HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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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 OUTLINE OF ORAL SUBMISSIONS

Filed on behalf of the Respondent, the Commonwealth of Australia

PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Scope of the aliens power

2. The aliens power has two aspects. The first aspect is the power to define the criteria that determine who will have the legal status of alien (subject to the qualification that Parliament cannot treat as aliens persons who could not possibly answer that description). The second aspect is the power to make laws specifying the legal consequences of having that status **(RS [6], [8])**.

10 • ***Shaw* (2003) 218 CLR 28 at [2] (Gleeson CJ, Gummow and Hayne JJ), [190] (Heydon J) (JBA V5, T29)**

3. It is open to Parliament to treat as an alien any "non-citizen" who could be treated as an alien under either of the two leading theories prevailing at the time of Federation (place of birth or descent), or who owes allegiance to a foreign sovereign power (subject to a presently irrelevant qualification concerning certain Aboriginal Australians) **(RS [9])**.

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

4. It is open to Parliament to treat the Appellant as an alien because he owes allegiance to a foreign sovereign power (ie Malta) **(RS [13(a)], [14]-[15])**.

20 • **SC [95], CAB 39-40; CAB 435 [6]-[8], 443 [36] (Nettle J)**

• ***Singh* (2004) 222 CLR 322 at [142]-[144], [190], [195], [200], [205] (Gummow, Hayne and Heydon JJ); see also [30], [32] (Gleeson CJ) (JBA V5, T30)**

5. The existence of dual citizenship does not deny the relevance of foreign allegiance to status as an alien. Parliament can choose whether or not to permit dual citizenship. It has made different choices at different times. To the extent that Parliament chooses to allow Australian citizenship to co-exist with foreign citizenship, a dual citizen is not an alien.

• ***Nationality and Citizenship Act 1948* (Cth) s 17 (JBA V2, T11)**

• **CAB 441 [32] (Nettle J)**

30 6. *Love/Thoms* does not deny the importance of foreign allegiance as a matter upon which Parliament may choose to rely in determining who will be treated as aliens, except in cases concerning certain Aboriginal Australians (**RS [16] fn 26**; **CAB 444-445 [39]-[42] (Nettle J))**.

7. Changes in the national and international context may bring persons within the reach of the aliens power **(RS [17]-[19])**.

- ***Nolan* (1988) 165 CLR 178 at 192 (Gaudron J) (JBA V4, T20)**
- ***Ame* (2005) 222 CLR 439 at [35]-[37] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ) (JBA V4, T26)**

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"

Path 1: The treatment of British subjects in the Citizenship Act

8. Assuming in the Appellant's favour that his status as a British subject had the consequence that he was not treated as an alien at the time of his arrival in Australia on 31 July 1948, it was open to Parliament to treat him as an alien thereafter. It did so on commencement of the Citizenship Act **(RS [21]-[23])**. There is no basis for the Appellant's submission that his initial status was "indelible" **(Reply [8]-[9])**.

- ***Nationality and Citizenship Act 1948* (Cth) ss 5(1), 12, 13, 25 (JBA V2, T11)**

9. The Appellant's focus on the statutory labels of "British subject" and "alien" in the Citizenship Act confuses the way that Parliament exercised its power under s 51(xix) to assign statutory rights to aliens (the second aspect of the power) with the existence of the power to specify the criteria governing that status (the first aspect). Legislation of the kinds mentioned in **AS [51]-[52]** and **[54]-[55]** are exercises of the legislative power to give a class of aliens special advantages in Australian law **(RS [24]-[25])**.

- ***Shaw* (2003) 218 CLR 28 at [8]-[10], [21], [22] (Gleeson CJ, Gummow and Hayne JJ; Heydon J agreeing) (JBA V5, T29)**

Path 2: Australia achieved independence prior to the Appellant's arrival in 1948

10. The correct question to ask in this appeal is when the Australian body politic became sufficiently independent of the United Kingdom such that British subjects could be treated as aliens **(RS [31]; Cth Reply [7]; cf AS [49])**.

- ***Shaw* (2003) 218 CLR 28 at [24], [27]-[28] (Gleeson CJ, Gummow and Hayne JJ; Heydon J agreeing) (JBA V5, T29)**

11. The reasoning in *Shaw* supports the conclusion that Australia was sufficiently independent to allow it to treat British subjects as aliens well prior to 1948 **(RS [27])**.

- **Twomey (JBA V7, T45) at 83, 108, 110-111**

- ***Shaw* (2003) 218 CLR 28 at [10], [12]-[20] and [32] (Gleeson CJ, Gummow and Hayne JJ; Heydon J agreeing) (JBA V5, T29)**

12. The facts agreed in the Special Case likewise establish that Australia was independent well before the Appellant's arrival on 31 July 1948: whether by 1926 (Balfour Declaration) **(RS [34], [36])**; or 1931 (*Statute of Westminster 1931* (UK) **(RS [36]-[37])**); or 1941 (Australia's declaration of war on Japan) **(RS [35])**.

13. South Australia's submissions regarding any constitutional constraints on the effect of the *Statute of Westminster Adoption Act 1942* (Cth) do not arise **(Cth Reply [4]-[8]; SA [16], [34])**.

- ***Kirmani* (1985) 159 CLR 351 at 367, 398, 443 (JBA V3, T15)**

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14. Even if the Appellant was given "non-alien" status by the *Nationality Act 1920* (Cth), he was plainly treated as an alien by the Citizenship Act. The Appellant's submissions attach significance to status as a "British subject" that, even by 1937, it did not have **(RS [39]-[41]**; **SC [37], CAB 30 and 288-289)**.

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

15. The Commonwealth Parliament had power under s 51(xix) to specify criteria for membership of the Australian body politic from Federation. Its power to do so did not depend on Australia being independent from the UK **(RS [42]; cf Reply [19])**.

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- ***Shaw* (2003) 218 CLR 28 at [10] (Gleeson CJ, Gummow and Hayne JJ), [190] (Heydon J) (JBA V5, T29)**
- ***Hwang* (2005) 80 ALJR 125 at [10] (McHugh J) (JBA V6, T33)**
- ***Love/Thoms* (2020) 94 ALJR 198 at [94] (Gageler J) (JBA V6, T34)**

16. Irrespective of when Australia achieved independence, the Appellant's 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. As the Appellant never satisfied those criteria, he remains an alien **(RS [44])**.

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Stephen Donaghue Craig Lenehan Zelie Heger

11 May 2021