth" referred to in ss 7 and 24 of the *Constitution* respectively, require that there be limits on the ability of Parliament to "fracture the membership of the political community of the body politic such as by exclusion of those people who were, and remain, necessary members of the body politic"<sup>54</sup>.

46 The references in ss 7 and 24 of the *Constitution* to "the people" do not support a limitation on s 51(xix) in addition to that identified by Gibbs CJ in *Pochi*<sup>55</sup>. As with citizenship, so the identification of those members of the people of the Commonwealth who are to be qualified as electors is the responsibility of

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52 *McCloy v New South Wales* (2015) 257 CLR 178 at 207 [45].

53 *Love v The Commonwealth* (2020) 270 CLR 152 at 197-198 [94] (footnote omitted).

54 *Hocking v Director-General, National Archives of Australia* (2020) 94 ALJR 569 at 614 [212]; 379 ALR 395 at 451-452. See also *Love v The Commonwealth* (2020) 270 CLR 152 at 311 [444].

55 *Pochi v Macphee* (1982) 151 CLR 101 at 109.

the Parliament<sup>56</sup>. Parliament's power in this regard is broad, but there are limits. Just as Parliament may not expand its law-making power under s 51(xix) of the *Constitution* by pursuing an eccentric understanding of alienage, so the Parliament cannot expand or restrict the electorate by pursuing an eccentric understanding of "the people"<sup>57</sup>. The Parliament could not, for example, limit the electorate by purporting to exclude from the people of the Commonwealth all Australian citizens of English descent. But while it may be accepted that the Parliament cannot expand the scope of s 51(xix) by adopting an understanding of the people that would also be an affront to ss 7 and 24 of the *Constitution*, there is nothing fanciful in classifying as an alien – separate from "the people" – an individual who, though previously a citizen, has acted so inimically to Australia's interests as to repudiate the obligations of citizenship on which membership of the people of the Commonwealth depends.

### *Repudiation of allegiance*

47 Mr Alexander argued that it was not open to the Parliament to treat the conduct described in s 36B(5)(h) as a repudiation of his allegiance constituting sufficient reason for depriving him of his citizenship.

48 In response, the Solicitor-General of the Commonwealth, appearing for the defendants, cited examples<sup>58</sup> of laws, the validity of which has never been challenged, that provide for the loss of citizenship as a result of acts indicating either loyalty to a foreign state or disloyalty to Australia. It was submitted that s 36B is "of the same genus" as some of those laws<sup>59</sup>, save to the extent that s 36B encompasses disloyalty indicated by a willingness to engage in terrorist activity in a foreign state. Specifically, the conduct captured by s 36B(5)(h) was characterised

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56 *McCloy v New South Wales* (2015) 257 CLR 178 at 206 [42]; *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 82 [157]-[158].

57 *McGinty v Western Australia* (1996) 186 CLR 140 at 170; *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 174 [7], 182 [23], 198-199 [83], 199-200 [85]-[86].

58 *Naturalization Act 1917* (Cth), s 7; *Nationality Act 1920* (Cth), ss 12(1), (2)(a), 18, 21; *Nationality and Citizenship Act 1948* (Cth), ss 17, 19, 21(1).

59 *Naturalization Act 1917* (Cth), s 7; *Nationality Act 1920* (Cth), s 12(2)(a); *Nationality and Citizenship Act 1948* (Cth), ss 19, 21(1).

as "inherently suggestive of the absence of a continuing commitment to the Australian body politic". There is force in the Solicitor-General's submissions.

49 The absence of the continuing commitment that is citizenship is sensibly described as an absence of "allegiance". The utility of "allegiance" as a determinative test for non-alienage has been questioned<sup>60</sup>; and the plurality in *Chetcuti* held that the reach of the aliens power could be determined in that case "without need to explore common law notions of allegiance and alienage"<sup>61</sup>. But allegiance is a useful gauge of the existence of the bonds of citizenship. Section 44(i) of the *Constitution* itself expressly acknowledges that allegiance may be an integral aspect of citizenship.

50 Given that citizenship is a status of reciprocal rights and obligations, it is to understand the status of citizenship in an incoherently one-sided way to say that s 51(xix) supports a law that specifies the criteria by which a citizen may voluntarily renounce Australian citizenship – as Mr Alexander accepted – but does not support a law that treats voluntary conduct demonstrating a repudiation of allegiance to Australia as an implied renunciation of citizenship.

51 Mr Alexander argued that voluntary conduct of the kind described in s 36B(5)(h) cannot rationally be treated as a repudiation of allegiance unless it is intended to be so. The facts stated in the special case suggest that it was reasonably open to the Parliament to regard voluntary conduct, as described in s 36B(5)(h), as so reprehensible as to be incompatible with the common bonds of allegiance to the Australian community, even though the person who has engaged in that conduct did not act intentionally to repudiate the bonds of citizenship. It is convenient to turn now to refer to those agreed facts.

#### *Terrorism and the threat to Australia's security*

52 On 4 December 2014, the Minister for Foreign Affairs made a declaration pursuant to s 119.3(1) of the *Criminal Code* (Cth) that al-Raqqa Province in Syria was a "declared area"<sup>62</sup>, on the basis of information indicating that it was the

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60 *Love v The Commonwealth* (2020) 270 CLR 152 at 303-305 [428]-[431].

61 *Chetcuti v The Commonwealth* (2021) 95 ALJR 704 at 714 [34]; 392 ALR 371 at 380.

62 That declaration came into effect on 5 December 2014: *Criminal Code (Foreign Incursions and Recruitment – Declared Areas) Declaration 2014 – Al-Raqqa Province, Syria* (Cth).

de facto capital of the Islamic State's operations and was used to engage in hostile activities. That declaration was revoked on 27 November 2017 on the basis that it was no longer confirmed that the Islamic State was engaging in hostile activity there<sup>63</sup>. It may be noted that Deir El-Zour Province in Syria (where Mr Alexander was apprehended by Kurdish militia forces) was not a declared area.

53 The Islamic State has been listed as a "terrorist organisation" within the meaning of para (b) of the definition in s 102.1(1) of the *Criminal Code* (Cth) under various names since at least 2010, including "Al-Qa'ida in Iraq", "Islamic State of Iraq and the Levant" and "Islamic State"<sup>64</sup>. In 2016, it was also listed as a "declared terrorist organisation" for the purposes of former s 35AA of the *Citizenship Act*<sup>65</sup>.

54 Since 2015, the terrorism threat in Australia has been assessed by ASIO as "Probable" on the National Terrorism Threat Advisory System, signifying that credible intelligence, assessed by Australia's security agencies, indicates that individuals or groups continue to possess the intent and capability to conduct a terrorist attack in Australia. The threat of religiously motivated violent extremism,

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63 *Criminal Code (Foreign Incursions and Recruitment – Declared Areas) Revocation Instrument 2017 – Al-Raqqa Province, Syria* (Cth); Australia, *Criminal Code (Foreign Incursions and Recruitment – Declared Areas) Revocation Instrument 2017 – Al-Raqqa Province, Syria*, Explanatory Statement at 1.

64 *Criminal Code Amendment Regulations 2010 (No 7)* (Cth); *Criminal Code (Terrorist Organisation – Al-Qa'ida in Iraq) Regulation 2013* (Cth); *Criminal Code (Terrorist Organisation – Islamic State of Iraq and the Levant) Regulation 2013* (Cth); *Criminal Code (Terrorist Organisation – Islamic State) Regulation 2014* (Cth); *Criminal Code (Terrorist Organisation – Islamic State) Regulations 2017* (Cth); *Criminal Code (Terrorist Organisation – Islamic State) Regulations 2020* (Cth).

65 *Australian Citizenship (Declared Terrorist Organisation – Islamic State) Declaration 2016* (Cth). See also Parliamentary Joint Committee on Intelligence and Security, *Review of the declaration of Islamic State as a terrorist organisation under the Australian Citizenship Act 2007* (October 2016).



including from groups such as the Islamic State, was and remains the principal concern<sup>66</sup>.

55 Since 2014, there have been at least nine attacks targeting people in Australia and 21 major counter-terrorism disruption operations in response to attacks being planned in Australia, such as the actions of Man Haron Monis in taking 18 people hostage at the Lindt Café in downtown Sydney.

56 In March 2019, the Islamic State was ousted by the United States-led Global Coalition to Defeat Islamic State from the last of the territory it had controlled across Syria and Iraq. While ASIO reported that "ISIL's 'caliphate' has been crushed and it has lost its safe havens and organised military capability", it identified that any remnants remained dangerous and required ongoing attention, including the anticipated return to Australia of foreign fighters<sup>67</sup>. Similarly, US intelligence considered that, as at April 2021, the Islamic State remained capable of waging a prolonged insurgency in Iraq and Syria and leading its global organisation, despite compounding senior leadership losses.

57 The risk posed by foreign fighters, defined by ASIO as "Australians who have participated in foreign conflicts or undertaken training with extremist groups overseas", is an aspect of this general threat. While relatively few returned fighters have posed a direct risk to the Australian community, those that did have been responsible for some of the most lethal terrorist attacks.

58 ASIO has reported that, since 2012, around 230 Australians (or former Australians) have travelled to Syria or Iraq to fight with or support groups involved in the Syria-Iraq conflict. Of that, 50 are estimated to have returned to Australia, the majority before 2016.

59 In a submission to the Parliamentary Joint Committee on Intelligence and Security's 2019 review of the *Australian Citizenship Amendment (Citizenship Cessation) Bill*, ASIO continued to assess that the return of Australians who have spent time with Islamist extremist groups in Syria or Iraq has the potential to

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66 Australian National Security, Current National Terrorism Threat Level, available at <<https://www.nationalsecurity.gov.au/national-threat-level/current-national-terrorism-threat-level>> [<https://perma.cc/C96K-JYH3>].

67 Australian Security Intelligence Organisation, *ASIO Annual Report 2018-19* (2019) at 4.

exacerbate the Australian threat environment "for many years to come"<sup>68</sup>. This is because foreign fighters can be expected to have developed characteristics such as a greater tolerance for and propensity towards violence, and to have established jihadist credentials<sup>69</sup>. Several serious terrorist plots in Australia between 2000 and 2010 each involved at least one returned foreign fighter.

*The "retrospective" operation of s 36B(5)(h)*

60 As to Mr Alexander's argument that he cannot be taken to have repudiated his allegiance to Australia because, at the time he travelled into Syria, s 36B(5)(h) had not been enacted, the validity of s 36B is not to be approached on the footing that it would be open to the Parliament to treat voluntary conduct of the kind described in s 36B(5)(h) as a repudiation of his allegiance to Australia only if Mr Alexander made a deliberate decision to defy Australian statute law in so conducting himself.

61 While the suite of provisions of which s 36B is a part might broadly hint at some analogy with the principles of contract law concerning the termination of a contract by one party for repudiatory conduct by the other party, those provisions do not purport to enact the contractual model. The question is whether it was open to the Parliament to treat a person who voluntarily engaged in the conduct described in s 36B(5)(h) as having repudiated that person's allegiance to Australia, whether or not that person actually intended to defy Australian law.

62 In that regard, it cannot be said that it was not open to Parliament to provide that such conduct voluntarily undertaken might be so incompatible with the values of the Australian people as to be seen to be incompatible with continued membership of the Australian body politic. It is a different question whether giving effect to that assessment may be done by depriving that person of his or her citizenship without regard for the requirements of a fair hearing that characteristically attend the exercise of judicial power.

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68 Australian Security Intelligence Organisation, *ASIO Submission to the Parliamentary Joint Committee on Intelligence and Security: Review of the Australian Citizenship Amendment (Citizenship Cessation) Bill 2019* (2019) at 4.

69 Australian Security Intelligence Organisation, *ASIO Submission to the Parliamentary Joint Committee on Intelligence and Security: Review of the Australian Citizenship Amendment (Citizenship Cessation) Bill 2019* (2019) at 4.

### Summary

63 In summary in relation to the first issue, it should be held that it is open to the Parliament under s 51(xix) to create a status of citizenship that allows for the exclusion of persons from membership of the body politic. It is not an abuse of language to say that a person whose conduct is inimical to Australia's interests may, by a law of the Commonwealth, forfeit the rights of citizenship conferred by the Parliament, and thereby become an alien. The withdrawal of citizenship from an individual who voluntarily engages in the conduct described in s 36B(5)(h) cannot be said to pursue an eccentric understanding of the meaning of "aliens" in s 51(xix) of the *Constitution*.

64 The question to which attention must now turn concerns the process by which that withdrawal of citizenship may be effected.

### Chapter III of the *Constitution*

65 Mr Alexander argued that s 36B of the Citizenship Act reposes in the Minister the power to adjudge and punish criminal conduct by involuntary denaturalisation. This was said to be an exclusively judicial function, and not one which fell within any established exception bringing it within the acknowledged remit of the executive.

66 In support of this submission, Mr Alexander relied upon *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*<sup>70</sup>. Mr Alexander sought to characterise denaturalisation as punishment.

67 The defendants accepted that the function of "adjudging and punishing criminal guilt" is "exclusively judicial", as this Court held in *Lim*<sup>71</sup>. But the defendants submitted that *Lim* said nothing about laws that do not impose detention in custody<sup>72</sup>, of which s 36B is one.

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70 (1992) 176 CLR 1.

71 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27. See also *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 340 [15].

72 See *Thomas v Mowbray* (2007) 233 CLR 307 at 330 [18], 356-357 [114]-[121], 509 [600], 526 [651].

68 The defendants submitted that at its highest, s 36B confers a power to inflict "involuntary hardship or detriment" on a person, which, as Gleeson CJ explained in *Re Woolley; Ex parte Applicants M276/2003*<sup>73</sup>, is "not an exclusively judicial function". Further, it was submitted that it was not necessarily the case that deprivation of Australian citizenship would inflict hardship or detriment, particularly because s 36B allowed the cessation of citizenship only in the case of a person who is also a citizen of another country.

69 The defendants also emphasised that s 36B is a discretionary power based on three conditions: that the person has engaged in the requisite conduct (as specified by s 36B(5)); the conduct demonstrates that the person has repudiated his or her allegiance to Australia; and that it would be contrary to the public interest for the person to remain an Australian citizen. The defendants also sought to emphasise that the power was ultimately discretionary, and that a determination under s 36B, and any decision to refuse to revoke it, is subject to judicial review.

70 The submissions of the defendants should not be accepted. The consequences of a determination under s 36B for the citizen, the legislative policy which informs the operation of s 36B, and a comparison of the operation of s 36B with the provisions of s 36D (which authorise the same consequences for the citizen only upon conviction after a trial), all point to the conclusion that the power reposed in the Minister by s 36B(1) is a power which Ch III of the *Constitution* requires to be exercised by a court that is part of the federal judicature. To these considerations one may now turn.

#### *Consequences for the citizen*

71 In *Lim*, Brennan, Deane and Dawson JJ, with whom Gaudron J relevantly agreed<sup>74</sup>, said that "the adjudgment and punishment of criminal guilt under a law of the Commonwealth" was the most important of the "functions which, by reason of their nature or because of historical considerations, have become established as essentially and exclusively judicial in character"<sup>75</sup>.

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73 (2004) 225 CLR 1 at 12 [17].

74 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 53.

75 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27.

72 The plurality in *Lim* went on to explain that the exclusive character of this judicial function is a matter of "substance and not mere form"<sup>76</sup>. In addition, their Honours explained that "putting to one side the exceptional cases" of detention, such as in "cases of mental illness or infectious disease", which can "legitimately be seen as non-punitive in character and as not necessarily involving the exercise of judicial power", detention of a person by the State is "penal or punitive in character"<sup>77</sup>. Today, detention by way of deprivation of liberty in retribution for reprehensible conduct by an individual is a familiar example of punishment by the State. Historically, of course, English law sanctioned criminal conduct by punishments other than detention: corporal and capital punishment come readily to mind. But in addition, and importantly, exile has long been regarded as punishment. In the early seventeenth century, in *Hussey v Moor*<sup>78</sup>, the Court of King's Bench said:

"[P]enal laws are those which do inflict penalty, ... and what law can be more penal than [a] statute ... which includes [penalties being] pecuniary, corporal and exile."

73 Today, the fundamental value accorded to the liberty of the individual provides the rationale for the strict insistence in the authorities that the liberty of the individual may be forfeited for misconduct by that person only in accordance with the safeguards against injustice that accompany the exercise of the judicial power of the Commonwealth<sup>79</sup>. The case for the strict insistence on these safeguards is, if anything, stronger where the penalty for misconduct involves not only a loss of liberty within the community, but the loss of all entitlement to be both within the community and at liberty.

74 For an Australian citizen, his or her citizenship is an assurance that, subject only to the operation of the criminal law administered by the courts, he or she is

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76 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27.

77 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27-28.

78 (1616) 3 Bulst 275 at 280 [81 ER 232 at 236].

79 *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161 at 179 [56]; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 612 [79], 632-633 [150]-[151].

entitled to be at liberty in this country and to return to it as a safe haven in need<sup>80</sup>. These entitlements are not matters of private concern; they are matters of public rights of "fundamental importance"<sup>81</sup> to the relationship between the individual and the Commonwealth. In *South Australia v Totani*<sup>82</sup>, Crennan and Bell JJ said:

"In harmony with the *Constitution*, conclusions about whether legislation conflicts with constitutional requirements, which turn on the nature of judicial power, or its usurpation, or which are directed to the effect of legislation on the institutional integrity of a court, commonly subsume consideration of the effect of the legislation on personal liberty."

75 The suite of provisions which includes s 36B may be said to pursue a purpose of protecting the Australian community from the risks to peace and security posed by returning foreign fighters. But that protective purpose is not the principal purpose of the provision so as to qualify the power conferred by s 36B as an exception to the *Lim* principle<sup>83</sup>. As will be seen in the next section, the principal purpose of s 36B is retribution for conduct deemed to be so reprehensible as to be "incompatible with the shared values of the Australian community"<sup>84</sup>. That characterisation of the principal purpose of s 36B as punitive accords with the long-held understanding of exile as a form of punishment.

76 As noted above, the Solicitor-General drew attention to the observation of Gleeson CJ in *Re Woolley* that "[p]unishment, in the sense of the inflicting of involuntary hardship or detriment by the State, is not an exclusively judicial function"<sup>85</sup>. So in *Behrooz v Secretary, Department of Immigration and*

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80 *Potter v Minahan* (1908) 7 CLR 277 at 305; *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462 at 469.

81 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 53.

82 (2010) 242 CLR 1 at 156 [424] (footnotes omitted).

83 cf *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 181 [36]; 388 ALR 1 at 14.

84 s 36A of the Citizenship Act.

85 *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 12 [17].

*Multicultural and Indigenous Affairs*<sup>86</sup>, Gleeson CJ observed that the effect of the reasons of the plurality in *Lim* was that "executive powers to receive, investigate and determine an application for an entry permit and, after determination, to admit or deport, is not punitive in nature, and not part of the judicial power of the Commonwealth"; but, importantly, Gleeson CJ went on to say:

"In the case of a citizen, what is punitive in nature about involuntary detention (subject to a number of exceptions) is the deprivation of liberty involved ...

For a citizen, that alone would ordinarily constitute punishment."

77        *Visnic v Australian Securities and Investments Commission*<sup>87</sup> and *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd*<sup>88</sup> were cited by the defendants' counsel in support of the argument that a determination under s 36B is neither an adjudgment of guilt nor an imposition of punishment. Crucially, these cases dealt with the revocation of licences or other statutory privileges, rather than citizenship. These cases are examples of the point that the hardship or detriment involved in the revocation of a statutory licence or other privilege, where the holder of the licence or privilege is shown to be not a fit and proper person to enjoy the privilege or the licence, is not "punishment", which is an exclusively judicial function. But the punishment of an individual involving the deprivation of citizenship by reason of that person's misconduct is punishment of a different order from the loss of a statutory privilege or a licence under a regulatory regime. The consequence for a person who voluntarily does the acts described in s 36B(5)(h) is no different in substance from the punishment meted out pursuant to s 36D. Such a consequence cannot be equated with the cancellation of a licence or other privilege conferred by a statute which regulates business or other activities.

78        In *Kennedy v Mendoza-Martinez*<sup>89</sup>, Goldberg J, writing for the majority of the Supreme Court of the United States, held that a law depriving a citizen of the United States of his nationality for evading conscription for military service was constitutionally invalid on the basis that it imposed "the sanction of deprivation of

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86    (2004) 219 CLR 486 at 499 [20]-[21].

87    (2007) 231 CLR 381.

88    (2015) 255 CLR 352.

89    (1963) 372 US 144 at 165-166.

nationality as a punishment ... without affording the procedural safeguards ... [of] trial by duly constituted courts". The majority opinion in *Kennedy* recognised that the deprivation of the rights of citizenship serves to "promote the traditional aims of punishment – retribution and deterrence"<sup>90</sup>. As Brennan J said in his concurring opinion<sup>91</sup>, so it may be said of s 36B(1) that the sanction of "expatriation" is "available for no higher purpose than to curb undesirable conduct, to exact retribution for it, and to stigmatize it".

79 As was said in *Lim*, whether a law provides for the adjudication and punishment of criminal conduct is a matter of substance, not form<sup>92</sup>. The substantive effect of the deprivation of rights of liberty conferred by Australian citizenship is not disguised by the use of the emollient language of "citizenship cessation" to describe the effect of a determination under s 36B upon an individual. In this regard, it may be noted that s 40(2) of the *British Nationality Act 1981* (UK) provides, with commendable frankness, for the "deprivation of citizenship" of an individual if the Secretary of State is satisfied that deprivation is conducive to the public good. The candid language in which this provision is expressed acknowledges the substance of the effect of the ministerial determination upon the citizen in question. This candour may owe something to the circumstance that the validity of the conferral of such a power on the executive government of the United Kingdom is not dependent on conformity with constitutional requirements such as those found in Ch III of our *Constitution*; but however that may be, the *British Nationality Act* more accurately expresses the effect upon the citizen of a determination under s 36B than "citizenship cessation".

#### *Sections 36A and 36D*

80 That s 36B facilitates punishment in the sense of retribution for the conduct described in s 36B(5)(h) is confirmed by a consideration of the terms of s 36A and a comparison of the operation of s 36B with that of s 36D, the validity of which is not in issue in this case.

81 Section 36A is found at the beginning of Subdiv C of Div 3 of Pt 2 of the Citizenship Act. It provides:

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90 *Kennedy v Mendoza-Martinez* (1963) 372 US 144 at 168.

91 *Kennedy v Mendoza-Martinez* (1963) 372 US 144 at 187-188.

92 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27.



27.

"This Subdivision is enacted because the Parliament recognises that Australian citizenship is a common bond, involving reciprocal rights and obligations, and that citizens may, through certain conduct incompatible with the shared values of the Australian community, demonstrate that they have severed that bond and repudiated their allegiance to Australia."

82 The operative provisions which give effect to the policy stated by s 36A are a response to conduct that is conceived of as being so reprehensible that it is radically incompatible with the values of the community. The response of the Parliament to that reprehensible conduct is retribution in the form of the deprivation of the entitlement to be at liberty in Australia. Retribution is characteristic of punishment under the criminal law – it is "punishing an offender 'because he [or she] deserves it'"<sup>93</sup> by reason of the offender's misconduct. Associated with this purpose are notions of denunciation and deterrence of conduct that is regarded as reprehensible by the community.

83 The statement in s 36A informs both ss 36B and 36D. Section 36D provides relevantly as follows:

*"Cessation of citizenship on determination by Minister"*

- (1) The Minister may determine in writing that a person ceases to be an Australian citizen if:
  - (a) the person has been convicted of an offence, or offences, against one or more of the provisions specified in subsection (5); and
  - (b) the person has, in respect of the conviction or convictions, been sentenced to a period of imprisonment of at least 3 years, or to periods of imprisonment that total at least 3 years; and
  - (c) the Minister is satisfied that the conduct of the person to which the conviction or convictions relate demonstrates that the person has repudiated their allegiance to Australia; and
  - (d) the Minister is satisfied that it would be contrary to the public interest for the person to remain an Australian citizen (see section 36E).

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93 *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 473.

28.

Note: A person may seek review of a determination made under this subsection in the High Court of Australia under section 75 of the Constitution, or in the Federal Court of Australia under section 39B of the *Judiciary Act 1903*. See also section 36H of this Act (revocation of citizenship cessation determination on application to Minister).

- (2) However, the Minister must not make a determination if the Minister is satisfied that the person would, if the Minister were to make the determination, become a person who is not a national or citizen of any country.
- (3) The person ceases to be an Australian citizen at the time the determination is made.
- (4) Subsection (1) applies to a person who is an Australian citizen regardless of how the person became an Australian citizen (including a person who became an Australian citizen upon the person's birth).
- (5) For the purposes of paragraph (1)(a), the provisions are the following:

...

- (g) a provision of Part 5.5 of the *Criminal Code* (foreign incursions and recruitment)".

84 Section 36D, like s 36B, gives practical effect to the policy stated in s 36A. Each provision serves "to shore up the convictions of the law-abiding by demonstrating that the wicked will not go unscathed"<sup>94</sup> for the reprehensible conduct described in ss 36B(5)(h) and 36D(5)(g).

85 The sanction of deprivation of citizenship may be imposed upon an individual by the exercise of the discretion conferred on the Minister by s 36B rather than as a consequence of a conviction after a trial under s 36D. True it is that the Minister under s 36B need not be satisfied of the same mental elements necessary to establish the commission of an offence under s 36D<sup>95</sup>, but to say this is to draw attention to the lower factual threshold required by s 36B for the exercise of the power reposed in the Minister to effect a deprivation of citizenship. It also

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94 *Kennedy v Mendoza-Martinez* (1963) 372 US 144 at 190.

95 s 36B(6) of the Citizenship Act.

highlights the absence of the procedural safeguards attending a criminal prosecution of an offence under s 36D.

86 Both ss 36B and 36D deal with the topic of "[c]essation of citizenship on determination by [the] Minister". But in the case of s 36D, the power of the Minister arises only in relation to a person who has been convicted and sentenced of an offence or offences by a court<sup>96</sup>. In contrast, the Minister's discretion under s 36B arises upon the Minister him or herself being satisfied that the conduct elements of the offence have occurred. And the Minister may be satisfied of those matters in circumstances in which the "offender" has not had a fair hearing (or indeed any hearing at all), much less the benefit of the other safeguards of a criminal trial, including the incidence of the burden of proof.

87 Statute law may validly regulate the incidence of the burden of proving facts without offending Ch III of the *Constitution*<sup>97</sup>, but s 36B contemplates a process of ministerial fact finding in relation to the grounds for the deprivation of citizenship in which the State is not required to carry the burden of proof, by contrast to the position under s 36D. Indeed, under s 36B, the Minister is not required even to proceed in accordance with the rules of procedural fairness<sup>98</sup>. And yet the process under s 36B may result in the same outcome by way of deprivation of citizenship as under s 36D, where the protections afforded by a criminal trial have been afforded to the citizen. This incongruity is not dispelled by the possibility that an application for revocation may subsequently be made under s 36H or that s 36J or s 36K may be engaged.

88 Some reference to the evolution of s 36B is also illuminating. Provisions for the termination of citizenship on terrorism-related grounds were first introduced into the Citizenship Act by the Allegiance to Australia Act and commenced on 12 December 2015. These provisions were introduced as part of the government's response to the Review of Australia's Counter-Terrorism Machinery for a Safer Australia, and with a view to broadening powers relating to

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96 s 36D(1)(a), (b) of the Citizenship Act.

97 *Nicholas v The Queen* (1998) 193 CLR 173 at 188-190 [23]-[24], 225 [123], 234-236 [152]-[154]; *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 22-23 [30]-[33].

98 s 36B(11) of the Citizenship Act.

the cessation of Australian citizenship for persons engaging in terrorism and who were a serious threat to Australia and Australia's interests<sup>99</sup>.

89 The predecessor to s 36B was s 33AA of the Citizenship Act. It was in largely the same terms, except that it provided for a mental element<sup>100</sup>:

- "(3) [Section 33AA(1)] applies to conduct specified in any of paragraphs [33AA](2)(a) to (h) only if the conduct is engaged in:
- (a) with the intention of advancing a political, religious or ideological cause; and
  - (b) with the intention of:
    - (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or
    - (ii) intimidating the public or a section of the public.
- (4) A person is taken to have engaged in conduct with an intention referred to in subsection (3) if, when the person engaged in the conduct, the person was:
- (a) a member of a declared terrorist organisation (see section 35AA); or
  - (b) acting on instruction of, or in cooperation with, a declared terrorist organisation.
- (5) To avoid doubt, subsection (4) does not prevent the proof or establishment, by other means, that a person engaged in conduct with an intention referred to in subsection (3)."

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**99** Australia, Senate, *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (Cth), Revised Explanatory Memorandum at 1.

**100** *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth), Sch 1, item 3.

90 In 2019, a report by the Independent National Security Legislation Monitor ("the INSLM Report") reviewed the operation, effectiveness and implications of the citizenship cessation provisions, including s 33AA. The INSLM Report stated that the "main focus" of these laws was involvement with the Islamic State, although they were not so limited<sup>101</sup>. The INSLM Report considered that Australia's counter-terrorism framework required a range of mechanisms, and that "[i]n some, possibly rare cases, citizenship cessation reduces the risk of a terrorist act being undertaken by that person in Australia"<sup>102</sup>.

91 However, the INSLM Report concluded that the citizenship cessation provisions, including s 33AA, lacked necessity, proportionality and proper protections for individual rights. The INSLM Report further identified, in addition to the risk of de facto or temporary statelessness, a denial of due process<sup>103</sup>. While s 36D affords a citizen the due process of a criminal trial before the Minister's discretion arises, a significant feature of s 36B is that it operates without due process at all.

*The ministerial discretion*

92 The defendants argued that a determination under s 36B(1) requires consideration of the public interest in addition to satisfaction that the conduct described in s 36B(5)(h) occurred, and that this exercise does not require a finding that an offence has been committed. It was also said that the Minister's determination will not decide a controversy as to the existence of present rights and obligations.

93 These points highlight that, in contrast to s 36D, which contemplates an orthodox exercise of judicial power as a necessary precondition of imposing

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101 Independent National Security Legislation Monitor, *Report to the Attorney-General: Review of the operation, effectiveness and implications of terrorism-related citizenship loss provisions contained in the Australian Citizenship Act 2007*, Report No 7 (2019) at 44 [6.13].

102 Independent National Security Legislation Monitor, *Report to the Attorney-General: Review of the operation, effectiveness and implications of terrorism-related citizenship loss provisions contained in the Australian Citizenship Act 2007*, Report No 7 (2019) at 44 [6.10].

103 Independent National Security Legislation Monitor, *Report to the Attorney-General: Review of the operation, effectiveness and implications of terrorism-related citizenship loss provisions contained in the Australian Citizenship Act 2007*, Report No 7 (2019) at 57 [6.87].

Kiefel CJ  
Keane J  
Gleeson J

32.

relevantly the same punishment, s 36B does not contemplate an exercise of judicial power at all. But to say that is entirely beside the point. The vice of s 36B is precisely that it does not provide for the exercise of judicial power. To emphasise that this is so is simply to make Mr Alexander's case for him.

### *Dual citizens*

94 For the defendants it was argued that the deprivation of Australian citizenship pursuant to s 36B would not necessarily mean that the former citizen would be exposed to the dangers of statelessness because, by reason of s 36B(2), the Minister's power may be exercised only in relation to an individual who is also a citizen of another country. It was said that the extent of the actual detriment to such an individual would depend upon the circumstances of that individual.

95 On any view of the situation of such an individual, the involuntary deprivation of rights involved in Australian citizenship by way of retribution for his or her conduct is a serious punishment. The individual is stripped of the right to be at liberty in Australia, and that is so whatever rights may be conferred by citizenship of another country.

### *Summary*

96 In summary in relation to the Ch III issue, the effect of the Minister's determination under s 36B(1) is to deprive Mr Alexander of his entitlement to enter and live at liberty in Australia. That sanction by the Parliament may be imposed only upon satisfaction of the Minister that Mr Alexander engaged in conduct that is so reprehensible as to be deserving of the dire consequence of deprivation of citizenship and the rights, privileges, immunities and duties associated with it. The power to determine the facts which enliven the power to impose such a punishment is one which, in accordance with Ch III of the *Constitution*, is exercisable exclusively by a court that is a part of the federal judicature.

### **Answers and orders**

97 The questions posed by the special case should be answered as follows:

1. Is s 36B of the *Australian Citizenship Act 2007* (Cth) invalid in its operation in respect of the plaintiff because:
  - (a) it is not supported by a head of Commonwealth legislative power;

Answer, "No".

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- (b) it is inconsistent with an implied limitation on Commonwealth legislative power preventing the involuntary deprivation of Australian citizenship;

Answer, "Unnecessary to answer".

- (c) it effects a permanent legislative disenfranchisement which is not justified by a substantial reason;

Answer, "Unnecessary to answer".

- (d) it effects a permanent disqualification from being chosen or from sitting as a senator or a member of the House of Representatives, otherwise than in the circumstances contemplated by ss 34 and 44 of the Constitution;

Answer, "Unnecessary to answer".

- (e) it reposes in the Minister for Home Affairs the exclusively judicial function of punishing criminal guilt?

Answer, "Yes".

- 2. What, if any, relief should be granted to the plaintiff?

Answer, "It should be declared that:

- (a) s 36B of the *Australian Citizenship Act 2007* (Cth) is invalid; and
- (b) the plaintiff is an Australian citizen".

- 3. Who should pay the costs of the special case?

Answer, "The defendants".

98 GAGELER J. The conclusion reached by Kiefel CJ, Keane and Gleeson JJ is that s 36B of the *Australian Citizenship Act 2007* (Cth) is a law with respect to "aliens" within the meaning of s 51(xix) of the *Constitution* but infringes the doctrine of separation of judicial power enshrined in Ch III of the *Constitution*. I agree with that conclusion and with the substance of their Honours' reasons for reaching it.

99 My purpose in writing additionally is to respond to a particular submission put by the defendants at the forefront of their argument that s 36B does not infringe the doctrine of separation of judicial power. The submission was that someone who ceases to be an Australian citizen by operation of a ministerial determination made under s 36B is not "punished", in the sense in which that term is used to describe an exercise of judicial power consequent upon a finding of criminal guilt<sup>104</sup>, because the "purpose" of the section is to "protect the Australian community" from persons found to have engaged in terrorist conduct.

100 My response to the submission is in two parts. The first part involves explaining why it does not help, in the context of determining whether a law infringes the doctrine of separation of judicial power enshrined in Ch III, to describe a legislative purpose at that level of generality. The second part explains how legislative purpose should be identified and, in doing so, points out what was wrong with the defendants' attempt to identify the legislative purpose through reliance on certain extrinsic material.

### **Part I: describing a legislative purpose**

101 Constitutional analysis in a variety of contexts can be assisted by identifying the "purpose" (or "object" or "end") of a law as distinct from the "manner" (or "means" or "mechanism") by which the law is designed to achieve that purpose. Without being exhaustive, those contexts include determining whether a law is "with respect to" a designated topic of legislative power<sup>105</sup>, determining whether a law infringes the express guarantee of freedom of interstate

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104 See *Duncan v New South Wales* (2015) 255 CLR 388 at 409 [46]; *Minogue v Victoria* (2019) 268 CLR 1 at 20-21 [31].

105 See *Stenhouse v Coleman* (1944) 69 CLR 457 at 471-472; *Murphyores Inc Pty Ltd v The Commonwealth* (1976) 136 CLR 1 at 11, 19-23; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 294.



trade<sup>106</sup> or intercourse<sup>107</sup>, and determining whether a law infringes the implied guarantee of freedom of political communication<sup>108</sup>.

102 In each context, the "purpose" is the "public interest sought to be protected and enhanced" by the law<sup>109</sup>. Expressed in more arcane terms, the "purpose" is the positive counterpart of "the mischief to redress of which [the] law is directed"<sup>110</sup>.

103 The purpose of any law can be described at different levels of generality. At one extreme, a law made by the Commonwealth Parliament under s 51 of the *Constitution* can always be described in the opening words of that section as being "for the peace, order, and good government of the Commonwealth". At another extreme, the same law can be described as having the specific purpose of achieving exactly what the law does. For example, the purpose of s 36B can be described as being to cancel the Australian citizenship of a person if the statutory preconditions it specifies are met and if the ministerial discretion it confers is exercised. Neither description is incorrect. But neither is of much use in constitutional analysis.

104 Between those two extremes will often lie other available descriptions each having a different level of generality. The selection between those other descriptions will then be functional. The level of generality at which the purpose of the law is best described will depend on what constitutional analysis is being

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106 See *Cole v Whitfield* (1988) 165 CLR 360 at 408-409; *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 473-474; *Betfair Pty Ltd v Western Australia* ("*Betfair No 1*") (2008) 234 CLR 418 at 451 [10], 464 [47]-[48].

107 See *Palmer v Western Australia* (2021) 95 ALJR 229 at 241-242 [47]-[48], [50], 249 [92], 265 [181], 267-268 [187]-[189], [191]-[192], 279 [241], 281 [249]; 388 ALR 180 at 192-193, 201, 222-223, 225-226, 240, 243.

108 See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561-562; *McCloy v New South Wales* (2015) 257 CLR 178 at 193-195 [2], 230-231 [126], [129], 258 [220], 280-281 [306].

109 *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 300.

110 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 394 [178]. See *McCloy v New South Wales* (2015) 257 CLR 178 at 232 [132]; *Brown v Tasmania* (2017) 261 CLR 328 at 391-392 [208]-[210].

undertaken. That in turn will depend on what constitutional doctrine is in play and ultimately on what constitutional value is at stake<sup>111</sup>.

105 The Supreme Court of Canada has emphasised the importance of selecting the appropriate level of generality at which to describe a legislative purpose in the context of determining whether a law is "demonstrably justified in a free and democratic society" within the meaning of the *Canadian Charter of Rights and Freedoms*. In *R v Moriarity*<sup>112</sup>, Cromwell J said:

"If the purpose is articulated in too general terms, it will provide no meaningful check on the means employed to achieve it: almost any challenged provision will likely be rationally connected to a very broadly stated purpose ... On the other hand, if the identified purpose is articulated in too specific terms, then the distinction between ends and means may be lost and the statement of purpose will effectively foreclose any separate inquiry into the connection between them. The appropriate level of generality, therefore, resides between the statement of an 'animating social value' – which is too general – and a narrow articulation, which can include a virtual repetition of the challenged provision, divorced from its context – which risks being too specific".

106 Traditionally, an analytical distinction has been drawn between a legislative purpose that is "penal or punitive" and a legislative purpose that is no more than "protective" in the context of determining whether a law infringes the doctrine of separation of judicial power by conferring on a decision-maker other than a court a power to detain – or, more broadly, a power to constrain the freedom of action or to revoke or suspend the statutory status of – a person found to have contravened a statutory norm. On the one hand, a punitive purpose will be incompatible with the doctrine. On the other hand, a protective purpose may be compatible with the doctrine<sup>113</sup>. The distinction alone cannot be determinative of the ultimate constitutional inquiry as a law with a protective purpose may still pursue that purpose in a manner incompatible with the doctrine<sup>114</sup>.

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111 eg, *Tajjour v New South Wales* (2014) 254 CLR 508 at 584 [163]; *Brown v Tasmania* (2017) 261 CLR 328 at 362-363 [99]-[101], 393-394 [216]-[217], 432-433 [322].

112 [2015] 3 SCR 485 at 498-499 [28].

113 See *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 28, 71; *Re Woolley*; *Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 12 [17], 25-26 [60]-[61].

114 Compare *Kruger v The Commonwealth* (1997) 190 CLR 1 at 162, citing *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176

107 The distinction between a punitive purpose and a protective purpose has been said to be "elusive"<sup>115</sup> in the context of examining the effect of an exercise of power on a person who is its object. The distinction nevertheless remains analytically useful in the context of characterising the power as judicial or non-judicial, as long as the notion of what amounts to a protective purpose is kept within bounds which make the distinction meaningful.

108 Long recognised as protective in a constitutionally meaningful sense has been the purpose of upholding standards of integrity and competence amongst professionals and others who engage in activities involving elements of public trust<sup>116</sup>. That protective purpose has accordingly been recognised to have the potential to justify conferral of a power to revoke or suspend a statutory status of a person found to have contravened a statutory norm on a decision-maker other than a court. When undertaken as an incident of a legislative scheme designed to uphold such standards, "it is not readily to be assumed that disciplinary action, however much it may hurt the individual concerned, is personal and retributive rather than corporate and self-respecting"<sup>117</sup>.

109 By parity of reasoning, when conferred on a decision-maker other than a court as an incident of a licensing regime designed to ensure that the content of radio or television broadcasting respects community standards<sup>118</sup>, a power to revoke or suspend a broadcasting licence where a broadcast is shown to have fallen short of those standards can meaningfully be characterised as having the purpose of protecting the Australian community. Accordingly, a decision-maker responsible for administering a licensing regime of that nature does not exercise the exclusively judicial power of adjudging and punishing criminal guilt merely by making its own inquiry and forming its own opinion that a licensee committed

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CLR 1 at 33, 46, 58, 65, 71; *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 343 [27].

115 *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at 145 [32].

116 *R v White; Ex parte Byrnes* (1963) 109 CLR 665; *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350; *Visnic v Australian Securities and Investments Commission* (2007) 231 CLR 381.

117 *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350 at 358-359 [17], quoting *Kariapper v Wijesinha* [1968] AC 717 at 737.

118 *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352 at 362 [4].

a criminal offence in the course of determining whether that licensee has breached a condition of its licence<sup>119</sup>.

110 The attempt by the defendants to analogise from a purpose of upholding standards to be expected of those who by choice engage in a profession or in an activity involving an element of public trust, or in radio or television broadcasting under statutory licence, to a purpose of upholding standards to be expected of all Australian citizens in virtue of them being Australian citizens must be rejected. It draws too long a bow. It stretches the concept of protection to breaking point. It deprives the distinction between "protective" and "punitive" of all utility.

111 In the context of determining whether a law infringes the doctrine of separation of judicial power, to say no more than that the purpose of a law is to protect the Australian community from an Australian citizen found to have contravened a statutory norm is to say nothing to indicate that the law has a purpose that is "protective" in a sense meaningfully distinct from a purpose that is "penal or punitive". That is because protection of the community from a citizen found to have contravened a statutory norm is a concept of such elasticity that it is not necessarily inconsistent with the imposition on that citizen of a criminal punishment following an adjudication of criminal guilt – a function which lies in the heartland of judicial power.

112 Indeed, "protection of society" has been identified as one of the "purposes of criminal punishment"<sup>120</sup>. In that regard, it has been said that "the protection of the community is one of the most important results that the criminal law is designed to secure"<sup>121</sup>. It has even been said that criminal law "exists for the protection of society" and that it is possible to discard the notion of punishment for punishment's sake and instead recognise that the imposition of criminal punishment pursues "the principles of rehabilitation, deterrence and, wherever necessary, the ultimate isolation from society of those individuals who have no capacity for the adjustments necessary to conform their conduct as active members of a free society to the requirements of the law"<sup>122</sup>.

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119 *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352 at 371 [33], 380 [63].

120 *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 476.

121 *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 475, quoting *R v Pedder* (unreported, Queensland Court of Criminal Appeal, 29 May 1964).

122 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 589 [11], quoting *United States v Chandler* (1968) 393 F 2d 920 at 929.

113 There is a notion of criminal punishment having protection of the community from future criminal conduct as its ultimate purpose which can be traced back to the Enlightenment. There is also a notion of criminal punishment encompassing protection of the community by removing the most recalcitrant of criminal contraveners from membership of the community altogether which is of even greater antiquity. In the late 18th century, Sir William Blackstone wrote<sup>123</sup>:

"As to the *end* ... of human punishments. This is not by way of atonement or expiation for the crime committed ... but as a precaution against future offences of the same kind. This is effected three ways: either by the amendment of the offender himself; for which purpose all corporal punishments, fines, and temporary exile or imprisonment are inflicted: or, by deterring others by the dread of his example from offending in the like way, ... or, lastly, by depriving the party injuring of the power to do future mischief; which is effected by either putting him to death, or condemning him to perpetual confinement, slavery, or exile. The same one end, of preventing future crimes, is endeavoured to be answered by each of these three species of punishment."

A century later, Oliver Wendell Holmes wrote that "probably most English-speaking lawyers would accept the preventive theory without hesitation"<sup>124</sup>. Whether the notion espoused by Blackstone and Holmes continues to have the same degree of contemporary acceptance is questionable but not to the point. The longevity of the notion is enough to illustrate the difficulty with drawing a categorical distinction based on the extremely broad concept of protection which the defendants sought to invoke.

## Part II: identifying the legislative purpose

114 Identifying the purpose of a law is an exercise in attributing an objective intention to the outcome of a legislative process. The exercise is similar, although not identical, to the exercise involved in construing a law by attributing meaning to legislated text. The two are informed by the same textual and contextual considerations. The main difference between them is as follows.

115 To the extent that legislated text has operative legal effect, the operative legal effect inheres in the meaning of the text construed in the totality of its context.

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123 Blackstone, *Commentaries on the Laws of England* (1769), bk IV, c 1 at 11-12 (emphasis in original).

124 Holmes, *The Common Law* (1881) at 43.

The text is in that sense, and for that reason, the beginning and the end of statutory construction<sup>125</sup>.

116 To the extent that the legislated text includes a statement of purpose, that statement of purpose can "throw light on"<sup>126</sup> the mischief to redress of which the operative legislated text is directed. But the purpose does not inhere in the text. The text is in that sense, and for that reason, the beginning of the identification of legislative purpose but cannot be the end.

117 A legislature of limited powers "cannot arrogate a power to itself by attaching a label to a statute"<sup>127</sup> and cannot, merely by including a statement of purpose in legislated text<sup>128</sup>, require a court to identify the purpose of a law as something that it is not. Not unknown in our constitutional history is for a law which purports to be designed to achieve a constitutionally permissible purpose to be found on close inspection "in truth" to pursue a constitutionally impermissible purpose<sup>129</sup>.

118 That said, the constitutional relationship between the judiciary and the legislature is such that a statement of legislative purpose must be treated by a court as a solemn and presumptively accurate declaration of why a law is enacted. The declaration is made by the legislature to itself and to the world.

119 The legislatively declared purpose might well be elucidated with reference to other aspects of the text or context. It might need to be supplemented or qualified in order to explain some detail of the law. It might need to be translated to a level appropriate for constitutional analysis in a particular context. Absent strong reason for concluding that the stated purpose is not a true purpose, however, it must be accepted and respected.

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125 *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39]; *Thiess v Collector of Customs* (2014) 250 CLR 664 at 671 [22].

126 *Wacando v The Commonwealth* (1981) 148 CLR 1 at 23.

127 *South Australia v The Commonwealth* ("the Uniform Tax Case No 1") (1942) 65 CLR 373 at 432; *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 263.

128 *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545 at 563-564; *IW v City of Perth* (1997) 191 CLR 1 at 11-12.

129 See *Pioneer Express Pty Ltd v South Australia* (1957) 99 CLR 227 at 240-241. See also *Betfair Pty Ltd v Western Australia* ("Betfair No 1") (2008) 234 CLR 418 at 483-484 [134].

120 When enacting the *Australian Citizenship Amendment (Citizenship Cessation) Act 2020* (Cth) ("the 2020 Amending Act"), Parliament chose to explain the purpose of the whole of the subdivision within which s 36B is included. Parliament did so in s 36A. Translated to the level appropriate for analysis of the compatibility of s 36B with Ch III of the *Constitution*, the purpose declared in s 36A is properly characterised as one of denunciation and exclusion from formal membership of the Australian community of persons shown by certain conduct to be unwilling to maintain or incapable of maintaining allegiance to Australia. The nature of the conduct understood by the Parliament to be capable of showing that unwillingness or incapacity is elucidated by the operative provisions of the subdivision and is limited to criminal conduct found to have been engaged in by a person in the past. Thus the purpose of denunciation and exclusion from formal membership of the Australian community is solely on the basis of past criminal conduct. That purpose can only be characterised as "punitive".

121 The revised explanatory memorandum<sup>130</sup> for the Bill for the 2020 Amending Act contains nothing to cast the purpose of s 36B as declared by s 36A in a different light. Nor does the second reading speech<sup>131</sup>.

122 The Bill for the 2020 Amending Act had its origin in a report to the Attorney-General in 2019 by the Independent National Security Legislation Monitor<sup>132</sup>. The parliamentary process which resulted in the Bill's enactment included an inquiry in 2019 and report in 2020 by the Parliamentary Joint Committee on Intelligence and Security ("the PJCIS")<sup>133</sup>.

123 The defendants did not seek to draw on anything in either of those reports to support their submission that the purpose of s 36B is appropriately identified as the protection of the Australian community. Rather, they sought to draw on a submission made to the PJCIS in the course of its inquiry.

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130 Australia, Senate, *Australian Citizenship Amendment (Citizenship Cessation) Bill 2020*, Revised Explanatory Memorandum.

131 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 19 September 2019 at 3602.

132 Independent National Security Legislation Monitor, *Report to the Attorney-General: Review of the operation, effectiveness and implications of terrorism-related citizenship loss provisions contained in the Australian Citizenship Act 2007*, Report No 7 (2019).

133 Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Australian Citizenship Amendment (Citizenship Cessation) Bill 2019* (2020).

124 The submission was made by the Australian Security Intelligence Organisation ("ASIO")<sup>134</sup>. The thrust of that submission was that ASIO considered "citizenship cessation" to be "a legislative measure that works alongside a number of other tools to protect Australia and Australians from terrorism". The submission implied that ASIO saw those "other tools" as including prosecution for terrorism offences, which it said would sometimes result in "the better security outcome". The concept of "protection" which ASIO employed in its submission was therefore one that encompassed invocation of a judicial process by way of prosecution for an offence.

125 The language of "security" and "protection" in which ASIO cast its submission is explicable by reference to ASIO's statutory charter. The statutory functions of ASIO centrally include obtaining, correlating, evaluating and communicating intelligence relevant to "security"<sup>135</sup>. The definition of "security" relevantly includes "the protection of, and of the people of, the Commonwealth" from politically motivated violence<sup>136</sup>.

126 A submission made by a responsible government agency to a parliamentary inquiry cannot be dismissed as beyond the scope of the material which might properly inform judicial identification of the purpose of a law. In the context of examining the compatibility of s 36B with Ch III of the *Constitution*, however, the ASIO submission to the PJCIS is of no analytical utility whatsoever. ASIO's frame of reference is such that even prosecution which results in the imposition of punishment by a court for a terrorism offence is regarded as being for the protection of the Australian community. That is not the frame of reference within which determining whether a statutory purpose is "protective" needs to occur in the context of the doctrine of separation of judicial power enshrined in Ch III of the *Constitution*. The concept of "protection" as employed in ASIO's submission to the inquiry therefore does not assist in identifying the purpose of s 36B in the context of the constitutional inquiry.

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134 Australian Security Intelligence Organisation, *ASIO submission to the Parliamentary Joint Committee on Intelligence and Security: Review of the Australian Citizenship Amendment (Citizenship Cessation) Bill 2019* (2019).

135 Section 17(1)(a) and (b) of the *Australian Security Intelligence Organisation Act 1979* (Cth).

136 Section 4 of the *Australian Security Intelligence Organisation Act 1979* (Cth) (definition of "security").



43.

**Disposition**

127 I agree with the answers proposed by Kiefel CJ, Keane and Gleeson JJ to the questions stated by the parties in the special case.

128 GORDON J. The plaintiff, Mr Alexander, conducts this litigation through a  
litigation guardian because his family and lawyers have not been able to contact  
him since 15 July 2021, shortly after he told them that he was being transferred to  
the Branch 235 prison in Damascus, Syria, operated by Syrian intelligence.

129 I gratefully adopt the description of Mr Alexander's plight, the Australian  
Government's decisions about Mr Alexander, the nature of the proceeding in this  
Court and the relevant provisions of Subdiv C of Div 3 of Pt 2 of the  
*Australian Citizenship Act 2007* (Cth) ("the Citizenship Act") set out in the reasons  
of Kiefel CJ, Keane and Gleeson JJ.

130 Section 36B of the Citizenship Act confers a power on the first defendant,  
the Minister for Home Affairs ("the Minister"), to make a citizenship cessation  
determination if satisfied that: a person has engaged in specified conduct  
(relevantly identified by reference to the physical elements of certain  
terrorism-related offences); the conduct demonstrates that the person has  
repudiated their allegiance to Australia; it would be contrary to the public interest  
for the person to remain an Australian citizen; and the person would not become a  
person who is not a national or citizen of any country.

131 On 2 July 2021, the Minister determined that Mr Alexander "ceases to be  
an Australian citizen" ("the Cessation Determination"). The Cessation  
Determination recorded that the Minister was satisfied: "that [Mr] Alexander ...  
has engaged in conduct specified in [s] 36B(5) of the [Citizenship] Act,  
namely engaging in foreign incursion, while outside Australia"; "that the conduct  
of [Mr] Alexander demonstrates that he has repudiated his allegiance to Australia";  
"that it would be contrary to the public interest for [Mr] Alexander to remain an  
Australian citizen, having had regard to the matters specified in [s] 36E(2)";  
and that Mr Alexander "would not, through the making of the determination,  
become a person who is not a national or citizen of any country"  
(emphasis in original).

132 Mr Alexander challenges the constitutional validity of s 36B on a number  
of grounds. These reasons address two grounds: (1) that s 36B is not supported by  
s 51(xix) of the *Constitution*, the "naturalization and aliens" power<sup>137</sup>;  
and (2) that s 36B reposes in the Minister the exclusively judicial function of  
punishing criminal guilt. Mr Alexander's challenge on the second ground should

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137 The ground raised by Mr Alexander was, more broadly, that s 36B in its purported  
application to him is not supported by any head of Commonwealth legislative  
power. Ultimately, however, the defendants only relied upon s 51(xix) of the  
*Constitution* to support the validity of s 36B.

be upheld. It is, therefore, neither necessary nor appropriate<sup>138</sup> to determine whether s 36B is supported by the "naturalization and aliens" power or any of the other grounds raised by Mr Alexander<sup>139</sup>. But, given that other members of the Court do decide the question of legislative power, it is necessary to make some brief observations about the "naturalization and aliens" power.

### Is s 36B supported by s 51(xix)?

133 The term "aliens" in s 51(xix) of the *Constitution* presupposes persons who are "non-aliens" – persons who are undoubtedly part of the Australian political community and who do not need to be formally admitted to membership. That is, there are persons who are *not* aliens and "who could not possibly answer the description of 'aliens' in the ordinary understanding of the word"<sup>140</sup>. These people are not aliens and could not possibly answer that description regardless of whether the Federal Parliament says that they are not aliens (or describes some or all of them as "citizens" or "nationals", or uses any other term or expression), or says that they can or must be provided with some identity document or can or must be provided with such a document if they recite or subscribe to some pledge of allegiance. The content of the constitutional word "aliens" is not and *cannot* be fixed by the content of laws made by the Federal Parliament. It is a necessary corollary of these propositions that "the 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"<sup>141</sup>. That limit on the aliens

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138 See *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140 at 199 [141], citing *Lambert v Weichelt* (1954) 28 ALJ 282 at 283, *Cheng v The Queen* (2000) 203 CLR 248 at 270 [58], *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 473-474 [249]-[252], *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at 443 [94], 468 [177] and *Chief Executive Officer of Customs v El Hajje* (2005) 224 CLR 159 at 171 [28]; *Mineralogy Pty Ltd v Western Australia* (2021) 95 ALJR 832 at 846 [56]; 393 ALR 551 at 565. See also *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 176.

139 Namely, that s 36B is inconsistent with an implied limitation on Commonwealth legislative power preventing the involuntary deprivation of Australian citizenship and effects a permanent legislative disenfranchisement which is not justified by a substantial reason.

140 See *Pochi v Macphee* (1982) 151 CLR 101 at 109.

141 *Pochi* (1982) 151 CLR 101 at 109.

power<sup>142</sup>, commonly referred to as the "*Pochi* limit", has been repeatedly endorsed by this Court<sup>143</sup> and is accepted by the defendants.

134 Non-aliens are not and cannot conclusively or exclusively be defined as persons who hold Australian citizenship. Citizenship is a statutory concept, which is neither necessary nor sufficient to determine the boundaries of membership of the Australian political community<sup>144</sup>. Conferral of statutory citizenship is within the legislative power of the Commonwealth under different heads of power for different purposes.

*Persons who could not possibly answer the description of "aliens"*

135 The starting point is that a law is not ordinarily supported by s 51(xix) – the "naturalization and aliens" power – in its application to those who could not possibly answer the description of "aliens" in the ordinary understanding of the word.

136 A law that grants statutory citizenship to those persons who could not possibly answer the description of "aliens" in the ordinary understanding of the word is not supported by the aliens power<sup>145</sup>. In respect of those persons,

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**142** See, by analogy, *Attorney-General for NSW v Brewery Employees Union of NSW* (1908) 6 CLR 469 at 513 in relation to trade marks in s 51(xviii) of the *Constitution*.

**143** *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 185-186, 192; *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 410 [43], 435-436 [132], 469-470 [238], 490 [297]; see also 492 [303]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 173 [31], 205 [159]; see also 172 [26], 175 [39]; *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 36 [9], 61 [94]; *Singh v The Commonwealth* (2004) 222 CLR 322 at 329 [4]-[5], 383 [151]; see also 376 [128], 383 [153]; *Koroitamana v The Commonwealth* (2006) 227 CLR 31 at 38 [12], 49 [62], 54-55 [81]; *Love v The Commonwealth* (2020) 270 CLR 152 at 171 [7], 183 [50], 218 [168], 237 [236], 239 [244], 244 [252], 266 [310]-[311], 270 [326], 288 [394], 303 [427], 305 [433]; *Chetcuti v The Commonwealth* (2021) 95 ALJR 704 at 715 [37], 722 [66], 729 [103], 739 [145]; 392 ALR 371 at 380, 389, 398, 411.

**144** *Love* (2020) 270 CLR 152 at 187 [64], 244 [252], 264 [304]-[305], 265-266 [308]-[310], 305-308 [432]-[437]; see also *Nolan* (1988) 165 CLR 178 at 186; *Lim* (1992) 176 CLR 1 at 54; *Chetcuti* (2021) 95 ALJR 704 at 715 [38], 720 [60], 729 [105]; cf 711 [16]; 392 ALR 371 at 381, 387, 399; cf 375.

**145** cf *Chetcuti* (2021) 95 ALJR 704 at 711 [16]; 392 ALR 371 at 375.

the implied nationhood power<sup>146</sup> and, in some of its operations, the external affairs power<sup>147</sup> support the grant of statutory citizenship. Those powers support the conferral of statutory citizenship upon persons who could not possibly answer the description of aliens because statutory citizenship is a status which facilitates the regulation of employment in the public service, pensions, passports and like matters<sup>148</sup>.

- 137 Those general propositions are subject to two exceptions. Persons who could not possibly *otherwise* answer the description of "aliens" in the ordinary understanding of the word may, subject to issues regarding statelessness<sup>149</sup>, be *denationalised* pursuant to legislation supported by the aliens power in two circumstances: first, where there are changes in sovereign identity or territory<sup>150</sup>; and, second, where the person has renounced their allegiance to Australia<sup>151</sup>, expressly or impliedly, by engaging in specified conduct. It will be necessary to return to the latter exception.

*Persons outside the Pochi limit*

- 138 By contrast, the "naturalization and aliens" power (s 51(xix)) and the immigration power (s 51(xxvii)) support legislation transforming aliens into non-aliens, including by grant of statutory citizenship<sup>152</sup>. An aspect of the

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146 See *Victoria v The Commonwealth and Hayden* ("the AAP Case") (1975) 134 CLR 338 at 397; *Davis v The Commonwealth* (1988) 166 CLR 79 at 93-95, 110-111; cf 103-104, 117, 119; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 87-88 [228]; cf 175-178 [506]-[511].

147 *Constitution*, s 51(xxix).

148 See *Singh* (2004) 222 CLR 322 at 378 [134]; see also 328, 346 [47], 433 [318]; cf 434 [319].

149 See Convention on the Reduction of Statelessness [1975] ATS 46, Arts 7-9. See also Convention relating to the Status of Stateless Persons [1974] ATS 20, Art 31; Convention on the Rights of the Child [1991] ATS 4, Arts 7 and 8.

150 See *Re Patterson* (2001) 207 CLR 391 at 466 [225], 468-469 [235]-[237]; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439 at 458-459 [35], 459 [37]-[38], 483 [117].

151 See *Nolan* (1988) 165 CLR 178 at 192; *Singh* (2004) 222 CLR 322 at 397-398 [197]; *Chetcuti* (2021) 95 ALJR 704 at 727 [90]; 392 ALR 371 at 396.

152 *Love* (2020) 270 CLR 152 at 270 [325]-[326]; *Chetcuti* (2021) 95 ALJR 704 at 715 [37]; 392 ALR 371 at 380. The grant of statutory citizenship is not the only

"naturalization and aliens" power is a power to determine how aliens lose the status of alienage, whether absolutely or upon conditions and, if the latter, on what conditions<sup>153</sup>. That aspect of the power reflects that it is a well-recognised attribute of sovereignty that every nation state is entitled to decide what aliens shall or shall not become members of its community<sup>154</sup>. As a general proposition, persons who have been naturalised or otherwise admitted to membership of the Australian community cannot subsequently be treated as or converted into "aliens" by statute supported by the aliens power because the aliens power is spent once the person is naturalised or otherwise admitted to membership of the community. But, again, that is not without exception.

139 Persons who have been naturalised or otherwise admitted to membership of the Australian community, like persons who could not possibly answer the description of "aliens" in the ordinary understanding of the word, may lose their status of non-alienage pursuant to legislation supported by the "naturalization and aliens" power where there are changes in sovereign identity or territory<sup>155</sup> or where the person has renounced their allegiance to Australia<sup>156</sup>, expressly or impliedly, by engaging in specified conduct. Again, that is subject to potential issues regarding statelessness.

140 As will be apparent, to the extent that an impugned law addresses one or both of those exceptions, it is unnecessary to determine if a particular person is one who could not possibly answer the description of an "alien" in the ordinary understanding of the word or if they are a person who has been naturalised or otherwise admitted to membership of the Australian community. Whatever their

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possible mechanism for admitting aliens to membership of the Australian community. Indeed, there was no statutory concept of Australian "citizenship" prior to 1948: see *Love* (2020) 270 CLR 152 at 264 [306].

153 See *Te* (2002) 212 CLR 162 at 170 [21], 171 [24], 172 [26], 173 [31], 175 [39], 179 [55]-[56], 192 [109]; *Shaw* (2003) 218 CLR 28 at 35 [2]; *Singh* (2004) 222 CLR 322 at 329 [4], 375 [126], 397 [196]; *Ame* (2005) 222 CLR 439 at 458-459 [35]; *Chetcuti* (2021) 95 ALJR 704 at 717 [48], 723 [70]; 392 ALR 371 at 383, 390.

154 *Robtelmes v Brenan* (1906) 4 CLR 395 at 400-401, 404; *Te* (2002) 212 CLR 162 at 170 [21]; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 632 [203]; *Love* (2020) 270 CLR 152 at 190 [74].

155 See *Re Patterson* (2001) 207 CLR 391 at 466 [225], 468-469 [235]-[237]; *Ame* (2005) 222 CLR 439 at 458-459 [35], 459 [37]-[38], 483 [117].

156 See *Nolan* (1988) 165 CLR 178 at 192; *Singh* (2004) 222 CLR 322 at 397-398 [197]; *Chetcuti* (2021) 95 ALJR 704 at 727 [90]; 392 ALR 371 at 396.

status, s 51(xix) provides support for a law which is addressed to one or both of those situations.

141 The exceptions identified above may not be the only circumstances in which Parliament may denaturalise a person or otherwise withdraw a person's membership of the Australian community. One possible example is sufficient to illustrate the point. If a person breaches a condition validly imposed upon the grant of membership of the community<sup>157</sup>, then, absent some other reason, it would be open to Parliament to make a law permitting withdrawal of that person's membership of the community for breach of the condition.

142 Other questions which do not require resolution in this proceeding may arise, including, first, whether conditions imposed on a person's entry into the community can be *retrospectively* changed to denaturalise the person or withdraw their membership of the community and thereby convert that person into an alien<sup>158</sup> and, second, whether a point can ever be reached, regardless of the conditions imposed on entry into the Australian community, where a person has become so connected to the Australian body politic that the connection cannot unilaterally be taken away by Parliament by converting the person into an alien.

143 As to the first matter, as Gaudron J stated in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*<sup>159</sup>, s 51(xix) does not support laws "providing for denaturalization in the absence of some failure to observe the requirements associated with naturalization or in the absence of some relevant change in the relationship of the person or persons concerned with the community constituting the body politic". While that recognises the possibility that a person might be converted into an alien as a result of changes in sovereign identity or territory, renunciation of allegiance, or breach of conditions validly imposed upon the grant of membership of the community, it excludes the possibility that, absent such circumstances, Parliament could retrospectively impose conditions to denaturalise a person or withdraw their membership of the community. Gaudron J further relevantly observed in *Re Patterson; Ex parte Taylor*<sup>160</sup> that, "[a]bsent any [relevant] change, [a] law could not be classified as a law with

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157 See *Nolan* (1988) 165 CLR 178 at 192; *Lim* (1992) 176 CLR 1 at 54; *Re Patterson* (2001) 207 CLR 391 at 411 [47]; *Te* (2002) 212 CLR 162 at 179 [54].

158 cf *Meyer v Poynton* (1920) 27 CLR 436 at 441; *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 87-88.

159 (1992) 176 CLR 1 at 54. See also *Nolan* (1988) 165 CLR 178 at 192; *Re Patterson* (2001) 207 CLR 391 at 411 [47]; *Te* (2002) 212 CLR 162 at 179 [54].

160 (2001) 207 CLR 391 at 411 [47].

respect to naturalisation or aliens, for that power is wholly concerned with the relationship of individuals to the Australian community".

144 As to the second matter – whether a point can ever be reached where a person is so connected to the Australian community that the connection cannot unilaterally be taken away by Parliament – it is enough, in this case, to make the following points. First, these issues were not considered or decided in either *Singh v The Commonwealth*<sup>161</sup> or *Koroitamana v The Commonwealth*<sup>162</sup>. The facts in neither case<sup>163</sup> provided a sufficient foundation for arguments of that kind. Second, as cases such as *Sue v Hill*<sup>164</sup> and *Shaw v Minister for Immigration and Multicultural Affairs*<sup>165</sup> show, the constitutional term "aliens" may have different application as national and international circumstances change<sup>166</sup>. It may be that the changes in national and international circumstances since *Pochi v Macphee*<sup>167</sup> was decided 40 years ago would mean that facts of the kind considered in *Pochi* could be said to call for some different answer today. That is not this case and, if argument of that kind were to be made, it would need a proper factual foundation.

*Laws concerning matters incidental or ancillary to "naturalization and aliens"*

145 The extent to which laws affecting non-aliens are supported by the "naturalization and aliens" power must be understood as subject to the qualification that certain laws may be validly supported by that power in their application to

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161 (2004) 222 CLR 322.

162 (2006) 227 CLR 31.

163 See *Singh* (2004) 222 CLR 322 at 328-329 [2]-[3], 342 [34], 380-381 [142]-[144]; *Koroitamana* (2006) 227 CLR 31 at 35 [1]-[2], 39-40 [17]-[20].

164 (1999) 199 CLR 462.

165 (2003) 218 CLR 28.

166 *Ame* (2005) 222 CLR 439 at 458-459 [35]; *Love* (2020) 270 CLR 152 at 189 [69]; *Chetcuti* (2021) 95 ALJR 704 at 718 [53]; 392 ALR 371 at 384.

167 (1982) 151 CLR 101.



non-aliens insofar as they govern or affect "matters that are incidental or ancillary to the subject matter"<sup>168</sup> of the power. That is not this case.

*Denationalisation, denaturalisation and withdrawing membership of the community*

146 Insofar as the defendants' submission that there is no distinction between natural-born and naturalised citizens is contrary to the preceding analysis, it should be rejected. The submission is not supported by the passage in *Re Canavan*<sup>169</sup> relied upon by the defendants.

147 In *Re Canavan*<sup>170</sup>, the Court was addressing Deane J's reasoning in *Sykes v Cleary*<sup>171</sup>, where his Honour had expressed the view that the second limb of s 44(i) of the *Constitution* was subject to a qualifying element, which "extends not only to the acquisition of the disqualifying relationship by a person who is already an Australian citizen but also to the retention of that relationship by a person who has subsequently become an Australian citizen" (ie, a naturalised Australian citizen). The Court in *Re Canavan*<sup>172</sup> held that the approach taken by Deane J drew no support from the text and structure of s 44(i).

148 It was in that context that the Court said that, "[i]n addition, the approach of Deane J places naturalised Australian citizens in a position of disadvantage relative to natural-born Australian citizens"<sup>173</sup>. The Court emphasised that the reasons of Mason CJ, Toohey and McHugh JJ, Brennan J and Dawson J respectively in *Sykes v Cleary*<sup>174</sup> did not draw any distinction between natural-born Australian citizens and naturalised Australian citizens in terms of the application

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168 *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 77. See *Thoms v The Commonwealth* [2022] HCA 20 at [70].

169 (2017) 263 CLR 284 at 308-309 [53].

170 (2017) 263 CLR 284 at 308-309 [53].

171 (1992) 176 CLR 77 at 127-128, quoted in *Re Canavan* (2017) 263 CLR 284 at 308 [50].

172 (2017) 263 CLR 284 at 308 [52].

173 *Re Canavan* (2017) 263 CLR 284 at 308 [53].

174 (1992) 176 CLR 77.

of s 44(i)<sup>175</sup>. The Court also noted that s 34 of the *Constitution*, unlike s 44(i), did draw a distinction between natural-born and naturalised Australians for the purpose of qualifying to be a candidate for election<sup>176</sup>.

149 No less significantly, the Court said that the absence from the text of s 44(i) of any distinction between natural-born and naturalised Australians "cannot be attributed to inadvertence on the part of the framers, both because the concept of citizenship by descent was commonplace at the time of federation, and because of the express provision in s 34"<sup>177</sup>.

150 Four points may be made. First, the Court's observations were concerned with a different provision in the *Constitution*, s 44(i), which is not a head of power. Second, s 51(xix) in its terms refers to "naturalization". Third, a basic distinction between naturalised citizens and persons who could not possibly answer the description of "aliens" in the ordinary understanding of the word is that all persons who are naturalised were once aliens. As has been explained, it is well established that it is an attribute of sovereignty that every nation state is entitled to decide *what aliens* shall or shall not become members of its community<sup>178</sup> and, by a law with respect to "naturalization and aliens", the Parliament can remove the status of "alienage" absolutely or subject to conditions<sup>179</sup>. And breach of conditions validly imposed at the time a person became naturalised or was otherwise admitted to membership of the Australian community may result in denaturalisation or withdrawing that person's membership of the community. Fourth, and relatedly, it may be accepted that once a person is naturalised or otherwise admitted to membership of the Australian community (subject to any validly imposed conditions) they are in the same position as persons who could not possibly answer the description of "aliens" in the ordinary understanding of the word for the

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**175** *Re Canavan* (2017) 263 CLR 284 at 308-309 [53].

**176** *Re Canavan* (2017) 263 CLR 284 at 309 [53].

**177** *Re Canavan* (2017) 263 CLR 284 at 309 [53].

**178** See *Robtelmes* (1906) 4 CLR 395 at 400-401, 404; *Te* (2002) 212 CLR 162 at 170 [21]; *Al-Kateb* (2004) 219 CLR 562 at 632 [203]; *Love* (2020) 270 CLR 152 at 190 [74].

**179** See *Te* (2002) 212 CLR 162 at 170 [21], 171 [24], 172 [26], 173 [31], 175 [39], 179 [55]-[56], 192 [109]; *Shaw* (2003) 218 CLR 28 at 35 [2]; *Singh* (2004) 222 CLR 322 at 329 [4], 375 [126], 397 [196]; *Ame* (2005) 222 CLR 439 at 458-459 [35]; *Chetcuti* (2021) 95 ALJR 704 at 717 [48], 723 [70]; 392 ALR 371 at 383, 390.

purposes of s 44(i), but that does not say anything about the "naturalization and aliens" power in s 51(xix).

*Mr Alexander and s 36B*

151 As foreshadowed above, the defendants accept the *Pochi* limit. In other words, they accept that there are persons who can never be treated as aliens, subject to the exceptions identified above. However, whilst recognising that the concept of "aliens" can and should have different application with changing national and international circumstances<sup>180</sup>, the defendants' submission on what the irreducible minimum is for that category of non-alien persons has changed without explanation over at least the last two decades<sup>181</sup>. It has gone from persons who were born in Australia to Australian parents<sup>182</sup> (and possibly persons born in Australia to permanent residents of Australia<sup>183</sup>) to, in this case, "persons who were born in Australia, to two Australian persons, who are not citizens of any other country, and who have not renounced or repudiated their allegiance to Australia". It is emphatically the province and duty of this Court to decide what is the proper construction of the *Constitution*<sup>184</sup>.

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180 See *Ame* (2005) 222 CLR 439 at 458-459 [35], citing *Sue v Hill* (1999) 199 CLR 462, *Shaw* (2003) 218 CLR 28 and *Singh* (2004) 222 CLR 322.

181 See *Singh v The Commonwealth* [2004] HCATrans 5 at lines 2578-2581, 3086-3088, 3103-3105, 3308-3311; *Singh v The Commonwealth* [2004] HCATrans 6 at lines 4071-4078; *Koroitamana* (2006) 227 CLR 31 at 43 [36], 46 [51]; *Love v The Commonwealth* [2019] HCATrans 90 at lines 2491-2497, 2756-2758, 2779-2793; *Love* (2020) 270 CLR 152 at 187 [64], 288 [395], 311 [444]; see also 188 [66], 320 [466]; *Chetcuti* (2021) 95 ALJR 704 at 722 [67]; 392 ALR 371 at 389.

182 *Singh* [2004] HCATrans 5 at lines 2578-2581, 3086-3088, 3103-3105, 3308-3311; *Singh* [2004] HCATrans 6 at lines 4071-4078; see also *Koroitamana* (2006) 227 CLR 31 at 43 [36], 46 [51].

183 *Singh* [2004] HCATrans 5 at lines 2554-2558, 2578-2581, 3105-3107, 3342-3345.

184 *Marbury v Madison* (1803) 5 US 137; *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 262-263; *Harris v Caladine* (1991) 172 CLR 84 at 134-135; *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at 570 [66]; *Singh* (2004) 222 CLR 322 at 330 [7]; *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1 at 48 [101]. See also *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 267-272.

152 It is unnecessary in this case to consider the scope of the category of persons who could not possibly answer the description of "aliens" in the ordinary understanding of the word, or to decide whether Mr Alexander falls within that category of persons. That is because s 36B is a law that purports to apply only in respect of persons who have renounced their allegiance to Australia impliedly by engaging in specified conduct<sup>185</sup>.

Section 36B(1)(a)

153 In that regard it is sufficient for present purposes to refer to the first jurisdictional fact<sup>186</sup> conditioning the exercise of power to make a citizenship cessation determination under s 36B(1), namely that the Minister is satisfied that a person has engaged in conduct specified in s 36B(5)<sup>187</sup>. The conduct specified in s 36B(5) includes, among other things, "engaging in international terrorist activities using explosive or lethal devices"<sup>188</sup>, "engaging in a terrorist act"<sup>189</sup>, "engaging in foreign incursions and recruitment"<sup>190</sup>, "fighting for, or being in the service of, a declared terrorist organisation"<sup>191</sup>, and "serving in the armed forces of a country at war with Australia"<sup>192</sup>. The words and expressions used in s 36B(5)(a)-(h) have the same meanings as they do in specified offence provisions

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185 See Citizenship Act, s 36B(1)(a) and (b).

186 See *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 651 [130]-[131]; *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992 at 998 [37]-[38]; 207 ALR 12 at 20-21; *Gedeon v Commissioner of New South Wales Crime Commission* (2008) 236 CLR 120 at 139 [43]; *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 179-180 [57]; *Southern Han Breakfast Point Pty Ltd (In liq) v Lewence Construction Pty Ltd* (2016) 260 CLR 340 at 357 [47].

187 Citizenship Act, s 36B(1)(a).

188 Citizenship Act, s 36B(5)(a).

189 Citizenship Act, s 36B(5)(b).

190 Citizenship Act, s 36B(5)(h).

191 Citizenship Act, s 36B(5)(i).

192 Citizenship Act, s 36B(5)(j).

of the *Criminal Code* (Cth), but this does not include the fault elements that apply to those offences<sup>193</sup>.

154 It may be accepted that to the extent that s 36B(1)(a) covers the "paradigm case of implicit renunciation" of allegiance by "spying or fighting" for an enemy state declared to be at war with Australia, and the closely related category of conduct involving service in the armed forces of a declared terrorist organisation<sup>194</sup> (namely, the conduct of persons who could be described as "foreign fighters"<sup>195</sup>), s 36B is within the scope of the aliens power. Indeed, Australian laws have long provided that persons who fight in a foreign army at war with Australia or assist Australia's enemies in other ways may be denaturalised or have their citizenship revoked<sup>196</sup>. And Australia is not unusual in having enacted laws of this kind. Provisions depriving persons of citizenship for

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193 Citizenship Act, s 36B(6).

194 Commonwealth, Independent National Security Legislation Monitor, *Report to the Attorney-General: Review of the Operation, Effectiveness and Implications of Terrorism-related Citizenship Loss Provisions Contained in the Australian Citizenship Act 2007*, 7th Report (2019) at 43-44 [6.7].

195 "[F]oreign fighters" is a term defined by the Australian Security Intelligence Organisation to mean "Australians who have participated in foreign conflicts or undertaken training with extremist groups overseas": see Australian Security Intelligence Organisation, *ASIO Annual Report 2019-20* (2020) at 142.

196 See *Nationality Act 1920* (Cth), s 12(2)(a); *Nationality and Citizenship Act 1948* (Cth) (as made), ss 19, 21(1)(b); see also s 21(1)(a); *Citizenship Act* (as made), s 35.

service in a foreign army have long existed in Canada<sup>197</sup>, France<sup>198</sup>, Germany<sup>199</sup>, Italy<sup>200</sup>, the Netherlands<sup>201</sup> and the United States<sup>202</sup>.

155 On the other hand, again having regard only to the conduct criterion in s 36B(1)(a), to the extent that s 36B captures conduct beyond serving in the armed forces of a country at war with Australia and conduct of foreign fighters, it might exceed the scope of the aliens power.

156 It is unnecessary to address any other or additional basis on which s 36B is said to be supported by s 51(xix) (namely, that the Minister must be satisfied that the person's conduct demonstrates that they have repudiated their allegiance to Australia<sup>203</sup> and that the person is a dual citizen<sup>204</sup>). While accepting that s 51(xix) supports s 36B at least insofar as it is directed at conduct which plainly constitutes renunciation of allegiance, namely, fighting for an enemy state at war with Australia and conduct of foreign fighters, it is unnecessary to determine whether

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197 *Canadian Citizenship Act 1946* (Can), s 17(2). See also *Strengthening Canadian Citizenship Act 2014* (Can), s 8.

198 *French Civil Code*, Art 23-8.

199 *Law on the Acquisition and Loss of Confederate and State Citizenship 1870* (North German Reichstag), §22: see extracted document titled "Law on Nationality and Citizenship (June 1, 1870)" in Retallack (ed), "Forging an Empire: Bismarckian Germany, 1866-1890", vol 4 of German Historical Institute, *German History in Documents and Images*. See also de Groot and Vink, *A Comparative Analysis of Regulations on Involuntary Loss of Nationality in the European Union*, Centre for European Policy Studies Paper No 75/December 2014 (2014) at 21 [4.1].

200 See de Groot and Vink, *A Comparative Analysis of Regulations on Involuntary Loss of Nationality in the European Union*, Centre for European Policy Studies Paper No 75/December 2014 (2014) at 23, 25 [4.2].

201 See de Groot and Vink, *A Comparative Analysis of Regulations on Involuntary Loss of Nationality in the European Union*, Centre for European Policy Studies Paper No 75/December 2014 (2014) at 21. See also *Netherlands Nationality Act 1984*, Art 14(3).

202 *Nationality Act of 1940* (8 USC §§501-907), §801(c). See also *Immigration and Nationality Act* (8 USC §§1101-1537), §1481(a)(3).

203 *Citizenship Act*, s 36B(1)(b).

204 *Citizenship Act*, s 36B(2).

s 36B is supported by s 51(xix) in all of its operations in circumstances where the law is, in any event, wholly invalid<sup>205</sup>.

### Chapter III of the *Constitution* – s 36B invalid in its entirety

157 Section 36B is invalid in its entirety because it is contrary to Ch III of the *Constitution*. It confers on the Minister the power to impose a sanction upon a person (involuntary cessation of citizenship) – a punishment – for that person engaging in past conduct of a kind identified as warranting the condemnation of the Australian community.

158 The principles are well established. The adjudgment and punishment of criminal guilt is an exclusively judicial function<sup>206</sup>. The Executive cannot "itself exercise judicial power and act as prosecutor and judge to punish breach of law by executive fiat or decree"<sup>207</sup>. The jurisprudence of this Court, to date, has been concerned foremost with executive detention, but the categories of

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205 *ICM Agriculture* (2009) 240 CLR 140 at 199 [141], citing *Lambert* (1954) 28 ALJ 282 at 283, *Cheng* (2000) 203 CLR 248 at 270 [58], *Re Patterson* (2001) 207 CLR 391 at 473-474 [249]-[252], *BHP Billiton* (2004) 221 CLR 400 at 443 [94], 468 [177] and *El Hajje* (2005) 224 CLR 159 at 171 [28]; *Mineralogy* (2021) 95 ALJR 832 at 846 [56]; 393 ALR 551 at 565. See also *Australian Capital Television* (1992) 177 CLR 106 at 176.

206 See *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 175; *R v Quinn*; *Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1 at 11; *Re Tracey*; *Ex parte Ryan* (1989) 166 CLR 518 at 580; *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 536, 609-610, 612, 646, 685-686, 721; *Lim* (1992) 176 CLR 1 at 27; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 258, 269; *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 109 [40]; *Magaming v The Queen* (2013) 252 CLR 381 at 396 [47], 399-400 [61]-[63]; *Kuczborski v Queensland* (2014) 254 CLR 51 at 120 [233]; *Duncan v New South Wales* (2015) 255 CLR 388 at 407 [41]; *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 340 [15]; *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 177-178 [18]-[19], 189 [72], 202 [140], 207 [160], 218 [207]-[208]; 388 ALR 1 at 9-10, 25, 41-42, 48, 62.

207 *Re Tracey* (1989) 166 CLR 518 at 580.

punishment are not closed<sup>208</sup>. And that has to be so. The concern of Ch III is with substance, not form<sup>209</sup>.

159 Section 36B does not require any person to be detained in custody. As such, Mr Alexander does not have the assistance of any "default characterisation"<sup>210</sup> of s 36B as being penal or punitive. The question then must be whether the involuntary cessation of citizenship effected by s 36B is a form of "punishment" of the requisite kind, that is, punishment that is penal or punitive in character. Critically, that requires considering whether, in the context of s 36B, involuntary cessation of citizenship is a measure which, "*by reason of [its] nature or because of historical considerations*"<sup>211</sup>, should be characterised as penal or punitive and, therefore, exclusively judicial in character. As Mr Alexander submits, the fact that denationalisation is not a "punishment" for committing a crime in any Australian statute book is not determinative; nor are capital punishment and forms of corporal punishment now forms of punishment in any Australian State or Territory, yet there can be no doubt that they are punitive. And whether s 36B has the character of a law conferring a power to punish is a question of construction<sup>212</sup>.

160 In *Re Woolley; Ex parte Applicants M276/2003*<sup>213</sup>, in the context of considering executive detention, Gleeson CJ pointed out that not "all hardship or distress inflicted upon a citizen by the State constitutes a form of punishment, although colloquially that is how it may sometimes be described". His Honour went on to explain<sup>214</sup>:

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**208** cf *Falzon* (2018) 262 CLR 333 at 340 [16] ("[o]ne form of punishment is involuntary detention").

**209** *Lim* (1992) 176 CLR 1 at 27; *Nicholas v The Queen* (1998) 193 CLR 173 at 233 [148]; *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 35 [82]; *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 27 [48]; *Benbrika* (2021) 95 ALJR 166 at 190-191 [78], 209 [168], 217 [203]; 388 ALR 1 at 26-27, 50, 60.

**210** See *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 611 [98]. See also *Falzon* (2018) 262 CLR 333 at 342 [24]; *Benbrika* (2021) 95 ALJR 166 at 182-183 [40], 189 [73]; 388 ALR 1 at 16, 25.

**211** *Lim* (1992) 176 CLR 1 at 27 (emphasis added).

**212** *Falzon* (2018) 262 CLR 333 at 341 [19].

**213** (2004) 225 CLR 1 at 12 [17], cited with approval in *Pollentine v Bleijie* (2014) 253 CLR 629 at 656 [70] and *Minogue v Victoria* (2019) 268 CLR 1 at 20-21 [31].

**214** *Re Woolley* (2004) 225 CLR 1 at 12 [17].



"Taxes are sometimes said, in political rhetoric, to be punitive. That is a loose use of the term. Punishment, in the sense of the inflicting of involuntary hardship or detriment by the State, is not an exclusively judicial function. On the other hand, the particular form of detriment constituted by the deprivation of liberty usually (although not always) follows adjudgment of criminal guilt, and the circumstances in which deprivation of liberty may be imposed upon a citizen by the State otherwise than by way of judicial punishment are limited."

161 The defendants accept that s 36B will operate, for some individuals, to cause detriment or hardship (including by separating them from family or employment), while emphasising that other individuals may be free to reside in the country of their other citizenship without suffering any hardship or detriment as a result. They contend, however, that to the extent hardship or detriment occurs it is the result of the particular circumstances of the individual, and that "[t]he variable and idiosyncratic nature of any such hardship points against characterising that possible consequence of loss of citizenship as punishment, let alone as punishment that can be imposed only by a court following a determination of criminal guilt".

162 It may be accepted that not every hardship or detriment that is imposed by the Executive on a person, even if they have been convicted of an offence, constitutes "punishment" of a kind that can be imposed only in the exercise of the judicial power of the Commonwealth. However, the defendants' submissions presuppose that involuntary deprivation of citizenship under s 36B is not penal or punitive; they do not say anything about why the *character* of the punishment is not penal or punitive and is instead simply "detriment" or "hardship". It is conclusory reasoning.

### *Section 36B*

163 It is necessary to start with the proper construction of s 36B. Properly construed, its purpose is retribution. Citizenship cessation, in the context of s 36B, is a measure "taken in the name of society to exact just retribution on those who have offended against the laws of society"<sup>215</sup> by engaging in past conduct that is "identified and articulated wrongdoing"<sup>216</sup>. That is what s 36B does in its terms. And that construction is reinforced by s 36A, which provides that Subdiv C of Div 3 of Pt 2 of the Citizenship Act (which contains s 36B) was:

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**215** *Falzon* (2018) 262 CLR 333 at 359 [94], citing *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 473-474, 490-491. See also *Pollentine* (2014) 253 CLR 629 at 650 [45]; *Benbrika* (2021) 95 ALJR 166 at 215 [196]; 388 ALR 1 at 58.

**216** *Al-Kateb* (2004) 219 CLR 562 at 650 [265].

"enacted because the Parliament recognises that Australian citizenship is a common bond, involving reciprocal rights and obligations, and that citizens may, *through certain conduct incompatible with the shared values of the Australian community, demonstrate that they have severed that bond* and repudiated their allegiance to Australia." (emphasis added)

164 Consistent with that purpose, in substance, s 36B authorises the Minister to impose a sanction upon a person (involuntary cessation of citizenship) for engaging in conduct of a kind identified as warranting the condemnation of the Australian community. The only point at which the protection of the Australian community is taken into account is for the purposes of assessing the third criterion in s 36B(1), namely whether it would be contrary to the public interest for the person to remain an Australian citizen<sup>217</sup>. The matters that the Minister must have regard to in considering the public interest for the purposes of deciding whether to make a determination under s 36B(1) are listed in s 36E(2). Only one of the matters listed – "the degree of threat posed by the person to the Australian community"<sup>218</sup> – concerns protection of the Australian community. Section 36B stands very far removed from the kinds of provisions with protective purposes considered in earlier cases<sup>219</sup>.

165 The character of citizenship cessation for the purposes of s 36B must also be considered in light of the Minister's role in adjudicating on whether a person has engaged in conduct that constitutes the physical element of identified offences<sup>220</sup>. Two matters are significant. First, s 36B operates with respect to "identified and articulated wrongdoing"<sup>221</sup>. Second, the cessation of citizenship is "a consequential step" after the Minister's adjudication that the person has engaged in "past acts" which, if accompanied by specified fault elements, would involve

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**217** Citizenship Act, s 36B(1)(c).

**218** Citizenship Act, s 36E(2)(c).

**219** See, eg, *Thomas v Mowbray* (2007) 233 CLR 307 at 328-330 [16]-[18], 356-357 [114]-[121], 507 [595], 526 [651]; *Pollentine* (2014) 253 CLR 629 at 650 [45], 654 [64]-[65], 657 [73]; *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 257-261 [82]-[90]; cf 287 [171]; *Benbrika* (2021) 95 ALJR 166 at 181 [36], 182-183 [39]-[41]; cf 192-193 [87]-[88], 193 [91]-[92], 194 [97], 207 [160], 210 [177], 211-212 [182]-[183], 215-216 [197]-[200], 219-220 [214]; 388 ALR 1 at 14-16; cf 29-31, 48, 52-54, 58-59, 64-65.

**220** Citizenship Act, ss 36B(1)(a), 36B(5), 36B(6); *Criminal Code*, Div 72, Subdiv A, ss 101.1, 101.2, 102.2, 102.4, 103.1, 103.2, Div 119; see also Pt 5.1.

**221** *Al-Kateb* (2004) 219 CLR 562 at 650 [265].

criminal guilt<sup>222</sup>. Put differently, the power to make a citizenship cessation determination under s 36B is *specifically linked* with conduct "for which [it] might be regarded as punishment"<sup>223</sup>.

166 And an exercise of power under s 36B does not simply involve "inflicting ... involuntary hardship or detriment by the State"<sup>224</sup>. The consequences of an executive citizenship cessation determination under s 36B are loss of fundamental rights of citizenship with immediate effect<sup>225</sup>, and permanently<sup>226</sup>. Those consequences are significant. If the person is overseas, they will be unable to return to Australia, unless granted a visa. If the person is in Australia they will immediately become an "unlawful non-citizen" who must be taken into immigration detention and is liable to be removed from Australia as soon as reasonably practicable<sup>227</sup>.

*Denationalisation, banishment, exile and outlawry as punishment*

167 That a citizenship cessation determination may constitute punishment is consistent with history. "The *penalty of denationalization* is not of recent invention"<sup>228</sup> (emphasis added). Historically, denationalisation, banishment, exile and outlawry have been used as punishments for criminal offending and were recognised to have a penal or punitive character.

168 In ancient Rome, "[t]here were many ways in which a man might lose his freedom, and with his freedom he necessarily lost his citizenship also. Thus he might be sold into slavery as an insolvent debtor, or condemned to the mines for

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222 cf *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 612 [80]; see also 613 [84].

223 cf *Kariapper v Wijesinha* [1968] AC 717 at 736, quoted in *Duncan* (2015) 255 CLR 388 at 410 [49].

224 cf *Re Woolley* (2004) 225 CLR 1 at 12 [17].

225 Citizenship Act, s 36B(3).

226 Citizenship Act, s 36L. Subject only to revocation of a citizenship cessation determination under s 36H, 36J or 36K, or seeking judicial review of a citizenship cessation determination or non-revocation decision.

227 *Migration Act 1958* (Cth), ss 13(1), 14(1), 189(1), 198.

228 Maxey, "Loss of Nationality: Individual Choice or Government Fiat?" (1962) 26 *Albany Law Review* 151 at 163.

his crimes as *servus poenae*. ... Another cause of the loss of citizenship was banishment in certain of its forms"<sup>229</sup>. During feudal times, according to Maxey, "the punishment of denationalization was not known" (at least not in its modern form), but there were "analogues of denationalization" in England<sup>230</sup>. He explained that<sup>231</sup>:

"[o]n the eve of the Norman conquest the decree of outlawry was the ultimate remedy of the state, even for petty offenses. A man so condemned was placed outside the law, subject, in his person and possessions, to complete destruction. Later on, outlawry adapted to the changed circumstances of a more civilized way of life and became an instrument for 'compelling the contumacious to abide the judgment of the courts'. But as long as it remained a weapon in the legal arsenal, it was adjudged a harsh punishment even by men who were accustomed to brutality in the administration of criminal justice."

169 In 1597, the English Parliament enacted a law that provided that convicted dangerous rogues be "banyshed out of this Realme and all other the Domynions thereof"<sup>232</sup>. From that time until 1864, "Parliament at frequent intervals passed new statutes reaffirming the use of this punishment"<sup>233</sup>. In 1616 in *Dr Hussey v Moor*<sup>234</sup>,

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<sup>229</sup> Salmond, "Citizenship and Allegiance" (1901) 17 *Law Quarterly Review* 270 at 276-277.

<sup>230</sup> Maxey, "Loss of Nationality: Individual Choice or Government Fiat?" (1962) 26 *Albany Law Review* 151 at 163.

<sup>231</sup> Maxey, "Loss of Nationality: Individual Choice or Government Fiat?" (1962) 26 *Albany Law Review* 151 at 163-164 (footnotes omitted).

<sup>232</sup> *Vagabonds Act 1597* (39 Eliz c 4), s 4.

<sup>233</sup> Banks, "Criminal Law – Banishment" (1954) 32 *North Carolina Law Review* 221 at 223. See also *Poor Relief Act 1662* (14 Car II c 12), s 23; *Piracy Act 1717* (4 Geo I c 11) (sometimes referred to as the *Transportation Act*); *Transportation Act 1830* (11 Geo IV & 1 Will IV, c 39).

<sup>234</sup> (1616) 3 Bulst 275 at 280 [81 ER 232 at 236]. See also *John and Magnus Arthur v Geddies and Wallets* (1590) 1 Bro Sup 124 at 124; *Sir Robert Murray v Murray of Bruchtoun* (1672) Mor 4799 at 4810; *Dr Sibbald v Lady Rosyth* (1685) Mor 13976 at 13978; *Stuart v Haliburton* (1713) Mor 6829 at 6829; *Newsome v Bowyer* (1729) 3 P Wms 37 at 38 [24 ER 959 at 960]; *Bontein v Bontein* (1731) Mor 14043 at 14044; *Procurator-Fiscal of Edinburgh v Campbell* (1736) Mor 9400 at 9401; *Cochran v Bar and Spence* (1739) Mor 3441 at 3441; *Marishal v Semple* (1752) Mor 3447 at 3447; *Farquhar v His Majesty's Advocate* (1753) Mor 4669 at 4670;

the Court of King's Bench identified the existence of three kinds of punishment: "pecuniary, corporal and exile". In respect of a statute imposing all three, it was held that "the same gives damages, corporal punishment, and exile, to lose his country, and *if this be not a penal law, I do not know what law is penal*" (emphasis added).

170 In the 17th edition of Blackstone's *Commentaries on the Laws of England*, published in 1830, in a chapter on "judgement and its consequences", in the context of considering what he described as "the next stage of criminal prosecution, after trial and conviction are past", Blackstone said that the court must pronounce the judgment which the law has annexed to the crime<sup>235</sup>. Blackstone explained that some punishments are capital, which extend to the life of the offender, and "[s]ome *punishments consist in exile or banishment*, by abjuration of the realm, or transportation: others in loss of liberty, by perpetual or temporary imprisonment"<sup>236</sup> (emphasis added). Similarly, in 1890, Craies observed that under English law "[t]he purposes for which a subject could conceivably be required to leave the realm [fell] into two main classes – public service, and *punishment for crime*"<sup>237</sup> (emphasis added).

171 In 1933, Plucknett distinguished outlawry (which involved "withdrawal by civil society of all legal rights and protection from one of its offending members") from "less serious *penalties*, such as exile, which was generally a voluntary withdrawal not resulting directly in loss of property or civil rights [and] *banishment*, which was similar save that it was compulsory"<sup>238</sup> (emphasis added).

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*Small v Sir James Clerk of Pennycuik* (1764) Mor 11782 at 11783; *Dalrymple v Dalrymple* (1809) 2 Hag Con (App) 1 at 120 [161 ER 802 at 863]; *Macneill v Macgregor* (1828) 2 Bli NS 393 at 465 [4 ER 1178 at 1203]; *Newton v Rowe*, *Norman and Boodle* (1847) 9 QB 948 at 955 [115 ER 1538 at 1541].

235 Blackstone, *Commentaries on the Laws of England*, 17th ed (1830), bk 4, ch 29 at 376.

236 Blackstone, *Commentaries on the Laws of England*, 17th ed (1830), bk 4, ch 29 at 377.

237 Craies, "The Compulsion of Subjects to Leave the Realm" (1890) 6 *Law Quarterly Review* 388 at 390.

238 Plucknett, "Outlawry", in Seligman and Johnson (eds), *Encyclopaedia of the Social Sciences* (1933), vol 11, 505 at 505-506. See also Tomlins, *Law-Dictionary*, 3rd ed (1820), vol 1, definition of "banishment".

172 Denationalisation, as a form of punishment, was also directly addressed by the Supreme Court of the United States in 1958 in *Trop v Dulles*<sup>239</sup>. Warren CJ observed of denationalisation that<sup>240</sup>:

"[t]here may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development."

Brennan J in *Trop v Dulles*<sup>241</sup> also put it bluntly. Adopting and adapting what his Honour said<sup>242</sup>, "I cannot see that [denationalisation] is anything other than forcing retribution from the offender – naked vengeance".

### *Section 36B and denationalisation as punishment*

173 Section 36B is contrary to Ch III. It confers on the Minister the power to impose a sanction upon a person (involuntary cessation of citizenship) for engaging in past conduct of a kind identified as warranting the condemnation of the Australian community. It permits the Executive to do what it cannot: to "exercise judicial power and act as prosecutor and judge to punish breach of law by executive fiat or decree"<sup>243</sup>.

174 It is unnecessary to chart the metes and bounds of when denationalisation constitutes punishment. It is sufficient to make two general observations. First, s 36B, unlike s 36D, does not confer power to cease citizenship by reference to the "factum" of an earlier adjudication by a court of a person's criminal guilt<sup>244</sup>. It is unnecessary to consider whether s 36D authorises the imposition of a new or additional punishment for a person committing an offence. Second, the position may well be different in respect of certain laws dealing with *denaturalisation*. By way of example, in respect of a law conferring power on the Minister to cancel

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239 (1958) 356 US 86. See also *Kennedy v Mendoza-Martinez* (1963) 372 US 144 at 167-168.

240 *Trop v Dulles* (1958) 356 US 86 at 101.

241 (1958) 356 US 86.

242 *Trop v Dulles* (1958) 356 US 86 at 112.

243 *Re Tracey* (1989) 166 CLR 518 at 580.

244 cf *Falzon* (2018) 262 CLR 333 at 357 [89].

a person's citizenship if they obtained citizenship by making false statements or engaging in fraudulent conduct, denaturalisation might be more properly characterised as the consequence of breaching a condition imposed on the person's entry into the community, rather than punishment<sup>245</sup>.

## Answers

175 For those reasons, the questions stated for the opinion of the Full Court in the amended special case should be answered as follows:

1. Is s 36B of the [Citizenship Act] invalid in its operation in respect of the plaintiff because:

(a) it is not supported by a head of Commonwealth legislative power;

Answer: Unnecessary to answer.

(b) it is inconsistent with an implied limitation on Commonwealth legislative power preventing the involuntary deprivation of Australian citizenship;

Answer: Unnecessary to answer.

(c) it effects a permanent legislative disenfranchisement which is not justified by a substantial reason;

Answer: Unnecessary to answer.

...

(e) it reposes in the Minister ... the exclusively judicial function of punishing criminal guilt?

Answer: Yes.

2. What, if any, relief should be granted to the plaintiff?

Answer: It should be declared that s 36B of the Citizenship Act is invalid.

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<sup>245</sup> cf *Trop v Dulles* (1958) 356 US 86 at 98-99.

3. Who should pay the costs of the special case?

Answer: The defendants.



EDELMAN J.

**The issues and the constitutional confusion**

176 Mr Alexander is an Australian-born citizen who is in a prison in Damascus operated by Syrian intelligence. In May 2021, the President of Syria decreed a general amnesty law pardoning perpetrators of a number of violations, misdemeanours, and felonies. Mr Alexander informed his family in June 2021 that he had been pardoned for his convictions under the Syrian Penal Code. Mr Alexander claims that, according to his Syrian lawyer, a reason that he remains in detention is that the Minister for Home Affairs has declared that he is no longer an Australian citizen. In his application for constitutional writs, Mr Alexander alleges that he is in danger of torture, serious bodily harm, or death.

177 Senior counsel for Mr Alexander politely requested that this Court consider adopting the approach of pronouncing orders before reasons in order to facilitate expedition of the result of this case in light of these "parlous circumstances" of Mr Alexander. I would have readily acceded to that request. The justification for the request was significantly more compelling than many, perhaps any, other instance in which this Court has recently, and properly, taken such an approach<sup>246</sup>. There was no suggestion at the oral hearing that any circumstance pointed against that proposed course. In any event, these reasons, like those of the other members of this Court, were prepared very shortly after the hearing in order to facilitate an expeditious delivery of the orders.

178 In these reasons, I gratefully adopt the facts, background, and statutory scheme comprehensively set out in the reasons of Steward J, and also in the reasons of Kiefel CJ, Keane and Gleeson JJ. It suffices for these reasons simply to reiterate that Mr Alexander was born in Australia in 1986 and became an Australian citizen by birth. His parents were permanent residents of the Commonwealth of Australia at the time of his birth. His mother became an Australian citizen before Mr Alexander was two years old. Like millions of Australians, Mr Alexander was born a dual citizen due to the citizenship of his parents. On 2 July 2021, the

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**246** See, eg, from 2019, *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285; *Taylor v Attorney-General (Cth)* (2019) 268 CLR 224; *Spence v Queensland* (2019) 268 CLR 355; *Palmer v Australian Electoral Commission* (2019) 269 CLR 196; *Fennell v The Queen* (2019) 93 ALJR 1219; 373 ALR 433; *KMC v Director of Public Prosecutions (SA)* (2020) 267 CLR 480; *Coughlan v The Queen* (2020) 267 CLR 654; *Cumberland v The Queen* (2020) 94 ALJR 656; 379 ALR 503; *Gerner v Victoria* (2020) 270 CLR 412; *Minister for Immigration and Border Protection v Makasa* (2021) 270 CLR 430; *Palmer v Western Australia* (2021) 95 ALJR 229; 388 ALR 180; *Ruddick v The Commonwealth* (2022) 96 ALJR 367; 399 ALR 476.

Minister made a determination under s 36B of the *Australian Citizenship Act 2007* (Cth) that Mr Alexander ceased to be an Australian citizen.

179 This special case essentially asks whether Mr Alexander was always an alien within the meaning of the aliens power in s 51(xix) of the *Constitution* or, if not, whether Commonwealth legislation validly permitted him to be stripped of his citizenship for other reasons. Section 36B of the *Australian Citizenship Act* permitted the Minister to make a determination that Mr Alexander ceased to be an Australian citizen if the Minister was satisfied that: (i) Mr Alexander engaged in specified conduct while outside Australia; (ii) the conduct demonstrates that Mr Alexander has repudiated his allegiance to Australia; (iii) it would be contrary to the public interest for Mr Alexander to remain an Australian citizen; and (iv) Mr Alexander would not, if the Minister were to make the determination, become a person who is not a national or citizen of any country. This special case challenges the constitutional validity of s 36B.

180 There are four questions raised by this special case<sup>247</sup>. First, is s 36B of the *Australian Citizenship Act* supported by a head of Commonwealth legislative power? Secondly and thirdly, is s 36B inconsistent with two asserted implied limitations upon the Commonwealth legislative power under s 51(xix) of the *Constitution*? Fourthly, does s 36B repose in the Minister "the exclusively judicial function of punishing criminal guilt"?

181 As to the first question, the only head of power relied upon by the defendants to support s 36B is the power over "naturalization and aliens" in s 51(xix) of the *Constitution*. This raises the question of how the meaning of "alien" – a foreigner to the political community – is to be applied. On the approach of the defendants, all dual citizens fall within the aliens power. Therefore, there is power to pass a law such as s 36B of the *Australian Citizenship Act* simply because all the people to whom it applies are dual citizens. That would mean that, subject to any separate implied limits, the Commonwealth Parliament would have the power to strip persons like Mr Alexander of their citizenship solely because they are dual citizens. The defendants also argued that s 36B is a valid law because the Commonwealth has power in circumstances described as "repudiation of allegiance" to make non-alien into aliens.

182 The application of the essential meaning of "alien" that was urged by the defendants has the likely consequence that potentially half of the permanent population of Australia are aliens, being dual (or more) citizens, being born overseas, or having at least one parent who does not hold Australian citizenship. Almost by definition, something must have gone wrong in the application by this Court of the meaning of the *Constitution* for it to be concluded that the

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247 In written submissions, Mr Alexander abandoned a further question concerning a limit derived from ss 34 and 44 of the *Constitution*.

Commonwealth Parliament has power to legislate on the premise that potentially half of the people of the Commonwealth of Australia are foreigners to the political community of the Commonwealth of Australia.

183        Nevertheless, the defendants' approach was only an incremental extension of the present state of the law concerning the application of the aliens power. That approach is the result of the compounding effect of a series of decisions of this Court. Those decisions have seen an imperial march of the application of the aliens power, extending it far beyond any ordinary understanding, capturing more and more members of the permanent population of the Commonwealth of Australia. At some point it will become necessary to confront the correctness of those decisions rather than tip-toeing around them, carefully confining them by tiny exceptions, or restricting their scope by recognising implied constitutional constraints such as those raised by the second and third questions in this special case. It is not necessary to do so in this case because none of the decisions was challenged.

184        The compounding effect of the decisions of this Court began in 1982, when this Court first held that persons who had been unconditionally absorbed into the Australian political community were still within the reach of the aliens power. From that premise, and case by case, the application of the essential meaning of "alien" – a foreigner to the Australian political community – was extended further and further to apply to persons who had less and less "foreign" connection. It might seem like only another small, incremental step to conclude that Mr Alexander is a foreigner to the Australian political community, despite his birth in Australia to two permanent members of the Australian body politic. But, with an appreciation that the decisions of this Court may have already stretched the application of alien beyond breaking point, that is a step that should not now be taken.

185        Although s 36B cannot validly apply to persons simply on the basis that they are dual citizens, and would not have applied to Mr Alexander at the time of his birth, the aliens power does permit the Commonwealth Parliament to legislate, as it did in s 36B of the *Australian Citizenship Act*, in relation to non-alien who act in a manner that has been described as a repudiation of their allegiance to Australia. The aliens power permits the Commonwealth Parliament to legislate in relation to some people who were *not* aliens in extreme cases where circumstances or conduct are capable of making them into aliens. One such circumstance is where a person's conduct is so wrongful and extreme that it can be judged to be inconsistent with continuing membership of the political community. That is the effect of s 36B, so, subject to any other constitutional limits, s 36B would therefore be valid.

186        In light of the distorted state of present authority concerning the aliens power it would not be appropriate to consider the two implied limits upon the aliens power that were the subject of Mr Alexander's submissions unless it were necessary to do so. Those limits broadly concerned the effect of being a member

of the political community of the Australian body politic. It is not necessary to consider those limits because I have concluded that s 36B imposes a punishment upon those people to whom it applies. As a Commonwealth law with the purpose of punishment by the Minister as a sanction for proscribed conduct, s 36B is invalid because it is contrary to the implied constitutional proscription on the exercise of federal judicial power by a body other than a Ch III court.

### **Was Mr Alexander always capable of being treated as an alien?**

#### *Basic propositions*

187 It has been suggested<sup>248</sup> that the aliens power resembles legislative powers conferred by the *Constitution* on the Commonwealth Parliament to make laws with respect to a legal status, such as bankruptcy<sup>249</sup>, trade marks<sup>250</sup>, and marriage<sup>251</sup>, rather than resembling legislative powers conferred by the *Constitution* with respect to physical things, like lighthouses, lightships, beacons, and buoys<sup>252</sup>. There are grave difficulties with the creation of separate constitutional principles within s 51 according to those classes concerned with physical things and those concerned with legal status on the basis that the former "are fixed by external nature" and "cannot well be extended"<sup>253</sup>.

188 All of the powers in s 51 are expressed by words which convey meaning, with the meaning anchored in its essence, at the appropriate level of generality, by the contemporary understanding at Federation. That meaning is ideational. It is not confined to categories of physical things or legal status. Indeed, numerous powers might even derive the essence of their meaning from both. For instance, fisheries in Australian waters beyond territorial limits<sup>254</sup> are concerned with both physical

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**248** *Love v The Commonwealth* (2020) 270 CLR 152 at 193-194 [86].

**249** *Constitution*, s 51(xvii).

**250** *Constitution*, s 51(xviii).

**251** *Constitution*, s 51(xxi).

**252** *Constitution*, s 51(vii).

**253** *Attorney-General for NSW v Brewery Employees Union of NSW* (1908) 6 CLR 469 at 611.

**254** *Constitution*, s 51(x).

things and legal status. So are bills of exchange or promissory notes<sup>255</sup>. The custody and guardianship of infants<sup>256</sup> concerns both people and legal status, and so does "the influx of criminals"<sup>257</sup>. Further, just as the application of the essential meaning of words that describe a legal status can change, so too a power that appears limited to purely physical things, such as a lighthouse, lightship, beacon, or buoy, might arguably extend to things never contemplated in 1900 but which are within the same concept, fulfilling the same purpose, such as global positioning system software for seafarers.

189 Although there is no warrant for creating new and separate constitutional categories within s 51, the character of a s 51 power can still influence the interpretation of the power<sup>258</sup>, particularly where the character reveals a purpose of the power. But one matter must be common in the interpretation of every power in s 51. It is an axiom of constitutional law in Australia that "[t]he validity of a law ... cannot be made to depend on the opinion of the law-maker": "a stream cannot rise higher than its source"<sup>259</sup>. Hence, no power in s 51 of the *Constitution*, whether in relation to legal status or not, is with respect to a subject matter that is determined by the opinion of the Commonwealth Parliament. The Parliament is not empowered to make laws based solely on the criterion that, in its opinion, the law is with respect to a status of bankruptcy, trade marks, or marriage.

190 In the context of bankruptcy, the legislative power is ample but it extends only "to regulate all matters which fairly fall within that subject"<sup>260</sup>. The power is constrained by reference to the "essential feature ... that provision is made for the appropriation of the assets of the debtor and their equitable distribution amongst [their] creditors, and for the discharge of the debtor from future liability for [their] existing debts"<sup>261</sup>.

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255 *Constitution*, s 51(xvi).

256 *Constitution*, s 51(xxii).

257 *Constitution*, s 51(xxviii).

258 See Stellios, "Constitutional Characterisation: Embedding Value Judgements About the Relationship Between the Legislature and the Judiciary" (2021) 45 *Melbourne University Law Review* 277.

259 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 258.

260 *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 at 586.

261 *Storey v Lane* (1981) 147 CLR 549 at 556.

191 In the context of trade marks, it has been emphasised that "[i]f the thing is not of itself within the meaning, an Act of Parliament cannot make it so"<sup>262</sup>. If the Parliament were to enact legislation dealing with a matter which did not have the "essential qualities"<sup>263</sup> or "common attributes"<sup>264</sup> of a trade mark, it would not be "in essence a species within the language of the legislative powers" and would "amount to an attempt to amend the Constitution by a process not sanctioned by the Charter"<sup>265</sup>.

192 In relation to passing laws dealing with the personal relationships that are the consequences of the marriage power, it has been observed that, "[s]o far as they can be regulated by law without impairing the essence of marriage", laws about the consequences of marriage, such as cohabitation, would "properly be called laws with respect to marriage"<sup>266</sup>. The power "does not support a law which so regulates the incidents of marriage as to impair the essence of marriage"<sup>267</sup>. In other words, "[t]he term marriage bears its own limitations and Parliament cannot enlarge its meaning"<sup>268</sup>. An exercise of "constitutional interpretation of the marriage power would be an exercise in hopeless circularity if the Parliament could itself define the nature and incidents of marriage by laws enacted in purported pursuance of the power"<sup>269</sup>.

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262 *Attorney-General for NSW v Brewery Employees Union of NSW* (1908) 6 CLR 469 at 522.

263 *Attorney-General for NSW v Brewery Employees Union of NSW* (1908) 6 CLR 469 at 541.

264 *Attorney-General for NSW v Brewery Employees Union of NSW* (1908) 6 CLR 469 at 607.

265 *Attorney-General for NSW v Brewery Employees Union of NSW* (1908) 6 CLR 469 at 522. See also at 501, 513; *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 529-530 [128].

266 *Attorney-General (Vict) v The Commonwealth* (1962) 107 CLR 529 at 580.

267 *In the Marriage of Cormick* (1984) 156 CLR 170 at 182.

268 *Attorney-General (Vict) v The Commonwealth* (1962) 107 CLR 529 at 549.

269 *Fisher v Fisher* (1986) 161 CLR 438 at 455.

*The aliens power is not a unique power, the scope of which is abdicated to the Parliament to decide*

193 Like other powers conferred upon the Commonwealth Parliament by s 51 of the *Constitution*, and as Gummow, Hayne and Heydon JJ said in *Singh v The Commonwealth*<sup>270</sup>, "a power to make laws with respect to aliens does not authorise the making of a law with respect to any person who, in the opinion of the Parliament, is an alien". The Parliament cannot legislate under a power in relation to aliens to affect people who do not have the essential characteristics of aliens. As McHugh J added in *Singh*, "an alien is a person who can be identified by reference to some criterion or criteria that exists or exist independently of any law of the Parliament ... [T]he Parliament of the Commonwealth cannot itself define who is an alien."<sup>271</sup>

194 The defendants submitted in this case that one "aspect" of the power to legislate in relation to aliens concerns persons whom it is "open to Parliament to treat as an alien", but until the Parliament does so, those persons are not aliens. If this reference to persons whom it is open to treat as aliens means that such persons are aliens within the constitutional meaning, and therefore may be treated as aliens, then it is accurate. But if it suggests that such persons are not aliens within the meaning in the *Constitution* yet by some bootstrapping statutory fiction are capable of being treated as aliens, then it is not accurate.

195 The constitutional meaning of "alien" must not be conflated with the statutory concept of "alien". If the statutory meaning given to "alien", namely the meaning of "alien" that is chosen by the Parliament, were to dictate the constitutional meaning then this constitutional power would be unique in s 51 as a power the scope of which had been abdicated to the Parliament to decide. In other words, consistently with orthodoxy, it is necessary that those persons whom it is open to the Parliament to treat as aliens *are* aliens within the meaning of s 51(xix).

#### *Avoiding absurdity*

196 In an apparently innocuous statement in the joint judgment in *Chetcuti v The Commonwealth*, four members of this Court<sup>272</sup> said that it was a "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

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**270** (2004) 222 CLR 322 at 383 [153]. See also at 329 [5] per Gleeson CJ.

**271** (2004) 222 CLR 322 at 343 [36].

**272** (2021) 95 ALJR 704 at 710 [12]; 392 ALR 371 at 374.

consequences to that status". If read literally, that statement would be a radical new theory of interpretation of constitutional heads of power.

197 If the statement in *Chetcuti* were read literally and without qualification, it might support an assumption that a constitutional alien is no more than the antonym of a statutory citizen. If that were true, then s 51(xix) would confer an unconstrained power on the Parliament to choose its own criteria for citizenship and thereby determine who is an alien and attach consequences to that alienage. Applied to other powers, this reasoning would mean that the Parliament could make laws to divest the assets of Croesus among his creditors on the basis that the Parliament determined for itself the meaning of bankruptcy, irrespective of the essential features inherent in the constitutional meaning of bankruptcy. The Parliament could "define 'trade mark' as including a will, and enact that no will shall be valid unless registered as a trade mark"<sup>273</sup>, contrary to "universal agreement in the laws of every part of the British Empire" at the time of Federation concerning "certain essentials founded in the origin and very nature of a trade mark"<sup>274</sup>. Or the Parliament could pass laws in relation to the merger of corporations, or forced, non-consensual unions, on the basis of its own determination of what a marriage is, thus enlarging that meaning beyond its constitutional essence as "a consensual union formed between natural persons in accordance with legally prescribed requirements" and bearing certain characteristics<sup>275</sup>.

198 The statement quoted above from the joint judgment in *Chetcuti* should not be read as rejecting a century of hornbook constitutional law. Rather, and consistently with the acknowledgement in the previous paragraph in *Chetcuti* that a law of the Parliament might need to be disapplied to the extent of "constitutional overreach" by treating "all non-citizens as aliens"<sup>276</sup>, the statement in *Chetcuti* should be understood as saying no more than that the Commonwealth Parliament has power to set the criteria for who will, and who will not, be a statutory alien and the consequences of that, provided always that the exercise of that power is within the boundaries of the *constitutional* concept of "alien". In oral submissions, the defendants quite correctly accepted that position, conceding that the aliens power

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**273** *Attorney-General for NSW v Brewery Employees Union of NSW* (1908) 6 CLR 469 at 614.

**274** *Attorney-General for NSW v Brewery Employees Union of NSW* (1908) 6 CLR 469 at 535, 540.

**275** *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 at 461 [33].

**276** (2021) 95 ALJR 704 at 710 [11]; 392 ALR 371 at 374.



"cannot be used to treat, as an alien, someone who cannot answer that description on the ordinary understanding of the word"<sup>277</sup>.

199 The ordinary understanding of the word "alien" – its essential meaning – is simple and well-established in this Court. At a reasonably high level of generality, which recognises the state of flux at lower levels of generality of the common law of alienage at the time of Federation<sup>278</sup>, an alien is a foreigner or outsider to the political community of the Australian body politic<sup>279</sup>. The difficult question is how that ordinary understanding of "alien" is to be applied.

200 On the submission of the defendants, the application of alien extends to people who have any of the following characteristics, each of which involves some "foreign" element: (i) the person has dual citizenship; (ii) the person was not born in Australia; or (iii) at birth, the person had one or more parents who were not an Australian citizen. It is likely that these slight foreign connections describe more than half of the Australian population; the first criterion alone involves close to half of the Australian population and the second and third criteria together likely involve a similar proportion. On the defendants' submission, therefore, potentially half of the Australian population are aliens within the meaning of the *Constitution* and can therefore be treated in that way by legislation.

201 It is not to the point that it might be thought to be extremely unlikely that the Parliament would ever legislate to impose the consequences of alienage, potentially including deportation, upon half of Australia's population. The identification of the extreme reach of the power on the submissions of the defendants is not to propose an absurd or distorting possibility<sup>280</sup>. Rather, the

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**277** See also *Singh v The Commonwealth* (2004) 222 CLR 322 at 329 [4].

**278** *Love v The Commonwealth* (2020) 270 CLR 152 at 291-292 [401]; *Chetcuti v The Commonwealth* (2021) 95 ALJR 704 at 720 [61]; 392 ALR 371 at 387.

**279** *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 183, 189; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 407 [33], 428 [114]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 185 [81], 205 [159]; *Singh v The Commonwealth* (2004) 222 CLR 322 at 351 [59], 395 [190]; *Love v The Commonwealth* (2020) 270 CLR 152 at 186-187 [61], 190 [74], 262 [296], 263 [301]-[302], 272 [333], 275 [343], 288 [394], 293 [403]-[404], 301-302 [424], 308 [437]; *Chetcuti v The Commonwealth* (2021) 95 ALJR 704 at 718 [53], 727 [89]; 392 ALR 371 at 384, 396.

**280** See *Western Australia v The Commonwealth* (1975) 134 CLR 201 at 275; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 380-381 [88]; *Egan v Willis* (1998)

extreme reach of the power, over more than half of the population of Australia, and the infinite range of possible laws over those persons, or groups of them, which would be within the scope of the power illustrate the difficulties with the proposed interpretation<sup>281</sup>.

202 The submission of the defendants was, nevertheless, a carefully devised formulation of the application of the essential meaning of "alien" which respected a line of authority in this Court since 1982. The extreme effect of the submission is only an incremental extension of a series of problematic decisions in this Court. Those decisions have developed the law to a point where the question that is asked of s 51(xix) is no longer which people are aliens. The question that is now asked is usually couched in the euphemism of "the *Pochi*<sup>282</sup> limit to the aliens power". But that "limit" is not some outer extreme within which Parliament has free rein. Rather, it is an absolutely orthodox requirement that the aliens power be applied in accordance with its meaning. As the application of the aliens power has strayed further and further from its essential meaning, the question has become how to identify which categories or groups of people are *not* aliens. And as the groups of people who are not aliens have come to be treated as diminishingly smaller, the answer to that question has not been readily forthcoming.

203 This case is not the appropriate vehicle to consider the extent to which it is possible to unwind some, or all, of the arguable errors in the decisions of this Court. But, in order to address the submissions of the parties on the first issue in this special case, it is necessary to identify where potential missteps may have occurred in order to explain why the aliens power should not extend any further to dual citizens born in the same circumstances as Mr Alexander.

*A coherent position prior to 1982*

204 To the extent that analogies and links can be drawn between the heads of power, the best analogy for the aliens power is not the power over trade marks (a legal concept) or lighthouses (physical things). It is the power over immigration, which concerns human beings all of whom are now aliens<sup>283</sup>. Prior to the decision

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195 CLR 424 at 505 [160]; *Singh v The Commonwealth* (2004) 222 CLR 322 at 384 [155]; *XYZ v The Commonwealth* (2006) 227 CLR 532 at 549 [39].

281 See *Singh v The Commonwealth* (2004) 222 CLR 322 at 418 [268]-[269].

282 *Pochi v Macphee* (1982) 151 CLR 101.

283 *Sue v Hill* (1999) 199 CLR 462.

of this Court in 1982 in *Pochi v Macphee*<sup>284</sup>, this Court applied, in respect of permanent residents of Australia, the same approach to the immigration power in s 51(xxvii) and the aliens power in s 51(xix). Since it was assumed that a non-immigrant, permanent resident of Australia could not be deported, the power to deport depended upon the scope of the immigration power. The aliens power was not seen as supplying a different test for deportation of immigrants than the immigration power.

205       The immigration power extended, and extends, to the deportation of alien immigrants and also those British immigrants who were then non-alien<sup>285</sup>. Under the immigration power, it was, and is<sup>286</sup>:

"within the constitutional powers of the Commonwealth Parliament ... to fix a reasonable period of probation during which immigrants who have been admitted into Australia should continue to be subject to the risk of becoming prohibited immigrants and not be allowed to acquire the rights and privileges and immunity from deportation of members of the Australian community".

Beyond the reasonable period of probation and any associated reasonable conditions, once a person who came to Australia as an immigrant had been fully integrated, in other words unconditionally absorbed, into the Australian community it was assumed that the person could no longer be deported<sup>287</sup>. The validity of a law which permitted permanent residents to be deported from Australia depended upon the law not extending to "persons who had made their homes in Australia and become part of its people"<sup>288</sup>.

206       There is much to commend about the approach, prior to 1982, which assumed that a like application, and like limits, would apply to the power to deport

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**284** (1982) 151 CLR 101.

**285** *R v Macfarlane; Ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518.

**286** *O'Keefe v Calwell* (1949) 77 CLR 261 at 294. See also *R v Macfarlane; Ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518 at 533; *R v Director-General of Social Welfare (Vict)*; *Ex parte Henry* (1975) 133 CLR 369 at 373-374, 379-381, 385, 388. Compare *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 561-562.

**287** *Salemi v MacKellar [No 2]* (1977) 137 CLR 396 at 430; *Minister for Immigration and Ethnic Affairs v Pochi* (1981) 149 CLR 139 at 144; *Pochi v Macphee* (1982) 151 CLR 101 at 110-111.

**288** *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 62. See also at 137.

permanent residents of Australia whether they were aliens or immigrants. That application, which involved an approach that had been used consistently for decades, asked whether a person had been unconditionally absorbed into the Australian community. There are three particularly powerful reasons in support of such an application.

207 First, a focus upon unconditional absorption into the Australian community is an application that is consistent with the ordinary and essential meaning of "alien" and with contemporary standards. Whatever might have been the prevailing application at the time of Federation or shortly afterwards<sup>289</sup>, by contemporary social mores a person is not a foreigner or outsider to the Australian body politic once the person is unconditionally absorbed into the Australian community.

208 Secondly, a coherent constitutional design would apply the same rules for when a person can be excluded from a political community as it does for when a person can be expelled from that community. The power to deport, whether under the aliens power or the immigration power, has been consistently recognised to be "the complement" of the power to exclude<sup>290</sup>. Put negatively, it would be a curious constitutional design that would make it easier to be expelled from a community than to be admitted to the community. It would be bizarre if s 51(xix) and s 51(xxvii) were to be applied in a manner that recognised that at the very point a permanent resident was unconditionally absorbed into the Australian political community and ceased to be an immigrant, the person became liable to be expelled from the Australian political community for any reason and at any time.

209 Thirdly, this application of the meaning of the aliens power to facts aligns with the other aspect of s 51(xix), naturalisation, which is concerned with the formal legal recognition that a person has been absorbed into the Australian political community. As Williams J said in *Australian Communist Party v The Commonwealth*<sup>291</sup>, s 51(xix) extends to a person who is "in fact and law an alien". Conversely, a person can become a member of the political community – a non-alien – either as a matter of fact or as a matter of law.

210 As a matter mainly of fact, the person can become a member of the political community at birth by powerful ties to the community beyond mere physical

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**289** *Love v The Commonwealth* (2020) 270 CLR 152 at 293-296 [404]-[409].

**290** *Robtelmes v Brennan* (1906) 4 CLR 395 at 415; *Ah Yin v Christie* (1907) 4 CLR 1428 at 1433; *O'Keefe v Calwell* (1949) 77 CLR 261 at 277; *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 555; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 31; *Love v The Commonwealth* (2020) 270 CLR 152 at 299 [417]; *The Commonwealth v AJL20* (2021) 95 ALJR 567 at 576 [21]; 391 ALR 562 at 569.

**291** (1951) 83 CLR 1 at 222.

presence. Those ties can include being born in the territory of the Australian community to a parent or parents who are permanent members of the community, or having a deep and historical connection with that territory. Also as a matter mainly of fact, a permanent resident can become a permanent member of the community when the person has been unconditionally absorbed into the community.

211 As a matter of law, a person can be unconditionally absorbed into the community. It was well recognised prior to Federation, and has been recognised ever since, that the Parliament has wide legislative powers to confer upon any person, or to empower the Executive to confer upon any person, formal legal membership of the political community. This power of the Commonwealth Parliament to decide, as a matter of law, who is to be formally naturalised is broad. In that respect, citizenship legislation is a central "norm from which a political community is determined"<sup>292</sup>. The membership might be absolute or, as in the case of a denizen<sup>293</sup>, it might be limited. And, like the power over immigration, the membership might be subject to reasonable conditions. But this Court does not countenance an application of the *Constitution* that "places naturalised Australian citizens in a position of disadvantage relative to natural-born Australian citizens"<sup>294</sup>. Subject to reasonable conditions that might be imposed on a person at the time of naturalisation in the same manner as reasonable conditions might be imposed on immigrants, it is difficult to see any justification for treating a power to legislate with respect to "naturalization and aliens" as permitting a person *once naturalised* to be treated any differently from a person who was never an alien.

### *Confining the rot*

212 In *Pochi v Macphee*<sup>295</sup>, Mr Pochi was born in Italy to Italian parents. He emigrated to Australia in 1959, married an Australian woman and lived in Australia for 20 years. As Murphy J said<sup>296</sup>, apart from lack of citizenship, Mr Pochi was "in every way an Australian". He had been absorbed into the Australian community with the consequence that he was no longer able to be deported under the immigration power in s 51(xxvii). Mr Pochi argued that the power to deport him in s 12 of the *Migration Act 1958* (Cth) was invalid. That

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**292** *Love v The Commonwealth* (2020) 270 CLR 152 at 308-309 [439].

**293** *Love v The Commonwealth* (2020) 270 CLR 152 at 307 [435].

**294** *Re Canavan* (2017) 263 CLR 284 at 308-309 [53].

**295** (1982) 151 CLR 101.

**296** (1982) 151 CLR 101 at 113.

section empowered the Minister to deport an alien who had been convicted in Australia of an offence for which they were sentenced to a term of imprisonment of one year or longer. The *Migration Act* "absorb[ed] the existing *Aliens Deportation Act* [1948 (Cth)]"<sup>297</sup> but did not "seek greater power for the executive than exist[ed]" previously<sup>298</sup>.

213 Mr Pochi's submission was extreme. He argued that the aliens power could not apply to any person who had been absorbed into the community<sup>299</sup>. On that view, a person who came to Australia as an alien, and was permitted to remain only for a limited period of years, could avoid deportation by becoming part of the community. This Court unanimously rejected that view. As Gibbs CJ said, it was "impossible to maintain"<sup>300</sup>. One obvious reason for that impossibility is that unconditional absorption can never occur whilst a person is in Australia on a conditional or temporary visa. The expectation of a person holding an unexpired, limited entry permit is only that they should be "allowed to stay for the permitted time"<sup>301</sup>. So too, the expectation of a person holding an entry permit subject to reasonable conditions is only that they should be allowed to stay so long as they comply with those conditions.

214 The submission that was *not* made in *Pochi v Macphee*, and the issue which therefore cannot be taken to have been decided<sup>302</sup>, was that a permanent resident of Australia who had been fully and unconditionally integrated into the community was not an alien. Depending upon whether his residence in Australia had become unconditional or remained subject to a condition of non-commission of various crimes<sup>303</sup>, that narrower submission might arguably have applied to Mr Pochi. But, since it was not raised, it was not necessary for the Court to consider it.

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297 Australia, Senate, *Parliamentary Debates* (Hansard), 23 September 1958 at 518.

298 Australia, Senate, *Parliamentary Debates* (Hansard), 23 September 1958 at 522.

299 (1982) 151 CLR 101 at 103.

300 (1982) 151 CLR 101 at 111.

301 *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 659, quoting *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149 at 171.

302 *CSR Ltd v Eddy* (2005) 226 CLR 1 at 11 [13], referring to *R v Warner* (1661) 1 Keb 66 at 67 [83 ER 814 at 815]; *Spence v Queensland* (2019) 268 CLR 355 at 486-487 [294].

303 See *Migration Act 1958* (Cth), s 12 (as enacted).

215 In his Honour's reasons, however, Gibbs CJ, with whom Mason and Wilson JJ agreed, spoke of the limits of the application of the aliens power that are dictated by the ordinary meaning of "alien" as a foreigner to the political community<sup>304</sup>:

"Clearly the 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. This question was not fully explored in the present case, and it is unnecessary to deal with it. However, 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."

216 Without doubt, Gibbs CJ was correct to identify that the constitutional word "aliens" must bear its ordinary meaning. It would have been an abdication of this Court's constitutional duty if the Court had concluded that the Parliament could expand its own power by statutory redefinition of a constitutional term. But, at least by the values and standards of today, Gibbs CJ's application of that impeccable reasoning would be flawed if it were taken (beyond the strict *ratio decidendi*) as accepting the proposition that a permanent resident of Australia, fully and unconditionally absorbed into the community over a lengthy period, remained an alien within s 51(xix) of the *Constitution* and vulnerable to deportation. Such people are not, in any modern and ordinary application of the meaning of "alien", foreigners to the Australian political community.

217 Even after *Pochi v Macphee*, the initial response of the Commonwealth Parliament was not to adopt an overly broad application of the aliens power that treated all permanent residents, even if fully and unconditionally integrated into the Australian community, as falling within the meaning of "alien" in s 51(xix). In 1983, s 10 of the *Migration Amendment Act 1983* (Cth) amended the *Migration Act* to repeal and replace the separate powers to deport aliens and immigrants. In the second reading speech, the Minister recognised that discrimination between "permanent resident aliens" and "other immigrants" was "totally unacceptable to the Government"<sup>305</sup>. The legislation generally prevented deportation of any alien who was a permanent resident, like any immigrant, if the person had been in Australia as a permanent resident for 10 years. The Minister added that "the overwhelming majority of non-citizens who have settled in Australia and have

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304 (1982) 151 CLR 101 at 109-110.

305 Australia, Senate, *Parliamentary Debates* (Hansard), 7 September 1983 at 373.

contributed to the development of this country have a right to expect, after 10 years of lawful residence, that they will not be expelled"<sup>306</sup>.

218 However, after the statutory 10 year period was abandoned, an overly broad application of the aliens power was adopted in decisions of this Court that, described politely, would strike an ordinary person as very curious. A majority of this Court reasoned in *Shaw v Minister for Immigration and Multicultural Affairs*<sup>307</sup> that the prosecutor in *Re Patterson; Ex parte Taylor*<sup>308</sup>, Mr Taylor, was an alien due to his British citizenship despite having been a permanent resident in Australia for more than 30 years from the age of six and on State and federal electoral rolls since the age of 18. This Court concluded in *Falzon v Minister for Immigration and Border Protection*<sup>309</sup> that Mr Falzon was an alien due to his Maltese citizenship, despite his permanent residence in Australia for 61 years after emigrating from Malta at the age of three. This Court also concluded in *Chetcuti v The Commonwealth*<sup>310</sup> that Mr Chetcuti was an alien despite his permanent residence in Australia for 69 years, during which he was a voter in local, State and federal elections and a registrant for military service, having arrived from Malta at the age of two as a British subject.

219 In the latter two of the cases above, and in the absence of any challenge to the reasoning in *Pochi v Macphee*<sup>311</sup> or any argument about the scope of its *ratio decidendi* described above, I supported those conclusions. But, since there was no suggestion that the permanent Australian residence of Mr Taylor, Mr Falzon, or Mr Chetcuti remained conditional, it is very hard to see how those conclusions can be supported by any ordinary application, with regard to today's morals and standards, of the essential meaning of "alien" as a foreigner or outsider to the Australian political community.

220 Any degeneration into further incoherence in the application of the aliens power could be arrested in this case, even whilst preserving the curious results in

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**306** Australia, Senate, *Parliamentary Debates* (Hansard), 7 September 1983 at 374.

**307** (2003) 218 CLR 28.

**308** (2001) 207 CLR 391.

**309** (2018) 262 CLR 333.

**310** (2021) 95 ALJR 704; 392 ALR 371.

**311** See *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 345 [37]; *Chetcuti v The Commonwealth* (2021) 95 ALJR 704 at 718 [54]; 392 ALR 371 at 384-385.



*Pochi v Macphee* and like cases. That arrest could occur by recognising that the application of the essential meaning of "alien" does not extend to persons who are born into the Australian community, such as by being born in Australia to a permanent member or members of the Australian community. That possibility was left open in argument by the Commonwealth in *Singh v The Commonwealth*<sup>312</sup>.

221 In *Singh v The Commonwealth*<sup>313</sup>, Gummow, Hayne and Heydon JJ held that Ms Singh was an alien within the meaning of s 51(xix) because, despite being born in Australia, she owed "obligations to a sovereign power other than [the Commonwealth of Australia]". On their Honours' approach, Ms Singh's dual nationality was sufficient to make her an alien. But that was not a majority approach. Gleeson CJ held that Ms Singh was an alien by focusing not merely upon her dual nationality but also upon her parentage: she was "a citizen of a foreign state [and] the child of foreign citizens"<sup>314</sup>. Kirby J held that Ms Singh was an alien because she was only a "temporary member of the community" with two foreign national parents<sup>315</sup>. At the time of her birth, her parents were in Australia awaiting the review of the refusal of their application for a protection visa<sup>316</sup>. McHugh J and Callinan J, both dissenting, held that Ms Singh was not an alien because she was born in Australia and remained a member of the Australian community<sup>317</sup>.

222 The conclusion of the majority in *Singh* was extended in *Koroitamana v The Commonwealth*<sup>318</sup>. In that case, this Court held that two children were aliens even though they were born in Australia, had lived continuously in Australia since their births in 1998 and 2000, had three siblings all of whom were Australian citizens, and did not have citizenship of any other country. Gummow, Hayne and Crennan JJ said that the statelessness of the children at birth was sufficient to make them aliens<sup>319</sup>. Importantly, however, their Honours emphasised that the

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312 [2004] HCATrans 5 at lines 2554-2558, 2578-2581, 3103-3107, 3342-3345.

313 (2004) 222 CLR 322 at 383 [154].

314 (2004) 222 CLR 322 at 342 [32].

315 (2004) 222 CLR 322 at 419 [272].

316 (2004) 222 CLR 322 at 420 [278]-[280].

317 (2004) 222 CLR 322 at 380 [140], 437 [322].

318 (2006) 227 CLR 31.

319 (2006) 227 CLR 31 at 46 [49].

statelessness of the children at the time of their birth arose in circumstances in which: (i) their parents were citizens of the Republic of the Fiji Islands and had not registered the children for citizenship, and (ii) their parents were not Australian citizens or permanent residents<sup>320</sup>.

223 Case by case, this Court has moved the application of the essential constitutional meaning of "alien" further and further from ordinary conceptions. Until the above authorities are revisited, this Court should take great care not to extend those authorities any further lest, as would be the consequence of the defendants' submissions, potentially half of the permanent population of Australia become constitutional aliens. The word "alien" would then be so devoid of meaning in the *Constitution* that it would make more sense to ask which Australians are *not* aliens. Even now, that question is difficult to answer.

224 Although the defendants' submissions might support such a conclusion, this Court has not yet recognised that a person born in Australia to parents of whom at least one is a permanent member of the Australian community can be a constitutional alien. At the time of Federation, such a conclusion was regarded as one which did not permit any difference of opinion. Writing in 1880, in a passage from his celebrated book, repeated in an edition published shortly before Federation<sup>321</sup>, W E Hall said<sup>322</sup>:

"The persons as to whose nationality no room for difference of opinion exists are in the main those who have been born within a state territory of parents belonging to the community, and whose connection with their state has not been severed through any act done by it or by themselves."

Putting to one side Aboriginal Australians, it would be remarkable if, as a nation comprised otherwise of immigrants and their descendants, the Commonwealth of Australia were to alienate persons who are born in Australia to parents belonging to the community merely because those persons have dual citizenship.

225 No reasonable person in today's society could consider a person born in Australia to parents who are permanent members of the Australian body politic to be an alien merely because the person has dual citizenship acquired by descent from a parent or grandparent. As Kirby J said of a similar example in *Singh v The*

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**320** (2006) 227 CLR 31 at 39 [18], 41 [26]. See also at 38 [13].

**321** Hall, *A Treatise on International Law*, 4th ed (1895) at 234 §67.

**322** Hall, *International Law*, 1st ed (1880) at 186 §67.

*Commonwealth*<sup>323</sup>, "this Court can be trusted to draw the necessary constitutional line".

226 Mr Alexander was born in Australia. His parents were permanent members of the Australian community at the time of his birth, and his mother became an Australian citizen less than two years after his birth. No authority of this Court requires Mr Alexander to be treated as an alien from birth. He was not an alien. At the time of Mr Alexander's birth, in Australia, he was not within the reach of the Commonwealth Parliament's power in s 51(xix) of the *Constitution*.

**It was open for the Parliament to legislate to treat as aliens those who repudiate allegiance to Australia**

227 In this part of the argument on this special case, there was confusion between constitutional concepts and statutory concepts. The constitutional concept of "alien" must be kept separate from the statutory concept of citizen. At the statutory level concerning citizens, the Parliament can make laws in relation to citizenship in reliance upon powers that include naturalisation and aliens, immigration, and the implied nationhood power<sup>324</sup>. The power of the Parliament to make a law also entails the power of the Parliament to repeal the law<sup>325</sup>. It is open for the Parliament to repeal any valid statutory enactment as to the criteria for statutory citizenship.

228 Constitutional considerations operate at a different level. They constrain both the extent to which the Parliament can make laws and the scope of the application of those laws. Section 51(xix) and the implied nationhood power confer broad powers upon the Parliament to enact laws conferring citizenship on constitutional aliens and non-aliens alike. But, subject to limited exceptions discussed below, neither s 51(xix) nor the implied nationhood power permits persons to be treated as aliens if they are not aliens under the *Constitution*, at least where they were absorbed into the political community from birth or they were naturalised. As Gordon J expresses the point<sup>326</sup>, once a person is naturalised according to whatever might be the requirements of a Commonwealth law made under s 51(xix), the legislative power over naturalisation is "spent" in relation to

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323 (2004) 222 CLR 322 at 418 [269].

324 *Hwang v The Commonwealth* (2005) 80 ALJR 125 at 128 [10]; 222 ALR 83 at 86-87.

325 *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 355-356 [12]-[14], 372 [57].

326 See at [138].

that person, subject to any reasonable conditions that are imposed. The naturalisation law might be amended or repealed but a person who has been naturalised is generally beyond the scope of the power.

229 There are exceptions. As the reasons of Gordon J demonstrate, it cannot be denied that s 51(xix) supports laws that regulate some circumstances in which a person can cease to be a member of the political community of the Australian body politic<sup>327</sup>. Such circumstances include: a change in sovereign identity or territory; breach by a naturalised member of the political community of a reasonable condition upon membership; and express or implied renunciation of membership of that political community. Each of these circumstances is a natural cause of the cessation of membership of a political community: a change in the community itself; a failure of an express, and reasonable, condition subsequent to membership of the community; or voluntary abandonment of membership of the community.

230 The premise of s 36B of the *Australian Citizenship Act* is that a further circumstance exists where, by s 36B(1)(b), a person has engaged in conduct which "demonstrates that the person has repudiated their allegiance to Australia". It is implicit in s 36B that the section will apply irrespective of whether the person's conduct permits an inference that the person wished to renounce their membership of the political community. In this respect, as Steward J explains<sup>328</sup>, the premise of s 36B aligns with the reasoning of Frankfurter J, who said, in delivering the opinion of the Court in *Perez v Brownell*<sup>329</sup>, that a person can lose their citizenship without any "intention of endangering [it] or of renouncing [their] allegiance".

231 So, what is the meaning of the objective concept of repudiation of allegiance in s 36B? In a number of decisions of this Court<sup>330</sup>, most recently that of Kiefel CJ, Gageler, Keane and Gleeson JJ in *Chetcuti v The Commonwealth*<sup>331</sup>, members of

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**327** At [138]-[140].

**328** See at [287]-[288].

**329** (1958) 356 US 44 at 61, quoting *Savorgnan v United States* (1950) 338 US 491 at 495.

**330** *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 441-442 [151]; *Love v The Commonwealth* (2020) 270 CLR 152 at 305 [430].

**331** (2021) 95 ALJR 704 at 712 [21]; 392 ALR 371 at 377. See also (2021) 95 ALJR 704 at 721 [64]; 392 ALR 371 at 388.

this Court have quoted with approval the observation of Professor Parry<sup>332</sup> that "[t]he 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". The statutory reintroduction of the concept in s 36B requires explanation.

232 The terms in which Steward J explains the statutory concept of allegiance in s 36B, with which I agree, associate that concept with membership of the community of the Australian body politic<sup>333</sup>. Whatever might have been its previous force as a concept of law, allegiance remains in use here as a metaphor to describe the association or belonging that a person has as a member of a community which brings additional civic rights and duties. Section 36A confirms that the concept of allegiance, and the repudiation of it, is used in that way in s 36B: "the Parliament recognises that Australian citizenship is a common bond, involving reciprocal rights and obligations, and that citizens may, through certain conduct incompatible with the shared values of the Australian community, demonstrate that they have severed that bond and repudiated their allegiance to Australia".

233 Renunciation of allegiance therefore arises, as Steward J explains<sup>334</sup>, irrespective of any subjective intention to sever a bond of membership, "from actions or steps that are indelibly inconsistent with ... membership of [the Australian political] community". In other words, although it is inherent in a political community's legal regulation of its membership that a person can commit wrongdoing, even extremely serious wrongdoing, whilst remaining a member of the political community, there will come a point at which the person's wrongdoing is so extreme that it can be judged to be inconsistent with continuing membership of the political community. I therefore agree with Steward J<sup>335</sup> that the limited class of conduct which might justify loss of citizenship "might include actions which seek to destroy or gravely harm the fundamental and basal features of the nation guarded by its *Constitution*, such as representative democracy and the rule of law, and actions directed at overthrowing state institutions where such conduct amounts to a clear rejection of allegiance to Australia. Terrorist attacks might also be included."

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

333 See at [257], [266]-[270], [283], [286].

334 See at [286].

335 At [290].

234 On its proper interpretation, s 36B of the *Australian Citizenship Act* is consistent with this reasoning. The objective conduct caught by ss 36B(1)(a) and 36B(5), involving matters related to terrorism, foreign incursions, and service in the armed forces of a country at war with Australia, provides a baseline for the extreme nature of the conduct required to establish a repudiation of allegiance, albeit divorced from any mental element that would render that conduct an offence. Plainly some objective conduct that is picked up by s 36B(1)(a) will come nowhere near the extreme, wrongful acts required to satisfy s 36B(1)(b). Mr Alexander even cited examples of such non-wrongful conduct, including a pharmacist who innocently keeps poisons. But the validity of s 36B hinges upon the extreme wrongdoing that is required by, and inherent in, the notion of repudiation of allegiance to Australia to be determined by the Minister.

### **Section 36B purports to confer judicial power upon the Executive**

#### *Punishment as an exclusively judicial power*

235 Mr Alexander's submissions in relation to this issue focused upon the constitutional implication expressed in *Chu Kheng Lim v Minister for Immigration*<sup>336</sup> that laws that are "penal or punitive in character" exist under our system of government "only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt". In *Falzon v Minister for Immigration and Border Protection*<sup>337</sup>, this Court proceeded on the basis, which was not disputed, that the reference to adjudging and punishing criminal guilt was to two alternative functions, both of which are exclusively judicial. That proposition, which has much to commend it, was also not in dispute in this special case.

236 The exclusively judicial function of punishment is not confined to punishment for criminal guilt, and certainly not confined to criminal guilt under some offence existing independently of the impugned law. It extends to all laws that are properly characterised as punitive. For instance, in their joint judgment in *Chu Kheng Lim*, Brennan, Deane and Dawson JJ said that a law would be punitive and invalid if it authorised detention of an alien for a period that was not "limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered"<sup>338</sup>.

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**336** (1992) 176 CLR 1 at 27.

**337** (2018) 262 CLR 333 at 340 [15].

**338** (1992) 176 CLR 1 at 33.

237 Since s 36B confers power to determine that a person ceases to be a citizen upon the Minister, a member of the Executive, the power will be invalid if, on its proper characterisation, it is punitive.

*The nature of punishment*

238 At the core of punishment lie five elements: (i) the imposition of harsh consequences; (ii) for an offence against legal rules or, put more generally, for a purpose of sanctioning proscribed conduct; (iii) to an actual or supposed offender for that offence; (iv) intentionally administered by other human beings on the offender; and (v) imposed and administered by an authority constituted by a legal system against which the offence is committed<sup>339</sup>. These elements do not form a conclusive test for the character of a law as punitive. But they illustrate the usual characteristics of the core case of punishment. The further that a law travels from this core case, the less likely it is that the law will be properly characterised as punitive.

239 An important aspect of the punitive character of a law will usually be that the harsh consequence is imposed, in whole or in part, as a sanction for certain proscribed conduct. A consequence that is imposed by the State does not attract a characterisation as "punishment" merely because it might be described as harsh. To adapt what was said by Gleeson CJ in *Re Woolley; Ex parte Applicants M276/2003*<sup>340</sup>, some general taxes might be thought to involve the imposition of harsh consequences by the State but those taxes are not punitive in a legal sense. They are not imposed as a sanction for proscribed conduct.

240 This Court has emphasised the "purposes of punishment"<sup>341</sup> as important to characterising a law as punitive or not. The imposition of a harsh consequence for the purpose of sanctioning conduct usually involves primary consideration of what is thought to be deserved for the conduct and secondary consideration of specific

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**339** See, in similar terms, Hart, *Punishment and Responsibility* (1968) at 4-5, approved in *Al-Kateb v Godwin* (2004) 219 CLR 562 at 650 [265]; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 641 [174]; *Minogue v Victoria* (2019) 268 CLR 1 at 26 [47]; *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 202 [140], 217 [204]; 388 ALR 1 at 41-42, 61.

**340** (2004) 225 CLR 1 at 12 [17].

**341** *Plaintiff M96A/2016 v The Commonwealth* (2017) 261 CLR 582 at 594 [22].

and general deterrence and rehabilitation<sup>342</sup>. All of these matters are the purposes of punishment.

*Whether the purpose of a law is to sanction proscribed conduct*

241 There can sometimes be a very fine line between (i) punitive laws, which have as one of their purposes sanctioning proscribed conduct by making it subject to harsh consequences, and (ii) laws which use certain conduct merely as a factum which informs a decision to impose harsh consequences for separate purposes concerning the public interest. The category that a law falls into will depend upon the identified purposes of the law.

242 The assessment of the purpose of a law involves "ordinary processes of interpretation, including considering the meanings of statutory words in the provision, meanings of other provisions in the statute, the historical background to the provision, and any apparent social objective"<sup>343</sup>. An express statement of statutory purpose will almost always be relevant to that exercise, all the more so where the statement of purpose concerns the relevant provision rather than the entire Act, but the question for a court will always be the "characterisation of the purpose of a provision at the appropriate level of generality"<sup>344</sup>.

243 An example of a law that imposes harsh consequences, but not for the purpose of sanctioning proscribed conduct and thus not for the purposes of punishment, is a law that permits the termination by the Commonwealth of a lease over premises which have been used for an unlawful purpose<sup>345</sup>. The purpose of the harsh consequence of termination is not to punish the unlawful conduct. It is to protect the interests of the lessor. Another example is the disqualification of a person from managing a corporation where that disqualification is "for the purpose of maintaining professional standards in the public interest" and "there is no

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**342** *Australian Building and Construction Commissioner v Pattinson* (2022) 96 ALJR 426 at 445 [88]-[89]; 399 ALR 599 at 620-621.

**343** *Ruddick v The Commonwealth* (2022) 96 ALJR 367 at 395 [133]; 399 ALR 476 at 508, quoting *Unions NSW v New South Wales* (2019) 264 CLR 595 at 657 [171].

**344** *Unions NSW v New South Wales* (2019) 264 CLR 595 at 657 [172].

**345** *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352 at 371-372 [33].



determination of guilt with respect to any offence provision"<sup>346</sup>. Similarly, a decision to cancel a broadcasting licence for breach of licence conditions is a harsh consequence but it can be made as an administrative decision to protect the public interest even if the conduct might separately be found to be an offence<sup>347</sup>.

244 The extent of the harshness of the consequence imposed by a law can assist in drawing a line between (i) consequences that sanction proscribed conduct and are thus for the purposes of punishment, and (ii) consequences that respond to other public interests although they rely upon a person's conduct as a factum. The harsher the consequence, the more likely it is that the law will be interpreted as a response to proscribed conduct. Extremely harsh consequences can rarely be justified, and hence are rarely imposed upon people, other than as responses to proscribed conduct. This is the reason that the imposition of the extreme consequence of detention is "likely to permit an inference to be drawn that, for some reason, the legislature wishes to punish the person to be detained"<sup>348</sup>.

245 Nevertheless, there will be some circumstances where a law will not be characterised as punitive despite an extremely harsh consequence such as detention. As I explained in *Minister for Home Affairs v Benbrika*<sup>349</sup>, a person with an extreme mental or physical illness might be detained by the State in a psychiatric institution or in a quarantine facility. That detention is solely for the public purpose of protection of the person and the public. It is "purely protective"<sup>350</sup>. It is not for the purpose, in whole or in part, of sanctioning proscribed conduct. Indeed, a person detained might not have engaged in any proscribed conduct.

246 By contrast, detention is plainly punitive when it is imposed as part of a sentence for an offence for purposes which include sanctioning an offender's conduct and preventing and deterring further offending. If that punishment is then continued, thus exceeding what the offender individually deserves for their

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**346** *Visnic v Australian Securities and Investments Commission* (2007) 231 CLR 381 at 385 [11], 386 [16]. See also *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350 at 358-359 [17].

**347** *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352.

**348** *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 342 [24].

**349** (2021) 95 ALJR 166 at 215-217 [197]-[204]; 388 ALR 1 at 58-61.

**350** (2021) 95 ALJR 166 at 215 [197]; 388 ALR 1 at 58.

conduct, it does not cease to be punitive. Indeed, it becomes more punitive. An example is a detention order made prior to the commencement of a person's sentence of imprisonment for an offence, ordering that on the expiration of the term of imprisonment the person be detained indefinitely at the Governor's pleasure for the protection of society<sup>351</sup>. The same is true of orders for continuing detention made at the end of a person's sentence: it is a category error to assume that because those orders have a preventive or protective purpose they do not also serve, at least in part, the purpose of being a sanction for proscribed conduct<sup>352</sup>.

*Section 36B is punitive*

247           Ultimately, I consider that s 36B has a punitive character with a purpose to sanction particular conduct. It is not a law which could be described as having the sole purpose of being "political" or "purely protective". This conclusion is dictated by four reasons.

248           First, the extreme consequences imposed by s 36B provide significant support for the conclusion that a purpose of the law is to sanction particular conduct. I do not accept the surprising submission of the defendants that the harshness of stripping a person of citizenship under s 36B might be better compared with the temporary disqualification of a person from managing corporations<sup>353</sup> than with detention. The stripping of a person's citizenship, with the usual consequence of deportation or banishment, is in a wholly different league from the temporary disqualification of a person from managing corporations. It involves "the total destruction of the individual's status in organized society"<sup>354</sup>. It has been described as "a fate universally decried by civilized people"<sup>355</sup> and as a

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351 *Chester v The Queen* (1988) 165 CLR 611 at 619.

352 Compare *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1.

353 See *Visnic v Australian Securities and Investments Commission* (2007) 231 CLR 381.

354 *Trop v Dulles* (1958) 356 US 86 at 101.

355 *Trop v Dulles* (1958) 356 US 86 at 102. See also at 110-111.

form of civil death<sup>356</sup>. Judge Augustus Hand thought it to be "a dreadful punishment, abandoned by the common consent of all civilized peoples"<sup>357</sup>.

249 It must be accepted, however, that even the extreme consequence of stripping a person of their citizenship, with associated deportation or exile, does not necessarily dictate the conclusion that a law is punitive. In *Ex parte Walsh and Johnson; In re Yates*<sup>358</sup>, Isaacs J recognised that the power of deportation might be enacted as "a punishment for crime", in which case it would necessarily be a power to be exercised by the judiciary. But his Honour acknowledged that the power of deportation might alternatively be enacted "as a political precaution ... and possibly on considerations not susceptible of definite proof but demanding prevention or otherwise dependent on national policy". A power of that latter "political" kind was upheld in *Falzon v Minister for Immigration and Border Protection*<sup>359</sup>, in which this Court upheld the validity of the power of the Minister to cancel a person's visa as a step in removing the person from Australia, by reference to "a primary and characteristic factum" of previous criminal offending. The cancellation of the visa was not a sanction for the proscribed criminal offending. Rather, the criminal offending was merely a factum that demonstrated a failure to comply with express or implied conditions for remaining in Australia.

250 Secondly, the character of a law can be informed by its historical antecedents<sup>360</sup>. Although denationalisation laws commencing with the *Naturalization Act 1870*<sup>361</sup> recognised denationalisation for non-punitive purposes, those purposes were generally based upon consent. The long history of non-consensual citizenship stripping or banishment is one strongly associated with punishment. In Roman law, death and exile were capital punishments, with the consequence of exile being "interdiction from fire and water" – that is, deprivation of warmth and food – in the community in which the person had lived<sup>362</sup>. Exile was used as punishment in England, following the example of Rome, as well as in

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**356** *Newsome v Bowyer* (1729) 3 P Wms 37 at 38 [24 ER 959 at 960]; *Elizabeth Farquhar v His Majesty's Advocate* (1753) Mor 4669 at 4670, 4671.

**357** *United States ex rel Klonis v Davis* (1926) 13 F 2d 630 at 630.

**358** (1925) 37 CLR 36 at 96.

**359** (2018) 262 CLR 333 at 347 [46]. See also at 357 [89].

**360** *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27, 53, 66-67.

**361** 33 & 34 Vict c 14, ss 4, 6 and 10.

**362** D 48.1.2 (Paul).

ancient Babylon and Greece<sup>363</sup>. It became most prominent in England with a 1597 statute that provided for various persons classed as criminals to be punished by being "banyshed out of this Realme and all other the Domynions thereof"<sup>364</sup>. Sir Edward Coke's report of *Doctor Hussey's Case*<sup>365</sup> described banishment as "so great a punishment" and equated it with perpetual imprisonment. The punishment of banishment was reaffirmed by Parliament "at frequent intervals" until 1864<sup>366</sup>. By the end of the 18th century, Hawkins had written of Parliament's prerogative to impose this extraordinary punishment, saying that "no power on earth, except the authority of parliament, can send a subject of England, *not even a criminal*, out of the land against [their] will"<sup>367</sup>.

251 Thirdly, the punitive character of s 36B is also supported by the statement in s 36A of the purpose of Subdiv C of Div 3 of Pt 2 of the *Australian Citizenship Act*. That statement of purpose includes the recognition by the Parliament that the common bond of Australian citizenship may be severed by citizens "through certain conduct incompatible with the shared values of the Australian community". The focus upon the breach of norms of conduct shared in the community is an indication, at a lower level of generality, of a purpose of sanctioning that conduct. In particular, the statement of purpose encompasses s 36D, which permits the Minister to determine in writing that a person ceases to be an Australian citizen upon various conditions including the person being convicted of a particularly serious offence. As the defendants conceded, s 36B, like s 36D, has a purpose of deterrence of a particular category of extreme, reprehensible conduct.

252 Fourthly, the punitive nature of the law is supported by the Minister being the person who, having decided that the conduct was extreme and reprehensible, is also the person who exercises a discretion to determine whether Australian citizenship should cease<sup>368</sup>.

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363 Armstrong, "Banishment: Cruel and Unusual Punishment" (1963) 111 *University of Pennsylvania Law Review* 758 at 759.

364 39 Eliz c 4; see also *The Poor Relief Act 1662* (14 Car II c 12), s 23, re-enacting the original statute.

365 (1611) 9 Co Rep 71b at 73a [77 ER 838 at 840].

366 Banks, "Criminal Law – Banishment" (1954) 32 *North Carolina Law Review* 221 at 223.

367 Hawkins, *A Treatise of the Pleas of the Crown*, 7th ed (1795), vol 4 at 297 (emphasis in original).

368 See *Dr Bonham's Case* (1610) 8 Co Rep 113b [77 ER 646].

253 Section 36B is invalid as a law that purports to confer exclusively judicial power upon the Executive.

### Conclusion

254 The questions in the special case should be answered as follows:

1. Is s 36B of the *Australian Citizenship Act 2007* (Cth) invalid in its operation in respect of the plaintiff because:

(a) it is not supported by a head of Commonwealth legislative power;

Answer: No.

(b) it is inconsistent with an implied limitation on Commonwealth legislative power preventing the involuntary deprivation of Australian citizenship;

Answer: Unnecessary to answer.

(c) it effects a permanent legislative disenfranchisement which is not justified by a substantial reason;

Answer: Unnecessary to answer.

[(d) Not pursued]

(e) it reposes in the Minister for Home Affairs the exclusively judicial function of punishing criminal guilt?

Answer: Yes.

2. What, if any, relief should be granted to the plaintiff?

Answer: It should be declared that:

(a) s 36B of the *Australian Citizenship Act 2007* (Cth) is invalid; and

(b) the plaintiff is an Australian citizen.

3. Who should pay the costs of the special case?

Answer: The defendants.

255 STEWARD J. The plaintiff was born in Australia in 1986. He thereby became a citizen of this country pursuant to s 10(1) of the *Australian Citizenship Act 1948* (Cth) ("the 1948 Citizenship Act"). On 2 July 2021, the first defendant ("the Minister") determined, pursuant to s 36B(1) of the *Australian Citizenship Act 2007* (Cth) ("the 2007 Citizenship Act"), that the plaintiff ceased to be an Australian citizen. Immediately before that determination, the plaintiff continued to satisfy the applicable requirements for Australian citizenship<sup>369</sup>.

### The "naturalization and aliens" head of power

256 The plaintiff challenges the validity of s 36B of the 2007 Citizenship Act. His principal ground of attack is that s 36B is not authorised by any head of power under s 51 of the *Constitution*, and, in particular, is not supported by the "naturalization and aliens" head of power in s 51(xix). The defendants accepted that the only head of power that could support the validity of s 36B is s 51(xix).

257 If it be correct to state that the antonym of a citizen for the purposes of the 2007 Citizenship Act is an alien of this country, then the plaintiff was not an alien within the meaning of s 51(xix) of the *Constitution* when the Minister exercised the power conferred by s 36B(1) of the 2007 Citizenship Act<sup>370</sup>. That is because he was a citizen. If it be more accurate to state that the essence of alienage is allegiance, not to Australia, but to another sovereign power<sup>371</sup>, then, based on the plaintiff's explanation for being in the Syrian Arab Republic ("Syria"), he was also no alien immediately before the Minister exercised the power under s 36B(1). That is because, as McHugh J observed in *Singh v The Commonwealth*, a person's allegiance to Australia (or the Crown in right of Australia) arises if the person is

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**369** In 2021, the *Australian Citizenship Act 2007* (Cth) provided that a person born in Australia who has a parent who is an Australian citizen is a citizen of this country: s 12(1)(a). It was an agreed fact in this amended special case that the plaintiff's mother acquired Australian citizenship in 1988.

**370** *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 43 [32] per Gleeson CJ, Gummow and Hayne JJ; *Chetcuti v The Commonwealth* (2021) 95 ALJR 704 at 711 [15]-[17], 714 [32]-[34] per Kiefel CJ, Gageler, Keane and Gleeson JJ; 392 ALR 371 at 375-376, 379-380.

**371** *Singh v The Commonwealth* (2004) 222 CLR 322 at 343-344 [38]-[40], 350-351 [56]-[58], 365-366 [99]-[100], 376 [129]-[130] per McHugh J, 398-399 [200]-[201] per Gummow, Hayne and Heydon JJ; *Chetcuti v The Commonwealth* (2021) 95 ALJR 704 at 728 [100], 729 [105], 739-740 [146] per Steward J; 392 ALR 371 at 398, 399, 412.

born in this country<sup>372</sup>. That observation requires qualification in the case of a person born in Australia to parents who are visiting this country on a *temporary* basis<sup>373</sup>. In *Singh*, the plaintiff had been born in Australia but was the daughter of Indian citizens who arrived in Australia on "Business (Short Stay) visas"<sup>374</sup>; thus, her parents were only residing *temporarily* in this country. Given those facts, the plurality concluded that the plaintiff, an Indian citizen by descent, was an alien because of her allegiance to a foreign power attributed to her by the law of India<sup>375</sup>. Here, the plaintiff's parents were not residing in Australia temporarily.

258 Contrary to the plaintiff's submissions, the issue for determination in this amended special case is not whether s 51(xix) of the *Constitution* authorises the Federal Parliament to pass a law that banishes a natural-born citizen. No such law may be found in the 2007 Citizenship Act. Rather, the consequences of possible deportation arise by reason of s 198(2) of the *Migration Act 1958* (Cth), which obliges an officer to remove an unlawful non-citizen "as soon as reasonably practicable" from Australia. As the plurality observe<sup>376</sup>, and I accept, the practical combined effect of s 36B and the *Migration Act* is exclusion from this country. Even then, however, once removed the unlawful non-citizen may be eligible to re-enter Australia upon the grant of an applicable visa<sup>377</sup>. In the case of the plaintiff, no issue of deportation arises. That is because he has remained abroad since 2013. Whether a grant of a protection visa in the plaintiff's case would be an "unlikely event"<sup>378</sup>, to use the language of Kiefel CJ, Keane and Gleeson JJ, remains unknown. Certainly, if one were to accept his version of what had happened to him, he may very well be eligible for the grant of a protection visa. It follows that the issue to be determined is not whether the Federal Parliament may banish a

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372 (2004) 222 CLR 322 at 344 [39]-[40], 350 [56], 365-366 [99], 377-378 [133].

373 Another qualification may be that a person who was born overseas to parents who were only temporarily absent from this country and who were Australian citizens may not be an alien for the purposes of s 51(xix). *Pochi v Macphee* (1982) 151 CLR 101 does not address this issue; cf s 16 of the *Australian Citizenship Act 2007* (Cth).

374 (2004) 222 CLR 322 at 401 [212] per Kirby J.

375 *Singh v The Commonwealth* (2004) 222 CLR 322 at 398-400 [200]-[205] per Gummow, Hayne and Heydon JJ.

376 See [26].

377 For example, a non-citizen could conceivably apply for a protection visa: *Migration Act 1958* (Cth), s 36.

378 See [26].

citizen, but rather whether it may validly pass a law that cancels the citizenship of a natural-born Australian, the concept of citizenship being "entirely statutory" in nature<sup>379</sup>. The authority to do so turns upon the extent to which s 51(xix) authorises Parliament to pass laws concerning the denationalisation or denaturalisation of its citizens.

259 Originally, and subject to certain exceptions<sup>380</sup>, at common law the "stern rule" was that a natural-born subject could not divest herself or himself of her or his allegiance to the Crown<sup>381</sup>. Allegiance was considered to be indelible<sup>382</sup>. As Blackstone wrote<sup>383</sup>:

"[I]t is a principle of universal law, that the natural-born subject of one prince cannot by any act of his own, no, not by swearing allegiance to another, put off or discharge his natural allegiance to the former: for this natural allegiance was intrinsic, and primitive, and antecedent to the other; and cannot be divested without the concurrent act of that prince to whom it was first due." (footnote omitted)

260 Prior to Federation, the common law's "stern" view about alienage was substantially modified by statute. In 1870, the *Naturalization Act 1870* (Imp) was enacted. It provided for both voluntary alienage and involuntary alienage. Section 3 provided that, in prescribed circumstances, a naturalised British subject could "make a declaration of alienage" and thereafter be "regarded as an alien". Section 4 provided that any natural-born British subject who at birth also became a subject of another state could "make a declaration of alienage" and thereafter would "cease to be a British subject". By s 6, a British subject who had become naturalised in another state was "deemed to have ceased to be a British subject and be regarded

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**379** *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 54 per Gaudron J.

**380** *Singh v The Commonwealth* (2004) 222 CLR 322 at 355-356 [73], 357 [75] per McHugh J.

**381** *Singh v The Commonwealth* (2004) 222 CLR 322 at 356-357 [75] per McHugh J; *Kenny v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 42 FCR 330 at 339 per Gummow J. See also Kent, *Commentaries on American Law*, vol 2 (1827), pt 4, lect 25 at 40-49.

**382** *Singh v The Commonwealth* (2004) 222 CLR 322 at 356-357 [75], 361 [86] per McHugh J, 428-429 [303]-[304] per Callinan J.

**383** Blackstone, *Commentaries on the Laws of England* (1765), bk 1, ch 10 at 358.



as an alien". By s 10, a married woman, being a natural-born subject, was "deemed to be a subject of the State of which her husband [was] ... a subject".

261 The *Naturalization Act 1870* reflected the conclusions of a Royal Commission appointed in 1868, which inquired into the laws of "naturalization and allegiance"<sup>384</sup>. In his authoritative work, Sir Alexander Cockburn, summarising the findings of the Royal Commission, determined that<sup>385</sup>:

"[I]t should be free to every one to expatriate and denationalize himself, and to transfer his allegiance to another country."

262 In the United States, Thomas Jefferson considered expatriation to be a natural right. He wrote<sup>386</sup>:

"I hold the right of expatriation to be inherent in every man by the laws of nature, and incapable of being rightfully taken from him even by the united will of every other person in the nation. If the laws have provided no particular mode by which the right of expatriation may be exercised, the individual may do it by any effectual and unequivocal act or declaration."

263 In 1868, the United States Congress passed the *Expatriation Act*<sup>387</sup>. Consistently with the opinion of Mr Jefferson, the recital to that Act declared that the "right of expatriation" was a "natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness". Section 1 provided that "any declaration, instruction, opinion, order, or decision of any officers" of the federal government which denied, restricted, impaired or questioned "the right of expatriation" was "declared inconsistent with the fundamental principles of ... government". Based on that Act, Frankfurter J, delivering the opinion of the Supreme Court of the United States, said that "it was

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384 Fraser, "Expatriation as Practised in Great Britain" (1930) 16 *Transactions of the Grotius Society* 73 at 83; *Singh v The Commonwealth* (2004) 222 CLR 322 at 363 [91] per McHugh J.

385 Cockburn, *Nationality: or the Law Relating to Subjects and Aliens, considered with a view to future legislation* (1869) at 214.

386 Letter from Thomas Jefferson to the Secretary of the Treasury Albert Gallatin, 26 June 1806, in Ford (ed), *The Works of Thomas Jefferson* (1905), vol 10 at 273, quoted in McAdam, "An Intellectual History of Freedom of Movement in International Law: The Right to Leave as a Personal Liberty" (2011) 12 *Melbourne Journal of International Law* 27 at 39.

387 Act of 27 July 1868, ch 249, 15 Stat 223.

the practice of the Department of State during the last third of the nineteenth century to make rulings as to forfeiture of United States citizenship" when a naturalised citizen returned to her or his country of origin and took steps, such as accepting public office or assuming political duties, to abandon American citizenship, and, generally, in the case of native-born citizens, when they acquired foreign citizenship<sup>388</sup>.

264 In 1907, Congress passed a further *Expatriation Act*<sup>389</sup>. It provided, amongst other things, that an "American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state ... or when he has taken an oath of allegiance to any foreign state", and that an "American woman who marries a foreigner shall take the nationality of her husband"<sup>390</sup>. That Act was based upon a report prepared by the Citizenship Board of 1906 which, amongst other things, had recommended that<sup>391</sup>:

"[N]o man should be permitted deliberately to place himself in a position where his services may be claimed by more than one government and his allegiance be due to more than one."

265 In *Mackenzie v Hare*, the Supreme Court of the United States upheld the validity of the *Expatriation Act* of 1907<sup>392</sup> on the following basis<sup>393</sup>:

"As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. We should hesitate long before limiting or embarrassing such powers."

266 The foregoing demonstrates that around the time of Federation, both the United Kingdom and the United States recognised various forms of *lawful* expatriation and denationalisation. In the case of the *Naturalization Act 1870*, denationalisation took place where, in defined circumstances, a person acted

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388 *Perez v Brownell* (1958) 356 US 44 at 49.

389 Act of 2 March 1907, ch 2534, 34 Stat 1228.

390 Act of 2 March 1907, ch 2534, §§2 and 3, 34 Stat 1228 at 1228.

391 *Perez v Brownell* (1958) 356 US 44 at 50 per Frankfurter J.

392 Act of 2 March 1907, ch 2534, 34 Stat 1228.

393 (1915) 239 US 299 at 311 per McKenna J.

inconsistently with her or his status as a British subject, by, for example, making a declaration of alienage or being naturalised in a foreign state<sup>394</sup>. In the case of the *Expatriation Act* of 1907, citizenship was forfeited when a person acted inconsistently with being a citizen of the United States, by, for example, taking an oath of allegiance to a foreign state<sup>395</sup>. In neither jurisdiction was it necessary for the person to assent to the loss of nationality. This history supports the proposition that denationalisation may occur when a person acts inconsistently with membership of a body politic by changing her or his allegiance, whether intentionally or not, to a foreign country. The founding fathers were no doubt aware of these developments in the law<sup>396</sup>.

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Reflecting this history, the *Naturalization Act 1903* (Cth) contained provisions that "deemed" a woman to be a British subject who, "not being a British subject", married a British subject<sup>397</sup> and "deemed" an infant "not being a natural-born British subject" to be a British subject in defined circumstances<sup>398</sup>. It also contained a provision that conferred on the Governor-General a power to revoke a "certificate of naturalization" obtained by any "untrue statement of fact or intention"<sup>399</sup>. A similar provision was to be found in s 11 of the *Naturalization Act 1903-1917* (Cth) and s 12 of the *Nationality Act 1920* (Cth). That Act also provided, amongst other things, that a woman, having been a British subject, was "deemed to be an alien" if she married an alien<sup>400</sup> and that a person was "deemed to have ceased to be a British subject" if she or he became naturalised in a foreign state<sup>401</sup>. In the foregoing examples, the assent of the person was not required.

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**394** *Naturalization Act 1870* (Imp) (33 & 34 Vict c 14), ss 3 and 6.

**395** Act of 2 March 1907, ch 2534, §2, 34 Stat 1228 at 1228.

**396** Reasons of Kiefel CJ, Keane and Gleeson JJ at [41]; *Singh v The Commonwealth* (2004) 222 CLR 322 at 397-398 [197] per Gummow, Hayne and Heydon JJ.

**397** *Naturalization Act 1903* (Cth), s 9.

**398** *Naturalization Act 1903* (Cth), s 10.

**399** *Naturalization Act 1903* (Cth), s 11.

**400** *Nationality Act 1920* (Cth), ss 18-19. Note, when that Act was in force, the Australian body politic comprised "British subjects" and "alien" was defined in s 5(1) as "a person who is not a British subject".

**401** *Nationality Act 1920* (Cth), s 21.

268 Some early authorities of this Court perhaps betray differing views about membership of the Empire, British subjecthood and race. In *Potter v Minahan*<sup>402</sup>, Minahan had been born in Victoria of mixed Anglo-Chinese parentage. He left Australia as a child to live in China for 26 years. He then returned to Australia. Each of Griffith CJ, Barton and O'Connor JJ decided that Minahan was not an immigrant for the purposes of the *Immigration Restriction Acts 1901-1905* (Cth). Isaacs and Higgins JJ dissented. Griffith CJ said<sup>403</sup>:

"[E]very person becomes at birth a member of the community into which he is born, and is entitled to remain in it until excluded by some competent authority. It follows also that 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. ...

At birth he is, in general, entitled to remain in the place where he is born. (There may be some exceptions based upon artificial rules of territoriality.) If his parents are then domiciled in some other place, he perhaps acquires a right to go to and remain in that place. But, until the right to remain in or return to his place of birth is lost, it must continue, and he is entitled to regard himself as a member of the community which occupies that place. These principles are self-evident, and do not need the support of authority."

269 Barton J said<sup>404</sup>:

"[W]here a charter of self-government, such as ours, grants the right to deal with immigration, which includes the right wholly to prohibit the landing of an immigrant, it is open to doubt whether the grant includes the right to prohibit the entry of those who are subjects of the Crown born within our bounds, and who, to adapt a phrase of Lord Watson's, may be called Australian-born subjects of the King."

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**402** (1908) 7 CLR 277.

**403** *Potter v Minahan* (1908) 7 CLR 277 at 289.

**404** *Potter v Minahan* (1908) 7 CLR 277 at 294.

270 O'Connor J said<sup>405</sup>:

"A person born in Australia, and by reason of that fact a British subject owing allegiance to the Empire, becomes by reason of the same fact a member of the Australian community under obligation to obey its laws, and correlatively entitled to all the rights and benefits which membership of the community involves, amongst which is a right to depart from and re-enter Australia as he pleases without let or hindrance unless some law of the Australian community has in that respect decreed the contrary."

271 Much of the foregoing supports the plaintiff's case. But the majority's reasoning in *Minahan* did not support an absolute right of abode for those born in Australia. Griffith CJ referred to exclusion "by some competent authority"<sup>406</sup>. Barton J referred to a person who intended to abandon her or his "domicil of origin"<sup>407</sup>. O'Connor J referred to a right to depart and re-enter "unless some law of the Australian community has in that respect decreed the contrary"<sup>408</sup>. His Honour also said<sup>409</sup>:

"It cannot be denied that, subject to the Constitution, the Commonwealth may make such laws as it may deem necessary affecting the going and coming of members of the Australian community."

272 In contrast, in *Donohoe v Wong Sau*<sup>410</sup>, this Court decided that an ethnic Chinese person, born in Australia to a naturalised parent, was an immigrant when she sought to re-enter Australia after a prolonged period living in China. Reflecting views on race that have long since been repudiated, Higgins J said<sup>411</sup>:

"In the case of *Potter v Minahan* it will be noticed that there were some facts which were not present in this case. The father in that case took the birth certificate with him to China when leaving Australia; and the

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405 *Potter v Minahan* (1908) 7 CLR 277 at 305.

406 *Potter v Minahan* (1908) 7 CLR 277 at 289.

407 *Potter v Minahan* (1908) 7 CLR 277 at 294.

408 *Potter v Minahan* (1908) 7 CLR 277 at 305.

409 *Potter v Minahan* (1908) 7 CLR 277 at 305.

410 (1925) 36 CLR 404.

411 *Donohoe v Wong Sau* (1925) 36 CLR 404 at 409.

mother of the child was an Australian of European stock. In this case the mother of the respondent was Chinese, and there is not the slightest evidence of anything Australian about the respondent except her birth. She could not even speak a word of English." (footnote omitted)

273 The preponderant opinion of this Court since Federation, nonetheless, supports the proposition that Parliament has the power to pass laws concerning when an existing subject or citizen may cease to be a member of the nation.

274 *Meyer v Poynton*<sup>412</sup> concerned the validity of s 11 of the *Naturalization Act 1903-1917* (Cth), which gave the Governor-General a power to revoke the naturalisation of a person where this was "desirable for any reason". Starke J upheld the validity of this provision. His Honour said<sup>413</sup>:

"It seems to me that if the power given by the *Naturalization Act* to admit to Australian citizenship is within the power to make laws with respect to naturalization, so must authority to withdraw that citizenship on specified conditions be also within that power."

275 The correctness of *Meyer* would not appear to have since been doubted<sup>414</sup>. Analogous reasoning would apply to the power given by the 2007 Citizenship Act to admit certain Australian-born persons to Australian citizenship<sup>415</sup>; inherent in such a power must be the authority to withdraw that citizenship.

276 *Ex parte Walsh and Johnson; In re Yates*<sup>416</sup> concerned the validity of s 8AA of the *Immigration Act 1901-1925* (Cth), which permitted the deportation of persons not born in Australia who had caused "a serious industrial disturbance prejudicing or threatening the peace, order or good government of the Commonwealth". A majority of this Court held that the "immigration and emigration" head of power in s 51(xxvii) supported the validity of s 8AA. Relevantly to s 51(xix), Isaacs J said<sup>417</sup>:

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412 (1920) 27 CLR 436.

413 *Meyer v Poynton* (1920) 27 CLR 436 at 441.

414 See, eg, *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 88 per Isaacs J.

415 *Australian Citizenship Act 2007* (Cth), s 12.

416 (1925) 37 CLR 36.

417 *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 94, 97-98.

"This nation cannot have less power than an ordinary body of persons, whether a State, a church, a club, or a political party who associate themselves voluntarily for mutual benefit, to eliminate from their communal society any element considered inimical to its existence or welfare. We have only to imagine, as I suggested during the argument, some individual found plotting with foreign powers against the safety of the country, or even suspected of being a spy or a traitor. It matters not, as I conceive, whether he is an alien or a fellow-subject, whether he is born in Kamtschatka or in London or in Australia, the national danger is the same.

...

I am unable to see why Parliament could not, in protection of the Commonwealth in respect of defence, customs, coinage or immigration, for instance, enact that any person who was shown to the satisfaction of the Minister to be a spy, a traitor, a smuggler, a coiner or an importer of prostitutes, might be summarily deported. Such legislation on admitted subjects of power might be considered arbitrary and even dangerous; but those are elements entrusted to the wisdom of Parliament when weighing in its own scales of social justice the comparative claims of individuals and the nation."

277 In *Nolan v Minister for Immigration and Ethnic Affairs*, the majority recognised that an "alien" included a "person who has ceased to be a citizen by an act or process of denaturalization"<sup>418</sup>.

278 In *Singh*, Gleeson CJ observed that under s 51(xix) and (xxvii) of the *Constitution*, Parliament has the power to pass a law whereby, subject to one qualification, any form of citizenship may be acquired and lost. Thus, his Honour said<sup>419</sup>:

"I have previously stated my view that, subject to a qualification, Parliament, under paras (xix) and (xxvii) of s 51, has the power to determine the legal basis by reference to which Australia deals with matters of nationality and immigration, to create and define the concept of Australian citizenship, to prescribe the conditions on which such citizenship may be

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**418** (1988) 165 CLR 178 at 183 per Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ. See also *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 374-375 per Toohey J.

**419** *Singh v The Commonwealth* (2004) 222 CLR 322 at 329 [4]. See also *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 173 [31] per Gleeson CJ.

acquired and lost, and to link citizenship with the right of abode." (footnote omitted)

279 The "qualification" was expressed in the following terms<sup>420</sup>:

"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 *Constitution*. Within the class of persons who could answer that description, Parliament can determine to whom it will be applied, and with what consequences. Alienage is a status, and, subject to the qualification just mentioned, Parliament can decide who will be treated as having that status for the purposes of Australian law and, subject to any other relevant constitutional constraints, what that status will entail." (footnote omitted)

280 It is at least implicit from the joint reasons of Gummow, Hayne and Heydon JJ in *Singh* that their Honours considered it would be an odd "one-way street"<sup>421</sup> for the "naturalization and aliens" head of power to authorise only laws granting citizenship and not also laws which denied citizenship. Thus, their Honours said<sup>422</sup>:

"Whatever may be the outcome of debate about the validity of laws alleged to depend upon other powers given to the federal Parliament, it is central to the plaintiff's argument that the constitutional word 'aliens' has a meaning which cannot include a person born within Australia. If that is the proper construction of 'aliens' the result would be that, through the exercise of the naturalisation aspect of the power conferred by s 51(xix), the class of persons born outside Australia who otherwise would be aliens can be altered or reduced by valid federal legislation, but the class of non-aliens contains an irreducible core. Understood in that way, the naturalisation and aliens power would provide a one-way street: empowering legislation permitting persons to become non-aliens but not empowering legislation that would affect the status of a person born in Australia, regardless of that person's ties to other sovereign powers."

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**420** *Singh v The Commonwealth* (2004) 222 CLR 322 at 329 [4] per Gleeson CJ. See further *Pochi v Macphee* (1982) 151 CLR 101 at 109-110 per Gibbs CJ.

**421** (2004) 222 CLR 322 at 397 [195].

**422** *Singh v The Commonwealth* (2004) 222 CLR 322 at 397 [195].



281 That implication is also supported by the following course of reasoning<sup>423</sup>:

"Argument in the present matter proceeded on the footing that the power also extends to making a law identifying the circumstances in which, and the procedures by which, a person who is not an alien may sever the ties of allegiance to Australia. (We leave aside any examination of what assumptions may be implicit in describing that as renouncing citizenship, renouncing allegiance, or ceasing to be a national of Australia.) Given the state of British law at the time of Federation, and in particular the provisions of the *Naturalisation Act 1870* permitting renunciation of allegiance, it would be surprising if the power with respect to naturalisation and aliens did not extend this far. *But, if the power extends to regulating renunciation of allegiance, the power extends, at least in this respect, to altering the criteria which are to determine whether the necessary connection between the individual and (to personify the concept) the Crown exists.*" (footnote omitted; emphasis added)

282 Because Gummow, Hayne and Heydon JJ went on to reject the plaintiff's case that a person born in Australia bears the unalterable status of being a non-alien, it must follow that their Honours accepted that the power conferred by s 51(xix) extends "to altering the criteria which are to determine whether the necessary connection between the individual and ... the Crown exists"<sup>424</sup>. It must also follow that the aliens power could authorise a law that denied citizenship to a person born in Australia, where that person owed allegiance to foreign power. Thus, Gummow, Hayne and Heydon JJ concluded<sup>425</sup>:

"The previous decisions of the Court do not require the conclusion that those born within Australia who, having foreign nationality by descent, owe obligations to a sovereign power other than Australia are beyond the reach of the naturalisation and aliens power."

283 This Court in *Singh* upheld the validity of a law that denied citizenship to a person born in Australia because that person owed allegiance to a foreign power. Implicitly, her birth in this country did not create any allegiance to Australia, in the sense described by McHugh J in *Singh*, as her location here was only of a temporary nature (given the *temporary* visa held by her parents). Such foreign allegiance may be seen, in the circumstances of that case, as necessarily

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423 *Singh v The Commonwealth* (2004) 222 CLR 322 at 397-398 [197] per Gummow, Hayne and Heydon JJ.

424 *Singh v The Commonwealth* (2004) 222 CLR 322 at 397-398 [197].

425 *Singh v The Commonwealth* (2004) 222 CLR 322 at 399 [203].

inconsistent with allegiance to Australia, and thus with membership of the community of peoples that comprises the Australian nation.

284 Subsequently, in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame*<sup>426</sup>, this Court upheld the validity of a law which revoked the citizenship of persons who had become citizens of the Independent State of Papua New Guinea upon its independence. The plurality said<sup>427</sup>:

"The extent of the power of Parliament to deal with matters of nationality and immigration, to create and define the concept of Australian citizenship, to prescribe the conditions on which citizenship may be acquired and lost, and to link citizenship with the right of abode, has been considered most recently by this Court in *Singh v The Commonwealth*. Two points of present relevance emerge from that consideration. First, the legal status of alienage has as its defining characteristic the owing of allegiance to a foreign sovereign power. Secondly, changes in the national and international context in which s 51(xix) is to be applied may have an important bearing upon its practical operation." (footnotes omitted)

285 The foregoing expression of the width of the aliens power does not draw any distinction, for the purposes of prescribing "the conditions on which citizenship may be acquired and lost"<sup>428</sup>, between a natural-born citizen and a naturalised citizen. Any such distinction has now been rejected by this Court<sup>429</sup>.

286 Whilst s 51(xix) of the *Constitution* authorises Parliament to make laws which prescribe "the conditions on which citizenship may be acquired and lost"<sup>430</sup>, that power, consistently with the "qualification" described by Gleeson CJ in

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426 (2005) 222 CLR 439.

427 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439 at 458-459 [35] per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ.

428 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439 at 458 [35] per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ.

429 *Re Canavan* (2017) 263 CLR 284 at 308-309 [53] per Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ.

430 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439 at 458 [35] per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ.

*Singh*<sup>431</sup>, is not unfettered. Because membership to the Australian body politic is inextricably bound up with the concept of allegiance to this country, the power to denationalise must be limited to laws that recognise and accept a loss of citizenship arising from actions or steps that are indelibly inconsistent with that allegiance and with membership of that community. That conclusion is consistent with how the law of denationalisation had developed in the United Kingdom and the United States by the time of Federation. It explains Isaacs J's observation in *Ex parte Walsh* that the Federal Parliament had the power to pass a law that eliminated from "communal society" any person, whether born in Australia or not, who was "inimical" to the "existence" of that society<sup>432</sup>. His Honour referred to "plotting with foreign powers against the safety of the country" and even being "suspected of being a spy or a traitor"<sup>433</sup>. No doubt there are many ways a person may act that are enduringly antithetical to allegiance to Australia, or to membership of the "people of the Commonwealth"<sup>434</sup> that comprise this nation.

287 It follows that the power to pass a law of denationalisation is not to be limited to a declaration of alienage<sup>435</sup>. Nor would the validity of such a law require an actual intention to renounce citizenship. In *Perez v Brownell*, Frankfurter J made the following observation in support of that proposition in relation to a law that cancelled a person's citizenship upon voting in a foreign political election. His Honour said<sup>436</sup>:

"Of course, Congress can attach loss of citizenship only as a consequence of conduct engaged in voluntarily. See *Mackenzie v Hare*, 239 US 299, 311-312. But it would be a mockery of this Court's decisions to suggest that a person, in order to lose his citizenship, must intend or desire to do so. The Court only a few years ago said of the person held to have lost her citizenship in *Mackenzie v Hare*, supra: 'The woman had not intended to give up her American citizenship.' *Savorgnan v United States*, 338 US 491, 501. And the latter case sustained the denationalization of Mrs Savorgnan although it was not disputed that she 'had no intention of

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**431** (2004) 222 CLR 322 at 329 [4]. See further *Pochi v Macphee* (1982) 151 CLR 101 at 109-110 per Gibbs CJ.

**432** (1925) 37 CLR 36 at 94.

**433** *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 94.

**434** *Constitution*, s 24.

**435** cf *Naturalization Act 1870* (Imp) (33 & 34 Vict c 14), s 4.

**436** (1958) 356 US 44 at 61.

endangering her American citizenship or of renouncing her allegiance to the United States.' 338 US, at 495. What both women did do voluntarily was to engage in conduct to which Acts of Congress attached the consequence of denationalization irrespective of – and, in those cases, absolutely contrary to – the intentions and desires of the individuals. Those two cases mean nothing – indeed, they are deceptive – if their essential significance is not rejection of the notion that the power of Congress to terminate citizenship depends upon the citizen's assent." (footnote omitted)

288 *Perez* was not followed by a subsequent decision of the Supreme Court of the United States<sup>437</sup>, but I nonetheless prefer Frankfurter J's opinion. The denationalisation power cannot be fettered by a requirement that the person must subjectively intend to abandon her or his citizenship in order for that power to be engaged in every case.

289 Thus, a law that denationalises a citizen because that person took a step or steps that represented a fundamental and lasting rebuttal of allegiance to Australia would be authorised by s 51(xix), consistently with an historical consideration of the aliens power. Axiomatically, it would include waging war against this country. This has long been recognised as a justification for denationalisation. For example, when the 1948 Citizenship Act was first enacted, as the *Nationality and Citizenship Act 1948* (Cth), it contained s 19 in the following terms:

"An Australian citizen who, under the law of a country other than Australia, is a national or citizen of that country and serves in the armed forces of a country at war with Australia shall, upon commencing so to serve, cease to be an Australian citizen."

290 Conduct that might also justify a law of denationalisation might include actions which seek to destroy or gravely harm the fundamental and basal features of the nation guarded by its *Constitution*, such as representative democracy and the rule of law, and actions directed at overthrowing state institutions where such conduct amounts to a clear rejection of allegiance to Australia. Terrorist attacks might also be included. It is otherwise unnecessary and inappropriate to define the metes and bounds of the denationalisation power conferred on the Federal Parliament by s 51(xix).

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437 *Afroyim v Rusk* (1967) 387 US 253.

291 The "qualification" recognised by Gleeson CJ in *Singh*<sup>438</sup> and by Gibbs CJ in *Pochi v Macphee*<sup>439</sup> is otherwise important for another reason, as recognised by Edelman J. It is a fetter on the legislative power to define who is an alien. As Edelman J explains, who is an alien for the purposes of s 51(xix) is ultimately a matter entrusted to this Court<sup>440</sup>. On that basis, Edelman J argues that a person who is unconditionally absorbed into the Australian community should not be considered, for the purposes of s 51(xix), to be an alien<sup>441</sup>. I respectfully agree with Edelman J's reasons. They recognise, as inevitably they must, that the "naturalization" power in s 51(xix), like the "aliens" power, has a constitutional field of application to be determined by this Court. Unconditional absorption in that respect is completion of the process of naturalisation for the purposes of s 51(xix). So construed, such a power has authorised all of the naturalisation laws enacted by Parliament since the *Naturalization Act 1903* (Cth). Those laws are a recognition of the constitutional consequences for a person's status of unconditional absorption into the Australian community.

### **Cancellation of citizenship and the 2007 Citizenship Act**

292 The 2007 Citizenship Act provides for several means by which citizenship of this country may be lost. Pursuant to s 33, a person may make an application to the Minister to renounce her or his citizenship. The Minister may approve such a renunciation if, for example, the person is aged over 18 years and is "a national or citizen of a foreign country"<sup>442</sup>. Pursuant to s 34(1), the Minister may revoke a person's citizenship if, for example, that person has been convicted of certain offences relating to her or his application for citizenship, and the Minister is satisfied that it would not be in the public interest for that person to remain a citizen. Pursuant to s 36, the children of a person who ceases to be a citizen may also cease to be citizens.

293 Subdivision C of Div 3 of Pt 2 of the 2007 Citizenship Act is headed "Citizenship cessation determinations". One of its operative provisions is s 36B, which confers a power on the Minister to determine that a person's citizenship has ceased. This was the power exercised here. Section 36A states the purpose of Subdiv C in the following way:

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438 (2004) 222 CLR 322 at 329 [4].

439 (1982) 151 CLR 101 at 109-110.

440 See [193]-[199], [225].

441 See [204]-[211].

442 *Australian Citizenship Act 2007* (Cth), s 33(3)(a).

"This Subdivision is enacted because the Parliament recognises that Australian citizenship is a common bond, involving reciprocal rights and obligations, and that citizens may, through certain conduct incompatible with the shared values of the Australian community, demonstrate that they have severed that bond and repudiated their allegiance to Australia."

294 Allegiance to Australia is a fundamental incident of Australian citizenship for the purposes of the 2007 Citizenship Act. That Act does not create that allegiance for natural-born Australians; rather, it recognises allegiance as an inherent feature of Australian citizenship. The preamble to that Act thus states:

"The Parliament recognises that Australian citizenship represents full and formal membership of the community of the Commonwealth of Australia, and Australian citizenship is a common bond, involving reciprocal rights and obligations, uniting all Australians, while respecting their diversity.

The Parliament recognises that persons conferred Australian citizenship enjoy these rights and undertake to accept these obligations:

- (a) by pledging loyalty to Australia and its people; and
- (b) by sharing their democratic beliefs; and
- (c) by respecting their rights and liberties; and
- (d) by upholding and obeying the laws of Australia."

295 As already concluded, a law that permits the cancellation of citizenship following conduct which is so incompatible with the shared values of the Australian community that it constitutes a severance of the bond between citizens and a repudiation of allegiance is an example of a valid denationalisation law. It is valid because cancellation takes place when there exists conduct which demonstrates an indelible renunciation of membership of this nation. Section 36B of the 2007 Citizenship Act is a law of this kind.

296 Section 36B operates when three conditions are met. First, the Minister must be satisfied that a person has engaged in certain types of "conduct"<sup>443</sup>. That "conduct" is prescribed in s 36B(5). Secondly, the Minister must be satisfied that "the conduct demonstrates that the person has repudiated their allegiance to Australia"<sup>444</sup>. Thirdly, the Minister must be satisfied that "it would be contrary to

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**443** *Australian Citizenship Act 2007* (Cth), s 36B(1)(a).

**444** *Australian Citizenship Act 2007* (Cth), s 36B(1)(b).

the public interest for the person to remain an Australian citizen"<sup>445</sup>. Pursuant to s 36E, in considering the public interest, the Minister "must" have regard to nine matters. These include "the severity of the conduct" in question, "the degree of threat posed by the person" to the community, whether "the person is being or is likely to be prosecuted" for the conduct, and "Australia's international relations"<sup>446</sup>.

297 The validity of this law hinges on the second condition in s 36B(1). Conduct that manifests a repudiation of allegiance to Australia is conduct that is inconsistent with continued citizenship and membership of this nation. The word "repudiated", in its statutory context, refers to a *voluntary* rejection or renunciation of allegiance<sup>447</sup>. Whether such a rejection or renunciation has taken place does not turn upon the subjective wishes of a person, but upon an objective consideration of the voluntary "conduct" identified in accordance with s 36B(1)(a). That conduct is examined to determine whether it "demonstrates" the presence of a repudiation of allegiance.

298 A further element of this statutory scheme is that it only applies to individuals who have dual citizenship. Pursuant to s 36B(2), the Minister cannot determine that a person ceases to be a citizen if the Minister is also satisfied that it would result in the person becoming someone who is not a national or citizen of any country. Thus, the power to cancel citizenship cannot be exercised if it would lead to statelessness. Here, the plaintiff is a citizen of the Republic of Turkey.

299 The "conduct", defined by s 36B(5), refers to behaviour that potentially contradicts allegiance to the bonds that constitute the nation. With the exception of s 36B(5)(j), the "conduct" listed is connected with terrorism or constitutes terrorism. Terrorism is an evil scourge, which in the 21st century has been visited on this country. It is warfare waged unconventionally<sup>448</sup>. Paragraph (a) of s 36B(5) refers to "engaging in international terrorist activities using explosive or lethal devices". Paragraph (b) refers to "engaging in a terrorist act". Paragraph (c) refers to "providing or receiving training connected with preparation for, engagement in, or assistance in a terrorist act". Paragraph (d) refers to "directing the activities of a terrorist organisation". Paragraph (e) refers to "recruiting for a terrorist organisation". Paragraph (f) refers to "financing terrorism". Paragraph (g) refers to "financing a terrorist". Paragraph (h) refers to "engaging in foreign incursions and

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**445** *Australian Citizenship Act 2007* (Cth), s 36B(1)(c).

**446** *Australian Citizenship Act 2007* (Cth), s 36E(2)(a), (c), (f) and (h) respectively.

**447** *cf Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115 at 135-136 [44] per Gleeson CJ, Gummow, Heydon and Crennan JJ.

**448** *cf Thomas v Mowbray* (2007) 233 CLR 307 at 324-325 [7] per Gleeson CJ.

recruitment" (addressed in greater detail below). Paragraph (i) refers to "fighting for, or being in the service of, a declared terrorist organisation"<sup>449</sup>. Paragraph (j) refers to "serving in the armed forces of a country at war with Australia".

300 The foregoing activities are *also* criminal offences for the purposes of the *Criminal Code* (Cth), although only if the "fault element" for each offence, as prescribed by the *Criminal Code*, is satisfied. Thus, s 36B(6) provides that the words and expressions used in s 36(5)(a)-(h) have the same meaning as they do in the *Criminal Code*<sup>450</sup>; however, this does not include the "fault elements" for each offence.

301 It is easy to accept that participation in these types of terrorist activities could amount to "conduct" that is necessarily inconsistent with allegiance to Australia or to membership of this nation. For example, s 100.1 of the *Criminal Code* defines the type of action that can constitute a "terrorist act", for the purposes of s 101.1, as engaged by s 36B(5)(b). It includes action that causes serious physical harm or death<sup>451</sup>, which is done with the intention of "advancing a political, religious or ideological cause", and with the intention of, amongst other things, "influencing by intimidation" the Australian government or "intimidating the public"<sup>452</sup>. Whether, by reason of s 36B(6), the intentional attributes of the definition of a "terrorist act" are included need not, for the moment, be resolved. A law that facilitates the cancellation of a person's citizenship for engaging in "terrorist acts", when that person's conduct demonstrates repudiation of allegiance to Australia, and when it is also in the public interest for that person not to remain a citizen, is authorised by s 51(xix). The same conclusion applies to the other types of conduct identified in s 36B(5)(a)-(i) that are connected to, or which further,

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449 As defined by s 36C of the *Australian Citizenship Act 2007* (Cth).

450 Corresponding with Subdiv A of Div 72 (International terrorist activities using explosive or lethal devices); ss 101.1 (Terrorist acts), 101.2 (Providing or receiving training connected with terrorist acts), 102.2 (Directing the activities of a terrorist organisation), 102.4 (Recruiting for a terrorist organisation), 103.1 (Financing terrorism) and 103.2 (Financing a terrorist); and Div 119 (Foreign incursions and recruitment), respectively. For the avoidance of doubt, s 5.6 of the *Criminal Code* (Cth) specifies that "[i]f the law creating the offence does not specify a fault element", the fault element will either be intention or recklessness depending on the type of "physical element".

451 *Criminal Code* (Cth), s 100.1(2)(a), (c).

452 *Criminal Code* (Cth), s 100.1(1) (definition of "terrorist act").



terrorism. Terrorism is manifestly antithetical to the fundamental values shared by members of the Australian nation.

### Foreign incursion

302 On the agreed facts of this amended special case, the Minister was satisfied that the plaintiff had engaged in a "foreign incursion" for the purposes of s 36B(5)(h) of the 2007 Citizenship Act. The Minister was also satisfied that this conduct demonstrated that the plaintiff had "repudiated [his] allegiance to Australia" and that it was "contrary to the public interest for [the plaintiff] to remain an Australian citizen".

303 Pursuant to s 36B(6), one turns to the *Criminal Code* to determine what a "foreign incursion" comprises. Pursuant to s 119.2 of the *Criminal Code*, an Australian citizen commits an offence if she or he enters or remains in an area of a foreign country and that area is "declared" by the Foreign Affairs Minister pursuant to s 119.3. The Foreign Affairs Minister may make that declaration if she or he is satisfied that a "listed terrorist organisation is engaging in a hostile activity in that area"<sup>453</sup>. The term "terrorist organisation" is defined to include "an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act"<sup>454</sup>. The phrase "engage in a hostile activity" refers to conduct that is engaged in with the intention of achieving objectives such as the overthrow of a government of a foreign country by force or violence, causing serious harm or death, intimidating the public, or unlawfully damaging property belonging to the government of a foreign country<sup>455</sup>. Section 119.2(3) lists a series of permitted or innocent purposes for being in such a "declared" area. These include providing humanitarian aid, performing an official governmental duty, performing an official duty for the United Nations or the Red Cross, making a bona fide visit to a family member, and making a news report.

304 Section 119.2 was enacted in 2014. The Explanatory Memorandum to the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (Cth) described the purpose of s 119.2 in the following terms<sup>456</sup>:

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453 *Criminal Code* (Cth), s 119.3(1). A "listed terrorist organisation" is defined in s 100.1(1) by reference to s 102.1(1).

454 *Criminal Code* (Cth), s 102.1(1) (definition of "terrorist organisation").

455 *Criminal Code* (Cth), s 117.1(1) (definition of "engage in a hostile activity").

456 Australia, Senate, *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, Explanatory Memorandum at 47 [225].

"The legitimate objective of the new offence is to deter Australians from travelling to areas where listed terrorist organisations are engaged in a hostile activity unless they have a legitimate purpose to do so. People who enter, or remain in, a declared area will put their own personal safety at risk. Those that travel to a declared area without a sole legitimate purpose or purposes might engage in a hostile activity with a listed terrorist organisation. These people may return from a declared area with enhanced capabilities which may be employed to facilitate terrorist or other acts in Australia. The new offence will enable the prosecution of people who intentionally enter an area in a foreign country where they know, or are aware of a substantial risk, that the Australian Government has determined that terrorist organisations are engaging in a hostile activity and the person is not able to demonstrate a sole legitimate purpose or purposes for entering, or remaining in, the area."

305 The reference in the foregoing passage to knowledge that an area contains a terrorist organisation that is engaging in hostile activity does not apply in the case of s 36B(5)(h) of the 2007 Citizenship Act. As already mentioned, s 36B(6) excludes the "fault elements" of the criminal offences listed in s 36B(5)(a)-(h). However, the incursion must still have taken place voluntarily. That is because s 4.1(1) of the *Criminal Code* provides that a "physical element" of an offence may be "conduct" and s 4.2(1) provides that "conduct" can "only be a physical element if it is voluntary". Thus, s 36B(5)(h) could not be satisfied if the person in question had made an involuntary foreign incursion.

306 In 2010, the group now known as "Islamic State" was listed as a terrorist organisation. The following was an agreed fact of this amended special case:

"Islamic State is opposed to Western interests, including those of Australia. Islamic State has openly called for attacks against Australia, and Australian citizens and interests, both because of the group's anti-Western ideology and because of Australia's support of military operations against Islamic State. Islamic State has promoted its opposition to Australia through propaganda material, foreign fighter videos and vitriolic speeches by senior leadership. Official Islamic State propaganda has sought to radicalise Australian Muslims in an effort to swell Islamic State ranks and encourage domestic terror attacks."

307 In 2014, the Foreign Affairs Minister declared al-Raqqa province in Syria to be a "declared" area for the purposes of s 119.3 of the *Criminal Code*<sup>457</sup>. In a

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**457** *Criminal Code (Foreign Incursions and Recruitment – Declared Areas) Declaration 2014 – Al-Raqqa Province, Syria* (4 December 2014).

statement of reasons accompanying the declaration, it was observed that Islamic State was "based in the Iraqi provinces of Ninewa and al-Anbar and the Syrian province of al-Raqqa"<sup>458</sup>. It was further observed that Islamic State's activities and calls "have attracted thousands of 'foreign fighters', including Australians, who have travelled to Syria to join ISIL and engage in hostile activity"<sup>459</sup>.

308 It was also an agreed fact of this amended special case that the plaintiff, at some point after 16 April 2013, travelled to Syria. It was not an agreed fact that he had entered into, and had remained in, al-Raqqa province after it became a "declared" area. Indeed, prior to his departure, the plaintiff informed his family that the purpose of his travel was to arrange a marriage, and that he intended to return to Australia. That marriage took place in 2013 in the Governorate of Idlib, Syria. The plaintiff's litigation guardian, his sister, claims that while in Syria (prior to his imprisonment) the plaintiff had wanted to return to Australia but was "stuck" as there was "no way to get out" because of road closures. He was subsequently detained at first by Kurdish militia and then by Syrian authorities. He claims he was tortured. He remains in custody in Syria.

309 The Minister's determination to cancel the plaintiff's citizenship, pursuant to s 36B(1) of the 2007 Citizenship Act, followed the receipt of a Qualified Security Assessment ("QSA") from the Director-General of Security of the Australian Security Intelligence Organisation ("ASIO"). The QSA advised that ASIO had assessed that the plaintiff had "likely engaged in foreign incursions and recruitment by entering or remaining in al-Raqqa Province in Syria, a declared area, on or after 5 December 2014" and had "likely travelled to Syria in early-to-mid-2013, and had joined the Islamic State of Iraq and the Levant ['ISIL']". ASIO indicated that the plaintiff's travel to Syria was facilitated through a Sydney-based facilitation network developed by convicted terrorist Hamdi Al Qudsi. The plaintiff is seeking review of this QSA in the Administrative Appeals Tribunal<sup>460</sup>. The correctness of the QSA and the lawfulness of the Minister's determination under s 36B(1) are not in issue before this Court. The plaintiff has also made an

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458 *Criminal Code (Foreign Incursions and Recruitment – Declared Areas) Declaration 2014 – Al-Raqqa Province, Syria*, Explanatory Statement at 2.

459 *Criminal Code (Foreign Incursions and Recruitment – Declared Areas) Declaration 2014 – Al-Raqqa Province, Syria*, Explanatory Statement at 2.

460 Pursuant to the *Australian Security Intelligence Organisation Act 1979* (Cth), s 54(1) and the *Administrative Appeals Tribunal Act 1975* (Cth), s 27AA(1).

application for revocation of the Minister's decision to cancel his citizenship<sup>461</sup>. He was also aware that he could seek judicial review of the determination.

310 The plaintiff contended that s 36B(5)(h) is over-inclusive because it extends to conduct that would include a visit to a "declared" area that was wholly innocent. In particular, he relied upon the absence of any fault element for conduct constituting a foreign incursion. However, that submission overlooks the fact that the existence of "conduct", enlivening s 36B(1), is only the first of three tests in the applicable statutory scheme<sup>462</sup>.

311 The second test requires the Minister to be satisfied that the conduct demonstrates that the person has "repudiated their allegiance to Australia"<sup>463</sup>. As the defendants contended, if a visit were truly innocent it would be most unlikely that the Minister would ever be satisfied that such blameless conduct constituted a rejection of allegiance to this country. This is made clear in the Revised Explanatory Memorandum to the *Australian Citizenship Amendment (Citizenship Cessation) Bill 2020* (Cth) ("the Cessation EM"), which states<sup>464</sup>:

"A person who, for example, unknowingly participated in conduct set out in new subsection 36B(5) is unlikely to satisfy the Minister that they have repudiated their allegiance to Australia."

312 Nor is it likely that such innocent conduct would justify a conclusion, for the purposes of the third component, that it was not in the "public interest for the person to remain an Australian citizen"<sup>465</sup>.

313 The plaintiff's submission also overlooks s 119.2(3) of the *Criminal Code*, which, as mentioned above, creates a significant number of exceptions for entry into a "declared" area for a legitimate purpose or purposes.

314 Whilst it must be accepted that it may be possible to enter innocently into a "declared" area, it is also possible to do so with evil intention. In 2014, Islamic State's reputation for extreme violence was notorious and it had become one of the world's deadliest and most active terrorist organisations. On 4 December 2014, the Minister for Foreign Affairs issued a press release concerning the declaration of

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**461** *Australian Citizenship Act 2007* (Cth), s 36H.

**462** *Australian Citizenship Act 2007* (Cth), s 36B(1)(a).

**463** *Australian Citizenship Act 2007* (Cth), s 36B(1)(b).

**464** Australia, Senate, *Australian Citizenship Amendment (Citizenship Cessation) Bill 2020*, Revised Explanatory Memorandum at 8 [46].

**465** *Australian Citizenship Act 2007* (Cth), s 36B(1)(c).

al-Raqqa province under s 119.3 of the *Criminal Code*, stating, amongst other things:

"The ISIL terrorist organisation is engaging in significant hostile activities in Al-Raqqa ...

Any Australians who are currently in Al-Raqqa province without legitimate purpose should leave immediately."

315 Given the foregoing, one can conceive that the *voluntary* act of entering and remaining in al-Raqqa province in 2014 could, of itself, well justify a conclusion that the person in question had "repudiated their allegiance to Australia" and that it was in "the public interest" for that person not to remain a citizen. Incursion might also be accompanied by other conduct, such as repeatedly accessing internet sites that promote terrorism, which is not an element of the offence prescribed by s 119.2 of the *Criminal Code*, but which might be very relevant to the issue of repudiation. As already mentioned, whether the plaintiff ever visited al-Raqqa province, and, if he did, whether his conduct thereby demonstrated repudiation of allegiance to Australia, are not matters before this Court. It is sufficient to state that a law so designed and targeted at *voluntary* movement into an area in which a "listed terrorist organisation" is undertaking hostile activity is a valid law of denationalisation, authorised by s 51(xix) of the *Constitution*.

### **The "people of the Commonwealth"**

316 The plaintiff advanced a number of additional grounds attacking the validity of s 36B of the 2007 Citizenship Act. The first of these was that the Court should imply from the text of the *Constitution* either an absolute or qualified prohibition on the removal of a person's status as a member of the "people of the Commonwealth", consistently with the use of that phrase in the *Constitution*<sup>466</sup>. The essence of the argument was that once it is acknowledged that the *Constitution* recognised the existence of the people of Australia as a distinct community, it followed that the character of that body of people was unalterable by Parliament. Parliament did not have an unfettered ability to define, for example, who were the "people" from whom senators and members of the House of Representatives were to be directly chosen for the purposes of ss 7 and 24 of the *Constitution*. Alternatively, it was submitted, it should be implied that any exclusion from membership of the "people of the Commonwealth" should only take place through an exercise of judicial power under Ch III of the *Constitution*. Neither proposition was directly supported by any authority.

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466 *Constitution*, s 24.

317 It is well established that implications which limit the legislative powers of the Commonwealth can only be drawn when it is necessary to do so to give effect to the text or structure of the *Constitution*<sup>467</sup>. Here, the suggested implication is unnecessary and conflicts with the scope of legislative authority conferred by the "naturalization and aliens" head of power in s 51(xix) of the *Constitution*. That head of power, for the reasons already given, authorises laws that provide for the denationalisation of an Australian citizen where that person has acted in a way, or taken a step or steps, that constitutes a permanent repudiation of her or his allegiance to Australia or of her or his membership of this nation. The existence of this legislative power is a complete answer to the implication sought to be propounded by the plaintiff. The relevance of Ch III to laws authorising the expatriation of Australian citizens is otherwise addressed below.

### **A law cannot disenfranchise a citizen**

318 The plaintiff submitted that, as a citizen and a member of the "people" for the purposes of ss 7 and 24 of the *Constitution*, he had a right to vote in federal elections. He relied upon the well-established proposition that ss 7 and 24 of the *Constitution* mandate universal adult suffrage, exclusion from which requires a "substantial reason"<sup>468</sup>. Because the cancellation of citizenship results in automatic disenfranchisement, it was submitted that such a law required the support of a "substantial reason", and that none existed here<sup>469</sup>.

319 There is an immediate difficulty with the plaintiff's contention. As the defendants pointed out, the plaintiff's reasoning is circular. Laws exist in this country which confer rights and duties on a person who is a citizen. One of those duties is the obligation to vote at federal elections. The existence of such rights and duties, which depend on a person's legal status as a citizen, cannot limit Parliament's power to make valid laws of denationalisation in accordance with s 51(xix) of the *Constitution*. If the plaintiff's citizenship has been validly cancelled, then he has forfeited his eligibility to vote, as a consequence of his new legal status as an alien. But a general implication derived from ss 7 and 24 of the *Constitution* concerning universal suffrage says nothing at all about who should, and who should not, be citizens of this country. That is because it is an implication

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<sup>467</sup> *Gerner v Victoria* (2020) 270 CLR 412 at 422 [14] per Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ.

<sup>468</sup> *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 174 [7] per Gleeson CJ; *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 48-49 [123] per Gummow and Bell JJ.

<sup>469</sup> *Commonwealth Electoral Act 1918* (Cth), s 93(1)(b), (7)(b).

that takes the body politic to be that which is defined by the Parliament subject to the *Constitution*<sup>470</sup>.

320 If, contrary to the foregoing, s 36B of the 2007 Citizenship Act must be justified by a "substantial reason", the defendants submitted that responding to a repudiation of membership of the Australian community and protection of that community from terror were both sufficient justifications. That submission should be accepted. In that respect, in *Roach v Electoral Commissioner*, Gleeson CJ observed<sup>471</sup>:

"The rational connection between such exclusion and the identification of community membership for the purpose of the franchise might be found in conduct which manifests such a rejection of civic responsibility as to warrant temporary withdrawal of a civic right."

321 Conduct of the kind identified in s 36B(5)(h) and which demonstrates a repudiation of allegiance to Australia may well constitute a "rejection of civic responsibility".

322 The plaintiff put his case that s 36B is not supported by a "substantial reason" in several different ways. For the reasons that follow, what might constitute a valid "substantial reason" need not be articulated. That is because the plaintiff's contentions are, in any event and with respect, misconceived.

323 The plaintiff first contended that s 36B is over-inclusive in the range of conduct it specifies and thus has no "rational connection" to any of the ends it might pursue. That submission should be rejected for the reasons already given. Secondly, the plaintiff then complained that s 36B is not a proportionate law because it deprives him of his citizenship permanently. He relied upon the decision of this Court in *Roach*, which decided that serious criminal offending could only ever justify a temporary withdrawal of the right to vote<sup>472</sup>. That submission is misconceived for two reasons. First, as the defendants pointed out, it overlooks s 36H, which provides that a person whose citizenship has been cancelled may apply to have that decision revoked. That provision allows the Minister to, amongst other things, revoke the decision if it be in the public interest to do so<sup>473</sup>. It also overlooks the power conferred on the Minister by s 36J(1) to revoke the cancellation of citizenship on the Minister's "own initiative" if that would be in the public interest. Secondly, because the reach of s 36B is unlikely to include wholly

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**470** Reasons of Kiefel CJ, Keane and Gleeson JJ at [44].

**471** (2007) 233 CLR 162 at 175 [8].

**472** (2007) 233 CLR 162 at 177 [12] per Gleeson CJ.

**473** *Australian Citizenship Act 2007* (Cth), s 36H(3)(b).

innocent conduct and is instead directed at conduct that would justify a conclusion by the Minister that a person has repudiated her or his allegiance to Australia, permanent cancellation, subject to ss 36H and 36J, is a proportionate response to an enduring renunciation of membership of the Australian community.

324 Finally, the plaintiff submitted that s 36B is a disproportionate law because of other laws that already exist and that achieve similar ends. For example, the Federal Parliament has passed laws addressing the risks of terror-related activities that provide for the cancellation of passports, for the making of preventative detention orders, and for the making of continuing detention orders and control orders<sup>474</sup>. The existence of these means of protecting the Australian community did not justify, it was said, what the plaintiff described as a "broad executive discretion permanently to extinguish the civic rights of any member of the Australian community, exercisable on the Minister's satisfaction that any of a wide range of 'conduct' has occurred, without assessment of any fault element". That characterisation of s 36B is a misdescription of the law. Once again, it ignores the fact that engaging in prescribed conduct is only one of three preconditions to the operation of s 36B. It also disregards the nature of the species of "conduct" listed in s 36B(5). For the reasons already given, each species of conduct is potentially repugnant to, and to that extent thereby inconsistent with, fundamental values that inhere in the community comprising the "people of the Commonwealth".

### **Cancellation is not an exercise of judicial power**

325 The plaintiff submitted that involuntary denationalisation is a form of punishment that could only be imposed by a Ch III court following the adjudication of criminal guilt. He relied upon this Court's decision in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*<sup>475</sup>, which established the principle that, subject to certain exceptions, the executive branch of government cannot involuntarily detain a person; detaining a person as punishment can only take place following adjudgment of guilt by a court. That is because this "function" has over time become "essentially and exclusively judicial in character"<sup>476</sup>. The plaintiff submitted that this principle is not confined to detention as a form of punishment; as a matter of logic, it extends to any form of

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<sup>474</sup> *Australian Passports Act 2005* (Cth), s 22 (cancellation of passports); *Criminal Code* (Cth), Divs 104 (control orders), 105 (preventative detention orders), 105A (continuing detention orders).

<sup>475</sup> (1992) 176 CLR 1.

<sup>476</sup> *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27 per Brennan, Deane and Dawson JJ.



punishment for breach of the law<sup>477</sup>. So much should be accepted. Here, the plaintiff urged the Court to characterise his denationalisation as a type of punishment; he contended that it is a form of banishment. Amongst other things, he relied upon the following observation of the Supreme Court of the United States in *Trop v Dulles*<sup>478</sup>:

"We believe, as did Chief Judge Clark in the court below, that use of denationalization as a punishment is barred by the Eighth Amendment. There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself. While any one country may accord him some rights, and presumably as long as he remained in this country he would enjoy the limited rights of an alien, no country need do so because he is stateless. Furthermore, his enjoyment of even the limited rights of an alien might be subject to termination at any time by reason of deportation. In short, the expatriate has lost the right to have rights." (footnotes omitted)

326 There is no equivalent to the Eighth Amendment to the Constitution of the United States in Australia's *Constitution*. Nonetheless, the Supreme Court's observation that denationalisation could be penal in nature should be accepted. In *Trop*, for example, denationalisation took place because the person in question had been guilty of desertion from the United States Army<sup>479</sup>. A majority of the Supreme Court reasoned<sup>480</sup>:

"The purpose of taking away citizenship from a convicted deserter is simply to punish him. There is no other legitimate purpose that the statute could serve."

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**477** *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 340 [15] per Kiefel CJ, Bell, Keane and Edelman JJ.

**478** (1958) 356 US 86 at 101-102 per Warren CJ (Black, Douglas and Whittaker JJ agreeing).

**479** *Nationality Act of 1940*, Pub L No 76-853, §401(g), 54 Stat 1137 at 1169.

**480** *Trop v Dulles* (1958) 356 US 86 at 97 per Warren CJ (Black, Douglas and Whittaker JJ agreeing); see also at 109-110 per Brennan J.

327 The characterisation of a power as being either judicial or administrative in nature is often difficult. As Kitto J famously observed in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*<sup>481</sup>:

"[I]t has not been found possible to frame an exhaustive definition of judicial power. But this is not to say that the expression is meaningless. The uncertainties that are met with arise, generally if not always, from the fact that there is a 'borderland in which judicial and administrative functions overlap', so that for reasons depending upon general reasoning, analogy or history, some powers which may appropriately be treated as administrative when conferred on an administrative functionary may just as appropriately be seen in a judicial aspect and be validly conferred upon a federal court." (citation omitted)

328 Three observations, however, should be made. First, the capacity to impose a penalty of some kind is not necessarily a power exclusively reposed in the judicial branch of government. What is so reposed is the jurisdiction to impose those types of punishment that are essentially and exclusively judicial in nature, such as punishment for breach of a law in the sense described in *Lim*. As Gleeson CJ observed in *Re Woolley; Ex parte Applicants M276/2003*<sup>482</sup>:

"The proposition that, ordinarily, the involuntary detention of a citizen by the State is penal or punitive in character was not based upon the idea that all hardship or distress inflicted upon a citizen by the State constitutes a form of punishment, although colloquially that is how it may sometimes be described. Taxes are sometimes said, in political rhetoric, to be punitive. That is a loose use of the term. Punishment, in the sense of the inflicting of involuntary hardship or detriment by the State, is not an exclusively judicial function."

329 Secondly, it is well established that the federal executive can, in some circumstances, impose detriments and penalties based upon the fact that some specific crime has been committed. Thus, in *Falzon v Minister for Immigration and Border Protection*<sup>483</sup>, it was held that the power reposed in the relevant Minister by s 501(3A) of the *Migration Act* to cancel a person's visa following conviction of a crime did not impermissibly confer upon that Minister any judicial power. It is also well established that the executive may exercise a power to impose a penalty or a detriment based upon an opinion that a crime has been committed,

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481 (1970) 123 CLR 361 at 373.

482 (2004) 225 CLR 1 at 12 [17].

483 (2018) 262 CLR 333.

as distinct from any conviction for that crime. Thus, in *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd*<sup>484</sup>, this Court decided that the Australian Communications and Media Authority ("the Authority") had power to determine whether a broadcaster had breached one of its licence conditions, namely not to use a broadcasting service in the commission of an offence. Making a finding that such an offence had taken place and then taking enforcement action was not an exercise of judicial power. The Authority did not need to defer the exercise of its power until conviction by a court of the offence<sup>485</sup>. The plurality observed<sup>486</sup>:

"More generally, and contrary to the 'normal expectation' stated by the Full Court, it is not offensive to principle that an administrative body is empowered to determine whether a person has engaged in conduct that constitutes a criminal offence as a step in the decision to take disciplinary or other action."

330 Here, of course, the power of denationalisation does not turn upon an opinion that any of the conduct described in s 36B(5)(a)-(h) of the 2007 Citizenship Act constitutes the commission of an offence under the *Criminal Code*. But the plaintiff urged that the inquiry undertaken by the Minister is closely tied to the subject matter of the conduct listed. For the reasons which follow, that contention does not justify a conclusion that the Minister exercises judicial power in making a determination pursuant to s 36B.

331 Thirdly, in determining whether the power to punish is one which is exclusively vested in the judiciary, considerations of history may assume great importance, especially when the intrinsic nature of the power exhibits features which are consistent with an exercise of executive as well as judicial power. In *Lim*, McHugh J, after considering Griffith CJ's descriptions of judicial power in

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**484** (2015) 255 CLR 352.

**485** See also *Visnic v Australian Securities and Investments Commission* (2007) 231 CLR 381 at 386 [16] per Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ.

**486** *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352 at 371 [33] per French CJ, Hayne, Kiefel, Bell and Keane JJ.

*Huddart, Parker & Co Pty Ltd v Moorehead*<sup>487</sup> and those of Kitto J in *Tasmanian Breweries Pty Ltd*<sup>488</sup>, made the following decisive observation<sup>489</sup>:

"The formulations of Griffith CJ and Kitto J illustrate the imprecision attaching to the lines between judicial power, executive power and legislative power. The line between judicial power and executive power in particular is very blurred. Prescriptively separating the three powers has proved impossible. The classification of the exercise of a power as legislative, executive or judicial frequently depends upon a value judgment as to whether the particular power, having regard to the circumstances which call for its exercise, falls into one category rather than another. The application of analytical tests and descriptions does not always determine the correct classification. Historical practice plays an important, sometimes decisive, part in determining whether the exercise of a particular power is legislative, executive or judicial in character." (footnote omitted)

332 Here, for three reasons the power exercised by the Minister in cancelling the plaintiff's citizenship was not judicial power. First, it has never been an essentially judicial function to make orders which denationalise a person. At common law, denationalisation and expatriation were not possible. And whilst common law courts ordered transportation of convicts to British colonies throughout the 18th and 19th centuries, those convicts remained British subjects<sup>490</sup>.

333 As explained above, the *Naturalization Act 1870* changed the common law. It provided for a British subject to lose her or his status as a subject in defined circumstances. None of those circumstances involved an exercise of judicial power. Nor did they involve any form of punishment. Rather, they recognised the

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**487** (1909) 8 CLR 330 at 357.

**488** (1970) 123 CLR 361 at 374-375.

**489** (1992) 176 CLR 1 at 67.

**490** This can be inferred from the absence of any reference to the loss of British subjecthood in the *Piracy Act 1717* (4 Geo 1 c 11) and the *Transportation Act 1785* (25 Geo 3 c 46) upon a sentence of transportation to a place within "his Majesty's colonies and plantations in America" (s 1) or "within his Majesty's dominions" (s 1), respectively. See generally Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (1991) at 33, 43, where no apparent distinction is drawn between convicts, emancipists and natural-born subjects comprising the Australian population.

acquisition of alien status upon, for example, a subject becoming naturalised in a foreign state.

334 Following Federation, early enactments in Australia provided the executive, not the judiciary, with the power of denationalisation or deportation in defined circumstances. Section 11 of the *Naturalization Act 1903-1917* conferred such a power on the Governor-General. Section 8AA of the *Immigration Act 1901-1925* conferred a power of deportation on the Minister. Section 12 of the *Nationality Act 1920* conferred a power on the Governor-General<sup>491</sup> to revoke a certificate of naturalisation where this had been obtained, for example, by false representation or fraud, or where the person had shown herself or himself to be disaffected or disloyal to the Crown. Section 21 of the *Nationality and Citizenship Act 1948*, as enacted, conferred on the Minister a power of denationalisation which was similar to that conferred by s 36B. It empowered the Minister to deprive a registered or naturalised citizen of her or his citizenship where, for example, the Minister was satisfied that: the person had shown herself or himself "by act or speech to be disloyal or disaffected towards" the Crown<sup>492</sup>; the person had, during any war in which Australia had been engaged, "unlawfully traded or communicated with the enemy or been engaged on or associated with any business which was to his knowledge carried on in such a manner as to assist an enemy in that war"<sup>493</sup>; or the person was not, at the date on which she or he was registered or naturalised, "of good character"<sup>494</sup>. The Minister could not make such an order in respect of a person unless the Minister was satisfied that it was "not conducive to the public good that that person should continue to be an Australian citizen"<sup>495</sup>.

335 Contrary to what might otherwise be thought, the 152 years of legal history since 1870 cannot be overlooked or dismissed as merely recent. Nor does it matter that many of the historical provisions were concerned with naturalised rather than natural-born citizens or subjects. As already mentioned, if denationalisation is a power that may validly be exercised in the case of a naturalised Australian by the executive in accordance with a law authorised by s 51(xix), no different outcome is justified in the case of those born in this country. Both are citizens who assume the same quality of allegiance, whether expressly in the case of naturalised citizens, or implicitly in the case of those born in Australia.

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**491** From 1936 this power was conferred on the Minister: see *Nationality Act 1936* (Cth), Schedule.

**492** *Nationality and Citizenship Act 1948* (Cth), s 21(1)(a).

**493** *Nationality and Citizenship Act 1948* (Cth), s 21(1)(b).

**494** *Nationality and Citizenship Act 1948* (Cth), s 21(1)(d).

**495** *Nationality and Citizenship Act 1948* (Cth), s 21(2).

336 Secondly, as already mentioned, the task of the Minister here is not to determine whether the conduct identified in s 36B(5)(a)-(h) constitutes the commission of any crime. The Minister is not determining guilt or innocence. The conduct to be examined excludes in each case the fault element provided for in the *Criminal Code*. Instead, the Minister is required to undertake a distinctly different task. The Minister must first determine whether "the conduct demonstrates that the person has repudiated their allegiance to Australia". That is not an inquiry mandated by any provision of the *Criminal Code* and it does not form part of the criteria for conviction for any of the crimes referenced in s 36B(5)-(6). The Minister must also examine, having regard to the factors listed in s 36E, whether it would be "contrary to the public interest for the person to remain an Australian citizen". What is in the public interest is a matter more usually, but not invariably, reserved to the executive branch of government<sup>496</sup>. In that respect, some of the mandatory factors to be considered pursuant to s 36E require the formation of subjective judgments<sup>497</sup> (for example, a person's connection to the other country of which they are a national or citizen (s 36E(2)(g))), and at least one raises directly a matter more naturally reserved to the executive branch of government ("Australia's international relations" (s 36E(2)(h))). Again, consideration of the public interest in the way mandated by s 36E does not form any part of the criteria for conviction of the crimes referenced in s 36B(5)-(6). It is a consideration that is foreign to the *Criminal Code*.

337 Thirdly, and in contrast to American decisions such as *Trop* or *Kennedy v Mendoza-Martinez*<sup>498</sup>, the purpose of s 36B is not to punish. If it had been, then it may not have been a valid law. Rather, s 36B serves a legitimate, non-punitive

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496 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 399-400 per Windeyer J; *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542 at 597 [168] per Crennan and Kiefel JJ.

497 See *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 377 per Kitto J.

498 (1963) 372 US 144. In any event, the American authorities do not stand for the proposition that any law of involuntary denationalisation or expatriation is inherently punitive in nature and therefore an exclusively judicial function: *Rogers v Bellei* (1971) 401 US 815 at 831-836 per Blackmun J (Burger CJ, Harlan, Stewart and White JJ agreeing).

purpose<sup>499</sup>. Its object, as a matter of substance<sup>500</sup>, is not retribution; rather, it is to recognise a person's repudiation of her or his allegiance to Australia and to prescribe a consequence for this repudiation, namely denationalisation. The Cessation EM clearly states that the "purpose" of Subdiv C of Div 3 of Pt 2 of the 2007 Citizenship Act is set out in s 36A<sup>501</sup>. Section 36A makes no reference, either directly or indirectly, or indeed inferentially, to punishment or retribution. Rather, it declares what Parliament considers to be the essential aspect of citizenship: it is a "common bond" which involves reciprocal rights and obligations. It then declares that a person may, by her or his conduct, act in a manner that is incompatible with the community's "shared values". It then further declares that when a person so acts, that may justify a conclusion that the person has "severed" her or his bond with the Australian community and has repudiated her or his allegiance to this country. Cancellation of that person's citizenship, in the circumstances mandated by Subdiv C, is simply the *de jure* acknowledgement of something which *de facto* has already occurred, namely that person's rejection of the Australian body politic.

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The foregoing gives full recognition to the words of s 36A and to the contents of the Cessation EM. It does not promote form over substance and practical effect. Rather, it reflects the reality of the statute. It is, with very great respect, wrong to conclude that the concern of s 36B is with "retribution for conduct" which is "reprehensible"<sup>502</sup>. Not only does such a conclusion manifestly clash with the expression of purpose set out in s 36A and in the Cessation EM, it also fails to grapple with an essential aspect of s 36B, namely repudiation of allegiance to Australia. A terrorist who has left Australia and has committed a terrorist act or acts which demonstrate the required repudiation of allegiance is most unlikely to care much for Australian citizenship (save for the possibility that it might be used to further some terrorist cause). For her or him, loss of citizenship is no punishment; it might be no more than an inconvenience or an insult. That is because she or he has already abandoned Australia. In that respect, it should be steadily borne in mind that the legislative scheme comprised by s 36B is in substance targeted at those who fundamentally loathe this country and all that it stands for. Those persons are not victims who require the protection of their former

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**499** *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 182-183 [40] per Kiefel CJ, Bell, Keane and Steward JJ; 388 ALR 1 at 16.

**500** *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27 per Brennan, Deane and Dawson JJ.

**501** Australia, Senate, *Australian Citizenship Amendment (Citizenship Cessation) Bill 2020*, Revised Explanatory Memorandum at 7 [33].

**502** Reasons of Kiefel CJ, Keane and Gleeson JJ at [75].

country; rather, they are, in substance and as a matter of practical effect, repudiators of Australia.

339 I otherwise agree with Kiefel CJ, Keane and Gleeson JJ<sup>503</sup> that, in a given case, a possible consequence of an application of s 36B might be the protection of the Australian people. That might be the case where the citizenship of a "foreign fighter" is cancelled. But again, that protective, non-punitive purpose does not result in a conferral by s 36B of judicial power on the executive<sup>504</sup>.

340 In argument it was said that s 36B operated retrospectively and that this revealed its true retributive purpose. That submission is misconceived. First, cancellation takes place with only prospective effect<sup>505</sup>. Secondly, the "conduct" which triggers its application has been unlawful since (at the latest) 1 December 2014<sup>506</sup>. Thirdly, for the reasons already given, if the plaintiff entered into and remained in a "declared" area, his conduct might well have shown a repudiation of the Australian community. For the reasons given by Frankfurter J in *Perez*, which I prefer, it is of no moment whether the plaintiff subjectively knew at that time that his repudiation of the body politic would lead to the cancellation of his citizenship.

341 Finally, in support of the conclusion that the power of denationalisation conferred by s 36B does not involve the exercise by the executive of judicial power, Subdiv C expressly preserves the responsibility of the courts to ensure that the power is exercised lawfully. A "note" which appears under s 36B(1) expressly refers to a person's ability to seek review of a determination to cancel citizenship in the High Court under s 75 of the *Constitution* or in the Federal Court under s 39B of the *Judiciary Act 1903* (Cth). The same note appears under s 36H(4) in relation to a decision to refuse an application to revoke a determination made under s 36B(1). In "proceedings under section 75 of the Constitution, or under [the 2007 Citizenship Act] or another Commonwealth Act", a determination made under s 36B(1) is taken to be revoked if a "court finds that the person did not engage in the conduct to which the determination relates" or the court finds that the person

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503 See [75].

504 See *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 183 [41] per Kiefel CJ, Bell, Keane and Steward JJ; 388 ALR 1 at 16.

505 *Australian Citizenship Act 2007* (Cth), s 36B(3).

506 On which date Div 119 of the *Criminal Code* (Cth) (foreign incursions and recruitment; see *Australian Citizenship Act 2007* (Cth), s 36B(5)(h)) commenced: *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth).



"was not a national or citizen of a country other than Australia"<sup>507</sup>. These provisions permit the issues of "conduct" and "dual citizenship" to be considered by a court on their merits. If a court were to find that the Minister had been mistaken in her or his satisfaction that conduct of the kind identified in s 36B(5) had taken place, or that the person in question was not a dual citizen, that person's citizenship is taken never to have ceased<sup>508</sup>.

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The foregoing finds some support in at least one early decision of this Court. In *Ex parte Walsh*, Isaacs J referred to a man who was thought "by the whole of the rest of Australia" to be of "so great a danger ... that nothing short of expulsion ... would be an adequate protection to the community"<sup>509</sup>. Isaacs J observed that Parliament could validly pass a law for that person's deportation, and that the exercise of such a power was a matter reserved to the executive branch of government, unless the deportation took place as punishment for a crime. His Honour said<sup>510</sup>:

"There is nothing in the written Constitution to require the power of deportation always to be exercised through the medium of the judiciary. If it is enacted as a punishment for crime, it necessarily falls to the judicial department. The Court then determines the matter, as it does every other, upon the proved circumstances of the case.

If it is enacted not as a punishment for crime, but as a political precaution, it must be exercised by the political department – the Executive – and possibly on considerations not susceptible of definite proof but demanding prevention or otherwise dependent on national policy. These principles, which are self-evident, have been abundantly recognized in America in cases of which *Mahler v Eby* is the latest." (footnote omitted)

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**507** *Australian Citizenship Act 2007* (Cth), s 36K(1)(a), (c).

**508** *Australian Citizenship Act 2007* (Cth), s 36K(2).

**509** (1925) 37 CLR 36 at 95.

**510** *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 95-96; see also Starke J at 132, who also accepted that both the executive and judicial powers of the Commonwealth could be used to exclude an alien as "preventive or protective measures for the peace, order and good government of the Commonwealth". However, this would not apply to "citizens of the Commonwealth" (at 138).

343 The same analysis, with respect, applies with equal force to a power to  
denationalise a citizen.

344 Section 36B was thus enacted, not as a punishment for a crime, but as a  
"political precaution". Because it does not, when correctly and lawfully applied,  
impose any punishment on a person whose citizenship is cancelled because of a  
repudiation of allegiance, there is no need for the "safeguard" of a "criminal trial,  
including the incidence of the burden of proof"<sup>511</sup>. Rather, and with great respect,  
curial oversight of the exercise of the power, as described above, is a sufficient  
safeguard.

345 I would answer the questions of law raised by the amended special case as  
follows:

1. Is s 36B of the *Australian Citizenship Act 2007* (Cth) invalid in its  
operation in respect of the plaintiff because:

(a) it is not supported by a head of Commonwealth legislative  
power;

Answer, "No".

(b) it is inconsistent with an implied limitation on  
Commonwealth legislative power preventing the involuntary  
deprivation of Australian citizenship;

Answer, "No".

(c) it effects a permanent legislative disenfranchisement which is  
not justified by a substantial reason;

Answer, "No".

(d) it effects a permanent disqualification from being chosen or  
from sitting as a senator or a member of the House of  
Representatives, otherwise than in the circumstances  
contemplated by ss 34 and 44 of the Constitution;

Answer, "Unnecessary to answer as this ground was not  
pressed".

(e) it reposes in the Minister for Home Affairs the exclusively  
judicial function of punishing criminal guilt?

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**511** Reasons of Kiefel CJ, Keane and Gleeson JJ at [86].

133.

Answer, "No".

2. What, if any, relief should be granted to the plaintiff?

Answer, "None".

3. Who should pay the costs of the special case?

Answer, "The plaintiff".