# HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

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TANIA SINGH AN INFANT BY HER
NEXT FRIEND MALKIT SINGH PLAINTIFF

AND

COMMONWEALTH OF AUSTRALIA & ANOR DEFENDANTS

*Singh v Commonwealth of Australia*
[2004] HCA 43
*9 September 2004*
S441/2003

**ORDER**

*Questions in the case stated answered as follows:*

*1.* *Q.* *Is the plaintiff an alien within the meaning of s 51(xix) of the Constitution?*
*A.* *Yes.*

*2.* *Q.* *If the answer to (1) is "No", is s 198 of the* Migration Act *1958 (Cth) capable of valid application to the plaintiff?*
*A.* *Does not arise.*

*3.* *Q.* *By whom should the costs of the case stated to the Full Court of this Court be borne?*
*A.* *The plaintiff.*

**Representation:**

B Levet with R B O'Hair and B C Boss for the plaintiff (instructed by Bharati Solicitors)

D M J Bennett QC, Solicitor-General of the Commonwealth with K Rubenstein and C J Horan for the defendants (instructed by Australian Government Solicitor)

**Intervener:**

J Basten QC with J R Clarke intervening on behalf of Applicant A269/2003 (instructed by Jeremy Moore & Associates)

## CATCHWORDS

### Singh v Commonwealth of Australia

Constitutional law (Cth) – Legislative powers of the Parliament – Power to make laws with respect to naturalization and aliens – Meaning of "aliens" – Plaintiff born in Australia to non-citizen parents – Infant plaintiff not a citizen under the *Australian Citizenship Act* 1948 (Cth) – Plaintiff's parents citizens of India – Whether plaintiff an alien under s 51(xix) of the Constitution.

Constitutional law (Cth) – Interpretation – Interpretive theories – Significance of historical context in constitutional interpretation – Use of Convention Debates.

Constitutional law (Cth) – Legislative powers of the Parliament – Whether *Migration Act* 1958 (Cth), s 198 validly authorises the removal of a non-alien from Australia because that person is a non-citizen under the *Australian Citizenship Act* 1948 (Cth).

Words and phrases – "alien".

Constitution, s 51(xix).

*Migration Act* 1958 (Cth), ss 196, 198.
*Australian Citizenship Act* 1948 (Cth), ss 10(2), 14.

1 GLEESON CJ. The primary issue in this case is whether the plaintiff is an alien within the meaning of s 51(xix) of the Constitution.

2 The proceedings challenge the validity of s 198 of the *Migration Act* 1958 (Cth), which provides for the removal of unlawful non-citizens (defined, in effect, to mean non-citizens who do not have permission to be or remain in Australia), in its application to the plaintiff. The plaintiff is a non-citizen. She has no substantive visa. Her parents, who are both citizens of India, entered Australia without visas in 1997. The plaintiff was born in Australia in 1998. She is a citizen of India, by descent. The Commonwealth contends that s 198, in its application to the plaintiff, is a valid law made pursuant to the power conferred upon Parliament by s 51(xix) of the Constitution, that is, the power to make laws with respect to "naturalization and aliens". The plaintiff's case is that, notwithstanding her Indian citizenship, and her lack of Australian citizenship, by virtue of the fact that she was born (albeit to non-citizens) in Australia, she is not an alien, and it is beyond the legislative competence of the Parliament to treat her as such.

3 The argument is about the meaning of s 51(xix). To be more precise, the question is whether, in s 51(xix), "aliens" necessarily excludes persons born in Australia, subject to certain presently irrelevant exceptions such as children of foreign diplomats, or of members of visiting armed forces. It is unnecessary to make further reference to such exceptions.

4 I have previously stated my view that, subject to a qualification, Parliament, under pars (xix) and (xxvii) of s 51, has the power to determine the legal basis by reference to which Australia deals with matters of nationality and immigration, to create and define the concept of Australian citizenship, to prescribe the conditions on which such citizenship may be acquired and lost, and to link citizenship with the right of abode[1]. In that regard, Brennan, Deane and Dawson JJ said in *Chu Kheng Lim v Minister for Immigration*[2], that the effect of Australia's emergence as a fully independent sovereign nation with its own distinct citizenship was that alien in s 51(xix) of the Constitution had become synonymous with non-citizen. The qualification is that Parliament cannot, simply by giving its own definition of "alien", expand the power under s 51(xix) to include persons who could not possibly answer the description of "aliens" in the Constitution[3]. Within the class of persons who could answer that description,

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**1** *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 173 [31].

**2** (1992) 176 CLR 1 at 25, referring to *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 183-184.

**3** cf *Pochi v Macphee* (1982) 151 CLR 101 at 109.

Parliament can determine to whom it will be applied, and with what consequences. Alienage is a status, and, subject to the qualification just mentioned, Parliament can decide who will be treated as having that status for the purposes of Australian law and, subject to any other relevant constitutional constraints, what that status will entail.

5 Everyone agrees that the term "aliens" does not mean whatever Parliament wants it to mean. Equally clearly, it does not mean whatever a court, or a judge, wants it to mean. When a judicial decision is made in the course of judicial review of legislative action, for the purpose of determining constitutional validity, it is made by reference to a standard other than current public opinion. In a representative democracy, the will of Parliament is the most authentic and legitimate expression of public opinion. It may be imperfect, but it is through the political process, culminating in legislative action, that public policy is formed and imposed. It is not the role of the judiciary to give effect to an understanding of public opinion in opposition to the will of Parliament. When a law enacted by Parliament, which represents, or purports to represent, current community values, is declared unconstitutional and invalid, the judicial arm of government is imposing a restraint upon the power of a democratically elected legislature by reference to a written instrument, the Constitution. The source of the restraint is the legal effect of the instrument; not the will of the judiciary. The legal effect of the instrument is determined by the meaning of the text.

6 It is in the nature of law that rules laid down in the past, whether the past be recent or distant, bind conduct in the future[4]. It is in the nature of a written, federal Constitution that a division of governmental power, necessarily involving limitations upon such power, agreed upon in the past, binds future governments. That the terms of the agreement were to have that future operation is a matter relevant to an understanding of their meaning, but the role of a court is to understand and apply the meaning of the terms, not to alter the agreement. Respect for the constitutional settlement is the primary obligation of a constitutional court. The source of this Court's power is the Constitution itself. There is no other. The role of the Court stems from the meaning and effect of the terms of that instrument. The stream of judicial review cannot rise above its source.

7 The power of judicial review, which is inherent in the structure of a federal union, was treated as axiomatic by the framers of the Australian Constitution[5]. The decision in *Marbury v Madison*[6] was 100 years old when this

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**4** Goldsworthy, "Originalism in Constitutional Interpretation", (1997) 25 *Federal Law Review* 1 at 27.

**5** *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 262 per Fullagar J.

Court was established. Furthermore, as Alfred Deakin reminded Parliament when the Bill for an Act to establish this Court was being debated, the legislatures in the Australian colonies were all of limited power, and colonial courts were accustomed to declaring those limits[7]. The historical context is critical to the existence of a power of judicial review. The legitimacy of judicial review depends upon adhering to a technique of deciding the meaning, and therefore the legal effect, of the Constitution that is consistent with the nature of the power being exercised. Judicial review of the validity of legislative action by reference to the Constitution is conducted upon the hypothesis that the terms, express and implied, of a written instrument, brought into existence more than a century ago, bind present and future parliaments, and courts. That instrument cannot be amended by Parliament, or by a simple majority of Australian voters, or by a court. Its meaning controls the exercise of governmental power. In some respects that meaning is clear. In some respects it is contestable. What the Constitution does not say may be as significant as what it says. On any view, it is a legal instrument written in the past that controls the exercise of power in the present, and (subject to the possibility of amendment in accordance with its own terms) in the future.

Meaning

8 Writing extra-judicially in 1995[8], Priestley JA, of the New South Wales Court of Appeal, noted that the purpose for which courts seek to discover the meaning of a text is different from the purpose of, for example, a literary critic, or an historian. He said:

> "Courts have to decide the meaning of texts in a way that will affect the property or civil rights of the parties before the court directly, and which may have an effect on the property or civil rights of many parties not before the court ...
>
> Courts, unlike literary critics, are not usually in a position to start afresh, even if so disposed, every time the meaning of a particular text is being considered. No doubt every successive reader of both a literary and a legal text will come to it with a somewhat different perception of its possible meaning than anyone had before; the literary interpreter can take advantage of the fact that the meaning of a text can be approached as

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**6** 5 US 137 (1803).

**7** Australia, House of Representatives, *Parliamentary Debates* (Hansard), 18 March 1902 at 10969.

**8** Priestley, "Judges as Story Tellers", paper delivered at the Law and Literature Association Conference, San Francisco, October 1995.

> never closed; the legal interpreter is constrained when ... an authoritative meaning for legal purposes has previously been seen in the text."[9]

9 He referred to what F W Maitland said, comparing lawyers and historians[10]:

> "The lawyer must be orthodox otherwise he is no lawyer; an orthodox history seems to me a contradiction in terms."

10 The Australian Constitution contains many terms that have a legal meaning, and that are naturally understood and applied by courts with reference to their legal meaning. To confine attention to s 51, they include bounties, insurance, bills of exchange, promissory notes, bankruptcy, insolvency, copyrights, patents of inventions and designs, trade marks, naturalization, aliens, corporations, trading corporations, marriage, divorce, matrimonial causes, custody and guardianship of infants, service and execution of process, and conciliation and arbitration. The concepts which those terms signify, in the context of the Constitution, can only be identified by reference to legal usage and understanding. Thus, when a dispute arose as to whether an incorporated local government authority that sold electrical appliances was a "trading corporation" within the meaning of s 51(xx), the question was not resolved by consulting a dictionary, and looking up the meaning of the noun "corporation", and the verb "to trade". This Court held that, although the authority in question was a corporation, and although it traded, it was not a trading corporation[11]. In reaching that conclusion, the Court looked to the history of the development of corporations law, and noted that, at and around the time of Federation, legal authorities treated trading corporations and municipal corporations as entities of a different kind[12]. The relevance of contemporary legal usage was that it formed part of the context in which the expression "trading corporations" was adopted, and an understanding of the context was necessary to a conclusion about the constitutional meaning of the expression. Furthermore, as Gaudron and Gummow JJ said in *Re Refugee Tribunal; Ex parte Aala*[13], some expressions

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**9** See also, Easterbrook, "Abstraction and Authority", (1992) 59 *University of Chicago Law Review* 349 at 362.

**10** Maitland, "Why the History of English Law is not written", in Fisher (ed), *The Collected Papers of Frederic William Maitland*, (1911) vol 1 at 491.

**11** *R v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533.

**12** (1974) 130 CLR 533 at 552 per Menzies J.

**13** (2000) 204 CLR 82 at 93 [24].

used in the Constitution, such as "a writ ... of prohibition", or "patents of inventions", have no meaning other than as technical legal expressions. A knowledge of the law, including legal history, is indispensable to an appreciation of their essential characteristics.

11 When a word is used to signify a concept, the process involves both inclusion and exclusion. The argument for the plaintiff in this case amounts to the proposition that the meaning of "aliens" in s 51(xix) excludes someone who was born in Australia, regardless of other circumstances and characteristics such as those which apply to the plaintiff. The plaintiff contends that it is an essential characteristic of aliens referred to in s 51(xix) that they were born outside Australia. If that is right, then the power conferred upon the Parliament by s 51(xix) is restricted by that limitation upon the meaning of "aliens". People born in Australia are excluded from the concept, and legislation about such people is not supported by the power to make laws with respect to naturalization and aliens.

Meaning and context

12 Meaning is always influenced, and sometimes controlled, by context. The context might include time, place, and any other circumstance that could rationally assist understanding of meaning. I referred above to the meaning of "aliens" in s 51(xix). That is a brief description of the immediate context in which "aliens" appears, but the context is much wider than that. It includes the whole of the instrument, its nature and purpose, the time when it was written and came into legal effect, other facts and circumstances, including the state of the law, within the knowledge or contemplation of the framers and legislators who prepared the Constitution or secured its enactment, and developments, over time, in the national and international context in which the instrument is to be applied. Reference was made earlier to what was said in *Chu Kheng Lim* about such developments affecting s 51(xix). Another example is *Sue v Hill*[14].

13 In *Jago v District Court (NSW)*[15] it was necessary to apply *Magna Carta* and the *Habeas Corpus Act* 1679 (UK), 31 Car II c 2 for the purpose of deciding whether there existed, in New South Wales in 1988, a right to a speedy trial. Both in the Court of Appeal of New South Wales, and in this Court, there was a detailed examination of the meaning of the texts by reference to wider contextual factors, including, of course, history. The words of *Magna Carta* and the *Habeas Corpus Act* were read through modern eyes, but modern eyes were not blind to their historical context.

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**14** (1999) 199 CLR 462.

**15** (1988) 12 NSWLR 558; (1989) 168 CLR 23.

14 Many examples could be given of the Court's reliance upon the historical context in which the Constitution was written as an aid to its interpretation. Two provisions that have given rise to notorious difficulties of interpretation are ss 90 and 92. The leading authorities which state the current jurisprudence in relation to both provisions rely strongly on history. In *Ha v New South Wales*[16], Brennan CJ, McHugh, Gummow and Kirby JJ said that "it is necessary to see the provisions of ss 90 and 93 in the context of Ch IV of the Constitution and to understand the operation which Ch IV was designed to have at the time of Federation". They referred[17] to the review by Dixon J in *Matthews v Chicory Marketing Board (Vict)*[18] of the history of the word "excise" in order to consider whether, according to any established meaning, "an essential part of its connotation is, or at any time was," such as to exclude taxes of a certain kind. They also considered whether there was any common use of the term "excise" in the Convention Debates which might illuminate its meaning[19]. The dissenting members of the Court, Dawson, Toohey and Gaudron JJ, similarly examined the historical context, although they drew different conclusions from it. In an earlier decision on s 90, *Hematite Petroleum Pty Ltd v Victoria*[20], Deane J laid much emphasis upon the European, as well as the colonial, experience prior to Federation, which, he said, formed the context in which the framers of the Constitution saw the relationship between duties of customs and excise. In *Cole v Whitfield*[21], in which the Court reconsidered a long line of conflicting interpretations of s 92, extensive reference was made to the history of s 92. It will be necessary to return to what was said in that case as to the utility of such reference. Consideration of the history of the Constitution is not for rhetorical purposes, invoking the past when it is convenient, and ignoring it when it is inconvenient, but for the purpose of understanding its meaning, which is related intimately to context.

15 Sometimes the problem of meaning lies, not in understanding the concept that a particular word or expression signifies, but in understanding the relationship between a number of concepts referred to in the Constitution. A well-known difficulty exists in the relationship between s 122, which confers

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**16** (1997) 189 CLR 465 at 491.

**17** (1997) 189 CLR 465 at 493.

**18** (1938) 60 CLR 263 at 299.

**19** (1997) 189 CLR 465 at 493.

**20** (1983) 151 CLR 599 at 661.

**21** (1988) 165 CLR 360.

upon the Parliament a general power to make laws for the government of territories (which includes a power to set up territorial courts), and Ch III, which deals with the Judicature. Not all aspects of that relationship have been finally worked out. An important aid to deciding what the Constitution means on this matter is an understanding of the disparate nature of territories with which the realities of government and administration must cope, including what was in the contemplation of the founders as to the variety of circumstances governing external and internal territories in the future.

16 One consideration of special importance to the meaning of a constitutional instrument is its general nature and purpose: an instrument of government, expressed in broad and general terms, designed to speak to a future that, as the founders well understood, was in many respects beyond their capacity to foresee. In his speech on the Judiciary Bill, Alfred Deakin said[22]:

> "[The] Constitution was drawn, and inevitably so, on large and simple lines, and its provisions were embodied in general language, because it was felt to be an instrument not to be lightly altered, and indeed incapable of being readily altered; and, at the same time, was designed to remain in force for more years than any of us can foretell, and to apply under circumstances probably differing most widely from the expectations now cherished by any of us. Consequently, drawn as it of necessity was on simple and large lines, it opens an immense field for exact definition and interpretation."

17 He also said[23]:

> "... our written Constitution, large and elastic as it is, is necessarily limited by the ideas and circumstances which obtained in the year 1900. It was necessarily precise in parts, as well as vague in other parts. That Constitution remains verbally unalterable except by the process of amendment. ... But the nation lives, grows, and expands. Its circumstances change, its needs alter, and its problems present themselves with new faces. The organ of the national life which preserving the union is yet able from time to time to transfuse into it the fresh blood of the living present, is the Judiciary the High Court of Australia or Supreme Court in the United States. It is as one of the organs of Government which enables the Constitution to grow and to be adapted to the changeful

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**22** Australia, House of Representatives, *Parliamentary Debates* (Hansard), 18 March 1902 at 10965.

**23** Australia, House of Representatives, *Parliamentary Debates* (Hansard), 18 March 1902 at 10967-10968.

> necessities and circumstances of generation after generation that the High Court operates. Amendments achieve direct and sweeping changes, but the court moves by gradual, often indirect, cautious, well considered steps, that enable the past to join the future, without undue collision and strife in the present."

18 There is no inconsistency between Alfred Deakin's statement that the written Constitution is necessarily limited by the ideas and circumstances which obtained in the year 1900, and his statement that it is capable of responding to changing circumstances and necessities. He distinguished between interpretation and amendment. The ideas and circumstances of 1900 influenced what the Constitution says, and what it does not say. They form part of the context in which the meaning of the written words is to be understood. Changing times, and new problems, may require the Court to explore the potential inherent in the meaning of the words, applying established techniques of legal interpretation.

Meaning, intention and purpose

19 Acknowledging that "[i]ntention of the Legislature" is a "very slippery phrase"[24], courts, and Parliament itself, refer to "intention" or "intent" in stating rules and principles of statutory interpretation. For example, a principle of interpretation, referred to by this Court in several recent judgments, is that courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language[25]. The *Acts Interpretation Act* 1901 (Cth) sets out various rules of interpretation of statutes which apply "unless the contrary intention appears"[26]. Questions of statutory interpretation are commonly formulated, and answered, by reference to legislative intention. For example, where a statute imposes a duty, the question whether a breach of the duty will give rise to an action for damages at the suit of an injured victim "depends upon the intention to be extracted from the statute when read as a whole, having regard to its general scope and purview as well as to its particular provisions"[27]. In

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**24** *Salomon v Salomon & Co* [1897] AC 22 at 38 per Lord Watson.

**25** eg *Coco v The Queen* (1994) 179 CLR 427 at 437; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 492 [30].

**26** eg *Acts Interpretation Act* 1901 (Cth) ss 2(1), 4, 5, 8, 10, 10A, 15, 15B, 16, 16A, 16B, 16C, 17, 17AA, 18, 18A, 19A, 20, 21, 22, 23, 25, 25B, 25C, 25E, 26, 27, 28, 29, 33, 34AA, 35, 36, 47.

**27** *Martin v Western District of the Australasian Coal and Shale Employees' Federation Workers' Industrial Union of Australia (Mining Department)* (1934) 34 SR (NSW) 593 at 596 per Jordan CJ, citing *Pasmore v Oswaldtwistle Urban Council* [1898] AC 387 at 394.

*Sovar v Henry Lane Pty Ltd*[28], Kitto J warned that the intention that such a private right shall exist is not conjured up by judges to give effect to their own ideas of policy, and then imputed to Parliament. "The legitimate endeavour of the courts is to determine what inference really arises, on a balance of considerations, from the nature, scope and terms of the statute, including the nature of the evil against which it is directed, the nature of the conduct prescribed, the pre-existing state of the law, and, generally, the whole range of circumstances relevant upon a question of statutory interpretation ... . It is not a question of the actual intention of the legislators, but of the proper inference to be perceived upon a consideration of the document in the light of all its surrounding circumstances." In *Wilson v Anderson*[29], I sought to explain the objectivity of the concept of intention, comparing the position with respect to construction of a contract, and stressing that the exercise is not formal or literalistic but demands consideration of background, purpose and object, surrounding circumstances, and other matters which throw light on the meaning of unclear language. The danger to be avoided in references to legislative intention is that they might suggest an exercise in psychoanalysis of individuals involved in the legislative process; the value of references to legislative intention is that they express the constitutional relationship between courts and the legislature. As Kitto J said, references to intention must not divert attention from the text, for it is through the meaning of the text, understood in the light of background, purpose and object, and surrounding circumstances, that the legislature expresses its intention, and it is from the text, read in that light, that intention is inferred. The words "intention", "contemplation", "purpose", and "design" are used routinely by courts in relation to the meaning of legislation. They are orthodox and legitimate terms of legal analysis, provided their objectivity is not overlooked.

20 Principles of purposive construction, and the provisions of the *Acts Interpretation Act*, dictate that regard be paid to purpose and object. Section 15AA of the *Acts Interpretation Act* provides that, in the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object. Section 15AB permits consideration of extrinsic material in the interpretation of an Act "if [the] material ... is capable of assisting in the ascertainment of the meaning of [a] provision", in order to confirm that the meaning is the ordinary meaning conveyed by the text "taking into account its context in the Act and the purpose or object underlying the Act", or to resolve ambiguity or obscurity, or to determine the meaning of a provision when the ordinary meaning of the text leads to manifest absurdity or unreasonableness. A

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**28** (1967) 116 CLR 397 at 405.

**29** (2002) 213 CLR 401 at 417-419 [7]-[10].

non-exhaustive list of potentially available extrinsic materials, including parliamentary records, is set out in s 15AB(2). That brings me to the Convention Debates, there being no reason to doubt that interpretative principles of the same kind as those set out in s 15AB are also relevant to the Constitution, making due allowance for the nature of the Constitution as an instrument of government and not an ordinary statute.

The Convention Debates

21 The public record of the Convention Debates is evidence of what some people, involved in the framing of the Constitution, said about various drafts of the instrument. It is a partial record of the drafting history of most of the provisions of the Constitution. It reveals what some people understood, knew, believed, thought, or intended about the proposed instrument, and the circumstances surrounding some of the events involved in its preparation. For the reasons already given, what the record shows about the subjective beliefs or intentions of some people may be interesting but, of itself, is not a relevant fact. Many people, in Australia and the United Kingdom, were involved, directly or indirectly, in decisions about the form of the Constitution. Not all of them participated in the Convention Debates. Furthermore, as at all gatherings of lawyers or politicians, those who had the most to say were not necessarily the best informed or the most influential. A search for the collective, subjective intention of the framers of the Constitution would be impossible, and the individual subjective intention of any one of them, if it could be established, would not be relevant, because it would not advance any legitimate process of reasoning to a conclusion about the meaning of the text. Nevertheless, the drafting history of the Constitution, including the record of the Convention Debates, may be capable of throwing light on the meaning of a provision. Whether this will be so depends upon the nature of the problem of interpretation that arises, the nature of the information that is gained from the drafting history, and the relevance of that information to the solution of the problem. Whether information is capable of assisting in the rational solution, by a legitimate process of reasoning, of a problem about the meaning of the text, depends upon the nature of the problem, and the nature of the information.

22 An example is given in *Cheng v The Queen*[30]. In the course of a debate, on 4 March 1898, there was an exchange between Mr Barton and Mr Isaacs concerning the drafting of what is now s 80, relating to trial by jury. The exchange was helpful in the resolution of the question considered in *Cheng*, not because it revealed what Mr Isaacs and Mr Barton believed the clause meant, (their belief was a legally irrelevant fact), but because it threw light on the purpose and object of the provision, a matter of importance to the process of

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**30** (2000) 203 CLR 248 at 269.

legal interpretation. What was involved was a commonplace exercise in purposive construction. The record of what occurred was regarded, as long ago as 1901[31], as capable of assisting the ascertainment of the meaning of s 80. Earlier inhibitions about taking advantage of that assistance have now been abandoned. Reference to the record may be made, not for the purpose of seeking the subjective intention of people involved in the drafting, "but for the purpose of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation"[32]. The reference, in *Cole v Whitfield*[33], to "identifying the contemporary meaning of language used", that is, its meaning at the time of the Convention Debates, directs attention to the historical context in which language, the subject of a problem of interpretation, was used. For the reasons already given, an understanding of that context is often a valuable, and sometimes necessary, aid to deciding meaning. To deny the relevance of the contemporary meaning of the language used in 1900 would not only be contrary to what was said in *Cole v Whitfield*, it would be contrary to one of the most elementary principles of legal interpretation, which is that a text must be understood in its context.

23 It is useful to consider the question that arises in the present case by reference to the interpretative approach taken in *Cheatle v The Queen*[34].

*Cheatle v The Queen*

24 *Cheatle* was a unanimous decision of the Court. The reasons were given in a joint judgment of Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ. The background to the case was that, at the time (1993), the States of South Australia, Western Australia and Tasmania, and the Northern Territory, like the United Kingdom, had legislation providing for the taking of majority verdicts in criminal trials. By contrast, in New South Wales, Queensland and, at the time, Victoria, jury verdicts at criminal trials were required to be unanimous. (Since then, Victoria has legislated for majority verdicts.) Section 80 of the Constitution requires the trial on indictment of an offence against any law of the Commonwealth to be by jury. Under ss 68 and 79 of the *Judiciary Act* 1903 (Cth), federal offences are frequently dealt with by State courts, following State procedures. The appellants were tried in South

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**31** Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 808.

**32** *Cole v Whitfield* (1988) 165 CLR 360 at 385.

**33** (1988) 165 CLR 360.

**34** (1993) 177 CLR 541.

Australia for an offence against a law of the Commonwealth. They were convicted following a majority verdict of a jury. This Court upheld their submission that, by virtue of s 80 of the Constitution, the convictions were nullities.

25 The requirement of s 80 was that the trial "shall be by jury": no more, and no less. The appellants were tried, before a judge and jury, according to the practice and procedure then current in South Australia, and in a number of other comparable jurisdictions. It is now the procedure current in most Australian jurisdictions. If, in 1993, and without reference to the Constitution, one were to ask, as an abstract question, whether trial by jury could include provision for majority verdicts, the answer would have been yes. If, today, one were to ask the same question, relating it to modern practice in Australian jurisdictions, the answer would be the same. Indeed, if progress were equated with change, the progressive view would surely be that the practice of trial by jury can accommodate majority verdicts. That is the modern trend, and there has been pressure for change even in those jurisdictions that retain a requirement for unanimity. If the words "trial on indictment ... shall be by jury" were taken out of their context, including their historical context, and considered solely in the light of current community values as reflected in legislation, it is difficult to see how the words could be understood as denying the possibility of majority verdicts. Why the values reflected in the legislation of, say, New South Wales and Queensland, would prevail over those reflected in the legislation of Victoria and South Australia, is not apparent. To make that the test, however, would involve a cardinal error, as this Court held. There is a further difficulty to be addressed. Trial by jury is a procedure that has evolved, and continues to evolve. Some aspects of jury trial that applied in the nineteenth century, such as property qualifications of jurors or exclusion of women, no longer apply. No one supposes that s 80 requires that, in the case of persons charged with federal offences, jury trial must have all the characteristics of jury trial in 1900. The procedure is not frozen as at that date. Yet one aspect of the procedure, unanimity, was held to be immutable. In reaching that conclusion, the Court took account of three considerations: history; principle; and judicial authority. Those factors were taken into account in deciding whether "the requirement of unanimity is an essential feature of the institution of trial by jury adopted by s 80"[35]. To describe the requirement of unanimity as "an essential feature" of the procedure of trial by jury referred to in s 80 is to say that the meaning of "trial by jury" *in that context* excludes the possibility of majority verdicts. It is obvious that the meaning of trial by jury in other contexts does not, in 2004, exclude that possibility; and it did not exclude that possibility in 1993. Yet it did so, and continues to do so, in the context of s 80. As to history, the Court said[36]:

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**35** (1993) 177 CLR 541 at 554.

**36** (1993) 177 CLR 541 at 552.

> "It follows ... that the history of criminal trial by jury in England and in this country up until the time of Federation establishes that, in 1900, it was an essential feature of the institution that an accused person could not be convicted otherwise than by the agreement or consensus of all the jurors. It is well settled that the interpretation of a constitution such as ours is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of the common law's history. In the context of the history of criminal trial by jury, one would assume that s 80's directive that the trial to which it refers must be by jury was intended to encompass that requirement of unanimity."

26 I have already explained the sense in which the word "intended" is used in this context. It is not a solecism. It is a common term of judicial exposition, but not to be misunderstood as a reference to the mental processes of some individual, or individuals. Similarly, the emphasis on the context of legal history is orthodox. As to principle, the Court said that "the common law's insistence upon unanimity reflects a fundamental thesis of our criminal law, namely, that a person accused of a crime should be given the benefit of any reasonable doubt"[37]. As to authority, the Court's examination of judicial decision-making in Australia and comparable jurisdictions reflects a consideration noted above, which is that legal interpretation of a text occurs as part of a process in which consistency and respect for authority play a significant role. Unconstrained by the past, the Court in 1993 would have been obliged to acknowledge that, according to current Australian legal practice, which varied between jurisdictions, trial by jury might or might not require unanimity, and that the possibility of majority verdicts was not excluded from the concept of jury trial.

27 The reasoning in *Cheatle* is inconsistent with a theory of constitutional interpretation that denies the importance of historical context. Recognition of the importance of context in the interpretation of a text that was written a century ago is not inconsistent with the role of the Constitution as a dynamic instrument of government. It is no more than an application of orthodox legal principle.

28 If the plaintiff is right in this case, then, just as "trial by jury" in s 80 excludes a procedure that allows for majority verdicts, so "aliens" in s 51(xix) excludes people born in Australia.

The plaintiff's case

29 The argument for the plaintiff depends largely upon the proposition that the legal and historical context at the time of the drafting of the Constitution

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**37** (1993) 177 CLR 541 at 553.

supports such a meaning. The argument fails, not in the major premise as to the relevance of the legal and historical context, but in the minor premise. The context, properly understood, does not support the conclusion for which the plaintiff contends. Rather, it supports the opposite conclusion.

30 In 1900, the major legal systems of the Western world adopted different approaches to the concept of alienage, and to correlative concepts of citizenship or allegiance. Broadly, the two leading theories were one which attached controlling importance to descent, and one which attached controlling importance to place of birth. The common law of England adhered to the second theory, but by 1900 the United Kingdom Parliament had intervened to modify the common law in significant respects. The 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. The complex racial circumstances that resulted from Imperial expansion complicated the issues even further. The reasons of Gummow, Hayne and Heydon JJ demonstrate that, in the case of someone such as the plaintiff, an Indian citizen, born in Australia of Indian citizens, there was in 1900 no established legal requirement that she be excluded from the class of aliens. At the least, it was a matter appropriate to be dealt with by legislation. In *Grain Pool of Western Australia v Commonwealth*[38] the joint judgment, referring to "cross-currents and uncertainties" in the law relating to patents and registered designs at the time of Federation, said "it plainly is within the head of power in s 51(xviii) to resolve them". It seems to me that, given the legal context in which the Constitution was written, it is equally plain that it was within the head of power given by s 51(xix) for Parliament to decide whether a person such as the plaintiff should be treated as an alien. To state the position negatively, the legal context does not support or require a conclusion that "aliens" in s 51(xix) excludes the plaintiff.

31 It was argued that the record of the Constitutional Debates concerning a failed proposal to include in what is now s 51 a power to make laws with respect to Commonwealth citizenship in some way supports the plaintiff. The first thing to be noted is that there were two alternative, and inconsistent, proposals. In 1898, the chief proponent of the inclusion of a citizenship power, Dr Quick, said that he wanted to see either a definition of citizenship in the Bill or a power conferred on the Parliament to define citizenship[39]. The debate that followed related to both alternatives. A number of speakers raised various objections.

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**38** (2000) 202 CLR 479 at 501.

**39** *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 2 March 1898 at 1751.

Some regarded a definition of citizenship as unnecessary[40]. Some saw the proposal as cutting across the concept of state citizenship[41]. Mr Isaacs thought that "all the attempts to define citizenship will land us in innumerable difficulties"[42]. He expressed concern that the proposed amendment might deprive Parliament of the power of excluding people of certain specified races "who happened to be British subjects"[43]. The subject of race was of great concern to the framers, and their views on that matter were quite different from those which now prevail. To put the point at its lowest, a purpose of limiting Parliament's power to legislate for exclusion is not apparent. It is impossible to discern in the record of the Convention Debates any specific reason for the rejection of Dr Quick's ambiguous proposal. The discussion throws no light on the purpose or object of s 51(xix), except to the extent that it suggests that a broad, rather than a narrow, power with respect to aliens was in contemplation.

Conclusions and Orders

32 The argument for the plaintiff has not been made out. She is a citizen of a foreign state, the child of foreign citizens and, although born in Australia, she is an alien.

33 The first question in the case stated should be answered, "Yes". The second question does not arise. The third question should be answered, "The plaintiff".

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**40** *Official Record of the Debates of the Australasian Federal Convention,* (Melbourne), 3 March 1898 at 1782.

**41** *Official Record of the Debates of the Australasian Federal Convention,* (Melbourne), 2 March 1898 at 1764.

**42** *Official Record of the Debates of the Australasian Federal Convention,* (Melbourne), 3 March 1898 at 1797.

**43** *Official Record of the Debates of the Australasian Federal Convention,* (Melbourne), 3 March 1898 at 1788.

34 McHUGH J. Is a child born in Australia an alien simply because the child's parents are aliens? That is the principal issue in these proceedings, brought on behalf of Ms Tania Singh, who was born in Australia but whose parents are "aliens" within the meaning of s 51(xix) of the Constitution. For her, the answer to this question is of momentous importance. If it is answered in the affirmative, the Minister for Immigration and Multicultural and Indigenous Affairs may proceed with her intention to deport her. Further, Ms Singh would have no legal or constitutional right to enter Australia in the future. Entry would be subject to the discretion of the Minister.

35 In my opinion, a person born in Australia is not, never has been and, without a constitutional amendment, never could be an alien unless that person falls within one of three categories. None of those categories applies to Ms Singh. Over 200 years ago, Sir William Blackstone said[44] that "[t]he children of aliens, born here in England, are, generally speaking, natural-born subjects, and entitled to all the privileges of such." Eight years after the colonies of Australia federated, Griffith CJ, Barton, O'Connor, Isaacs and Higgins JJ made the same comment about a person born in this country in a case where the father was a Chinese alien[45]. Ms Singh is a natural born "subject of the Queen" of Australia for the purpose of s 117 of the Constitution and, unlike an alien, entitled to its protection. If she is a natural born subject of the Queen of Australia, I do not see how anyone could find that she is an alien for the purpose of the Constitution. Furthermore, subject to presently irrelevant exceptions, birth in Australia made her a member of the Australian community and one of "the people of the Commonwealth" to whom the Constitution refers. The Minister has no power to deport Ms Singh. She is not an alien. The Minister has no power to act as if Ms Singh were not a member of the Australian community.

36 Section 51(xix) of the Constitution empowers the Parliament of the Commonwealth to make laws with respect to "aliens". By necessary implication or assumption, that grant of power recognises that an alien is a person who can be identified by reference to some criterion or criteria that exists or exist independently of any law of the Parliament or indeed of the Constitution itself. It is a corollary of that implication or assumption that the Parliament of the Commonwealth cannot itself define who is an alien. Thus, s 51(xix) implies or assumes that an alien can be defined – but not by the Parliament.

37 It must follow, then, that that paragraph also implies or assumes that, when the Constitution was enacted in 1900, the term had a meaning that would

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**44** Blackstone, *Commentaries on the Laws of England*, (1765), bk 1, c 10 at 361-362.

**45** *Potter v Minahan* (1908) 7 CLR 277 at 287, 289 per Griffith CJ, 294 per Barton J, 304-305 per O'Connor J, 308 per Isaacs J, 320 per Higgins J.

be understood objectively by the Australian people. The persons who fall within or outside that meaning may change over the years. Australia's evolving independence from the United Kingdom, its steps towards becoming a sovereign nation, the acceptance of the divisibility of the Crown and the evolution of the Crown from an Imperial to a national office have led to changes in the denotation of the term "aliens". Hence, a person born in the United Kingdom who is resident in Australia may now be regarded as an alien in Australia for constitutional purposes even though such a person would not have been regarded as an alien in 1900. It may even be that experience of political or social developments has given or may give insights that lead later generations of Australians to define the constitutional term "aliens" itself in a way that does not fully accord with its perceived meaning in 1900. But if the persons who fall within the denotation of the term change or the connotation of the term changes, it will be because of events that occur independently of laws made by the Parliament. To deny that proposition is to deny the binding effect – indeed the legitimacy – of the Constitution itself.

38 In the Australian colonies in 1900, the essential meaning – the connotation – of the term "alien" was a person who did not owe permanent allegiance to the Crown. And, subject to three exceptions, in 1900 *and now*, birth in Australia, irrespective of parentage, gave and still gives rise to an obligation of permanent allegiance to the sovereign of Australia. Even if it is permissible in 2004 to give the constitutional term "aliens" a *meaning* different from that which it had in 1900 – itself a contestable proposition – the Commonwealth has referred to no circumstance external to the Constitution which demonstrates that the essential meaning of the term in 1900 no longer applies. Indeed, even under a "progressivist" theory of constitutional interpretation, it is hard to conceive of the essential meaning of a constitutional term being entirely displaced and another meaning substituted for it[46].

39 Under the law of India at the time of her birth, Ms Singh acquired Indian citizenship at birth because her parents are Indian citizens. However, it is of no relevance in determining the meaning of the constitutional term "aliens" that, under the law of another country, a person, born in this country, may be a citizen of, and owe obligations of allegiance to the sovereign of, the foreign country. Equally irrelevant to determining the meaning of "aliens" in s 51(xix) are concepts of nationality and citizenship. Discussion of those concepts in this

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**46** In 1900, for example, "marriage" in s 51(xxi) of the Constitution meant a voluntary union for life between a man and a woman to the exclusion of others. By reason of changing circumstances, it may now extend to a voluntary and permanent union between two people. But irrespective of changing circumstances, it is impossible to accept that a voluntary union for life between a man and a woman to the exclusion of others could be outside the term "marriage".

constitutional context merely invites error. What was, and is now, central to the meaning of the constitutional term "aliens" is the existence of an obligation of permanent allegiance to *our* sovereign – once the Queen of the United Kingdom but now, according to the doctrine of this Court, the Queen of Australia. Because the Commonwealth contends that Ms Singh is an alien – and therefore within the operation of s 51(xix) – it must show that upon her birth, she came under no obligation of permanent allegiance to the Queen of Australia. Not only has the Commonwealth failed to show that that is the case, it has not attempted to, nor could it, do so.

40 The unanswerable logic of Ms Singh's claim that she is not an alien can be seen in the following polysyllogism[47]:

> An alien is a person who does not owe permanent allegiance to the Queen of Australia.
>
> A person who is born in Australia owes an obligation of permanent allegiance to the Queen of Australia.
>
> Therefore, a person born in Australia is not an alien.
>
> Ms Singh was born in Australia.
>
> Therefore, Ms Singh is not an alien.

41 The Commonwealth cannot defend its claim that Ms Singh is an alien unless it can successfully attack the validity of the premise in the prosyllogism[48]. The Commonwealth cannot succeed without demonstrating at least one of two propositions: first, that it is erroneous to say that an alien is a person who does not owe permanent allegiance to the Queen of Australia; and, second, that it is erroneous to say that a person who is born in Australia owes an obligation of permanent allegiance to the Queen of Australia until it is voluntarily abandoned.

Statement of the case

42 Tania Singh was born in Mildura, Victoria, on 5 February 1998 and has remained in Australia ever since. Ms Singh's parents are Indian citizens. In April 1997, they arrived in Australia with Ms Singh's brother. In July 1997,

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**47** A polysyllogism consists of two or more syllogisms in which the conclusion of one is the premise of the next.

**48** A prosyllogism is the syllogism that leads to the conclusion that forms the premise of the succeeding syllogism which is called an episyllogism.

Ms Singh's father lodged an application for a protection visa. The Minister refused the application.

43 In July 2003, Ms Singh, by her next friend, filed a writ of summons in this Court seeking, among other relief, a declaration that she had acquired Australian citizenship by birth. She also sought declarations that s 10(2) of the *Australian Citizenship Act* 1948 (Cth) ("the Citizenship Act") was invalid and that s 198 of the *Migration Act* 1958 (Cth) ("the Migration Act") was incapable of being validly applied to her. Section 198 provides for the removal from Australia of "unlawful non-citizens", that is, non-citizens who do not hold a visa that is in effect. If s 10(2) of the Citizenship Act validly applies to Ms Singh, she is not an Australian citizen because neither of her parents is an Australian citizen or a permanent resident of Australia.

44 Subsequently, Kirby J stated a Case for the consideration of the Full Court of this Court. The first question in the Case is: "Is [Ms Singh] an alien within the meaning of s 51(xix) of the Constitution?" The second question is: "If the answer to 1 is 'No', is s 198 of the [Migration Act] capable of valid application to [Ms Singh]?" The third question is: "By whom should the costs of the case stated to the Full Court of this Honorable Court be borne?"

The relevant constitutional and legislative provisions

45 The Constitution confers no specific power on the Federal Parliament to make laws with respect to citizenship. This omission did not occur because the delegates at the Constitutional Conventions failed to consider the issue. On the contrary, they debated whether the Parliament of the Commonwealth should have the power to define citizenship. At the Melbourne Convention in 1898, Dr John Quick proposed that the Constitution should confer power on the Parliament to make laws with respect to citizenship[49]. But the delegates rejected the proposal. Mr Richard O'Connor QC said[50]:

> "It appears to me quite clear, as regards the right of any person *from the outside* to become a member of the Commonwealth, that the power to regulate immigration and emigration, and the power to deal with aliens, give the right to define who shall be citizens, as coming from the outside world." (emphasis added)

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**49** *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 2 March 1898 at 1752.

**50** *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 2 March 1898 at 1754.

46 Mr O'Connor's reference to immigration and emigration and aliens was a reference to what became ss 51(xix) and (xxvii) of the Constitution. Those paragraphs provide:

> "51. The Parliament shall ... have power to make laws ... with respect to:
>
> ...
>
> (xix) naturalization and aliens;
>
> ...
>
> (xxvii) immigration and emigration".

47 Acting under the naturalisation and aliens power and, according to the argument of the defendants, an implied nationhood power, the Federal Parliament has enacted the Citizenship Act. Section 10 of that Act declares:

> "(1) Subject to this section, a person born in Australia after the commencement of this Act shall be an Australian citizen.
>
> (2) Subject to subsection (3), a person born in Australia after the commencement of the *Australian Citizenship Amendment Act* 1986 [(Cth)] shall be an Australian citizen by virtue of that birth if and only if:
>
> (a) a parent of the person was, at the time of the person's birth, an Australian citizen or a permanent resident; or
>
> (b) the person has, throughout the period of 10 years commencing on the day on which the person was born, been ordinarily resident in Australia.
>
> (3) Subject to subsection (5), a person shall not be an Australian citizen by virtue of this section if, at the time of the person's birth, a parent of the person was an enemy alien and the birth occurred in a place then under occupation by the enemy.
>
> (5) Subsection (3) does not apply in relation to a person if, at the time of the person's birth, a parent of the person:
>
> (a) was an Australian citizen or a permanent resident; and
>
> (b) was not an enemy alien.
>
> (6) A reference in this section to a permanent resident does not include a reference to a person who is, for the purposes of the *Migration Act* 1958, an exempt non-citizen."

48 Under the Migration Act, a person in Australia who is not a citizen and who does not hold a visa that is in effect is an "unlawful non-citizen"[51]. Under s 198 of that Act, an officer must remove such a person "as soon as reasonably practicable". If Ms Singh is an unlawful non-citizen within the meaning of the Migration Act, the Minister and her officers have a duty to remove her from Australia. Whether they can do so depends on whether the Parliament of the Commonwealth has the constitutional power to declare that a person, born in this country, is an unlawful non-citizen and to order the removal from Australia of such a person. In my opinion, neither the aliens power under s 51(xix) of the Constitution nor any other legislative power of the Commonwealth permits either step to be taken.

49 The defendants contend that the Parliament has a wide power to make laws "with respect to" "aliens". That contention is correct. But its limits are found in the constitutional term "aliens". A corollary of the implication that the power to make laws with respect to "aliens" necessarily assumes that the status of alienage can be identified objectively, that is, without reference to any federal law or to the Constitution, is that the Federal Parliament cannot itself define who is an alien[52]. Section 51(xix) therefore assumes that in 1900 the term "aliens" had an objective meaning that was understood by the Australian people. In that respect, the constitutional term "aliens" is like the constitutional term "marriage". It is for this Court and other courts exercising the judicial power of the Commonwealth to define the term. To hold that the Parliament of the Commonwealth can treat a child, born in Australia, as an alien can be justified only by resort to the erroneous view that somehow in some way Parliament has power to define the constitutional term "aliens". Acting under the aliens power, the Parliament can say that persons who are aliens are not aliens for the purpose of federal law. But it cannot say that they are not aliens for the purpose of the Constitution any more than it can say that people who are not aliens are aliens. Further, Parliament can say that aliens are to have the same rights and privileges as natural born Australians. Indeed, it can make any law "with respect to" "aliens". It is for the courts exercising the judicial power of the Commonwealth, however, to determine who is an alien for the purpose of the Constitution. The fallacy that runs throughout the submissions of the Commonwealth in this case is the notion that the Parliament can define the term "aliens" by picking and choosing among various jurisprudential theories concerning the indicia of nationality and alienage.

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**51** Sections 13 and 14.

**52** cf Dixon J in *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29 at 81, speaking of the trade and commerce power in s 51(i) of the Constitution: "The subject of the power is, therefore, treated as a recognized phenomenon of national life existing independently of the Commonwealth."

50 What, then, is the meaning of the term "aliens" in s 51(xix) and how is it to be ascertained?

Constitutional interpretation

*General issues pertaining to constitutional interpretation*

51 There is no consensus as to any single approach to the interpretation of the Constitution. Commentators on the constitutional jurisprudence of this Court claim that all the methodologies that it has used are subject to criticism[53]. Current High Court jurisprudence on constitutional interpretation favours some form of textualism[54]. The basic premise of a textualist approach is that the text has ultimate primacy, although history and extrinsic materials may be relevant to explain the meaning of the text.

52 Because the Constitution is contained in a statute of the Imperial Parliament and the people of the Commonwealth have agreed to be governed under the Constitution, it seems obvious that the best guides to its interpretation are the general rules of statutory interpretation[55]. The fundamental rule of statutory interpretation is that the meaning of an enactment is the meaning that its makers intended. Intention in the context of statutory interpretation is "an obvious fiction"[56]. But it is "a useful judicial construct because the judge is required to make the choices that best express the statutory text's meaning."[57] In

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**53** See, eg, Selway, "Methodologies of Constitutional Interpretation in the High Court of Australia", (2003) 14 *Public Law Review* 234 at 250.

**54** Selway, "Methodologies of Constitutional Interpretation in the High Court of Australia", (2003) 14 *Public Law Review* 234 at 239; Kenny, "The High Court on Constitutional Law: The 2002 Term", (2003) 26 *University of New South Wales Law Journal* 210 at 214, 222.

**55** *Tasmania v The Commonwealth and Victoria* (1904) 1 CLR 329 at 358-360 per O'Connor J; *McGinty v Western Australia* (1996) 186 CLR 140 at 230 per McHugh J; *Eastman v The Queen* (2000) 203 CLR 1 at 41-42 [134] per McHugh J; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 426 [106] per McHugh J.

**56** Popkin, *Statutes in Court: The History and Theory of Statutory Interpretation*, (1999) at 211.

**57** Popkin, *Statutes in Court: The History and Theory of Statutory Interpretation*, (1999) at 211.

the case of the Constitution, the intention is that of those who framed it[58]. Their intention is determined objectively. Their subjective beliefs and assumptions as to its meaning are irrelevant[59].

53 In applying the rules of statutory construction to the Constitution, Justices of this Court have always taken into account that it is no ordinary statute[60]. They have recognised that it is an instrument difficult to amend, designed for the ages and intended as the blueprint for governing a federation consisting of a central and six regional governments as well as a number of territories. The makers of the Constitution and the people of the Australian colonies who approved the Constitution laid down a blueprint for the government of the nation for the indefinite future, subject to the power of the people to consent to its amendment under s 128 of the Constitution. The Constitution must be interpreted with that fundamental premise in mind. Because that is so, its provisions must not be interpreted pedantically or narrowly[61]. They must be interpreted flexibly and purposively and, subject to the text and structure, in the manner best fitted to the contemporary needs of a federal system[62]. Many provisions of the Constitution are framed in terms wide enough to allow this to be done. Dixon J recognised

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**58** *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 549 [35], 551 [40] per McHugh J; *Eastman* (2000) 203 CLR 1 at 41-44 [134]-[140] per McHugh J; *Re Patterson* (2001) 207 CLR 391 at 426 [107] per McHugh J.

**59** *Re Wakim* (1999) 198 CLR 511 at 549 [35], 550 [38], 551 [40] per McHugh J; *Eastman* (2000) 203 CLR 1 at 45-47 [145]-[147] per McHugh J.

**60** *Attorney-General (NSW) v Brewery Employes Union of NSW* (1908) 6 CLR 469 at 611-612 per Higgins J; *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 367-368 per O'Connor J; *McGinty* (1996) 186 CLR 140 at 230-231 per McHugh J.

**61** *Australian National Airways Pty Ltd* (1945) 71 CLR 29 at 85 per Dixon J.

**62** *Re Patterson* (2001) 207 CLR 391 at 426 [109] per McHugh J, citing *Jumbunna Coal Mine NL* (1908) 6 CLR 309 at 367-368 per O'Connor J; *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225-226; *R v Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 297 at 314; *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 127-128 per Mason J; *McGinty* (1996) 186 CLR 140 at 230-231 per McHugh J. See also *The Commonwealth v Kreglinger & Fernau Ltd and Bardsley* (1926) 37 CLR 393 at 413 per Isaacs J; *Abebe v The Commonwealth* (1999) 197 CLR 510 at 531 [41] per Gleeson CJ and McHugh J, 581 [203] per Kirby J; *Re Wakim* (1999) 198 CLR 511 at 550 [39] per McHugh J; *Eastman* (2000) 203 CLR 1 at 42-43 [135] per McHugh J.

this in *Australian National Airways Pty Ltd v The Commonwealth* when he said that[63]:

> "[I]t is a Constitution we are interpreting, an instrument of government meant to endure and conferring powers expressed in general propositions wide enough to be capable of flexible application to changing circumstances."

At an earlier stage in the history of the federation, Isaacs J also recognised this point in *The Commonwealth v Kreglinger & Fernau Ltd and Bardsley*, when he said[64] that the Constitution was "made, not for a single occasion, but for the continued life and progress of the community". So far as the text and structure allows, the Constitution should be interpreted so as to achieve a rational and efficient system of government. Although considerations of practicality are not and cannot be determinative[65], they may be taken into account in some circumstances[66]. As Cardozo J once said[67], while consequences cannot alter the meaning of legislative provisions, they may help to fix their meaning.

54 In interpreting the Constitution, historical and other materials often throw light on its meaning. They can be considered, for example, in order to identify the mischief to which the words of the Constitution were directed, to identify the purpose of the relevant constitutional concept or to determine the specialised meaning of constitutional terms[68]. Latham CJ once pointed out that the Commonwealth was not born into a vacuum[69]. Behind its making was a body of

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**63** (1945) 71 CLR 29 at 81.

**64** (1926) 37 CLR 393 at 413.

**65** *Re Wakim* (1999) 198 CLR 511 at 540 [2] per Gleeson CJ, 554 [49] per McHugh J, 569 [94], 579-580 [121], 581-582 [126] per Gummow and Hayne JJ.

**66** *Abebe* (1999) 197 CLR 510 at 531-532 [41]-[44] per Gleeson CJ and McHugh J; *Sue v Hill* (1999) 199 CLR 462 at 489 [56] per Gleeson CJ, Gummow and Hayne JJ; *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 332 [9] per Gleeson CJ, McHugh and Callinan JJ.

**67** *In re Rouss* 116 NE 782 at 785 (1917).

**68** *Cheng v The Queen* (2000) 203 CLR 248 at 292 [129], 294-295 [140]-[142] per McHugh J; see also *Cole v Whitfield* (1988) 165 CLR 360 in relation to the meaning of the word "free" and *Ha v New South Wales* (1997) 189 CLR 465 in relation to the meaning of the word "excise".

**69** *In re Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508 at 521.

constitutional conventions and common law rules and principles that governed the relationship of the Crown and the people of the Australian colonies and gave content to the Constitution's language. In addition, many constitutional words and phrases are legal terms of art with a rich pre-federation history of which the framers would have been aware. Further, as I pointed out in *Theophanous v Herald & Weekly Times Ltd*[70]:

> "The true meaning of a legal text almost always depends on a background of concepts, principles, practices, facts, rights and duties which the authors of the text took for granted or understood, without conscious advertence, by reason of their common language or culture."

55 A most striking example of background throwing light on the meaning of a constitutional provision is the decision in *Cole v Whitfield*[71]. In *Cole*, the Court used history to read down the words in s 92 of the Constitution that "trade ... among the States ... shall be absolutely free" to cover cases only where interstate trade was burdened by laws that were discriminatory in a protectionist sense. In a line of cases dealing with "trial ... by jury" in s 80 of the Constitution[72], the Court used history to look for the "essential" characteristics of a jury as they were understood at common law in 1900. The Court identified these essential features by considering the historical evolution of juries in the United Kingdom and Australia before and around 1900 and the purpose of the relevant section of the Constitution. The Court then considered these "essential" aspects in their historical context.

56 When those who framed the Constitution included the term "aliens", they did so against a background of British and colonial history that, for at least six centuries, had regarded an alien as a person who did not owe permanent allegiance to the Crown. The makers of our Constitution enacted s 51(xix) knowing that the principle that a person who did not owe permanent allegiance to the Crown was an alien was an entrenched rule of the common law, a rule as central to the unwritten constitution of the United Kingdom and its colonies as could be found. They also knew that, upon birth in any part of the Crown's dominions, the new born child immediately owed permanent allegiance to the Crown and was entitled to claim a reciprocal duty of protection on the part of the Crown, unless the child fell into one of three categories to which I shall later refer. In 1900, no-one in Australia who knew anything about the subject would

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**70** (1994) 182 CLR 104 at 196.

**71** (1988) 165 CLR 360.

**72** See, eg, *Cheatle v The Queen* (1993) 177 CLR 541; *Brownlee v The Queen* (2001) 207 CLR 278.

think for a moment that a person, born in any part of the Crown's dominions, was an alien unless the child fell into one of the three categories.

57 It is a mistake to think that in 1900 an alien was simply a person who was not a British subject. In the then structure of the Empire, a person who was not a British subject was an alien. Nevertheless, "non-British subject" was not the "essential meaning" of the term "alien" in 1900. If it were, the term would have that meaning until amended under s 128 of the Constitution. Most Australians would now be aliens. It is more accurate to say that in 1900 an alien was a person who was not a "subject of the Queen"[73]. The essence of the term "alien" was the lack of permanent allegiance to the Crown. While the Crown remained indivisible, a British subject was outside the denotation of the term "alien". However, when the Crown divided, so to speak, the denotation of the term "subject of the Queen" changed. As a result, British subjects no longer owed permanent allegiance to the Queen of Australia and became "aliens" in Australia.

58 Against this background, the inevitable conclusion is that in s 51(xix) of the Constitution the term "aliens" means persons who do not owe permanent allegiance to the Queen of Australia. It is only a half-truth to say that an alien is a person who owes permanent or even temporary allegiance to another country. Indeed, in the case of a stateless person, it is not even a half-truth. The meaning of "aliens" in the Constitution does not turn on whether under the law of another country the person in question owes a duty of allegiance to that country. It turns on whether that person owes a duty of permanent allegiance to the Queen of Australia. The history of the concepts of aliens and alienage in England and Australia shows why this is so. To that history, I now turn.

Historical development of the concepts of "aliens" and "alienage"

59 Historically, the term "alien" has denoted the legal status of a person in relation to the sovereign of a body politic. As a matter of etymology, the English word "alien" derives from the Latin *alienus* through Old French. It means "belonging to another person or place". In Anglo-Australian law, the concept of "alien" is inextricably linked with the concept of the "subject" under English common law.

*Origins of "alienage" in English common law*

60 English common law traditionally distinguished between "natural born subjects", "alien subjects" and "aliens". Under the English common law, all persons *within* the dominions of the monarch were either "natural born subjects" or "alien subjects". A subject was literally a person subjected to the dominion or

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**73** cf Constitution, s 117.

laws of the monarch. An alien was a person *outside* the dominions of the monarch who was not a "natural born subject".

61 The status of subjects of the Crown and aliens derives from English medieval common law and the feudal system[74]. Feudalism was based on concepts of territory and person. Under the feudal system, all rights and duties were "bound up with and dependent upon the holding of land, and there [was] a personal tie of fealty between the tenant [or vassal] and his lord."[75] Fundamental to the concept of the "subject" in the common law was the English feudal notion of allegiance. Ideas of territory and person were behind the doctrine of allegiance. Sir William Blackstone described the twin concepts underlying the doctrine of allegiance as "land" or "territory" and personal "fealty"[76]. During the medieval period, all persons within the King's dominions owed a duty of allegiance to the King. Fealty was the feudal obligation of fidelity and obedience that was owed by a vassal to his or her lord together with the reciprocal duty of protection and guardianship which the lord owed to the vassal[77]. As Sir William Holdsworth noted, the doctrine of allegiance "has its roots in the feudal idea of a personal duty of fealty to the lord from whom land is held"[78].

62 In his *Commentaries on the Laws of England*, Sir William Blackstone described allegiance as "the tie, or *ligamen*, which binds the subject to the king, in return for that protection which the king affords the subject."[79]

63 The common law recognised the sovereign as the supreme feudal lord of the people as well as the land. Subjects owed the King the same duties of fidelity and obedience as vassals owed to their lord, for the King was their sovereign lord. "Allegiance" referred to the obligations owed by subjects to the King; "fealty" referred to the obligations owed by vassals to their lord. (The ideas of territory and person were modified in order to apply to the relationship between the King and his subjects, because this relationship was not based on tenure.)

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**74** Blackstone, *Commentaries on the Laws of England*, (1765), bk 1, c 10 at 354.

**75** Holdsworth, *A History of English Law*, 3rd ed (1944), vol 9 at 73.

**76** Blackstone, *Commentaries on the Laws of England*, (1765), bk 1, c 10 at 354-355.

**77** Salmond, "Citizenship and Allegiance", (1902) 18 *Law Quarterly Review* 49 at 50; Holdsworth, *A History of English Law*, 3rd ed (1944), vol 9 at 72.

**78** Holdsworth, *A History of English Law*, 3rd ed (1944), vol 9 at 72.

**79** Blackstone, *Commentaries on the Laws of England*, (1765), bk 1, c 10 at 354.

Subjects were *ad fidem regis* ("in the faith of the king")[80]. In early feudal times the territorial element was the more important element of allegiance.

64 English common law distinguished between natural born subjects and alien subjects according to the nature of the allegiance owed by each. Sir William Blackstone observed that the principle of allegiance was the distinguishing feature between natural born subjects, alien subjects and aliens. He said[81]:

> "Natural-born subjects are such as are born within the dominions of the crown of England, that is, within the ligeance, or as it is generally called, the allegiance of the king; and aliens, such as are born out of it."

Natural born subjects owed a permanent and personal allegiance to the sovereign, while alien subjects owed a local, temporary allegiance[82]. During the medieval period, the allegiance of a natural born subject was regarded as personal, permanent and absolute. In other words, "the tie of allegiance [was] indissoluble, and ... the status of the subject [was] permanent."[83] In *Storie's Case*[84] and later in *Calvin's Case*[85], the common law courts held that the status of a natural born subject was indelible.

65 Sir William Blackstone also distinguished between the different types of allegiance owed by natural born subjects and alien subjects, "the one natural, the other local; the former being also perpetual, the latter temporary."[86] "Natural allegiance", he declared, "is such as is due from all men born within the king's dominions immediately upon their birth", because the sovereign's reciprocal obligations of protection arose immediately upon such persons' birth and during their infancy, when they were "incapable of protecting themselves"[87]. In addition, natural allegiance could not be divested without the concurrence of the

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**80** Salmond, "Citizenship and Allegiance", (1902) 18 *Law Quarterly Review* 49 at 50.

**81** Blackstone, *Commentaries on the Laws of England*, (1765), bk 1, c 10 at 354.

**82** Salmond, "Citizenship and Allegiance", (1902) 18 *Law Quarterly Review* 49 at 50.

**83** Holdsworth, *A History of English Law*, 3rd ed (1944), vol 9 at 78.

**84** (1571) 3 Dyer 300b [73 ER 675].

**85** (1608) 7 Co Rep 1a [77 ER 377].

**86** Blackstone, *Commentaries on the Laws of England*, (1765), bk 1, c 10 at 357.

**87** Blackstone, *Commentaries on the Laws of England*, (1765), bk 1, c 10 at 357.

sovereign to whom such allegiance was due[88]. Local allegiance owed by alien subjects, on the other hand[89]:

> "is such as is due from an alien, or stranger born, for so long time as he continues within the king's dominion and protection: and it ceases, the instant such stranger transfers himself from this kingdom to another."

66 By the end of the 13th century, the settled principle of English law was that all persons born on English soil, regardless of parentage, owed allegiance to and were therefore subjects of the King[90]. The issue of the status of persons born outside the territory belonging to the King was raised in the 17th year of the reign of Edward III in 1343. The question was laid before the Lords as to whether the King's sons born outside the realm could inherit. The Lords replied unanimously that there was no doubt that the King's sons could inherit, wherever born, but that with regard to children of other persons there were great difficulties in deciding the question[91]. The matter was then brought jointly before the Lords and Commons, who concurred in the opinion previously given by the Lords[92].

67 Statute 25 Edw III stat 1[93] was subsequently passed in 1351 to the effect that:

> "all Children Inheritors ... born without the Ligeance of the King, whose Fathers and Mothers at the Time of their Birth be and shall be at the Faith and Ligeance of the King of England, shall have and enjoy the same Benefits and Advantages, to have and bear the Inheritance within the same Ligeance, as the other Inheritors aforesaid in Time to come".

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**88** Blackstone, *Commentaries on the Laws of England*, (1765), bk 1, c 10 at 358.

**89** Blackstone, *Commentaries on the Laws of England*, (1765), bk 1, c 10 at 358.

**90** Holdsworth, *A History of English Law*, 3rd ed (1944), vol 9 at 75, citing Pollock and Maitland, *The History of English Law Before the Time of Edward I*, (1895), vol 1 at 446; *Rotuli Parliamentorum*, vol 1 at 44.

**91** Great Britain, *Report of the Royal Commissioners for Inquiring into the Laws of Naturalization and Allegiance*, (1869) [4109], Appendix 1 at 6.

**92** Great Britain, *Report of the Royal Commissioners for Inquiring into the Laws of Naturalization and Allegiance*, (1869) [4109], Appendix 1 at 6, citing *Rotuli Parliamentorum*, vol 2 at 139.

**93** This statute was previously given as 25 Edw III stat 2.

68 In 1368, the Parliament declared that persons born within any territory belonging to the King were natural born subjects[94]. The concept of the "subject of the King" was also extended to include the children of English parents born in foreign countries, as well as any child born within the King's territories[95].

69 Viewed together, the decision of the Lords and Commons in 1343, the 1351 statute and the 1368 declaration by Parliament effectively settled the rules as to the acquisition of the status of subject by birth. Birth within the sovereign's territories while those territories were under the sovereign's control was the common law test for determining whether a person was a natural born subject[96]. The status could also be acquired by statute. A person born within the sovereign's territories was regarded as a "natural born" subject; a person who was not a "natural born" subject could become a "natural" subject by statute. Accordingly, an alien subject was a person within the sovereign's dominions who was neither a natural born subject nor a person who had become a natural subject by statute. And an alien was a person *who was not within the sovereign's dominions* who was neither a natural born subject nor a person who had become a natural subject by statute.

*Restatement of the law in* Calvin's Case

70 By the end of the 16th century, it was accepted that under the common law a person's formal legal status was determined by the nature of the allegiance that person owed to the sovereign and by the place of his or her birth. In 1608, the judges who heard *Calvin's Case* in the Exchequer Chamber restated and explained the common law rules[97]. The judges considered the problem of the status of the "postnati", that is, persons born after the accession of James VI of Scotland to the English throne as James I of England. The case turned on whether a person born in Scotland after the accession of James I to the English throne in 1603 was a natural born subject of James I who enjoyed the rights accruing to natural born subjects, including the right to hold land in England. The defendants had disseised Calvin of lands that Calvin held in Haggerston and Bishopsgate, claiming that he was an alien born in Scotland and as an alien was not entitled to hold land in England.

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**94** Statute 42 Edw III c 10. At the time the King had substantial continental possessions.

**95** Holdsworth, *A History of English Law*, 3rd ed (1944), vol 9 at 75-76.

**96** Holdsworth, *A History of English Law*, 3rd ed (1944), vol 9 at 72; Pryles, *Australian Citizenship Law*, (1981) at 14.

**97** (1608) 7 Co Rep 1a [77 ER 377].

71 Coke CJ and all the judges, except Walmesley and Foster JJ, held that persons born in Scotland after the accession of James I to the English throne were natural born subjects of James I. This conclusion flowed from the territorial and the personal view of the tie of allegiance. Coke CJ applied the common law rule that a person cannot be a natural born subject unless the place of his or her birth, at the time of his or her birth, was within the King's dominions. He said[98]:

> "There be regularly (unless it be in special cases) three incidents to a subject born. 1. That the parents be under the actual obedience of the King. 2. That the place of his birth be within the King's dominion. And, 3. The time of his birth is chiefly to be considered; for he cannot be a subject born of one kingdom that was born under the ligeance of a King of another kingdom, albeit afterwards one kingdom descend to the King of the other."

72 Coke CJ explained that the requirement of "actual obedience" refers to birth within the sovereign's dominions at the time when the sovereign is in "actual possession" of that territory[99]. He cited France as an example: although the King of England had absolute right to the kingdom of France, persons born in France were not natural born subjects of the King of England if the King was not in actual possession of France at the time of their birth. The requirement that the place of birth be within the King's dominions refers to the place of birth within the sovereign's territories being under the actual control (dominion) of the sovereign at the time of birth. Coke CJ noted that "any place within the King's dominions without obedience can never produce a natural subject."[100] Thus, if any part of the sovereign's dominions ceased to be within the sovereign's possession – for example, if a castle was overrun by enemy aliens – any children born within that territory during the time when that territory was outside the sovereign's possession was not a natural born subject. Coke CJ noted that the time of birth "is of the essence of a subject born" and that a person "cannot be a subject to the King of England, unless at the time of his birth he was under the ligeance and obedience of the King."[101]

73 *Calvin's Case* also recognised two exceptions to the common law rule that a person acquired the status of a natural born subject at birth, if the place of the person's birth, at the time of the person's birth, was under the actual dominion of

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**98** *Calvin's Case* (1608) 7 Co Rep 1a at 18a [77 ER 377 at 399].

**99** *Calvin's Case* (1608) 7 Co Rep 1a at 18a [77 ER 377 at 399].

**100** *Calvin's Case* (1608) 7 Co Rep 1a at 18a [77 ER 377 at 399].

**101** *Calvin's Case* (1608) 7 Co Rep 1a at 18b [77 ER 377 at 399].

the sovereign. The first exception was that the children of the King's ambassadors and their English wives were recognised as natural born subjects, notwithstanding that they were born outside the sovereign's dominions[102]. The second exception was that the children of enemy aliens born within the sovereign's territory were not regarded as natural born subjects, if at the time of birth the territory in which the child was born was not under the King's ligeance or obedience[103].

74 *Calvin's Case* also emphasised that allegiance was a personal bond between the King and the subject. The bond was not between the King in his capacity as a "corporation sole" because this concept existed only in English law. The bond was between the subject and the natural person of the King. All persons within the King's dominions recognised the natural person of the King, regardless of whether their law (eg, Scottish or Welsh law) recognised the political entity of the King[104].

75 The effects of the decision in *Calvin's Case* were significant. The first and most important effect was that the case laid down a general common law rule for the acquisition of the status of a natural born subject, a rule that applied to all persons born within the King's dominions. Thus, the decision secured a uniformity of status for natural born subjects. The second effect of the decision was that it laid down definite rules for the *acquisition* of the status of a natural born subject. In this context, Sir William Blackstone later observed[105] that "[t]he children of aliens, born here in England, are, generally speaking, natural-born subjects, and entitled to all the privileges of such." The third effect of the decision was that it accepted that the status of the subject was "indelible" and that, if the King lost any of his territories, persons born in those territories while those territories were within the King's possession retained their status as natural born subjects of the King[106]. Sir Matthew Hale accepted this third principle[107],

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**102** *Calvin's Case* (1608) 7 Co Rep 1a at 18a per Coke CJ [77 ER 377 at 399].

**103** *Calvin's Case* (1608) 7 Co Rep 1a at 18a-18b per Coke CJ [77 ER 377 at 399].

**104** *Calvin's Case* (1608) 7 Co Rep 1a at 10a-10b per Coke CJ [77 ER 377 at 388-389]; see also Holdsworth, *A History of English Law*, 3rd ed (1944), vol 9 at 80-82.

**105** Blackstone, *Commentaries on the Laws of England*, (1765), bk 1, c 10 at 361-362.

**106** *Calvin's Case* (1608) 7 Co Rep 1a at 27b per Coke CJ [77 ER 377 at 409]. See also Holdsworth, *A History of English Law*, 3rd ed (1944), vol 9 at 84-85.

**107** Holdsworth, *A History of English Law*, 3rd ed (1944), vol 9 at 86, citing Hale, *The History of the Pleas of the Crown*, (1736), vol 1 at 68.

and it was applied in *Aeneas Macdonald's Case*[108] in 1747. The court of the King's Bench in that case stated[109]:

> "It is not in the power of any private subject to shake off his allegiance, and to transfer it to a foreign prince. Nor is it in the power of any foreign prince … to dissolve the bond of allegiance between that subject and the crown."

The common law rule that the status of the subject was "indelible" persisted in the United Kingdom, albeit with a number of exceptions[110], until altered by the *Naturalization Act* 1870 (UK).

*Effect of historical and political developments since* Calvin's Case

76 Political changes in the 18th century gave rise to modifications in the common law doctrine of alienage. After the unification of the English and Scottish thrones, for example, the notion of a natural born *British* subject gained currency in place of the term "natural born subject". The former term appeared in Art IV of the *Union with Scotland Act* 1706 (6 Anne c 11), which ensured trade and navigation rights to "all the subjects of the United Kingdom of Great Britain".

77 A significant change also occurred with the loss of the United States colonies. That loss gave rise to a change in the doctrine of the indelibility of the subject. In *Doe d Thomas v Acklam*[111], the King's Bench held that the rule of the indelibility of the subject had no application in circumstances where a colony seceded, as had occurred with the United States colonies. *Doe d Thomas v Acklam* concerned an action in ejectment brought by an heiress. The woman was born in the United States after those colonies became independent. The woman's father was born in the United States before independence and continued to reside in the United States after independence. The Court dismissed the woman's action, holding that the father was an alien at the time of the woman's birth[112] and

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**108** (1747) 18 S T 858.

**109** *Aeneas Macdonald's Case* (1747) 18 S T 858 at 859.

**110** See, eg, *Doe d Thomas v Acklam* (1824) 2 B and C 779 [107 ER 572]; *Doe d Auchmuty v Mulcaster* (1826) 5 B and C 771 [108 ER 287].

**111** (1824) 2 B and C 779 [107 ER 572]. See also Holdsworth, *A History of English Law*, 3rd ed (1944), vol 9 at 87.

**112** Abbott CJ, delivering the judgment of the Court, held that parents who continued to reside in the United States ceased to be natural born subjects on 3 September 1783, when Great Britain recognised the independence of the United States colonies

(Footnote continues on next page)

that, consequently, the woman was also an alien. The Court regarded the election of the parents to continue residing in the United States as an election to become citizens of the United States and to shed allegiance to the Crown of Great Britain. Under the English law of the time, aliens could not own property in England. Abbott CJ said that the woman's father[113]:

> "had ceased to be a subject of the Crown of Great Britain, and became an alien thereto, before the birth of his daughter, and, consequently, that she is also an alien, and incapable of inheriting land in England".

The decision of the Court turned on the interpretation of the treaty of peace of 3 September 1783 between Great Britain and the United States. If there had been no treaty, those persons born in the United States before independence would have continued to be natural born subjects after independence and the decision would have been different.

78 In *Doe d Auchmuty v Mulcaster*[114], the King's Bench appeared to accept that, but for the provisions of a treaty (or, presumably, some other formal act of recognition by a sovereign), natural born British subjects would have continued to be British subjects. *Doe d Auchmuty v Mulcaster* concerned an action for ejectment brought by the heirs of Robert Auchmuty. Auchmuty was born in the United States before independence and, as a loyalist, was evacuated to England at the time of independence in 1783. He later returned to the United States, where his children, the heirs, were born. Abbott CJ, Bayley and Holroyd JJ held that Auchmuty retained his status as a natural born British subject after independence. Accordingly, under the terms of the *British Nationality Act* 1730 (UK) (4 Geo II c 21), his children were entitled to the privileges of natural born British subjects of the King of Great Britain, which included the right to inherit land.

79 *In re Stepney Election Petition; Isaacson v Durant*[115] concerned the entitlement to vote in parliamentary elections of persons who were born in Hanover and who were living in England, but were not naturalised British subjects, at the time when Queen Victoria ascended the throne of Great Britain but not Hanover. Such persons were born when William IV was simultaneously the King of Hanover and the King of Great Britain and Ireland. The Queen's Bench Division held that a Hanoverian, who by birth was a British subject while

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under a treaty of peace between Great Britain and the United States: *Doe d Thomas v Acklam* (1824) 2 B and C 779 at 797-798 [107 ER 572 at 579].

**113** *Doe d Thomas v Acklam* (1824) 2 B and C 779 at 798 [107 ER 572 at 579].

**114** (1826) 5 B & C 771 at 775 per Bayley J [108 ER 287 at 289].

**115** (1886) 17 QBD 54.

William IV held both the Crowns of Great Britain and Hanover, had become an alien when Queen Victoria ascended the throne of Great Britain but not Hanover. Lord Coleridge CJ said[116]:

> "The Hanoverian by birth who had needed no naturalization in the lifetime of William IV needed it when the Hanoverian heir and successor of that monarch was no longer the sovereign of these islands. He owed allegiance to William IV and his heirs and successors according to law, and as a Hanoverian he owed it on the death of William IV to the Duke of Cumberland, who was, according to Hanoverian law, the heir and successor of his brother, and ascended the throne as King Ernest in due course of law. He became an alien because the sovereign to whom his allegiance was due was a foreign sovereign; and the person to whom his allegiance had been due was dead leaving an heir. The Crowns had by accident been united in one person, but when the union of the Crowns came to an end the union of allegiance ceased too; and the allegiance which had been due to the King of Hanover, who was also King of the United Kingdom, was never at any time due to the Queen of the United Kingdom, who was not and who could not be by law Queen of Hanover."

80 The decision established the rule that a natural born subject becomes an alien when the sovereign ceases to have dominion over the territory in which the person resides. Lord Coleridge CJ said that statements to the contrary in *Calvin's Case* were "dicta only"[117]. After considering the *British Nationality Act* 1730 and the *British Nationality Act* 1772 (UK) (13 Geo III c 21), Lord Coleridge CJ also said that, as the statutes referred to the Crown and not the sovereign, allegiance was due to the King in his *politic*, and not in his *personal*, capacity[118]. This was a further development in the law since *Calvin's Case*. Fundamental to the decision in that case – that those born after the accession of James I to the English throne were "natural born subjects" of the King of England – was the conclusion that the tie of allegiance is a tie between the individual and the person of the sovereign, not between the individual and the political entity that is the sovereign.

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**116** *Isaacson v Durant* (1886) 17 QBD 54 at 59-60.

**117** *Isaacson v Durant* (1886) 17 QBD 54 at 64.

**118** *Isaacson v Durant* (1886) 17 QBD 54 at 65-66.

*The common law rules in the late 19th century*

81 By the late 19th century, international law recognised two well-established rules for acquiring nationality by birth: *jus soli*[119] and *jus sanguinis*[120]. *Jus soli*, which emphasised place of birth, was favoured in the United Kingdom, the United States, Spain and many Latin American countries. *Jus sanguinis*, which emphasised the father's nationality, was favoured by most European states, such as France, Prussia and Austria-Hungary, particularly after the French Revolution, when France adopted the *jus sanguinis* rule in the Code Napoléon. However, no nation relied exclusively on one of these principles to determine who was a natural born subject[121].

82 In the United Kingdom, the common law never recognised the principle of *jus sanguinis* as such. Instead, from time to time, statutes were enacted to equate certain blood relatives with natural born subjects[122]. Thus, legislation was needed to confer the status and privileges of a natural born British subject on the children of natural born subjects and, later, the grandchildren of natural born subjects who were born outside the kingdom. The *British Nationality Act* 1730 was directed at the children of natural born subjects and provided that:

> "all children born out of the ligeance of the crown of England, or of Great Britain, or which shall hereafter be born out of such ligeance, whose fathers were or shall be natural-born subjects of the crown of England, or of Great Britain, at the time of the birth of such children respectively, … are hereby declared to be natural-born subjects of the crown of Great Britain".

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**119** The *Butterworths Australian Legal Dictionary*, (1997) at 654 defines *jus soli* to mean:

> "a right acquired by virtue of the soil or place of birth. Under this right, the nationality of a person is determined by the place of birth rather than parentage. Nationality is conferred by the state in which the birth takes place."

**120** The *Butterworths Australian Legal Dictionary*, (1997) at 654 defines *jus sanguinis* to mean a "right of blood. A right acquired by virtue of lineage. Under this right, the nationality of a person is determined by the nationality of their parents, irrespective of the place of birth."

**121** Great Britain, *Report of the Royal Commissioners for Inquiring into the Laws of Naturalization and Allegiance*, (1869) [4109] at viii, Appendix 1.

**122** See, eg, Statute 25 Edw III stat 1.

The *British Nationality Act* 1772 provided that all persons whose fathers by the *British Nationality Act* 1730 were entitled to the rights of natural born subjects were declared to be natural born subjects[123]. These statutes were needed to make permanent the allegiance of persons who were aliens at common law.

83 When the concept of the natural born subject was expanded by statute to include persons born outside the dominions of the sovereign, it might result in a person having the status of a natural born subject of two sovereigns. In his *Commentaries*, Sir William Blackstone briefly adverted to the situation of a person who becomes subject to two sovereigns, but did not consider how such a problem should be resolved[124]. In *Doe d Thomas v Acklam*, Abbott CJ also mentioned the difficulties that arose when a person was a citizen of one country and a subject of another. However, he did not proffer any solution to the problem[125].

84 The legislative developments during the 18th and 19th centuries that expanded the circumstances in which the status of the natural born subject could be acquired showed that, as in other areas of the common law, its rules concerning aliens were not flexible enough to cope with some needs in a changing world. Sir William Holdsworth observed that the common law rules had "become quite unsuited to the new political and economic conditions of the day."[126] He thought that the common law rules were "too restrictive in respect both to the acquisition and to the loss of the status of a subject."[127] Two principal problems had emerged[128]:

1. Conflicting claims to allegiance resulted from the rule that all persons born in territory within the allegiance of the Crown were British subjects when other states claimed allegiance through parentage.

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**123** See Great Britain, *Report of the Royal Commissioners for Inquiring into the Laws of Naturalization and Allegiance*, (1869) [4109], Appendix 1 at 6-7.

**124** Blackstone, *Commentaries on the Laws of England*, (1765), bk 1, c 10 at 358.

**125** *Doe d Thomas v Acklam* (1824) 2 B and C 779 at 797-798 [107 ER 572 at 579].

**126** Holdsworth, *A History of English Law*, 3rd ed (1944), vol 9 at 88-89. See also Great Britain, *Report of the Royal Commissioners for Inquiring into the Laws of Naturalization and Allegiance*, (1869) [4109] at v.

**127** Holdsworth, *A History of English Law*, 3rd ed (1944), vol 9 at 89.

**128** Holdsworth, *A History of English Law*, 3rd ed (1944), vol 9 at 89.

2. The doctrine of the indelibility of the subject gave rise to serious international complications, as had occurred with the secession of the United States colonies and the issue whether people born in the colonies before or after secession remained or were British subjects.

85 Moreover, the common law did not appear capable of developing in a way that would resolve these problems and remain doctrinally coherent.

*The Royal Commission into naturalisation and allegiance*

86 In England, a Royal Commission to inquire into the laws of naturalisation and allegiance was established on 21 May 1868. The Commissioners accepted that the common law rule was that those born *within* the dominions of the British Crown were natural born British subjects, that upon birth they came under a duty of allegiance to the Crown and that their allegiance was indelible[129]. However, the Commissioners thought that the common law did not recognise those born of British parents *outside* the dominions of the British Crown as natural born British subjects[130]. In their Report, the Commissioners said[131]:

> "There are two classes of persons who by our law are deemed to be natural-born British subjects:-
>
> 1. Those who are such from the fact of their having been born within the dominion of the British Crown;
>
> 2. Those who, though born out of the dominion of the British Crown, are by various general Acts of Parliament declared to be natural-born British subjects.
>
> The allegiance of a natural-born British subject is regarded by the Common Law as indelible."

87 The Commissioners noted that, while the common law rule "is open to some theoretical and some practical objections", it has "solid advantages"[132].

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**129** Great Britain, *Report of the Royal Commissioners for Inquiring into the Laws of Naturalization and Allegiance*, (1869) [4109] at v.

**130** Great Britain, *Report of the Royal Commissioners for Inquiring into the Laws of Naturalization and Allegiance*, (1869) [4109] at v.

**131** Great Britain, *Report of the Royal Commissioners for Inquiring into the Laws of Naturalization and Allegiance*, (1869) [4109] at v.

**132** Great Britain, *Report of the Royal Commissioners for Inquiring into the Laws of Naturalization and Allegiance*, (1869) [4109] at viii.

The Commissioners stated their belief that "of the children of foreign parents, born within the dominions of the Crown, a large majority would, if they were called upon to choose, elect British nationality."[133] The Commissioners concluded that "[t]he balance of convenience, therefore, is in favour of treating them as British subjects unless they disclaim that character"[134].

88 However, the Commissioners formed the view that the common law rule of the indelibility of the subject "is neither reasonable nor convenient."[135] Although the Commissioners did not favour the abandonment of the rule altogether, they recommended that "it ought not to be, as it now is, absolute and unbending."[136] Rather, they proposed that[137]:

> "In the case of children of foreign parentage, it [the common law rule] should operate only where a foreign nationality has not been chosen. Where such a choice has been made, it should give way."

89 The Commissioners made the following recommendations in respect of persons born within the dominions of the Crown[138]:

> "(a) All persons born within the dominions of the Crown should be regarded by British law as British subjects by birth, except children born of alien fathers and registered as aliens.
>
> (b) Provision should be made for enabling children, born within the dominions of the Crown, of alien fathers, to be registered as aliens; and children so registered should be thenceforth regarded as aliens. The child, if not so registered on his birth or during his minority by

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**133** Great Britain, *Report of the Royal Commissioners for Inquiring into the Laws of Naturalization and Allegiance*, (1869) [4109] at viii.

**134** Great Britain, *Report of the Royal Commissioners for Inquiring into the Laws of Naturalization and Allegiance*, (1869) [4109] at viii.

**135** Great Britain, *Report of the Royal Commissioners for Inquiring into the Laws of Naturalization and Allegiance*, (1869) [4109] at v.

**136** Great Britain, *Report of the Royal Commissioners for Inquiring into the Laws of Naturalization and Allegiance*, (1869) [4109] at viii.

**137** Great Britain, *Report of the Royal Commissioners for Inquiring into the Laws of Naturalization and Allegiance*, (1869) [4109] at viii.

**138** Great Britain, *Report of the Royal Commissioners for Inquiring into the Laws of Naturalization and Allegiance*, (1869) [4109] at ix.

his father or guardian, should be permitted to register himself as an alien at any time before he has exercised or claimed any right or privilege as a British subject.

(c) If the father, being an alien when the child was born, becomes during the child's minority naturalized as a British subject, the child, though registered as an alien, should follow the condition of the father."

90 While some Commissioners dissented from some of the recommendations, none disputed the existence and content of the common law rule that, subject to the three established exceptions outlined further below, birth within the Crown's dominions made a person a natural born subject of the Crown and, accordingly, such a person was not an alien. Nor did the dissentients dispute the continuing effect of the common law rules concerning the acquisition of nationality by birth. The dissentients were, however, uniformly critical of the operation of those rules[139]. For example, in his dissenting report, W Vernon Harcourt stated that "the rule of determining nationality by locality of birth was of purely feudal origin" and had been discarded by European countries after the French Revolution[140]. He described the "inconveniences" of the common law rule and stated that "the rule is wholly indefensible in principle."[141] He noted that under the rule nationality is derived by the accidental situation of the mother and that a child may become a subject of a country in which its father not only never made his home, but which he never even entered[142]. Harcourt also observed that under the law of "all modern nations" the child's nationality is determined by the father's[143].

91 The recommendations of the Royal Commission were enacted in the *Naturalization Act* 1870 (UK). That Act purported to ameliorate the effects of

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**139** See, eg, Great Britain, *Report of the Royal Commissioners for Inquiring into the Laws of Naturalization and Allegiance*, (1869) [4109] at xi-xii (dissenting report of Bramwell and Bernard), xiii (dissenting report of Harcourt).

**140** Great Britain, *Report of the Royal Commissioners for Inquiring into the Laws of Naturalization and Allegiance*, (1869) [4109] at xiii (dissenting report of Harcourt).

**141** Great Britain, *Report of the Royal Commissioners for Inquiring into the Laws of Naturalization and Allegiance*, (1869) [4109] at xiii (dissenting report of Harcourt).

**142** Great Britain, *Report of the Royal Commissioners for Inquiring into the Laws of Naturalization and Allegiance*, (1869) [4109] at xiii (dissenting report of Harcourt).

**143** Great Britain, *Report of the Royal Commissioners for Inquiring into the Laws of Naturalization and Allegiance*, (1869) [4109] at xiii (dissenting report of Harcourt).

the common law rule of the indelibility of the status of the natural born subject. The Act permitted natural born British subjects who at birth were subjects of a foreign state by the law of that state and persons born outside the dominions of the Crown to a father who was a British subject to make a declaration of alienage[144]. In addition, British subjects who had become naturalised in a foreign state were permitted to renounce their allegiance to the British Crown[145].

*Restatement of the common law rules in 1900*

92 In 1896 Albert Venn Dicey, who with F W Maitland was the leading constitutional lawyer of the time, stated the rules for the acquisition of British "nationality" at birth as follows[146]:

> "1. 'British subject' means any person who owes permanent allegiance to the Crown.
>
> 2. 'Natural-born British subject' means a British subject who has become a British subject at the moment of his birth.
>
> 3. 'Naturalized British subject' means any British subject who is not a natural-born British subject.
>
> 4. 'Alien' means any person who is not a British subject." (footnotes omitted)

93 Dicey did not identify the "alien subject" as a sub-group of "alien", although he recognised a category of alien who, because he or she was within British dominions, owed "temporary" allegiance to the Crown[147]. Such an alien could be distinguished from a "British subject" who owed "permanent" allegiance to the Crown. Dicey referred to the basic dichotomy between "British subject" and "alien", saying[148]: "Every natural person is either a British subject

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**144** *Naturalization Act* 1870 (UK), s 4.

**145** *Naturalization Act* 1870 (UK), s 6.

**146** Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws*, (1896) at 173.

**147** Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws*, (1896) at 173.

**148** Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws*, (1896) at 174.

or an alien." He identified the "leading principle of English law on the subject of British nationality"[149] as the rule that, subject to certain exceptions[150]:

> "[A]ny person who (whatever nationality of his parents) is born within the British dominions, is a natural-born British subject. … Nationality under this Rule is independent of descent. The child of aliens, if born within any country subject to the Crown, is a natural-born British subject."

In Dicey's view, the theoretical basis for the rule depended on the birth of a person within territory that at the time was under the control and protection of a particular sovereign[151].

94 Dicey listed two exceptions to the common law rule that British nationality was acquired by birth within the dominions of the Crown[152]:

1. Any person whose father was an enemy alien and who was born within a part of the British dominions that at the time of the person's birth was in hostile occupation was an alien.

2. Any person born within British dominions whose father was an alien and, at the time of the person's birth, was an ambassador or other diplomatic agent accredited to the Crown by the sovereign of a foreign state was an alien.

95 The common law also recognised a third exception, namely, that a child of a foreign sovereign born within British dominions was an alien[153].

96 Accordingly, in 1900, when the Constitution was enacted, British law did not recognise the concept of "citizen": it recognised only the concepts of "natural born British subject", "alien subject" and "alien". The "naturalised British

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**149** Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws*, (1896) at 175.

**150** Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws*, (1896) at 175-176.

**151** Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws*, (1896) at 175.

**152** Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws*, (1896) at 176-177.

**153** See Jones, *British Nationality Law and Practice*, (1947) at 34-35; Pryles, *Australian Citizenship Law*, (1981) at 14.

subject" was a statutory creation. Persons within British dominions were either "natural born subjects" or "alien subjects", as both persons were subject to the power, laws and jurisdiction of the Crown[154]. The concept of the "natural born subject" was also recognised by the Australian colonies in the mid-19th century in domestic naturalisation legislation[155]. And, as I have indicated, the natural born subject owed from birth permanent allegiance to the Crown. In turn, the Crown owed duties of protection to the subject. The natural born British subject acquired British nationality by birth within the dominions of the British Crown. The alien acquired it by legislation. Nevertheless, both the "natural born British subject" and the "naturalised British subject" owed obligations of permanent allegiance to the British Crown and were differentiated from aliens.

97 In *Shaw v Minister for Immigration and Multicultural Affairs*, Gleeson CJ, Gummow and Hayne JJ said that[156]: "It may be that there never was a single nationality law throughout the British Empire." However, Sir John Salmond asserted that[157]:

> "The British empire, like the Roman, is a congeries of different countries, the populations of which live under different laws; but, unlike the case of Rome [which recognised local as well as Imperial citizenship], there is but one citizenship throughout the length and breadth of the dominions of the Crown. No man is a subject of England, or of Scotland, or of Victoria, or of Quebec. He is a subject of the British empire in its unity, or else he is an alien."

98 As Sir John Salmond noted, each of the colonies had its own regime for the naturalisation of aliens, which extended only within the jurisdiction – essentially the territory – of that colony. Thus, a person could be a "naturalised British subject" in one part of the British Empire – in South Australia, for example – but an alien in Victoria[158]. Nevertheless, such modifications to the

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**154** Salmond, "Citizenship and Allegiance", (1902) 18 *Law Quarterly Review* 49 at 49.

**155** See, eg, *The Aliens Statute* 1865 (Vic) (28 Vict No 256); Great Britain, *Report of the Royal Commissioners for Inquiring into the Laws of Naturalization and Allegiance*, (1869) [4109], Appendix 1 at 13.

**156** (2003) 78 ALJR 203 at 207 [20]; 203 ALR 143 at 148, citing *Potter* (1908) 7 CLR 277 at 304-305 per O'Connor J; *Re Patterson* (2001) 207 CLR 391 at 439-440 [146]-[147] per Gummow and Hayne JJ; Parry, *Nationality and Citizenship Laws of the Commonwealth and of the Republic of Ireland*, (1957) at 82.

**157** Salmond, "Citizenship and Allegiance", (1902) 18 *Law Quarterly Review* 49 at 58.

**158** Salmond, "Citizenship and Allegiance", (1902) 18 *Law Quarterly Review* 49 at 58.

status of aliens were entirely statutory: *the underlying common law rules pertaining to the acquisition of the status of a natural born subject by birth within British dominions remained consistent throughout the British Empire*.

99 Thus, the irresistible conclusion is that in 1900, those who made the Constitution understood that at common law, a person born within the dominions of the British Crown was a "natural born British subject" who owed permanent allegiance to the British Crown and was not an alien. They would have understood that general proposition to have three exceptions:

1. Any person whose father was an enemy alien and who was born within a part of the British dominions that at the time of the person's birth was in hostile occupation was an alien.

2. Any person born within British dominions whose father was an alien and, at the time of the person's birth, was an ambassador or other diplomatic agent accredited to the Crown by the sovereign of a foreign state was an alien.

3. A child of a foreign sovereign born within British dominions was an alien.

100 It would have been inconceivable to the makers of the Constitution and the people of Australia generally that a person born within the dominions of the Crown could be an alien unless the person fell within one of the three exceptions to the basic rule. In addition, because a person born in Australia was a subject of the Queen, that person was a member of the Australian community.

The Convention Debates and the "aliens power"

101 The Constitution eschews any reference to "citizenship". Indeed, the Constitution contains only two references to the word "citizen". Section 44(i) provides that a person is incapable of being chosen as a member of Parliament if he or she:

> "is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power".

The Convention Debates demonstrate that the failure to confer on the Federal Parliament the power to make laws with respect to "citizenship" was a conscious decision of the delegates.

102 The makers resolved to leave the legal concept of the Australian citizen undefined. Dr John Quick sought to include a definition of Australian citizenship

when he argued that the Commonwealth should have the power over Commonwealth citizenship[159]. He had earlier said[160]:

> "We ought either to place in the forefront of this Constitution an express definition of citizenship of the Commonwealth, or empower the Federal Parliament to determine how federal citizenship shall be acquired, what shall be its qualifications, its rights, and its privileges, and how the status may hereafter be lost."

103 His "approximate" definition of citizenship was[161]:

> "[A]ll persons resident in the Commonwealth, being natural-born or naturalized subjects of the Queen, and not under any disability imposed by the Federal Parliament, should be citizens of the Commonwealth."

Mr Isaac Isaacs opposed the proposal, fearing that all attempts to define citizenship would land them in "innumerable difficulties"[162]. Mr Josiah Symon also opposed the proposal. He regarded citizenship as a "birthright" – acquired by birth in a State – which should not be handed over to any government. His fear was that, by placing such a power in the hands of the Commonwealth, the Parliament could legislate to deprive a person of his or her citizenship[163].

104 One of the problems confronting the makers of the Constitution was the issue of categorisation, in particular, the effect of defining "citizen" as a "subject of the Queen". Under the common law, "subject of the Queen" included all "natural born subjects" born in any part of the British Empire. This included colonies such as Hong Kong. Some delegates were concerned not only that Chinese people from Hong Kong would be treated differently from those born in other parts of China, but also that they would be able to claim citizenship of the

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**159** *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 3 March 1898 at 1788.

**160** *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 2 March 1898 at 1752.

**161** *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 2 March 1898 at 1752.

**162** *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 3 March 1898 at 1797.

**163** *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 2 March 1898 at 1763-1764.

Commonwealth[164]. Dr John Cockburn, a South Australian delegate, emphasised[165]: "We desire always to deal with Asiatics on broad lines, whether they are subjects of the Queen or not; and in South Australia, and, I believe, other colonies, those lines of distinction are obliterated."

105 Accordingly, the legislative power of the Commonwealth in s 51(xix) was confined to the making of laws with respect to "naturalization and aliens". The Convention Debates suggest that the paragraph was enacted because delegates feared that, if the Parliament had power to legislate with respect to citizenship, it could exercise the power to deprive a person of his or her citizenship, a concept that was treated as identical with "subject of the Queen", that is to say, a person born within the dominions of the Queen or a person who had been naturalised under a law of a colony.

106 The Constitution refers variously to "subject of the Queen", "subject", and "citizen" in ss 117, 44(i) and 34(ii). Section 117, which deals with discrimination against interstate residents, refers to a "subject of the Queen, resident in any State". Section 44 refers to persons who are "incapable of being chosen or of sitting as a senator or a member of the House of Representatives." Section 44(i) describes one category as any person who "is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power". Section 34(ii) addresses the qualifications for membership of the House of Representatives. To be eligible a person:

> "must be a subject of the Queen, either natural-born or for at least five years naturalized under a law of the United Kingdom, or of a Colony which has become or becomes a State, or of the Commonwealth, or of a State."

Plainly, the Constitution did not see such persons as aliens, although they could not be chosen or sit if they fell within s 44(i).

107 In addition, s 25 provides that:

> "For the purposes of [s 24], if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the

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**164** *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 3 March 1898 at 1788-1797.

**165** *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 3 March 1898 at 1797.

> people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted."

Thus, s 25 contemplates that a person can be a natural born subject but not entitled to some of the rights of "political membership" of the body politic.

Early High Court authority on the "aliens power"

108 Early cases in which this Court considered the issue of the composition of the Australian body politic turned on the immigration power. However, some of the early decisions also referred to the aliens power and the status of persons born within Australia. In *Potter v Minahan*[166], a case which concerned the immigration power, Mr James Minahan was born in Australia, an illegitimate child of a white mother and a Chinese father. He left Australia with his father at the age of five, and then returned when he was 31. This Court held that he was not an immigrant and so was not subject to the *Immigration Restriction Act* 1901 (Cth). Griffith CJ held[167] that on these facts, Minahan acquired "a British nationality" at birth as a matter of law. His Honour said[168]:

> "[A]nterior, both in order of thought and in order of time, to the concepts of nationality and domicil is another, upon which both are founded, and which is, I think, an elementary part of the concept of human society, namely, the division of human beings into communities. From this it follows that *every person becomes at birth a member of the community into which he is born, and is entitled to remain in it until excluded by some competent authority.* It follows also that every human being (unless outlawed) is a member of some community, and is entitled to regard the part of the earth occupied by that community as a place to which he may resort when he thinks fit. In the case of *Musgrove v Chun Teeong Toy* it was held that an alien (though an alien friend) has no legal right to enter a country of which he is not a national. Yet, unless he is outlawed from human society, he must be entitled to enter some community. So, by process of exclusion, we ascertain at least one part of the world to which every human being, not an outlaw, can claim the right of entry when he thinks fit.
>
> *At birth he is, in general, entitled to remain in the place where he is born. (There may be some exceptions based upon artificial rules of territoriality.)* If his parents are then domiciled in some other place, he

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**166** (1908) 7 CLR 277.

**167** *Potter* (1908) 7 CLR 277 at 287.

**168** *Potter* (1908) 7 CLR 277 at 289.

> perhaps acquires a right to go to and remain in that place. But, *until the right to remain in or return to his place of birth is lost, it must continue, and he is entitled to regard himself as a member of the community which occupies that place. These principles are self-evident, and do not need the support of authority.*" (emphasis added, footnote omitted)

109 Barton J referred to "Australian-born subjects of the King"[169] and found that Minahan[170]:

> "is a natural-born British subject by virtue of his birth within the British Dominions. That fact is independent of the question of his legitimacy, and is as much a fact as if his father had been, say, a citizen of the United States, and had duly married Winifred Minahan in Australia. There is not a tittle of evidence of the respondent's having endeavoured or even intended to divest himself of that nationality." (reference omitted)

110 O'Connor J stated as a general principle of law[171]:

> "[*E*]*very person born within the British Dominions is a British subject and owes allegiance to the British Empire and obedience to its laws. Correlatively he is entitled to the benefit and protection of those laws*". (emphasis added)

O'Connor J also considered the concept of "national allegiance". In 1908 the divisibility of the British Crown was not recognised; hence, Australia was not regarded as a nation with a "sovereign nationality". His Honour held[172] that the "principle which regulates rights as between the British Empire and its subjects must be applied in determining the relations of the Australian community to its members." Accordingly, he found that[173]:

> "A person born in Australia, and by reason of that fact a British subject owing allegiance to the Empire, becomes by reason of the same fact a member of the Australian community under obligation to obey its laws, and correlatively entitled to all the rights and benefits which membership of the community involves, amongst which is a right to depart from and

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**169** *Potter* (1908) 7 CLR 277 at 294.

**170** *Potter* (1908) 7 CLR 277 at 293.

**171** *Potter* (1908) 7 CLR 277 at 304-305.

**172** *Potter* (1908) 7 CLR 277 at 305.

**173** *Potter* (1908) 7 CLR 277 at 305.

> re-enter Australia as he pleases without let or hindrance unless some [constitutionally valid] law of the Australian community has in that respect decreed the contrary."

111 Isaacs J dissented. His Honour accepted that birth in Australia created a tie of allegiance to the King. Nevertheless, he said[174]:

> "The fact that a person was born in Australia, constitutes him a British subject, but as allegiance is only the tie which binds him to the King ... birth in Australia creates precisely the same tie of allegiance and confers the same common law right of entry to all parts of the King's Dominions, no more and no less, as birth in any other part of the Empire."

His Honour held[175] further that "no claim to exemption from the Commonwealth power of legislation in respect of immigration could arise by reason of the mere fact of birth on Australian soil." He said[176]:

> "The ultimate fact to be reached as a test whether a given person is an immigrant or not is whether he is or is not at that time a constituent part of the community known as the Australian people.
>
> Nationality and domicil are not the tests; they are evidentiary facts of more or less weight in the circumstances, but they are not the ultimate or decisive considerations."

112 Higgins J also dissented, although he accepted that Minahan was "a British subject, for he was born in British territory"[177]. His Honour said[178]:

> "It is urged that there is an Australian species of British nationality; that a man born in Australia is an 'appendage to the soil'; that when a man goes back to the land of his birth he is not 'immigrating' etc. I cannot find any foundation for these contentions. Throughout the British Empire there is one King, one allegiance, one citizenship. I use this last word, not in the Roman or in the American sense, but only because there is no suitable abstract noun corresponding to the word 'subject' (natural-born or

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**174** *Potter* (1908) 7 CLR 277 at 308.

**175** *Potter* (1908) 7 CLR 277 at 308.

**176** *Potter* (1908) 7 CLR 277 at 308.

**177** *Potter* (1908) 7 CLR 277 at 320.

**178** *Potter* (1908) 7 CLR 277 at 320-321.

> naturalized). Even when England and Scotland were distinct kingdoms under one King, from 1603 to 1707, there was no distinction recognized between English and Scottish citizenship. There was not one local allegiance for the subjects of England, and another local allegiance for the subjects of Scotland. All the King's subjects are members of one great society, bound by the one tie of allegiance to the one Sovereign, even as children hanging on to the ropes of a New Zealand swing. The top of the pole is the point of union: *Calvin's Case*. The fact of birth on British soil made the respondent a British subject, owing allegiance and entitled to protection; but that is all." (footnote omitted)

113 These passages show that the first five Justices of this Court – all of whom can fairly be said to have been present at the creation of the Constitution – accepted that a person who was born in Australia came under an obligation of permanent allegiance to the King that made him or her a subject of the King and a member of the Australian community. They also accepted that a person who was a natural born subject of the King could not be an alien.

114 In *Donohoe v Wong Sau*[179], this Court followed the dissenting judgments of Isaacs and Higgins JJ in *Potter*. *Donohoe* also concerned the immigration power. The Court held that, in some circumstances, a natural born British subject could enter Australia as an immigrant and therefore be subject to federal laws made under the immigration power. Isaacs J said that, when Ms Lucy Wong Sau entered the Commonwealth, she was not "a member of this community. She was not Australian in point of language, bringing-up, education, sentiment, marriage, or of any of those indicia which go to establish Australian nationality."[180] The decision in *Donohoe* was treated as one of fact and that decision does not affect the *dicta* in *Potter* concerning the acquisition of British nationality. Nor does it affect the statements in *Potter* that upon birth in Australia Minahan owed permanent allegiance to the sovereign of Australia.

115 In *Meyer v Poynton*[181], Starke J rejected the argument that the naturalisation power did not extend to depriving a naturalised person of citizenship. His Honour stated[182]:

> "It is said that depriving a person of citizenship so acquired [by naturalisation under statute] is not a law relating to naturalization. I am

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**179** (1925) 36 CLR 404.

**180** *Donohoe* (1925) 36 CLR 404 at 408.

**181** (1920) 27 CLR 436.

**182** *Meyer* (1920) 27 CLR 436 at 441.

> quite unable to agree with the contention … [I]f the power given by the *Naturalization Act* [1903 (Cth)] to admit to Australian citizenship is within the power to make laws with respect to naturalization, so must authority to withdraw that citizenship on specified conditions be also within that power."

116 Starke J's conclusion supports the argument that the power in s 51(xix) includes a power to determine legal status[183]. Thus, it permits the Parliament to determine the process and circumstances in which an alien may become naturalised and, conversely, the process and circumstances in which a naturalised alien may be denaturalised. However, Starke J in *Meyer* did not consider the question whether the power extends to the "denaturalisation" of a "natural born subject".

Recent High Court authority on the "aliens power"

117 In recent years, this Court has considered the scope of the aliens power in the context of the deportation of non-citizens and the changed relationship between Australia and England. *Pochi v Macphee*[184] and *Nolan v Minister for Immigration and Ethnic Affairs*[185] concerned persons born in Italy and the United Kingdom respectively, who had not taken out Australian citizenship. They were about to be deported under the Migration Act. They sought to prevent their deportation by arguing that s 12 of the Migration Act which purported to authorise their deportation was invalid as beyond the legislative power of the Federal Parliament. In *Pochi* the plaintiff argued that the provision was invalid because it applied to some persons who were British subjects. In *Nolan* the plaintiff, who was a British subject, argued that he was not an "alien" for constitutional purposes. The Court held in each case that the plaintiff was an alien to whom the Migration Act validly applied.

118 In *Pochi*, Gibbs CJ considered the history of the status of British subjects, explaining that at the time of federation, "the status of British subjects was governed mainly by the common law, which applied in both England and the Australian colonies with some immaterial statutory modifications."[186] He stated the formulation in Sir William Blackstone's *Commentaries* as the common law

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**183** See *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 171 [24] per Gleeson CJ.

**184** (1982) 151 CLR 101.

**185** (1988) 165 CLR 178.

**186** (1982) 151 CLR 101 at 107.

rule[187]. His Honour rejected the argument that English law governed the question, saying[188]:

> "If English law governed the question who are aliens within s 51(xix), almost all Australian citizens, born in Australia, would in future be aliens within that provision. The absurdity of such a result would be manifest."

Accordingly, a British subject under the law of the United Kingdom could be an alien within s 51(xix). Gibbs CJ said that "the Parliament can ... treat as an alien any person who was born outside Australia, whose parents were not Australians, and who has not been naturalized as an Australian."[189] Gibbs CJ also said that the Parliament could not expand the power under s 51(xix) to include persons "who could not possibly answer the description of 'aliens' in the ordinary understanding of the word."[190] With respect, however, this statement provides no assistance in determining the meaning of the constitutional term "aliens". To apply this statement, one has to know what is "the ordinary understanding of the word" before one can say that particular persons "could not possibly answer the description of 'aliens' in the ordinary understanding of the word." That is to say, one must have a definition of "aliens".

119 The majority in *Nolan*[191] accepted the definition of an alien given by Gibbs CJ in *Pochi*, that is, an alien is "any person who was born outside Australia, whose parents were not Australians, and who has not been naturalized as an Australian." Whether or not the statement of Gibbs CJ in *Pochi* was an *obiter dictum*, in *Nolan* it was the *ratio decidendi* of the decision. Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ agreed that at federation, the term "aliens" certainly did not extend to British subjects. In a joint judgment their Honours stated[192]:

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**187** *Pochi* (1982) 151 CLR 101 at 107-108, citing Blackstone, *Commentaries on the Laws of England*, (1765), bk 1, c 10 at 354 and Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 599.

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

**189** *Pochi* (1982) 151 CLR 101 at 109-110.

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

**191** (1988) 165 CLR 178 at 185 per Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ.

**192** *Nolan* (1988) 165 CLR 178 at 183.

> "The word could not … properly have been used in 1900 to identify the status of a British subject vis-à-vis one of the Australian or other colonies of the British Empire for the reason that those colonies were not, at that time, independent nations with a distinct citizenship of their own. At that time, no subject of the British Crown was an alien within any part of the British Empire."

120 However, their Honours observed that following the creation of separate Australian citizenship by the *Nationality and Citizenship Act* 1948 (Cth)[193]:

> "The fact that a person *who was born neither in Australia nor of Australian parents* and who had not become a citizen of this country was a British subject or a subject of the Queen by reason of his birth in another country could no longer be seen as having the effect, so far as this country is concerned, of precluding his classification as an 'alien'." (emphasis added)

121 Their Honours referred to developments that "necessarily produced different reference points for the application of the word 'alien'."[194] They identified these developments as the emergence of Australia as an independent nation, the acceptance of the divisibility of the Crown (implicit in the development of the Commonwealth as an association of independent nations) and the creation of a distinct Australian citizenship[195]. They said that the meaning of the word "alien" had not "altered" but that[196]:

> "Inevitably, the practical designation of the word altered so that, while its abstract meaning remained constant, it encompassed persons who were not citizens of this country even though they might be British subjects or subjects of the Queen by reason of their citizenship of some other nation. We would add that, to the extent that there would otherwise be inconsistency in the use of the words 'subject of the Queen' in the Constitution, it should be resolved by treating those words as referring, in a modern context, to a subject of the Queen in right of Australia".

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**193** *Nolan* (1988) 165 CLR 178 at 184. The *Nationality and Citizenship Act* was subsequently renamed the *Australian Citizenship Act* 1948 (Cth).

**194** *Nolan* (1988) 165 CLR 178 at 186.

**195** *Nolan* (1988) 165 CLR 178 at 185-186.

**196** *Nolan* (1988) 165 CLR 178 at 186.

122 Subsequently, Toohey J in *Cunliffe v The Commonwealth*, after referring to *Nolan*, said that[197]:

> "[A]n alien can generally be defined as *a person born out of Australia of parents who were not Australian citizens and who has not been naturalized under Australian law* or a person who has ceased to be a citizen by an act or process of denaturalization. Thus the terms 'non-citizen' and 'alien' are synonymous." (emphasis added, footnote omitted)

While the terms "alien" and "non-citizen" may be synonymous in some contexts, this does not mean that a "non-citizen" for the purposes of the Migration Act is an "alien" within the constitutional meaning of the term.

123 More recently, the Court considered the scope of the aliens power in *Re Patterson; Ex parte Taylor*[198], *Re Minister for Immigration and Multicultural Affairs; Ex parte Te*[199] and *Shaw*[200]. In *Re Patterson*, the Court considered the status of a person born in the United Kingdom. Gleeson CJ adopted the definition of alien expressed by the Court in *Nolan* and accepted that "Parliament cannot, by some artificial process of definition, ascribe the status of alienage to whomsoever it pleases"[201]. Gaudron J repeated the definition of alien she had articulated in *Nolan*, namely, that an alien is "a person who is not a member of the community which constitutes the body politic of the nation state from whose perspective the question of alien status is to be determined."[202] Her Honour noted that a person "is not necessarily excluded from membership of the Australian community by reason of his or her being a citizen of a foreign power."[203]

124 In *Te*, Gleeson CJ said that "[f]rom the beginning", the aliens power "has been understood as a wide power, equipping the Parliament with the capacity to decide, on behalf of the Australian community, who will be admitted to formal

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**197** (1994) 182 CLR 272 at 375.

**198** (2001) 207 CLR 391.

**199** (2002) 212 CLR 162.

**200** (2003) 78 ALJR 203; 203 ALR 143.

**201** *Re Patterson* (2001) 207 CLR 391 at 400 [7].

**202** *Re Patterson* (2001) 207 CLR 391 at 407 [33], citing *Nolan* (1988) 165 CLR 178 at 189.

**203** *Re Patterson* (2001) 207 CLR 391 at 407 [34].

membership of that community."[204] As alienage is a legal status, the power conferred by s 51(xix), subject to one qualification, "includes a power to determine legal status."[205] Accordingly[206]:

> "Parliament has the power to determine the legal basis by reference to which Australia deals with matters of nationality and immigration, to create and define the concept of Australian citizenship, to prescribe the conditions on which such citizenship may be acquired and lost, and to link citizenship with the right of abode."

His Honour said that the qualification, explained by Gibbs CJ in *Pochi*, was that[207]:

> "Parliament cannot, simply by giving its own definition of 'alien', expand the power under s 51(xix) to include persons who could not possibly answer the description of 'aliens' in the ordinary understanding of the word."

125 These statements have to be read in the light of the facts of *Te* and cannot be regarded as throwing light on whether the Parliament has the power to legislate for the deportation of persons born in Australia. Moreover, there are very considerable difficulties in finding in s 51(xix) of the Constitution a general power to deal with matters of nationality or to create and define the citizenship of all persons in Australia. As Professor Cheryl Saunders has written[208]:

> "The source of Commonwealth power to legislate for citizenship is not entirely clear, although it would be likely to be found in the power over 'Naturalisation and aliens' (s 51(xix))."

126 The power in s 51(xix) is concerned with aliens and their naturalisation. Naturalisation is the process by which one undertakes allegiance to a new sovereign and, often enough, sheds allegiance to another sovereign. Historically, naturalisation for the purpose of s 51(xix) meant naturalisation as a subject of the

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**204** (2002) 212 CLR 162 at 171 [24].

**205** *Te* (2002) 212 CLR 162 at 171 [24] per Gleeson CJ.

**206** *Te* (2002) 212 CLR 162 at 173 [31] per Gleeson CJ.

**207** *Te* (2002) 212 CLR 162 at 173 [31], citing *Pochi* (1982) 151 CLR 101 at 109 per Gibbs CJ.

**208** Saunders, "Citizenship under the Commonwealth Constitution", (1994) 3(3) *Constitutional Centenary* 6 at 6.

Queen. Even if the power now extends to making laws concerning nationality and citizenship, it could only extend to persons who were or had been aliens.

127 Nothing in *Shaw*, the most recent case concerning aliens, throws any light on the issue in the present case. The decision merely applied the law laid down in *Nolan*. The Court was not required to consider the constitutional status of persons born in Australia. Gleeson CJ, Gummow and Hayne JJ said in *Shaw* that[209]:

> "The understanding of the expression 'subject of the Queen', and the light which that understanding casts on the ambit of the aliens power … with its implicit reference to notions of sovereignty, must recognise that at least by 1948 the subjects of the Queen to which reference was made were subjects of the monarch in right of Australia, not subjects of the monarch in right of the UK.
>
> …
>
> Once it be decided that the text of the Constitution contemplates changes in the political and constitutional relationship between the United Kingdom and Australia, it is impossible to read the legislative power with respect to 'aliens' as subject to some implicit restriction protective from its reach those who are not Australian citizens but who entered Australia as citizens of the UK and colonies under the [*British Nationality Act* 1948 (UK)]. It was unnecessary to reach that conclusion in *Re Patterson; Ex parte Taylor*, but it should now be reached." (footnote omitted)

Conclusion: Ms Singh is not liable to deportation

128 The term "aliens" in s 51(xix) denotes the legal status of alienage. "Naturalization and aliens" in s 51(xix) refers to a process (naturalisation and denaturalisation) and a legal status (alienage). By the late 19th century, international law recognised two well-established rules for acquiring nationality by birth: *jus soli* and *jus sanguinis*. But those terms provide no more assistance in interpreting s 51(xix) of the Constitution than do the citizenship provisions of the Fourteenth Amendment of the United States Constitution. Both terms are irrelevant. In determining the meaning of the term "aliens" in s 51(xix), the term *jus sanguinis* in particular is no more helpful than the definition of the continental jury would be in determining the meaning of "jury" in s 80 of the Constitution. The terms *jus soli* and *jus sanguinis* would be relevant only if the term "aliens" had no meaning in the Anglo-Australian world in 1900 or since and Parliament itself could define the term. For the reasons that I have given,

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**209** (2003) 78 ALJR 203 at 208-209 [20]-[27]; 203 ALR 143 at 148-150.

Parliament cannot define the constitutional term "aliens". As a result, the issues here are:

1. What did "alien" mean when the Constitution was enacted?

2. Has its meaning, as opposed to its application, changed?

3. Whether or not its meaning has changed, is a person born in Australia an alien because her parents are aliens?

129 In 1900, as I have indicated, the common understanding of the term "alien" in the United Kingdom and Australia was that it described a person who did not owe the permanent allegiance to the Crown that was the obligation of a natural born or naturalised British subject. Subject to the three exceptions I have outlined earlier, a natural born British subject was a person born within the dominions of the Crown which were under the actual control of the Crown.

130 Thus, under the law of the United Kingdom and Australia in 1900, an alien was a person who did not owe permanent allegiance to the Queen because he or she was not a "subject of the Queen". Upon entering Australia, a person who was not born within the dominions of the Crown owed the Crown a temporary or local allegiance by virtue of being within Australia. Such a person was not a "subject of the Queen" but an "alien subject". And, except for stateless persons, that person – the alien – would have owed permanent allegiance to another sovereign or country.

131 In 1900, then, it was inconceivable in the Anglo-Australian world that a person, born in Australia, could be an alien unless that person came within one of the three exceptions to the rule. In *Potter*, this Court accepted that every person born within Australia was a subject of the King and owed permanent allegiance to the King. As a corollary, that person was also entitled to the benefit and protection of the King. Further, as the joint judgment of the Court in *Nolan* accepted, the meaning of the constitutional term "aliens" has not changed since federation, although persons who were once outside its application are now within it. This change in the application of the term is the result of a number of significant developments since federation. They include:

(a) the gradual emergence of Australia as an independent, sovereign nation (which arguably culminated with the passage of the *Australia Acts* 1986 (Cth) and (UK));

(b) the acceptance of the divisibility of the Crown (implicit in the development of the Commonwealth as an association of independent nations);

(c) the creation of a distinct Australian citizenship commencing in 1948 with the passage of the *Nationality and Citizenship Act* and the *British Nationality Act* 1948 (UK); and

(d) the acceptance by this Court that the phrase "subject of the Queen" in the Constitution no longer means "subject of the Queen of the United Kingdom" but "subject of the Queen of Australia".

132 Ms Kim Rubenstein has correctly characterised[210] these changes in the application of the term "aliens" as changes in its denotation. Hence, while the meaning (or connotation) of "aliens" has remained constant, the classes of persons falling within that meaning have changed. As Windeyer J noted in *Ex parte Professional Engineers' Association*[211]: "Law is to be accommodated to changing facts. It is not to be changed as language changes."

133 Rightly or wrongly, this Court took the bold step in *Nolan* of holding that, in light of the developments described above, a natural born British subject (that is, a person born in the United Kingdom) may be regarded as an alien in Australia for constitutional purposes. However, cases such as *Nolan*, *Re Patterson* and *Shaw* concerned persons born in the United Kingdom who had not become naturalised as Australian citizens. Once it is accepted that after 1948 such persons were the subjects of a foreign power *and not* subjects of the Queen of Australia, those decisions are not open to criticism. But they do not address the position of persons born in Australia of alien parents. Such persons are subjects of the Queen of Australia. They are qualified to stand for the House of Representatives unless they fall within the terms of s 44(i) of the Constitution. By force of s 117 of the Constitution, while resident in any State, they cannot be subjected "in any other State to any disability or discrimination which would not be equally applicable to [them] if [they] were a subject of the Queen resident in such other State." Upon birth, like the children of native born Australian parents, they come under an obligation of permanent allegiance to the Queen of Australia and a duty to obey the law, including the law of treason. Moreover, because they are "subjects of the Queen", they are members of the Australian community and among "the people of the Commonwealth". The "essential meaning" of the term "aliens" in 1900 and now does not include a person born in Australia who owes permanent allegiance to the Queen of Australia. For that reason, Ms Singh is not an alien.

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**210** Rubenstein, "Citizenship and the Centenary – Inclusion and Exclusion in 20th Century Australia", (2000) 24 *Melbourne University Law Review* 576 at 601, citing Zines, *The High Court and the Constitution*, 4th ed (1997) at 21.

**211** (1959) 107 CLR 208 at 267.

134 The Constitution avoids references to "citizenship" in relation to the powers of the Commonwealth. This was a deliberate omission of those who made the Constitution. That omission and the discussion at the 1898 Convention lead to the irresistible conclusion that the Constitution does not confer on the Parliament of the Commonwealth a *broad* power concerning citizenship and nationality. Instead, the Constitution has given the Parliament of the Commonwealth a limited specific power to control the entry of persons into Australia and to regulate the rights and privileges of aliens in Australia. However, the so-called implied nationhood power[212] seems extensive enough to give the Parliament *some* modest power over citizenship and nationality generally. It must be implicit in the Constitution that the Parliament of the nation can define who are the citizens or nationals of the Commonwealth and, subject to the Constitution, prescribe what conditions must exist for citizenship. It is a matter that is the concern of the Commonwealth rather than the States. The "external affairs" power (s 51(xxix)) is another potential source of power for federal laws concerning citizenship and nationality. In 1937, Australia ratified the Convention on Certain Questions Relating to the Conflict of Nationality Laws[213]. Article 1 of that Convention declared that it was "for each State to determine under its own law who are its nationals." It is unnecessary in this case to determine whether Australia's accession to the Convention authorises the Citizenship Act or part of it.

135 Whatever the source of that Act may be, it cannot be forgotten that those who made the Constitution refused to give the Commonwealth powers concerning citizenship, because they feared that the Commonwealth could deprive a person of the citizenship that was acquired by birth in a State. In addition, assuming that the implied nationhood power extends to making laws concerning citizenship or that the external affairs power is the source of such laws, those powers cannot extend to removing the citizenship or nationality that arises from being born in Australia. As O'Connor J pointed out in *Potter*, birth within Australia makes a person a member of the Australian community who comes under an obligation to obey its laws and is correlatively entitled to all the rights and benefits which membership of the community involves. The implied nationhood power cannot be used to deprive a person of his or her membership of the Australian community acquired by birth[214].

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**212** See *Victoria v The Commonwealth and Hayden* ("the *AAP Case*") (1975) 134 CLR 338; *Davis v The Commonwealth* (1988) 166 CLR 79.

**213** Opened for signature 12 April 1930, 179 LNTS 89 (entered into force 1 July 1937; entered into force for Australia 8 February 1938).

**214** cf Wynes, *Legislative, Executive and Judicial Powers in Australia*, 5th ed (1976) at 303 fn 54; *United States v Wong Kim Ark* 169 US 649 (1898).

136 Many would argue that the makers of the Constitution erred in failing to give the Parliament of the Commonwealth specific powers over citizenship and nationality. One reason is that during the 20th and 21st centuries, the movement of people between nations has increased significantly. Some of this movement has resulted from voluntary migration; some of it is a result of conflict or persecution. Developments in aviation have also facilitated the international movement of people. Australia has experienced several waves of immigration. Australia also has obligations under the Convention relating to the Status of Refugees[215]. The increased movement of people and populations has exacerbated perceived problems in the rules governing the acquisition of nationality by birth, particularly where those rules are based on principles of *jus soli*. Many nations have adopted the principles of *jus sanguinis* (or some variation thereof) as the basic rule governing the acquisition of nationality by birth. Even the United Kingdom has departed from the principles of *jus soli* in a number of significant respects (see, eg, *British Nationality Act* 1981 (UK), under which a person born within the United Kingdom of alien parents does not automatically acquire British citizenship at birth).

137 There is also an increasingly sophisticated and nuanced discourse in relation to the concept of Australian "citizenship" and what it means to be a member of the Australian community. A plenary power over citizenship and nationality seems a necessity for any national government.

138 No doubt the makers of the Constitution would respond to criticism of their omission to give the Parliament a citizenship power by arguing that the Parliament has all the power it needs to deal with *relevant* issues of citizenship. They would say that, subject to the well-known exceptions, all persons born in this country are members of the Australian community and constitutional "citizens" and that the naturalisation power authorises the Parliament to make laws about the citizenship status of aliens.

139 The Citizenship Act seeks to deal with some of the changes that have occurred since 1900. Whether all or most of it is within the power of the Parliament is not relevant in the present case. Only the application of s 10 of that Act to Ms Singh is in issue. The first difficulty that faces the Commonwealth in respect of that section is that it deals with citizenship, a subject that is not within any head of federal legislative power conferred by the Constitution. The second difficulty is that s 10(2) declares that a person born in Australia after the commencement of the *Australian Citizenship Amendment Act* 1986:

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**215** Opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954).

"shall be an Australian citizen by virtue of that birth if and only if:

(a) a parent of the person was, at the time of the person's birth, an Australian citizen or a permanent resident; or

(b) the person has, throughout the period of 10 years commencing on the day on which the person was born, been ordinarily resident in Australia."

Thus, in so far as s 10 applies to a person like Ms Singh who is not an alien, it seeks to deprive her of her membership of the Australian community and her constitutional citizenship. It is beyond the power of the Parliament to do so. In *Nolan*, Gaudron J said, correctly in my opinion[216]:

> "As the transformation from non-alien to alien requires some relevant change in the relationship between the individual and the community, it is not, in my view, 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."

Similarly, none of the naturalisation power, the implied nationhood power or the external affairs power empowers the Parliament to deprive a non-alien of her constitutional citizenship by an enactment such as s 10.

140 It follows that Ms Singh is not an "unlawful non-citizen" for the purpose of the Migration Act and that an officer has no power under s 198 of that Act to remove her from Australia. Even if, contrary to my view, the Parliament could constitutionally enact a law that defined or described a person such as Ms Singh as a non-citizen, she could not be removed from this country. None of the aliens power, the immigration power, the external affairs power or any other power enables the Parliament to deport from this country a person who was born here and who remains a member of the Australian community.

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**216** (1988) 165 CLR 178 at 193.

Orders

141 The questions in the Case Stated should be answered:

1. No.

2. No.

3. The defendants.

142 GUMMOW, HAYNE AND HEYDON JJ. The plaintiff was born in Australia in February 1998. Her parents then were, and now are, citizens of India. Both the plaintiff's parents were born in 1969 at Delhi. Neither of her parents is an Australian citizen; neither is a permanent resident of Australia. Each came to Australia in 1997. It was common ground that the plaintiff is a citizen of India by descent from her parents. Because neither of her parents is an Australian citizen or a permanent resident the plaintiff is not an Australian citizen[217].

143 Section 198 of the *Migration Act* 1958 (Cth) provides for the removal from Australia of those non-citizens who do not hold a visa that is in effect. The *Migration Act* refers to such persons as "unlawful non-citizens"[218].

144 A Justice has stated a case for the consideration of a Full Court under s 18 of the *Judiciary Act* 1903 (Cth). As amended, the case stated raises three questions. The first question – "Is the plaintiff an alien within the meaning of s 51(xix) of the Constitution?" – should be answered, "Yes". As a citizen of India the plaintiff has obligations, "owes allegiance", to a nation other than Australia. She is, therefore, a person within the class referred to in s 51(xix) as "aliens". As will be apparent from what has just been said, the plaintiff does not fall into that class simply because her parents do so.

145 In view of the answer to the first question, the second question – "If the answer to 1 is 'No', is s 198 of the *Migration Act* 1958 (Cth) capable of valid application to the plaintiff?" – does not arise. The third question – "By whom should the costs of the case stated to the Full Court of this Honourable Court be borne?" – should be answered: "The plaintiff".

"Aliens" – the competing contentions

146 The plaintiff submitted that, at the time of federation, "aliens" had an accepted and fixed legal meaning which, subject to two immaterial exceptions, excluded from its embrace any person born in Australia. (The two exceptions concerned children of foreign diplomats and children of occupying armies.) This, the plaintiff submitted, was the meaning which the common law of England had attributed to the word "alien" since as long ago as *Calvin's Case*[219] and it was not within the powers of the federal Parliament to give any new or different

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**217** *Australian Citizenship Act* 1948 (Cth), s 10(2).

**218** *Migration Act* 1958 (Cth), s 14.

**219** (1608) 7 Co Rep 1a [77 ER 377].

content to that term. That is, the plaintiff contended not just that, in 1901, it was possible to decide who, under British law as it then stood, was or was not an alien. The plaintiff contended that the word "aliens" had a meaning which was fixed by the common law as expressed in *Calvin's Case* and that that "common law meaning" fixed the outer limits to the power given to the Parliament by s 51(xix).

147 By contrast, the defendants contended that the power under s 51(xix) permitted the Parliament to prescribe the criteria to be applied in deciding who is an alien.

148 It will be necessary to consider whether, as the plaintiff contended, "aliens" had a legal meaning at the time of federation fixed by the decision in *Calvin's Case*. To do that it will be necessary to examine some aspects of the history of the law of alienage. That examination requires attention to some questions of terminology lest the answer to the question presented in this matter be assumed by the definition given to terms used – particularly the expression used to refer to those who are not aliens.

Some questions of terminology

149 Within the text of the Constitution the expressions "people of the Commonwealth" (s 24) and "a subject of the Queen" (s 117) might be seen as providing antonyms of "alien". The expression in s 44(i) of the Constitution

> "Any person who:
>
> (i) is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power"

might be thought to provide a compendious expression synonymous with "alien". But to adopt either the expression "people of the Commonwealth" or the expression "a subject of the Queen" as an antonym of alien necessarily forecloses the exploration of some questions about the proper construction of s 51(xix). Likewise, to adopt the lengthy description given in s 44(i) of those who owe obligations to foreign powers as providing a synonym for the term may also foreclose relevant inquiries. Accordingly, it will be convenient, at some points in the consideration of the arguments advanced in the present matter, to refer to those who fall outside the class embraced by the constitutional word "aliens" simply as "non-aliens".

150 Moreover, it will be necessary to keep at the forefront of consideration that any question about the operation of the *Australian Citizenship Act* 1948 (Cth), and the application of the statutory term "Australian citizen", is not a question which arises in this case. Likewise, although it will be necessary to make reference to the identification of those who, for international purposes, are to be treated as the "nationals" of a particular nation, the use of terms like "national", "citizen", or "subject", should not distract attention from the central issue about the meaning of the word "aliens".

Constitutional interpretation

151 The defendants (the Commonwealth and the Minister for Immigration and Multicultural and Indigenous Affairs) submitted that the power to make laws with respect to naturalization and aliens confers on the Parliament power to make laws determining to whom is attributed the status of alien. That power was said not to be unqualified. It was said that "while this Court may determine the 'outer boundaries' of the word 'aliens' in accordance with the Constitution,[220] the Parliament may enact laws to define 'aliens' within the penumbra of the 'ordinary understanding' of the word". The reference to the "ordinary understanding of the word" was an allusion to what Gibbs CJ said in *Pochi v Macphee*[221]:

> "Clearly the Parliament cannot, simply by giving its own definition of 'alien', expand the power under s 51(xix) to include persons who could not possibly answer the description of 'aliens' in the ordinary understanding of the word."

152 It may be doubted whether metaphorical references to the "penumbra" of the meaning of a constitutional expression or, as it was put in oral argument, the "core" meaning of a constitutional expression, can be of great assistance in any task of constitutional interpretation. The questions about the construction of the Constitution, which fall for decision in this Court, require particular answers to particular questions arising in a live controversy between parties. The task of the Court is not to describe the metes and bounds of any particular constitutional provision; it is to quell a particular controversy by deciding whether, in the circumstances presented in the matter, the relevant constitutional provisions do or do not have the consequence for which a party contends.

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**220** *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 205 [159] per Kirby J.

**221** (1982) 151 CLR 101 at 109.

153 It is nonetheless important to emphasise the point made by Fullagar J in *Australian Communist Party v The Commonwealth* ("the *Communist Party Case*")[222] by reference to the metaphor that a stream cannot rise higher than its source. As his Honour said[223]:

> "A power to make laws with respect to lighthouses does not authorize the making of a law with respect to anything which is, in the opinion of the law-maker, a lighthouse."

To adapt that dictum to the present case, a power to make laws with respect to aliens does not authorise the making of a law with respect to any person who, in the opinion of the Parliament, is an alien. That Parliament has made a law which a party or intervener asserts to be a law with respect to aliens presents the constitutional question for resolution; it does not provide an answer.

154 These reasons seek to demonstrate that a central characteristic of the status of "alien" is, and always has been, owing obligations to a sovereign power other than the sovereign power in question. The plaintiff has that characteristic. The problem to which Gibbs CJ adverted in *Pochi*[224] and Fullagar J adverted in the *Communist Party Case*[225] does not arise and s 198 of the *Migration Act* can be supported in its operation with respect to the plaintiff as a law with respect to naturalization and aliens.

155 As was pointed out in the joint reasons in *Grain Pool of Western Australia v Commonwealth*[226], the general principles which are to be applied to determine whether a law is with respect to a head of legislative power are well settled. For present purposes, it is enough to draw attention to two of those well-settled principles. First, the constitutional text is to be construed "with all the generality which the words used admit"[227]. Secondly, as was pointed out as long ago as

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**222** (1951) 83 CLR 1 at 258.

**223** (1951) 83 CLR 1 at 258.

**224** (1982) 151 CLR 101 at 109.

**225** (1951) 83 CLR 1 at 258.

**226** (2000) 202 CLR 479 at 492 [16] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

**227** *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225.

*Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* ("the *Engineers Case*")[228], once the true meaning of a legislative power is ascertained, it is not to be further limited by the fear of its abuse. As the Court has said on a number of occasions, the meaning of a power given by s 51 is "not to be given any meaning narrowed by an apprehension of extreme examples and distorting possibilities of its application in some future law"[229].

156 Next, the plaintiff's argument, that at federation "aliens" had a known and fixed legal meaning, which excluded persons in the plaintiff's position, invites attention to another aspect of the principles governing constitutional interpretation.

157 The plaintiff's contention that "aliens" had a fixed legal meaning at federation assumed not only that this meaning was to be ascertained by reference to the common law but also that the meaning, once ascertained, defined the outer limits of the power of the Parliament. These reasons will seek to demonstrate that, at federation, "aliens" did not have a fixed legal meaning ascertained by reference to the common law. What had been the common law at the time of *Calvin's Case* had been overtaken by statute and by subsequent developments of legal thought in England and in Europe. It is as well, however, to go on to say something further about the second of the assumptions just identified – that a meaning ascertained in the way for which the plaintiff contended defined the outer limits of the constitutional power.

158 To say of a constitutional expression, like "aliens", that its content is "immutable" invites controversy which may be more remarkable for its heat than for the light shed on the underlying issue. The relevant question is not whether the meaning of "aliens" is immutable, it is whether, as a matter of construction, the law now in question (here s 198 of the *Migration Act*) can be supported in its operation with respect to the plaintiff as a law with respect to naturalization and aliens.

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**228** (1920) 28 CLR 129 at 151.

**229** *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 78 ALJR 203 at 210 [32] per Gleeson CJ, Gummow and Hayne JJ; 203 ALR 143 at 151. See also *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 380-381 [87]-[88] per Gummow and Hayne JJ; *Egan v Willis* (1998) 195 CLR 424 at 505 [160] per Kirby J; *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 at 492 [16] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

159 In undertaking that question of construction, to identify the meaning conveyed, at the time of federation, by the words used in the Constitution is more than a matter of historical interest[230]. It is an essential step in the task of construction. That is not to say, however, that seeking an understanding of the meaning of a constitutional expression like "aliens", when used at the time of federation, permits or requires searching for the subjective intention of the framers. It does not. Metaphorical references to "the founders' intention" are as apt to mislead in the constitutional context as are references to the intentions of the legislature when construing a statute[231] or references to the intentions of the parties to a contract[232] when considering its construction. Rather, the question is one of construing the relevant constitutional provisions. That task of construction cannot be undertaken without knowing what particular constitutional expressions meant, and how words were used, at the time of federation. But the task does not end with the results of that inquiry. Always, the Constitution is to be construed bearing steadily in mind that it is an instrument of government intended to endure[233].

160 Numerous cases decided by this Court reveal that constitutional expressions may have a different operation 50 or 100 years after federation from the operation they would have had in 1901. *Sue v Hill*[234], and its consideration of whether Great Britain is now to be regarded as a foreign power, and *Grain Pool of Western Australia v Commonwealth*, with its discussion of whether legislation concerning the grant of plant variety rights was a law with respect to copyrights, patents of invention and designs and trademarks, are but two recent examples.

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**230** Kirby, "Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?", (2000) 24 *Melbourne University Law Review* 1 at 14.

**231** *Mills v Meeking* (1990) 169 CLR 214 at 234 per Dawson J; *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 at 339 per Gaudron J; *Salomon v Salomon & Co* [1897] AC 22 at 38 per Lord Watson.

**232** *Masters v Cameron* (1954) 91 CLR 353 at 362; *Australian Broadcasting Corporation v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540 at 548-549 per Gleeson CJ.

**233** *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29 at 81 per Dixon J.

**234** (1999) 199 CLR 462.

161 It may be that tools like the distinction between connotation and denotation[235] or the distinction between concepts and conceptions[236] are thought to be useful in understanding or explaining decisions like *Sue v Hill*. There is at least a risk, however, that using such tools directs attention to their content and to their utility rather than to the analytical task they are being used to undertake.

162 For present purposes, all that need be noted are two related points. First, to require the identification of the historical meaning of constitutional terms does not confine the operation of the Constitution to the applications which those who wrote it may have had in mind. To confine it in that way would be to fall into the error of seeking the subjective intention of the founders. Secondly, the identification of the historical meaning of a constitutional term like "aliens" is not complete if all that is done is to give a list of the particular circumstances to which the word was applied at federation. Yet that is essentially what the plaintiff's contention requires.

"Aliens" at common law – allegiance

163 It is convenient to begin consideration of the plaintiff's contention that, at federation, "aliens" had a fixed legal meaning by reference to Quick and Garran. They commenced their commentary on the term "aliens", when used in s 51(xix), by saying[237]:

> "In English law an alien may be variously defined as a person who owes allegiance to a foreign State, who is born out of the jurisdiction of the Queen, or who is not a British subject. The rule of the common law is that every person born out of the British Dominions is an alien, and that every person born within British Dominions is a British subject. This is known as the *jus soli* or the territorial test of nationality, which is contrasted with the *jus sanguinis* or the parentage test of nationality."

Two aspects of that comment may be noted: the reference to "allegiance" and the contrast between "alien" and "British subject".

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**235** *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Professional Engineers' Association* (1959) 107 CLR 208 at 267 per Windeyer J.

**236** *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 552 [43] per McHugh J.

**237** Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 599.

164 The feudal notion of allegiance has played a significant part in the development of English law respecting aliens. Holdsworth wrote of the appearance in England in the course of the thirteenth century of what were the beginnings of "the modern rules of the common law, which define the persons who are to be accounted as British subjects"[238]. As the common law stood before the accession of King James VI of Scotland to the throne of England, "all persons born on English soil, no matter what their parentage, owed allegiance to, and were therefore subjects of the king"[239]. As Holdsworth said[240]:

> "[I]t is the duty of allegiance, owed by the subject to the crown, which differentiates the subject from the alien. This doctrine has its roots in the feudal idea of a personal duty of fealty to the lord from whom land is held; and, though it has necessarily developed with the development of the position of the king, its origin in this idea has coloured the whole modern law on this topic."

However, as was emphasised in *Re Minister for Immigration and Multicultural Affairs; Ex parte Te*[241], care is required in treating what Holdsworth wrote of the position in England centuries ago respecting allegiance to the Crown as supplying in modern times a sufficient and adequate discrimen between subjects or citizens and aliens. For example, reference is made later in these reasons to the uses of the term "allegiance" and variations such as "temporary and local allegiance" in describing the status of classes of aliens who are not subjects.

165 Using the concept "allegiance" to distinguish between British subjects and aliens invites attention to what is meant by "allegiance" in this context. Pointing to its root in the feudal idea of a personal duty of fealty to a lord from whom land is held does little to identify the content of the term. Plainly it is a term which connotes duty or obligation, but what exactly are the duties or obligations embraced by the word? These duties or obligations, whatever their content, are said to be due to the Crown in the "politic" not the "personal capacity" of the sovereign[242]. Sometimes they are spoken of as being duties or obligations of

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**238** Holdsworth, *A History of English Law*, 3rd ed (1944), vol 9 at 72.

**239** *A History of English Law*, 3rd ed (1944), vol 9 at 75.

**240** *A History of English Law*, 3rd ed (1944), vol 9 at 72.

**241** (2002) 212 CLR 162 at 196-199 [121]-[129] per Gummow J.

**242** *In re Stepney Election Petition; Isaacson v Durant* (1886) 17 QBD 54 at 65-66 per Lord Coleridge CJ; *United States v Wong Kim Ark* 169 US 649 at 663 (1898) per Gray J; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 465-466 [224] per

(Footnote continues on next page)

"fidelity"[243] or "loyalty"[244] but again those words reveal little about the content of the duties or obligations. What is clear is that the obligations of a non-alien who owes allegiance are more than the obligation to obey the law. A resident alien, being bound to obey the law, is said to owe "local and temporary" allegiance to the monarch but that implies, of course, that the non-alien (or subject) owes larger duties and obligations than the alien. The content of those duties or obligations is not spelled out. That may be because "allegiance" and "loyalty" are terms that point to a political or social relationship yet in this context are being used to describe a legal status.

166 Moreover, the relationship between sovereign power and the person who is a non-alien (that is, in Australia, the relationship between Crown and non-alien) is mutual. The Crown owes obligations to the non-alien. But again those obligations are described only in abstract terms like a "duty of protection"[245]. Their content is not spelled out, although it may very well be that these obligations find expression in Australia's exercise of its right, but not duty, in international law to protect its nationals[246], and even, perhaps, in what the Court said[247] was "[t]he right of the Australian citizen to enter the country [which] is not qualified by any law imposing a need to obtain a licence or 'clearance' from the Executive". Further, the relationship between the Crown and a resident alien is also mutual and is not necessarily limited to such time as the alien remains in Australia. "The protection of the laws of Australia which is the counterpart of a local allegiance due from a resident alien" may continue despite departure from Australia[248].

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Gummow and Hayne JJ; *Te* (2002) 212 CLR 162 at 196-197 [122]-[123] per Gummow J.

**243** *Carlisle v United States* 83 US 147 at 154 (1872) per Field J.

**244** cf *Joyce v Director of Public Prosecutions* [1946] AC 347.

**245** Glanville Williams, "The Correlation of Allegiance and Protection", (1948) 10 *Cambridge Law Journal* 54.

**246** *Oppenheim's International Law*, 9th ed (1992), vol 1 at 934.

**247** *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462 at 469.

**248** *Te* (2002) 212 CLR 162 at 198 [126]-[128] per Gummow J.

167 The second of the points to be noted about Quick and Garran's commentary on "aliens" is the contrast drawn between "aliens" and "British subjects".

Aliens and subjects – a definitional dichotomy

168 It was indicated in *Shaw v Minister for Immigration and Multicultural Affairs*[249] that the dichotomy drawn, in many writings, between "aliens" and "subjects", or "British subjects", is definitional. As Dicey wrote, in 1896, in the first edition of *A Digest of the Law of England with reference to the Conflict of Laws*[250], "'Alien' means any person who is not a British subject". This was a definition which Quick and Garran adopted[251]. Further, the distinction drawn between the two terms, by reference to the nature or extent of "allegiance" owed, was again a definitional distinction. The British subject owed "permanent allegiance" to the Crown; the alien, if resident within the Kingdom, owed, at most, no more than "local and temporary allegiance" to the Crown.

169 Dicey defined "British subject" as "any person who owes permanent allegiance to the Crown"[252]. He then divided British subjects into "natural-born" British subjects and "naturalized" British subjects, the former being those who became a British subject at the moment of birth. But again, these are all definitions. None reveals the principle or principles used to establish the taxonomy adopted.

*Calvin's Case*

170 No doubt, the definition and classifications adopted by Dicey, and by Quick and Garran, can be traced at least to *Calvin's Case*. The decision in *Calvin's Case* concerned the status of those born in Scotland after the Crown of England descended to King James VI of Scotland. At the time, the Kingdoms were separate yet it was held that Calvin, born in the Kingdom of Scotland, was not an alien in England. Two aspects of the reasoning in *Calvin's Case* are

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**249** (2003) 78 ALJR 203 at 206 [11] per Gleeson CJ, Gummow and Hayne JJ; 203 ALR 143 at 146.

**250** at 173.

**251** *The Annotated Constitution of the Australian Commonwealth*, (1901) at 599.

**252** *A Digest of the Law of England with reference to the Conflict of Laws*, (1896) at 172.

notable. First, the determinative question was seen[253] as requiring a choice between mutually exclusive alternatives:

> "Every man is either *alienigena*, an alien born, or *subditus*, a subject born. Every alien is either a friend that is in league, &c. or an enemy that is in open war, &c. Every alien enemy is either *pro tempore*, temporary for a time, or *perpetuus*, perpetual, or *specialiter permissus*, permitted especially. Every subject is either *natus*, born, or *datus*, given or made".

Secondly, the answer given was understood[254] as depending upon natural law:

> "Whatsoever is due by the law or constitution of man, may be altered: but natural ligeance or obedience of the subject to the sovereign cannot be altered; *ergo* natural ligeance or obedience to the sovereign is not due by the law or constitution of man. Again, whatsoever is due by the law of nature, cannot be altered: but *ligeance and obedience of the subject to the sovereign is due by the law of nature; ergo it cannot be altered*." (emphasis added)

171 The plaintiff contended that the conclusions reached in *Calvin's Case* confined the meaning to be given to the word "aliens" in s 51(xix).

172 There is no doubt that after *Calvin's Case*, at common law, subject to exceptions for children of foreign diplomats and children of occupying armies, any person born within the British Dominions (whatever the nationality of that person's parents) was a natural-born British subject. And at common law the allegiance of a natural-born British subject was regarded as permanent or "indelible"[255].

Statutory modifications

173 Both before and after *Calvin's Case* there had been many statutes declaring persons born out of the dominion of the British Crown to be

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**253** (1608) 7 Co Rep 1a at 17a [77 ER 377 at 397].

**254** (1608) 7 Co Rep 1a at 25a [77 ER 377 at 407].

**255** "Report of the Royal Commissioners for Inquiring into the Laws of Naturalization and Allegiance (1869)", in *Reports from Commissioners*, (1868-1869), vol 14, 607 at 611.

natural-born British subjects[256]. But until the enactment of the *Naturalization Act* 1870 (UK) (33 Vict c 14), enacted in consequence of the 1869 Report of the Royal Commissioners for Inquiring into the Laws of Naturalization and Allegiance, no provision had been made for the severing of the connection of a British subject established by birth within the Crown's dominions. It is important to notice the reasons given by the Royal Commission for recommending the enactment of such a law. Having noted that the allegiance of a natural-born British subject was regarded by the common law as indelible, those Commissioners who joined in the report of the majority went on to say[257]:

> "We are of opinion that this doctrine of the Common Law is neither reasonable nor convenient. *It is at variance with those principles on which the rights and duties of a subject should be deemed to rest;* it conflicts with that freedom of action which is now recognized as most conducive to the general good as well as to individual happiness and prosperity; and it is especially inconsistent with the practice of a State which allows to its subjects absolute freedom of emigration. *It is inexpedient that British law should maintain in theory, or should by foreign nations be supposed to maintain in practice, any obligations which it cannot enforce and ought not to enforce if it could;* and it is unfit that a country should remain subject to claims for protection on the part of persons who, so far as in them lies, have severed their connexion with it." (emphasis added)

174 Enacting legislation extending the classes of persons entitled to the benefits and subject to the obligations of being a British subject was, and is, consistent with identifying birth within the dominions of the Crown as generally sufficient both to qualify for the status of British subject and to deny identification as an alien. But the statutory modification of the law made by the *Naturalization Act* 1870 was radically different. It abandoned the principle that being a natural-born British subject was an indelible status. Further, it abandoned that principle because the common law doctrine was "at variance with those principles on which the rights and duties of a subject should be deemed to rest". That is, the change made to the law denied the validity of the natural law justification given in *Calvin's Case* for the consequences said to follow from birth within the dominions of the Crown.

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**256** See, for example, 25 Edw III Stat 2; 7 Ann c 5; 10 Ann c 5; 4 Geo II c 21; 13 Geo III c 21; *Naturalization Act* 1844 (UK) (7 & 8 Vict c 66); *Naturalization Act* 1847 (UK) (10 & 11 Vict c 83).

**257** *Reports from Commissioners*, (1868-1869), vol 14, 607 at 611.

175 The *Naturalization Act* 1870 was later understood[258] as not introducing a new or a revived system of Imperial naturalization. Section 16 of the Act expressly saved "[a]ll laws, statutes, and ordinances which may be duly made by the legislature of any British possession for imparting to any person the privileges ... of naturalization, to be enjoyed ... within the limits of such possession ...". Questions of Imperial naturalization were examined at the Colonial Conference of 1902 and again at the Imperial Conferences of 1907 and 1911[259]. The deliberations at these Conferences culminated in the *British Nationality and Status of Aliens Act* 1914 (Imp). The operation in a self-governing dominion of Pt II of that Act, which concerned naturalization, depended upon the enactment of legislation by the dominion[260]. The legislative and other consequences of that Act in Australia were discussed in *Re Patterson; Ex parte Taylor*[261] and *Shaw*[262].

176 For present purposes, two points are important. First, the subjects of naturalization, indelibility of allegiance, nationality and alienage were matters of lively controversy in Britain during the latter part of the 19th century. Secondly, and no less importantly, that led to legislative change. (It is not necessary to stay to examine whether, as Sir Francis Piggott later wrote[263], "the Act of 1870 was, by common consent, the worst drafted piece of legislation that had ever found its way on to the Statute Book".)

177 Due account of the existence of this controversy, and of developments in British statutory law on the subject, must be taken in considering the meaning to be given to "aliens" in s 51(xix). Both the existence of the controversy, and the

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**258** *Report of the Inter-Departmental Committee*, (1901) Cmd 723, par 26; Parry, *Nationality and Citizenship Laws of the Commonwealth and of the Republic of Ireland*, (1957) at 80-81.

**259** Parry, *Nationality and Citizenship Laws of the Commonwealth and of the Republic of Ireland*, (1957) at 82.

**260** *British Nationality and Status of Aliens Act* 1914 (Imp), s 9.

**261** (2001) 207 CLR 391 at 440 [148] per Gummow and Hayne JJ.

**262** (2003) 78 ALJR 203 at 207-208 [20] per Gleeson CJ, Gummow and Hayne JJ; 203 ALR 143 at 148.

**263** Piggott, "The 'Ligeance of the King' A study of Nationality and Naturalization", in *The Nineteenth Century and After*, (October 1915), vol 78 (No 464) 729 at 732.

developments in British statutory law, at the very least tend to deny that in 1901 there was an accepted fixed legal meaning to the term derived from the common law as understood in *Calvin's Case*. Moreover, in attempting to identify how the word "aliens" was understood at the time of federation, it would be wrong to confine attention to Britain. The subjects of nationality, naturalization and related matters were subjects of lively consideration throughout Europe during the 19th century. It is necessary, therefore, to say something more about some developments in other legal systems which occurred during the 19th century.

Citizenship by descent

178 Until the beginning of the 19th century citizenship by birth within the country, regardless of descent, appears to have been the general rule in Europe[264]. The Code Napoléon of 1803 provided in Art 3 of the Civil Code that the laws governing the status and capacity of persons should govern Frenchmen even though residing in foreign countries. Article 10 provided: "Tout enfant né d'un Français en pays étranger est Français." Hall described[265] what happened thereafter as being that:

> "[M]ost civilised states, either in remodelling their system of law upon the lines of the Code Napoleon, or by special laws, have since adopted the principle simply, or with modifications giving a power of choice to the child, or else, while keeping to the ancient rule in principle, have offered the means of avoiding its effects."

179 Thus, by the turn of the 20th century, instead of the rule of country of birth, the rule of descent or blood had become the leading principle in Europe. That is, a rule which was "the natural outcome of the intimate connexion in feudalism between the individual and the soil upon which he lived"[266] (but which had survived the ideas with which it was originally connected) was supplanted by, or at least supplemented by, the rule that a child's nationality should follow the nationality of its parents. And, as the *Naturalization Act* 1870 revealed, Britain was not immune from these changes.

180 That different states applied different rules in deciding those who were its citizens was important to the conclusions reached by the Royal Commission in

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**264** Hall, *A Treatise on International Law*, 4th ed (1895) at 234; *United States v Wong Kim Ark* 169 US 649 at 666 (1898).

**265** Hall, *A Treatise on International Law*, 4th ed (1895) at 235.

**266** Hall, *A Treatise on International Law*, 4th ed (1895) at 234.

1869. Dual or double allegiance is not a phenomenon only of the 20th century. The problems presented by dual allegiance lay at the heart of Sir Alexander Cockburn's book on nationality[267]. As that author said in the introduction to his work[268]:

> "It seems to be admitted on all hands that the law of England respecting nationality, with reference to the circumstances under which the status of a subject arises, or may be acquired, or, on the other hand, may be put off, together with the law relating to the disabilities of aliens, requires to be considered with a view to its alteration and amendment. *The conflict between the law of England and that of so many of the leading nations of the world as to the origin of nationality, and the inconvenience to which such conflict may give rise, as well as the inconsistency of our rule as to the immutability of allegiance,* at a time when emigration from this country to America is annually taking place on so large a scale, *are now so sensibly felt, that an alteration of the law has become inevitable.*" (emphasis added)

181 One of the chief features taken into account in formulating the recommendations of the Royal Commissioners was the attempt "to diminish the number of cases in which one who by British law is a British subject is regarded by foreign law as a foreign subject or citizen, and to obviate, as far as possible, the difficulties and inconveniences arising from such a double allegiance"[269]. To that end, the Commission recommended that efforts should be made to procure suitable reciprocal arrangements with other countries. But, as history was later to reveal, apart from the so-called "Bancroft Treaties"[270] made between the United States and some German States in 1868, between the United States and the United Kingdom in 1870, and thereafter between the United States and some other European and American powers, that hope went largely unfulfilled. The treaty between the United States and the United Kingdom resolved some issues which had contributed to the outbreak of war between those nations in 1812 – issues like the pressing into the Royal Navy of naturalized citizens of the United

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**267** Cockburn, *Nationality: or the Law Relating to Subjects and Aliens, considered with a view to future legislation*, (1869) ("Cockburn on Nationality").

**268** Cockburn on Nationality at 3.

**269** *Reports from Commissioners*, (1868-1869), vol 14, 607 at 617.

**270** Weis, *Nationality and Statelessness in International Law*, (1956) at 135-137.

States who were natural-born British subjects[271]. But the wider problems of dual or multiple nationality remained unresolved.

182 By the time of federation, it was well recognised that "[m]ore than one state may claim the allegiance of the same individual, and a man whom English Courts treat as a British subject may, by French Courts, be treated as a French citizen"[272]. As Dicey went on to point out[273]:

> "An alien, further, who has, under the Naturalization Act, 1870, acquired a certificate of naturalization 'shall not, when within the limits of the foreign state of which he was a subject previously to obtaining his certificate of naturalization, be deemed to be a British subject unless he has ceased to be a subject of that state in pursuance of the laws thereof, or in pursuance of a treaty to that effect.'[274] *Hence a person naturalized under the Naturalization Act, 1870, may under some circumstances be held, even by English Courts, to be an alien.*" (emphasis added)

183 Be this as it may, the understanding of the term "alien" at the time of federation must take account of these developments. In particular, it must take account of the existence of different, and competing, views about how aliens were to be identified. As Hall wrote in 1895[275]:

> "The persons as to whose nationality no room for difference of opinion exists are in the main those who have been born within a state territory of parents belonging to the community, and whose connexion with their state has not been severed through any act done by it or by themselves. ...
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> *The persons as to whose nationality a difference of legal theory is possible are children born of the subjects of one power within the territory of another*, illegitimate children born of a foreign mother, foreign women

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**271** Cockburn on Nationality at 70-81.

**272** Dicey, *A Digest of the Law of England with reference to the Conflict of Laws*, (1896) at 174.

**273** *A Digest of the Law of England with reference to the Conflict of Laws*, (1896) at 174-175.

**274** *Naturalization Act* 1870, s 7.

**275** Hall, *A Treatise on International Law*, 4th ed (1895) at 234.

> who have married a subject of the state, and persons adopted into the state community by naturalisation, or losing their nationality by emigration, and the children of such persons born before naturalisation or loss of nationality." (emphasis added)

184 Further, account must be taken of the British legislative response to these questions. It is, therefore, to be noticed that the *Naturalization Act* 1870 permitted a natural-born British subject who, at the time of birth, "became under the law of any foreign state a subject of such state, and [was] still such subject, ... if of full age and not under any disability, [to] make a declaration of alienage"[276]. It further provided for British subjects to renounce allegiance to the Crown by voluntarily becoming naturalized in a foreign state[277].

185 No doubt it is also necessary to have regard to the position in the United States.

"Aliens" and the United States

186 Section 8 of Art 1 of the United States Constitution gave the Congress power "[t]o establish an uniform Rule of Naturalization". Section 1 of the 14th Amendment (which was ratified in July 1868) provided, among other things, that: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

187 But for the deviation of the *Dred Scott Case*[278] concerning the citizenship of a freed slave, and the treatment of native Americans as subject to a separate sovereignty[279], the United States Supreme Court consistently applied the rule of territorial birthright citizenship[280]:

> "Nothing is better settled at the common law, than the doctrine, that the children, even of aliens, born in a country, while the parents are resident

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**276** *Naturalization Act* 1870 (UK) (33 Vict c 14), s 4.

**277** *Naturalization Act* 1870, s 6.

**278** *Dred Scott v Sandford* 60 US 393 (1856).

**279** *Cherokee Nation v Georgia* 30 US 1 (1831).

**280** *Inglis v Sailor's Snug Harbour* 28 US 99 at 164 (1830).

there under the protection of the government, and owning a temporary allegiance thereto, are subjects by birth."

188 The 14th Amendment entrenched this rule, although native Americans were still regarded as not subject to the jurisdiction of the United States. (Native Americans were brought within the rule of territorial birthright citizenship by the *Citizenship Act of 1924*[281].)

189 Subject to this exception, and the exception of the children of foreign diplomats, it is clear that, since the 14th Amendment, children born in the United States are citizens of the United States regardless of the nationality or citizenship or their parents. Thus, in 1898, the Supreme Court held in *United States v Wong Kim Ark*[282] that a child born in the United States, of parents of Chinese descent who, at the time of the child's birth, were subjects of the Emperor of China but then resided in the United States, became at the time of his birth a citizen of the United States. Although Gray J convincingly demonstrated in *Wong Kim Ark* that the rule of so-called birthright citizenship adopted in the 14th Amendment not only was consistent with, but also was derived from, the common law rules developed in England, the conclusion reached in that and other later American cases concerning nationality must ultimately depend upon the proper construction of the particular constitutional provision engaged – s 1 of the 14th Amendment. For that reason there is no advantage to be gained from tracing the American law in any greater detail. For present purposes, what is significant is that the Australian Constitution contains no provision equivalent to s 1 of the 14th Amendment and contains no reference to citizenship except the references in s 44(i) to citizens of foreign powers.

What the history demonstrates

190 The word "aliens" may have had a fixed legal meaning in the 17th century. (Even then the legislature had altered the rules about alienage in some respects.) By the end of the 19th century the word did not bear the meaning it did at the time of *Calvin's Case*. There had been numerous legislative interventions in the subject. But there was one feature about the use of the word that was constant: it was that the alien "belonged to another". Often that was expressed by reference to the concept of allegiance and often it was expressed in terms that, by their definitions, assumed that the world could be divided into two groups. Either one was a British subject or one was an "alien". And those

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**281** 8 USC § 1401 (b) (1988).

**282** 169 US 649 (1898).

groups were defined by reference to the nature of the allegiance they owed. During the 19th century, large numbers of persons emigrated from the British Isles to America and from Europe to the British Isles and America. During the latter half of that century legal thought in Britain and Europe grappled with the consequences of these movements. What may once have been the common law understanding of alienage yielded to these new circumstances. "Aliens", even if it had once had a fixed legal meaning, did not bear such a meaning by the end of the 19th century. But what did remain unaltered was that "aliens" included those who owed allegiance to another sovereign power, or who, having no nationality, owed no allegiance to any sovereign power.

The absence of a citizenship power

191 The plaintiff placed some emphasis on the specific rejection at the Australasian Federal Convention of a proposal to give the Federal Parliament power to make laws with respect to citizenship. At the Third Session of the Convention held in Melbourne in 1898, Dr Quick proposed that the federal Parliament be given power to make laws with respect to "Commonwealth citizenship"[283]. The proposal failed. When asked, in the course of debate, to define citizenship, Dr Quick said[284] that "a reasonably approximate definition would be ... to the effect that all persons resident in the Commonwealth, being natural-born or naturalized subjects of the Queen, and not under any disability imposed by the Federal Parliament, should be citizens of the Commonwealth".

192 Debate at the Convention focused upon the ambit of the proposed power. As the plaintiff pointed out in argument in the present matter, statements were made in debate by, for example, Mr Symon (later Sir Josiah Symon)[285] and Mr O'Connor (later O'Connor J)[286], which can be read as suggesting that they opposed the proposal on the basis that the federal Parliament should not have power to determine who is a citizen of Australia. Read as a whole, however, the debate about the proposal demonstrates the difficulty of distilling from debate a

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**283** *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 2 March 1898 at 1750.

**284** *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 2 March 1898 at 1752.

**285** *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 2 March 1898 at 1768.

**286** *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 2 March 1898 at 1753-1755.

single proposition, or even series of propositions, as the reason or reasons which underpinned the ultimate rejection of the proposal. Some speakers[287] opposed the proposal because it might empower the federal Parliament not only to define who is a citizen, but also to define the rights attaching to citizenship in ways amplifying the reach of powers otherwise to be conferred on the federal Parliament. Mr Barton[288] also emphasised the importance to be attached to the status of subject of the Queen suggesting, in effect, that the injection of a new concept of "citizenship" was unnecessary. In the end, little is to be gained from the Convention Debates on this proposal except for the obvious fact that it was considered and rejected. It is, in these circumstances, unnecessary to examine the principles which are to be applied in deciding the use to which statements in the Convention Debates may properly be put[289].

193 That is not to say, however, that the absence of an express power with respect to citizenship is not significant. If the plaintiff is right in submitting that any person born in Australia (other than the child of a foreign diplomat or occupying force) cannot fall within the expression "alien" when used in s 51(xix), there is a considerable fetter on the power of the federal Parliament to identify those who are to be treated, whether for domestic or international purposes, as nationals of Australia.

194 It must be noted that the powers to make laws with respect to immigration and emigration, and with respect to external affairs, may well be engaged in various ways in connexion with that general subject. So, for example, enacting a law to give effect to a treaty dealing with the subject of dual nationality would, on its face, appear to be a law with respect to external affairs. And it may be argued that a law providing for the removal of the dependent children of persons not permitted to immigrate to Australia is a valid law with respect to immigration. These questions need not be resolved now.

195 Whatever may be the outcome of debate about the validity of laws alleged to depend upon other powers given to the federal Parliament, it is central to the plaintiff's argument that the constitutional word "aliens" has a meaning which cannot include a person born within Australia. If that is the proper construction

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**287** For example, Mr Barton, *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne) 2 March 1898 at 1765.

**288** *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne) 2 March 1898 at 1765-1766.

**289** *Cole v Whitfield* (1988) 165 CLR 360 at 385.

of "aliens" the result would be that, through the exercise of the naturalization aspect of the power conferred by s 51(xix), the class of persons born outside Australia who otherwise would be aliens can be altered or reduced by valid federal legislation, but the class of non-aliens contains an irreducible core. Understood in that way, the naturalization and aliens power would provide a one-way street: empowering legislation permitting persons to become non-aliens but not empowering legislation that would affect the status of a person born in Australia, regardless of that person's ties to other sovereign powers.

Laws with respect to "naturalization and aliens"

196 These reasons have hitherto focused on the meaning to be given to the word "aliens". It is necessary to recall, however, that the power is to make laws with respect to "naturalization and aliens". The power to make laws with respect to naturalization plainly extends to making a law prescribing the circumstances in which, and the procedures by which, an alien ceases to hold that status and becomes "naturalized".

197 Argument in the present matter proceeded on the footing that the power also extends to making a law identifying the circumstances in which, and the procedures by which, a person who is not an alien may sever the ties of allegiance to Australia. (We leave aside any examination of what assumptions may be implicit in describing that as renouncing citizenship, renouncing allegiance, or ceasing to be a national of Australia.) Given the state of British law at the time of federation, and in particular the provisions of the *Naturalization Act* 1870 permitting renunciation of allegiance[290], it would be surprising if the power with respect to naturalization and aliens did not extend this far. But, if the power extends to regulating renunciation of allegiance, the power extends, at least in this respect, to altering the criteria which are to determine whether the necessary connexion between the individual and (to personify the concept) the Crown exists. Yet it is central to the plaintiff's case that, at least in the case of a person born in Australia, this criterion of connexion is to be unalterable. That is, it is central to the plaintiff's case that the status flowing from birth within Australia cannot be altered except at the will of the individual, but then only if and to the extent that the Parliament permits the individual to take that step.

198 This understanding of the power treats the subject-matter (whether it is described as alienage, nationality, or citizenship) as a status describing a *bilateral* relationship (between sovereign power and individual) which is a status alterable

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**290** *Naturalization Act* 1870, ss 3, 4 and 6.

only by the *unilateral* act of the person whose status is in issue. That one-sided understanding of the power sits uncomfortably with any notion of allegiance that is bilateral. In particular, it is a view of the power that presents great difficulty in accommodating political changes like the changes in the relationship between the United Kingdom and Australia since federation, or the changes in relationship between Australia and what now is the Independent State of Papua New Guinea.

"Aliens" – conclusions

199 The plaintiff alleges that because a person in her circumstances would have fallen outside the class identified by British law in 1901 as "aliens" the federal Parliament has no power, under the naturalization and aliens power, to make a law, the application of which to the plaintiff depends, as s 198 of the *Migration Act* does in its operation with respect to "non-citizens", upon her parents not being natural-born or naturalized citizens of Australia. Identification of membership of the class described as "aliens" in 1901 depended in Britain not only upon common law rules, but also upon the application of particular statutory modifications of those rules. To say, then, as the plaintiff does, that "aliens" is a word that had an accepted and fixed legal meaning in 1901 would be accurate only if it were to be understood as saying no more than that resort to the then applicable law in Britain would have revealed whether or not an individual fell within the reach of that term.

200 To understand the constitutional reference to "aliens" as confined to those who, in 1901, by then existing British law, would have been treated by a British court as an alien would be to confine the meaning of the word too narrowly. It would be to give meaning to the word by listing those to whom it could then have been applied rather than by identifying the characteristics of the legal status to which the word refers. The central characteristic of that status is, and always has been, owing obligations ("allegiance") to a sovereign power other than the sovereign power in question (here Australia). That definition of the status of alienage focuses on what it is that gives a person the status: owing obligations to another sovereign power. It does not seek to define the status, as the plaintiff sought to submit, by pointing to what is said to take a person *outside* its reach.

201 That owing obligations to a sovereign power other than Australia is the central characteristic of what is meant by "aliens" can be illustrated by reference to the law that had developed about enemy aliens. For most, if not all, practical

purposes, by 1900 friendly aliens were "treated in reference to civil rights as if they were British subjects"[291]. The position with enemy aliens was different.

202 An enemy alien not present in Britain and under the protection and by permission of the Crown had no civil rights or privileges[292] and could maintain no real or personal action in the courts[293]. In 1802 it was held[294] that whether a person was barred from maintaining a suit on the ground of being an enemy alien depended upon that person's place of residence or business, not upon whether the person was a natural-born subject of the Crown. This rule invited attention to the obligations that the person owed as a result of residing and doing business in the country concerned. As Lord Lindley later said[295], "when considering questions arising with an alien enemy, it is not the nationality of a person, but his place of business during war that is important"[296]. Just as an alien friend resident in Britain owed a temporary and local allegiance to the Crown, so too the British subject, voluntarily resident in the territory of a nation at war with Britain, came under obligations to the country of residence of a kind sufficient to classify that person as an enemy alien. Those obligations were voluntarily assumed by choosing to reside in the enemy territory. The obligations which friendly aliens owe to their respective sovereign powers may not be assumed voluntarily. But what is important, as the case of the British subject voluntarily resident in an enemy State reveals, is that each owes obligations (allegiance) to another sovereign power. Owing allegiance (even temporary and local allegiance) to a sovereign power other than the Crown brought the person within the concept of alienage.

203 The previous decisions of the Court do not require the conclusion that those born within Australia who, having foreign nationality by descent, owe

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**291** *Porter v Freudenberg; Kreglinger v S Samuel & Rosenfeld; In re Merten's Patents* [1915] 1 KB 857 at 869; *Bradley v The Commonwealth* (1973) 128 CLR 557 at 582 per Barwick CJ and Gibbs J.

**292** Blackstone, *Commentaries on the Laws of England*, (1765), vol 1, c 10 at 360-361.

**293** *In re Merten's Patents* [1915] 1 KB 857 at 869-874.

**294** *M'Connell v Hector* (1802) 3 Bos & Pul 113 [127 ER 61].

**295** *Janson v Driefontein Consolidated Mines Ltd* [1902] AC 484 at 505.

**296** See also *Wells v Williams* (1697) 1 Ld Raym 282 [91 ER 1086]; *The "Jonge Klassina"* (1804) 5 C Rob 297 at 302-303 [165 ER 782 at 784]; *In re Merten's Patents* [1915] 1 KB 857 at 868-869.

obligations to a sovereign power other than Australia are beyond the reach of the naturalization and aliens power. Observations in *Potter v Minahan*[297], a case ultimately about the meaning of "immigrant" in a statute, concerning the consequences of birth in Australia were not directed to the present problem, and took no account of the question whether the defendant owed allegiance to any foreign power[298]. In *Pochi*[299], Gibbs CJ said that Parliament could "treat as an alien any person who was born outside Australia, whose parents were not Australians, and who has not been naturalized as an Australian". Mr Pochi met all three of these conditions. It would be wrong, however, to take what was said by Gibbs CJ as necessarily treating a person born in Australia as beyond the reach of the aliens power. That question did not arise and was not decided in *Pochi*.

204 Nor has the question arisen since. Thus, although references may be found, for example, in *Patterson*[300] to "[b]irth within the sovereign's territories [being] the criterion by which the common law distinguished the subject of the sovereign from the alien" it is to be recalled that *Patterson*, *Te*[301] and *Shaw*[302] all concerned the status of persons born outside Australia. The status of those born within Australia did not fall for decision in those cases.

205 Rather, the meaning of "aliens" was conveniently described in the joint reasons of six members of the Court in *Nolan v Minister for Immigration and Ethnic Affairs*[303] where it was said that "alien" "[u]sed as a descriptive word to describe a person's lack of relationship with a country ... means, as a matter of ordinary language, 'nothing more than a citizen or subject of a foreign state'[304]". It was common ground that the plaintiff is a citizen of India. She is, therefore, a

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**297** (1908) 7 CLR 277.

**298** The same is true of the dictum of the Privy Council in *Cunningham v Tomey Homma* [1903] AC 151 at 156 that a child of Japanese parentage born in Vancouver was a natural-born subject of the King.

**299** (1982) 151 CLR 101 at 109-110.

**300** (2001) 207 CLR 391 at 432 [125].

**301** (2002) 212 CLR 162.

**302** (2003) 78 ALJR 203; 203 ALR 143.

**303** (1988) 165 CLR 178 at 183.

**304** *Milne v Huber* 17 Fed Cas 403 at 406 (1843).

citizen of a foreign state. She is a person within the naturalization and aliens power.

Conclusion and Orders

206 For these reasons the first question reserved for the consideration of the Full Court should be answered, "Yes". The second question should be answered, "Does not arise". The plaintiff should bear the costs of the case stated and the third question should be answered accordingly.

207 KIRBY J. Is a person, born in Australia to parents, neither of whom is an Australian citizen, an "alien" within s 51(xix) of the Constitution, or otherwise liable under the Constitution and federal law to be removed from Australia?

208 This is the central question presented by a case stated for the opinion of the Full Court. The proceeding represents the latest in a series of cases that have addressed the power of ministerial deportation affecting foreign nationals[305] and long-term residents who are also subjects of the Queen[306]. The point of distinction in the present case is that the proposed deportee was born in Australia. Does this fact prevent involuntary removal?

The facts

209 Tania Singh ("the plaintiff")[307] was born in Mildura, Victoria, on 5 February 1998. She has remained in Australia continuously since her birth. Each of her parents was born in 1969 in India. Her brother was also born in India, in 1994. The parents and brother are citizens of India. By Indian law applicable at the time of her birth, the plaintiff appears to have been entitled, automatically, to Indian citizenship by descent[308].

210 The case was argued on the basis that the plaintiff was, and is, a citizen of India. However, this is far from clear. In December 2003, the *Citizenship Act* 1955 (India) was amended by *The Citizenship (Amendment) Act* 2003 (India). The amending Act was notified in the Gazette of India in January 2004[309] (before the hearing of this matter), but it is not clear whether the amendment has yet been brought into force. The amendments provide that a person, such as the plaintiff, who is "born outside India", where either parent is a citizen of India, is a citizen only *if* their "birth is registered at an Indian consulate"[310]. This amendment was not referred to in argument by either of the parties. This Court does not know its precise effect, or whether there is any question as to its validity.

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**305** *Pochi v Macphee* (1982) 151 CLR 101; *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162.

**306** *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391; *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 78 ALJR 203; 203 ALR 143.

**307** Suing by her father as her next friend. The proceedings were formerly named *S441/2003*. By consent the title was amended: *Singh v The Commonwealth* [2004] HCATrans 005 at 315-367.

**308** *Citizenship Act* 1955 (India), s 4 (as it was in 1998).

**309** [2004] AIR (Acts) 7.

**310** *The Citizenship (Amendment) Act* 2003 (India), s 4(1).

211 However, aware of the content of the amending Act, this Court cannot say unequivocally that the plaintiff is a citizen of India: owing allegiance to that country. The case must be answered on the basis that the plaintiff's status in Australian law is to be determined against the probability that she is not necessarily entitled to other citizenship in default of prompt registration of her birth with, or the exercise of administrative power by, officials of the country of the nationality of her parents.

212 The plaintiff's parents and her brother entered Australia in April 1997 on Business (Short Stay) visas. They have not departed since their arrival. Upon the expiry of the Business visas in July 1997, the plaintiff's father lodged an application for a protection visa[311], claiming refugee status for himself and his family. Proceedings challenging the Minister's adverse determinations of that application were commenced in this Court and remitted to the Federal Court of Australia, where those proceedings remain pending.

213 The plaintiff has now commenced her own proceedings in this Court, relying on her status as a person born in Australia, to resist any risk of removal from Australia under the *Migration Act* 1958 (Cth)[312] ("the Migration Act").

The legislation

214 Before the passage of the *Nationality and Citizenship Act* 1948 (Cth), later renamed the *Citizenship Act* 1948 (Cth) ("the Citizenship Act"), the concept of nationality within Australia was substantially subsumed, so far as the law was concerned, in that generally operating throughout the British Empire[313]. Australians were identified as having the status of "British subject"[314]. Following

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**311** Under the *Migration Act* 1958 (Cth), s 36(2).

**312** s 198.

**313** By the *Citizenship Act* 1969 (Cth), s 1(3). See Rubenstein, *Australian Citizenship Law in Context*, (2002) at Ch 3.

**314** See *Naturalization Act* 1903 (Cth), ss 3, 8; *Nationality Act* 1920 (Cth), ss 5(1), 6. Some distinctions were drawn between British subjects who were permanent residents of Australia and those only temporarily in the Commonwealth; cf Rubenstein, *Australian Citizenship Law in Context*, (2002) at 10, 79. In 1901, the word "citizen" was commonly, but not invariably, used to describe nationality status in republics with "subject" used for equivalent status in monarchical polities. The notion of allegiance was common: *United States v Wong Kim Ark* 169 US 649 at 663-664 (1898) per Gray J (for the Court); cf Anson, *The Law and Custom of the Constitution*, 3rd ed (1907), vol 2 at 239.

the introduction of the statutory concept of citizenship[315], the status of "British subject" was retained until 1 May 1987, alongside that of "Australian citizen"[316]. The Citizenship Act from 1948 provided that a person born in Australia was an Australian citizen, provided that his or her father (later "parent") was not a foreign diplomat or enemy alien, in the latter case where the birth occurred in a place at the time under occupation by the enemy[317]. These notions had particular meanings[318]. In substance, the original scheme of the Citizenship Act was designed to reflect the common law.

215 In 1986, the Citizenship Act was changed to introduce one of the provisions, the validity of which as it affected the plaintiff was initially challenged in these proceedings. Section 10 of the Citizenship Act was amended to provide that a person born in Australia after 20 August 1986 became an Australian citizen by virtue of such birth if, and only if, a parent of the person was at the time of the person's birth an Australian citizen or permanent resident[319] or "the person has, throughout the period of 10 years commencing on the day on which the person was born, been ordinarily resident in Australia"[320]. The change to the Citizenship Act removed the former statutory exception in the case of a child of foreign diplomats[321]. However, the exception for a child of an enemy alien was maintained[322]. Special provision exists in relation to a child found abandoned in Australia[323] and for a child born in Australia to persons who are stateless[324]. There is no other special provision for a child who is stateless

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**315** Citizenship Act, Pt III.

**316** The references to "British subject" were removed by the *Australian Citizenship Amendment Act* 1984 (Cth), amending the *Citizenship Act* 1948 (Cth), Pt II. See *Re Patterson* (2001) 207 CLR 391 at 442-443 [152]-[153].

**317** Citizenship Act, s 10(2)(a).

**318** The definition of "Australia", by reference to external and other territories; of "foreign diplomat", by reference to various identified envoys; and of "enemy alien", by reference to descent and the period of hostilities.

**319** Permanent residence is defined by the Citizenship Act, s 5A. See also s 5(3)(e).

**320** Citizenship Act, s 10(2)(b).

**321** Now subject to the general requirements of the Citizenship Act, s 10(2).

**322** In terms of ss 10(3) and 10(5).

**323** Citizenship Act, s 5(3)(b).

**324** Citizenship Act, s 23D.

according to the municipal law of the country of the nationality of her parents and according to Australian law.

216 By s 198 of the Migration Act, provision is made for the removal from Australia "as soon as reasonably practicable" of an "unlawful non-citizen". Clearly, this provision is intended to be read with the provisions of the Citizenship Act defining who is a "citizen" of Australia. In terms of the latter, the plaintiff is not an Australian citizen despite her birth in Australia. This is so because she does not satisfy either of the additional conditions of citizenship stated in the Citizenship Act, s 10(2).

217 Although it appeared that, pending the resolution of the parents' proceedings in the courts, the plaintiff may have been entitled to a "visa" preventing her deportation as an "unlawful non-citizen", the plaintiff defensively sought protection against the possibility of involuntary removal. She sought clarification of her status. In argument, her counsel accepted that she was not a "citizen" of Australia within that statutory concept as defined by the Citizenship Act[325]. However, he contended that neither was she an "alien". As such, whether as a "subject of the Queen"[326] or simply as a non-"alien" within the Constitution, born in Australia, she was not liable to be removed from the country involuntarily. Whatever the Citizenship Act or the Migration Act provided, the plaintiff claimed protection by appeal to a higher law, namely the Constitution, and the limited powers that it affords to the Federal Parliament to enact a law for the removal from the Commonwealth of a person like herself.

218 The plaintiff's only experience of a country, since her birth, has been of Australia. Initially, I inclined to the view that she was not an "alien" in terms of the Constitution and could not be made so involuntarily (nor otherwise rendered liable to deportation) pursuant to valid federal law. However, ultimately, I have reached the opposite conclusion. I will explain the arguments upon which the plaintiff relied, for they are not without persuasive force. But I will then explain the more persuasive reasons that bring me to the contrary result.

The plaintiff's arguments

219 *Constitutional text and citizenship*: The starting point for the plaintiff's arguments was that the Constitution contains no express authority to make laws with respect to citizenship, and specifically for depriving nationality (called "citizenship") from a "natural born" Australian, that is, someone born on Australian soil.

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**325** *Singh* [2004] HCATrans 005 at 399-411.

**326** cf Constitution, s 117.

220 The word "citizen" appears in the Constitution. It does so by way of contrast to "subject"[327] and apparently by way of contrast to the stated obligation that every member of the House of Representatives[328] and the Senate[329] was obliged to be "a subject of the Queen, either natural-born or for at least five years naturalized under a law of the United Kingdom, or of a Colony which has become or becomes a State, or of the Commonwealth, or of a State"[330]. This latter provision, together with a protection expressed for the rights of residents in different States in terms of their position as a "subject of the Queen"[331], both still in force, make it clear that the nationality status, and the only such status, envisaged at the time the Constitution was made, was that of British subject. Considerations of history and politics at that time confirm this view.

221 According to the plaintiff, even if this interpretation of the Constitution seems old-fashioned, or anomalous to modern eyes (or to eyes fixed on the present federal statute book)[332], it was the only such status provided in the Constitution. On this argument, no invocation of other legislative powers, dealing in general terms with other subject matters, nor of the incidental power afforded by or under the Constitution[333], could permit the taking away of the one form of nationality for which the Constitution makes express provision. Even if it seemed anomalous to some, it was the duty of the Court to give effect to it, for its source was the express provision of the constitutional text. Alteration of that text was not the province of the Court but of the electors in accordance with the provisions of the Constitution governing formal amendment[334].

222 *Birthright and the Constitution*: The plaintiff elaborated this idea by reference to what she said was the "core" concept of nationality accepted in the common law at the time the Australian Constitution was adopted and long

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**327** Constitution, s 44(i). See *Sue v Hill* (1999) 199 CLR 462.

**328** Constitution, s 34(ii).

**329** Constitution, s 16.

**330** Constitution, s 34(ii).

**331** Constitution, s 117.

**332** The Citizenship Act abolished the status of "British subject" in respect of Australian citizens with effect from 1 May 1987. See above fn 316.

**333** Constitution, s 51(xxxix).

**334** Constitution, s 128.

before[335]. This was nationality by birthright ("*jus soli*", literally "right of the soil"). As Professor Pryles puts it[336]:

> "[T]he common law accepted as the general basis of allegiance that of the jus soli (the place of birth) rather than the jus sanguinis (the allegiance of the parents)."

223 The classic common law rule regarding "natural-born subjects" of the English King was stated by Sir Edward Coke CJ in *Calvin's Case*[337]:

> "There be regularly … three incidents to a subject born. 1. That the parents be under the actual obedience of the King. 2. That the place of his birth be within the King's dominion. And, 3. The time of his birth is chiefly to be considered; for he cannot be a subject born of one kingdom that was born under the ligeance of a King of another kingdom …".

224 This principle, which had its "roots in the feudal idea of a personal duty of fealty" owed by a tenant to his lord[338] was, according to the plaintiff, deeply embedded in the law of the Australian Constitution, both at its origin and since[339]. It reflected Holdsworth's dictum[340]:

> "[A]ll persons born on English soil, no matter what their parentage, owed allegiance to, and were therefore subjects of the king."

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**335** *Singh* [2004] HCATrans 005 at 1044-1059, 1250-1256, 1474-1477.

**336** Pryles, *Australian Citizenship Law*, (1981) at 14; see also *Re Patterson* (2001) 207 CLR 391 at 440 [148].

**337** (1608) 7 Co Rep 1a at 18a [77 ER 377 at 399]. Cited in *Nolan* (1988) 165 CLR 178 at 189 per Gaudron J; *Re Patterson* (2001) 207 CLR 391 at 429-430 [116] per McHugh J, 481-482 [273] of my own reasons; *Te* (2002) 212 CLR 162 at 180 [57] per Gaudron J, 196 [121] per Gummow J; *Shaw* (2003) 78 ALJR 203 at 213 [54]; 203 ALR 143 at 155-156. See Broom, *Constitutional Law Viewed in Relation to the Common Law and Exemplified by the Cases* (1866) at 42.

**338** Holdsworth, *A History of English Law*, 3rd ed (1944), vol 9 at 72; *Lesa v Attorney-General* [1982] 1 NZLR 165 at 174-175 (PC). See *Nolan* (1988) 165 CLR 178 at 189; *Re Patterson* (2001) 207 CLR 391 at 428-429 [114]-[115].

**339** *Singh* [2004] HCATrans 005 at 998-1059, 1250-1256.

**340** Holdsworth, *A History of English Law*, 3rd ed (1944), vol 9 at 75.

225 This was not simply local obedience, of a transient kind attaching to those temporarily within the Crown's dominions[341]. Such temporary allegiance was to be distinguished from that with which this case was concerned. According to the plaintiff, the constitutional text made it clear that nationality contained an enduring notion of allegiance to the monarch. When the Australian Constitution referred to the matter, it did so reflecting the long-established rule of the common law. Other countries might since have changed their law of nationality, but, according to the plaintiff, the text of the Australian Constitution demanded continued fidelity to the principle of nationality as a birthright.

226 *Constitutional role of the Crown*: In support of this view of nationality, in the text of the Australian Constitution, the plaintiff pointed to the centrality of the role of the Crown (concededly now personified in the role of the Queen as Queen of Australia) throughout the text of the Constitution.

227 From the opening words of the Preamble declaring the Commonwealth to be a federal polity "under the Crown" to the scheduled oath and affirmation of officers appearing at the end of the text (providing for a promise to be "faithful and bear true allegiance" to the monarch) the Constitution reflects a conception of constitutional monarchy. Such a system might be changed in constitutional ways. But whilst it endures, so the plaintiff submitted, it preserves the reciprocal relationship between the Queen of Australia and the people of the Commonwealth who owe her allegiance. Whatever changes statutes may introduce, the Constitution, according to this argument, remained grounded in a traditional view of Australian nationality based on the idea of personal allegiance to the monarch as provided in the Constitution.

228 To those who complained about the feudal history lying at the heart of this birthright idea, the plaintiff simply pointed to the character of the Constitution. Until the text was validly changed, she argued, it was binding on "the courts, judges, and people of every State and of every part of the Commonwealth"[342]. The birthright principle, according to the plaintiff, was subject to well-settled exceptions recognised in the common law at the time of the Constitution's making[343]. These extended to a child born in the Crown's dominions to a foreign

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**341** *Wong Kim Ark* 169 US 649 at 693 (1898) per Gray J (for the Court); cf *Joyce v Director of Public Prosecutions* [1946] AC 347 at 366. For discussion of the history of the Fourteenth Amendment to the *Constitution of the United States* 1787, see Drimmer, "The Nephews of Uncle Sam: The History, Evolution, and Application of Birthright Citizenship in the United States", (1995) 9 *Georgetown Immigration Law Journal* 667.

**342** Constitution, covering cl 5.

**343** *Potter v Minahan* (1908) 7 CLR 277 at 320-321 per Higgins J.

monarch; to an accredited diplomat; or to an enemy alien[344]. Furthermore, it was subject to the extensions established by imperial statutes before 1901, including the recognition by statute, enacted as early as 1351, of the nationality of children born abroad to English parents who were entitled to be considered as subjects from birth, despite being born outside the kingdom[345].

229 Save for these few exceptions, well established when the Constitution was made and reflected in its textual references to "subject of the Queen", the plaintiff would admit to no power in the Parliament to alter such "core" constitutional notions. They were part of the fixed connotation of the idea of Australian nationality. No meaning could be given to any other constitutional word, such as "alien", that contradicted that connotation[346]. To attempt, by statute, to vary the meaning of "alien" from its essential connotation would be to attempt to change the "bedrock of principle" upon which the Constitution was founded[347].

230 *Convention debates*: To strengthen these arguments, the plaintiff invoked the course of the debates at the Constitutional Conventions which substantially determined the text of the Constitution endorsed at the pre-Federation referenda[348].

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**344** The exceptions in relation to the children of foreign monarchs and diplomats is consistent with the principles of international law. See eg *Convention on Certain Questions Relating to the Conflict of Nationality Laws*, signed at The Hague on 12 April 1930, Art 12.

**345** 25 Edw III Stat 2 (1351), referred to in Holdsworth, *A History of English Law*, 3rd ed (1944), vol 9 at 75-76. This position was confirmed by 7 Anne c 5 (1708), 10 Anne c 5 (1710) and 4 George II c 21 (1730), described in Holdsworth, *A History of English Law*, 3rd ed (1944), vol 9 at 87-88.

**346** cf *Street v Queensland Bar Association* (1989) 168 CLR 461 at 537-538 per Dawson J.

**347** cf Australian Parliament, *We are Australian – The Constitution and Deportation of Australian-born Children*, Research Paper No 3, (2003-04) ("Parliamentary Research Paper") at 5. See also *Re Patterson* (2001) 207 CLR 391 at 429 [115] per McHugh J, 440 [148] per Gummow and Hayne JJ.

**348** The plaintiff relied on *Cole v Whitfield* (1988) 165 CLR 360 at 385 to support reference to the Constitutional Debates: *Singh* [2004] HCATrans 005 at 501-568, 689-711. The use to which the debates were put, and their meaning and content, was contested by the Commonwealth: *Singh* [2004] HCATrans 006 at 4848-4888; cf McGrath, "Today's High Court and the Convention Debates", (2001) 13 *Upholding the Australian Constitution: Proceedings of the Thirteenth Conference of the Samuel Griffith Society* 1 at 7.

231 At the third session of the Conventions (Melbourne, 1898) Dr John Quick argued that the Constitution should[349]:

> "[E]ither place in the forefront of [the] Constitution an express definition of citizenship of the Commonwealth, or empower the Federal Parliament to determine how citizenship shall be acquired, what shall be its qualifications, its rights and its privileges, and how the status may hereafter be lost."

However, this proposal was rejected by the delegates. One of the reasons for the rejection was the suggestion that a power to legislate with respect to citizenship might lead to the power to deprive a natural-born subject of citizenship[350]. Mr Josiah Symon declared that it would "hand over our birthright as citizens"[351].

232 In this way, the notion of "birthright" was, according to the plaintiff, entrenched in the conception of nationality adopted by the Constitution. To this extent, the plaintiff argued that the history of its drafting confirmed the inferences to be drawn from the language of its text. Any change belonged not to the Parliament or to courts but to the people of the Commonwealth as electors.

233 *Aliens and statutory citizens*: The plaintiff acknowledged that the Citizenship Act had made particular provisions in relation to the status of citizenship. However, lacking an express constitutional source, this status was "entirely statutory"[352]. Although there were judicial suggestions of a dichotomy between citizenship and alienage[353], the plaintiff submitted that such suggestions were fundamentally inconsistent with the constitutional text. She pointed to numerous observations of the Court to the effect that the Parliament could not declare anyone it wished to be an "alien"[354]. By this logic, the Parliament could

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**349** *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 2 March 1898 at 1751-1752.

**350** Rubenstein, *Australian Citizenship Law in Context*, (2002) at 30; *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 2 March 1898 at 1763.

**351** *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 2 March 1898 at 1764.

**352** *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 54 per Gaudron J.

**353** *Re Patterson* (2001) 207 CLR 391 at 481-483 [273]-[276].

**354** *Pochi* (1982) 151 CLR 101 at 109-110; *Shaw* (2003) 78 ALJR 203 at 205-206 [9], 220 [94]; 203 ALR 143 at 145, 166.

not, by adopting a statutory definition of citizenship, and attaching powers of deportation to those not conforming, take away rights that attached by the Constitution to the status of non-"alien" or a "subject of the Queen".

234 It was thus possible, according to the plaintiff, that somewhere between persons who were, and were not, citizens according to statute, lay an intermediate category of non-citizen non-aliens. This possibility was inherent in the deliberate omission from the Constitution of a provision to empower the Parliament to make laws on citizenship. It might be hoped that the clarification of the meaning of "alien" (and hence of the status of non-aliens) would lead promptly to federal legislation to regularise this intermediate class. But if it did not, it would remain for this Court to defend non-aliens from exclusion from the polity of the Commonwealth and from ministerial deportation only because they were, in terms of statute, "non-citizens".

235 *Judicial references to birth*: In proof of the deeply entrenched notion of a "birthright", deriving from birth on Australian soil, the plaintiff pointed to numerous judicial observations about the constitutional idea of alienage in terms excluding persons born in Australia[355]. It was conceded that these references were not essential to the decisions then in question. In none of the cases was the person concerned born in Australia. The problem now presenting was therefore not specifically addressed.

236 Nevertheless, the plaintiff submitted that the idea of "birthright" ran very deep in the nationality notions of English-speaking democracies. At least it did so in settler societies. Thus, to this day, in the United States of America[356], Canada[357] and New Zealand[358], birth on the soil of each country remains sufficient to attract the local right of citizenship or nationality. Although since 1981, this has been changed by statute in the United Kingdom[359], along lines not

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**355** *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 375 per Toohey J. See *Shaw* (2003) 78 ALJR 203 at 205 [7] per Gleeson CJ, Gummow and Hayne JJ; 203 ALR 143 at 145; cf *Re Patterson* (2001) 207 CLR 391 at 429 [115], 440 [148].

**356** *Constitution of the United States* 1787, Fourteenth Amendment, s 1.

**357** *Constitution Act* 1867 (Can), s 91(25). See *Cunningham v Tomey Homma* [1903] AC 151 at 156-157; *Citizenship Act* 1985 (Can), s 3(1)(a).

**358** cf *Citizenship Act* 1977 (NZ), s 6(1). It should be noted that the *Identity (Citizenship and Travel Documents) Bill* was introduced into the New Zealand Parliament on 17 June 2004, and amendment to relevant sections of the *Citizenship Act* 1977 (NZ) has been foreshadowed by the Government.

**359** *British Nationality Act* 1981 (UK), s 1.

dissimilar to those now appearing in the Citizenship Act, s 10(2), the plaintiff asserted that such change was irrelevant. Although the United Kingdom was subject to the obligations of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*[360] and now to the *Human Rights Act* 1998 (UK), its Parliament was not subject to a written constitution reflecting notions of nationality formed in earlier times. It could change such notions as it pleased whereas, so the plaintiff said, the Federal Parliament in Australia could not. For a change to be effected in Australia, the plaintiff argued, it was necessary to contemplate formal constitutional amendment such as has recently been adopted in the Republic of Ireland to abolish express birthright entitlements[361] formerly appearing[362].

237 *Practical considerations*: The plaintiff denied that the arguments that she advanced, defensive of her status, caused any significant practical problem for the operation of the Australian Constitution. Her counsel submitted that the fact that at her birth, by Indian law, she enjoyed the status of a citizen of India was irrelevant. By inference, if the amendments to the *Citizenship Act* 1955 (India) are in force, the same argument would apply to any present right of the plaintiff to Indian citizenship by registration of her birth or by the exercise of administrative discretion. According to the plaintiff, it remained for this Court to determine whether she had rights to Australian nationality in accordance with Australia's Constitution and laws. Such rights could not be governed by, nor could they depend upon, the law of India. The earlier approach of international law generally unfavourable to dual nationality[363] had, in any case, lately given way to numerous instances of dual citizenship. This movement is now reflected in both Australian and Indian citizenship legislation[364].

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**360** Signed at Rome on 4 November 1950 (as amended).

**361** A referendum to amend *The Constitution of Ireland* 1937, art 9, was held on 11 June 2004. See *Twenty-seventh Amendment of the Constitution Act* 2004 (Ireland), s 1.

**362** *The Constitution of Ireland* 1937, art 2.

**363** Donner, *The Regulation of Nationality in International Law*, 2nd ed (1994) at 18-19; Tiburcio, *The Human Rights of Aliens under International and Comparative Law* (2001) at 9-11.

**364** The *Australian Citizenship Legislation Amendment Act* 2002 (Cth), the relevant sections having effect from 4 April 2002, repealed the former s 17 of the Citizenship Act, dealing with the loss of citizenship on acquisition of another nationality. *The Citizenship (Amendment) Act* 2003 (India), if and when in force, amends the *Citizenship Act* 1955 (India) to permit dual nationality. See generally Donner, *The Regulation of Nationality in International Law*, 2nd ed (1994) at 205-207.

238 The plaintiff conceded that the mere fact that she might have rights as a non-"alien" to nationality or other status in Australia would not assure her parents of a right to remain in this country[365]. Although the plaintiff's rights as a non-alien, who could not be deported involuntarily, would require consideration by officials deciding whether or not to deport her parents[366], the latter's legal entitlements were separate from her own. Even if, as a matter of practicality, the plaintiff departed with her parents and brother (if, as aliens, they were removed from Australia during her minority), her constitutional "birthright" might later be claimed if she were to seek to return to Australia. The plaintiff urged the consideration of her case in accordance with *her* rights conforming to the Constitution, separate from those of her parents. She was entitled to point to the fact that the number of individuals in her position was hardly a flood. An official report in 1986, commenting on the amendment to s 10(2) of the Citizenship Act proposed at the time, suggested that the number affected was extremely small[367].

239 *Dangers of statutory definition*: The plaintiff also pointed to what she said was the danger of opening up departures from the birthright nationality of persons born on Australian soil. She referred, fairly, to the sorry history of the deprivation of nationality rights in a number of countries in recent, and not so recent, years[368]. Once the Parliament was afforded the power to provide for the deportation ("removal") of persons born in Australia, it was impossible, according to the plaintiff, to draw an incontestable line that would prevent others, universally hitherto regarded as Australians, from being defined out of Australian nationality by legislation and subjected to the risk of removal. Like concerns have been voiced in this Court in *Re Patterson; Ex parte Taylor*[369], *Re Minister*

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**365** *Kioa v West* (1985) 159 CLR 550 at 604.

**366** *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 304-305. See Parliamentary Research Paper at 7.

**367** Parliamentary Research Paper at 7, citing Australia, Human Rights Commission, *The Human Rights of Australian-born Children whose Parents are Deported*, Report No 18, (1986) at 3: "[T]he risk can be over-stated. [The Commission] considers the suggestion that 'the floodgates' might be opened is without foundation … Allowing all of these persons to stay … would hardly constitute a trickle, let alone a flood".

**368** *Dred Scott v Sandford* 60 US 393 (1856); *Co-operative Committee on Japanese Canadians v Attorney-General for Canada* [1947] AC 87; cf *Korematsu v United States* 323 US 214 (1944).

**369** (2001) 207 CLR 391 at 491-492 [301]-[304].

*for Immigration and Multicultural Affairs; Ex parte Te*[370] and *Shaw v Minister for Immigration and Multicultural Affairs*[371].

240 The plaintiff rejected assurances given for the Commonwealth suggesting that children born in Australia, one of whose parents was an Australian citizen, could not possibly be "removed" by valid legislation against their will[372]. She submitted that the history of ethnic prejudice in many countries necessitated an attitude of high vigilance to any interpretation of the Constitution that would enlarge governmental powers of expulsion by redefining notions of citizenship, alienage and nationality. Maintenance of the principle accepted at the time when the Constitution was made, defensive of nationality as "birthright", was the one stable and certain means of preventing legislative and administrative misuse of the power of expulsion[373]. On this footing alone, the plaintiff argued, a heavy burden of justifying a change in the constitutional notion of alienage rested on those who propounded it.

241 The plaintiff also submitted that an instance of the arbitrariness of statutory definitions was already to be seen in the adoption of the criteria expressed for citizenship in s 10(2) of the Citizenship Act. If the Parliament could provide, alternatively, that one parent of a person born *in* Australia must be an Australian citizen or permanent resident[374], it could, by amendment, provide that additionally a parent, or both parents or grandparents and possibly great-grandparents had themselves to have been Australian citizens. Similarly, if the Parliament could provide, alternatively, that a person claiming citizenship, although born in Australia, must have been "ordinarily resident" in the country throughout a period of ten years, it could abolish that alternative. It could increase the precondition of lawful residence from ten years to twenty, fifty or even more years and narrow still further the notion of "ordinarily resident".

242 According to the plaintiff, these were the dangers of shifting from the bedrock constitutional notion of Australian nationality by birthright and permitting the Parliament, contrary to the decision of the delegates at the Conventions when the Constitution was adopted, to substitute its views of nationality that might reflect passing prejudices not present in the objective common law doctrine of birthright reflected in the constitutional text.

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**370** (2002) 212 CLR 162 at 217-218 [200]-[202].

**371** (2003) 78 ALJR 203 at 221 [97]-[98]; 203 ALR 143 at 167-168.

**372** This was argued by the Commonwealth.

**373** *Robtelmes v Brenan* (1906) 4 CLR 395 at 403-406. See Wynes, *Legislative, Executive and Judicial Powers in Australia*, 5th ed (1976) at 302-304.

**374** Citizenship Act, s 10(2)(a).

243 I acknowledge the power of the plaintiff's arguments. I also confess to sympathy for the plaintiff's plight as a young girl who was born in Australia and who has been educated here and has known no other country. If I were a legislator, I would not favour a law depriving her of Australian nationality and providing for her involuntary removal. However, my function is to give meaning to constitutional concepts. I must do so in a way that is consistent with my notion of how the Constitution must be interpreted when it refers to a word such as "aliens". For me, that word, like every other word in the Constitution, is not frozen in whatever meaning it may have had in 1901. Thus, for me, this case is primarily about the proper approach to constitutional construction.

The parliamentary power over "aliens"

244 *Approach to constitutional interpretation*: The starting point for resolving the primary issue in this case is the approach that should be taken to construing the legislative powers afforded to the Federal Parliament by the Constitution, primarily the power to make laws with respect to "aliens".

245 For the reasons explained by all members of this Court in *Grain Pool of WA v The Commonwealth*[375], it is inconsistent with the function of constitutional interpretation to give the text "the same meaning and intent with which [the Constitution] spoke when it came from the hands of its framers, and was voted on and adopted by the people"[376]. Those were the words of Taney CJ in the unfortunate decision of the Supreme Court of the United States in *Dred Scott v Sandford*[377] which concerned the citizenship of people in the United States originally of African descent.

246 From its earliest days[378], and throughout its history[379], this Court has ordinarily observed[380] a different approach. It is one that recognises that, of its

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**375** (2000) 202 CLR 479 at 492-496 [16]-[23], 511-513 [76]-[79], 522-525 [110]-[118].

**376** *Dred Scott* 60 US 393 at 426 (1856).

**377** 60 US 393 (1856).

**378** *Jumbunna Coal Mine, NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 367-368 per O'Connor J.

**379** *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 599-600 [185]-[186].

nature, a national constitution must operate "indefinitely, and from age to age, [affording] authority to the Federal Parliament to make laws responding to different times and changing needs"[381].

247 Regard may certainly be had to the framers' intentions, as in affording legislative power with respect to "naturalization and aliens"[382]. However, whilst the task of interpretation remains anchored to the text of the Constitution, the ambit of the power is not limited by the wishes, expectations or imagination of the framers. They did not intend, nor did they enjoy the power, to impose their wishes and understanding of the text upon later generations of Australians[383]. Intention is a fiction often used in explaining contested questions of interpretation. It is an objective, not subjective concept[384].

248 In elucidating its meaning, different judges of this Court have made different use of the understandings of the framers and of the constitutional text, viewed from the perspective of 1901[385]. All accept that these are relevant considerations. None pretends that they are the only relevant factors. No clearer instance of the capacity of the constitutional text to accommodate radical changes in the world, and in the nation, can be seen than in *Sue v Hill*[386]. There can be little doubt that, at the Conventions and in 1901, the reference in the Constitution[387] to the disqualification from election to the Federal Parliament of "a subject or a citizen … of a foreign power" would *not* have been understood to include disqualification of a subject or citizen of the United Kingdom. Quite the contrary. Yet by 1999 this Court concluded that it did. Such had been the change of the world to which the Constitution speaks and in which its text must now operate and be understood.

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**380** cf *Attorney-General for NSW v Brewery Employés Union of NSW* (1908) 6 CLR 469 at 534-535.

**381** *Grain Pool* (2000) 202 CLR 479 at 523 [111]; cf at 492 [16].

**382** Constitution, s 51(xix).

**383** *Re Wakim* (1999) 198 CLR 511 at 599-602 [186]-[192]; cf Clark, *Studies in Australian Constitutional Law* (1901 ed, 1997 reprint) at 21.

**384** See *Al-Kateb v Godwin* [2004] HCA 37 at [167].

**385** See *Grain Pool* (2000) 202 CLR 479 at 511-512 [78], 520 [104], 522 [110].

**386** (1999) 199 CLR 462.

**387** s 44(i).

249 It follows that the legislative power afforded to the Parliament to make laws with respect to "aliens" is capable of application to a larger, contemporary, condition of things beyond what might have been the generally accepted meaning of the word at the time of Federation. Observance of a consistency of approach requires that this Court construe this power with all the generality that the words used in the Constitution admit, as those words are understood today[388]. This does not mean that the meaning of the word is wholly open-ended. Or that the meaning is entirely a matter for the Parliament to determine. The ultimate responsibility of expounding the meaning of a constitutional word belongs to this Court. However, the notion that the meaning of such a word or phrase is fixed forever by reference to understandings that existed in 1901 is not the accepted constitutional doctrine in Australia.

250 *Dual theories available*: Once the foregoing approach is adopted it must be acknowledged that, even in 1901, there were two major legal theories concerning the legal status of "aliens", in the sense of "belonging to" another place or person[389].

251 The birthright or *jus soli* theory was traditional at that time in common law countries. However, in countries of the civil law tradition, the derived nationality or *jus sanguinis* ("right of blood") usually recognised that membership of a nation passed by descent[390]. Given the existence of these two legal systems, vying for acceptance amongst the nations of the world in 1901, it is unconvincing to suggest that the Federal Parliament in Australia was forever to be limited to the approach of birthright.

252 Why could the Parliament not adopt, wholly or in part, elements of the alternative legal approach to the issue of alienage accepted by many legal systems of the world? After all, each approach was an endeavour to identify the feature of a relationship between the individual and a nation on the basis of which loyalty and membership could generally be imputed and demanded[391]. Further, the common law rule of birthright had already admitted its own exceptions, namely for the children of a foreign monarch, diplomats and enemy aliens. Why, of its nature, could more exceptions never develop around the notion of "aliens"? From medieval times, the English Parliament provided

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**388** *Grain Pool* (2000) 202 CLR 479 at 492 [16].

**389** *Nolan* (1988) 165 CLR 178 at 183; *Re Patterson* (2001) 207 CLR 391 at 428-429 [114] per McHugh J; *Te* (2002) 212 CLR 162 at 185 [81], 205 [159].

**390** Brownlie, *Principles of Public International Law*, 6th ed (2003) at 378.

**391** Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws* (1896) at 173-177, cited in *Wong Kim Ark* 169 US 649 at 655-658 (1898).

particular derogations from birthright in favour of the principle of descent. Why, as a matter of constitutional principle, should further exceptions be forbidden to the Australian Parliament[392]? Why should it be forbidden in the absence of a clear indication that such was the purpose of those who made the Constitution and designed its basic notions[393]?

253 In the nineteenth century, in the United Kingdom, enquiries had been launched relating to the need to modify the birthright rule[394]. If this was in the contemplation of the generation that adopted the Constitution, why did the use of the word "aliens" forbid any further movement if later generations were convinced that movement was warranted? Within limits set by the unchanging, essential elements of the word "aliens", it has been conventional in our constitutional law to acknowledge a large power on the part of the Parliament to give meaning to the language of the Constitution, subject always to consideration by the courts, which, in this respect, have the last say[395].

254 *Changes in operation*: One functional reason for avoiding a rigid approach to the meaning of a word like "aliens" lies in changing perceptions of what the word means and changing circumstances in which the word must operate.

255 Alienage is a status. Of their nature, notions of status tend to change over time, especially in periods of rapid social evolution such as the last century

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**392** As with respect to "local allegiance". See *Te* (2002) 212 CLR 162 at 173 [28]-[29], 215 [192]; *Shaw* (2003) 78 ALJR 203 at 209 [29]; 203 ALR 143 at 150.

**393** As was originally provided in *The Constitution of Ireland* 1937, providing for Irish nationality as a birthright of all born in the island of Ireland. Or as was enacted in the law of Israel as the *Law of Return* 1950 (Israel) providing (in art 1) that "Every Jew has the right to come to [Israel] as an oleh". See *NAGV v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 202 ALR 1 at 5 [15].

**394** "Report of the Royal Commissioners for Inquiring into the Laws of Naturalization and Allegiance (1869)", in *Reports from Commissioners*, (1868-1869), vol 14, 607. Following this report, the *Naturalization Act* 1870 (UK) (33 Vict c 14) was enacted under which natural-born subjects who at birth were subjects of a foreign state were allowed to make a "declaration of alienage". See Holdsworth, *A History of English Law*, 3rd ed (1944), vol 9 at 88-90 explaining that the common law rules were found inconvenient in the latter part of the 19th century, it becoming evident "that conflicting claims to allegiance resulted from the rule that all persons born on territory within the allegiance of the crown, no matter what their parentage, were British subjects".

**395** *Re Patterson* (2001) 207 CLR 391 at 409-410 [41]-[43]. See also *Te* (2002) 212 CLR 162 at 179 [54]-[55].

witnessed. The global circumstances of alienage have also changed. The word must respond to the disappearance from the Australian context of the British Empire. It must respond to the advent of aviation and other modes of rapid transport that make possible, in ways unthinkable in 1901, adventitious arrivals of parents, with confinement and birth arranged within the receiving country. The word should also be capable of adapting to the circumstances involving large scale global immigration and contested claims of asylum that have replaced the British settler migration to Australia of earlier times.

256 Because the Constitution, of its function and character, adapts to such changes[396], there is no reason why the word "aliens" should not be capable of responding to such new circumstances. There is every reason why it should[397].

257 *International law*: International law has long recognised, and still recognises, the right of each nation state to determine its own nationality laws and principles. As a general rule, questions of nationality fall within the domestic jurisdiction of each nation state[398]. Consequently, international law recognises nationality by birthright, by descent and by variants of the two systems. Thus, the interpretation of the Constitution urged by the Commonwealth would involve no relevant inconsistency with international law[399]. Further, since international law permits dual nationality[400], it would not

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**396** *Bonser v La Macchia* (1969) 122 CLR 177 at 227 per Windeyer J.

**397** There were a number of additional reasons, apart from the preservation of birthright, why the framers chose not to include a legislative power over citizenship: Rubenstein, "Citizenship and the Constitutional Convention Debates: A Mere Legal Inference", (1997) 25 *Federal Law Review* 295. See also reasons of Gleeson CJ at [31]; reasons of Gummow, Hayne and Heydon JJ at [191]-[192].

**398** Brownlie, *Principles of Public International Law*, 6th ed (2003) at 373. See also *Wong Kim Ark* 169 US 649 at 667-668 (1898) per Gray J (for the Court); *Nationality Decrees Issued in Tunis and Morocco (Advisory Opinion)* (1923) *Permanent Court of International Justice* 6, Series B, No 4 at 24.

**399** For the role of international law in the interpretation of Australian legislation, and of the Australian Constitution, see *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* [2004] HCA 36 at [125]-[127]; *Al-Kateb* [2004] HCA 37 at [152], [167]-[191] of my reasons, compare [62]-[73] of McHugh J's reasons.

**400** *Case Concerning the Barcelona Traction, Light and Power Company (Belgium v Spain)* (1970) *International Court of Justice* 3 at 51, 130, 199-200; Tiburcio, *The Human Rights of Aliens under International and Comparative Law* (2001) at 9-10; Donner, *The Regulation of Nationality in International Law*, 2nd ed (1994) at 245.

contravene international law for Australia's legislation to lead to the possibility that a person may become capable of obtaining nationality in two states.

258 Because the Constitution must operate in the environment of international law, and because the general notion of alienage adapts to that environment, it would be astonishing if, without clearer language, Australia's constitutional power to enact federal legislation with respect to "aliens", as broadly defined, were closed off and confined, in this respect, to specific nineteenth century notions that have been altered in several countries where they previously prevailed[401].

259 *The United States model*: This last point is also reinforced by recalling that the Constitutional Conventions that drafted the provision including the legislative power with respect to "aliens" had before them a model, and a text, that could have been adopted to provide the nationality rights of "natural-born" Australians but was not.

260 By the Fourteenth Amendment to the United States Constitution[402], it is expressly provided that "[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside". That provision was adopted in the United States of America in 1868. Although there was specific debate in the Australian Conventions of the 1890s about notions of nationality and citizenship, the Australian Constitution did not enshrine concepts similar to those then so recently adopted in the United States. Instead, it left the legal regulation of alienage (and of its counterpart, Australian nationality) to the Federal Parliament armed with relevant legislative powers expressed in terms of great generality. Deliberately, it omitted an express guarantee similar to that adopted in the United States.

261 It would be contrary to the normal canons of constitutional interpretation, for this Court now to insert an equivalent guarantee as implicit in the word "aliens" which the Founders refrained from expressing.

262 *The Crown in the Constitution*: In response to the suggestion that the role of the Crown in the Constitution necessarily endorsed a type of feudal notion of

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**401** eg the United Kingdom, the Republic of Ireland and India.

**402** The Fourteenth Amendment not only defined citizenship in the United States but also gave aliens constitutional rights in the United States because the due process and equal protection clauses apply not only to citizens but to all persons. Note that the Citizenship Act, ss 10B, 10C and 11 impose conditions that limit the entitlement of a child born outside Australia to citizenship by descent. The validity of these provisions was not in question in this case.

allegiance, subservience and duty implicit in the approach of birthright to nationality[403], there are many answers.

263 From the start, the relationship with the Crown in Australia has been a comparatively light burden, if burden at all. It was freely adopted and retained in the Constitution. It has adapted in its Antipodean environment to the needs of this country[404]. The adaptation of the Constitution to the practical and statutory change in the position of the Queen as Queen of Australia has been recognised in many cases[405]. These cases, in turn, demonstrate the capacity of the Constitution to move with international and national realities[406].

264 Constitutional notions of membership of the Australian community, and of who constitute the "people of the Commonwealth", have kept pace with these changes[407]. It is unrealistic, indeed highly artificial, to conceive of such membership today in feudal terms. The constitutional text does not require it. Legal principle and historical independence deny it. By parity of reasoning, the word "aliens" adapts as the counterpart to modern notions of Australian nationality. These changes permit enlargement of the federal power to make laws with respect to "aliens" beyond that which would generally have been accepted at the time the Constitution came into force.

265 *Consistency with recent decisions*: It is also desirable that the decision of this Court in this case should take into account, and conform to, the course of recent decisions concerned with the "aliens" power. A minority of this Court favoured a view that a residual category existed of non-citizen, non-alien British subject[408]. That view has not prevailed. Yet even within the minority view[409], it

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**403** cf *Re Patterson* (2001) 207 CLR 391 at 429 [115] per McHugh J.

**404** *Street v Queensland Bar Association* (1989) 168 CLR 461 at 525, 541, 553-554; *Nolan* (1988) 165 CLR 178 at 186; *DJL v Central Authority* (2000) 201 CLR 226 at 278 [135]; *Re Patterson* (2001) 207 CLR 391 at 467 [229]; *Shaw* (2003) 78 ALJR 203 at 209 [30]; 203 ALR 143 at 150-151.

**405** eg *Sue v Hill* (1999) 199 CLR 462 at 498-500 [84]-[88]; *Street* (1989) 168 CLR 461 at 525 per Deane J; *Nolan* (1988) 165 CLR 178 at 185-186; *Re Patterson* (2001) 207 CLR 391 at 467 [229].

**406** *Re Patterson* (2001) 207 CLR 391 at 466 [226] per Gummow and Hayne JJ.

**407** cf Speech by Sir Gerard Brennan on his swearing in as Chief Justice (1995) 183 CLR ix at ix-x.

**408** *Re Patterson* (2001) 207 CLR 391; *Shaw* (2003) 78 ALJR 203; 203 ALR 143.

was accepted that, by 1986, the position of British subjects, accepted by the minority as Australian nationals without the need of citizenship, had become anomalous and must be taken to have terminated. The majority regarded the termination as happening decades earlier. On both views, by a given time, non-citizens in Australia were treated as "aliens" although they might be "subjects of the Queen" in some other dominion of the Crown.

266 The recognition of this change in the notion of alienage is only consistent with an acceptance of the fact that the ambit of the word "aliens" was not closed at the time of Federation. It was not a word devoid of meaning. But neither was its meaning fixed by what the word would have meant to lawyers, or the laity, in 1901 or even 1980. Addressing as it does a status, defined by reference to the relationship between the Australian people and each other as well as with the people of the rest of the world, it is inevitable that geo-political, technological and other developments will have an impact on the contemporary understanding of the meaning of "aliens" and that appreciation of the meaning of that word will change over time.

267 *Dealing with abuse*: Given recent history in many parts of the world, the dangers of a misuse of a legislative power over "aliens", referred to by the plaintiff, cannot be lightly dismissed. Nor can concessions made for the Commonwealth in the present case[410] necessarily be taken as binding future governments or parliaments. Recent decisions show how the Executive Government sometimes presses forward extensions of its powers, expanding past exceptions into new and controversial constitutional doctrine[411].

268 Whilst it is true that Australian constitutional interpretation cannot take place in an environment in which horrible and extreme instances are imagined to frighten the decision-maker[412], it is obviously useful to test propounded interpretations against their possible consequences[413]. Normally, if the consequences may be seriously inimical to freedom, that interpretation will not

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**409** See *Shaw* (2003) 78 ALJR 203 at 212 [48], 224-225 [117], 230 [154]; cf at 209-210 [27]-[32], 235 [190]; 203 ALR 143 at 154, 172, 180, cf at 150-151, 187. See also *Re Patterson* (2001) 207 CLR 391 at 410 [44] per Gaudron J.

**410** See above at [240].

**411** cf *Re Colonel Aird; Ex parte Alpert* [2004] HCA 44 at [74], [130]-[137], [145]-[147].

**412** *Shaw* (2003) 78 ALJR 203 at 210 [32]; 203 ALR 143 at 151.

**413** cf *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 414-417 [159]-[165].

be imputed to the Constitution of the Commonwealth of Australia. At least, this will not happen unless the language is very clear[414].

269 Should some future Parliament attempt to push the "aliens" power into extreme instances, so as to deem a person born in Australia an "alien" despite parental or grand-parental links of descent and residence, this Court can be trusted to draw the necessary constitutional line. Doing so is inherent in the task of constitutional interpretation. To avoid such dangers, it is not necessary to embrace a rigid, and now outmoded, meaning of a contested constitutional word.

270 If the present case is taken as an instance, the operation of the provisions of s 10(2) on the plaintiff cannot be viewed as "extreme", whether tested against developments of alienage in our own law or in the law of other nations as recognised by international law.

271 Even if, as is theoretically possible, Australian law in combination with the nationality law of a child's parents left a child born in Australia a stateless person, this is an incident of the intersection of the two legal systems. It cannot limit or restrict the Australian head of legislative power, nor control its meaning. It might be a consideration affecting the right of removal[415] and the exercise of the powers of the Minister under the Migration Act. But it cannot impose an artificial construction on the Australian Constitution. To hold otherwise would be to subject this country's basic law to the chance provisions of the statute laws of other countries. That is obviously an unacceptable proposition.

272 The plaintiff's birth in Australia was an incident of her parents' resort to this country with her older brother. If the applicant's parents can establish an entitlement to a protection visa, that visa will extend to the plaintiff[416]. If they cannot, it is open to the Parliament to provide by statute, in effect, that her desire for Australian nationality under the Constitution must take its place with that of other would-be migrants. By our Constitution, she enjoys no separate Australian nationality, whether as a "subject of the Queen" or otherwise. Like any other temporary member of the community, she owes local allegiance whilst in

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**414** See *Australian Communist Party v The Commonwealth* ("the *Communist Party Case*") (1951) 83 CLR 1 at 258; *Pochi v Macphee* (1982) 151 CLR 101 at 109, cited by Gummow, Hayne and Heydon JJ at [151].

**415** cf *Al-Kateb* [2004] HCA 37 at [80], [144]-[145].

**416** See *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 at 319-320 [81].

Australia[417]. However, at this time, the Citizenship Act denies her Australian citizenship. That provision of the Citizenship Act is valid; based on the aliens power. In consequence, the Migration Act may make provision for her removal as an alien "non-citizen".

Conclusions and orders

273 *Conclusions: The laws are valid*: Because, in the plaintiff's case, the impugned provisions of the Citizenship Act and Migration Act are sustained by the Federal Parliament's legislative power to make laws with respect to her status as an alien, her claim for relief in this Court fails. In light of the conclusion that the challenged laws are constitutionally valid on the basis of the aliens power, it is unnecessary to consider the other heads of power upon which the Commonwealth additionally or alternatively relied[418].

274 During the hearing, the Court gave leave to Mazhar Mehdi Bakhtiari to intervene in the plaintiff's proceedings. His counsel was heard to support and elaborate the argument advanced by the plaintiff. Necessarily, upon the issues common to the intervener's case in this Court and that of the plaintiff, the same result must follow upon the resolution of the common constitutional questions. However, as Mr Bakhtiari had additional arguments to support his claim for relief, the disposal of his proceedings must await any separate and later determination of his case.

275 *Answers to questions*: The reformulated questions in the case stated should be answered in the way proposed by Gleeson CJ[419].

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**417** *Te* (2002) 212 CLR 162 at 173 [28]-[29]; 215 [192]; *Shaw* (2003) 78 ALJR 203 at 209 [29]; 203 ALR 143 at 150.

**418** The Commonwealth relied, in addition, upon the immigration power, the external affairs power and the "implied nationhood" power.

**419** Reasons of Gleeson CJ at [33].

276 CALLINAN J. The substantial issue which this case stated raises is whether the defendants may remove from Australia a person born in this country to unlawful entrants.

Facts

277 The plaintiff's parents were both born in Delhi, India, in 1969. Her brother, who is 10 years of age, was also born in Delhi. They are Indian citizens who entered and have remained in Australia since 22 April 1997.

278 The plaintiff was born in Australia on 5 February 1998 and has remained in this country with her parents and brother since that date.

279 On 9 July 1997, the plaintiff's father lodged an application for a protection visa with the Department of Immigration and Multicultural Affairs, as it then was. The plaintiff's mother and brother were included in the application.

280 On 26 November 1997, a delegate of the second defendant Minister refused the application. The plaintiff's father sought a review by the Refugee Review Tribunal ("Tribunal") of the delegate's decision.

281 On 20 August 1998, the Tribunal affirmed the delegate's decision. On 24 April 2001, the plaintiff's father, mother and brother were joined as represented applicant parties to proceedings titled *Lie v Refugee Review Tribunal and Ors* and numbered S89 of 1999 ("the representative proceedings"), which were then pending in this Court.

282 On 29 May 2003, the plaintiff's father, mother and brother commenced proceedings in this Court pursuant to s 75(v) of the Constitution, seeking prerogative relief in respect of the Tribunal's decision. Pursuant to orders made by a Justice of this Court on 25 November 2002, the representative proceedings were remitted instanter to the Federal Court of Australia. They have not yet been resolved.

283 The plaintiff is a citizen of India by descent pursuant to s 4 of the *Citizenship Act* 1955 (India) which provided, at the time of her birth, that a person born outside of India on or after the commencement of the *Citizenship (Amendment) Act* 1992 (India) shall be a citizen of India if either of his or her parents is a citizen of India at the time of birth[420]. In December 2003, the

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**420** Section 3 of the *Citizenship Act* 1955 (India) provided that every person born in India on or after 26 January 1950 but before the commencement of the *Citizenship (Amendment) Act* 1986 (India) shall be a citizen of India by birth (except where the person's father is a foreign diplomat or an enemy alien). A person born in India on or after the commencement of the *Citizenship (Amendment) Act* 1986 is only a

(Footnote continues on next page)

*Citizenship Act* 1955 was amended by the *Citizenship (Amendment) Act* 2003 (India). As a result, the plaintiff's Indian citizenship may be lost if her parents do not register her birth at an Indian consulate within one year of the commencement of the *Citizenship (Amendment) Act* 2003[421].

Questions Reserved

284 Questions were reserved for the consideration of the Full Court of this Court in respect of the plaintiff as follows:

1. Did the plaintiff acquire Australian citizenship by birth on 5 February 1998 in Australia and has she retained Australian citizenship since that date?

2. Alternatively to 1, did the plaintiff acquire Australian nationality as a "subject of the Queen" by birth in Australia on 5 February 1998 and has she retained such Australian nationality since that date?

3. In the light of the answers to 1 and 2, is s 10(2) of the *Australian Citizenship Act* 1948 (Cth) a valid law of the Commonwealth?

4. In the light of the answers to 1 and 2, is s 198 of the *Migration Act* 1958 (Cth) capable of valid application to the Plaintiff?

5. By whom should the costs of the case stated to the Full Court of this Court be borne?

285 During argument it became apparent that the questions as framed did not identify the matters truly in issue, and that a reformulation of them was necessary. After reformulation by a Justice of this Court, the questions became as follows:

1. Is the plaintiff an alien within the meaning of s 51(xix) of the Constitution?

2. If the answer to 1 is "No", is s 198 of the *Migration Act* 1958 (Cth) capable of valid application to the plaintiff?

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citizen of India by birth where either of the person's parents is a citizen of India at the time of his or her birth.

**421** At the time of writing, it is unclear whether the *Citizenship (Amendment) Act* 2003 (India) has commenced operation.

3. By whom should the costs of the case stated to the Full Court of this Honourable Court be borne?

*Australian Citizenship Act* 1948 (Cth)

286 The plaintiff is not a citizen within the meaning of s 10 of the *Australian Citizenship Act* 1948 (Cth) (the "Citizenship Act") which provides as follows:

"**Citizenship by birth**

(1) Subject to this section, a person born in Australia after the commencement of this Act shall be an Australian citizen.

(2) Subject to subsection (3), a person born in Australia after the commencement of the *Australian Citizenship Amendment Act 1986* shall be an Australian citizen by virtue of that birth if and only if:

(a) a parent of the person was, at the time of the person's birth, an Australian citizen or a permanent resident; or

(b) the person has, throughout the period of 10 years commencing on the day on which the person was born, been ordinarily resident in Australia.

(3) Subject to subsection (5), a person shall not be an Australian citizen by virtue of this section if, at the time of the person's birth, a parent of the person was an enemy alien and the birth occurred in a place then under occupation by the enemy.

(5) Subsection (3) does not apply in relation to a person if, at the time of the person's birth, a parent of the person:

(a) was an Australian citizen or a permanent resident; and

(b) was not an enemy alien.

(6) A reference in this section to a permanent resident does not include a reference to a person who is, for the purposes of the *Migration Act 1958*, an exempt non-citizen."

The plaintiff's submissions

287 The substance of the plaintiff's submissions is that although she is not a "citizen" within the meaning of s 10 of the Citizenship Act, she is nonetheless a national of this country and not an alien for the purpose of s 51(xix) of the

Constitution[422] because she was born in Australia. Further, even though her parents are non-citizens, and unlawful entrants[423] who have failed to establish their entitlement to the status of refugee and are therefore liable to be removed from Australia pursuant to legislation enacted under the immigration or the alien power, or a combination of these, she is not an alien because alienage is inconsistent with her Australian birth. I will return to these propositions but it is necessary first to deal with a preliminary point raised by the defendants.

The Federal Conventions

288 The plaintiff sought to rely upon some of the speeches made and a resolution passed during the Federal Convention in 1898 in Melbourne[424].

289 One of the delegates, Dr John Quick, proposed that the Federal Parliament be given an express power with respect to the grant or removal of a status of citizenship. He said[425]:

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**422** Section 51(xix) provides:

> "51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:
>
> …
>
> (xix) naturalization and aliens".

**423** Sections 4 and 42 of the *Migration Act* 1958 (Cth) require a non-citizen to hold a visa in order to travel to Australia, and s 36 allows the grant of a protection visa to those who have entered Australia without a visa and subsequently establish that they are refugees to whom Australia owes obligations of protection. Section 42 provides:

> "(1) Subject to subsections (2), (2A) and (3), a non-citizen must not travel to Australia without a visa that is in effect."

Section 36 provides for the grant of protection visas to persons owed protection because of a well-founded fear of persecution according to the Convention relating to the Status of Refugees of 1951 as amended by the Refugees Protocol.

**424** See Prince, *We are Australian – The Constitution and Deportation of Australian-born Children*, Department of the Parliamentary Library Research Paper No 3 2003-04, (2003) at 14-15.

**425** *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 2 March 1898 at 1752.

> "We ought either to place in the forefront of this Constitution an express definition of citizenship of the Commonwealth, or empower the Federal Parliament to determine how federal citizenship shall be acquired, what shall be its qualifications, its rights, and its privileges, and how the status may hereafter be lost."

290 The majority of the delegates were, however, of a different opinion. They were concerned that a federal government might abuse such a power to disenfranchise residents of particular States. A South Australian delegate, Mr Josiah Symon, observed that[426]:

> "At the very root of the proposed Union is the invitation to the citizens of the states to join the Federation, and to obtain, as their reward, citizenship of the Commonwealth. ... [W]hat this Convention is asked to do is to hand over to the Federal Parliament the power, whether exercised or not, of taking away from us that citizenship in the Commonwealth which we acquire by joining the Union."

291 Similarly, another delegate, later a senator and a justice of this Court, Mr Richard O'Connor said in opposing the conferral of such a power[427]:

> "As you have power to prevent any person from entering any part of the Commonwealth, you have also the power to prevent any person from becoming a member of the Commonwealth community. ... It appears to me quite clear, as regards the right of any person from the outside to become a member of the Commonwealth, that the power to regulate immigration and emigration, and the power to deal with aliens, give the right to define who shall be citizens, as coming from the outside world."

292 Dr Quick's proposal to confer power on the Federal Parliament to enact laws in relation to citizenship was defeated in a vote of a committee at the Melbourne session of the Convention by 21 to 15 on 2 March 1898, and accordingly no relevant express power was included in the Constitution[428].

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**426** *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 2 March 1898 at 1768.

**427** *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 2 March 1898 at 1753 and 1754.

**428** *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 2 March 1898 at 1768.

293 The defendants object to the reception of this material. The objection should be dismissed. There is no doubt that the common law and the founders' understanding of it heavily informed the language of the Constitution. So too of course did history and contemporary perceptions of mischiefs[429] to be dealt with and objectives to be attained. The Court is not only, in my opinion, entitled, but also obliged, to have regard to the Convention debates when, as is often the case, recourse to them is relevant and informative[430]. The debates are certainly relevant and informative here.

294 It is also the case, as the plaintiff submitted in argument, that the material sought to be relied upon satisfies the requirements stated by this Court in *Cole v Whitfield*[431]:

> "Reference to the [Convention debates] may be made, not for the purpose of substituting for the meaning of the words used [in the Constitution] the scope and effect – if such could [objectively] be established – which the founding fathers subjectively intended the section to have, but for the purpose of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged."

295 There are compelling reasons why recourse to the debates is permissible and will usually be helpful. Courts and judges may speak of the changing meaning of language but in practice substantive linguistic change occurs very slowly, particularly in legal phraseology. When change does occur, it generally tends to relate to popular culture rather than to the expression of fundamental ideas, philosophies, principles and legal concepts. Judges should in my opinion be especially vigilant to recognise and eschew what is in substance a constitutional change under a false rubric of a perceived change in the meaning of a word, or an expression used in the Constitution. That power, to effect a Constitutional change, resides exclusively in the Australian people pursuant to s 128 of the Constitution and is not to be usurped by either the courts or the Parliament. In any event, I am not by any means persuaded that an actual change in the meaning of a word or a phrase, if and when it occurs, can justify a

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**429** Mischief in the legal sense, for example problems to be solved and hardships to be ameliorated.

**430** There is probably no legal significance in the anomaly that s 15AB of the *Acts Interpretation Act* 1901 (Cth) would allow recourse to explanatory memoranda and second reading speeches, yet the defendants' submissions would deny it to the foundational constitutional materials.

**431** (1988) 165 CLR 360 at 385.

departure from its meaning at the time of Federation. The constitutional conservatism of the Australian people reflected in the failure of so many referenda[432] cannot justify a supposed antidote of judicial "progressivism". This is not to say that adherence to 19th century meanings which have become archaic will always be obligatory. But it is to say that instruments, including constitutional ones are still basically to be construed by reference to the intentions of their makers objectively ascertained. Examination of the circumstances which formed the background to the making of the Constitution assists in this examination. In my opinion Convention materials showing what the founders deliberately discarded may be especially illuminating in the same way as evidence of what parties to a contract deliberately excluded negates the implication of a term of a contract to the effect of what was excluded[433].

296 This approach is not inconsistent with recent authority of this Court, an example of which is *Cheatle v The Queen*[434]. There, recourse to legal history resulted in the attribution to the words "trial by jury" used in s 80 of the Constitution, a similar meaning to the one they bore in 1900 immediately before Federation[435]. It is true that an identical meaning might not have been able to be given to those words, for example, trial by [a] jury [as constituted in 1900] that is, [entirely by men], but the substance and the essence of the concept of trial by jury remain unchanged. The decision of this Court in *Grain Pool of Western Australia v The Commonwealth*[436] compels no different an approach. The special nature of the property rights with which the Court was concerned there, intellectual property, involving as it does innovation and its potential utility to humankind, necessarily looks to, and accepts, indeed embraces change, not so much in meaning as in scope. It would have been antithetical to this special nature to confine what was patentable, and therefore within the meaning of the term "patent" in the Constitution to the intellectual and prophetic horizons of 1900. Indeed it would have been absurd to do so and courts strive, in construing instruments, to avoid absurdities.

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**432** Since 1901, 44 proposals have been put to the Australian people and only eight have succeeded: see Blackshield & Williams, *Australian Constitutional Law and Theory*, 3rd ed, (2002) at 1301.

**433** *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 346 per Mason J.

**434** (1993) 177 CLR 541.

**435** (1993) 177 CLR 541 at 552.

**436** (2000) 202 CLR 479.

Meaning of "aliens" at common law

297 It is relevant therefore to refer to the common and statutory law with respect to aliens before and at the time of Federation, the latter providing some indication at least of the extent to which the common law was seen to be in need of modification.

298 People born within the monarch's dominions were, by virtue of their birth, British subjects[437]. This was so because they owed allegiance to the sovereign, a concept which had its roots in the feudal law of personal fealty owed by a tenant to his lord[438]. Legal history is all one way as to this. Holdsworth put it in these terms[439]:

> "[a]ll persons born on English soil, no matter what their parentage, owed allegiance to, and were therefore subjects of the king."

299 In *Calvin's Case*[440], Sir Edward Coke pronounced that a person born in Scotland after the Crown of England had descended to King James VI of Scotland was a natural-born subject and not an alien in England, and was therefore not disabled from bringing real or personal actions for lands within England. Coke CJ said[441]:

> "There be regularly … three incidents to a subject born. 1. That the parents be under the actual obedience of the King. 2. That the place of his birth be within the King's dominion. And, 3. The time of his birth is chiefly to be considered; for he cannot be a subject born of one kingdom that was born under the ligeance of a King of another kingdom, albeit afterwards one kingdom descend to the King of the other."

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**437** See, for example, *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 428-429 [114]-[115] per McHugh J, 440 [148]-[149] per Gummow and Hayne JJ, 481-482 [273] per Kirby J.

**438** Holdsworth, *A History of English Law*, 3rd ed (1944), vol 9 at 72; see also *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 189 where Gaudron J said: "For the purposes of the early common law of England alien status was identified as absence of allegiance to the Crown ... Allegiance to the Crown became synonymous with being a British subject."

**439** Holdsworth, *A History of English Law*, 3rd ed (1944), vol 9 at 75.

**440** (1608) 7 Co Rep 1a [77 ER 377].

**441** (1608) 7 Co Rep 1a at 18a [77 ER 377 at 399].

Pollock and Maitland said[442]:

> "As regards the definition of the two great classes of men which have to be distinguished from each other, the main rule is very simple. The place of birth is all-important. A child born within any territory that is subject to the king of England is a natural-born subject of the king of England, and is no alien in England. On the other hand, with some exceptions, every child born elsewhere is an alien, no matter the nationality of its parents.
>
> The full extent of the first half of this rule was settled in 1608 by the famous decision in Calvin's case: a child born in Scotland after the moment when King James the Sixth became King James the First is no alien in England. The decision was one which pleased the king and displeased many of his subjects; but no other judgment could have been given, unless many precedents derived from times when our kings had large territories on the continent of Europe had been disregarded."

Blackstone states that[443]:

> "The first and most obvious division of the people is into aliens and natural-born subjects. Natural-born subjects are such as are born within the dominions of the crown of England; that is, within the ligeance, or as it is generally called, the allegiance of the king: and aliens, such as are born out of it. Allegiance is the tie, or *ligamen*, which binds the subject to the king, in return for that protection which the king affords the subject. The thing itself, or substantial part of it, is founded in reason and the nature of government; the name and the form are derived to us from our Gothic ancestors.
>
> …
>
> Allegiance, both express and implied, is however distinguished by the law into two sorts or species, the one natural, the other local; the former being also perpetual, the latter temporary. Natural allegiance is such as is due from all men born within the king's dominions immediately upon their birth. For, immediately upon their birth, they are under the king's protection; at a time too, when (during their infancy) they are incapable of protecting themselves. Natural allegiance is therefore a debt of gratitude; which cannot be forfeited, cancelled, or altered, by any

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**442** *The History of English Law*, 2nd ed (1952), vol 1 at 458 (footnote omitted).

**443** Blackstone, *Commentaries on the Laws of England*, 5th ed (1773), vol 1 at 366, 369-370 and 373 (footnotes omitted) (original emphasis).

> change of time, place, or circumstance, nor by any thing but the united concurrence of the legislature. An Englishman who removes to France, or to China, owes the same allegiance to the king of England there as at home, and twenty years hence as well as now.
>
> …
>
> When I say, that an alien is one who is born out of the king's dominions, or allegiance, this also must be understood with some restrictions. The common law indeed stood absolutely so; with only a very few exceptions: so that a particular act of parliament became necessary after the restoration, 'for the naturalization of children of his majesty's English subjects, born in foreign countries during the late troubles'. And this maxim of the law proceeded upon a general principle, that every man owes natural allegiance where he is born, and cannot owe two such allegiances, or serve two masters, at once. Yet the children of the king's embassadors born abroad were always held to be natural subjects: for as the father, though in a foreign country, owes not even a local allegiance to the prince to whom he is sent; so, with regard to the son also, he was held (by a kind of *postliminium*) to be born under the king of England's allegiance, represented by his father, the embassador. To encourage also foreign commerce, it was enacted by statute 25 Edw III st 2 that all children born abroad, provided *both* their parents were at the time of the birth in allegiance to the king, and the mother had passed the seas by her husband's consent, might inherit as if born in England: and accordingly it hath been so adjudged in behalf of merchants. But by several more modern statutes these restrictions are still farther taken off: so that all children, born out of the king's ligeance, whose *fathers* were natural-born subjects, are now natural-born subjects themselves, to all intents and purposes, without any exception: unless their said fathers were attainted, or banished beyond sea, for high treason; or were then in the service of a prince at enmity with Great Britain."

300 Accordingly, the common law accepted the place of birth (*jus soli*) as the basis of allegiance, rather than the nationality of the parents (*jus sanguinis*). The common law was however supplemented by Parliament as appears from the passage quoted above from Blackstone's *Commentaries on the Laws of England*.

301 There were only two exceptions however to the common law rule: children born in the monarch's dominions of foreign ambassadors, and children born in such places to members of invading armies or enemy aliens[444].

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**444** As Sir Edward Coke said in *Calvin's Case*: "any place within the King's dominions without obedience can never produce a natural subject" (1608) 7 Co Rep 1a at 18a [77 ER 377 at 399].

302 The other side of the coin is, as stated by Gleeson CJ in *Re Minister for Immigration and Multicultural Affairs; Ex parte Te*[445] birth outside Australia will generally mean that the person born is, and will be treated as, an alien for most purposes[446].

303 In 1869 the Royal Commission for Inquiring into the Laws of Naturalization and Allegiance made a report to both Houses of Parliament in which the Commissioners said this[447]:

> "There are two classes of person who by our law are deemed to be natural-born British subjects:
>
> 1. Those who are such from the fact of their having been born within the dominion of the British Crown;
>
> 2. Those who, though born out of the dominion of the British Crown, are by various general Acts of Parliament declared to be natural-born British subjects.
>
> The allegiance of a natural-born British subject is regarded by the Common Law as indelible."

304 The Commission gave careful consideration to the need or otherwise for change. This relevantly was their conclusion[448]:

> "The rule which impresses on persons born within Your Majesty's dominions the character of British subjects is open to some theoretical and some practical objections, of the force of which we are aware. But it has, on the other hand, solid advantages. It selects as the test a fact readily

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**445** (2002) 212 CLR 162 at 170 [18].

**446** To similar, but not identical effect, see 179 [54] per Gaudron J and 206 [162] per Kirby J, relying on the common law position as set out in Blackstone's *Commentaries on the Laws of England*. Hayne J at 219-220 [210] also referred to place of birth as one of the two features which determine the status of alienage.

**447** "Report of the Royal Commissioners for Inquiring into the Laws of Naturalization and Allegiance (1869)", in *Reports from Commissioners*, (1868-1869), vol 14, 607 at 611.

**448** "Report of the Royal Commissioners for Inquiring into the Laws of Naturalization and Allegiance (1869)", in *Reports from Commissioners*, (1868-1869), vol 14, 607 at 614-615.

> proveable; and this, in questions of nationality and allegiance, is a point of material consequence. It prevents troublesome questions in cases, (numerous in some parts of the British empire,) where the father's nationality is uncertain; and it has the effect of obliterating speedily and effectually disabilities of race, the existence of which within any community is generally an evil, though to some extent a necessary evil. Lastly, we believe that of the children of foreign parents, born within the dominions of the Crown, a large majority would, if they were called upon to choose, elect British nationality. The balance of convenience, therefore, is in favour of treating them as British subjects unless they disclaim that character, rather than of treating them as aliens unless they claim it. The former course is, of the two, the less likely to inflict needless trouble and disappoint natural expectations.
>
> We do not therefore recommend the abandonment of this rule of the common law, but we are clearly of opinion that it ought not to be, as it now is, absolute and unbending. In the case of children of foreign parentage, it should operate only where a foreign nationality has not been chosen. Where such a choice has been made, it should give way.
>
> As to the second class, – persons of British parentage born abroad, – we think it expedient that the Statutes now in force should be repealed, in order to introduce some limitations and place the law on a clearer and more satisfactory basis. Birth abroad is often merely accidental, while of those British subjects who go to reside in foreign countries a great number certainly prize British nationality for themselves, and wish that it should be enjoyed by their children. The law, as it stands, concedes this benefit to their children born abroad; and we do not recommend that it should be withdrawn; but we think that the transmission of British nationality in families settled abroad should be limited to the first generation."

It may safely be accepted that this was the contemporary legal position with which the founders were familiar.

305 It may also be accepted that the scope of the term "alien" can be affected by changes in the identity of the sovereign and the boundaries of the sovereign's territory. This is to give effect to the reality that allegiance can no longer be owed, and protection afforded without sovereign power to command the former and to provide the latter. The meaning of the word, however, has not altered[449]. It cannot be modified by Parliament to include persons "who could not possibly answer the description of 'aliens' in the ordinary understanding of the word"[450].

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**449** *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 185.

**450** *Pochi v Macphee* (1982) 151 CLR 101 at 109 per Gibbs CJ.

As Gibbs CJ observed in *Pochi v Macphee*[451], in relation to s 12 of the *Migration Act* 1958 (Cth) ("Migration Act"), as it then was, if the word "alien" did include some persons who were not aliens, it should be given a distributive operation, so as to apply only to those to whom it could validly apply.

306 Mr Basten QC who appeared in this appeal for a person given leave to intervene, submitted that the reference to the meaning of "alien" to which I have referred was not made inaccurately or incautiously. The language used reflects established principle in other common law jurisdictions, Great Britain[452], the United States[453] and Canada. Observations in a Canadian case, *Cunningham v Tomey Homma*[454], by the Privy Council to the effect that a Provincial enactment denying the franchise to a person of Japanese descent did not necessarily have anything to do with naturalization or alienage are relevant here. The Lord Chancellor said[455]:

> "A child of Japanese parentage born in Vancouver City is a natural-born subject of the King, and would be equally excluded from the possession of the franchise."

Citizenship

307 "Citizen" is a term of no particular constitutional significance. It appears twice in the Constitution, in s 44(i) only, but it is not used in such a way as to affect the plaintiff's case adversely. Indeed the usage in the section is not inconsistent with it. It is concerned with the right to be a parliamentarian, and not to reside in, or to be a national of Australia. Section 44 relevantly provides:

> "**Disqualification**
>
> 44. Any person who:

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**451** (1982) 151 CLR 101 at 110.

**452** See *Joyce v Director of Public Prosecutions* [1946] AC 347 at 366, cited with approval in *Re Minister for Immigration & Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 198 [126] per Gummow J.

**453** *United States v Wong Kim Ark* 169 US 649 at 693 (1898), referred to in *Re Minister for Immigration & Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 197 [124] per Gummow J.

**454** [1903] AC 151.

**455** [1903] AC 151 at 156. See *The British North America Act* 1867 (UK), s 91(25) the head of power being identical to that identified in s 51(xix) of our Constitution.

> (i) is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power;
>
> …
>
> shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives."

308 By using the language of "allegiance, obedience, or adherence" the founders can again be seen to have had in mind the old common law concepts of allegiance owed, in the case of republics, by citizens, and, in the case of monarchies, by subjects. It is also significant that they used the word "acknowledgment" which suggests that a natural born subject could, by a voluntary act, come to owe allegiance or obedience, or to adhere to a foreign power. The reference to subjection to, or citizenship of, or the rights or privileges of, a foreign power must be to those according to Australian domestic law. It cannot be that by the mere legislative act of a foreign power, an Australian national could be deprived of the right of representation, or other rights enjoyed by a natural born Australian. It is also significant that the word "citizen" is *not* used in reference to an Australian, or for that matter, a British subject, but is used in relation to citizens or subjects of a foreign power in s 44. On no view does that section provide any head of power to legislate with respect to Australian citizenship.

309 The concept of an Australian citizenship is therefore a statutory and not a constitutional one, as Gaudron J said in *Chu Kheng Lim v Minister for Immigration*[456]:

> "Citizenship, so far as this country is concerned, is a concept which is entirely statutory, originating as recently as 1948 with the enactment of what was then styled the *Nationality and Citizenship Act* 1948 (Cth). It is a concept which is and can be pressed into service for a number of constitutional purposes, including with respect to Commonwealth elections and, as this case shows, for the purpose of legislating with respect to aliens pursuant to s 51(xix) of the Constitution. … [The concept of citizenship] cannot control the meaning of 'alien' in s 51(xix) of the Constitution."

A similar observation was made by Kirby J in *Shaw v Minister for Immigration and Multicultural Affairs*[457]:

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**456** (1992) 176 CLR 1 at 54 (footnote omitted).

**457** (2003) 78 ALJR 203 at 220 [94]; 203 ALR 143 at 166.

> "[B]ecause 'aliens' is a constitutional word, it cannot have any meaning that the Federal Parliament may choose to give it."

310 Parliament cannot define the scope of alienage for constitutional purposes. It was because of the risk that a power to define it presented, that the proposal of Dr Quick that the Constitution refer to and define "citizenship" foundered, and provoked the spirited opposition of Mr O'Connor[458] and Mr Symon[459] which carried the day.

311 It is necessary to say something about some of the defendants' other submissions. Correctly, they accept that Australian citizenship is a statutory concept[460], first established by the *Nationality and Citizenship Act* 1948 (Cth), and that there is no constitutional entitlement to "citizenship". The conclusion which they seek to draw from that however does not follow, that a person born in Australia will only become an Australian citizen by virtue of a statute conferring that status, if, as the defendants contend, only citizens [by statute] can have a status other than of alien. The argument is circular. It assumes, wrongly, that there is a constitutional power to define the constitutional term "alien" by an enactment, the effect of which, according to the defendants, is to define a "citizen" and to provide that a person who is not a citizen must in consequence be an alien. The Court's task of finding the meaning of s 51(xix) cannot be constrained by a legislative construct of the Parliament, the obverse of which, it is contended, is to supply it.

312 The fact that the acquisition of Australian citizenship has statutory consequences under several Commonwealth enactments[461] is not to the point.

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**458** *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 2 March 1898 at 1753 and 1755.

**459** *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 2 March 1898 at 1762, 1763, 1764 and 1768.

**460** *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 54 per Gaudron J; *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 179 [53] per Gaudron J; *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 78 ALJR 203 at 217-218 [79] per Kirby J; 203 ALR 143 at 162.

**461** The right to vote in Federal elections is restricted to Australian citizens and those British subjects enrolled on the electoral roll before 26 January 1984: *Commonwealth Electoral Act* 1918 (Cth), s 93. Although no longer a pre-condition of employment, significant weight is still placed on Australian citizenship as a criterion for employment in the Australian Public Service: *Public Service Act* 1999 (Cth), s 6.

The defendants' next submission is substantially correct, that the statutory conferral of citizenship does not give rise to any direct rights or entitlements under the Constitution[462]. Nor can it however, define by exclusion, who is an alien. A person who is not an alien cannot possibly be enacted to be one, and cannot be treated by, or pursuant to an enactment for any purpose as if he or she is one.

313 It is not possible to give "citizen" a constitutional meaning except under and as required by s 44. Citizenship is not otherwise a term of necessarily fixed meaning. It may include more than one category of people. As Mr Symon pointed out during the Melbourne Convention[463]:

> "… the expression 'citizen' does not mean only persons exercising the franchise; it includes infants and lunatics, if you like. Every one who is recognised as an inhabitant, and is under the laws, is a citizen."

314 There are other statements made by Mr Symon and Mr O'Connor[464] indicating an awareness and the possibility of different kinds of citizenship: that there was, for example, a difference between a status of citizenship conferred or recognized by statute, and a more general and traditional notion of citizenship embracing a "resident, inhabitant or person".

315 "Alien" or "non-alien" in any sense in which either term is used calls into question a matter of status. In *Shaw v Minister for Immigration and Multicultural Affairs*, I said and would repeat[465]:

> "Courts have long been reluctant to alter the status of a person without a compelling reason to do so."

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**462** Note however that the guarantee contained in s 117 of the Constitution is applicable in relation to a "subject of the Queen" (see also s 34). This provision is now taken to refer to a subject of the Queen in right of Australia (that is, the sovereign in her "Australian politic capacity"), which for practical purposes may encompass any Australian citizen.

**463** *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 3 March 1898 at 1794.

**464** *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 3 March 1898 at 1796.

**465** (2003) 78 ALJR 203 at 229-230 [148]; 203 ALR 143 at 179.

316 This traditional reluctance of courts to interfere with status is itself a factor to be weighed in favor of the plaintiff in resolving ambiguity in the meaning of "alien".

317 The defendants argued that because the Indian enactment[466] to which earlier reference has been made conferred Indian citizenship on the plaintiff, she was under allegiance to the foreign state of India and was therefore an alien according to all historical understandings of alienage, and that any allegiance owed by the plaintiff to Australia was no more than a local allegiance[467]. It is unnecessary to explore further the extent to which a foreign statute conferring citizenship could possibly operate to deprive a person born in this country of the rights due to him or her arising out of that birth, and in particular to affect the meaning and application of the Australian Constitution. Nor is it necessary to explore the effect, or the binding nature of a foreign statute with respect to an infant born and living abroad who has not reached an age of understanding and adulthood enabling her to acknowledge or renounce the citizenship which a foreign power has purported to confer upon her. In the meantime, as a person born in this country, as Sir Edward Coke in *Calvin's Case* pointed out, the plaintiff is entitled as of right to be regarded as a national of it, and in substance as a citizen of it, albeit not as a citizen for the purposes of the Citizenship Act to the extent that that Act is valid. And there seems to me to be no reason why the plaintiff should not continue to have that right unless and until she renounces it or makes an acknowledgment inconsistent with it.

Implied nationhood power

318 The defendants also sought to rely upon an "implied nationhood" power, to make laws relating to matters arising out of the existence of the Commonwealth and its status as a federal government, specifically to make laws with respect to nationality and citizenship[468]. The defendants submitted that it is

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**466** *Citizenship Act* 1955 (India).

**467** cf *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 226 [221] where I said:

> "Blackstone explains the difference between natural allegiance due from birth of a person born within the king's dominion, and local allegiance. A person owing the former cannot unilaterally renounce allegiance: it is intrinsic and primitive and requires for its divestment, 'the concurrent act of that prince to whom it was first due.'" (*Commentaries on the Laws of England*, 15th ed (1809) bk 1, c 10 at 369-371).

**468** *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 252 per Deane J.

a necessary incident of sovereignty that a nation be able to determine who are its citizens and that such a power may be deduced from "the establishment and nature of the Commonwealth as a national polity"[469].

319 No implication of nationhood or otherwise can validly contradict, or allow the definition by enactment of, an express constitutional term such as "alien". I would reject this submission.

320 For similar reasons it is unnecessary to explore the significance and constitutional relevance of dual citizenship, the right to assert and hold which apparently arises out of the repeal of s 17 of the Citizenship Act on 4 April 2002 which provided as follows:

> "**Loss of citizenship on acquisition of another nationality**
>
> 17 (1) A person, being an Australian citizen who has attained the age of 18 years, who does any act or thing –
>
> (a) the sole or dominant purpose of which; and
>
> (b) the effect of which,
>
> is to acquire the nationality or citizenship of a foreign country, shall, upon that acquisition, cease to be an Australian citizen.
>
> (2) Subsection (1) does not apply in relation to an act of marriage."

Immigration power

321 I was for a time impressed by a written submission of the defendants which was given little attention in oral argument, that the power to make laws with respect to immigration extends to laws dealing with the status of a child of unlawful immigrants who is born in Australia. The defendants submitted that, in so far as the power applies to the children of immigrants, s 10(2) of the Citizenship Act is a law with respect to immigration within the meaning of s 51(xxvii) of the Constitution, and similarly, in so far as s 198 of the Migration Act which I will set out, applies to immigrants, it is a law with respect to immigration within the meaning of s 51(xxvii) of the Constitution.

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**469** The defendants sought in this regard to rely on *Davis v The Commonwealth* (1988) 166 CLR 79 at 93, 95 per Mason CJ, Deane and Gaudron JJ.

"**198 Removal from Australia of unlawful non-citizens**

(1) An officer must remove as soon as reasonably practicable an unlawful non-citizen who asks the Minister, in writing, to be so removed.

(1A) In the case of an unlawful non-citizen who has been brought to Australia under section 198B for a temporary purpose, an officer must remove the person as soon as reasonably practicable after the person no longer needs to be in Australia for that purpose (whether or not the purpose has been achieved).

(2) An officer must remove as soon as reasonably practicable an unlawful non-citizen:

(a) who is covered by subparagraph 193(1)(a)(i), (ii) or (iii) or paragraph 193(1)(b), (c) or (d); and

(b) who has not subsequently been immigration cleared; and

(c) who either:

(i) has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; or

(ii) has made a valid application for a substantive visa, that can be granted when the applicant is in the migration zone, that has been finally determined.

(2A) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is covered by subparagraph 193(1)(a)(iv); and

(b) since the Minister's decision (the ***original decision***) referred to in subparagraph 193(1)(a)(iv), the non-citizen has not made a valid application for a substantive visa that can be granted when the non-citizen is in the migration zone; and

(c) in a case where the non-citizen has been invited, in accordance with section 501C, to make

representations to the Minister about revocation of the original decision – either:

(i) the non-citizen has not made representations in accordance with the invitation and the period for making representations has ended; or

(ii) the non-citizen has made representations in accordance with the invitation and the Minister has decided not to revoke the original decision.

(3) The fact that an unlawful non-citizen is eligible to apply for a substantive visa that can be granted when the applicant is in the migration zone but has not done so does not prevent the application of subsection (2) or (2A) to him or her.

(5) An officer must remove as soon as reasonably practicable an unlawful non-citizen if the non-citizen:

(a) is a detainee; and

(b) was entitled to apply for a visa in accordance with section 195, to apply under section 137K for revocation of the cancellation of a visa, or both, but did neither.

(6) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is a detainee; and

(b) the non-citizen made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and

(c) one of the following applies:

(i) the grant of the visa has been refused and the application has been finally determined;

(iii) the visa cannot be granted; and

(d) the non-citizen has not made another valid application for a substantive visa that can be granted when the applicant is in the migration zone.

(7) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is a detainee; and

(b) Subdivision AI of Division 3 of this Part applies to the non-citizen; and

(c) either:

(i) the non-citizen has not been immigration cleared; or

(ii) the non-citizen has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and

(d) either:

(i) the Minister has not given a notice under paragraph 91F(1)(a) to the non-citizen; or

(ii) the Minister has given such a notice but the period mentioned in that paragraph has ended and the non-citizen has not, during that period, made a valid application for a substantive visa that can be granted when the applicant is in the migration zone.

(8) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is a detainee; and

(b) Subdivision AJ of Division 3 of this Part applies to the non-citizen; and

(c) either:

(i) the Minister has not given a notice under subsection 91L(1) to the non-citizen; or

(ii) the Minister has given such a notice but the period mentioned in that subsection has ended and the non-citizen has not, during that period, made a valid application for a substantive visa

that can be granted when the applicant is in the migration zone.

(9) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is a detainee; and

(b) Subdivision AK of Division 3 of this Part applies to the non-citizen; and

(c) either:

(i) the non-citizen has not been immigration cleared; or

(ii) the non-citizen has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and

(d) either:

(i) the Minister has not given a notice under subsection 91Q(1) to the non-citizen; or

(ii) the Minister has given such a notice but the period mentioned in that subsection has ended and the non-citizen has not, during that period, made a valid application for a substantive visa that can be granted when the applicant is in the migration zone.

(10) For the purposes of subsections (6) to (9), a valid application under section 137K for revocation of the cancellation of a visa is treated as though it were a valid application for a substantive visa that can be granted when the applicant is in the migration zone."

I was not ultimately however persuaded by it. Although alienage and migration, and more particularly the consequences of each are related, they are different concepts. The plaintiff is in no sense an immigrant. Those, and the other matters which I have held to be decisive in concluding that the plaintiff is not an alien, ultimately also conclude this argument against the defendants. In view of these conclusions, it is unnecessary to consider any of the other arguments advanced.

Conclusion

322 I return to the defendants' principal submission that the constitutional meaning of "alien" includes persons who are born in Australia of non-Australian citizens. I would reject it, in summary, for these reasons. It does not matter that the plaintiff is not a citizen within the meaning of the Citizenship Act. The conclusion that I have reached accords with the view that prevailed at the Federal Convention in 1898. It gives rise to a clear and certain rule. That rule has existed for hundreds of years. It is consistent with the assumptions implicit in s 44 of the Constitution. It is a true reflection of the legal concept of alienage at the time of Federation. It is not inconsistent with any majority holdings of this Court. It falls squarely within the language of Gibbs CJ in *Pochi v Macphee*[470], and McHugh J in *Re Patterson; Ex parte Taylor*[471]. Because status is involved the Court should not give "alien" any extended meaning. To classify the plaintiff as an alien would be to give the word an extended meaning. No "evolutionary process" or supposed change in the language of the Constitution could, or does require a different outcome. To the extent, if any, that, absent citizenship as conferred or recognized by the Citizenship Act, a person born in Australia as this plaintiff was, is precluded by s 23C of that Act from asserting Australian nationality, the section would be invalid in its operation in relation to her.

323 I turn now to the reformulated questions.

1. Is the plaintiff an alien within the meaning of s 51(xix) of the Constitution?

   No.

2. If the answer to 1 is "No", is s 198 of the *Migration Act* 1958 (Cth) capable of valid application to the plaintiff?

   No.

3. By whom should the costs of the case stated to the Full Court of this Honourable Court be borne?

   The defendants.

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**470** (1982) 151 CLR 101 at 109-110.

**471** (2001) 207 CLR 391 at 429 [115].