HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

ON APPEAL FROM
A SINGLE JUDGE OF THE HIGH COURT

BETWEEN: **FREDERICK CHETCUTI**
Appellant

and

COMMONWEALTH OF AUSTRALIA
Respondent

APPELLANT'S REPLY

PART I: PUBLICATION

1. These reply submissions are in a form suitable for publication on the Internet.

PART II: REPLY SUBMISSIONS

2. At RS [8], the Respondent identifies only two categories of people "who could not possibly answer the description of 'aliens' in the ordinary understanding of that word":[1] a category of Aboriginal Australians and, persons born in Australia to two Australian parents who are not dual citizens and who have not renounced their allegiance to Australia. The Appellant submits that, there is at least one other category of people who could not possibly be 'aliens'.

3. That other category of persons comprises natural-born subjects of the Queen who: (i) arrived in Australia and were permitted by the Commonwealth to take up residence here prior to bifurcation of the Crown *and* the emergence of Australia's own distinct statutory citizenship (on 26 January 1949 with the commencement of the *Nationality and Citizenship Act 1948* (the **1948 Act**)); and (ii) have not renounced their allegiance to Australia. People in that category enjoy indelible non-alien status (Parliament's power with respect to the first aspect of s 51(xix) is constrained).

Key issues in the proceedings

4. At RS [11], the Respondent has re-framed the steps in the Appellant's primary argument. For the avoidance of doubt, the Appellant's primary argument involves the following steps:

   (a) the Appellant is a natural-born subject of the Queen and arrived in Australia as such;

   (b) between Federation and the commencement of the 1948 Act on 26 January 1949, subjects of the Queen residing in Australia comprised 'the people of the Commonwealth', that is, 'Australian constitutional citizens';

   (c) the Crown in right of Australia did not emerge until some time after the introduction of Australia's own distinct statutory citizenship on 26 January 1949. As a result, until 26 January 1949, natural-born British subjects resident in Australia were included in 'the people of the Commonwealth'; and

   (d) once the Appellant satisfied the criteria referred to at [3] above, no Act of Parliament could alienate him, nor could the unsought conferral of foreign citizenship. His

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

allegiance transformed, along with and at the same time as all other natural-born subjects of the Queen residing in Australia, from being to the British/Imperial Queen to the Queen of Australia.

The Respondent's First Proposition

The significance of the Appellant's Maltese citizenship

5. Whilst the Repsondent accepts *arguendo* that the Appellant was, by reason of his British subjecthood, a non-alien when he arrived in Australia, it fails to grapple with the consequence that the Appellant, unlike the applicants in ***Singh***[2] and ***Ame***,[3] was a full member of the Australian political community prior to the conferral of Maltese citizenship.

6. Foreign allegiance as a "central"[4] or "defining"[5] characteristic of alienage did not survive ***Love***[6] in the sense that the Respondent contends that it did.[7]

7. The framers of the Constitution understood that subjects of the Queen who were eligible to be members of the Parliament might have dual allegiance.[8] Section 44(i) of the *Constitution* was designed to ensure that members would not be under any improper influence.[9] It does not follow that those falling within s 44(i) were necessarily aliens.[10] Indeed, those subjects of the Queen who were otherwise qualified to be members[11] could not possibly meet the description of 'alien'. Further, acceptance of the Respondent's first proposition as it applies to the Appellant would mean that the conferral by a foreign power of citizenship upon any Australian citizen would, without more, bring the citizen

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2 Unlike the Appellant, Ms Singh was born in Australia. She was born more than a decade after the latest recognized date of Australia's independence from the United Kingdom (in 1986 – see *Sue v Hill* (1999) 199 CLR 462), and, almost half a century after Australia introduced its own form of citizenship. Unlike the Appellant, Ms Singh did not, at any time, hold the same citizenship status as other Australian-born people. Her foreign citizenship was bestowed upon her at birth.

3 Mr Ame was born after 26 January 1949 in Papua. As a result, he was granted Australian citizenship but it did not entitle Mr Ame to enter or reside in Australia (unlike the Appellant who, by reason of his British subjecthood, was allowed to enter and reside in Australia). Unlike the Appellant who arrived prior to Malta's independence, Mr Ame did not enter, or apply for any right to enter, any of the States or internal Territories of Australia before Papua's independence.

4 ***Singh*** (2004) 222 CLR 322 at [200] (Gummow, Hayne and Heydon JJ).

5 ***Ex parte Ame*** (2005) 222 CLR 439 at [35] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan, Heydon JJ).

6 ***Love*** (2020) 94 ALJR 198 at [66] (Bell J), [247] (Nettle J), [300], [316]-[322] (Gordon J), [89] (Gageler J), [430] (Edelman J).

7 RS [14]-[16].

8 *Constitution* ss 16, 34 and 44(i).

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

10 ***Love*** (2020) 94 ALJR 198 at [319] (Gordon J).

11 See *Constitution* ss 16, 34. On the Appellant's case, he falls into this class.

within the aliens power. Such a result would be problematic and does not conform with accepted principle.[12]

The Respondent's Second Proposition

The treatment of British subjects in the Citizenship Act

8. Contrary to the submission at RS [21], the Appellant's non-alien status was not subject to statutory modification. The submissions at RS [21]-[24] do not answer the submissions at AS [26]-[32]. For the purposes of his primary argument, the Appellant does not rely on Commonwealth statutory provisions, satisfaction of which qualifies him as one of the "people of the Commonwealth". The Appellant was a British subject with an allegiance to the Imperial Crown (he was a subject of the Queen) from the time of his birth. The 1948 Act merely ***reflected*** that fact.

9. Nor could any of the statutory provisions in the 1948 Act (or any subsequent Act of Parliament) alter the Appellant's non-alien status because for the reasons at AS [57]-[61] and [65]-[69], it was indelible.[13]

Respondent's alternative path of reasoning-

10. The Respondent's second proposition puts in issue the date on which the Imperial British Crown broke into its national components with the result that a natural born British subject could be an alien in Australia. The Appellant contends that the resolution of that issue requires both that Australia had sufficient sovereign independence from the United Kingdom and, most critically, that it had its own distinct citizenship. That could not have occurred before the introduction of the 1948 Act on 29 January 1949 (by which time the Appellant was already a subject of the Queen resident in Australia).

11. The Balfour Statement upon which the Commonwealth relies at RS [34] as evidence of Australia's capacity to act as an independant sovereign member of the Commonwealth, was expressed to be subject to a "**common** allegiance to the Crown".[14] Despite the changes brought about by the *Statute of Westminster 1931* (UK), until Australia had its own form of citizenship there was no means by which a British subject resident in

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12 ***Sykes v Cleary*** (1992) 176 CLR 77 at 107 (Mason CJ, Toohey and McHugh JJ); ***Love*** (2020) 94 ALJR 198, [320], [322] (Gordon J).

13 ***Nolan*** (1988) 165 CLR 178 at 193 (Gaudron J); ***Love*** (2020) 94 ALJR 198 at 160 [445] (Edelman J).

14 Special Case at [33] (AB 29) and Annexure SC-22 (AB 267).

Australia could demonstrate his allegiance to anyone other than the Imperial Crown.[15] 'Capacity' is, in this context, inadequate.

12. The 1920 Act was expressed to be an Act with respect to nationality and aliens. The Respondent contends that it was concerned, not with the Australian body politic, but with that of the British Empire (RS[40]). The Appellant does not accept that contention.[16] However, it is certainly the case that the concept of Australian nationality[17] as reflected in the 1920 Act (and also in the 1948 Act),[18] rested on the broad principle of allegiance to the Imperial Crown.[19] Members of the Australian body politic were either subjects of the Imperial Queen or aliens.[20]

10 13. The capacity approach is also inconsistent with the notion that sovereignty "in regard to a portion of the globe is the right to exercise therein, **to the exclusion of any other State**, the functions of a State (emphasis added)".[21] While the United Kingdom had any authority (exercised or otherwise) to interfere in Commonwealth or State affairs, the requisite exclusivity was absent.

14. The Appellant adopts the submissions of the intervenor at [22] and [27]-[28]. It was only upon the "joint action [in 1986] of all the Parliaments of Australia and the United Kingdom, that the legislative, executive and judicial institutions of the United Kingdom ceased to have any power, responsibility or jurisdiction in respect of Australian affairs".[22] This issue must take into account the position of the States. To consider the question only
20 from the perspective of the Commonwealth[23] adopts what Sir Owen Dixon described as the 'illogical course' of treating the State and Federal legislatures as if they operated in different counties.[24]

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15 Until 1973 the oath of allegiance required of those seeking to be naturalized was to an undivided sovereign. It was only with the amendments introduced by s 19 of the *Australian Citizenship Act* 1973 that the oath became to the 'Queen of Australia'.

16 The 1920 Act was concerned with the political and other rights, powers, privileges and obligations and duties attached to membership of the Australian body politic: see s 11.

17 Defined in the Macquarie Dictionary, 5th Edition as 'the quality of membership in a particular nation (original or acquired)'.

18 See also AS [28]-[31].

19 AS [26]; *Halsbury's Laws of England* (3rd ed, 1964) Vol 1 at [1023].

20 ***Nolan*** (1988) 165 CLR 178 at 183 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ); ***Singh*** (2004) 222 CLR 322 at [56], [100], [129]-[130] (McHugh J); ***Love*** (2020) 94 ALJR 198 at 241 [61] (Bell J); 198 [60] (Keane J).

21 *Island of Palmas Arbitration* (1928) 2 RIAA 829 at 838, cited in Twomey, "Sue v Hill — The Evolution of Australian Independence" (2000) at 79.

22 Final Report of the Constitutional Commission (1988) Vol 1 at 2.141; ***Sue v Hill*** (1999) 199 CLR 462.

23 As the Commonwealth Submissions in Reply to the Intervener do at [8] and [10].

24 Owen Dixon, 'The Statute of Westminster 1931' (1936) 10 Supp. *Australian Law Journal* 96 at 100.

Appellant's alternative argument

15. If British subjects like the Appellant were, at the time of his arrival, within the aliens power, the 1920 and 1948 Acts were both an excersise of that power in treating British subjecthood as a qualification for domestic citizenship.[25]

16. If one accepts the proposition at RS [7] that an alien is no more and no less than a person who has not been admitted to formal membership of the community that constitutes the (relevant) body politic, according to the prevailing test for membership prescribed by law, then the prevailing test at the time of the Appellant's arrival was British subjecthood.

17. The logical extension of the Respondent's contention at RS [39] is that every person who migrated to Australia after federation and before the commencement of the 1948 Act was within the aliens power. And further, that all legislation conferring rights, powers and privileges on British subjects,[26] including critically the qualification to be a member of Parliament[27] was legislation with respect to aliens that fell short of conferring upon them membership (i.e., non-alien status).

18. If that were the case, the provisions of the *Commonwealth Electoral Act 1918* (Cth) that permitted non-citizen British subjects to become Members of the House of Representatives or the Senate must have offended s 44(i) of the *Constitution* for around half a century. The unlikelihood of that proposition is self-evident.

The Respondent's third proposition

19. For the reasons advanced in [10] – [14] above, the Respondent's third proposition should also be rejected.

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G L Schoff
T: (03) 9225 7239
E: glschoff@vicbar.com.au

G A Costello
T: (03) 9225 6139
E: costello@vicbar.com.au

K E Slack
T: (07) 3221 2182
E: kslack@qldbar.asn.au

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25 Latham, 'The Law and the Commonwealth' 1937 at 592.

26 AS [50]-[55].

27 Section 69 of the *Commonwealth Electoral Act* 1918, as amended by s 4 of the *Commonwealth Electoral Act 1925*, provided that the qualifications of a Member of Parliament included that "he must be a subject of the King, either natural born or for at least five years naturalized under a law of the United Kingdom or of the Commonwealth", and then as amended by s 5 of the *Commonwealth Electoral Act 1949*, provided that "he must be a British subject". British subjecthood remained a necessary qualification until s 51 of the *Electoral and Referendum Amendment Act 1989* introduced the requirement of "Australian citizen".