HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 24 Jan 2022 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S103/2021
File Title:	Delil Alexander (by his litigation guardian Berivan Alexander)
Registry:	Sydney
Document filed:	Form 27E - Plaintiff's Reply
Filing party:	Plaintiff
Date filed:	24 Jan 2022

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY No. S103 of 2021

BETWEEN:

DELIL ALEXANDER

(BY HIS LITIGATION GUARDIAN BERIVAN ALEXANDER)

Plaintiff

and

MINISTER FOR HOME AFFAIRS

First Defendant

COMMONWEALTH OF AUSTRALIA

Second Defendant

PLAINTIFF'S REPLY SUBMISSIONS

Australian Criminal & Family Lawyers
Suite 1003
263–5 Castlereagh Street
Sydney NSW 2000

Telephone: (02) 8330 5521

Email: osman@acfl.com.au
Ref: Osman Samin

1. These submissions may be published on the internet. They reply to (and adopt defined terms from) the submissions of the Defendants dated 10 December 2021 (**DS**).

2. The withdrawal of reliance on other placita (DS [47]) means that the factual controversies (cf DS [4]-[13]), and the great majority of the Special Case, are irrelevant. It is necessary to revisit two threshold matters going to the characterisation of s 36B of the Citizenship Act.

Characterisation of s 36B of the Citizenship Act

3. *First*, s 36B of the Citizenship Act does not apply to "aliens" (cf DS [43]). Section 36B takes as its criterion of operation a status (citizenship) which is exclusively held by persons who are *not* aliens. It confers upon the Minister a discretionary power, based on vague criteria (see [4] below), the effect of which is to destroy for the citizen a bundle of invaluable common law, constitutional and statutory rights (PS [15]). It is only once the exercise of the power is complete that the person is converted into an alien – and excised from the "people of the Commonwealth" – at which point s 36B no longer has work to do. On its proper characterisation, therefore, s 36B is not a law about "aliens"; it is a law about the rights and duties of citizenship (and their destruction).

4. *Secondly*, the determination of who is to be made into an "alien" under s 36B depends upon the Minister's satisfaction of matters susceptible to only limited[1] judicial review. The concepts of "repudiation" of "allegiance", and "shared values of the Australian community", upon which s 36B pivots (see ss 36A and s 36B(1)(b)), are indeterminate. The statute attributes no meaning at all to these terms, and the Revised EM provides no interpretative assistance.[2] The draftsperson apparently assumed they had a sufficiently stable *legal* content. But that is not so. "Allegiance" is recognised as "a political or social relationship",[3] and since feudal times has become "a mystic concept which dims, instead of clarifying, definitions".[4] The "historic notions of the obligation of fealty" (DS [23]) can do "little to identify the content of the term".[5] Section 36B leaves to the Minister to attribute normative content to "allegiance" and "shared values", and to form an inherently contestable opinion: whether conduct "repudiates" allegiance. These are matters "of opinion or policy or taste", which "cannot be effectively reviewed by the courts".[6]

---

1 Eg *Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 3 at [22]-[27] (Allsop CJ, Besanko and O'Callaghan JJ).
2 Revised Explanatory Memorandum to the Australian Citizenship Amendment (Citizenship Cessation) Bill 2020 at [46].
3 *Singh* (2004) 222 CLR 322 at [200] (Gummow, Hayne and Heydon JJ).
4 Koessler, "'Subject', 'Citizen', 'National', and 'Permanent Allegiance'" (1946) 56 *Yale Law Journal* 58 at 69.
5 *Singh* (2004) 222 CLR 322 at [165] (Gummow, Hayne and Heydon JJ).
6 *Buck v Bavone* (1976) 135 CLR 110 at 118-119 (Gibbs J).

Ground 1

5. ***Summary.*** Section 51(xix) does not confer legislative power to regulate or destroy the rights (see [3] above) of persons who are not aliens. An existing citizen is not an "alien", and is outside the scope of s 51(xix) except in two circumstances. *First*, a change in sovereignty over the territory in which a non-alien is a resident can *transform* a citizen into an alien. *Secondly*, it may be that a statutory citizen can *become* an alien by engaging (valid) conditions that were impressed upon their citizenship at the time of grant. In each of these cases, the statutory citizen may be regulated as an "alien".

6. ***Section 51(xix): General Principles.*** Section s 51(xix) includes power to define by criteria of general application who will have the status of "alienage". This empowers the Parliament to define criteria for membership of the Australian body politic. If s 51(xix) includes a power to "prescribe the conditions" on which citizenship may be *lost*,[7] such a power is only available to be exercised in relation to persons otherwise falling within the ambit of s 51(xix). The ability to use s 51(xix) to create and control Australian citizenship is constrained by the description of its subject matter. The subject matter is "aliens" (a status) and "naturalisation" (the process by which that status is lost).[8] Alienage is a binary status.[9] The opposite status ("citizen"[10]) and the opposite process ("denationalisation") were deliberately omitted (PS [30]). Parliament using s 51(xix) cannot transform a person into an alien eg by stipulating new conditions of citizenship, because in its application to non-aliens such a law could not be classified as a law with respect to naturalisation or aliens.[11] Without a "relevant change in the relationship", it is "not open to the Parliament to effect that transformation by simply redefining the criterion for admission to membership of the community constituting the body politic of Australia".[12] For these reasons, any power in s 51(xix) to prescribe conditions of citizenship is available to be exercised only in respect of an alien undertaking the process of naturalisation, or an unborn person whom it would be within Parliament's power to treat as an alien. Once a person attains the status of citizen, the operation of s 51(xix) is spent.

---

7 It does not follow, and his Honour did not contemplate, that s 51(xix) will support a discretionary power to expel a non-alien from the body politic (cf DS [44]). Indeed, his Honour had earlier said that s 51(xix) may authorise the expulsion of a person absorbed into the Australian community, but only if "the person in question entered as an alien, ***and that status has not altered***": *Ex parte Te* (2002) 212 CLR 162 at [25] (Gleeson CJ).

8 *Ex parte Te* (2002) 212 CLR 162 at [24] (Gleeson CJ); *Love* (2020) 270 CLR 152 at [83] (Gageler J), [300] fn 491 (Gordon J).

9 *Love* (2020) 270 CLR 152 at [434] (Edelman J).

10 See *Singh* (2004) 222 CLR 322 at [193] (Gummow, Hayne and Heydon JJ), noting that the absence of an express power with respect to citizenship is "not insignificant".

11 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 31 at [47] (Gaudron J).

12 *Nolan* (1988) 165 CLR 178 at 192-193 (Gaudron J).

7. For these reasons, s 51(xix) will authorise "denaturalization laws" *only* where there has been a failure to observe the conditions prescribed at the time of grant, or "some relevant change in the relationship".[13] If this is unbalanced (DS [37]), that is only because of an *a priori* assumption that the Commonwealth Parliament *should* have the power to expel and denationalise, which is the question for resolution.

8. The submission that "alien" is "no more and no less" than a person who does not satisfy "the test for membership prescribed by law" (DS [30]) is contrary to authority and logic. It is flatly inconsistent with the majority's decision in *Love*, which the Defendants do not here seek leave to submit should be overruled. The submission is inconsistent with the various decisions of this Court prior to *Love*, which did not adopt statutory citizenship as the exclusive test for non-alienage.[14] Indeed, as Gleeson CJ had put it, "*Everyone* agrees that the term 'aliens' does not mean whatever Parliament wants it to mean."[15] The submission is illogical because it depends upon a false premise that there is "unity" between non-citizenship and alienage (cf DS [47]). There is no such unity: there can be statutory citizens who are "aliens" because of supervening constitutional changes; and there are people who will not be aliens regardless of whether they satisfy the criteria for citizenship (eg *Love*, and the third-generation natural-born Australian[16]).

9. In its very formulation, the so-called *Pochi* qualification, which has commanded unanimous support in this Court,[17] expressly requires the attribution to the term "alien" of an "ordinary understanding",[18] which will form the outer boundary of the power. In its ordinary understanding, "alien" describes "a person's lack of relationship with a country".[19] Here, that relationship is established by statutory citizenship. As a citizen by birth, the Plaintiff is beyond the reach of s 51(xix) unless he is brought back within s 51(xix) in one of the ways described at [5] above. Section 36B infringes the *Pochi* qualification for two reasons. *First*, because it adopts as a criterion of operation a statutory citizen, who fall outside the ordinary understanding of "alien". *Secondly*, because it withdraws from effective judicial scrutiny the question whether the outer boundary of the power is exceeded (see [4] above).[20]

---

13 *Chu Kheng Lim* (1992) 176 CLR 1 at 54 (Gaudron J); *Ex parte Te* (2002) 212 CLR 162 at [54] (Gaudron J).
14 *Love* (2020) 270 CLR 152 at [422]-[427], [466] (Edelman J); *Chetcuti* (2021) 95 ALJR 704 at [38] fn 73 (Gordon J), [69] (Edelman J) and [105] (Steward J).
15 *Singh* (2004) 222 CLR 322 at [5] (Gleeson CJ) (emphasis added).
16 *Chetcuti* (2021) 95 ALJR 704 at [67] (Edelman J).
17 See *Love* (2020) 270 CLR 152 at [433] fn 667 (Edelman J); *Chetcuti* (2021) 95 ALJR 704 at [66] fn 135 and 137.
18 *Pochi* (1982) 151 CLR 101 at 109 (Gibbs CJ).
19 *Nolan* (1988) 165 CLR 178 at 183 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey J), *Love* (2020) 270 CLR 152 at [15], [18] (Kiefel CJ), [302] (Gordon J), [403] (Edelman J).
20 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 258 (Fullagar J).

10. At the time of the Plaintiff's birth, the first aspect of s 51(xix) had been exercised by enacting that "a person born in Australia after the commencement of this Act shall be an Australian citizen by birth".[21] The Plaintiff was thus born on the citizenship side of "the dividing frontier"[22] between alienage and citizenship. The power to impose conditions on citizenship was exercised at the time of the Plaintiff's birth by imposing conditions including that citizenship could be renounced, and (subject to constitutional validity) it would automatically cease in certain circumstances.[23] Unless these conditions were engaged, or there occurred other "supervening constitutional and political events",[24] this exhausted the operation of s 51(xix) in relation to the Plaintiff.

11. ***Pre-Federation potential for loss of citizenship.*** The submissions as to the history and context of the *Naturalization Act 1870* (Imp) (DS [34]-[38]) are distorted. The true position at federation was that loss of legal status as a subject could be imposed only as a punishment for a crime, or because of a change in sovereignty over the territory in which the subject resided. Loss of status was an ancient form of punishment.[25] As noted at PS [47], the doctrine of attainder resulted in the deemed extinction of the civil rights and capacities of an offender, either upon a sentence of death or outlawry,[26] or upon the enactment of a bill of attainder.[27] The doctrine derived from the feudal notion that property and offices were subject to surrender for breach of fealty.[28] As explained at PS [76], banishment was used as a punishment in England for centuries.[29] It is therefore incorrect to say that, prior to 1870, conduct was irrelevant to whether individuals remained members (DS [36]). For centuries, conduct could be *punished* by loss of membership.

12. The other established way in which British nationality could be lost was by "supervening constitutional and political events".[30] After the death of William IV, for example, the Hanoverian Crown did not pass to Queen Victoria, with the result that the Hanoverian by birth "became an alien"[31] to the British Crown. Further, the "true effect" of the treaty between the United Kingdom and the United States in September 1783 (later enshrined in legislation) was

---

21 *Australian Citizenship Act 1948* (Cth), s 10(1) (current at 5 August 1986).
22 *Ex parte Walsh & Johnson; in re Yates* (1925) 37 CLR 36 at 88 (Isaacs J).
23 Eg *Australian Citizenship Act 1948* (Cth), ss 18 and 17 – the validity of s 17 is discussed further below.
24 *Chetcuti* (2021) 95 ALJR 704 at [136] (Steward J).
25 *Duggan v Mirror Newspapers Ltd* (1978) 142 CLR 583 at 610 (Murphy J).
26 *DPP v Toro-Martinez* (1993) 33 NSWLR 82 at 85-86 (Kirby P).
27 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 719 (McHugh J).
28 *DPP v Toro-Martinez* (1993) 33 NSWLR 82 at 85-86 (Kirby P).
29 Armstrong, "Banishment: Cruel and Unusual Punishment" (1963) 111 *University of Pennsylvania Law Review* 758 at 759 quoting Hawkins, *Pleas of the Crown* (7th ed, 1795) at 298.
30 *Re Patterson* (2001) 207 CLR 31 at [235] (Gummow and Hayne JJ); *Chetcuti* (2021) 95 ALJR 704 at [136] (Steward J).
31 *Isaacson v Durant* (1886) 17 QBD 54 at 60 (Lord Coleridge CJ).

that a British subject "had become an alien".[32] Thus, in *Ex parte Ame*, this Court held that it was within s 51(xix) to "respond to the change in sovereign rights"[33] and recognised that "changes in the national and international context" may bear upon the operation of s 51(xix).[34]

13. As to the 1870 Act, its principal purpose was to facilitate for British subjects what was known as the "right of expatriation". The letters patent charged the Commissioners to "inquire into and consider the Legal Condition" of subjects who "may depart from and reside beyond the Realm".[35] The view of the Commissioners was that the doctrine of indelibility of allegiance conflicted with the individual's "freedom of action", and with the "absolute freedom of emigration".[36] It is a serious distortion to say that the 1870 Act "made actual loyalty … a condition of membership of the British body politic" (DS [36]). Instead, it conferred upon subjects a limited or partial right of expatriation,[37] in that "naturalisation obtained in a foreign State *during residence there* was recognised to terminate British nationality subject to the continuance of liability for acts already done."[38] That the subject could terminate British nationality was an incident of the subject's freedom of emigration.

14. There is no "incoherence" in admitting the capacity of the Commonwealth Parliament to regulate the citizen's right of voluntary expatriation whilst denying an unlimited power to denationalise involuntarily (cf DS [49]-[50]). Physically and permanently moving from Australia to another society will terminate Australia's effective control over the emigrant. The power over emigration can be understood to include a capacity to permit a citizen voluntarily to dissolve the ties of allegiance.[39] But the power over emigration could never be used to *force* a citizen to emigrate. For the citizen, the right of expatriation and the qualified immunity from forced denationalisation are correlative protections of individual liberty.[40] For the body

---

32 *Isaacson v Durant* (1886) 17 QBD 54 at 60 (Lord Coleridge CJ).

33 *Ex parte Ame* (2005) 222 CLR 439 at [37] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ), [116] (Kirby J).

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

35 1869 Report, p.iii.

36 1869 Report, p.iii.

37 Nygh, "Problems of Nationality and Expatriation before English and Australian Courts" (1963) 12 *International and Comparative Law Quarterly* 175 at 177; Salmond, "Citizenship and Allegiance" (1902) 18(1) *Law Quarterly Review* 49 at 57; Parry, *Nationality and Citizenship Laws of the Commonwealth* (1957) at 78-79.

38 Parry, *Nationality and Citizenship Laws of the Commonwealth* (1957) at 78.

39 See generally Whelan, "Citizenship and the Right to Leave", (1981) 75 *American Political Science Review* 636 at 638.

40 See eg Cicero, *Pro Balbo*, viii, 31; (R Gardner trans; Loeb Classical Library, 1958), p.665: "the unshakeable foundations of our liberty are that each one of us has the absolute power of retaining or of renouncing his right of citizenship." The right of Roman citizenship was lost by withdrawal of it from entire populations, from individuals as a punishment or as a consequence of the loss of personal liberty, and by voluntary renunciation including by accepting the right of citizenship in a foreign State: W B Lawrence, *Wheaton's Elements of International Law* (3nd ed, 1863), Appendix entitled "Naturalization and Expatriation", p.891 at p.892. See also, in the American context, *Talbot v Janson* (1795) 3 Dall. 133 at 162-163 (Iredell J); and Flournoy, "Naturalisation and Expatriation" (1922) 31 *Yale Law Journal* 702 at 719.

politic, different considerations arise. Denationalisation produces legal effects at the international level, and the body politic is constrained by *jus cogens* norms applicable in the field of nationality.[41] The Defendants' claim of "incoherence" overlooks that the juristic position of the citizen is fundamentally different to that of the body politic.

15. ***Loss of Citizenship by Conduct.*** The historical antecedents and international analogues for s 36B of the Citizenship Act do not assist in the analysis of constitutional validity (DS [39]-[43]). That the Commonwealth Parliament assumed for "many decades" that it has the power to denationalise (DS [39]-[40]), and that other countries not having our *Constitution* may have exercised such a power (DS [42]), is not relevant. In any event, contrary to DS [42], s 36B is radically different to the laws described at DS [40] and is unprecedented in Australia. None of those laws purported retroactively to alter the conditions upon which Australian citizenship had been granted to a citizen by birth, so as to deem past conduct repudiatory of citizenship. None of those laws reposed in the political branches a power to revoke citizenship, based upon a subjective determination not amenable to effective judicial review, of whether conduct is repudiatory of allegiance.

16. Finally, the submission that the conduct captured by s 36B(5)(h), read with s 119.2 and 119.3 of the *Criminal Code*, "is inherently suggestive of the absence of a continuing commitment to the Australian body politic" (DS [43]) should not be accepted. Section 119.2 is an offence which reflects that it "will commonly be difficult to obtain admissible evidence as to exactly what is done in such areas after entry" (DS [19]). What is done or not done after entry may or may not demonstrate absence of a continuing commitment to the Australian body politic (whatever that means). Section 36B does not require the Minister to have any reference to the fault element of the offence (DS [19]).

17. ***Foreign Citizenship.*** The purpose and effect of ss 36B(2) and 36K(1)(c) of the Citizenship Act are to prevent statelessness,[42] consistent with Australia's international obligations.[43] They have no wider significance for this case. As the Defendants appear to concede, automatic possession of Turkish citizenship (SC [9]) is not sufficient to bring the Plaintiff within the

---

41 See generally Mantu, "'Terrorist' citizens and the human right to nationality" (2018) 26(1) *Journal of Contemporary European Studies* 28 at 29-31.

42 Revised Explanatory Memorandum to the Australian Citizenship Amendment (Citizenship Cessation) Bill 2020 at [60].

43 The Convention on the Reduction of Statelessness (New York, 30 August 1961) entered into force for Australia on 13th December 1975: [1975] ATS 46. Article 7(1)(a) and (6) expressly prohibit depriving a person of his or her nationality if such deprivation would render him or her stateless.

scope of the aliens power.[44] The older view, that the defining characteristic of alienage was "owing obligations to another sovereign power",[45] has been "implicitly discarded".[46]

18. This Court would not assume (cf DS [44]) that it is "open to Parliament to prohibit dual citizenship either generally or in specific circumstances". That assumption is at odds with written advice which the Commonwealth received in 1995, and which was incorporated into the Senate Hansard in 2002 when s 17 of the *Nationality and Citizenship Act 1948* (Cth) was repealed, that s 17 was unconstitutional.[47] The "ubiquity of Australian dual citizens"[48] means that the Court would not decide the point unless it were necessary to do so.

Ground 2

19. Any constitutional implication would need to be coherent with the construction of s 51(xix). If the Defendants' construction be accepted, the Plaintiff accepts that an *absolute* limitation would not be coherent with s 51(xix). However, the Defendants' construction of s 51(xix) only accentuates the necessity for a qualified limitation on the power to expel (cf DS [52]-[54]). If "alienage" is a juristic classification of "ineluctable fluidity",[49] if Parliament can specify any conduct (even presence in a declared place) as "inconsistent with ongoing membership of the body politic" (DS [38]), and if even the *Pochi* "group of people" can be expelled if they "act in a way that repudiates their allegiance to Australia" (DS [32]), then s 51(xix) has within it the capacity to undermine "the constitutionally prescribed system of representative government".[50] Our nation's signature protection of "rights through the democratic process" (DS [51]) is rationally defensible only if the democratic process *itself* is adequately protected (PS [68]-[70]). Our constitutional system plainly would not countenance (for example) what occurred in Bolshevik Russia between 1921 and 1926, where two million people were denationalised.[51] It is therefore necessary to identify a limiting principle.

20. The *first* possible limiting principle is that denationalisation can be enacted under s 51(xix) only as an exercise of judicial power (PS [47]-[48]).[52] Contrary to DS [55], this does not

---

44 *Love* (2020) 270 CLR 152 at [66] (Bell J), [317] (Gordon J), [430] (Edelman J); *Chetcuti* (2021) 95 ALJR 704 at [146] (Steward J).

45 *Singh* (2004) 222 CLR 322 at [200] (Gummow, Hayne and Heydon JJ); *Ame* at [35] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ).

46 *Love* (2020) 270 CLR 152 at [89] (Gageler J), see also [59] (Bell J).

47 Advice dated 27 June 1995 from Mr Ron Castan QC: see Commonwealth of Australia, Senate, *Official Hansard*, 14 March 2002, p.788.

48 *Love* (2020) 270 CLR 152 at [263] (Nettle J).

49 *Love* (2020) 270 CLR 152 at [86] (Gageler J).

50 *Roach* (2007) 233 CLR 162 at [85] (Gummow, Kirby and Crennan JJ).

51 Williams, "Denationalization" (1927) 8 *British Yearbook of International Law* 45 at 46.

52 See generally Lavi, "Citizenship Revocation as Punishment: on the Modern Duties of Citizens and their Criminal Breach" (2011) 61(4) *The University of Toronto Law Journal* 783 at 792.

assume that cancellation of citizenship is *exclusively* judicial (the principle in *Lim* allows for executive infliction of punitive measures in established non-punitive cases: see Ground 5). It recognises that the status of citizenship is *sui generis* in defining who shall comprise the "people of the Commonwealth", and protects that status by requiring that expulsion from the "people of the Commonwealth" must involve all branches of government. The involvement of the judiciary protects against the potential for abuse or arbitrariness and erosion of the democratic principle. The *second* possibility is the "substantial reasons" principle suggested by Gageler J in *Love*.[53] This recognises that the ability to participate in the "constitutionally prescribed system of representative government"[54] depends upon citizenship. Because the power to expel citizens might undermine that system (see [19] above), and in alignment with *Roach* and *Rowe*, it can only be exercised for a "substantial reason". For reasons developed at PS [54]-[72], and under Ground 3 below, the enactment of s 36B, in its application to s 119.2 of the *Criminal Code*, is not supported by a "substantial reason".

21. Contrary to DS [56], there is no circularity in implying, from the existence of constitutionally entrenched rights, a protection of the status from which the rights derive (cf DS [54]). This is an outworking of the principle that Parliament cannot do indirectly what it is prohibited to do directly.[55]

22. Lastly, the Defendants accuse the Plaintiff of reversing the correct order of analysis because s 51(xix) permits the Parliament to give meaning to the constitutional expression "the people" (DS [52]). But s 51 is expressly made "subject to this Constitution", which begs the question presented by Ground 2: what implications arise from the textual references to "the people".

Ground 3

23. ***A novel limitation.*** The Defendants resist Ground 3 by contending that the doctrine recognised in *Roach* and *Rowe* applies only where the impugned law is a "law with respect to the franchise" or "seeks to regulate the franchise" (DS [56]). But where the law is "about" another topic, they say, the doctrine has no application (DS [58]).

24. In so contending, the Defendants are asserting a novel limitation on the applicability of the *Roach/Rowe* doctrine, without acknowledging that they are doing so. *Roach* and *Rowe* were both concerned with amendments to the *Commonwealth Electoral Act*. That does not, however, make that feature a necessary condition to the application of the doctrine, any more than the doctrine in *Lange* applies only to defamation laws. The Defendants impermissibly

---

53 *Love* (2020) 270 CLR 152 at [101] (Gageler J).
54 *Roach* (2007) 233 CLR 162 at [85] (Gummow, Kirby and Crennan JJ).
55 *Caltex Oil (Aust) Pty Ltd v Best* (1990) 170 CLR 516 at 522 (Mason CJ, Gaudron and McHugh JJ).

seek to elevate a *feature* of *Roach* and *Rowe* to a *condition* of their application.[56] But neither case, nor any since, holds that the doctrine can apply only to legislation that "seeks to regulate the franchise". On the contrary, *Roach* and *Rowe* state a doctrine of structural importance in our constitutional design, which applies to *any* measure operating to disenfranchise a person or persons entitled to the benefit of universal adult suffrage otherwise than for a substantial reason, whether or not that measure forms part of a law that answers the description of being "with respect to the franchise".

25. The Defendants' version of the *Roach/Rowe* doctrine would introduce a threshold inquiry into the proper characterisation of the impugned law, to determine whether or not the law is "with respect to the franchise". The Defendants do not explain how that characterisation exercise would work: for example, whether the impugned law must have regulating the franchise as its *sole* purpose, or its *dominant* purpose, or merely *a* purpose.

26. Were the Defendants' novel limitation to be recognised, it would significantly cut down the protection the doctrine affords. Circumvention would be easy. One could simply enact the offending measure as part of a law that has some purpose other than regulating the franchise. For example, Parliament could re-enact the provision struck down in *Roach* by locating it within a law that had some purpose other than regulating the franchise: for example, within criminal sentencing legislation that prescribes consequences for criminal offending. Though they deny it, the Defendants' argument *does* involve elevating form over substance; and doing indirectly that which cannot be done directly (cf. DS [58]).

27. Telling in this respect is that the Defendants have offered no answer to the second-last sentence of PS [53]. As there noted, if their argument were correct, Parliament could have achieved precisely the result rejected in *Roach* by legislating that all prisoners should cease to be citizens for the duration of their sentence, with their citizenship revived upon release. That would be a law "about" citizenship, not "about" the franchise, and so on the Defendants' view, would be valid. But that cannot be right: the constitutionally guaranteed franchise cannot be erased by circuitous devices.

28. Similarly, if the Defendants' argument were correct, Parliament could pass a law cancelling the citizenship of those groups in society that the government of the day regards as undesirable electors: for example, welfare recipients. That would be a law "with respect to" social security, rather than the franchise, but it would be anathema to our system of representative democracy. The protection against such an act of disenfranchisement lies not in a formal

---

[56] See *Fairfax Media Publications Pty Ltd v Voller* [2021] HCA 27 at [163] (Steward J).

characterisation of the law's subject matter, but in the ***substantive*** nature of the doctrine recognised in *Roach* and *Rowe*; and, specifically, the need to demonstrate a "substantial reason" for the measure.

29. ***The source of the right to vote.*** At DS [58], the Defendants assert that the Parliament may take away the right to vote as it sees fit, provided that it does so by removing a person's citizenship. That is so, it is said, because the right to vote "is a right that exists only as a consequence of status as a citizen". No authority is cited for these propositions.

30. This argument misstates the source of the right to vote. The right to vote enjoys "constitutional protection"[57] arising from ss 7 and 24 of the Constitution: it is not merely statutory. The right existed long before statutory citizenship was introduced in Australia, and it would continue to exist if statutory citizenship were abolished. Although the right to vote is currently tethered to statutory citizenship as defined from time to time, it does not follow the that right itself is merely statutory, capable of being withdrawn and extended to the people of the Commonwealth at will. It is a constitutional right, which through an exercise of legislative choice, happens now to be linked effectively to statutory citizenship. That link is neither inevitable nor immutable. Parliament could have, for example, amended the *Commonwealth Electoral Act* to provide that a person whose citizenship was cancelled under s 36B of the Act would retain the right to vote.

31. ***Substantial reason***. Why, then, was it necessary for Parliament to remove the right to vote? The Defendants make no affirmative attempt to show that a substantial reason exists: see DS [58]–[62]. Instead, they confine themselves to criticising (briefly) three aspects of the Plaintiff's submissions in chief. The absence of an affirmative case for the *need* for this law is a powerful indication that the measure cannot be justified; it having always been incumbent on the Defendants to justify it.[58]

32. It is convenient to deal with the Defendants' criticisms in reverse order. At DS [62], they offer merely two sentences in response to eight paragraphs of argument concerning the prior state of law, dismissively labelling these arguments as "hyperbolic rhetoric", but offering no substantive response to them.

33. As an example of this, they emphasise PS [66], where the Plaintiff made this submission: "Where near total control over a person's movements and liberty is already made possible by the existing suite of laws, power to take away a person's civic rights is unjustifiable." That is

---

57 *Roach* (2007) 233 CLR 162 at 174 [7] (Gleeson CJ).
58 *Unions NSW v New South Wales* (2019) 264 CLR 595 at 631 [93] (Gageler J); 650 [151] (Gordon J).

not "hyperbolic rhetoric". On the contrary, it is directed to the very question that *Roach* and *Rowe* requires to be asked and answered. The Commonwealth Parliament has passed at least 92 anti-terrorism laws since September 2001. As explained at PS [22], those include laws concerning: (1) temporary exclusion orders, preventing Australian citizens from re-entering the country; (2) cancelling passports; (3) preventative detention orders; (4) continuing detention orders; and (5) control orders. Combined with complementary measures at the State and Territory level, the existing suite of anti-terrorism laws affords ample power to control the circumstances in which a person shall be permitted to return to Australia, let alone to be at large in the community.

34. It is against this backdrop of extensive anti-terrorism legislation that the justification for s 36B falls to be assessed. In asking and answering the question of whether a substantial reason exists for that provision, one must consider what, if any, *incremental* advantage is afforded by this new measure in the fight against terrorism. Why is it necessary (in the proportionality sense) to have a measure enabling the extinguishment of a person's civic rights, when a vast number of existing laws confer such a range of powers to ensure that no person thought to pose a threat to our community should ever successfully act on their intentions? What is the *substantial* reason that justifies this innovation, where the government's existing anti-terrorism powers are an embarrassment of riches?

35. The Defendants make no attempt to answer this question, even though it was posed squarely at PS [54]. They cannot dismiss as "rhetoric" the posing of the question that *Roach* and *Rowe* demand be answered. To do so only serves to underscore the lack of a satisfactory answer.

36. As to the permanent nature of a decision under s 36B, the Defendants note that it is possible for a cancellation to be revoked. This response deserves little weight because of the statutory features inhibiting the ability to make a meaningful revocation application. The applicant may not actually have received the notice of cancellation (s 36F(2)), yet the revocation application must be made within 90 days (s 36H(2)(a)). The notice need only give "a basic description of the conduct" (s 36F(5)(b)),[59] yet the applicant must persuade the Minister that he did not engage in *that* conduct (s 36H(3)(a)(ii)). The notice will not contain reasons for the Minister being satisfied of the public interest (s 36B(11)), yet the Plaintiff must persuade the Minister that it is in the public interest to revoke the determination (s 36H(3)(b)). In other words, the Plaintiff must persuade the Minister to change her mind without knowing why the Minister

[59] In the present case, the Notice asserted only that the Plaintiff "engaged in conduct, specifically foreign incursions, by entering and remaining in a declared area" (SC, p.60). There were no particulars of the date or location of the declared area.

formed an adverse view. In those circumstances, the technical availability of revocation can do little or nothing to ameliorate the lack of substantial justification.

37. The Defendants offer no response to the submission that s 36B is over-inclusive, other than to point out (which the Plaintiff now concedes) that only voluntary conduct can engage the physical element of the offence (DS [20]). But a requirement of voluntariness is no answer to the submission made at PS [57]-[60]. Every pharmacist in this country will satisfy s 36B(5)(h) on a daily basis, by accumulating, stockpiling or otherwise keeping poisons. The fault element prescribed by s 119.4(2) of the Code – that the poisons are kept with the intention that an offence be committed under s 119.1 – is to be disregarded by dint of s 36B(6). Stripped of that fault element, what remains is nothing more than the running of a pharmacy. Likewise, the conduct element of s 119.5 of the Code, stripped of the fault element in s 119.5(1)(c), is committed every time the owner of a cafe, library, or other public space permits *any* group of people to meet at their premises for *any* purpose. Again, s 119.5(1) is an example of an offence picked up by s 36B(5) the criminality of which inheres in the fault element alone: the very element required by s 36B(6) to be disregarded. These examples shows that s 36B is over-inclusive in that it encompasses conduct that, because of the obligation to disregard any fault element, is in no way criminal. That over-inclusiveness causes s 36B(5) to fall foul of *Roach* and *Rowe*, as explained at PS [60]. Just as the commission of manslaughter was held in *Roach* to be an insufficient basis for the deprivation of the franchise – because it "involves an extensive range of moral culpability down to little more than negligence" – so, too, the conduct picked up by s 36B(5) extends to conduct involving no moral culpability at all.

38. Finally, the Defendants place much reliance on s 36B(1)(b) and (1)(c). It is true that both those criteria must also be satisfied. Without a meaningful limitation imposed by s 36B(1)(a), the power reduces to a bare discretion. The Minister can use it to cancel the citizenship of a person who has engaged in no conduct of a criminal kind, provided she is satisfied of the broad and general criteria posited by (b) and (c). The over-inclusive nature of s 36B(1)(a) means that much will turn on these criteria. Yet they are open-textured criteria not readily amenable to judicial review (see [4] above). Section 36B is thus properly characterised as over-inclusive. For these reasons, s 36B(5) is not supported by any "substantial reason". It can be engaged where no terrorist-related or criminal conduct has occurred. Its effects are extreme, and in the usual course, permanent. It offers no evident incremental advantage in the fight against terrorism over and above that achieved by the 92 already-existing laws enacted for that purpose.

Ground 5

39. At the start of their response to Ground 5, the Defendants take a wrong turn. They then spend most of their submissions attacking a straw man.

40. The wrong turn is to assert that *Lim* "says nothing about laws that do not involve detention in custody" (DS [63]). That is wrong. *Lim* recognises a broader principle, of which the rule against executive detention is but a specific instance. The broader principle for which *Lim* is authority is set out in the plurality judgment of Brennan, Deane and Dawson JJ (with whom Gaudron J relevantly agreed) at 26-7.[60] There, their Honours re-affirmed the principle recognised in *Boilermakers* that "[n]o part of the judicial power can be conferred in virtue of any other authority or otherwise than in accordance with the provisions of Chap. III" (at 26). Their Honours continued, in a critically important passage:[61]

> There are some functions which, ***by reason of their nature or because of historical considerations***, have become established as essentially and exclusively judicial in character. The most important of them is ***the adjudgment and punishment of criminal guilt*** under a law of the Commonwealth. That function appertains exclusively to and "could not be excluded from" the judicial power of the Commonwealth. That being so, Ch III of the Constitution precludes the enactment, in purported pursuance of any of the subsections of s 51 of the Constitution, of any law purporting to vest ***any*** part of that function in the Commonwealth Executive.
>
> In exclusively entrusting to the courts designated by Ch III ***the function of the adjudgment and punishment of criminal guilt*** under a law of the Commonwealth, the Constitution's concern is with substance and not mere form. It would, ***for example***, be beyond the legislative power of the Parliament to invest the Executive with an arbitrary power to detain citizens in custody notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt. *The reason why that is so is that, putting to one side the exceptional cases to which reference is made below, the involuntary detention of a citizen in custody by the State is* ***penal or punitive in character*** *and, under our system of government, exists only as* ***an*** *incident of the exclusively judicial function of adjudging and punishing criminal guilt*.

41. As their Honours expressly said, detention in custody is but "*an* incident" of the exclusively judicial function of adjudging and punishing criminal guilt. It is not the *only* such incident. As the plurality said in *Falzon v Minister for Immigration and Border Protection*:[62] "*One form* of punishment is involuntary detention" (emphasis added).

---

60 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 26–7.
61 Ibid, footnotes omitted; emphases added.
62 (2018) 262 CLR 333 at 340 [16] (Kiefel CJ, Bell, Keane and Edelman JJ).

42. The reason that detention in custody constitutes *an* incident of the judicial function of adjudging and punishing criminal guilt is because it is "penal or punitive in character". *Lim* must, therefore, apply also to other measures that are penal or punitive in character. For example, corporal punishment is plainly punitive in character, and so a law vesting that function in the executive would engage *Lim*, with the measure being valid only if it came within an "exceptional case" (just as the rule against executive detention is subject to several established exceptions). If *Lim* had no application to punishments other than detention, it would be a feeble protection against the conferral of the "function of the adjudgment and punishment of criminal guilt" in a body other than a Ch III court, as it would prevent only a *single* kind of punishment from being so conferred, while allowing the conferral of all other punishments without restriction.

43. For this reason, the real question is whether involuntary denationalisation is penal or punitive in character. The question is not answered by positing that "*any* step that inflicts involuntary hardship or detriment on a person" may be in one sense penal (cf. DS [65]). The question is whether this *particular* kind of measure – involuntary deprivation of citizenship – is penal or punitive in character. If it is, then *Lim* will be engaged, unless executive deployment of this punishment falls within an established "exceptional case".

44. It was for this reason that in chief the Plaintiff explained why, as a matter of principle and of history, involuntary denationalisation is indeed punitive (PS [76]–[78]).[63] The Defendants do not answer those submissions at all. Indeed, they accept that "deprivation of citizenship has sometimes been imposed as punishment" (DS [72]), but say that this "does not have the consequence that it will *always* be imposed as a form of punishment for criminal offending, any more than detention or the exaction of a monetary sum will *always* constitute punishment for criminal offending". That is not the test: the test is whether the measure is of its nature "penal or punitive" in such a way as enables it to be characterised as "an incident" of the exclusively judicial function of punishing criminal guilt. Detention is a measure of that character, even though detention does not "always" constitute punishment; so, too, corporal punishment; so, too, involuntary denationalisation.

45. Rather than making any effort to disprove that involuntary denationalisation is penal (which the Defendants seem to accept it is, at least sometimes), the Defendants spend a considerable amount of time discussing the text and operation of s 36B, noting, for example, that the power does not determine rights, quell controversies, or give rise to issue estoppels (DS [67]–[71]).

---

63 And see *Kennedy, Attorney General v Mendoza-Martinez* 372 US 144 at 163–8 (1968).

That, however, is to attack a straw man. That analysis is of the kind associated with cases like *Alinta*,[64] which generally feature an examination of the functions conferred on some federal decision-maker, such as a tribunal, in order to ascertain whether those functions are impermissibly of a judicial kind. Such cases necessarily focus on the decision-making process, having regard to the text and operation of the statute.

46. But *Lim* throws up a different, albeit related, kind of *Boilermakers* problem. The problem recognised in *Lim* is the impermissible vesting in the executive of a *function* that intrinsically belongs to the judiciary alone. An impugned law can fall foul of *Lim* on that basis, irrespective of the extent to which the decision-making *process* of the executive body might be described as "administrative" or "judicial" in character.

47. The proof of this is detention itself. Suppose a law purported to vest in an executive officer a power to detain any person of their choosing, purely on policy grounds. In that scenario, it would in no way ameliorate the law if it were one that was required to be exercised in an "administrative" manner. On the contrary, the more "administrative" the decision-making process, the starker the *impermissibility* of the executive officer wielding such a power. The Defendants are, therefore, wrong to assert that the non-judicial characteristics of s 36B assist their case: on the contrary, those characteristics underscore how *unsuitable* the scheme is for the dispensation of this punishment.

48. *Lim* is concerned with the impermissible vesting of an exclusively judicial function in the executive, irrespective of the manner in which Parliament then determines that that function shall then be exercised. It represents an entirely different field of discourse from the *Alinta* line of cases, which are concerned with whether a particular decision-making process, by reason of the manner of its exercise, is impermissibly judicial. The latter is about process; the former is about the vesting of a function that is stamped with a judicial character. The Defendants' submissions thus fail to engage with the real issue raised by this ground.

DATED: 24 January 2022

David Hooke SC
Sebastian Hartford Davis
Stephen Lawrence
Daniel Reynolds

---

64 *Attorney-General of the Commonwealth of Australia v Alinta Ltd* (2008) 233 CLR 542.

ANNEXURE TO THE PLAINIFF'S REPLY

Pursuant to paragraph 3 of the *Practice Direction No 1 of 2019*, the Plaintiff sets out below a list of the particular constitutional provisions and statutes referred to in submissions in reply.

No	Title	Provision(s)	Version
1.	*Commonwealth Constitution*	51(xix)	
2.	*Australian Citizenship Act* 1948 (Cth)	ss 10(1), 17, 18,	Current as at 5 August 1986
3.	*Australian Citizenship Act* 2007 (Cth)	36A, 36B, 36B(1)(a)(b)(c), 36B(2), 36B(5)(h), 36B(6), 36K(1)(c),	Current as at July 2021
4.	*Criminal Code* (Cth)	ss 119.1, 119.2, 119.4(2), 119.5(1)(c)	As at 3 July 2021 (Compilation No. 138, 28 March 2021 – 31 August 2021)