HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

ON APPEAL FROM A SINGLE JUSTICE OF THE HIGH COURT

BETWEEN: **FREDERICK CHETCUTI**

Appellant

AND: **COMMONWEALTH OF AUSTRALIA**

Respondent

RESPONDENT'S SUBMISSIONS

Filed on behalf of the Respondent, the Commonwealth of Australia

PART I PUBLICATION

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

PART II ISSUES

2. The sole issue that arises for determination is whether it is within the power of Parliament under s 51(xix) of the Constitution to treat the Appellant as an "alien".

PART III NOTICE OF CONSTITUTIONAL ISSUE

3. The Commonwealth is satisfied that notice given by the Appellant complies with s 78B of the *Judiciary Act 1903* (Cth).

PART IV MATERIAL FACTS

4. The Commonwealth does not dispute the facts set out at AS [5]-[12].

PART V ARGUMENT

General principles

5. Even in the early years of Federation it was "trite law that any community is entitled to determine by its Parliament of what persons the community is to be composed. Hence subs-s(xix) of s 51 of the Constitution."[1] To this end, the Constitution did not "commit Australia to uncompromising adherence"[2] to either of the two leading theories of alienage prevailing at the time of Federation which, respectively, attributed controlling importance to place of birth (*jus soli*) or descent (*jus sanguinis*).[3] That is because, at Federation, the concept of alienage did not have an "established and immutable legal meaning".[4] Instead, "questions of nationality, allegiance and alienage were matters on which there were changing and developing policies, and which were seen as appropriate for parliamentary resolution".[5]

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1 *Ferrando v Pearce* (1918) 25 CLR 241 at 253 (Barton J).

2 *Koroitamana v Commonwealth* (2006) 227 CLR 31 (***Koroitamana***) at [9] (Gleeson CJ and Heydon J).

3 *Singh v Commonwealth* (2004) 222 CLR 322 (***Singh***) at [30] (Gleeson CJ), [81] (McHugh J), [250]-[251] (Kirby J), [300] (Callinan J); *Koroitamana* (2006) 227 CLR 31 at [9] (Gleeson CJ and Heydon J) and [62] (Kirby J); *Love v Commonwealth* (2020) 94 ALJR 198 (***Love***) at [6]-[7] (Kiefel CJ), [167] (Keane J).

4 *Koroitamana* (2006) 227 CLR 31 at [9] (Gleeson CJ and Heydon J); *Singh* (2004) 222 CLR 322 at [30] (Gleeson CJ), [183], [190] (Gummow, Hayne and Heydon JJ), [252] (Kirby J).

5 *Koroitamana* (2006) 227 CLR 31 at [9] (Gleeson CJ and Heydon J), quoting *Singh* (2004) 222 CLR 322 at [30] (Gleeson CJ). See also *Singh* (2004) 222 CLR 322 at [176]–[177] (Gummow, Hayne and Heydon JJ),

6. It is in that context that Parliament was given the power conferred by s 51(xix). That power has two aspects. The first is a power to define the circumstances in which a person will have the legal status of "alienage"[6] or, as sometimes expressed, a power to determine who will be admitted to formal membership of the Australian community or the Australian body politic.[7] Subject to the qualification identified in paragraph 8 below, that aspect of the power allows Parliament to specify the criteria by which a person is to be identified as having the status of "alien". It extends, at least, to allowing Parliament to select or adapt one, both or a mixture of the two leading theories – place of birth or descent – as the applicable criteria.[8] The second aspect of the power conferred by s 51(xix) is then the power to make laws specifying the legal consequences of having that status.[9]

7. For the purposes of s 51(xix), and subject to the qualification below, 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 (whether that be statute or, in the absence of applicable statute, the common law). As the first aspect of the power conferred by s 51(xix) allows Parliament to determine the criteria for who holds the status of "alien", the persons who hold that status from time to time can be identified only by applying the applicable legislative (or, if relevant, common law) criteria. They cannot be identified "independently of the exercise of the power as a question of constitutional fact".[10]

8. The qualification is that identified by Gibbs CJ in *Pochi v Macphee* (***Pochi***) – that is, "the Parliament cannot, simply by giving its own definition of 'alien', expand the power under

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relevantly with respect to the position in Britain, and *Love* (2020) 94 ALJR 198 at [251] (Nettle J) and [403] (Edelman J).

6 *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 (***Shaw***) at [2] (Gleeson CJ, Gummow and Hayne JJ, Heydon J agreeing at [190]); *Singh* (2004) 222 CLR 322 at [4] (Gleeson CJ), [116] (McHugh J); *Koroitamana* (2006) 227 CLR 31 at [11] (Gleeson CJ and Heydon J) and [28] (Gummow, Hayne and Crennan JJ); *Love* (2020) 94 ALJR 198 at [5] (Kiefel CJ), [83]-[86], [90], [94] (Gageler J), [166] (Keane J), [236] (Nettle J), [326] (Gordon J).

7 *Love* (2020) 94 ALJR 198 at [62]-[63] (Bell J), [94] (Gageler J), and see also (implicitly) [18] (Kiefel CJ), [177] (Keane J), [349] (Gordon J), [395], [438] (Edelman J); *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 (***Ex parte Te***) at [24], [39] (Gleeson CJ); *Koroitamana* (2006) 227 CLR 31 at [11] (Gleeson CJ and Heydon J); *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 (***Nolan***) at 189 (Gaudron J).

8 *Koroitamana* (2006) 227 CLR 31 at [9] (Gleeson CJ and Heydon J), [50] (Gummow, Hayne and Crennan JJ), [62] (Kirby J). See also *Love* (2020) 94 ALJR 198 at [7] (Kiefel CJ), [100] (Gageler J), [167] (Keane J); *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439 (***Ex parte Ame***) at [115] (Kirby J).

9 *Love* (2020) 94 ALJR 198 at [84] (Gageler J), and the cases there cited.

10 *Love* (2020) 94 ALJR 198 at [88] (Gageler J).

s 51(xix) to include persons who could not possibly answer the description of 'aliens' in the ordinary understanding of the word".[11] A majority of the Court in *Love* held that a certain category of Aboriginal Australians fall within that qualification. It may also extend to persons who lack any connection to any place other than Australia, and thus who on no view "belong to another"[12] (such as persons who were born in Australia, to two Australian parents, who are not citizens of any other country, and who have not renounced their allegiance to Australia). While the existence of the qualification identified in *Pochi* is undoubted, it is important to emphasise that it operates as a limit on the first aspect of s 51(xix) identified above. That is, it constrains the laws that Parliament may validly enact in specifying the criteria for formal membership of the Australian body politic. It does not enable a person's status to be identified independently of those laws.

9. The result is that s 51(xix) empowers the Parliament (subject to the qualification above) to define the criteria for membership of the Australian body politic, including by reference to a person's place of birth, descent or foreign citizenship. Consistent with that high constitutional purpose, that power is "wide"[13] and must be construed "with all the generality which the words used admit".[14]

10. For the purposes of this appeal it is not necessary to explore further the metes and bounds of the concept of alienage or the word "aliens". That is because, leaving aside the unique position of Aboriginal Australians that was held to exist in *Love* (the correctness of which does not arise in this appeal), that case did not disturb the following propositions, either of which is sufficient for the resolution of this appeal: namely, that it has been, at all material times, open to Parliament to treat as an "alien" a non-citizen: (a) who owes allegiance to a foreign sovereign power[15] (which might also be described as membership of, or "belonging to", a foreign body politic) (see **Proposition 1** below); or (b) who falls

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11 (1982) 151 CLR 101 at 109. See also *Ex parte Te* (2002) 212 CLR 162 at [31], [39] (Gleeson CJ), [159] (Kirby J); *Love* (2020) 94 ALJR 198 at [7] (Kiefel CJ); [50], [64] (Bell J); [168] (Keane J), [236], [244] (Nettle J); [326] (Gordon J), [433] (Edelman J).

12 *Nolan* (1988) 165 CLR 178 at 183; *Singh* (2004) 222 CLR 322 at [190] (Gummow, Hayne and Heydon JJ); *Love* (2020) 94 ALJR 198 at [301] (Gordon J), [394] (Edelman J).

13 *Koroitamana* (2006) 227 CLR 31 at [11] (Gleeson CJ and Heydon J).

14 *Singh* (2004) 222 CLR 322 at [155] (Gummow, Hayne and Heydon JJ); see also *Love* (2020) 94 ALJR 198 at [131] (Gageler J), [168] (Keane J), [236], [244] (Nettle J).

15 In *Love* (2020) 94 ALJR 198, it was recognised that "allegiance" will not always be determinative: [59] (Bell J), [89] (Gageler J), [430]-[431] (Edelman J). Nevertheless, it was also recognised that it is important or relevant: [16] (Kiefel CJ), [170] (Keane J), [245] (Nettle J), [311], [316], [322] (Gordon J). See also *Ex parte Ame* (2005) 222 CLR 439 at [35] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ); *Singh* (2004) 222 CLR 322 at [190], [200] (Gummow, Hayne and Heydon JJ).

within either of the two leading theories prevailing at the time of Federation which, as noted, gave controlling importance to place of birth (*jus soli*) or descent (*jus sanguinis*)[16] (see **Proposition 2** below). As Nettle J observed in *Love*:[17] "as a general proposition, there is no difficulty in describing a child who is born outside Australia and who is a citizen of a foreign country as an 'alien' within the ordinary understanding of that word".

Key issues in the proceedings

11. The Appellant's primary argument involves the following steps:

a) when he arrived in Australia on 31 July 1948 as a British subject, Australia had not yet become independent; he owed allegiance to the same Monarch as the Australian community did; and for that reason was accepted into the Australian community as an "Australian constitutional citizen": AS [24]-[34];

b) when Australia became independent at some point thereafter (it is not clear when the Appellant says that occurred; perhaps 1986: AS [56]) he became a subject of, and owed permanent allegiance to, the Queen of Australia: AS [62]-[64], [65], [68];

c) the fact that he owes permanent allegiance to the Queen of Australia is sufficient to take him outside the scope of s 51(xix): AS [64]. The fact that he also is a citizen of Malta does not render him an "alien"; his position is akin to a "dual citizen": AS [15].

12. The Appellant is right to submit that the *ratio* of *Nolan*,[18] *Patterson*,[19] and *Shaw*[20] do not foreclose this argument (AS [34]), since they all dealt with British subjects who arrived in Australia well after 1948. However, he goes too far in submitting that "it follows" from those cases that a person who entered Australia prior to the introduction of the Citizenship Act is beyond the aliens power: AS [38], [43], [45]. None of those cases addressed that question (and, in any event, *Patterson* is not authority for any proposition concerning the aliens power).[21]

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16 See *Pochi* (1982) 151 CLR 101 at 109-110 (Gibbs CJ, with whom Mason and Wilson JJ agreed); *Nolan* (1988) 165 CLR 178 at 185 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ). See also *Koroitamana* (2006) 227 CLR 31 at [9], [14] (Gleeson CJ and Heydon J), [62] (Kirby J); *Singh* (2004) 222 CLR 322 at [30] (Gleeson CJ), [183] and [190] (Gummow, Hayne and Heydon JJ), [250]-[252] (Kirby J).

17 *Love* (2020) 94 ALJR 198 at [254]; also [19] (Kiefel CJ) and [147] (Keane J) (each in dissent in the result).

18 (1988) 165 CLR 178.

19 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 (***Patterson***) at [124] (McHugh J), [378] (Callinan J).

20 (2003) 218 CLR 28.

21 *Shaw* (2003) 218 CLR 28 at [39] (Gleeson CJ, Gummow and Hayne JJ, with whom Heydon J agreed).

13. The argument summarized above is, in essence, the same argument that was rejected by Nettle J at first instance. The argument should be rejected again, for at least three different reasons:

(a) Given that the Appellant is a citizen of Malta, it is open to Parliament to treat him as an alien (as it has done) whether or not he was an "alien" on arrival in Australia on 31 July 1948 (**Proposition 1**).

(b) By the time of the commencement of the *Nationality and Citizenship Act 1948* (Cth) (**Citizenship Act**) on 26 January 1949, it was open to Parliament to treat the Appellant as an "alien" despite his status as a "British subject", as it chose to do (**Proposition 2**).

(c) Upon the creation of the Australian body politic in 1901, it was open to Parliament to treat as "aliens" British subjects born overseas (**Proposition 3**).

Proposition 1: The Appellant being a citizen of Malta, it is open to Parliament to treat him as an alien <u>whether or not</u> he was an "alien" on arrival in Australia on 31 July 1948

Foreign citizenship

14. The Commonwealth submits that Parliament is entitled to treat the Appellant as an "alien" solely by virtue of the fact that, by reason of his admitted Maltese citizenship (AS [57]), he is a non-citizen who owes allegiance to a foreign power (although the Commonwealth accepts that, had he become an Australian citizen, he could only have been treated as an alien if that citizenship was first cancelled or withdrawn). That is so irrespective of the Appellant's status when he arrived in Australia in 1948.

15. That proposition is supported by *Singh*.[22] That case concerned a child who had been born in Australia, but was an Indian citizen born to parents who were also Indian citizens. In rejecting the argument that her birth in Australia took her beyond the reach of the aliens power, Gummow, Hayne and Heydon JJ observed that the "central characteristic of [the legal status of "alien"] is, and always has been, owing obligations (allegiance) to a sovereign power other than the sovereign power in question (here Australia)".[23] Their Honours concluded (at [205]) that, because the plaintiff was an Indian citizen, she was

[22] (2004) 222 CLR 322.

[23] (2004) 222 CLR 322 at [200]; see also [30], [32] (Gleeson CJ) to a similar effect.

within the scope of s 51(xix). In *Ex parte Ame*,[24] the majority endorsed the reasoning in *Singh* by referring to foreign allegiance as a "defining characteristic" of alienage. However, in the light of *Koroitamana* (where a stateless person was held to be an "alien"),[25] *Singh* and *Ex parte Ame* should not be taken to have held that the owing of foreign allegiance was necessary to bring a person within the scope of s 51(xix) (that is, it is not "defining" in the sense of "definitional"). Rather, their Honours considered that the owing of foreign allegiance was sufficient to bring a person within the reach of the aliens power. Parliament may then elect not to treat all foreign citizens as "aliens", as it has done by permitting dual foreign and Australian citizenship (as Nettle J observed at [32]). But it has not done so here in a way that assists the Appellant.

16. Of course, the reasoning in *Singh* must now be read in the light of *Love*, the effect of which is that, as the law currently stands, Aboriginal Australians who satisfy the tripartite test constitute a sui generis exception to the general rule that foreign allegiance is sufficient to allow Parliament to treat a person as an alien under s 51(xix). Nevertheless, while holding that it was not determinative in every case, it was recognised in *Love* that foreign allegiance remains at least relevant, and perhaps very important, to the reach of that power.[26]

"Non-alien" status can be altered by supervening events

17. There is no difficulty with the proposition that a person who was once a "non-alien" (which is accepted *arguendo* for the Commonwealth's Proposition 1) being rendered an "alien" by subsequent events such as the acquisition of foreign citizenship. In contending otherwise, the Appellant cites the dissenting observations of Gaudron J in *Nolan* that "mere inactivity in the face of legislative change"[27] cannot transform a non-alien into an alien: AS [33]. However, as Gummow and Hayne JJ recognised in *Patterson*, a person may "acquire the status or character of alienage by reason of supervening constitutional and political events not involving any positive act or assent on the part of the person concerned"[28]: cf AS [65]-[69]. Their Honours gave the example of the *Papua New*

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24 (2005) 222 CLR 439 at [35] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan, Heydon JJ).

25 (2006) 227 CLR 31.

26 (2020) 94 ALJR 198 at [16] (Kiefel CJ), [57] (discussed, without questioning, *Singh*) (Bell J), [170], [172] (Keane J), [245], [249], [254] (Nettle J), [311], [316], [322] (Gordon J), [429]-[430] (Edelman J).

27 (1988) 165 CLR 178 at 193.

28 (2001) 207 CLR 391 at [235] (Gummow and Hayne JJ).

Guinea Independence Act 1975 (Cth) and associated regulations, the effect of which was that Australia ceased to have sovereignty in respect of Papua New Guinea and those who became citizens of Papua New Guinea lost their Australian citizenship.[29] While their Honours were dissenting in *Patterson*, in *Ex parte Ame* this Court endorsed that aspect of their analysis, accepting that "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" (referring to *Sue v Hill*,[30] *Shaw* and *Singh*).[31] The Court expressly rejected an argument that there is a limitation inherent in s 51(xix) "that prevents that power from being applied unilaterally (that is, without the consent of the individual manifested by renunciation or some similar act) to change a person's status from non-alien to alien".[32] Indeed, even Gaudron J's (dissenting) reasons in *Nolan* do not go as far as the Appellant needs them to, because her Honour accepted that Parliament could constitute a non-alien an alien in circumstances that included "the acquisition of membership of some other nation community" and observed (by reference to the common law) that such a transformation need "not necessarily involve any positive act on the part of the person concerned".[33]

18. As submitted at paragraph 9 above, s 51(xix) should be construed with all the generality the words admit. As such, there is no basis to construe s 51(xix) as being subject to an unexpressed limitation that prevents Parliament from altering the status of a person who it would otherwise be entitled to treat as an alien (because, for example, of foreign birth or foreign allegiance), simply because the person was not an alien when he or she arrived in Australia. *Ex parte Ame* denies that there is any such limitation on s 51(xix), and there is no basis to overrule that decision.

19. The laws by which the Appellant became a citizen of Malta, and simultaneously ceased to be a citizen of the United Kingdom and Colonies, are similar to those considered in *Ex parte Ame*. It would be surprising if the Appellant's status as a British subject prevented Australia from treating him as an alien, when the United Kingdom itself has done so. Consistently with *Ex parte Ame*, and irrespective of his status when he arrived in Australia in 1948, at least from the time that he became a citizen of Malta it has been open to the

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29 (2001) 207 CLR 391 at [237] (Gummow and Hayne JJ).

30 (1999) 199 CLR 462.

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

32 *Ex parte Ame* (2005) 222 CLR 439 at [34]-[36] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan, Heydon JJ). See also *Singh* (2004) 222 CLR 322 at [195], [200] (Gummow, Hayne and Heydon JJ).

33 *Nolan* (1988) 165 CLR 178 at 192.

Parliament to treat the Appellant as an alien, and that is what it has done. The appeal can be dismissed on that basis alone.

Proposition 2: By the time of the commencement of the Citizenship Act on 26 January 1949, it was open to Parliament to treat the Appellant as an "alien" notwithstanding his status as a "British subject", and it did so

20. Proposition 2 can be established by two independent paths of reasoning.

The treatment of British subjects in the Citizenship Act

21. **First**, even assuming *arguendo* that Australia did not become independent until the commencement of the Citizenship Act on 26 January 1949 (which, according to *Shaw*, is the latest relevant date[34]), and further assuming that at common law (or international law)[35] the Appellant would have become a subject of the Queen of Australia at that time, any such rule is clearly subject to statutory modification.

22. The Appellant contends that there was no such modification, pointing to the fact that s 5 of the Citizenship Act defined "alien" to exclude "British subjects": see AS [32]. As the Appellant had the statutory status of "British subject" by virtue of his status as a citizen of the United Kingdom and the Colonies (a status he had acquired on 1 January 1949 upon the commencement of the *British Nationality Act 1948* (UK)), he contends that the Citizenship Act did not treat him as an alien.

23. That submission overlooks s 25 of the Citizenship Act, which provided that persons who were British subjects immediately prior to 26 January 1949 became Australian citizens only if they fell into one of four categories – (broadly) those born in Australia; born in New Guinea; naturalised in Australia; or resident in Australia for 5 years. None of these categories applied to the Appellant. By enacting s 25, Parliament evidently did not provide that all British subjects resident in Australia on the commencement of the Citizenship Act were to become part of the Australian body politic; to the contrary, it expressly specified that certain categories of British subject (essentially those with close ties to Australia) would be admitted to membership of the Australian body politic by

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34 *Shaw* (2003) 218 CLR 28 at [20], [22], [32] (Gleeson CJ, Gummow and Hayne JJ; Heydon J agreeing).

35 See O'Connell, *State Succession in International and Municipal Law* (1967) Vol 1, at 502, 519 (inhabitants of dominions lost to the Crown ceased to be British subjects); Crawford, *The Creation of States in International Law* (2nd ed, 2007) at 53 (persons habitually resident in the territory of a new State automatically acquire that nationality) – but both accepted the position is subject to statutory modification.

being deemed to be citizens, while others (including the Appellant) would become members only if they applied for membership by the procedure provided for in s 12 (citizenship by registration).[36] The Appellant's claim that, despite not falling within the categories in s 25 and not having applied for citizenship by registration under s 12, he nevertheless somehow became a member of the Australian body politic ignores the explicit choices that Parliament made in 1948 (including the provision of a simple mechanism under s 12 to obtain such membership, which he did not use). It was open to Parliament to differentiate between British subjects in this way because, as the majority in *Shaw* emphatically observed: "It can hardly be said that, as the relevant political facts and circumstances stood in 1948, those citizens [including citizens of the United Kingdom[37]] could not possibly answer the description of aliens in the ordinary understanding of that word".[38]

24. The Appellant's focus on the statutory labels of "British subject" and "alien" confuses the way that Parliament exercised its power under s 51(xix) to assign statutory rights to aliens (ie the second aspect of the power identified in paragraph 6 above) with the existence of the power to specify (within limits) the criteria governing that status (ie the first aspect of the power identified in paragraph 6 above). That distinction was fundamental to *Shaw*, where the majority expressly held that the Citizenship Act defined a statutory class of "aliens" that was a subset of the constitutional concept.[39] Thus, *Shaw* specifically held that, while "British subjects" did not fall within the statutory definition of "aliens" in s 5 of the Citizenship Act, they were nevertheless aliens (albeit "a class of aliens with special advantages in Australian law"[40]). While the Appellant takes issue with this reasoning (AS [28]-[30], esp fn 38), he makes no real attempt to re-open *Shaw*.

25. The above submissions supply the answer to AS [51]-[52] and [54]-[55], where the Appellant attributes significance to the fact that, even as late as the 1980s and 1990s, Commonwealth legislation continued to provide that holding the status of a British

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36 The Appellant is therefore wrong to submit at AS [25] that "for decades following" the Appellant's arrival in Australia, "British subjecthood was the fullest kind of formal community membership that a person residing in Australia could possess". Rather, from 26 January 1949, the fullest kind of membership was citizenship under the Citizenship Act.

37 See also *Nolan* (1988) 165 CLR 178 at 186 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ).

38 *Shaw* (2003) 218 CLR 28 at [22] (Gleeson CJ, Gummow and Hayne JJ, Heydon J agreeing).

39 *Shaw* (2003) 218 CLR 28 at [21] (Gleeson CJ, Gummow and Hayne JJ, Heydon J agreeing).

40 *Shaw* (2003) 218 CLR 28 at [21]-[22] (Gleeson CJ, Gummow and Hayne JJ, Heydon J agreeing); see also [16], noting that those advantages included with respect to the franchise, and the issue of passports.

subject had prescribed legal consequences – attaching certain duties, rights and privileges to that status that align with those imposed or conferred on Australian citizens. Like the Citizenship Act, these laws are examples of Parliament exercising the second aspect of the power; to give a "class of aliens … special advantages in Australian law".[41] The conferral of particular duties, rights or privileges on a class of aliens does not mean that members of that class cease to be aliens.[42]

Australia achieved independence prior to the Appellant's arrival in 1948

26. **Second**, an alternative path of reasoning that supports Proposition 2 is to hold, as Nettle J did at [49], that, by the time of the Appellant's arrival in Australia on 31 July 1948, Australia had emerged as a nation independent from the United Kingdom, such that any change in the status of British subjects in Australia that occurred when Australia became independent had already taken place before the Appellant arrived. While it is enough to conclude, as Nettle J did at [49], that Australia was "sufficiently independent" upon the enactment of the *Statute of Westminster Adoption Act 1942* (Cth) (**Adoption Act**), such independence may well have been achieved much earlier – either by 1926 or 1931 (Notice of Contention, Ground 1).

The decision in *Shaw*

27. While the actual decision in *Shaw* does not determine the status of a British subject who arrived in Australia prior to 26 January 1949, the reasoning of the majority in that case strongly suggests that, by 31 July 1948, Australia had achieved independence from the United Kingdom such that at least on and from that point in time it was open to Parliament to treat British subjects as "aliens".

28. Mr Shaw was a citizen of the United Kingdom, born in the United Kindgom to British parents, who arrived in Australia in 1974. The majority (Gleeson CJ, Gummow and Hayne JJ, with whom Heydon J agreed) concluded that Mr Shaw had entered Australia as an "alien" in the constitutional sense and had not lost that status by reason of his

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41 *Shaw* (2003) 218 CLR 28 at [22] (Gleeson CJ, Gummow and Hayne JJ, Heydon J agreeing).

42 That is so even if the "special advantages" include voting or access to passports: see *Shaw* (2003) 218 CLR 28 at [16] (Gleeson CJ, Gummow and Hayne JJ, Heydon J agreeing), [176] (Callinan J); *Patterson* (2001) 207 CLR 391 at [234] (Gummow and Hayne JJ). The distinction between statutory rights or duties and status as an alien is illustrated by one of the Appellant's own examples: on any possible view, Australia was independent by 1986 (with the enactment of the Australia Acts), yet until 1992 s 59(b) of the *Defence Act 1903* (Cth) required "British subjects" to serve in the Defence force if called upon: cf AS [52].

subsequent personal history in Australia. The majority concluded that, "by 1948", significant changes in the Imperial system meant that the indivisible nature of the Crown was no longer apparent, with the result that British subjects could be treated as aliens.[43] That conclusion is squarely at odds with the Appellant's contention that sufficient independence was not achieved until later; perhaps even as late as 1986 upon the enactment of the Australia Acts: cf AS [56]. It is also inconsistent with the contention that Australian independence depended upon the removal of the references to "British subject" from various statutes in the 1980s: cf AS [51]-[55].

29. The majority in *Shaw* did not specify the particular date by which Australia had achieved sufficient independence such that British subjects could be treated as aliens. However, their Honours referred to the adoption of the Balfour Declaration in 1926[44] and to the "political realities of the separation of the dominions from the United Kingdom which had occurred and which found reflection in the Statute of Westminster" in 1931[45] (both of which are addressed further below).

30. Their Honours also noted that the passage of the Citizenship Act in 1948,[46] and equivalent legislation in other countries,[47] followed "negotiations between the governments concerned", and that the new arrangements reflected "significant changes in the Imperial system which had taken place since federation".[48] Their Honours did not refer to the detail of those negotiations, which is set out in the Special Case at [37], [56]-[58], [60], [63], and [65]-[66]. The negotiations culminated in the agreement at the 1947 British Commonwealth Conference on Nationality and Citizenship that all Commonwealth countries should adopt legislation enabling each country to determine who its citizens are, declaring those citizens to be British subjects, and recognising as British subjects (as distinct from citizens) the citizens of other Commonwealth countries (SC [60]) and the clear statements by the Australian government on 3 December 1947 (SC [63]) and 12

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43 *Shaw* (2003) 218 CLR 28 at [14], [17], [20], [22], [27]-[28] (Gleeson CJ, Gummow and Hayne JJ) (emphasis added).

44 *Shaw* (2003) 218 CLR 28 at [24] (Gleeson CJ, Gummow and Hayne JJ).

45 *Shaw* (2003) 218 CLR 28 at [12], [14] (Gleeson CJ, Gummow and Hayne JJ) (emphasis added), although their Honours recognised that this "fell short of achieving a full measure of legal autonomy for Australia": at [25].

46 The Citizenship Act was enacted on 21 December 1948 and commenced on 26 January 1949.

47 The *British Nationality Act 1948* (UK) was enacted 30 July 1948 and commenced 1 January 1949.

48 (2003) 218 CLR 28 at [17] (Gleeson CJ, Gummow and Hayne JJ) (emphasis added). See also at [17] the passage quoted from *Halsbury's Laws of England* (3rd ed, 1964) Vol 1 at [1023]; and the reference at [19] to *R v Secretary of State for Foreign and Commonwealth Affairs; Ex parte Ross-Clunis* [1991] 2 AC 439 at 444.

July 1948 (SC [66]) that it would enact such legislation. The dates of the various matters to which the majority in *Shaw* referred should be understood to indicate that the majority concluded that Australia emerged as an independent body politic well prior to 31 July 1948. That coheres with observations made in other cases.[49]

31. The Appellant's reliance on Rich J's observations in *Gulson* at AS [49] is misplaced,[50] for that case did not raise the question when Australia had achieved independence from the United Kingdom; rather, the question was whether the indivisibility of the Crown meant that the rule of construction that the Crown is not bound by a statute expressed in general words applied so as to create a presumption that a State Government is not bound by a Commonwealth Act. Even in that context, Latham CJ recognised (at 350-351) that the principle that the Crown is "one and indivisible … when stated as a legal principle … tends to dissolve into verbally impressive mysticism" and is "almost invariably followed by a … 'but'".[51] For that reason, the Appellant's focus on the date upon which the Crown divided are a distraction from the real issue, which is when Australia attained a sufficient measure of independence (as to which, see further below).

Australia was sufficiently independent by 1926, 1931 or 1942

32. Independently of authority, the Commonwealth submits that Australia had emerged as a nation sufficiently independent from the United Kingdom before 31 July 1948. While it is not necessary to settle upon the particular date, it may have occurred as early as 1926, or alternatively 1931 (Ground 1 of the Notice of Contention), or alternatively 1942 (consistently with Nettle J's finding at [49]).

33. Generally speaking, the factors relevant to determining the existence of a sovereign independent nation include: (a) whether it has a defined territory; (b) whether it has a permanent or identifiable population; (c) whether it is under the control of the authority of its own government (as opposed to external control); and (d) whether it has the capacity

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49 See eg *Love* (2020) 94 ALJR 198 at [97] (Gageler J); *Nolan* (1988) 165 CLR 178 at 184 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ), noting that the Citizenship Act and the *British Nationality Act 1948* (UK) merely "reflected and formalized" the diminished importance of the notion of British subject.

50 *Minister for Works (WA) v Gulson* (1944) 69 CLR 338 at 356.

51 As to the difficulties surrounding the notion of "indivisibility" of the Crown, see also Zines' commentary in Evatt, *The Royal Prerogative* (1924, republished 1987) at C2 ("[t]he doctrine of the indivisibility of the Crown has been responsible for decades of distorted reasoning, intellectual gymnastics and a blindness to reality"); see also Evatt at 62-64.

to engage in international relations.[52] The first two elements were satisfied at the time of Federation, but the latter two were not.[53] The point at which Australia became sufficiently independent therefore depends on the third and fourth elements. The relevant question is whether Australia had the capacity to govern without external control (ie to choose whether it is subject to external constraints), and the capacity to enter into international relations – as opposed to whether or when it exercised that capacity.[54] These questions (addressed in reverse order below) are to be judged from the point of view of historical and political "realities", not from the point of view of legal form.[55]

34. **Capacity to engage in international relations**: The steps between Federation and 1926 by which the Commonwealth had been brought to the brink of autonomy in its dealings in foreign affairs are set out in the Special Case at [16]-[27].[56] They include the "Famous Constitutional Resolution of 1917", which referred to the Dominions as "autonomous nations of an Imperial Commonwealth", and Australia's separate representation at the Paris Peace Conference followed by the Australian Prime Minister's signing of the Treaty of Versailles. By 1926, Australia's capacity to enter into international relations became clear. The Imperial Conference of 1923 had already recognised that.[57] Then, in 1926, the Imperial Conference issued the "Balfour Declaration", which declared that Great Britain and the Dominions "are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another": SC [33] and Annexure 22.

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52 Twomey, "*Sue v Hill* — The Evolution of Australian Independence" in Stone and Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (2000) at 78-79, citing art 1 of the Montevideo Convention of 1933 on the Rights and Duties of States; Starke, *An Introduction to International Law* (3rd ed, 1954) at 83; see also Crawford, *The Creation of States in International Law* (2nd ed, 2007).

53 Twomey, "*Sue v Hill* — The Evolution of Australian Independence" (2000) at 79; Winterton, "The Acquisition of Independence" in French, Lindell and Saunders (eds), *Reflections on the Australian Constitution* (2003) at 32-33.

54 See *Ibralebbe v The Queen* [1964] AC 900 at 924-925; Cowen "Legislature and Judiciary: Reflections on the Constitutional Issues in South Africa, Part 1" (1952) 15 *Mod Law Rev* 282 at 292; Twomey, "Independence" in Saunders and Stone (eds), *Oxford Handbook of the Australian Constitution* (2018) at 97; Twomey, "*Sue v Hill* — The Evolution of Australian Independence" (2000) at 80; Crawford, *Brownlie's Principles of Public International Law* (9th ed, 2019) at 117-123. That is also consistent with the view that it was the *Statute of Westminster 1931* (UK) (not the Adoption Act), which conferred legislative independence on Australia: *Kirmani v Captain Cook Cruises Pty Ltd (No 1)* (1985) 159 CLR 351 (***Kirmani***) at 402, 410 (Brennan J) and 435 (Deane J).

55 See *British Coal Corporation v The King* [1935] AC 500 at 520 (cited with approval in *Shaw* (2003) 218 CLR 28 at [12]); Wade, "The Basis of Legal Sovereignty" (1955) 13 *Cambridge Law Journal* 172 at 196.

56 They are considered in detail in Evatt, *The Royal Prerogative* (1924, republished 1987) at 145-146.

57 See SC [32] and Annexure 21 – Imperial Conference of 1923, *Summary of Proceedings*, page 6-7 "IX – Negotiation, Signature and Ratification of Treaties".

35. The conclusion that Australia had capacity to conduct its own international relations that emerges from the above facts is not undermined by the events that occurred at the commencement of the Second World War. It is true that, on 3 September 1939, Prime Minister Menzies announced that Great Britain was at war with Germany and "as a result, Australia is also at war": SC [39]. The correctness of that reasoning has been doubted.[58] But, whatever the explanation for Prime Minister Menzies' statement,[59] the circumstances surrounding Australia's declaration of war on Japan demonstrate its independence. On 8 December 1941, prior to any declaration of war by the United Kingdom, the Australian War Cabinet agreed that there was a state of war between Australia and Japan: SC [47], [51]. Australia asked the King to sign an instrument assigning to the Governor-General power to declare war with Japan: SC [47]-[48]. However, prior to Australia being notified that that instrument had been signed, and prior to the United Kingdom's own declaration of war, Prime Minister Curtin addressed the nation and announced: "Men and women of Australia, we are at war with Japan": SC [50]. These matters were consistent with the political reality at the time: that "Australia look[ed] to America, free of any pangs as to our traditional links or kinship with the United Kingdom": SC [54].[60]

36. **Power to govern without external control**: In addition to the Balfour Declaration, at the Imperial Conference of 1926 it was also recognised that "an essential consequence of the equality of status existing among the members of the British Commonwealth" was that the Dominion Governors-General should no longer represent the British government, but should act solely as "the representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held

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58 Professor Twomey has noted that it is "clear … that Australia could have made its own declaration of war in 1939, or even remained neutral had it so chosen": Twomey, "*Sue v Hill* — The Evolution of Australian Independence" (2000) at 86. Hasluck concludes that, although "[t]he forms chosen and the promptness of the response might suggest that [Australia's] entrance into war was automatic", "[i]n reality it was deliberate and expressed more than anything else an Australian decision which the country had been steadily shaping and had fully accepted for weeks before 3rd September": Hasluck, *The Government and the People 1939-1941* (1952) at 156. Further, the records concerning the declarations of war in 1941 (SC [41]-[53]) "do not disclose any consideration of the thesis that because Britain is at war Australia is at war": Hasluck, *The Government and the People 1942-1945* (1970) at 4-9.

59 Prime Minister Menzies' statement suggests that he still adhered to the doctrine of the indivisibility of the Crown, and that he acted accordingly: Menzies, *Afternoon Light* (1967) at 16.

60 See also Winterton, "The Evolution of a Separate Australian Crown" (1993) 19 *Monash UL Rev* 1 at 19: all four Dominions declared war separately from the United Kingdom, thereby "unanimously demonstrating the division of the Crown".

by His Majesty the King in Great Britain".[61] These resolutions "sufficed to secure the independence of Dominion executives, in the conduct of both domestic and foreign affairs".[62] They meant that Australia was independent from the United Kingdom as a matter of historical and political reality, if not yet in legal form.[63] The point was put beyond doubt at the Imperial Conference in 1930, which recognised that the Governor-General would be appointed on the advice of the Ministers in the relevant Dominion (as occurred in 1931 when Sir Isaac Isaacs was appointed Governor-General): SC [34]-[35].[64]

37. Insofar as legislative power is concerned, the constitutional convention from 1926 was that, even though as a matter of form the United Kingdom retained the power to legislate for Australia, in practice the "strong and unbending"[65] convention was that this would not be done without Australia's consent.[66] Then, on 11 December 1931, the *Statute of Westminster 1931* (UK) commenced: SC [36], Annexure 25. As Gibbs CJ subsequently explained, the principal purpose of the Statute of Westminster was to "give to the Dominions … that autonomy and equality of status with each other and with the United Kingdom which had been recognized by the Balfour Declaration" and to reflect the fact that as a matter of "constitutional practice" the Dominions had come to be regarded "not as colonies, but as sovereign communities".[67] While its provisions did not have legal effect with respect to Commonwealth laws until the commencement of the Adoption Act on 9 October 1942, from 1931 Australia had the capacity to pass legislation of that kind.[68]

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61 See SC [33] and Annexure 22, Imperial Conference of 1926, *Summary of Proceedings*, page 12 "Position of Governors-General".

62 Winterton, "The Acquisition of Independence" (2003) at 35.

63 See Dixon, "The Law and the Constitution" in *Jesting Pilate* (1965) at 56, stating that the significance of the Imperial Conference of 1926 "is probably much greater than the enactment of the Statute of Westminster. … [L]awyers should acknowledge that such conventions [ie the constitutional conventions which attendees at the conference sought to establish] may well have a deeper constitutional and political significance and greater practical consequences than the purely legal development contained in the statute". See also *R v Secretary of State for Foreign and Commonwealth Affairs* [1982] 1 QB 892, where Denning MR held that the Crown in the Dominions became separate and autonomous with the Balfour declaration in 1926 (at 916-917) and May LJ held they became independent "at the latest" in 1931 (at 933); cf Kerr LJ at 927.

64 See Winterton, "The Acquisition of Independence" (2003) at 36 ("Dominion independence in the exercise of executive power was fully achieved by 1930").

65 *Copyright Owners Reproduction Society Ltd v EMI (Australia) Pty Ltd* (1958) 100 CLR 597 at 611-612 (Dixon CJ).

66 See Twomey, *The Constitution of New South Wales* (2004) at 116, fns 277-278; Twomey, "*Sue v Hill* — The Evolution of Australian Independence" (2000) at 95.

67 *Kirmani* (1985) 159 CLR 351 at 363 (Gibbs CJ), approved in *Shaw* (2003) 218 CLR 28 at [13]. See also Dixon, "The Statute of Westminster 1931" (1936) 10 (Supp) ALJ 96 at 98.

68 With some exceptions, none of which "materially affected Australia's legislative powers": Twomey, "*Sue v Hill* — The Evolution of Australian Independence" (2000) at 101. See also Winterton, "The Acquisition of

The date by which the Commonwealth became independent

38. In light of the above, it may be that as early as 1926 Australia had achieved sufficient independence such that it was open to Parliament to treat British subjects as "aliens", and that the factual reality of that independence was merely confirmed by the *Statute of Westminster* in 1931. But whether the chosen date be that of the Balfour Declaration in 1926, the commencement of the *Statute of Westminster* in 1931,[69] or the commencement of the Adoption Act in 1942, Australia had achieved sufficient independence considerably before the Appellant's birth in 1945.[70] As such, the Appellant was born an alien (notwithstanding the fact that he was born a British subject). Since he never acquired Australian citizenship, he never ceased to be an alien (it being impossible to cease to be an alien by any means other than naturalisation[71]: cf AS [66]).

Appellant's alternative argument: AS [71]-[73]

39. The Appellant makes a largely undeveloped alternative argument that, even if Australia achieved independence prior to his arrival in Australia, he was given "non-alien" status by the *Nationality Act 1920* (Cth) (**Nationality Act**) and the Citizenship Act[72]: AS [72]. That argument is not in fact a true alternative, because even if the Appellant was treated by those Acts as an "non-alien", that would be relevant only if that somehow meant that it was not thereafter open to Parliament to treat him as an "alien". On ordinary principles, however, if it was open to Parliament to treat the Appellant as an alien when he arrived in Australia, Parliament did not lose that power simply because it had not been exercised at the time of his arrival (at least where, as here, the alien never became a citizen).

40. In any event, the argument should be rejected on its merits. In so far as the Nationality Act is concerned, that Act was concerned with membership of the body politic known as

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Independence" (2003) at 42.

69 Which is the date favoured by Professors Twomey, Winterton and Lindell: see Twomey, "*Sue v Hill* — The Evolution of Australian Independence" (2000) at 108, and the cases there cited at fn 136; Winterton, "The Acquisition of Independence" (2003) at 42; Lindell, "Further Reflections on the Date of Acquisition of Australia's Independence" in French, Lindell and Saunders (eds), *Reflections on the Australian Constitution* (2003) at 54. See also Zines' commentary in Evatt, *The Royal Prerogative* (1924, republished 1987) at C2, referring to "the development of the status of … Australia … between the world wars to full sovereign nations".

70 See also "Final Report of the Constitutional Commission", 1988, vol 1 at [2.128], concluding that "at some time between 1926 and the end of [WWII] Australia had achieved full independence as a sovereign state".

71 *Pochi* (1982) 151 CLR 101 at 111 (Gibbs CJ, with whom Mason and Wilson JJ agreed); *Ex parte Te* (2002) 212 CLR 162 at [24], [26], (Gleeson CJ), [55]-[57], [69] (Gaudron J), [90] (McHugh J), [116] (Gummow J), [210] (Hayne J); *Shaw* (2003) 218 CLR 28 at [31] (Gleeson CJ, Gummow and Hayne JJ, Heydon J agreeing).

72 The effect of the Citizenship Act is sufficiently addressed in paragraphs 24 to 26 above.

the British Empire (as Maitland put it with specific reference to the Commonwealth, "a body politic may be a member of another body politic"[73]). The need for the Nationality Act to address that topic arose from the fact that, prior to 1914, naturalisation under the local law of a British Dominion or colony made the "naturalised" person a British subject only within the territory of that Dominion or colony.[74] Such a person remained an "alien" in other parts of the Empire.[75] The purpose of the *British Nationality Act 1914* (UK) (**1914 UK Act**), and the Dominion statutes that adopted it (which included the Nationality Act[76]), was to alter that position by providing a mechanism for "Imperial naturalization" that would be "recognized throughout the whole of the British dominions".[77] Such naturalisation was "valid, for what it is worth, throughout the Empire".[78] Importantly, however, "Imperial naturalization" did not detract from the power of the Dominions to make laws concerning membership of the bodies politic of the Dominions themselves (notwithstanding that all British subjects still owed allegiance to the as-yet-undivided Crown). Thus, at the Imperial Conference of 1911, "the following main principles were enunciated, which [came to] form the basic rules of Imperial naturalisation" as ultimately implemented in the 1914 UK Act: [79]

> (1) Imperial nationality should be world-wide and uniform, each Dominion being left free to grant local naturalisation on such terms as its legislatures should think fit.
>
> …
>
> (5) Nothing now proposed would affect the validity and effectiveness of local laws regulating immigration or the like, or differentiating between classes of British subjects.

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73 Maitland, "The Crown as Corporation" (1901) 17 *Law Quarterly Review* 131 at 144, as reproduced in Maitland, *State, Trust and Corporation*, ed Runciman and Ryan (2003) at 46.

74 *Markwald v Attorney-General* [1920] 1 Ch 348 at 361; *Report of the Inter-Departmental Committee Appointed by the Secretary of State for the Home Department* (Cd. 723, 1901) at 12-13; Mervyn Jones, *British Nationality Law and Practice* (OUP, 1947) at 106. That limit was reflected in the *Naturalization Act 1903* (Cth), which provided that a person naturalised under that Act "shall in the Commonwealth be entitled to all political and other rights powers and privileges and be subject to all obligations to which a natural-born British subject is entitled or subject in the Commonwealth" (emphasis added).

75 As was illustrated by *Markwald v Attorney-General* [1920] 1 Ch 348.

76 The Nationality Act "conform[ed] to the Imperial Scheme" established by the 1914 UK Act: Gey van Pittius, *Nationality within the British Commonwealth of Nations* (1930) at 63. Indeed, much of the Nationality Act was identical to the 1914 UK Act.

77 Second reading speech, *Nationality Bill 1920*, House of Representatives Official Hansard (No. 44, 1920), 26 October 1920, at 5962, which referred to that Act as "Empire-wide in its scope". See also Keith, *Dicey's Conflict of Laws* (5th ed, 1932) at 170; Latham, "The Law and the Commonwealth", in Hancock, *Survey of British Commonwealth Affairs* (1937) Vol 1 at 592.

78 Latham, "The Law and the Commonwealth", in Hancock, *Survey of British Commonwealth Affairs* (1937) Vol 1 at 592.

79 Gey van Pittius, *Nationality within the British Commonwealth of Nations* (1930) at 53 (emphasis added).

41. Given the above, the Nationality Act had no bearing on whether the Appellant could be treated as an alien under s 51(xix), even if his status as a British subject meant that the legal consequences of alienage were not initially visited upon him.[80] The scheme for Imperial naturalisation of which that Act formed part recognised that each Dominion might make its own laws with respect to alienage and naturalisation, which necessarily meant that status as a British subject was not determinative of membership of the bodies politic that formed part of the British Empire. For that reason, status as a "British subject" under the Nationality Act[81] said nothing about whether the Commonwealth Parliament could treat a person as an alien.[82] When the Commonwealth Parliament enacted s 25 of the Citizenship Act (see paragraph 23 above), and thereby differentiated between different classes of British subject, it did exactly what had been envisaged as far back as the Imperial Conference of 1911.

PART VI NOTICE OF CONTENTION

Proposition 3: Upon the creation of the Australian body politic in 1901, it was open to Parliament to treat as "aliens" British subjects born overseas

42. Ground 1 of the Notice of Contention has been dealt with above. Under Ground 2, the Commonwealth contends that, upon and from the creation of the Australian body politic, it was within the power of Parliament under s 51(xix) to specify criteria for membership of that body politic, and in doing so to treat British subjects born overseas as aliens. While there are observations in some of the authorities to the effect that, as at 1901, British subjects were not aliens,[83] those observations were made without the benefit of argument. In *Shaw*, for example, it was common ground that, as at 1901, it was not open to Parliament to treat British subjects as "aliens". However, Heydon J said: "[i]t is not in

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80 In *Cunningham v Tomey Homma* [1903] AC 151, the Privy Council held (at 156-157) that the provision on which s 51(xix) was modelled "undoubtedly reserves these subjects [alienage and naturalisation] for the exclusive jurisdiction of the Dominion—that is to say, it is for the Dominion to determine what shall constitute either the one or the other". See also SC [17(b)] (Churchill); *Report of the Inter-Departmental Committee Appointed by the Secretary of State for the Home Department* (Cd. 723, 1901) at 18; Keith, *Dicey's Conflict of Laws* (5th ed, 1932) at 170. See 1914 UK Act s 26.

81 The definition of "alien" in s 5 of the Nationality Act mirrored that in s 27 of the 1914 UK Act.

82 See, eg, *Potter v Minahan* (1908) 7 CLR 277 at 304-305 (O'Connor J): "the British Empire is subdivided into many communities, some of them endowed by Imperial Statute with wide powers of self government, including the power to make laws which … will operate to exclude from their territories British subjects of other communities of the Empire."

83 *Nolan* (1988) 165 CLR 178 at 183 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ), 190 (Gaudron J); *Patterson* (2001) 207 CLR 391 at [113] (McHugh J); *Love* (2020) 94 ALJR 198 at [61] (Bell J), [96] (Gageler J).

fact self-evident that from 1 January 1901 all British subjects were not aliens".[84]

43. On the coming into effect of the Constitution, a new Australian body politic was created.[85] That new body politic clearly was not independent of the British Empire. Nevertheless, as a matter of logic, it must have had members. Further, while all members of the Australian body politic were members of the British Empire, the reverse was not true. It is for this reason that the term "British subject" was inapt to identify the members of the new Australian body politic, that being the reason that terms such as "local nationality" or "citizenship" were used,[86] including in decisions of this Court.[87] For example, in 1923, Isaacs, Rich and Starke JJ observed that the people of New South Wales were "united with their fellow Australians as one people for the higher purposes of common citizenship, as created by the Constitution".[88]

44. Once it is recognised that the Constitution brought a new Australian body politic into existence in 1901, with a distinct membership, it logically follows that Parliament must have had the power to define the criteria for membership of that body politic. For that reason, the better view is that, since Federation,[89] s 51(xix) has empowered Parliament to specify the criteria for membership of the Australian body politic, including by excluding at least some British subjects from such membership. Allegiance to the same Monarch did not deny Parliament that power. Thus, irrespective of whether or not Australia had achieved independence before the Appellant arrived in Australia in 1948, his status as a British subject did not preclude Parliament from legislating to specify criteria that he was required to satisfy in order to become a member of the Australian body politic.[90] As the Appellant never satisfied such criteria, he remains an alien.

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84 *Shaw* (2003) 218 CLR 28 at [190].

85 See, eg, *Love* (2020) 94 ALJR 198 at [91] (Gageler J).

86 *Report of the Conference on the Operation of Dominion Legislation 1929* (No 102, 1930) at [78].

87 See, eg, *R v Sutton* (1908) 5 CLR 789 at 807 (O'Connor J); *Commonwealth v Kreglinger & Fernau Ltd* (1926) 37 CLR 393 at 414 (Isaacs J); *Ex parte Nelson (No 2)* (1929) 42 CLR 258 at 275 (Dixon J); *Gonzwa v Commonwealth* (1944) 68 CLR 469 at 476 (Latham CJ); *Attorney-General (Vic) (Ex rel Dale) v Commonwealth* (1945) 71 CLR 237 at 276 (Williams J).

88 *Commonwealth v New South Wales* (1923) 32 CLR 200 at 209.

89 *Love* (2020) 94 ALJR 198 at [94] (Gageler J); *Shaw* (2003) 218 CLR 28 at [10] ("100 years of history denies"), [20] (referring to the power under s 51(xix) in the first decades post-Federation).

90 Constraints on the specification of such criteria that may have existed following Federation arose not from inherent limits on s 51(xix), but from the continuing application of United Kingdom legislation operating by paramount force: eg *Love* (2020) 94 ALJR 198 at [96]-[97] (Gageler J).

Orders sought

45. The appeal should be dismissed with costs.

46. The Appellant seeks a declaration that he is not an alien (CAB 457). However, Question 1 in the Special Case was: "Is it within the power of the Parliament, under s 51(xix) of the Constitution, to treat the plaintiff as an alien?". If the appeal were to be allowed, the Court should not grant the declaration as sought, but should simply answer that question "yes". Although at times the Appellant's submissions suggest that s 189 of the *Migration Act 1958* (Cth) does not apply to him (eg AS [13], [17]), that question was not before Nettle J and is not before this Court. That is important because, even if the Appellant is not an alien, it does not follow that s 189 could not validly apply to him.[91] However, as that issue is not before the Court, it should not be decided.

PART VII ESTIMATE OF TIME

47. The Commonwealth estimates that it will require approximately 2 hours for the presentation of oral argument.

Dated: 1 April 2021

……..	…….	…….
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[91] See *Ruddock v Taylor* (2005) 222 CLR 612 at [27]-[28], [33]-[36] (Gleeson CJ, Gummow, Hayne and Heydon JJ).