

HIGH COURT OF AUSTRALIA

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

BRENDAN CRAIG THOMS

APPLICANT

AND

COMMONWEALTH OF AUSTRALIA

RESPONDENT

Thoms v Commonwealth of Australia

[2022] HCA 20

Date of Hearing: 9 March 2022

Date of Judgment: 8 June 2022

B56/2021

ORDER

The question ordered to be heard and determined separately and removed into this Court pursuant to s 40 of the Judiciary Act 1903 (Cth) be answered as follows:

Question: *Was the detention of Brendan Craig Thoms between 28 September 2018 and 11 February 2020 unlawful?*

Answer: *No.*

Representation

S J Keim SC with K E Slack and A J Hartnett for the applicant (instructed by Maurice Blackburn Lawyers)

S P Donaghue QC, Solicitor-General of the Commonwealth, with S B Lloyd SC and C J Tran for the respondent (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

Thoms v Commonwealth of Australia

Constitutional law (Cth) – Powers of Commonwealth Parliament – Power to make laws with respect to naturalisation and aliens – Detention of unlawful non-citizens – Where applicant "unlawful non-citizen" within meaning of s 14(1) of *Migration Act 1958* (Cth) – Where applicant detained by officers in purported exercise of s 189(1) of *Migration Act* – Where majority of High Court of Australia determined applicant not "alien" within meaning of s 51(xix) of *Constitution* in *Love v The Commonwealth* (2020) 270 CLR 152 ("*Love*") – Where applicant released from detention after delivery of judgment in *Love* – Where detaining officers held reasonable suspicion that applicant was "unlawful non-citizen" to whom s 189(1) of *Migration Act* applied until delivery of judgment in *Love* – Whether detention lawful under s 189(1) of *Migration Act* – Whether s 51(xix) of *Constitution* supported valid application of s 189(1) of *Migration Act* to applicant during time of detention.

Words and phrases – "alien", "aliens power", "detention", "non-citizen, non-alien", "partially disapply", "reasonable suspicion", "so insubstantial, tenuous or distant", "sufficient connection", "unlawful non-citizen".

Constitution, s 51(xix).

Acts Interpretation Act 1901 (Cth), s 15A.

Migration Act 1958 (Cth), ss 3A, 189.

1 KIEFEL CJ, KEANE AND GLEESON JJ. The applicant was born in New Zealand in 1988 and is a citizen of that country. He first arrived in Australia in 1988 and began residing in Australia in 1994 pursuant to a Subclass 444 Special Category (temporary) visa granted to him on his date of entry. On his most recent entry into Australia on 8 January 2003, he was again granted a Subclass 444 Special Category (temporary) visa which permitted him to reside temporarily in Australia. That visa was cancelled on 27 September 2018 pursuant to s 501(3A) of the *Migration Act 1958* (Cth) ("the Act"). The applicant did not hold any other visa.

2 Section 189(1) of the Act provides:

"If an officer knows or reasonably suspects that a person in the migration zone ... is an unlawful non-citizen^[1], the officer must detain the person."

3 On 28 September 2018, the applicant was detained by an officer of the Department of Home Affairs in the purported exercise of s 189(1) and he remained in detention until 11 February 2020.

4 On 5 December 2018, the applicant commenced proceedings against the Commonwealth in the original jurisdiction of this Court. In those proceedings he sought: a declaration that his detention subsequent to the cancellation of his visa was unlawful and not supported by s 189 of the Act; a declaration that he was not an alien for the purposes of s 51(xix) of the *Constitution*; injunctions directing his release from detention; damages for wrongful imprisonment; and costs. The parties later agreed to a Special Case in which the following question of law was stated for the opinion of the Full Court:

"Is [the applicant] an 'alien' within the meaning of s 51(xix) of the Constitution?"

5 The Special Case was ordered to be heard concurrently with a related proceeding brought by Mr Daniel Alexander Love. The Special Case stated as facts that the applicant's maternal grandmother was born in Australia; identifies, and is accepted by other Gunggari People, as a member of the Gunggari People; and is a common law holder of native title following determinations made by the Federal Court of Australia. The Special Case stated that the applicant also

1 A non-citizen in the migration zone who does not hold a visa that is in effect. See *Migration Act*, ss 14 and 15.

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identifies, and is accepted by the Gunggari People, as a member of the Gunggari People; and is also a native title holder.

6 In those proceedings the applicant and Mr Love argued that, because they are Aboriginal Australians who satisfy the tripartite test in *Mabo v Queensland [No 2]*², they have the special status of being a "non-citizen, non-alien" and as such are not within the reach of the aliens power in s 51(xix) of the *Constitution*.

7 On 11 February 2020, this Court, by a majority, gave judgment in *Love v The Commonwealth; Thoms v The Commonwealth*³ ("*Love and Thoms*") in which the answer to the question stated in the Special Case was given as:

"Aboriginal Australians (understood according to the tripartite test in *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 70) are not within the reach of the 'aliens' power conferred by s 51(xix) of the *Constitution*. The [applicant] is an Aboriginal Australian and, therefore, the answer is 'No'."

On the same day the applicant was released from detention.

8 On 1 July 2020, it was ordered that the balance of the applicant's matter be remitted to the Federal Court pursuant to s 44(1) of the *Judiciary Act 1903* (Cth) for further hearing and determination in accordance with the reasons of this Court. On 6 July 2021, Jagot J of that Court ordered that the following question be heard and determined separately:

"Was the detention of the applicant between 28 September 2018 and 11 February 2020 unlawful?"

9 On 11 October 2021, following an application by the Attorney-General of the Commonwealth, Keane J ordered, pursuant to s 40(1) of the *Judiciary Act 1903* (Cth), that that question be removed into this Court.

The decisions to detain

10 The applicant was initially detained and then continued to be detained as a result of the decisions of three officers of the Department of Home Affairs (respectively officers "A", "B" and "C").

11 At some time on 27 or 28 September 2018, officer A reviewed departmental records relating to the applicant. They included the notice of his visa cancellation.

2 (1992) 175 CLR 1 at 70 per Brennan J.

3 (2020) 270 CLR 152.

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Those records indicated that the applicant was not an Australian citizen and that he did not hold any visa that was in effect. On 28 September 2018, officer A interviewed the applicant and confirmed his identity, his New Zealand citizenship and the fact that he did not hold a valid Australian visa. On the basis of her review of the departmental records and the interview, officer A suspected that the applicant was an unlawful non-citizen. The applicant was detained pursuant to s 189(1) on the basis of that suspicion.

12 Between 29 September 2018 and 3 October 2018, officer B, a Detention Review Manager, reviewed the lawfulness of the applicant's detention. As a result of that review, which included inquiries about the applicant's citizenship status, officer B suspected that the applicant was an unlawful non-citizen and therefore considered that s 189(1) of the Act required him to continue to be held in immigration detention.

13 On 1 November 2018, the applicant's case was referred to officer C. On the basis of a review of the departmental records, officer C suspected that the applicant was an unlawful non-citizen and determined that he was required to be detained pursuant to s 189(1) of the Act.

14 On 5 November 2018, officer C received copies of a certificate of Aboriginality and a family tree which had been provided by the applicant, and an opinion from another officer within the Department of Home Affairs to the effect that the applicant's claim to be of Aboriginal descent was not a relevant matter when determining whether he was an Australian citizen. The information provided by the applicant did not alter officer C's suspicion that the applicant was an unlawful non-citizen.

15 On 6 November 2018, officer C interviewed the applicant. During the interview, the applicant informed officer C that he identified as an Aboriginal Australian and his mother was an Australian citizen of Aboriginal descent. Later that day, the applicant sent officer C an email attaching a family tree, which the officer observed contained similar information as that already received. On 7 November 2018, officer C informed the applicant by email that there was no record of him having applied for Australian citizenship or having acquired Australian citizenship by operation of law. The officer also informed the applicant that his claim to be of Aboriginal descent was not a relevant matter in determining whether he was an Australian citizen. On the same day, the applicant sent officer C a document titled "Confirmation of Aboriginality" in which he made a declaration under the *Statutory Declarations Act 1959* (Cth) that he is of Aboriginal descent and identifies as an Aboriginal person.

16 On 12 December 2018, officer C was advised by email that the applicant had commenced proceedings in this Court challenging the Commonwealth's

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authority to detain him. The email contained legal advice stating that it was open to a detaining officer to maintain a reasonable suspicion that the applicant was an unlawful non-citizen for the purposes of s 189 of the Act, notwithstanding the nature of his claim in the proceedings. After reading these advices, officer C was satisfied that the applicant's proceedings did not mean that a suspicion could no longer reasonably be held that the applicant was an unlawful non-citizen. Officer C remained satisfied that the applicant was an unlawful non-citizen and that s 189(1) required his detention. At all times until 11 February 2020, officer C maintained that suspicion, which was recorded in monthly case reviews of the applicant's case prepared by the officer.

17 On 11 February 2020, after receiving legal advice concerning the decision of this Court in *Love and Thoms*, which had been handed down that morning, officer C arranged for the applicant's immediate release.

The applicant's case

18 The applicant's case is that, in its application to him, s 189(1) of the Act is not supported by s 51(xix) of the *Constitution*, the constitutional head of power which includes as its subject matter "aliens". The applicant accepts that the Act is supported by s 51(xix) and that s 189(1) is authorised by s 51(xix) except in the case of Aboriginal Australians. The effect of the decision in *Love and Thoms* is that he is not an alien as that word is used in s 51(xix). It follows that, in its application to him, s 189(1) is not a law "with respect to ... aliens".

19 The applicant accepts that a law "with respect to ... aliens" can confer a power to detain someone reasonably suspected of being an alien, but contends that such a law cannot validly confer a power to detain someone reasonably suspected of being an "unlawful non-citizen" when that person is not in fact an alien. Section 189(1) is valid only in its application to unlawful non-citizens who are also aliens. It follows, the applicant submits, that the fact that an officer held a reasonable suspicion as to the applicant's immigration status is irrelevant. The applicant submits in the alternative that, from 5 November 2018, the Commonwealth was on notice that he asserted that he was an Aboriginal Australian. No steps were taken to enquire into that assertion and his continuing detention was justified on the basis that his Aboriginality was not a relevant matter. Any suspicion that he was an alien or an unlawful non-citizen could not therefore be a reasonable one.

20 The applicant accepts that, but for the decision in *Love and Thoms*, s 189(1) would apply to him; but he does not accept that the question comes down to whether the officer's suspicion that he was an unlawful non-citizen was reasonable, as assessed according to what was known prior to the decision in *Love and Thoms*.

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Conclusion as to the applicant's case

21 The issues raised by the applicant are largely disposed of by the decision of this Court in *Ruddock v Taylor*⁴. Mr Taylor's detention was held by the Court to be validly authorised and required by s 189(1) regardless of whether or not he was an alien. As a matter of construction, the question raised by s 189(1) is whether an officer held a reasonable suspicion that the person to be detained was an unlawful non-citizen, not whether the person in fact had that status⁵. What constitutes reasonable grounds for suspecting a person to be an unlawful non-citizen is to be judged as at the time the detention was effected⁶. There can be no doubt that the constitutional validity of s 189(1) was raised in *Ruddock v Taylor* and that the answer given by the majority was that it was a valid law. That can only have been because it was supported by the aliens power in the *Constitution*.

22 The separate question removed should be answered "No". No question as to costs arises.

The language of the *Migration Act*

23 It has been observed⁷ that, since 2 April 1984, the Commonwealth Parliament has relied on the aliens power to sustain the Act. Apart from the reference to "aliens" in the long title of the Act⁸, the Act employs the term "unlawful non-citizen" throughout. The term "non-citizen" as used in the Act has been understood by this Court to be synonymous with "alien"⁹. Section 189(1) is to be read consistently with that understanding.

4 (2005) 222 CLR 612.

5 *Ruddock v Taylor* (2005) 222 CLR 612 at 621-623 [26]-[28].

6 *Ruddock v Taylor* (2005) 222 CLR 612 at 626 [40].

7 *Chetcuti v The Commonwealth* (2021) 95 ALJR 704 at 710 [11] per Kiefel CJ, Gageler, Keane and Gleeson JJ; 392 ALR 371 at 374.

8 "An Act relating to the entry into, and presence in, Australia of aliens, and the departure or deportation from Australia of aliens and certain other persons".

9 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 25, referring to *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 183-184.

24 In *Chetcuti v The Commonwealth*¹⁰, it was explained that:

"[s]ubject to providing through s 15A of the *Acts Interpretation Act 1901* (Cth) for the *Migration Act* to have a distributive and severable operation to the extent of any constitutional overreach^[11], the Parliament has done so treating all non-citizens as aliens. And since 1 September 1994, it has done so creating a clear-cut distinction between lawful non-citizens, being non-citizens who hold visas permitting them to enter and remain in Australia^[12], and unlawful non-citizens, being non-citizens who do not hold visas^[13] and who are in consequence liable to detention and to removal from Australia^[14]."

25 The detention of a person reasonably suspected of being an unlawful non-citizen may occur at the point of entry into Australia (immigration clearance¹⁵) or when a person is present in Australia. In both cases the evident purpose of s 189(1) and the detention it authorises is to separate a person from the community until their status and the lawfulness of their presence is investigated and determined. In connection with immigration clearance, the Act provides¹⁶ that a person who enters Australia must present evidence of their identity and immigration status. If the person is a citizen, they must present their passport or other evidence of their identity and Australian citizenship. If the person is a non-citizen, they must present evidence of their identity and of a visa that is in effect and is held by that person. An Australian citizen who does not produce the necessary evidence is liable to detention under s 189(1)¹⁷. But on the applicant's

10 (2021) 95 ALJR 704 at 710 [11] per Kiefel CJ, Gageler, Keane and Gleeson JJ (footnotes omitted); 392 ALR 371 at 374.

11 See also *Migration Act*, s 3A.

12 *Migration Act*, s 13.

13 *Migration Act*, ss 14 and 15.

14 *Migration Act*, ss 189, 196 and 198.

15 See also *Migration Act*, ss 190 and 191.

16 *Migration Act*, s 166.

17 See *Migration Act*, s 190.

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case, a non-citizen who does not have a visa that is in effect is not so liable so long as they are not an alien.

Ruddock v Taylor

26 Mr Taylor was not a citizen of Australia. He was a British subject who had resided in Australia since 1966 and was the holder of a permanent transitional visa which permitted him to remain in Australia. His visa, like the applicant's, was cancelled under s 501 of the Act on "character grounds". Two consecutive decisions cancelling his visa, made in September 1999 and June 2000 respectively, were quashed by orders of this Court within a number of months of each decision. Mr Taylor was detained in immigration detention, purportedly under s 189(1), following each decision to cancel his visa until each decision was quashed. He sued the Ministers in question, and the Commonwealth, for damages for false imprisonment. The Court held that s 189(1)¹⁸ validly applied to him and that his detention was not unlawful.

27 Before the first decision to cancel Mr Taylor's visa was made, this Court had held that a person born outside Australia to non-Australian parents and who had not been naturalised was an alien¹⁹. After the second cancellation decision was made, it was reviewed by this Court in *Re Patterson; Ex parte Taylor*²⁰. A majority of the Court held²¹ in that case that British subjects who had resided in Australia since before the commencement of the *Australian Citizenship Amendment Act 1984* (Cth), as Mr Taylor had, did not fall within either the aliens or the immigration power. A little over two years later, in *Shaw v Minister for*

18 In *Ruddock v Taylor*, reference is made to s 189, which would include sub-s (2). This sub-section applies to a person outside the migration zone. Although the reasoning of the majority would apply to both sub-ss (1) and (2), it is clear that the operative provision in that case was sub-s (1), as it is here. For consistency, these reasons will refer to s 189(1) in connection with *Ruddock v Taylor*.

19 *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 185-186, affirming *Pochi v Macphee* (1982) 151 CLR 101 at 109-110 per Gibbs CJ.

20 (2001) 207 CLR 391.

21 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 410-413 [44]-[52] per Gaudron J, 435 [132] per McHugh J, 494 [308] per Kirby J, 517-518 [373]-[376] per Callinan J.

*Immigration and Multicultural Affairs*²², this Court held that, even if a person born outside Australia to non-Australian parents was a British subject, if they were not naturalised they were an alien. The authority of *Patterson* on that question was effectively overruled²³ but that did not disturb the Court's holding in *Patterson* that Mr Taylor was not an alien.

28 It was not necessary for the Court in *Ruddock v Taylor* to resolve any issue arising as to Mr Taylor's true immigration status. It was not necessary because of the view taken as to the proper construction of s 189.

The construction of s 189

29 Mr Taylor argued that because the decision to cancel his visa pursuant to s 501 was unlawful it followed that his detention was unlawful²⁴. That argument was rejected. In the joint judgment it was explained that the lawfulness of Mr Taylor's detention was to be determined by reference to s 189(1)²⁵. The operation of s 189(1) was explained as follows²⁶:

"Section 189 is directed not only to cases where an officer *knows* that a person is an unlawful non-citizen, it extends to cases where the officer *reasonably suspects* that a person has that status. It follows that demonstrating that a person is not an unlawful non-citizen does not necessarily take the person beyond the reach of the obligation which s 189 imposes on officers. ... The reference to an officer's state of mind is explicable only if the section is understood as not confined in operation to those who are, in fact, unlawful non-citizens."

30 It followed, their Honours said, that s 189(1) applies in cases where, on later examination, a person proves not to have been an unlawful non-citizen. So long as

22 (2003) 218 CLR 28.

23 *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 45 [39] per Gleeson CJ, Gummow and Hayne JJ, 87 [190] per Heydon J. See *Ruddock v Taylor* (2005) 222 CLR 612 at 620 [17].

24 See *Ruddock v Taylor* (2005) 222 CLR 612 at 621 [22]-[25].

25 *Ruddock v Taylor* (2005) 222 CLR 612 at 621 [25].

26 *Ruddock v Taylor* (2005) 222 CLR 612 at 622 [27] (emphasis in original).

the requisite state of mind is held by the officer, the person is required to be detained²⁷.

31 So understood, it does not matter that the applicant here is not an alien. So long as the officers in question had objectively reasonable grounds to suspect that he was a non-citizen who did not hold an effective visa, that was sufficient for his detention to be justified. As a matter of construction, s 189(1) authorises and requires the detention of persons who are not aliens if there are objectively reasonable grounds to suspect that they are non-citizens who do not hold a visa which is in effect.

The validity of s 189(1)

32 The applicant contends that *Ruddock v Taylor* is not to be understood as having determined the question he raises as to the constitutional validity of s 189(1). The applicant does so by reference to an observation made in the joint judgment²⁸ that Mr Taylor "did not submit that s 189 was invalid". In context, that is to be understood as saying no more than that there was no general challenge to its validity. It is plain that their Honours, and Callinan J²⁹, considered whether s 189 was valid in its application to Mr Taylor. There can be no doubt that the validity of s 189(1) was argued by the parties in *Ruddock v Taylor* and that the majority allowed the appeal and gave judgment against Mr Taylor on the basis that the provision was constitutionally valid in its application to him.

33 The judgment appealed from in *Ruddock v Taylor*, that of the Court of Appeal of the Supreme Court of New South Wales³⁰, was given before this Court's decision in *Shaw* had been handed down. As was observed in the joint judgment in *Ruddock v Taylor*³¹, the Court of Appeal had proceeded to determine the appeal upon the basis that Mr Taylor's detention was necessarily unlawful. This was considered to have followed from what had been decided in *Patterson*, namely that Mr Taylor was not an alien and therefore s 501 could not validly apply to him so

27 *Ruddock v Taylor* (2005) 222 CLR 612 at 622 [28].

28 *Ruddock v Taylor* (2005) 222 CLR 612 at 624 [35].

29 *Ruddock v Taylor* (2005) 222 CLR 612 at 667 [200].

30 *Ruddock v Taylor* (2003) 58 NSWLR 269.

31 (2005) 222 CLR 612 at 623 [30].

as to enable the Minister to cancel his visa. As a consequence, he could not become an unlawful non-citizen³², and s 189(1) could have no valid application to him³³.

34 In *Ruddock v Taylor*, Mr Taylor argued that the decision of the Court of Appeal could be upheld on the basis that he belonged to a class that was neither citizen nor alien, as *Patterson* had held, and that the Commonwealth did not have power to legislate for his detention on the ground that he was an alien. But as was pointed out in the joint judgment in *Ruddock v Taylor*, the Court in *Patterson* "did not consider, and did not decide, any issue about the constitutional validity of s 189"³⁴. For their part, the Ministers and the Commonwealth, being the appellants in *Ruddock v Taylor*, accepted that the argument put against them was that s 189 is not capable, constitutionally, of applying to a person in Mr Taylor's position.

35 The question identified in the joint judgment in *Ruddock v Taylor* to arise was whether s 189(1), when properly construed, *validly* applied to authorise and require Mr Taylor's detention³⁵ or, put more generally, whether s 189(1) could have no valid application to require the detention of a non-citizen whose visa had not lawfully been cancelled³⁶. It is difficult to accept that, in framing the question, their Honours failed to appreciate that whether s 189(1) could validly, which is to say constitutionally, apply to Mr Taylor was a matter in question. In the reasoning which followed, their Honours did not need to resolve Mr Taylor's actual immigration status. It did not matter in the end result because it was held that s 189(1) applied regardless of a person's immigration status and it validly applied to Mr Taylor.

36 The reasons of Callinan J put the matter of what was in issue beyond doubt. His Honour noted³⁷ the argument made by the Ministers and the Commonwealth that a law:

32 By operation of *Migration Act*, s 15.

33 *Ruddock v Taylor* (2003) 58 NSWLR 269 at 274 [15]-[16] per Spigelman CJ, 283 [69], 285 [80] per Meagher JA, 285 [84] per Ipp JA.

34 *Ruddock v Taylor* (2005) 222 CLR 612 at 625 [36]. See also 624 [33].

35 *Ruddock v Taylor* (2005) 222 CLR 612 at 625 [36].

36 *Ruddock v Taylor* (2005) 222 CLR 612 at 625 [37].

37 *Ruddock v Taylor* (2005) 222 CLR 612 at 667 [200].

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"may still be constitutionally valid even if its operation depends upon a reasonable suspicion that a state of affairs is within Commonwealth legislative power. Accordingly, s 189 is constitutionally valid to the extent that it permits detention of persons who may not be unlawful non-citizens, because its operation depends upon the holding by the officer of a reasonable suspicion that the relevant person is an unlawful non-citizen. That sometimes the suspicion may turn out to be well-founded, and sometimes not, is not to the point."

His Honour then proceeded to hold s 189 to have a sufficient connection with the aliens power³⁸.

A sufficient connection?

37 In any event, s 189(1) of the Act may clearly be taken as supported by s 51(xix) of the *Constitution*. Section 51(xix) most obviously confers power to make laws which bind aliens. But, like other heads of power, it carries with it power to make laws affecting many matters that are incidental or ancillary to its subject matter³⁹. While s 51(xix) confers legislative power concerning a class of persons – aliens – it can support any law that has more than an "insubstantial, tenuous or distant" connection with aliens⁴⁰. It is capable of supporting a law which affects the rights and obligations of persons who are not aliens⁴¹. *Cunliffe v The Commonwealth*⁴² furnishes an example. There, s 51(xix) was held to support a law with respect to migration agents.

38 Section 189(1) of the Act may be seen to have a sufficient connection with s 51(xix) of the *Constitution* in its application to persons who are "reasonably

38 *Ruddock v Taylor* (2005) 222 CLR 612 at 676 [234].

39 *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 296 per Mason CJ, 312 per Brennan J, 354 per Dawson J, 373-374 per Toohey J.

40 *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 314 per Brennan J, quoting *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 79 per Dixon J. See also (1994) 182 CLR 272 at 316.

41 See *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 295 per Mason CJ, 317-318 per Brennan J, 334-335 per Deane J, 387 per Gaudron J, 394-395 per McHugh J.

42 (1994) 182 CLR 272.

suspected" of being aliens without a valid visa. In *Milicevic v Campbell*⁴³, a provision of the *Customs Act 1901* (Cth)⁴⁴ made it an offence to possess any prohibited imports which were "reasonably suspected of having been imported into Australia" in contravention of the *Customs Act*. It was argued in that case that the trade and commerce power in s 51(i) of the *Constitution* is limited to goods which "are in truth imports"⁴⁵. The provision was argued to be invalid because it created an offence for a person to have in his possession goods which in truth had not been imported. It will be observed that the applicant in this case puts a similar argument. In *Milicevic*, the provision was held to be a valid law. Mason J considered that the existence of a reasonable suspicion that goods may have been imported may itself constitute a sufficient nexus with the subject matter of the power in s 51(i)⁴⁶.

39 Moreover, the purpose of s 189(1) is appropriate to provide the necessary connection to s 51(xix). The purpose of a law – the end sought to be achieved – may provide the key to determining whether a law is incidental to the subject matter of a power⁴⁷. The purpose of the detention required by s 189(1) is to keep separate from the community a person who is reasonably suspected of being an unlawful non-citizen until their immigration status is investigated and determined.

A reasonable suspicion – when assessed

40 In *Ruddock v Taylor* it was argued by Mr Taylor that a belief or suspicion could not be reasonable if it was based on a mistake of law and that was so even if the mistake was identified only after detention commenced. The joint judgment rejected any distinction between a mistake of law and one of fact as being relevant to the question of whether the suspicion that a person is an unlawful non-citizen is reasonable in the circumstances⁴⁸. The applicant does not now pursue such an

43 (1975) 132 CLR 307.

44 As amended in 1971.

45 Referring to *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 189 per Dixon J. See *Milicevic v Campbell* (1975) 132 CLR 307 at 314 per Gibbs J, 318 per Mason J.

46 *Milicevic v Campbell* (1975) 132 CLR 307 at 320 per Mason J; see also 321-322 per Jacobs J.

47 *Spence v Queensland* (2019) 268 CLR 355 at 406 [60].

48 *Ruddock v Taylor* (2005) 222 CLR 612 at 626-627 [41]-[47].

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argument. But the applicant contends that the decision in *Love and Thoms* does not operate only prospectively.

41 The applicant's contention is contrary to what was held in *Ruddock v Taylor*. In the joint judgment it was explained that⁴⁹:

"what constitutes reasonable grounds for suspecting a person to be an unlawful non-citizen must be judged against what was known or reasonably capable of being known at the relevant time".

42 For each of the two periods when Mr Taylor was detained it was necessary to look at what was known when the detention was first effected. Their Honours went on to say⁵⁰ that even if *Patterson* were to be understood as overruling *Nolan v Minister for Immigration and Ethnic Affairs*⁵¹ (noting that *Shaw* held that it did not):

"what were reasonable grounds for effecting [Mr Taylor's] detention did not retrospectively cease to be reasonable upon the Court making its orders in *Patterson* or upon the Court later publishing its reasons in that case".

A reasonable suspicion?

43 It follows that, if the suspicion which each of the three officers held concerning the applicant – that he was an unlawful non-citizen – was otherwise objectively reasonable in the circumstances, the decision of the majority in *Love and Thoms* did not retrospectively make it unreasonable. It may have become unreasonable if the applicant had continued to be detained after the outcome in that case was known to officer C, but that did not occur.

44 Each of officers A, B and C considered the objective facts concerning the applicant. In particular, each observed that he was a citizen of New Zealand whose visa permitting him to remain in Australia had been cancelled. That was sufficient for them to have a reasonable suspicion that he was an unlawful non-citizen. Section 189(1), understood in its terms, required his detention. True it is that, on 5 November 2018, officer C had received information from which it might be inferred that the applicant might satisfy the tripartite test in *Mabo v Queensland [No 2]* and therefore be an Aboriginal Australian, but the officer did not know and could not reasonably have known that this Court would pronounce in *Love and*

49 *Ruddock v Taylor* (2005) 222 CLR 612 at 626 [40].

50 *Ruddock v Taylor* (2005) 222 CLR 612 at 626 [40].

51 (1988) 165 CLR 178.

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Thoms that, as a consequence of his Aboriginality, the applicant could not be an alien in the constitutional sense.

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45 GAGELER J. The applicant's argument is that s 51(xix) of the *Constitution* does not support the application of s 189 of the *Migration Act 1958* (Cth) to a postulated "non-citizen, non-alien" whom an officer reasonably suspects to be an "unlawful non-citizen". I agree with Kiefel CJ, Keane and Gleeson JJ that the argument is foreclosed by *Ruddock v Taylor*⁵². Given that no application has been made to reopen that decision, I see no reason to address the argument further.

46 I agree with the answer proposed by their Honours to the separate question removed.

52 (2005) 222 CLR 612.

47 GORDON AND EDELMAN JJ. Mr Thoms, an Aboriginal Australian who satisfies the tripartite test in *Mabo v Queensland [No 2]*⁵³ and who is not an Australian citizen, had his visa cancelled. On 28 September 2018, he was detained pursuant to s 189(1) of the *Migration Act 1958* (Cth). On 11 February 2020, on this Court holding in *Love v The Commonwealth*⁵⁴ that Aboriginal Australians who satisfy the tripartite test in *Mabo [No 2]* are not aliens within the meaning of s 51(xix) of the *Constitution*, Mr Thoms was released from detention.

48 The sole question is whether the detention of Mr Thoms between 28 September 2018 and 11 February 2020 was unlawful. The answer is "no".

49 Section 189(1) requires that an officer must detain a person if the officer knows, or reasonably suspects, that the person is an unlawful non-citizen; the knowledge, or reasonable suspicion, of the relevant officer is a jurisdictional fact⁵⁵ that enlivens the duty of that officer to detain. In *Ruddock v Taylor*⁵⁶, the plurality held that "[s]o long always as the officer had the requisite state of mind, knowledge or reasonable suspicion that the person was an unlawful non-citizen, the detention of the person concerned is required by s 189"⁵⁷ and that "what constitutes reasonable grounds for suspecting a person to be an unlawful non-citizen must be judged against what was known or reasonably capable of being known at the relevant time"⁵⁸.

50 In this case, there is no dispute that the officers who detained Mr Thoms had at all times during his detention a suspicion that he was an unlawful non-citizen, within the meaning of s 14(1) of the *Migration Act*, because he was in

53 (1992) 175 CLR 1 at 70.

54 (2020) 270 CLR 152 at 190 [74], 192 [81], 259 [284], 284 [374], 290 [398].

55 See *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 651-654 [130]-[137]; *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 148 [28]; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 609 [183]; *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at 619-620 [20]; *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 179-180 [57].

56 (2005) 222 CLR 612.

57 (2005) 222 CLR 612 at 622 [28].

58 (2005) 222 CLR 612 at 626 [40]; see also 674-675 [228]-[229].

the migration zone, was not an Australian citizen, and did not hold a visa. On the day *Love*⁵⁹ was decided, the officer detaining him effected his release.

51 Applying *Ruddock*⁶⁰, at all relevant times during Mr Thoms' detention, it is common ground that there existed facts that were sufficient to induce a state of mind in a reasonable person (namely, an officer) of a reasonable suspicion that Mr Thoms was an unlawful non-citizen. Consistent with the text, context and purpose of s 189(1), at all relevant times, the circumstances objectively known or reasonably capable of being known were sufficient to raise an officer's reasonable suspicion that Mr Thoms was an unlawful non-citizen and thus his detention was required for the purpose, at that time, of his removal from Australia. Mr Thoms' status does not distinguish his case from *Ruddock*.

52 The background to this case is set out in the reasons of Kiefel CJ, Keane and Gleeson JJ, which we gratefully adopt.

Migration Act and detention

53 The object of the *Migration Act* is "to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens"⁶¹. To advance that object, the *Migration Act* provides for "visas permitting non-citizens to enter or remain in Australia"⁶² and "the removal or deportation from Australia of non-citizens whose presence in Australia is not permitted" by the *Migration Act*⁶³, as well as requiring non-citizens and *citizens* "to provide personal identifiers"⁶⁴ in order, amongst other things, to assist in identifying in the future any such

59 (2020) 270 CLR 152.

60 (2005) 222 CLR 612.

61 *Migration Act*, s 4(1).

62 *Migration Act*, s 4(2).

63 *Migration Act*, s 4(4).

64 *Migration Act*, s 4(3). For example, Div 5 of Pt 2 of the *Migration Act* deals with immigration clearance, and relevantly imposes obligations upon a person, whether a citizen or a non-citizen, entering Australia to present evidence of their identity, including their passport if they are a citizen, or their visa if they are a non-citizen: *Migration Act*, s 166.

person⁶⁵, to improve passenger processing at Australia's border⁶⁶ and to assist in determining whether a person is an unlawful non-citizen or a lawful non-citizen⁶⁷.

Section 189(1)

54 This case is concerned with s 189(1), in Div 7 of Pt 2 of the *Migration Act*, which provides that "[i]f an officer^[68] knows or *reasonably suspects* that a person in the migration zone ... is an unlawful non-citizen, *the officer must detain the person*" (emphasis added).

55 That authority which the *Migration Act* gives to the Executive (relevantly, "an officer") to keep a person in detention is limited⁶⁹. Whether detention under s 189(1) is lawful "is a question which must be able to be asked, and the detention justified, at any point of time on any day"⁷⁰. The criteria against which the lawfulness of the detention must be judged "are set at the start of the detention"⁷¹

65 See *Migration Act*, s 5A(3)(b).

66 See *Migration Act*, s 5A(3)(ca).

67 See *Migration Act*, s 5A(3)(fa). "[U]nlawful non-citizen" is relevantly defined as "[a] non-citizen in the migration zone who is not a lawful non-citizen" (s 14(1)) and "lawful non-citizen" is relevantly defined as "[a] non-citizen in the migration zone who holds a visa that is in effect" (s 13(1)).

68 The definition of "officer" in s 5(1) of the *Migration Act* relevantly includes an officer of the Department (para (a)), an officer under the *Customs Act 1901* (Cth) (para (b)), a protective service officer under the *Australian Federal Police Act 1979* (Cth) (para (c)), a member of the Australian Federal Police or of the police force of a State or Territory (paras (d)-(e)) and any person or class of persons authorised by the Minister to be officers for the purposes of the *Migration Act* (paras (f)-(g)).

69 *The Commonwealth v AJL20* (2021) 95 ALJR 567 at 587-588 [80]; 391 ALR 562 at 584, quoting *Plaintiff M96A/2016 v The Commonwealth* (2017) 261 CLR 582 at 597 [31] and *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 at 232 [29].

70 *AJL20* (2021) 95 ALJR 567 at 591 [92]; 391 ALR 562 at 588, citing *Plaintiff S4* (2014) 253 CLR 219 at 232 [29] (in turn citing *Crowley's Case* (1818) 2 Swans 1 at 61 [36 ER 514 at 531]) and *Plaintiff M96A* (2017) 261 CLR 582 at 597 [31]-[32].

71 *Plaintiff S4* (2014) 253 CLR 219 at 232 [29], cited in *AJL20* (2021) 95 ALJR 567 at 588 [80], 591 [92]; 391 ALR 562 at 584, 588.

– relevantly, does the officer *reasonably suspect* that the *person* is an *unlawful non-citizen*? The lawfulness of detention is "assessed objectively by reference to all of the circumstances"⁷² and the circumstances include the conduct of any officer responsible for a person's detention⁷³. The detention – which is mandatory, not discretionary – "must serve the purposes of the Act and its duration must be fixed by reference to what is both necessary and incidental to the execution of those powers and the fulfilment of those purposes"⁷⁴.

56 The text of s 189(1) is the starting point. It is directed to an officer who knows or *reasonably suspects* that a *person* is an unlawful non-citizen. It serves a purpose of the *Migration Act*: "to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens"⁷⁵. Consistent with that stated purpose, the sub-section expressly recognises and addresses the practical administrative difficulty of the Executive determining whether a person has the right to enter the Australian community, especially at the border, or to remain in the Australian community; an officer cannot always *know* whether a person is an unlawful non-citizen.

57 Section 189(1) therefore provides the Executive with the statutory power to detain a *person* while an officer investigates the person's status⁷⁶; the sub-section is capable of applying to any *person*, regardless of their status in fact. Two further provisions in Div 7 of Pt 2 reinforce that construction. Section 196(2) provides that none of the prescribed events under s 196(1) for termination of detention under s 189 prevents "the release from immigration detention of a citizen or a lawful non-citizen". And s 190 – a deeming provision – relevantly provides that an officer will suspect on reasonable grounds that a person is an unlawful non-citizen for the purposes of s 189 if, in respect of a person who is a *citizen*, the officer knows or suspects on reasonable grounds that the person was not able to present, or otherwise did not present, their Australian passport or prescribed other evidence

72 *Plaintiff M96A* (2017) 261 CLR 582 at 594 [22], cited in *AJL20* (2021) 95 ALJR 567 at 594 [103]; 391 ALR 562 at 592.

73 *AJL20* (2021) 95 ALJR 567 at 594 [103]; 391 ALR 562 at 592, citing *Al-Kateb v Godwin* (2004) 219 CLR 562 at 576 [17] and *Plaintiff M96A* (2017) 261 CLR 582 at 594 [22].

74 *Plaintiff S4* (2014) 253 CLR 219 at 232 [29], quoted in *AJL20* (2021) 95 ALJR 567 at 588 [80]; 391 ALR 562 at 584.

75 *Migration Act*, s 4(1).

76 See *AJL20* (2021) 95 ALJR 567 at 576-577 [24]-[28]; 391 ALR 562 at 570-571.

of their Australian citizenship to a clearance authority⁷⁷. These sections recognise, consistent with the express terms of s 189, that a person may be detained by an officer on the grounds that the officer *reasonably suspects* that the person is an unlawful non-citizen regardless of their status in fact, including if they are in fact a citizen.

58 Next, s 189(1) provides that an officer must detain a person if the officer *reasonably suspects* that the person is an unlawful non-citizen. Reasonable suspicion is objective: facts must exist which are sufficient to induce a reasonable suspicion in the mind of a reasonable officer that a person is an unlawful non-citizen⁷⁸. The officer's reasonable suspicion that a person is an unlawful non-citizen must be "justifiable upon objective examination of relevant material"; but that is something "substantially less than certainty"⁷⁹. The reasonable suspicion may turn out to be wrong but that does not mean that, at all relevant times, the officer did not reasonably suspect that the person was an unlawful non-citizen. The question is whether the reasonable suspicion continued for the duration of the person's detention⁸⁰. Put in different terms, the reasonable suspicion is temporally bounded: "[s]o long always as the officer had the requisite state of mind, knowledge or reasonable suspicion that the person was an unlawful non-citizen, the detention of the person concerned is required by s 189"⁸¹. The status, in fact, of the person detained is not determinative, if not irrelevant.

Legislative power and s 189(1)

59 That analysis of the *Migration Act* and the legal and practical operation of s 189(1) is of critical importance to the next issue – the legislative power relied upon by Parliament to sustain the *Migration Act* and, in particular, s 189(1) of that Act. Since 1984, Parliament has relied upon the "naturalization and aliens" power in s 51(xix) of the *Constitution* as one source of power to sustain the *Migration*

77 *Migration Act*, ss 190(1)(a) and 190(1)(b)(ii), read with s 166(1)(a)(i).

78 See *George v Rockett* (1990) 170 CLR 104 at 112; *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423 at 429 [10]; *Prior v Mole* (2017) 261 CLR 265 at 270 [4], 292 [73], 298 [98].

79 *Goldie v The Commonwealth* (2002) 117 FCR 566 at 568-569 [4]-[5].

80 See *AJL20* (2021) 95 ALJR 567 at 591 [92]; 391 ALR 562 at 588. See also *Minister for Immigration and Multicultural and Indigenous Affairs v VFAD* (2002) 125 FCR 249 at 276-277 [150]-[152].

81 *Ruddock* (2005) 222 CLR 612 at 622 [28].

Act⁸². Prior to that time, Parliament had relied principally upon the "immigration and emigration" power in s 51(xxvii) of the *Constitution*⁸³.

60 Not all of the *Migration Act*, however, is supported by the aliens aspect of the power in s 51(xix) of the *Constitution*. To the extent that the *Migration Act*, and thus s 189, operates with respect to aliens, it is supported by the aliens power⁸⁴. Insofar as the *Migration Act* deals with immigration clearance and control, including for citizens, it is also supported by the immigration power⁸⁵.

61 Despite the *Migration Act* having been drafted based upon a dichotomy between citizens and non-citizens, "alien" and "non-citizen" are not synonymous⁸⁶. Citizenship is relevant to alienage but not determinative of it⁸⁷. For instance, the conferral of citizenship by naturalisation is the formal recognition that a person has become part of the Australian political community and is no longer an alien⁸⁸.

82 *Chetcuti v The Commonwealth* (2021) 95 ALJR 704 at 710 [11]; 392 ALR 371 at 374. See also *Migration Amendment Act 1983* (Cth).

83 *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 574 [10], [13].

84 See *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 10, 26, 32; *Al-Kateb* (2004) 219 CLR 562 at 571 [1], 573 [4], 604 [110], 613 [139].

85 See *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 173 [31]; *Singh v The Commonwealth* (2004) 222 CLR 322 at 329 [4]; *Love* (2020) 270 CLR 152 at 270 [325]. See also *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462 at 466, 470.

86 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 491 [300]; *Singh* (2004) 222 CLR 322 at 343 [36], 382 [149]-[150]; *Love* (2020) 270 CLR 152 at 263 [300], 264 [304], 289 [395], 292 [401], 301-303 [422]-[427]; *Chetcuti* (2021) 95 ALJR 704 at 715 [38], 720 [60], 721-722 [65]-[66], 729 [105]; 392 ALR 371 at 381, 387-389, 399; *Alexander v Minister for Home Affairs* [2022] HCA 19 at [134]; cf *Lim* (1992) 176 CLR 1 at 25; *Singh* (2004) 222 CLR 322 at 329 [4]; *Chetcuti* (2021) 95 ALJR 704 at 710 [11]; 392 ALR 371 at 374.

87 *Love* (2020) 270 CLR 152 at 263 [303]; *Chetcuti* (2021) 95 ALJR 704 at 715 [38], 720 [60]; 392 ALR 371 at 381, 387.

88 *Alexander* [2022] HCA 19 at [134], [138], [209], [291]. See also *Love* (2020) 270 CLR 152 at 270 [325].

Otherwise, citizenship is a statutory concept which cannot control the meaning of the constitutional term aliens⁸⁹. At a high level of generality, the term alien has consistently been held to convey otherness, being an "outsider", or "belonging" to another⁹⁰. At a greater level of specificity, the term has been held to convey notions of allegiance to a foreign power⁹¹. It is unnecessary in this case to consider the correctness of that understanding⁹² or the metes and bounds of how allegiance is created or lost⁹³. At whatever level of generality the meaning is characterised, aliens, like all other constitutional terms, can and will have different application with changing national and international circumstances⁹⁴. The concept of aliens also 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 membership⁹⁵; that is, "persons who could not possibly answer the description

89 *Lim* (1992) 176 CLR 1 at 54; *Love* (2020) 270 CLR 152 at 263 [300], 264 [305], 301 [422]; *Alexander* [2022] HCA 19 at [134], [228].

90 See *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 183, 189; *Singh* (2004) 222 CLR 322 at 351 [59], 395 [190]; cf 400 [205]; *Chetcuti* (2021) 95 ALJR 704 at 718 [53]; 392 ALR 371 at 384. See also *Love* (2020) 270 CLR 152 at 186-187 [61], 190 [73]-[74], 248 [263], 256-257 [276], 260-261 [289]-[290], 262 [296], 272 [333], 272-273 [335]-[336], 273 [338], 274 [340]-[341], 276-277 [349], 279 [357], 280-281 [363]-[364], 284 [374], 286-287 [391]-[392], 288 [394], 289 [396], 290 [398], 293-294 [404], 296 [410], 298-299 [415], 313-314 [450]-[451], 316 [454].

91 *Singh* (2004) 222 CLR 322 at 398 [200]; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439 at 458 [35]; *Chetcuti* (2021) 95 ALJR 704 at 728 [100], 729 [105]; 392 ALR 371 at 398, 399.

92 See *Love* (2020) 270 CLR 152 at 188 [66], 195 [89], 248 [263], 268-269 [318]-[322], 305 [430]; *Chetcuti* (2021) 95 ALJR 704 at 712 [21], 716 [40], 721 [64], 739-740 [146]; 392 ALR 371 at 377, 381, 388, 412; *Alexander* [2022] HCA 19 at [156], [182], [185], [200], [224]-[225].

93 See *Alexander* [2022] HCA 19 at [154]-[155], [231]-[233], [286].

94 See *Ame* (2005) 222 CLR 439 at 458-459 [35], citing *Sue v Hill* (1999) 199 CLR 462 and *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28; *Love* (2020) 270 CLR 152 at 189 [69]; *Chetcuti* (2021) 95 ALJR 704 at 718 [53]; 392 ALR 371 at 384; *Alexander* [2022] HCA 19 at [138], [144].

95 *Alexander* [2022] HCA 19 at [133].

of 'aliens' in the ordinary understanding of the word"⁹⁶. That is the "*Pochi* limit". In other words, since the constitutional term aliens cannot be applied in a manner inconsistent with its meaning, Parliament cannot legislate in relation to persons who are not outsiders, persons belonging to the Australian political community. The Parliament cannot define the term alien so as to include such persons⁹⁷. The Parliament cannot define who is, and who is not, an alien, or what the irreducible minimum is for the category of persons within the *Pochi* limit⁹⁸.

62 These statements need some further explanation. As a starting point, Parliament may only subject a person to a law with respect to aliens if that person is "in fact and law" an alien⁹⁹. Determination of who is, and who is not, a person who is in fact and law an alien is the province and duty of this Court¹⁰⁰. It is *this Court* which must first identify what the subject matter of a constitutional head of power is – as a question of legislative power¹⁰¹ – so that it may then consider the effect of the relevant law upon that subject matter¹⁰². Accordingly, this Court does not defer to the opinion of Parliament in determining the scope of the constitutional

96 *Pochi v Macphree* (1982) 151 CLR 101 at 109.

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

98 *Singh* (2004) 222 CLR 322 at 383 [153]; *Love* (2020) 270 CLR 152 at 171 [7], 183 [50], 218 [168], 237 [236], 266 [310], 270-272 [326]-[330], 305 [433]; cf 193-195 [86]-[87]; *Alexander* [2022] HCA 19 at [151], [193]; cf *Chetcuti* (2021) 95 ALJR 704 at 710 [12]; 392 ALR 371 at 374.

99 *Australian Communist Party v The Commonwealth* ("the Communist Party Case") (1951) 83 CLR 1 at 222; cf *Love* (2020) 270 CLR 152 at 193-196 [86]-[89]. See Gerangelos, "Reflections upon Constitutional Interpretation and the 'Aliens Power': *Love v Commonwealth*" (2021) 95 *Australian Law Journal* 109 at 113.

100 *Alexander* [2022] HCA 19 at [151], citing *Marbury v Madison* (1803) 5 US 137, *Communist Party Case* (1951) 83 CLR 1 at 262-263, *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 267-272, *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], and *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1 at 48 [101].

101 *Love* (2020) 270 CLR 152 at 270 [325].

102 *Attorney-General (Vict) v The Commonwealth* (1962) 107 CLR 529 at 578.

concept of aliens¹⁰³. To do so would entail this Court determining that a person's status as an alien or a non-alien for the purposes of the aliens power is *dependent* upon the Parliament's exercise of that power¹⁰⁴. That would countenance Parliament determining for itself the scope of the aliens power. It cannot do so¹⁰⁵.

63 A law, therefore, is not ordinarily supported by the aliens power in its application to those who could not possibly answer the description of aliens in the ordinary understanding of the word. So how then does s 189(1) operate in relation to Aboriginal Australians who satisfy the tripartite test in *Mabo [No 2]*, and under what head of power? How does s 189(1) operate to authorise – to require – an officer to detain such a person if the officer reasonably suspects that person to be an unlawful non-citizen?

64 As has been explained, s 189(1) operates upon a person – a person who an officer reasonably suspects is an unlawful non-citizen. Such a law operates upon persons who are aliens, and upon those who are non-aliens: it may operate upon persons who are citizens and those who are lawful non-citizens¹⁰⁶; and it may operate upon persons who are within the *Pochi* limit – so long as the officer reasonably suspects the person to be an unlawful non-citizen.

65 Section 189(1) is supported by the aliens head of legislative power in its application to non-aliens, including those within the *Pochi* limit. It is to that issue that we now turn.

Section 189(1) may validly operate upon non-aliens

66 Where a person who is a non-alien – including a person within the *Pochi* limit – is detained under s 189(1), the sub-section requires that the officer detain that person so long as objective facts or law exist sufficient to induce a reasonable

103 *Love* (2020) 270 CLR 152 at 264 [305], citing *Communist Party Case* (1951) 83 CLR 1 at 258, *Te* (2002) 212 CLR 162 at 179 [53] and *Shaw* (2003) 218 CLR 28 at 61 [94].

104 cf *Love* (2020) 270 CLR 152 at 195 [88].

105 *Communist Party Case* (1951) 83 CLR 1 at 258.

106 See *Migration Act*, ss 190(1)(a), 190(1)(b)(ii) (read with s 166(1)(a)(i)), 196(2).

suspicion in the mind of a reasonable officer that that person is an unlawful non-citizen¹⁰⁷.

67 The operation of s 189(1), in those circumstances, is supported by the legislative power under s 51(xix) (particularly, the aliens aspect of that power), notwithstanding that it will operate upon persons who are non-aliens, because s 189(1) has a sufficient connection with the subject matter of that power. The power of the Parliament to make laws *with respect to* aliens is not limited to those who are aliens.

68 That last statement needs explanation. The subject matter of the power – the aliens power – "is to be construed 'with all the generality which the words used admit'"¹⁰⁸. There is no need for a law to be shown to be connected with the subject matter of the aliens power to the exclusion of some other subject matter¹⁰⁹. If a sufficient connection exists between the law and the subject matter of the power – here, the aliens power – "the justice and wisdom of the law, and the degree to which the means it adopts are necessary or desirable, are matters of legislative choice"¹¹⁰.

69 So is there a sufficient connection between s 189(1) and the aliens power to the extent that it operates upon non-aliens? The answer is "yes".

70 The character of s 189(1) – its legal and practical operation – is not removed from the constitutional description of that subject matter of power¹¹¹. It is a law with respect to that subject matter because the legal *and* practical operation of

107 See fn 78.

108 *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 492 [16], quoting *R v Public Vehicles Licensing Appeal Tribunal (Tas)*; *Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225. See also *Singh* (2004) 222 CLR 322 at 384 [155]; *Spence v Queensland* (2019) 268 CLR 355 at 405 [57]; *Love* (2020) 270 CLR 152 at 209 [131], 218 [168], 236 [236], 239 [244].

109 *Grain Pool* (2000) 202 CLR 479 at 492 [16]; *Spence* (2019) 268 CLR 355 at 405 [57].

110 *Grain Pool* (2000) 202 CLR 479 at 492 [16], quoted in *New South Wales v The Commonwealth (Work Choices Case)* (2006) 229 CLR 1 at 104 [142] and *Spence* (2019) 268 CLR 355 at 405 [57].

111 See *Bank of NSW v The Commonwealth* ("the Bank Nationalisation Case") (1948) 76 CLR 1 at 186, quoted in *Spence* (2019) 268 CLR 355 at 404-405 [57].

s 189(1) is directed to an officer's reasonable suspicion that a person is an unlawful non-citizen¹¹². When that power is exercised in respect of a person reasonably suspected of being an unlawful non-citizen and that person is, in fact, within the *Pochi* limit, the connection is not "so insubstantial, tenuous or distant" that the law ought *not* be regarded as enacted with respect to aliens¹¹³. Likewise, when that power is exercised in respect of a person reasonably suspected of being an unlawful non-citizen and that person is, in fact, a citizen, the connection is not "so insubstantial, tenuous or distant" that the law ought *not* be regarded as enacted with respect to aliens. Section 189(1) is, in those operations, "incidental" to the aliens power¹¹⁴.

71 That is because the operation of s 189(1) upon a person who is within the *Pochi* limit, by reference to the criterion of reasonable suspicion that they are an unlawful non-citizen, is an operation which is "necessary to effectuate [the] main purpose" of the aliens aspect of the power in s 51(xix)¹¹⁵ – it being "a power to make laws with respect to a class of persons"¹¹⁶, a core element of which enables Parliament to decide which aliens "shall be permitted to enter and remain in this country"¹¹⁷.

72 The purposes of s 189(1) are: detention for a limited period for the purpose of a person's removal from Australia; receiving, investigating and determining an

112 *Milicevic v Campbell* (1975) 132 CLR 307 at 320, 321.

113 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 79, quoted in *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 314, *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 369 and *Spence* (2019) 268 CLR 355 at 405 [57], 433 [132], 456 [197], 489 [299].

114 *Communist Party Case* (1951) 83 CLR 1 at 175; *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 77; *Cunliffe* (1994) 182 CLR 272 at 317-322; *Spence* (2019) 268 CLR 355 at 406 [59]. See also *Victoria v The Commonwealth* (1957) 99 CLR 575 at 615.

115 *Grannall* (1955) 93 CLR 55 at 77, quoted in *Spence* (2019) 268 CLR 355 at 403 [53].

116 *Cunliffe* (1994) 182 CLR 272 at 315.

117 *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 358 [92]. See also *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 12-13 [18].

application for a visa; or determining whether to permit an application for a visa¹¹⁸. Section 189(1) also authorises the detention of a person – whether a citizen, lawful non-citizen or unlawful non-citizen – while their status is being ascertained¹¹⁹, provided they are reasonably suspected of being an unlawful non-citizen throughout the period of their detention. In respect of citizens and lawful non-citizens, s 191 requires the release of such persons once they have satisfied an officer of their relevant status, and, as has been seen, s 196(2) provides that none of the prescribed events under s 196(1) for termination of detention under s 189 prevent "the release from immigration detention of a citizen or a lawful non-citizen".

73 Accordingly, in its operation with respect to persons within the *Pochi* limit who are reasonably suspected of being unlawful non-citizens, s 189(1) is a law "with respect to" aliens; the connection between its legal and practical operation and the aliens power is not "so insubstantial, tenuous or distant" that it ought not be regarded as enacted with respect to the subject matter of that power¹²⁰. It does not "reach too far"¹²¹.

74 But that is not the end of inquiry. As the Commonwealth submitted, where objective circumstances – facts or law – exist which would indicate to the mind of a reasonable officer that a person is within the *Pochi* limit, although the express terms of s 189(1) and the definition of "unlawful non-citizen" would require an officer to detain that person – because they are not a citizen and do not have a visa – s 189(1) will, to that extent, operate in excess of the aliens power and cannot be supported by that power. That is because it cannot be said to be incidental to the aliens power for s 189(1) to operate upon a person within the *Pochi* limit who it is reasonable for an officer to know or reasonably suspect is such a person. For s 189(1) to require detention in that circumstance would be

118 *Plaintiff S4* (2014) 253 CLR 219 at 231 [26].

119 See *Migration Act*, ss 190(1)(a), 190(1)(b)(ii) (read with s 166(1)(a)(i)), s 196(2).

120 *Melbourne Corporation* (1947) 74 CLR 31 at 79, quoted in *Cunliffe* (1994) 182 CLR 272 at 314, *Re Dingjan* (1995) 183 CLR 323 at 369 and *Spence* (2019) 268 CLR 355 at 405 [57], 433 [132], 456 [197], 489 [299].

121 cf *Davis v The Commonwealth* (1988) 166 CLR 79 at 100, quoted in *Spence* (2019) 268 CLR 355 at 407 [63].

beyond legislative authority. And, moreover, detention would no longer be for a permissible purpose¹²².

75 Accordingly, it is necessary to partially disapply (what some have described as "reading down" or "severance"¹²³) s 189(1) so as not to operate where objective facts or law exist which would indicate to the mind of a reasonable officer that a person is within the *Pochi* limit, even though such a person would otherwise be reasonably suspected of being an unlawful non-citizen.

76 The Commonwealth expressly accepted in argument that the operation of the *Migration Act* must take into account the *Pochi* limit, and that it is able to do so by partially disapplying¹²⁴ the provisions of that Act where it is necessary to do so for those provisions not to exceed legislative power by operating upon persons within that limit. It also accepted (it said "[i]n theory") that the *Pochi* limit is not confined to Aboriginal Australians who satisfy the tripartite test in *Mabo [No 2]*.

Method of partially disapplying s 189(1)

77 As the Commonwealth submitted, by the application of s 15A of the *Acts Interpretation Act 1901* (Cth), s 189(1) is to be applied in a manner which is not in excess of power¹²⁵. Section 3A of the *Migration Act* similarly requires that if s 189(1) has an invalid application but also at least one valid application, Parliament intends it not to have the invalid application but to have every valid application. Accordingly, s 189(1) can and should be applied only to the extent that it does not authorise an officer to detain a person in respect of whom, despite the officer's reasonable suspicion that the person is an unlawful non-citizen,

122 See *Lim* (1992) 176 CLR 1 at 33, 65-66; *Plaintiff S4* (2014) 253 CLR 219 at 231 [26].

123 As the Commonwealth submitted, nothing turns on the different labels used.

124 See *Clubb v Edwards* (2019) 267 CLR 171 at 320-321 [429]-[430], quoting *Bank Nationalisation Case* (1948) 76 CLR 1 at 252, 369. See also *R v Poole; Ex parte Henry [No 2]* (1939) 61 CLR 634 at 652; *Pidoto v Victoria* (1943) 68 CLR 87 at 110-111; *Clubb* (2019) 267 CLR 171 at 218-219 [141], 290 [340].

125 See *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 502, citing *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co* (1910) 11 CLR 1 at 54, *Vacuum Oil Co Pty Ltd v Queensland [No 2]* (1935) 51 CLR 677 at 692, *Pidoto* (1943) 68 CLR 87 at 108, *Bank Nationalisation Case* (1948) 76 CLR 1 at 369-371 and *Re Dingjan* (1995) 183 CLR 323 at 348.

the objective facts or law capable of being known to a reasonable officer at the time they held that suspicion would indicate to such an officer that that person is within the *Pochi* limit.

78 But that does not affect the validity of s 189(1) as it applied to Mr Thoms prior to the decision in *Love*¹²⁶. It is the reasonableness of the suspicion as to Mr Thoms' status as an unlawful non-citizen which created the sufficient connection to the aliens power. And prior to *Love*, the objective facts and law were sufficient to induce a state of mind in a reasonable officer of a reasonable suspicion that Mr Thoms was an unlawful non-citizen. During the period of Mr Thoms' detention, the law could not have indicated to a reasonable officer that he was within the *Pochi* limit. His detention was lawful.

Mr Thoms' detention not unlawful

79 Mr Thoms submitted that s 189, in its application to him, is and always was invalid because he is a non-citizen non-alien and accordingly his detention prior to *Love*¹²⁷ must have been unlawful. Mr Thoms accepted that the suspicion formed by the officers that he was an unlawful non-citizen was reasonable, but submitted that s 189(1) did not apply to him. He submitted that, as s 189(1) could not apply to him, any reasonable suspicion formed as to whether he was an unlawful non-citizen is irrelevant.

80 Mr Thoms also submitted that *Ruddock*¹²⁸ was not controlling because that case did not concern the constitutional application or validity of s 189(1); it only related to the consequences of the jurisdictional error found in respect of the invalidated decisions concerning the cancellation of Mr Taylor's visa. Mr Thoms submitted that there is a constitutional dimension in his case which was not present in *Ruddock*; namely, *Love*¹²⁹ decided that he was not within the reach of the aliens power. He submitted that *Love* "did not effect a 'change' in the law"; it was an "orthodox application of well-settled principles to recognise a previously unrecognised category of 'non-alien non-citizen'". Mr Thoms sought to call in aid the principle that a declaration of invalidity has the consequence that a law is void

126 (2020) 270 CLR 152.

127 (2020) 270 CLR 152.

128 (2005) 222 CLR 612.

129 (2020) 270 CLR 152.

"ab initio"¹³⁰ and, thus, as he was never an alien and s 189(1) has always been invalid in its application to him, his detention was unlawful.

81 Mr Thoms accepted in argument that a law with respect to aliens is valid if it confers power to detain someone reasonably suspected of being an alien – but he submitted that it will be invalid insofar as it confers, as s 189(1) does here, power to detain a person reasonably suspected of being an unlawful non-citizen who is not an alien. Mr Thoms' arguments must be rejected. They proceed from a misunderstanding of the characterisation and operation of s 189(1).

82 It is true as a general proposition that a law is not ordinarily a law with respect to aliens if it operates upon persons who are not aliens, including persons within the *Pochi* limit. But, as we have seen, that is not the end of the analysis in respect of s 189(1). Section 189(1) is valid in its operation upon persons who are within the *Pochi* limit where they are reasonably suspected of being unlawful non-citizens and no objective facts or law exist which are capable of being known to a reasonable officer at the time that officer holds that suspicion which would indicate to such an officer that those persons are within that limit¹³¹. That is because in its operation with respect to persons within the *Pochi* limit who are reasonably suspected of being unlawful non-citizens, s 189(1) is a law "with respect to" aliens. The connection between its legal and practical operation and the aliens power is not "so insubstantial, tenuous or distant" that it ought not be regarded as enacted with respect to the subject matter of that power¹³².

83 Accordingly, s 189(1) validly applied to Mr Thoms during his detention as he was reasonably suspected of being an unlawful non-citizen throughout the entirety of his detention. Even though he is now known to be within the *Pochi* limit, at the time of his detention, which was prior to *Love*¹³³, it was not then recognised that Aboriginal Australians who satisfy the tripartite test in *Mabo [No 2]* are within that limit. Accordingly, under s 189(1), an officer was required to detain Mr Thoms because, throughout the duration of his detention, the objective

130 *South Australia v The Commonwealth* (1942) 65 CLR 373 at 408.

131 cf *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 283 FCR 602 at 608 [2], 621 [69], 622-623 [76], 677-678 [339]-[340].

132 See [70]-[73] above.

133 (2020) 270 CLR 152.

facts and law *at the time* were such that an officer reasonably suspected him to be an unlawful non-citizen¹³⁴.

Ruddock not distinguishable

84 That construction of s 189(1) and the application of s 189(1) to Mr Thoms is consistent with this Court's decision in *Ruddock*¹³⁵. In particular, the principle that "what constitutes reasonable grounds for suspecting a person to be an unlawful non-citizen must be judged against what was known or reasonably capable of being known at the relevant time"¹³⁶ was not qualified by any reference to the type of mistake of law that is said to have occurred – jurisdictional, constitutional or otherwise. So, just as in *Ruddock* where the decision in *Re Patterson; Ex parte Taylor*¹³⁷ did not mean that Mr Taylor's past detention was not authorised by s 189(1), the decision in *Love* did not mean that Mr Thoms' detention was not authorised by s 189(1).

85 Mr Thoms, however, contended that *Ruddock* was distinguishable because the Court did not consider the validity of s 189(1) and its application to non-aliens. Those contentions must be rejected. It is true that the plurality in *Ruddock* recorded that Mr Taylor "did not submit that s 189 was invalid"¹³⁸. But the point that was being made by the plurality was that Mr Taylor made no submission that s 189 was invalid in all of its applications. Mr Taylor's submission was that s 189 was invalid in its application to him. Hence, the Court did consider the application of s 189 to non-aliens to determine the extent to which it might be invalid in its application to Mr Taylor. That it did so is made clear by what the plurality described as the "relevant question", namely "whether a particular provision of the Act (s 189), when properly construed, *validly* applied to authorise and require [Mr Taylor's] detention"¹³⁹ (emphasis added). As the Commonwealth submitted, that framing of the "relevant question" is explicable only on the basis that the constitutional issue

134 *Ruddock* (2005) 222 CLR 612 at 626 [40].

135 (2005) 222 CLR 612.

136 *Ruddock* (2005) 222 CLR 612 at 626 [40].

137 (2001) 207 CLR 391.

138 (2005) 222 CLR 612 at 624 [35].

139 *Ruddock* (2005) 222 CLR 612 at 625 [36]; see also 624-625 [34]-[35], 667 [200], 668 [203], 676 [233]-[234].

as to whether s 189 validly applied to Mr Taylor had been a live issue in *Ruddock* throughout the course of the litigation¹⁴⁰.

Conclusion

86 We agree with the answer proposed by Kiefel CJ, Keane and Gleeson JJ to the separate question removed into this Court.

140 See, eg, *Ruddock v Taylor* (2003) 58 NSWLR 269 at 271 [1], 274 [14]-[16], 283 [67]-[70], 285 [80].

87 STEWARD J. Subject to what follows, I generally agree with the reasons of Kiefel CJ, Keane and Gleeson JJ, as well as with the reasons of Gageler J. The reasons of Kiefel CJ, Keane and Gleeson JJ state that the term "non-citizen" as it is used in the *Migration Act 1958* (Cth) is "synonymous" with the term "alien" as it is referred to in s 51(xix) of the *Constitution*¹⁴¹. If the word "synonymous" means that the concepts of "non-citizen" and "alien" are closely associated, then I agree with this observation. However, if their Honours have used the word "synonymous" to mean that those terms have the same meaning, then I respectfully disagree. For the reasons I have expressed in *Chetcuti v The Commonwealth*, the concepts of alienage and non-citizenship may presently, and for practical purposes, greatly overlap, but they do not necessarily mean the same thing¹⁴². Citizenship is a purely statutory concept.

88 I otherwise agree with the answer proposed by Kiefel CJ, Keane and Gleeson JJ to the separate question removed.

141 See [23].

142 *Chetcuti v The Commonwealth* (2021) 95 ALJR 704 at 729 [105]; 392 ALR 371 at 399.