HIGH COURT OF AUSTRALIA

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

RE SENATOR THE HONOURABLE
KAY CHRISTINE LESLEY PATTERSON RESPONDENT

EX PARTE: GRAHAM ERNEST TAYLOR PROSECUTOR

Re Patterson; Ex parte Taylor
[2001] HCA 51
Date of Order: 7 December 2000
Date of Publication of Reasons: 6 September 2001
S165/2000

ORDER

1. *Order absolute for a writ of certiorari to quash the decision of the respondent made on 30 June 2000 to cancel the visa of the prosecutor.*

2. *Order absolute for a writ of prohibition prohibiting the respondent from further proceeding on the decision made by the respondent on 30 June 2000 to cancel the visa of the prosecutor.*

3. *Respondent to pay the prosecutor's costs.*

Representation:

D M J Bennett QC, Solicitor-General of the Commonwealth with S J Gageler SC and R P L Lancaster for the respondent (instructed by Australian Government Solicitor)

P Le G Brereton SC with D P M Ash for the prosecutor (instructed by Teakle Ormsby Conn)

Intervener:

D R Williams QC, Attorney-General of the Commonwealth with D M J Bennett QC, Solicitor-General of the Commonwealth with S J Gageler SC and R P L Lancaster intervening on behalf of the Commonwealth (instructed by Australian Government Solicitor).

CATCHWORDS

Re Patterson; Ex parte Taylor

Constitutional Law (Cth) – Naturalisation and aliens – Meaning of "aliens" in s 51(xix) – Law empowering cancellation of visa of "non-citizen" – Whether such a law, applied to a British subject who has lived in Australia for over 33 years, is a law with respect to naturalisation and aliens.

Constitutional Law (Cth) – External affairs power – Whether s 51 (xxix) supports application of s 501(3) of *Migration Act* 1958 (Cth) to the prosecutor, a British subject who has lived in Australia for over 33 years.

Constitutional Law (Cth) – Meaning of "Minister" in s 64 of the Constitution – Whether Parliamentary Secretary constituted the "Minister" for the purpose of s 64 – Whether Parliamentary Secretary constituted "the Minister personally" for the purpose of s 501(4) of the *Migration Act* 1958 (Cth).

Immigration – Jurisdictional error – Power of Minister to cancel a visa on character grounds under s 501(3) of *Migration Act* 1958 (Cth) – Prosecutor had been sentenced to a term of imprisonment of 12 months or more and accordingly had a "substantial criminal record" – Substantial criminal record grounds for failure of character test – Prosecutor could not possibly pass the character test – Respondent invited prosecutor to make representations to her to have the decision revoked under s 501C(4) of *Migration Act* 1958 (Cth) – Only ground for revocation was that prosecutor passed the character test – Whether invitation to make representations evinced misunderstanding of nature of decision – Whether misunderstanding amounted to a constructive failure of jurisdiction.

Immigration – Jurisdictional error – Power of Minister to cancel a visa on character grounds under s 501(3) of *Migration Act* 1958 (Cth) – requirement that decision be in national interest – Meaning of "national interest" – Whether Minister in this case satisfied that decision in national interest.

Words and phrases – "aliens" – "non-citizen" – "the Minister" – "subject of the Queen" – "national interest".

Constitution, ss 24, 51(xix), 51(xxix), 64, 117.
Migration Act 1958 (Cth), s 501.

1 GLEESON CJ. I agree with the reasons given by Gummow and Hayne JJ for the orders that were made in this matter on 7 December 2000. I also agree with the reasoning of their Honours upon the issues as to which, in their view, the prosecutor's arguments should be rejected. I wish to add some comments in relation to two of those issues: first, whether the power given by the Constitution to the Parliament to make laws with respect to naturalization and aliens (s 51(xix)) sustains s 501(3) of the *Migration Act* 1958 (Cth) ("the Migration Act") in its application to the prosecutor; and secondly, whether the respondent's appointment, pursuant to which she acted under s 501(3) as the Minister, was valid.

Naturalization and aliens

2 The gradual process by which a number of British colonies, having joined in a federal union, became an independent nation, was examined by this Court recently in *Sue v Hill*[1]. In 1901, Australia was part of the British Empire; a status considered vital to its security and prosperity. The people of Australia were British subjects, owing allegiance to a Crown then regarded as one and indivisible. Other British subjects included, not only the people of the United Kingdom, but also those of the other units of the Empire.

3 The concept of citizenship does not appear in the Constitution. It emerged in the *Australian Citizenship Act* 1948 (Cth). Even then, all citizens in what had become the British Commonwealth had the common status of British subjects. It was not until 1984 that the distinction between Australian citizens and non-citizens became pivotal in the operation of the provisions of the Migration Act concerning the entitlement of persons born outside Australia, of non-Australian parents, to remain here.

4 Writing of the legislation which introduced that change, a senior officer of the Commonwealth Attorney-General's Department, Mr Brazil, said[2]:

> "At the time of writing - mid 1983 - Australia appears to be at the end of one era and to be beginning another in relation to the legal and conceptual bases by reference to which it deals with matters of nationality and immigration.
>
> Australian citizenship was established as late as 1949, and it has been allied with the status of a British subject, and this at a time when no

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1 (1999) 199 CLR 462.

2 Brazil, "Australian Nationality and Immigration" in Ryan (ed), *International Law in Australia*, 2nd ed (1984), 210 at 210.

> other country of the former British Empire, including Britain itself, continues to use or recognise that status. Early action to correct this anomaly, and the remaining discriminatory provisions that have gone with the recognition of the status of British subject, seems inevitable. Also, important changes are proposed to the *Migration Act* 1958 that would have the effect of uniting, for the first time in Australian legislation, citizenship with the right of abode."

5 The prosecutor is a non-citizen. But, he says, he came to Australia in 1966, as a British subject; and has lived here ever since. That, it is argued, puts him beyond the reach of the power of Parliament to enact laws with respect to naturalization and aliens, and, specifically, to provide that he may be deprived of a right to remain in Australia, by action taken under s 501(3) of the Migration Act on the basis of his criminal history. As a British subject, who has become absorbed into the Australian community, he maintains that he cannot be treated by the Parliament as an alien, even though the United Kingdom, where he was born, has now become a foreign power[3].

6 The prosecutor's argument is directly inconsistent with the decision of this Court in *Nolan v Minister for Immigration and Ethnic Affairs*[4]. The Court held that a person whose situation was not materially different from that of the prosecutor, a non-citizen who was a British subject, was covered by the then corresponding provisions of the Act, and that those provisions satisfied the description of a law with respect to naturalization and aliens. Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ referred to a United States decision of 1843[5] where it was said[6] that, for the purposes of United States law, an alien was "one born out of the United States, who has not since been naturalized under the constitution and laws." They went on to describe that as "an acceptable general definition of the word 'alien' when that word is used with respect to an independent country with its own distinct citizenship."[7] Evidently they did not regard the circumstance that the independent country with its own distinct citizenship retained a monarchical system of government, was formerly a unit of an Empire, and included amongst its residents persons who retained the status of subject but did not acquire citizenship, as altering the case. They said[8]:

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3 *Sue v Hill* (1999) 199 CLR 462.

4 (1988) 165 CLR 178.

5 *Milne v Huber* 17 Fed Cas 403 (1843).

6 17 Fed Cas 403 at 406 (1843).

7 (1988) 165 CLR 178 at 183.

8 (1988) 165 CLR 178 at 184.

> "The transition from Empire to Commonwealth and the emergence of Australia and other Dominions as independent sovereign nations within the Commonwealth inevitably changed the nature of the relationship between the United Kingdom and its former colonies and rendered obsolete notions of an indivisible Crown … 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'. It is not that the meaning of the word 'alien' had altered. That word is and always has been appropriate to describe the status, vis-à-vis a former colony which has emerged as an independent nation with its own citizenship, of a non-citizen who is a British subject by reason of his citizenship of a different sovereign State."

7 I am not persuaded that the Court should now reverse the interpretation which it gave the Constitution in 1988, in *Nolan*. Whilst fully accepting that the Parliament cannot, by some artificial process of definition, ascribe the status of alienage to whomsoever it pleases, I see no sufficient reason to deny to s 501(3) of the Migration Act, in its application to a person in the position of the prosecutor, the character of a law with respect to naturalization and aliens. The prosecutor was born outside Australia; his parents were not Australians; and he has not been naturalized as an Australian[9]. The power conferred by s 51(xix) includes a power to determine legal status[10]. It should be construed with full generality and in a manner that accommodates the changes that have occurred, over a century, in Australia's international standing, and in its relations with the United Kingdom. A conclusion that it is beyond the capacity of the Australian Parliament to respond to those changes in the manner provided for by s 501(3) of the Migration Act is unwarranted.

The respondent as Minister

8 The prosecutor challenged the status of the respondent as Minister for the purposes of the exercise by her of the power conferred by s 501(3) of the Migration Act.

9 On 21 October 1998, the Governor-General, acting pursuant to ss 64 and 65 of the Constitution, appointed the Honourable Philip Ruddock, a member of the House of Representatives, and a member of the Federal Executive Council, to

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9 cf *Pochi v Macphee* (1982) 151 CLR 101 at 109-110, per Gibbs CJ with whom Mason and Wilson JJ agreed.

10 *Meyer v Poynton* (1920) 27 CLR 436 at 440-441 per Starke J.

hold the office of Minister for Immigration and Multicultural Affairs, and directed that he administer the Department of Immigration and Multicultural Affairs. The validity of such appointment and direction is not in question.

10 On 10 March 2000, the Governor-General signed an instrument, relating to the respondent, described as "Appointment of Parliamentary Secretary". By that instrument, the Governor-General, acting pursuant to ss 64 and 65 of the Constitution, appointed the respondent, who is a Senator and a member of the Executive Council, to administer two Departments, the Department of Foreign Affairs and Trade and the Department of Immigration and Multicultural Affairs. By the instrument, His Excellency also designated the respondent, pursuant to s 4 of the *Ministers of State Act* 1952 (Cth), as Parliamentary Secretary, and directed her to hold the office of Parliamentary Secretary to the Minister for Foreign Affairs and the office of Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs.

11 This, the prosecutor argues, cannot be done. Why not? If there is a reason, it must be found in the provisions of Ch II of the Constitution, concerning the Executive Government. But those provisions are relatively brief and, as one would expect, are expressed in a form which allows the flexibility that is appropriate to the practical subject of governmental administration, consistent with the basic requirements of responsible government.

12 The relevant sections of the Constitution provide as follows:

> "61 The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.
>
> 62 There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the Governor-General and sworn as Executive Councillors, and shall hold office during his pleasure.
>
> 63 The provisions of this Constitution referring to the Governor-General in Council shall be construed as referring to the Governor-General acting with the advice of the Federal Executive Council.
>
> 64 The Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish.
>
> Such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Federal Executive Council, and shall be the Queen's Ministers of State for the Commonwealth.

> After the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives.
>
> 65 Until the Parliament otherwise provides, the Ministers of State shall not exceed seven in number, and shall hold such offices as the Parliament prescribes, or, in the absence of provision, as the Governor-General directs."

13 The above provisions contain, or reflect, in broad outline, some of the structural elements of the system of government provided for the body politic that was created in 1901. There was to be a constitutional monarchy. There was to be a separation of legislative, executive and judicial powers. The executive power of the Commonwealth was to be vested in the Queen, and exercisable by her representative, the Governor-General. The Governor-General was to act upon the advice of a Federal Executive Council, chosen by the Governor-General and holding office during his or her pleasure. The Governor-General in Council was empowered to establish departments of State, and to appoint, from among the members of the Federal Executive Council, officers to administer such departments. They were to be the Queen's Ministers of State for the Commonwealth. A Minister of State was to be either a senator or a member of the House of Representatives, and thus answerable in and to Parliament for matters relating to the administration of government. Parliament was empowered to make provision as to the number of Ministers of State at any one time, and also to prescribe the offices such Ministers should hold. In the absence of such parliamentary prescription it was to be for the Governor-General to direct which offices should be held by Ministers. Parliament, however, was to control the size of the Ministry.

14 For the framers of the Constitution to have descended into greater specificity would have imposed an unnecessary and inappropriate degree of inflexibility upon constitutional arrangements that need to be capable of development and adaptability. The deliberate lack of specificity is demonstrated by the absence of any reference to such prominent features of our system of democratic government as the office of Prime Minister, or the Cabinet.

15 The concept of administration of departments of State, appearing in s 64, is not further defined. This is hardly surprising. The practices and conventions which promote efficient and effective government administration alter over time, and need to be able to respond to changes in circumstances and in theory.

16 The prosecutor contends that, consistently with the above provisions, it was not open to the Governor-General, having previously appointed Mr Ruddock to administer the Department of Immigration and Multicultural Affairs, then to appoint the respondent to administer the same Department, as Parliamentary Secretary to the Minister.

17 This contention fails. There is nothing inconsistent with s 64 in the appointment of two persons to administer a Department. The practice of appointing Ministers, and Assistant Ministers, is well established, here and in the United Kingdom[11]. The concept of administration does not require that there be only one person who administers, and the concept of responsible government does not require that there be only one person answerable to Parliament for the administration of a Department. Under the appointments made by the Governor-General, it is for the Minister and the Parliamentary Secretary to make their own arrangements as to the method by which the Department will be administered. It is for Parliament to determine the procedures by which those two persons will answer for the conduct of such administration. To repeat what was said in *Egan v Willis*[12], responsible government is a concept based upon a combination of law, convention, and political practice. The characteristics of responsible government are not immutable. They are certainly capable of accommodating the arrangements made by the Governor-General in the present case.

18 The *Ministers of State Act* 1952 (Cth), as amended by the *Ministers of State and Other Legislation Amendment Act* 2000 (Cth), provides that the number of Ministers of State must not exceed, in the case of those designated upon appointment as Parliamentary Secretary, 12, and in the case of those not so designated, 30. This is an exercise of the power conferred by s 65 and also by s 51(xxxvi) of the Constitution. The respondent is a Minister of State, designated upon appointment as a Parliamentary Secretary. By virtue of s 19A of the *Acts Interpretation Act* 1901 (Cth) she had the powers conferred upon the Minister by s 501(3) of the Migration Act.

19 The challenge to the respondent's status as Minister must be rejected.

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11 Parris, *Constitutional Bureaucracy* (1969) at 122-126.

12 (1996) 40 NSWLR 650 at 660.

20 GAUDRON J. On 7 December 2000, this Court made absolute an order nisi for certiorari and prohibition directed to the respondent, Senator the Hon Kay Christine Lesley Patterson, Parliamentary Secretary to the Minister for Foreign Affairs and Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs ("the Parliamentary Secretary"). By its order, the Court quashed her decision of 30 June 2000 cancelling the visa of the prosecutor, Graham Ernest Taylor, and prohibited her from further proceeding on that decision. The following are my reasons for joining in that order.

Preliminary matters

21 Before turning to the precise issues raised in this case, it is convenient to note that, on 10 March 2000, the Governor-General appointed the Parliamentary Secretary "to administer the Department of Immigration and Multicultural Affairs". It was in that capacity that she purported to cancel Mr Taylor's visa. Her decision in that regard was purportedly made pursuant to s 501(3) of the *Migration Act* 1958 (Cth) ("the Act").

22 In fact, Mr Taylor did not have a visa in the sense that that word is ordinarily understood. Mr Taylor has never held a passport. He came to Australia as a child on his father's United Kingdom passport which, apparently, was stamped with a permanent entry permit. The visa which the Parliamentary Secretary purported to cancel is a deemed visa, being either an absorbed person visa under s 34 of the Act[13] or a transitional (permanent) visa pursuant to reg 4(1) of the Migration Reform (Transitional Provisions) Regulations (Cth)[14].

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13 See s 34(2) of the Act which provides:

> " A non-citizen in the migration zone who:
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> (a) on 2 April 1984 was in Australia; and
>
> (b) before that date, had ceased to be an immigrant; and
>
> (c) on or after that date, has not left Australia, where left Australia has the meaning it had in this Act before 1 September 1994; and
>
> (d) immediately before 1 September 1994, was not a person to whom section 20 of this Act as in force then applied;
>
> is taken to have been granted an absorbed person visa on 1 September 1994."

14 Regulation 4(1) provides that, subject to reg 5, which is not presently relevant, "if, immediately before 1 September 1994, a non-citizen was in Australia as the holder of a permanent entry permit, that entry permit continues in effect on and after 1 September 1994 as a transitional (permanent) visa that permits the holder to remain indefinitely in Australia."

However, the Parliamentary Secretary apparently proceeded on the basis that she was revoking Mr Taylor's transitional (permanent) visa.

Relevant provisions of the Act

23 The legislative authority pursuant to which the Parliamentary Secretary purported to cancel Mr Taylor's visa is to be found in s 501(3) of the Act. That sub-section provides:

> " The Minister may:
>
> (a) refuse to grant a visa to a person; or
>
> (b) cancel a visa that has been granted to a person;
>
> if:
>
> (c) the Minister reasonably suspects that the person does not pass the character test; and
>
> (d) the Minister is satisfied that the refusal or cancellation is in the national interest."

The effect of s 501F of the Act is that, if either of Mr Taylor's deemed visas was cancelled by the Parliamentary Secretary, the other was also cancelled[15].

24 The "character test" referred to in s 501(3) of the Act is elaborated in sub-s (6) of that section in these terms:

> " For the purposes of this section, a person does not pass the ***character test*** if:
>
> (a) the person has a substantial criminal record (as defined by subsection (7)); or

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15 Section 501F(1) applies if the Minister makes a decision under s 501 to cancel a visa that has been granted to a person. Section 501F(3) provides:

> " If:
>
> (a) the person holds another visa; and
>
> (b) that other visa is neither a protection visa nor a visa specified in the regulations for the purposes of this subsection;
>
> the Minister is taken to have decided to cancel that other visa."

(b) the person has or has had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct; or

(c) having regard to either or both of the following:

(i) the person's past and present criminal conduct;

(ii) the person's past and present general conduct;

the person is not of good character; or

(d) in the event the person were allowed to enter or to remain in Australia, there is a significant risk that the person would:

(i) engage in criminal conduct in Australia; or

(ii) harass, molest, intimidate or stalk another person in Australia; or

(iii) vilify a segment of the Australian community; or

(iv) incite discord in the Australian community or in a segment of that community; or

(v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way.

Otherwise, the person passes the ***character test***."

25 "Substantial criminal record" is defined in s 501(7) to include the situation where "the person has been sentenced to a term of imprisonment of 12 months or more". Nothing in the Act elaborates the notion of "national interest" referred to in s 501(3).

26 Sub-section (4) of s 501 should also be noted. That sub-section provides:

" The power under subsection (3) may only be exercised by the Minister personally."

27 By s 15 of the Act, "if a visa is cancelled its former holder, if in the migration zone, becomes, on the cancellation, an unlawful non-citizen unless,

immediately after the cancellation, the former holder holds another visa that is in effect."[16] And by s 189(1) it is provided:

> " If an officer knows or reasonably suspects that a person in the migration zone is an unlawful non-citizen, the officer must detain the person."

Moreover, the provisions of Div 8 of Pt 2 of the Act allow for the removal of an unlawful non-citizen from Australia.

The issues

28 The issues which arise in this matter are:

1. whether s 501(3) of the Act is valid in its application to the prosecutor;

2. whether, as a matter of statutory construction, the Parliamentary Secretary is "the Minister personally" for the purposes of s 501(4) of the Act;

3. if the Parliamentary Secretary is "the Minister personally", whether she has been validly appointed as one of the Queen's Ministers of State for the Commonwealth;

4. whether the decision of the Parliamentary Secretary involved jurisdictional error attracting relief by way of prohibition under s 75(v) of the Constitution.

The facts

29 At this stage it is necessary to note that Mr Taylor was convicted of an offence in respect of which he was sentenced to a minimum term of imprisonment of three and a half years. Thus, he did not pass and cannot pass the character test in s 501(3) of the Act. Otherwise, to the extent that it is necessary to refer to the facts, which are set out in other judgments, the facts relevant to each issue will be referred to separately in relation to each of those issues.

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16 Section 15 is subject to an exception, which is not presently relevant, with respect to "[a]n allowed inhabitant of the Protected Zone".

Validity of s 501(3) of the Act in its application to Mr Taylor

30 Mr Taylor was born in the United Kingdom and, as already noted, came to Australia as a child on his father's passport in 1966. He was then a young child. He has resided in Australia ever since. He was educated here and has made his home here. He has been on the electoral roll since attaining the age of 18. He has never applied for a passport and has not taken out Australian citizenship.

31 It was conceded on behalf of the Parliamentary Secretary that, when she made her decision cancelling his visa, Mr Taylor was completely absorbed into the Australian community. Indeed, the Parliamentary Secretary must be taken to have conceded that he was completely absorbed into the community prior to April 1984, that being one of the requirements for an absorbed person visa[17].

32 Because it was accepted by both sides that Mr Taylor had been absorbed into the Australian community, the matter was argued on the assumption that s 501(3) of the Act cannot be supported in its application to him by reference to the legislative power of the Commonwealth with respect to "immigration and emigration"[18]. That is an assumption that requires further examination, and to which it will be necessary to return. Given that assumption, the matter was argued on the basis that s 501(3) of the Act is valid in its application to Mr Taylor only if, at the time of the decision to cancel his visa, he was an alien for the purposes of s 51(xix) of the Constitution.

33 As I pointed out in *Nolan v Minister for Immigration and Ethnic Affairs*, 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."[19] That is not the same as asking whether the person 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", that being the question posed by s 44(i) of the Constitution with respect to the qualification necessary to be a member of the Commonwealth Parliament.

34 Were the question whether Mr Taylor is, by force of s 44(i) of the Constitution, disqualified from being a member of the Commonwealth Parliament, he would certainly be identified as "a citizen of a foreign power". That is because, given Australia's status as an independent nation, the United

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17 See fn 13.

18 Constitution, s 51(xxvii).

19 (1988) 165 CLR 178 at 189.

Kingdom is now a foreign power, although it could not have been so described at the time of federation[20]. However, that is not the question posed in this case. 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. Thus, a person who has been naturalised as an Australian may be a member of the Australian community by virtue of his or her Australian citizenship and, at the same time, a citizen or subject of a foreign country[21].

35 On his arrival in Australia, Mr Taylor was, by virtue of his birth in the United Kingdom, "a citizen of the United Kingdom and Colonies"[22] for the purposes of the *British Nationality Act* 1948 (UK). And for the purposes of the *Nationality and Citizenship Act* 1948 (Cth) (later known as the *Citizenship Act* 1948 and, later still, the *Australian Citizenship Act* 1948) ("the Citizenship Act"), he was a British subject[23]. He was, at that stage, a migrant but not an alien as defined in s 5 of the Citizenship Act. That section then defined "alien" to mean "a person who [was] not a British subject, an Irish citizen or a protected person". And that remained the position until 1987 when that definition was repealed by the *Australian Citizenship Amendment Act* 1984 (Cth)[24] ("the 1984 Act").

36 In *Nolan*, the majority pointed out that the definition of "alien" in the Citizenship Act did not "confine the meaning or denotation of the word in s 51(xix) of the Constitution."[25] That is correct. There can be no doubt, as the majority pointed out in that case, that "the emergence of Australia as an

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20 See *Sue v Hill* (1999) 199 CLR 462 at 523-528 [158]-[173] per Gaudron J.

21 Whether a person who is naturalised as an Australian loses the citizenship of his or her country of origin depends on the municipal laws of that country: see *Sykes v Cleary* (1992) 176 CLR 77 at 105-106 per Mason CJ, Toohey and McHugh JJ, 110-112 per Brennan J, 127 per Deane J, 131 per Dawson J, 135 per Gaudron J; *Sue v Hill* (1999) 199 CLR 462 at 486-487 [47] per Gleeson CJ, Gummow and Hayne JJ, 529 [175] per Gaudron J. On the other hand, s 17 of the *Australian Citizenship Act* 1948 (Cth) provides for the loss of Australian citizenship by the subsequent acquisition of the nationality or citizenship of a foreign country.

22 See s 5 of the *British Nationality Act* 1948 (UK).

23 Section 7 of the Citizenship Act as at 1966 defined "British subject" to include a citizen of the United Kingdom and Colonies.

24 Section 4(2) of the 1984 Act, which removed the definition of "alien" from s 5 of the Citizenship Act, came into force on 1 May 1987.

25 (1988) 165 CLR 178 at 186 per Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ.

independent nation, the acceptance of the divisibility of the Crown which was implicit in the development of the Commonwealth as an association of independent nations and the creation of a distinct Australian citizenship ... necessarily produced different reference points for the application of the word 'alien'"[26] with the consequence that, although there was a point in Australia's development where a British subject could not be an alien, that is no longer the case.

37 To say that "although there was a point in Australia's development where a British subject could not be an alien, that is no longer the case" leaves unanswered two questions which are material in the present case. The first is whether a person in the position of Mr Taylor was always an alien for the purposes of s 51(xix) of the Constitution. And, if he was not, the second is whether it is within the power of the Parliament to legislate so as to transform him into one.

38 In *Nolan*, the majority held that a person whose circumstances were not relevantly distinguishable from those of Mr Taylor was an alien for constitutional purposes and, as such, the deportation provisions of the Act, as it then stood, were applicable to him. However, the majority did not address the question whether the person whose status was in issue in that case had always been an alien and, if not, whether and by what means he could be converted into one. That being so, the decision, in my view, is flawed.

39 Although the majority decision in *Nolan* was rested upon what was said in *Pochi v Macphee*[27], it cannot be said to have rested on a principle that had been carefully worked out in a significant succession of cases[28]. What was said in *Pochi* was 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."[29] However, that case was not concerned to analyse the position of persons who entered this country as British subjects at a time when they fell outside the definition of "alien" in the Citizenship Act. Nor was it

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26 (1988) 165 CLR 178 at 185-186.

27 (1982) 151 CLR 101.

28 See *The State of Victoria v The Commonwealth* ("the *Second Uniform Tax Case*") (1957) 99 CLR 575 at 615-616 per Dixon CJ; *Queensland v The Commonwealth* (1977) 139 CLR 585 at 599 per Gibbs J, 630 per Aickin J; *The Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49 at 56 per Gibbs CJ; *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438 per Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ.

29 (1982) 151 CLR 101 at 109-110 per Gibbs CJ.

concerned with the question whether, if they were not aliens, Parliament could legislate to make them so for the purpose of s 51(xix) of the Constitution.

40 Because the decision in *Nolan* is not rested on a principle that has been carefully worked out in a series of cases and because it is, in my view, flawed, I would grant leave to Mr Taylor, if leave be necessary[30], to reopen the decision in that case. In this regard, it should also be noted that, in the words of Deane J in *Stevens v Head*, "[t]here are ... weighty statements of authority ... that, in matters of fundamental constitutional importance, the members of this Court are obliged to adhere to what they see as the requirements of the Constitution"[31]. And there could hardly be an issue of more fundamental importance than that of a person's constitutional status.

41 The Constitution does not identify any specific criterion for membership of the Australian body politic or for the withdrawal of that membership. Rather, it leaves it to Parliament, in the exercise of its power to legislate with respect to naturalisation and aliens, to specify the conditions upon which a person may become a member or may be expelled from membership of the Australian body politic.

42 For present purposes, the most significant legislative development with respect to membership of the Australian body politic was the introduction, in 1948, of the concept of Australian citizenship. With the enactment, in that year, of the Citizenship Act, Australian citizenship became a criterion, but not the sole criterion, for membership of the Australian body politic[32]. Australian citizenship did not become the sole criterion for membership until the coming into effect of the 1984 Act in 1987.

43 Although the Parliament may legislate to specify the conditions upon which a person may become or may be expelled from membership of the

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30 See *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311.

31 (1993) 176 CLR 433 at 461-462. See also *The Tramways Case [No 1]* (1914) 18 CLR 54 at 70 per Isaacs J; *W & A McArthur Ltd v State of Queensland* (1920) 28 CLR 530 at 555 per Knox CJ, Isaacs and Starke JJ; *The Commonwealth v Cigamatic Pty Ltd (In Liquidation)* (1962) 108 CLR 372 at 377-378 per Dixon CJ (with whom Kitto and Windeyer JJ agreed), 389 per Menzies J (with whom Owen J agreed); *Queensland v The Commonwealth* (1977) 139 CLR 585 at 593-594 per Barwick CJ, 630 per Aickin J; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 554.

32 See *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 189-190 per Gaudron J.

Australian body politic, the power to legislate with respect to aliens is not necessarily a power to define who is and who is not an alien. In that regard, Gibbs CJ accepted in *Pochi* that there may well be limits to the Parliament's power to define an alien[33]. And certainly it would not have been open to the Parliament to define a subject of the Queen as an alien at the time of federation or for some time thereafter[34]. That is why the power with respect to immigration and emigration was the crucial issue in *R v Macfarlane; Ex parte O'Flanagan and O'Kelly*, the prosecutors in that case being British subjects born in Ireland[35].

44 Although the definition of "alien" in s 5 of the Citizenship Act could never control the meaning of that word in s 51(xix) of the Constitution, it could, until its repeal in 1987, serve to identify those whom the Parliament had legislated to recognise as members of the Australian community. The effect of the definition was either to confirm Mr Taylor's membership of the body politic constituting the Australian community by virtue of his status as a British subject or, if the point had then been reached when Australia might treat British subjects as aliens for constitutional purposes, to confer non-alien status upon him – in effect, to naturalise him and all other British citizens in the same position. Either way, Mr Taylor was not, for constitutional purposes, an alien at any time prior to 1987.

45 Given that Mr Taylor was not, for constitutional purposes, an alien at any time prior to 1987, two questions arise. The first is whether Parliament has legislated to withdraw his membership of the Australian community; and if it has, whether that legislation is within constitutional power.

46 Parliament has not, in terms, legislated to withdraw membership of the body politic constituting the Australian community from those British subjects who entered Australia prior to 1987 but who have not since taken out Australian citizenship. Rather, it has simply legislated to repeal the definition of "alien" that appeared in the Citizenship Act until 1987 and, having done so, it has assumed, for the purposes of the Act, that, as a matter of constitutional fact, that is the case. However, because that assumption is implicit in the Act, it necessarily operates, if valid, to withdraw their membership of the Australian community. In my opinion, it cannot validly operate with that effect.

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33 (1982) 151 CLR 101 at 109.

34 *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 183-184 per Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ.

35 (1923) 32 CLR 518. As to the recognition that British subjects were not then aliens, see also *Jerger v Pearce* (1920) 27 CLR 526; *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 88 per Isaacs J, 117 per Higgins J, 132 per Starke J.

47 The power to legislate with respect to naturalisation and aliens clearly includes a power to legislate to deprive a person of his or her membership of the body politic that constitutes the Australian community. However, the Parliament's power in that regard is not at large. It can only be exercised by reference to some change in the relationship between the individual and the community. Absent any such change, the law could not be classified as a law with respect to naturalisation or aliens, for that power is wholly concerned with the relationship of individuals to the Australian community.

48 The only relevant change that can be postulated with respect to Mr Taylor's relationship with the Australian community is that there has been an evolutionary change in constitutional and governmental thinking with the emergence of the notion of the divisibility of the Crown. Thus, modern jurisprudence has it that the Queen of the United Kingdom is separate and distinct from the Queen of Australia, a situation brought about by Australia having become an independent nation[36].

49 Undoubtedly, when allegiance to the Sovereign was the criterion for membership of the body politic, a change in allegiance could serve to terminate one's membership of it. And that was so whether the change occurred by choice on the part of the individual concerned or by operation of law. Thus the status of Hanoverians resident in England changed by operation of law when, following the death of William IV, different monarchs succeeded to the thrones of England and Hanover. That was because the allegience owed by Hanoverians resident in England was to the sovereign of Hanover, his heirs and successors. On the death of William IV, the Hanoverian "became an alien because the sovereign to whom his allegiance was due was a foreign sovereign"[37], there being different laws of succession in Hanover and England. Of significance, however, was that "[t]he Hanoverian by birth ... had needed no naturalization ... [when t]he Crowns had by accident been united in one person"[38].

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36 See *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 184 per Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ; *Sue v Hill* (1999) 199 CLR 462 at 489-490 [57] per Gleeson CJ, Gummow and Hayne JJ, 526-527 [169] per Gaudron J.

37 *In re Stepney Election Petition. Isaacson v Durant* (1886) 17 QBD 54 at 60 per Lord Coleridge CJ.

38 *In re Stepney Election Petition. Isaacson v Durant* (1886) 17 QBD 54 at 59-60 per Lord Coleridge CJ.

50 Notwithstanding that, for constitutional and governmental purposes, a distinction is made between the Queen as Queen of the United Kingdom and as Queen of Australia, there is but one person who performs both sovereign functions, as was the case when the Crowns of Hanover and England were "united in one person". Mere change in constitutional and legal thinking with respect to the Crown cannot, of itself, effect a change in the relationship between persons in the position of Mr Taylor and the body politic constituting the Australian community. Whatever changes may occur in the composition of the body politic constituting the Australian community as a result of changes in constitutional thinking, the relationship between the individual, who is likely to be unaware of those changes, and the community, as an abstraction, is not.

51 To say that a change in constitutional and legal thinking is not, of itself, sufficient to change the relationship between persons in the position of Mr Taylor and the Australian community is not to say that that change is irrelevant to Parliament's powers to legislate as to the criterion by which persons such as Mr Taylor might, in the future, be classified as aliens. Parliament might, for example, legislate to define "alien" to include persons who, although not aliens prior to 1987, have since taken action to acknowledge their allegiance to the United Kingdom or to assert their rights and privileges as one of its citizens. But Parliament has not done so. It follows that Mr Taylor remains a member of the body politic constituting the Australian community and is, thus, not an alien.

52 A law providing for the detention otherwise than upon conviction for a criminal offence and for the compulsory removal from Australia of persons who have been integrated into the Australian community cannot be supported as a law with respect to immigration and emigration[39]. Nor, in my view, can it be supported as a law with respect to external affairs. That is because the removal of a person from Australia, simpliciter, does not give rise to any external affair, as such. Such a law is valid only as a law with respect to aliens. It follows, therefore, that the provisions of the Act providing for the detention and removal of prohibited non-citizens from Australia are valid only in their application to non-citizens who are also aliens. Thus, they are not valid in their application to Mr Taylor.

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39 See *Potter v Minahan* (1908) 7 CLR 277 at 308 per Isaacs J; *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 62-65 per Knox CJ, 109-110 per Higgins J, 137-138 per Starke J; *R v Carter; Ex parte Kisch* (1934) 52 CLR 221 at 229 per Evatt J; *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 576-577 per Dixon J, 587-588 per Williams J; *R v Director-General of Social Welfare (Vict); Ex parte Henry* (1975) 133 CLR 369 at 372 per Barwick CJ, 373 per Gibbs J, 379 per Mason J, 383 per Jacobs J; *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 194-195 per Gaudron J.

53 Because the provisions of the Act providing for the detention and removal from Australia of non-citizens are invalid in their application to Mr Taylor, it follows that prohibition lies to prevent the Parliamentary Secretary from taking any action in that regard pursuant to her decision of 30 June 2000. It does not follow, however, that her decision should be quashed.

54 Although the power to legislate with respect to immigration does not extend to laws for the detention and removal of persons who have been integrated into the Australian community, there is no reason, in my view, why that power does not enable the Parliament to legislate so as to provide for the conferral of visas on persons who have migrated to Australia. Nor in my view, is there any reason why, having legislated to confer visas on such persons, the Parliament cannot legislate to provide for their cancellation. That being so, s 501(3) is not, in my view, invalid and certiorari does not lie to quash the Parliamentary Secretary's decision on that account.

The Minister personally

55 On this issue, I agree with Gummow and Hayne JJ, for the reasons that their Honours give, that, as a matter of statutory construction, the Parliamentary Secretary is, for the purposes of s 501(4) of the Act, "the Minister personally".

Validity of the Parliamentary Secretary's appointment as Minister of State

56 It was argued on behalf of Mr Taylor that, notwithstanding that, as a matter of statutory construction, the Parliamentary Secretary is "the Minister personally" for the purposes of s 501(4) of the Act, her appointment as Minister is invalid and the only person capable of acting as the Minister personally is the Hon Philip Ruddock who was appointed by the Governor-General on 21 October 1998 to administer the Department of Immigration and Multicultural Affairs and, thus, to hold office as one of the Queen's Ministers of State for the Commonwealth. His appointment has not been revoked.

57 The Parliamentary Secretary's appointment occurred on 10 March 2000. On that day the Governor-General signed an Instrument of Appointment designating her, pursuant to s 4 of the *Ministers of State Act* 1952 (Cth) ("the Ministers of State Act"), as Parliamentary Secretary and directing her to hold the office of Parliamentary Secretary to the Minister for Foreign Affairs and the office of Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs. By the Instrument of Appointment she was also appointed "to administer THE DEPARTMENT OF FOREIGN AFFAIRS AND TRADE AND THE DEPARTMENT OF IMMIGRATION AND MULTICULTURAL AFFAIRS".

58 The appointment of the Hon Philip Ruddock and of the Parliamentary Secretary were each expressed to be pursuant to ss 64 and 65 of the Constitution. Section 64 relevantly provides:

> " The Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish.
>
> Such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Federal Executive Council, and shall be the Queen's Ministers of State for the Commonwealth."

59 Section 65 provides:

> " Until the Parliament otherwise provides, the Ministers of State shall not exceed seven in number, and shall hold such offices as the Parliament prescribes, or, in the absence of provision, as the Governor-General directs."

The Ministers of State Act provides, in s 4, that:

> " The number of the Ministers of State must not exceed:
>
> (a) in the case of those designated, when appointed by the Governor-General, as Parliamentary Secretary – 12; and
>
> (b) in the case of those not so designated – 30."

60 It was put on behalf of Mr Taylor that s 4 of the Ministers of State Act is invalid in so far as it "purports to confer upon the Executive a power to designate [a member of Parliament] a Parliamentary Secretary upon ... appointment by the Executive under s 64 of the Constitution". Accordingly, so the argument went, the Governor-General could not appoint more than 30 Ministers, a number which was exceeded by the appointment of the various Parliamentary Secretaries and, thus, their appointments were invalid.

61 The Parliament has power under s 51(xxxvi) of the Constitution to legislate with respect to "matters in respect of which this Constitution makes provision until the Parliament otherwise provides". Section 65 of the Constitution makes provision with respect to the number of the Ministers of State and the offices they are to hold "[u]ntil the Parliament otherwise provides". By s 4 of the Ministers of State Act Parliament has provided for an office of Parliamentary Secretary to be held by twelve of the forty-two persons who are appointed Ministers of State. Such provision is clearly authorised by s 51(xxxvi) of the Constitution.

62 Additionally, it was put that there is no power under s 64 of the Constitution "to appoint to administer a department of State a person who cannot and does not administer the department". The question whether, at the relevant time, the Parliamentary Secretary administered the Department of Immigration and Multicultural Affairs is a question of fact and as will later appear, is one that is irrelevant to these proceedings. The question whether she could administer the Department depends on whether s 64 of the Constitution permits of two or more persons to administer a department of State.

63 Before turning to s 64 of the Constitution, it is convenient to note that the notion of responsible government was called in aid of the argument that s 64 permits of the appointment of only one person to administer a department of State. The concept of responsible government is not one which is elaborated in the Constitution. Rather, the Constitution simply provides, in the concluding sentence of s 64, that:

> " After the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives."

It may here be noted that the Parliamentary Secretary has at all relevant times been a Senator.

64 The concluding sentence of s 64 of the Constitution provides the machinery by which a Minister is accountable to Parliament, a core aspect of the notion of responsible government. Of equal significance to the concept of responsible government is the conferral, by s 75(v) of the Constitution, of original jurisdiction on this Court in all matters "in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth". That provision provides the mechanism by which the Executive is subjected to the rule of law.

65 To the extent that there is ambiguity in the terms of s 64 of the Constitution, the notion of responsible government, as embodied in the concluding sentence of s 64 and in s 75(v) of the Constitution, may shed light on its proper construction. Primarily, however, its meaning depends on its terms. And by its terms, it permits of the appointment of "officers to administer ... departments of State". As a matter of ordinary language, s 64 permits of the appointment of more than one person to administer one or more departments of State. Nothing in its concluding sentence, or in s 75(v) of the Constitution directs otherwise.

66 What, however, does not clearly emerge from s 64 is whether, if more than one person is appointed to administer a department of State, those persons are appointed to administer it jointly or severally. In this respect, the concluding sentence of s 64 provides no guidance. However, the notion of "administering a

department of State" is not one that easily accommodates anything other than joint appointment. Moreover, the subjection of those administering a department of State to the rule of law, as contemplated by s 75(v) of the Constitution, may be thwarted if, in the case of more than one person administering a department, their appointment is other than joint. Accordingly, in my view, although s 64 permits of the appointment of more than one person to administer a department of State, it permits only of their joint appointment.

67 Ordinarily, in the case of a joint appointment, the appointees are appointed in the same instrument and at the same time. However, the Constitution does not specify the manner of appointment of those who are to administer the departments of State of the Commonwealth. That being so, I would not construe the instrument appointing the Parliamentary Secretary to administer the Department of Immigration and Multicultural Affairs other than as an appointment to administer that department jointly with any other person appointed on that behalf. Accordingly, her appointment is valid. Even so, a question arises whether, as a joint appointee, she is "the Minister personally" for the purposes of s 501(4) of the Act.

68 It does not follow that, because the Parliamentary Secretary was appointed jointly to administer the Department of Immigration and Multicultural Affairs, she was not "the Minister personally" for the purposes of s 501(4) of the Act. In making the decision to cancel Mr Taylor's visa, she was exercising a statutory power. Whether or not she was also administering the Department is beside the point. So far as the exercise of the power conferred by s 501(3) of the Act is concerned she was, for the reasons given by Gummow and Hayne JJ, the Minister personally.

Jurisdictional error

69 The decision-making process which led to the Parliamentary Secretary's decision to cancel Mr Taylor's visa commenced with a departmental minute of 26 June 2000 advising her that the Hon Philip Ruddock had "indicated that a submission to consider the possible cancellation of Mr Taylor's visa under subsection 501(3) of the Act should be prepared *and* that the matter ought to be considered by [her]." The minute sought a decision whether the submission to consider possible cancellation "should be under s 501(2) / s 501(3) of the Act."

70 The minute of 26 June 2000 correctly informed the Parliamentary Secretary that if she "decide[d] to consider Mr Taylor's case under s 501(2), then [he had to] be accorded natural justice prior to the making of a decision". It also informed her that if she "decide[d] to consider [his] case under s 501(3), then there [was] no requirement to accord natural justice prior to the making of a decision" but, if a decision were made to cancel his visa, he would thereafter have to be given "an opportunity to make representations seeking revocation of

the decision". The minute then referred the Parliamentary Secretary to ss 501C(3) and (4) of the Act.

71 Sub-section (4) of s 501C of the Act provides with respect to a decision to cancel a visa that:

> " The Minister may revoke the original decision if:
>
> (a) the person makes representations in accordance with the invitation [required by s 501C(3)]; and
>
> (b) the person satisfies the Minister that the person passes the character test (as defined by section 501)."

The departmental minute did not explain that Mr Taylor did not and could not pass the character test and thus, in fact, he could not effectively seek revocation of her decision.

72 The Parliamentary Secretary indicated her intention to consider possible cancellation of Mr Taylor's visa under s 501(3) of the Act and, on 29 June 2000, a departmental submission was put to her for her consideration. It is necessary to give a somewhat detailed account of that submission which, in Pt A, set out Mr Taylor's personal particulars and details of his visa.

73 Part B of the departmental submission, headed "CONSIDERATION OF VISA CANCELLATION" was in these terms:

> "Grounds:
>
> 1. The relevant ground for cancellation is section 501(6)(a) – substantial criminal record of the *Migration Act* 1958 (the Act).
>
> Evidence of grounds for cancellation:
>
> 2. Departmental files 96/701378, CLF1999/12446 and CLF2000/23125 contain evidence of Mr Taylor's criminal history in Australia. The evidence includes court transcripts and criminal history information disclosed by the New South Wales Police."

74 The terms of s 501(6) defining the character test, details of Mr Taylor's convictions and the judge's remarks on sentencing were set out in Pt C of the departmental submission, as were certain submissions with respect to the national interest. Part D of the submission concerned matters relevant to the exercise of her discretion should the Parliamentary Secretary decide that Mr Taylor had a substantial criminal record and it was in the national interest that his visa be cancelled. It is unnecessary to refer to the detail of the submission concerning the exercise of discretion for it is not suggested that jurisdictional error is

revealed in that part of the Parliamentary Secretary's decision. However, it is necessary to refer to that part of Pt C of the submission bearing on the national interest requirement of s 501(3) of the Act.

75 The submission recorded the holding in *In Re Application of Amalgamated Anthracite Collieries Ltd*[40] that the national interest is not essentially a legal concept but one for Parliament and the executive to determine, that it was for the Parliamentary Secretary to decide the issue raised by s 501(3)(d) and that her consideration was not confined to "core government functions [but] extends to the realm of 'perception' of the nation or its laws." The submission then proceeded:

> "10. In *MIMA v Paul William Gunner* (NG49 of 1998), the Full Federal Court agreed that it was reasonable for you to find that it was not in the national interest that a person who has a substantial criminal record be allowed to have the benefits of an Australian visa.
>
> 11. It is now open to you to find whether or not it is in the national interest that Mr Taylor's visa should be cancelled."

76 In *Minister for Immigration and Multicultural Affairs v Gunner*[41], the Minister had cancelled a visa under s 501 of the Act because the visa-holder was not of good character and he was satisfied that it was in the national interest to do so. The Minister had also issued a certificate under s 502 of the Act declaring the visa-holder to be an excluded person. The issue was whether the Minister had "power to make orders under ss 501 and 502 where that decision was based on the same facts and circumstances as those that had caused the [Administrative Appeals Tribunal] to set aside [an earlier] deportation order"[42]. It was held that he did. In the course of its judgment, the Full Court of the Federal Court said this:

> "Nor could it be suggested that [the visa-holder's] crimes were not sufficiently serious to be capable of founding a view that it was in the national interest that he be deported."[43]

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40 (1927) 43 TLR 672. This was a decision of the Railway and Canal Commission (UK) rather than of the High Court of Australia, as suggested in the submission to the Parliamentary Secretary.

41 (1998) 84 FCR 400.

42 (1998) 84 FCR 400 at 401.

43 (1998) 84 FCR 400 at 408-409.

A little later, the Full Court said:

> "It is the seriousness of *that* conduct which has to be assessed in the national interest. Obviously enough, the national interest dictates that people who engage in sufficiently serious crime should not have the benefits of an Australian visa."[44]

77 The statements of the Full Court in *Gunner* by no means constitute an endorsement of the proposition that convictions which result in a person failing the character test by reason of s 501(7)(c) – a sentence of imprisonment of 12 months or more – are, themselves, sufficient to entitle the Minister to determine that it is in the national interest that his or her passport be cancelled. That, however, was the purport of the departmental submission.

78 The terms of s 501(3) make it clear that national interest considerations are separate and distinct from the question whether or not a person passes the character test. That is not to say that the matters which result in a person failing the character test may not also provide the foundation for the Minister's satisfaction that it is in the national interest that that person's visa be cancelled. It may be that the conduct which has led to a person failing the character test is such as to threaten the national interest as, for example, if a person fails the character test because his or her conduct is more likely than not to cause discord in the Australian community[45].

79 Moreover, the crimes or some of the crimes of which a person has been convicted may be of such a nature as to found a satisfaction that it is in the national interest to cancel his or her visa. Crimes which involve circumventing passport and immigration laws may well be crimes of that kind[46]. Further, crimes of which a person has been convicted may be of such seriousness or the circumstances in which they were committed may be of such a nature as to found the satisfaction that it is in the national interest that his or her visa be cancelled.

80 To say that the conduct which leads a person to fail the character test may also provide the foundation for the Minister's satisfaction that it is in the national interest to cancel his or her visa is not to say that it will always do so. Both issues must be considered separately. And where the same conduct is relied upon for both purposes, there must be something in the nature, or the seriousness

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44 (1998) 84 FCR 400 at 409.

45 See s 501(6)(d)(iv).

46 Note that the crimes involved in *Minister for Immigration and Multicultural Affairs v Gunner* included a passport offence.

of that conduct, or in the circumstances surrounding it to found a satisfaction that it is in the national interest to cancel the visa of the person concerned.

81 The departmental submission did not inform the Parliamentary Secretary that she had to evaluate the conduct which led Mr Taylor to fail the character test to determine if it also satisfied her that it was in the national interest that his visa be cancelled. Rather, she was simply informed that the ground on which she was entitled to cancel Mr Taylor's visa was his substantial criminal record and that it was open to her to find that it was in the national interest to do so because of that record.

82 A decision-maker falls into jurisdictional error if he or she misunderstands the nature of the jurisdiction to be exercised, misconceives his or her duty, fails to apply himself or herself to the question to be decided or misunderstands the nature of the opinion which he or she is to form[47]. By failing to appreciate that it was necessary for there to be something in the nature or seriousness of Mr Taylor's criminal convictions or in the circumstances in which his crimes were committed before she could be satisfied that it was in the national interest to cancel his visa, the Parliamentary Secretary misconceived her duty, failed to apply herself to the question to be decided and misunderstood the nature of the opinion she was to form.

83 Additionally, for the reasons given by Gummow and Hayne JJ, the Parliamentary Secretary misunderstood the nature of the jurisdiction she was exercising by failing to appreciate that there would, in effect, be no opportunity for Mr Taylor to seek revocation of her decision.

84 The jurisdictional errors involved in the decision of the Parliamentary Secretary ground relief by way of certiorari to quash her decision and prohibition to prevent further action being taken on it.

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47 See *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 74 ALJR 1348 at 1356 [31] per Gleeson CJ, Gaudron and Hayne JJ; 174 ALR 585 at 594-595, and the cases there cited.

85 McHUGH J. On 7 December 2000, this Court, exercising its original jurisdiction under s 75(v) of the Constitution, made absolute orders nisi for writs of prohibition and certiorari granted on 29 September 2000. The orders were made at the end of the parties' arguments and without giving reasons.

86 In support of his claim for relief against the respondent, Mr Graham Ernest Taylor ("the prosecutor") had argued a number of grounds, two of which raised questions of great constitutional importance. The first constitutional ground raised the issue whether ss 64 and 65 of the Constitution authorised the appointment of the respondent to the office of Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs with a direction to administer the Department of Immigration and Multicultural Affairs. The second constitutional ground raised the issue whether the prosecutor, a British subject who emigrated to Australia with his parents in 1966 as a young child[48] and has not left the country since, was an alien for the purpose of s 51(xix) of the Constitution.

87 At the end of the argument, I was unsure whether the prosecutor had made out one or both of these constitutional grounds. But I had concluded that the respondent had exercised her discretion under the relevant legislation under the erroneous belief that the prosecutor would have an opportunity to make representations to her. Accordingly, I agreed that the Court should make the orders that it made on 7 December 2000. My reasons for concluding that the respondent had erroneously exercised her discretion were the same as those now set out in the judgment of Gummow and Hayne JJ.

88 Ordinarily, that would be enough to dispose of the case because it is sound policy, acted on time and again by this Court and the Supreme Court of the United States, that constitutional issues should be determined only when it is necessary to do so. However, the other members of the Court have expressed views on the two constitutional issues. In respect of the "aliens" issue, the Court is equally divided. In these circumstances, I think it is necessary for me to express a view on the "aliens" issue, particularly since it would be open to the respondent or the Minister to cancel the prosecutor's visa in the future. Moreover, the issue affects many subjects of the Queen of the United Kingdom who arrived in this country many years ago and who have lived in Australia under the belief that they are not aliens but loyal subjects of the Queen of Australia.

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48 Some evidence suggests that he was born on 29 September 1956; other evidence suggests that he was born on 26 September 1959.

89 In *Nolan v Minister for Immigration and Ethnic Affairs*[49] ("*Nolan*"), six Justices of this Court held that Nolan was an alien although he was a citizen of the United Kingdom and a subject of the Queen who had arrived in Australia in 1967 and lived here for 18 years. If that case was correctly decided, the prosecutor in the present case is an alien and a person who can be deported by the cancellation of his deemed visa pursuant to the powers conferred on the Minister by s 501 of the *Migration Act* 1958 (Cth).

90 It is a large proposition to assert that a joint judgment of six Justices of this Court on a constitutional issue is so clearly wrong that it should not be followed. But I have concluded that the joint judgment in *Nolan* falls into that category. In my opinion, the joint judgment in that case overlooked two significant matters. First, if the emergence of Australia as an independent nation had made Australians who were subjects of the Queen of the United Kingdom subjects of the Queen of Australia, there was no constitutional reason for distinguishing their position from that of British born subjects of the Queen of the United Kingdom living in Australia. Logically, the evolutionary process that converted persons born in Australia into subjects of the Queen of Australia must also have converted British born subjects living in Australia into subjects of the Queen of Australia. Second, although the joint judgment in *Nolan* referred to s 117 of the Constitution, it failed to acknowledge and give effect to its implications and the light that those implications threw on who was an "alien" for the purpose of s 51(xix) of the Constitution.

91 For these reasons, the decision in *Nolan* should be overruled. The applicant and all other British subjects, born in the United Kingdom, who were living in Australia at the commencement of the *Royal Style and Titles Act* 1973 (Cth) and who have continued to reside here are subjects of the Queen of Australia, even if they are also subjects of the Queen of the United Kingdom. They are not and never have been aliens. They cannot be deported under the aliens or immigration powers conferred on the Parliament by s 51 of the Constitution.

The material facts and issues

92 The prosecutor was born in the United Kingdom. He came to Australia with his parents in 1966, as part of the assisted migration scheme[50]. He did not carry a passport or visa, but was deemed to be included in the entry permit

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49 (1988) 165 CLR 178.

50 Agreement between Australia and the United Kingdom of Great Britain and Northern Ireland relating to an assisted passage migration scheme (London, 28 May 1962). ATS 1962 No 3; UNTS 434 at 219.

granted to his parents[51]. While his status is in issue in these proceedings, it is clear that he is deemed to have held two types of visas: an Absorbed Person Visa[52] and a Transitional (Permanent) Visa[53]. He has spent most of his life in Gunnedah, a rural town in New South Wales. He has been on the electoral rolls for the federal and State parliaments since he turned eighteen[54]. The prosecutor has never left Australia since he arrived and has no recollection of life in the United Kingdom.

93 In February 1996, the prosecutor pleaded guilty in the District Court of New South Wales to serious offences involving sexual assaults upon children. Knight DCJ sentenced him to a minimum term of three and a half years with an additional term of two and a half years parole, to be released on 6 August 1999. In prison he received favourable reports and undertook sex offender diversion courses. Upon release from prison in 1999, he returned home to Gunnedah. He began regular visits to a psychologist. The Gunnedah community does not object to his presence in that locality.

94 On 4 November 1999, immigration officials and police officers came to the prosecutor's home. They arrested and detained him under a warrant issued as the result of a notice cancelling his visas. The visas had been cancelled under the power conferred by s 501(2) of the *Migration Act* which enacts:

> "*Decision of Minister or delegate - natural justice applies*
>
> …
>
> (2) The Minister may cancel a visa that has been granted to a person if:
>
> (a) the Minister reasonably suspects that the person does not pass the character test[55]; and

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51 s 6(8), *Migration Act* 1958 (Cth) (as in force at the relevant time).

52 s 34, *Migration Act* 1958 (Cth).

53 Granted as a result of the Migration Reform (Transitional Provisions) Regulations (Cth), reg 4.

54 As was his right and as preserved under s 93(1)(b)(ii)(A), *Commonwealth Electoral Act* 1918 (Cth).

55 The character test is set out in s 501(6): "For the purposes of this section, a person does not pass the **character test** if: (a) the person has a substantial criminal record (as defined by subsection (7))". Subsection (7) includes if "(c) the person has been sentenced to a term of imprisonment of 12 months or more".

(b) the person does not satisfy the Minister that the person passes the character test."

95 It was the Minister for Immigration and Multicultural Affairs, the Hon Philip Ruddock, who made the decision to cancel the prosecutor's visas on 4 September 1999. The decision followed some correspondence and contact with the prosecutor when he was serving his sentence, but those communications were apparently tainted by some procedural errors, the details of which are not presently relevant[56]. Eventually, the prosecutor commenced proceedings in this Court's original jurisdiction seeking relief against the decision to cancel his visas. On 16 March 2000, the proceedings came before Callinan J who intimated an intention to grant an order nisi on the ground of a denial of natural justice and made directions with a view to resolving outstanding issues. Subsequently, the Minister consented to an order absolute for prohibition and certiorari, which Callinan J made in chambers on 12 April 2000. Upon those orders being made, the prosecutor was released from detention. He returned home to Gunnedah.

96 On 6 July 2000, the prosecutor was again arrested and detained after his visas had been cancelled. On this occasion, the decision to cancel the prosecutor's visas was made not by the Minister but by the respondent, Senator the Hon Kay Christine Lesley Patterson. She was acting in her capacity as Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs, a position to which she was appointed on 10 March 2000 by the Governor-General. She purported to cancel the prosecutor's visas pursuant to s 501(3) of the *Migration Act*, which enacts[57]:

"*Decision of Minister – natural justice does not apply*

(3) The Minister may:

(a) refuse to grant a visa to a person; or

(b) cancel a visa that has been granted to a person;

if:

(c) the Minister reasonably suspects that the person does not pass the character test; and

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56 See *Re Ruddock; Ex parte Taylor* per Callinan J, 16 March 2000.

57 Both of the prosecutor's visas would have effectively been cancelled by this decision. By s 501F(3) if the person holds another visa which is neither a protection visa nor a visa specified in the Regulations, then the Minister is taken to have decided to cancel that other visa.

(d) the Minister is satisfied that the refusal or cancellation is in the national interest.

(4) The power under subsection (3) may only be exercised by the Minister personally.

(5) The rules of natural justice, and the code of procedure set out in Subdivision AB of Division 3 of Part 2, do not apply to a decision under subsection (3)."

97 It is with respect to that decision that the prosecutor brought the present proceedings seeking relief under s 75(v) of the Constitution.

The "aliens" issue

98 The prosecutor sought relief upon various grounds. But for the reasons I have given, it is only necessary to deal with the aliens issue. Was the prosecutor at the relevant time an "alien" within the meaning of s 51(xix) of the Constitution and thereby properly subject to an exercise of power under s 501(3) of the *Migration Act*?

99 Section 51(xix) of the Constitution provides that, subject to the Constitution, the Parliament of the Commonwealth has power to make laws with respect to "Naturalization and aliens". The power is plenary. In *Chu Kheng Lim v Minister for Immigration*[58] I said:

> "Subject to the Constitution, [the power granted to Parliament by s 51(xix) of the Constitution to make laws with respect to 'aliens'] is limited only by the description of the subject matter. If a law of the Parliament can be characterized as a law with respect to aliens, it is valid whatever its terms, provided that the law does not infringe any express or implied prohibition in the Constitution[59]. Subject to any relevant constitutional prohibitions, Parliament can make laws imposing burdens, obligations and disqualifications on aliens which could not be imposed on members of the community who are not aliens. In *Polites v The Commonwealth*[60] Latham CJ, after referring to the aliens power, said: 'The Commonwealth Parliament can legislate on these matters in breach of international law,

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58 (1992) 176 CLR 1 at 64.

59 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 222 per Williams J.

60 (1945) 70 CLR 60 at 69.

taking the risk of international complications'. In *Pochi v Macphee*[61] Gibbs CJ said that under s 51(xix) 'Parliament has power to make laws providing for the deportation of aliens for whatever reasons it thinks fit'."

100 Thus, as long as a person falls within the description of "aliens", the power of the Parliament to make laws affecting that person is unlimited unless the Constitution otherwise prohibits the making of the law. But is the prosecutor an alien within the meaning of the Constitution?

101 The respondent claims not only that the prosecutor is an alien now but that he was an alien when he arrived in Australia. She contends that, while British citizens once had a special status in Australia, the concept of "alien" encompasses people who have not taken out Australian citizenship. The prosecutor, having been born in England of non-Australian parents and never having taken out citizenship in Australia[62], was a British citizen, who was a subject of and owed allegiance to the Queen of the United Kingdom.

102 As an alternative, the respondent argues that, even if the prosecutor was a non-alien when he arrived in Australia, he had undoubtedly lost that status and become an alien by the time she made her decision in June 2000. That was because of the evolutionary emergence of Australia as an independent sovereign state and the existence of a number of statutory developments to which I will refer in more detail below. Whether or not the prosecutor was an alien at the time of his arrival does not matter according to the respondent because a non-alien can lose his or her status and become an alien. This can occur by means of a change in the relationship between subject and sovereign, either at the instigation of the individual, or by a change in the nature of the sovereign.

103 Accordingly, the respondent argued that the prosecutor could be the subject of an exercise of the power conferred by s 501(3) of the *Migration Act*.

104 In response, the prosecutor contended that he could not be deported by cancelling his deemed visas under the power conferred by s 501 of the *Migration Act* because he is neither an immigrant nor an alien. Consequently, he says that he cannot be the subject of a valid exercise of Commonwealth power that depends on the immigration and emigration power (s 51(xxvii)) or on the naturalization and aliens power (s 51(xix)).

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61 (1982) 151 CLR 101 at 106.

62 *Pochi v Macphee* (1982) 151 CLR 101 at 109-110; *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 185; *Kenny v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 42 FCR 330 at 345.

105 It was common ground between the parties that the prosecutor could no longer be treated as an immigrant for the purpose of s 51(xxvii) of the Constitution because he had been absorbed into the Australian community when the respondent decided to cancel his visas. This Court has held that the immigration power ceases to apply to migrants once they become absorbed into the Australian community[63]. If s 501(3) applies to the prosecutor, it must be because of a head of constitutional power other than the immigration power, s 51(xxvii). The respondent relied only on s 51(xix), the power with respect to naturalization and aliens. The respondent did not seek to rely on the external affairs power (s 51(xxix)). If that power would support some aspects of the *Migration Act*, it could not in my opinion support legislation that would result in the deportation of a person who was not an alien. In response to the claim that he is an alien, the prosecutor says that British subjects, living in Australia, were not aliens in 1901 when the Constitution was enacted and are not aliens now. At all events, the prosecutor claims that they are not aliens if they arrived in Australia before 1984. In that year, the Parliament amended the *Migration Act* by deleting the definition of alien – which up to that time did not include a British subject – and substituting a definition of "non-citizen" who was defined as a person "who is not an Australian citizen"[64].

Interpreting a constitutional term

106 The Constitution is contained in a statute of the United Kingdom Parliament, and its meaning must be determined by the ordinary techniques of statutory interpretation. It must therefore be interpreted according to the ordinary and natural meanings of its text, read in the light of its history, with such necessary implications as derive from its structure[65].

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63 *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 64 per Knox CJ, 109-111 per Higgins J, 137 per Starke J; *O'Keefe v Calwell* (1949) 77 CLR 261; *Koon Wing Lau v Calwell* (1949) 80 CLR 533; *R v Forbes; Ex parte Kwok Kwan Lee* (1971) 124 CLR 168 at 175 per Barwick CJ; *R v Director-General of Social Welfare (Vict); Ex parte Henry* (1975) 133 CLR 369 at 373 per Gibbs J, 376-377 per Stephen J, 381-382 per Mason J, 383 per Jacobs J; *Pochi v Macphee* (1982) 151 CLR 101; *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 295 per Mason CJ. See also *Ex parte Black; Re Morony* (1965) 83 WN (Pt 1) (NSW) 45 and *R v Governor of Metropolitan Gaol; Ex parte Molinari* [1962] VR 156.

64 *Australian Citizenship Amendment Act* 1984 (Cth), s 4(2) (which came into operation on 1 May 1987).

65 *McGinty v Western Australia* (1996) 186 CLR 140 at 230.

107 In *Re Wakim*[66], I pointed out that the starting point for a principled interpretation of the Constitution is the search for the intention of its makers, which can only be deduced from the words that they used in the historical context in which they used them.

108 Where the interpretation of individual words, such as "aliens", is in issue, the current doctrine of the Court draws a distinction between connotation and denotation or meaning and application. As Windeyer J explained in *Ex parte Professional Engineers' Association*[67]:

> "We must not, in interpreting the Constitution, restrict the denotation of its terms to the things they denoted in 1900. The denotation of words becomes enlarged as new things falling within their connotations come into existence or become known. But in the interpretation of the Constitution the connotation or connotations of its words should remain constant. We are not to give words a meaning different from any meaning which they could have borne in 1900."

109 The Constitution contains terms "intended to apply to the varying conditions which the development of our community must involve"[68]. This Court has rarely hesitated to apply particular words and phrases to facts and circumstances that were or may have been outside the contemplation of the makers of the Constitution[69]. In *The Commonwealth v Kreglinger & Fernau Ltd and Bardsley*, Isaacs J pointed out that the Constitution was "made, not for a single occasion, but for the continued life and progress of the community"[70].

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66 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 551 [40].

67 (1959) 107 CLR 208 at 267.

68 *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 368 per O'Connor J. Approved in *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 313-314; *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 128; *McGinty v Western Australia* (1996) 186 CLR 140 at 230-231.

69 See for example *Cheatle v The Queen* (1993) 177 CLR 541 where the Court accepted that "jury" in s 80 of the Constitution could no longer be read as excluding women and unpropertied persons; *McGinty v Western Australia* (1996) 186 CLR 140; *Langer v The Commonwealth* (1996) 186 CLR 302 at 342 where I said that the expression "chosen by the people" in ss 7 and 24 of the Constitution should be read as guaranteeing the right to vote to all adults and not only men.

70 (1926) 37 CLR 393 at 413.

110 A recent example of this process of the denotation of constitutional terms becoming enlarged in the context of Australia's emergence as a sovereign state is *Sue v Hill*[71]. In *Sue v Hill*, the Court held that the term "foreign power" in s 44(i) of the Constitution now includes the United Kingdom although in 1901 and for long after the United Kingdom was not a "foreign power" within the meaning of that term. Consequently, the first respondent, Mrs Hill, who had been born in England but had taken out Australian citizenship, was the subject of a foreign power and incapable of being chosen as a member of the Senate. Three Justices of the Court said[72]:

> "Whilst the text of the Constitution has not changed, its operation has. This reflects the changed identity of those upon whose advice the sovereign accepts that he or she is bound to act in Australian matters by reason, among other things, of the attitude taken since 1926 by the sovereign's advisers in the United Kingdom. The Constitution speaks to the present and its interpretation takes account of and moves with these developments."

111 This method of interpretation is equally applicable to the term "aliens" in s 51(xix) of the Constitution. Indeed, it was applied to that term in *Nolan*[73]. Six Justices of this Court held that, although at the time of federation the term would not have included British subjects, it now included British subjects who were not citizens of Australia and who were not born in Australia or had Australian parents[74]. This change was the result of Australia becoming an independent sovereign nation. The Justices stressed that the meaning of the term "aliens" had not altered. The connotation of the term had remained but its denotation had evolved with the gradual development of the Australian sovereign state[75].

112 Yet as Callinan J pointed out in *Sue v Hill*[76], there is a danger in applying changing denotations of constitutional terms in accordance with an evolutionary

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71 *Sue v Hill* (1999) 199 CLR 462.

72 (1999) 199 CLR 462 at 496 [78]. Gaudron J also held that Mrs Hill was the subject of a foreign power: at 523-529 [158]-[176].

73 (1988) 165 CLR 178.

74 (1988) 165 CLR 178 at 184.

75 (1988) 165 CLR 178 at 184.

76 (1999) 199 CLR 462 at 571-573 [290]-[297].

theory of Australian independence. That is because the "destination marker of the evolution" is not clear. His Honour said[77]:

> "The great concern about an evolutionary theory of this kind is the doubt to which it gives rise with respect to peoples' rights, status and obligations as this case shows. The truth is that the defining event in practice will, and can only be a decision of this Court ruling that the evolutionary process is complete, and here, as the petitioners and the Commonwealth accept, has been complete for some unascertained and unascertainable time in the past."

The meaning of "aliens"

113 In 1901, an "alien" for constitutional purposes was a person from another place who did not "bear true allegiance to Her Majesty Queen Victoria, Her heirs and successors according to law"[78]. The denotation of "alien" in 1901 included all persons who were not British subjects. But "[a]t that time, no subject of the British Crown was an alien within any part of the British Empire.[79]"

114 As the majority in *Nolan* pointed out[80], the word "alien" comes from the Latin *alienus*, which means belonging to another person or place. Dictionary meanings of the term include "of a foreign nation, under foreign allegiance"[81], "one born in or belonging to another country who has not acquired citizenship by naturalisation and is not entitled to the privileges of a citizen" or simply "a foreigner"[82]. But at the time of federation, common lawyers contrasted the term "alien" with that of a subject of the Crown[83]. A subject of the Crown owed allegiance to the sovereign; an alien did not, although in some circumstances an

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77 (1999) 199 CLR 462 at 571-572 [291].

78 Schedule to the Constitution.

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

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

81 *New Shorter Oxford Dictionary* (1993), vol 1 at 51.

82 *Macquarie Dictionary*, 2nd ed (1991) at 42.

83 See for example Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 599-600.

alien resident in the Queen's dominions might owe local and temporary allegiance to the monarch. Blackstone stated the common law rule as follows[84]:

> "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."

In vol 9 of *A History of English Law*, Sir William Holdsworth said[85] that the common law rules concerning subjects and aliens[86]:

> " … centre around the doctrine of allegiance; for it 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."

115 The core concept of allegiance was based on *jus soli* – birth within the territory of the realm – though over time the concept expanded through statutory developments that took into account descent from British parents and naturalization. Birth within the King's territories, therefore, was the common law test for determining whether a person was a subject or an alien[87]. As Sir William Holdsworth pointed out[88] "all persons born on English soil, no matter what their parentage, owed allegiance to, and were therefore subjects of the king." By the end of the 14th century, the concept of "subject of the king" had been extended by legislation to include the children of English parents born in foreign countries or any child born within the sovereign's territories. And from time to time, legislation gave aliens the status of a subject of the King. At this stage, common lawyers saw "the tie of allegiance [as] indissoluble, and … the status of the subject [as] permanent[89]."

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84 Blackstone, *Commentaries*, 8th ed (1778), vol 1 at 366 as cited by Gibbs CJ in *Pochi v Macphee* (1982) 151 CLR 101 at 107-108.

85 Holdsworth, *A History of English Law*, 3rd ed (1944), vol 9 at 72-104.

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

87 Holdsworth, *A History of English Law*, 3rd ed (1944), vol 9 at 73; Pryles, *Australian Citizenship Law*, (1981) at 14.

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

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

116 *Calvin's Case*[90], decided in 1608, went so far as to accept that, if the King lost any of his territories, persons born in those territories retained their status as subjects of the King. But the loss of the United States colonies brought about a change in doctrine. In *Doe d Thomas v Acklam*[91], the King's Bench held that children born in the United States after independence were aliens even though their parents were born in that country before independence. The Court dismissed an action in ejectment brought by a woman who was the heiress at law on the ground that she and her father, once a British subject, were aliens and could not own land in England. Abbott CJ, giving the judgment of the Court, said[92] that her father "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". In *Isaacson v Durant*[93], the Queen's Bench Division held that a Hanoverian, who by birth was a British subject while William IV was King of the United Kingdom and Hanover, had become an alien when Queen Victoria ascended the throne of the United Kingdom but not Hanover. Lord Coleridge CJ said[94]:

> "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."

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90 *Re Calvin's Case* (1608) 7 Co Rep 1a [77 ER 377].

91 (1824) 2 B & C 779 [107 ER 572].

92 (1824) 2 B & C 779 at 798 [107 ER 572 at 579].

93 *In re Stepney Election Petition. Isaacson v Durant* (1886) 17 QBD 54.

94 (1886) 17 QBD 54 at 59-60.

117 The *Naturalization Act* 1870 (UK) made important changes to the common law rules of allegiance, but, for present purposes, it is unnecessary to refer to them.

Australian legislative developments

118 In 1948, the Parliament enacted the first in a series of legislation that has led to persons, who were born in the United Kingdom, being classified as aliens. The first major step was the enactment of the *Nationality and Citizenship Act* 1948 (Cth) (later called the *Australian Citizenship Act*) which introduced the concept of Australian citizenship – through birth, descent or grant. However, the *Australian Citizenship Act* retained the traditional British subject status with the result that British subjects were not aliens, s 5(1) defining an alien as "a person who is not a British subject, an Irish citizen or a protected person". The *Migration Act* also defined an alien as a person who was not a British subject, an Irish citizen or a protected person.

119 A significant change occurred in 1973 when the *Australian Citizenship Act* was amended to require any person seeking the grant of Australian citizenship to swear allegiance to "Her Majesty Elizabeth the Second, Queen of Australia"[95]. A further significant change occurred in 1983 when the *Migration Act* was amended to omit the definitions of "alien" and "immigrant" and to substitute a definition of "non-citizen" being "a person who is not an Australian citizen"[96]. But a change of even greater significance occurred in 1984 when the *Australian Citizenship Act* was amended to omit the definitions of "alien" and "British subject" and to make further provision for acquiring Australian citizenship. After the commencement of those amendments on 1 May 1987, Australian citizenship could only be acquired by birth or adoption[97], descent[98] or the grant of a certificate of Australian citizenship upon swearing allegiance to Her Majesty Elizabeth the Second, Queen of Australia[99].

120 The result of these legislative amendments is that the prosecutor is within the definition of non-citizen in the *Migration Act*. But is he an alien for the purpose of the Constitution and can s 501 of the *Migration Act* validly apply to

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95 s 15 and Sched 2.

96 s 5.

97 ss 10 and 10A.

98 s 10B.

99 ss 13 and 15.

him? In my opinion, the prosecutor is not an alien for the purpose of the Constitution and s 501 does not apply to him.

121 Central to the argument of the respondent is the claim that the aliens power cannot be confined to common law notions of allegiance and that it is open to the Parliament to treat as an alien any person who is not an Australian citizen. Moreover, the respondent contends that it is open to the Parliament, as it has done, to confer Australian citizenship only on those who were born in Australia, those who are descended from or adopted by an Australian citizen and those who are granted Australian citizenship. That contention may be true as a general proposition. But in my view the terms of the Constitution make it clear that, at least until the passing of the *Royal Style and Titles Act* 1973 (Cth), a person, living in Australia, who owed allegiance to the Queen of the United Kingdom was not and is not an alien within the meaning of the Constitution. That legislation provided that, for Australia, the Royal Style and Title of Elizabeth the Second was henceforth "Queen of Australia".

Subjects of the Queen in an evolving Australian nation

122 As six Justices of the Court pointed out in *Nolan*[100], "the emergence of Australia and other Dominions as independent sovereign nations within the Commonwealth inevitably changed the nature of the relationship between the United Kingdom and its former colonies and rendered obsolete notions of an indivisible Crown." A striking example of the changing nature of that relationship is found in *Sue v Hill*[101] where a majority of this Court held that, "since at least the commencement of the *Australia Act* 1986 (Cth)"[102], the United Kingdom was a "foreign power" within the meaning of s 44(i) of the Constitution although it had not been a "foreign power" in 1901 and for long after. But it is one thing to say that a person born in England is the subject of a foreign power and another thing to say that such a person is an alien for the purpose of the Constitution.

123 Until the relationship between the United Kingdom and Australia evolved to the stage that the United Kingdom became a foreign power, it was impossible to maintain that a person born in the United Kingdom and a subject of the Queen was an alien within the meaning of s 51(xix) of the Constitution. That was because all British subjects including those born in Australia were subjects of the Queen in right of the United Kingdom. By enacting the *Royal Style and Titles*

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100 (1988) 165 CLR 178 at 184.

101 (1999) 199 CLR 462.

102 (1999) 199 CLR 462 at 490 [59].

Act 1973, the Parliament of the Commonwealth asserted – no doubt correctly – that the Crown was no longer "one and indivisible throughout the Empire", as this Court had held in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*[103]. The Queen in right of the United Kingdom had evolved, for Australian purposes, into the Queen of Australia. In *Southern Centre of Theosophy Inc v South Australia*[104], Gibbs J said that the *Royal Style and Titles Act* 1973 "was a formal recognition of the changes that had occurred in the constitutional relations between the United Kingdom and Australia".

124 Logically, it must follow that, upon the completion of the evolutionary process, the subjects of the Queen born and living in Australia became subjects of the Queen of Australia. Henceforth, by a mystical process, they owed their allegiance to the Queen of Australia, not the Queen of the United Kingdom. In *Pochi v Macphee*[105], Gibbs CJ said that "[t]he allegiance which Australians owe to Her Majesty is owed not as British subjects but as subjects of the Queen of Australia."

125 But upon what legal or logical basis can this Court distinguish between subjects of the Queen of the United Kingdom born in Australia and those subjects of the Queen born outside, but living in, Australia when the evolutionary process was complete? I can see none. Birth within the sovereign's territories was the criterion by which the common law distinguished the subject of the sovereign from the alien. But that fact provides no ground for a court distinguishing between the subjects of the evolutionary process. It is also true that subjects of the Queen born in the United Kingdom continued to owe allegiance to the Queen in right of the United Kingdom. But that was not incompatible with them also owing allegiance to the Queen of Australia *as subjects of that Queen* while they continued to live in Australia. Whether or not they were aliens, they were under the protection of and owed allegiance to the Queen of Australia as long as they lived here[106]. If they were subjects of the Queen living here immediately before the end of the evolutionary process, there is no constitutional reason why they could not become subjects of the Queen of Australia as well as subjects of the United Kingdom. *Sue v Hill*[107] holds that this dual allegiance prevents them from being members of the federal Parliament.

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103 (1920) 28 CLR 129 at 152; see also 146-147.

104 (1979) 145 CLR 246 at 261.

105 (1982) 151 CLR 101 at 109.

106 Chitty, *Prerogatives of the Crown*, (1820) at 12-13; *Joyce v Director of Public Prosecutions* [1946] AC 347 at 366.

107 (1999) 199 CLR 462.

But nothing in the Constitution indicates that allegiance to the Queen in two capacities makes a person born in the United Kingdom an alien for the purpose of the Constitution. Indeed s 117 of the Constitution strongly supports the opposite conclusion.

Section 117 of the Constitution

126 Section 117 declares:

> "A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State."

127 In 1901, "subject of the Queen" in s 117 meant subject of the Queen of the United Kingdom of Great Britain and Ireland[108]. In *Nolan*, six Justices of this Court, answering the argument that the terms of s 117 were inconsistent with a British subject being an alien, referred to the changes in the relationship between the United Kingdom and Australia and said[109]:

> "Those developments necessarily produced different reference points for the application of the word 'alien'. 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: cf *Royal Style and Titles Act* 1973 (Cth)."

128 The proposition in the first and second sentences in this passage can be readily accepted if it is confined to British subjects of the Queen who arrived in Australia after the completion of the evolutionary process that made Australians subjects of the Queen of Australia. It is simply an application of the principle that, although the meaning of a constitutional term remains constant, its denotation – the matters, persons or things to which it applies – may change. The proposition in the third sentence may also be accepted for present purposes although it ranks as one of the most radical propositions in the constitutional jurisprudence of the Court. It is *that* radical because it relies on external events to change the *meaning* or connotation of a constitutional term and not merely its

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108 Preamble and Covering Clause 2.

109 (1988) 165 CLR 178 at 186.

application or denotation. It changes the meaning of "subject of the Queen" in s 117 and other sections of the Constitution from subject of the Queen of the United Kingdom to subject of the Queen of Australia. It repudiates the declaration in Covering Clause 2 of the Constitution that "[t]he provisions of this Act referring to the Queen shall extend to Her Majesty's heirs and successors in the sovereignty of the United Kingdom." Moreover, it changes the meaning of "subject of the Queen" to accommodate the expanded denotation of "aliens" in s 51(xix) although the grant of that power is conferred "subject to this Constitution", a process of reasoning that reverses the ordinary rule of statutory and constitutional construction[110].

129 Whatever may be said of the process of legal reasoning that led to the proposition in the third sentence of the above passage in *Nolan*, however, it makes the language of a number of constitutional provisions consistent with the realities that have accompanied Australia's emergence as an independent nation. I would not seek to overturn the proposition in the third sentence although it may have been more consistent with the 1901 meaning to read "subject of the Queen" in the Constitution "as referring to the subjects of the Queen in any of those rights, including as Queen of Australia[111]." What the above passage from *Nolan* does not deal with, however, is the effect that the change of meaning of "subject of the Queen" had on the rights that s 117 gave to subjects of the Queen before the completion of the evolutionary process.

130 Immediately prior to the completion of that process, a subject of the Queen, resident in a State, had the right to ignore any law that subjected that person to any disability or discrimination in another State that "would not be equally applicable to him if he were a subject of the Queen" resident in that other State. Moreover, the subject of the Queen had the right to seek the protection of the courts from any executive action taken under a law that infringed s 117[112]. I cannot accept that the constitutional rights of some subjects of the Queen granted by s 117 of the Constitution simply disappeared at some unidentified and unidentifiable time by reason of the change in the relationship between the executive governments of the United Kingdom and Australia. No bell rang or could have been rung to tell British born subjects of the Queen, resident in an Australian State, that from that moment they no longer had the rights that s 117 of the Constitution conferred on them. No bell rang or could have been rung to inform them that henceforth they could be subjected to disabilities and

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110 *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 580-581.

111 Brazil, "Australian Nationality and Immigration" in Ryan (ed), *International Law in Australia*, (1984) 210 at 223.

112 *Street v Queensland Bar Association* (1989) 168 CLR 461.

discriminations that could not be imposed on Australian born subjects of the Queen of the United Kingdom. Ironically, before the decision in *Nolan*, the concern was not that overseas born subjects of the Queen would lose their s 117 rights but that Australian born subjects would do or had done so[113].

131 I accept, as *Nolan* holds, that "subject of the Queen" in s 117 has evolved to mean subject of the Queen of Australia. By parity of reasoning, however, subjects of the Queen, resident in Australia at the end of the evolutionary process, became subjects of the Queen of Australia, irrespective of their place of birth. That meant that the rights conferred on them by s 117 were protected.

132 Once it is accepted that a person is the subject of the Queen for the purpose of the Constitution, that person cannot be an alien for the purpose of the Constitution. It is not a matter of Australian citizenship – a term that the Constitution does not use[114] – but of the distinction that the Constitution draws between a subject of the Queen and one who is not, that is to say, an alien. That distinction was not altered because of the enactment of the *British Nationality Act* 1948 (UK) whose purpose was to ensure that no person should be a British subject except by reason of his or her citizenship of a country in the British Commonwealth. That Act and the cognate legislation of the Commonwealth countries "envisaged two national statuses – citizenship of a Commonwealth country as well as the common status of a British subject or Commonwealth citizen[115]." Nor was the distinction altered by the enactment of the *British Nationality Act* 1981 (UK). Nor can the distinction that the Constitution draws be altered by the Parliament defining aliens to include some persons who are subjects of the Queen of Australia. In *Pochi v Macphee*[116], Gibbs CJ pointed out that "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."

133 Prior to the completion of the evolutionary process that made the United Kingdom a foreign power, the Parliament could not have asserted that British subjects, living in Australia, were aliens. In 1925, in *Ex parte Walsh and*

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113 Brazil, "Australian Nationality and Immigration" in Ryan (ed), *International Law in Australia*, (1984) 210 at 223.

114 Indeed, the only reference to "citizen" in the Constitution is in s 44(i) – " ... a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power".

115 Pryles, *Australian Citizenship Law* (1981) at 25.

116 (1982) 151 CLR 101 at 109.

Johnson; In re Yates[117] this Court held that the federal government had no power to deport two union officials although they were born overseas and fell within the scope of the relevant legislation. Both officials were British subjects. Walsh had been born in Ireland in 1871, but since 1893 Australia had been his home. Johnson had been born in Holland in 1885 but had been naturalized in Australia in 1913 and had had his permanent home in New South Wales since 1910. Although Sir Robert Garran, Solicitor-General of the Commonwealth, relied on many heads of federal power to support the application of the legislation to the two men, he made no attempt to rely on the aliens power. It would be a curious result if 76 years later the federal government now had the power to deport them. No doubt they are both long dead. But perhaps Mr Anthony Black is still alive and living in Australia. He was born in Ireland in 1927 and arrived in Australia in 1947. The Supreme Court of New South Wales held[118] in 1965 that the federal government had no power to deport him. If the argument of the respondent is correct, it now has the power to deport him, if he is still alive.

134 The critical question then in the present case is whether the prosecutor was a person who was resident in an Australian State when the evolutionary process was completed. That question involves identifying when the Queen in right of the United Kingdom became the Queen of Australia.

135 Ms Anne Twomey has forcefully argued that Australia became an independent nation in 1931 on the enactment of the Statute of Westminster[119]. But accepting that this was the relevant date, no attempt was made to assert the sovereignty of the Queen of Australia until the passing of the *Royal Style and Titles Act* 1973. Until the commencement of that Act – and maybe later – all British subjects resident in Australia, whether born here or overseas, owed their allegiance to the Queen of the United Kingdom. That being so, those British subjects, born in the United Kingdom, who were living in Australia at the commencement of the *Royal Style and Titles Act* 1973 became subjects of the Queen of Australia as well as subjects of the Queen of the United Kingdom. Accordingly, they were not and did not subsequently become aliens within the meaning of s 51(xix) of the Constitution.

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117 (1925) 37 CLR 36.

118 *Ex parte Black; Re Morony* (1965) 83 WN (Pt 1) (NSW) 45.

119 "*Sue v Hill* – The Evolution of Australian Independence" in Stone and Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (2000) 77.

Conclusion

136 The prosecutor migrated from the United Kingdom to Australia in 1966 and has lived here ever since. He is therefore a subject of the Queen of Australia, not an alien. Neither the Minister nor the Parliamentary Secretary had the power to deport him because s 501 of the *Migration Act* cannot constitutionally apply to him.

GUMMOW AND HAYNE JJ.

137 On 7 December 2000, the Court, at the conclusion of submissions, made absolute two orders nisi which had been granted by a Justice on 29 September 2000. The first order absolute was for certiorari to quash the decision of the respondent (Senator Patterson) made on 30 June 2000 to cancel the transitional (permanent) visa of the prosecutor (Mr G E Taylor). The second order prohibited the respondent from further proceeding on that decision. What follows are our reasons for joining in those orders.

138 The prosecutor had sought prohibition against the respondent under s 75(v) of the Constitution, supported by certiorari as an ancillary or incidental remedy under s 31 of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act") or Ch III of the Constitution itself[120]. The prosecutor contended on various grounds that the respondent had acted in the absence, or in excess, of jurisdiction. Shortly stated, the grounds were that the respondent was not "the Minister" either within the meaning of the relevant legislation or Ch II of the Constitution; that the prosecutor is not an "alien" within the meaning of s 51(xix) of the Constitution, as he has been absorbed into the Australian community so that the legislation under which the respondent made her decision and the prosecutor was detained and rendered liable to deportation cannot apply to him; and that, in any event, the respondent exercised her discretion under the relevant legislation in favour of visa cancellation on the erroneous basis that the prosecutor thereafter would have an opportunity to make representations to her.

139 For the reasons that follow, the last of these grounds was established: the respondent exercised her discretion under the relevant legislation on the erroneous basis that has been identified. The respondent was "the Minister", both within the meaning of the relevant legislation and Ch II, and is an officer of the Commonwealth to whom s 75(v) applies. Those conclusions were sufficient to decide the present matter. It is, however, as well to add that the contention that the prosecutor is not an "alien" within s 51(xix) should be rejected.

140 The decision of the respondent had rendered the prosecutor liable to detention pending his deportation to the United Kingdom, his country of citizenship. The prosecutor was born in the United Kingdom more than 40 years ago[121]. It appears that his parents were citizens of the United Kingdom. Since

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120 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 75 ALJR 52 at 55 [14]; 176 ALR 219 at 223.

121 The evidence is unclear as to whether his date of birth was 29 September 1956 or 26 September 1959. Nothing turns upon the point.

his birth and under the law of the United Kingdom, the prosecutor has been a citizen of that country. The prosecutor was born a citizen of the United Kingdom and Colonies by the operation of s 1 of the *British Nationality Act* 1948 (UK) ("the 1948 UK Act"). Presumably, upon the commencement of the *British Nationality Act* 1981 (UK), he acquired the status of a "British citizen"[122]. It is unnecessary here to pursue questions as to what further changes to the prosecutor's status may flow from the membership by the United Kingdom of the European Union.

The status of the prosecutor in Australia

141 In this litigation, the issues require an understanding of the civil status of the prosecutor in Australia. Immediately before the events giving rise to the present dispute, under Australian law the prosecutor had an entitlement to remain in this country and to continue his enrolment as an elector, but he was not an Australian citizen. We turn to indicate the legal developments which over a period of many years brought about this state of affairs.

142 The prosecutor entered Australia as a child on 2 November 1966, with his parents, brother and sister. The family came to Australia under an assisted migration scheme. The prosecutor's father died in 1997. His sister now resides in the United Kingdom. His brother and mother, Mrs Joan Taylor, reside in Australia. Mrs Taylor remains a citizen of the United Kingdom. Since arriving here in 1966, the prosecutor has resided continuously in Australia. He has spent most of his time in Gunnedah, a rural town in New South Wales.

143 Until the words emphasised were removed in 1984[123], s 7(1) of the *Passports Act* 1938 (Cth) ("the Passports Act") provided for the issue of Australian passports to "Australian citizens *and to British subjects who are not Australian citizens*"[124]. However, the prosecutor does not hold, and it may be taken has never held, an Australian passport or other travel document issued under that statute.

144 At the time the prosecutor entered Australia with his parents, the provisions of the *Migration Act* 1958 (Cth) ("the Migration Act") turned upon the criterion of "immigrant". This term was so defined in s 5(1) as to include persons entering Australia with permission and for the purpose of staying permanently.

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122 See *Sue v Hill* (1999) 199 CLR 462 at 504-505 [101], 527 [171].

123 By s 4 of the *Passports Amendment Act* 1984 (Cth).

124 See Pryles, *Australian Citizenship Law*, (1981) at 142.

Section 6(8) of the Migration Act deemed a child under 16 years, such as the prosecutor, to be included in any entry permit granted to either parent. Without an entry permit, an immigrant who entered Australia became a "prohibited immigrant" (s 6(1)). An entry permit might be expressed to permit the grantee to enter and remain in Australia (s 6(3)). It may be assumed that the prosecutor's parents, and thus the prosecutor, had such permanent entry permits. The contrary is not suggested.

145 The references to permission are significant. The status of citizen of the United Kingdom and Colonies which the prosecutor acquired at birth by operation of the 1948 UK Act gave him no right under Australian law to enter this country and to remain in it. Section 51(xxvii) of the Constitution supports laws with respect to "[i]mmigration and emigration". It was settled in some of the earliest decisions of this Court that this authorised laws which applied to immigrants who were British subjects[125]. The power of exclusion by immigration laws of some categories of British subjects was at the heart of what, since a time before federation, had been the White Australia Policy[126]. In view of the importance of the point to an understanding of the status of the prosecutor, it is convenient at this stage to stay to consider it.

146 When federation was achieved in Australia, and thereafter, the structure of the British Empire presented an apparent paradox. This was the existence of a British nationality, common to the whole of the Empire and conferred upon any person born within the dominions and allegiance of the Crown, and the toleration by the Imperial authorities of local legislation and judicial decisions which had the effect of discriminating between classes of British subjects. The status conferred by naturalisation under the laws of one jurisdiction might be denied recognition elsewhere within the Empire[127]. Further, as indicated above, local legislation discriminated against some British subjects and interfered with the movement of British subjects within the Empire by excluding them from entry into the jurisdiction of the enacting legislature. In Australia, after federation, this was achieved by legislation based upon the immigration power, British subjects then not being seen as aliens.

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125 *Attorney-General for the Commonwealth v Ah Sheung* (1906) 4 (Pt 1) CLR 949 at 951; *Potter v Minahan* (1908) 7 CLR 277 at 288-289, 304-305, 310, 321.

126 *R v Macfarlane; Ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518 at 557-565; Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 624-627.

127 *Ex parte Lau You Fat* (1888) 9 NSWLR (L) 269; *R v Francis; Ex parte Markwald* [1918] 1 KB 617; *Markwald v Attorney-General* [1920] 1 Ch 348; cf *Ah Sheung v Lindberg* [1906] VLR 323 at 334-337; *Bulmer v Attorney-General* [1955] Ch 558.

147 In *Potter v Minahan*, O'Connor J said[128]:

> "Speaking generally, every 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, and is entitled, among other things, to entry and residence in any part of the King's Dominions except in so far as that right has been modified or abolished by positive law. But the British Empire is subdivided into many communities, some of them endowed by Imperial Statute with wide powers of self government, including the power to make laws which, when duly passed and assented to by the Crown, will operate to exclude from their territories British subjects of other communities of the Empire. To this extent the British subject's right to enter freely into any part of the King's Dominions may be modified by Statute law."

148 The common law rule in England was that "all persons born on English soil, no matter what their parentage, owed allegiance to, and were therefore subjects of the king"[129]. That was not an exhaustive definition of those owing allegiance. This, for example, later was demonstrated by the significance attached to the British passport held by Joyce, a United States citizen, as supporting his conviction for treason[130]. But the common law notion of allegiance was carried over into statute law defining the class of British subjects. The *British Nationality and Status of Aliens Act* 1914 (Imp) ("the 1914 Imperial Act") was enacted well before the *Statute of Westminster Adoption Act* 1942 (Cth). Part I of the 1914 Imperial Act, comprising s 1, treated as the primary class of those deemed to be natural-born British subjects "[a]ny person born within His Majesty's dominions and allegiance". Part II dealt with naturalisation of aliens. It required (s 9) legislative adoption by the self-governing dominions. However, Pt I appears to have applied in Australia by paramount force[131]. Nevertheless, the whole of the 1914 Imperial Act, including s 1, was adopted and enacted in Australia as the *Nationality Act* 1920 (Cth) ("the 1920 Nationality Act")[132].

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128 (1908) 7 CLR 277 at 304-305.

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

130 *Joyce v Director of Public Prosecutions* [1946] AC 347. See also *Public Prosecutor v Oie Hee Koi* [1968] AC 829 at 858-859.

131 Jones, *British Nationality Law*, rev ed (1956) at 88-89.

132 Section 1 of the 1914 Imperial Act was repealed by s 34 of the 1948 UK Act.

149 On attaining his majority at the age of 18, the prosecutor enrolled as an elector in exercise of the entitlement to enrol then conferred by s 39(1) of the *Commonwealth Electoral Act* 1918 (Cth) ("the Electoral Act"). So far as relevant, that provision then conferred entitlement to enrolment upon all persons not under the age of 18 who had lived in Australia for six months continuously and who were British subjects. The prosecutor was classified as having the status of a "British subject" for the purposes of Australian law, in particular, for s 39(1) of the Electoral Act. This was brought about by the operation of s 7 of the *Australian Citizenship Act* 1948 (Cth) ("the Citizenship Act")[133]. Before its amendment in 1949[134], s 39(1) of the Electoral Act had used as the criterion of eligibility for enrolment "natural-born or naturalised subjects of the King".

150 The Citizenship Act had repealed (by s 3) the 1920 Nationality Act and had introduced (in Pt III) the status of Australian citizenship. The enactment of Pt III followed a Conference of Nationality Experts of various countries of the British Commonwealth that convened in February 1947 at the invitation of the United Kingdom; a plan had been formulated to combine local citizenship with "the wider status of British subject" and the United Kingdom (in the 1948 UK Act) and New Zealand had already legislated along the lines of the Australian bill[135]. In *Pochi v Macphee*, Gibbs CJ said[136]:

> "The principles to which this legislation gave effect were that the peoples of each of the countries of the Commonwealth should have separate citizenship, but that all citizens of Commonwealth countries should have the common status of British subjects. Section 7 of the [Citizenship Act] gave effect to this common status, which was, of course, derivative, being dependent on the possession of citizenship."

151 The notion of allegiance to the Imperial Crown as a legislative determinant of the class of "British subjects" had disappeared before the birth of the prosecutor from both British and Australian law. The relevant provision of

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133 The statute was enacted as the *Nationality and Citizenship Act* 1948 (Cth). The short title was changed by s 1 of the *Citizenship Act* 1969 (Cth) ("the 1969 Act").

134 By s 3 of the *Commonwealth Electoral Act* 1949 (Cth).

135 Australia, House of Representatives, *Parliamentary Debates* (Hansard), Second Reading Speech, 30 September 1948 at 1062. See also Brazil, "Australian Nationality and Immigation", in Ryan (ed), *International Law in Australia*, (1984), 210 at 216-217; Jones, *British Nationality Law*, rev ed (1956) at 92-93.

136 (1982) 151 CLR 101 at 108.

the 1914 Imperial Act and the whole of the 1920 Nationality Act had been repealed respectively by the 1948 UK Act and the Citizenship Act. The new situation was described as follows by Professor Parry in his authoritative work, *Nationality and Citizenship Laws of the Commonwealth and of the Republic of Ireland*[137]:

> "What the [1948 UK Act], and the parallel enactments elsewhere, did was to create a new, statutory concept of citizenship of each country concerned and to render the traditional and familiar status of a British subject (with which term there was equated also a new expression, Commonwealth citizen) a derivative status, capable of enjoyment, transitional cases apart, only in virtue of possession of the citizenship of one or more of the local communities of the Commonwealth. *The concept of allegiance, which had been the foundation of the status of a subject, was not imported into the rules governing local citizenship but was altogether swept away, together with all other rules of the common law respecting nationality.*" (emphasis added)

Thus, it would be an inaccurate summary of the effect in Australia of these important changes to say that the Citizenship Act retained the traditional (ie the previously understood) British subject status. The use of the term "status of British subject" was, as McLelland J put it in *McM v C (No 2)*[138]:

> "intended as an acknowledgment of the symbolic title of the Queen as 'Head of the Commonwealth' (ie the British Commonwealth) [a position which] involves the exercise of no constitutional or governmental powers, duties or functions".

152 This "status of British subject" was the creation of legislation which marked a significant departure from what might be termed the previous Imperial constitutional position of the Crown. The new legislative status was significant to individuals not as a determinant of nationality or citizenship but as the criterion by which certain benefits or rights (and obligations) were conferred (or imposed) under local statute law. The provisions of the Electoral Act relating to the prosecutor were one example; those in the Passports Act for the issue of an Australian passport another[139].

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137 (1957) at 92 (footnotes omitted).

138 [1980] 1 NSWLR 27 at 44.

139 Other examples were to be found in State laws regulating entry into various professions; see, for example, *In re Ho* (1975) 10 SASR 250.

153 At the time of the enrolment of the prosecutor in 1977, Pt II of the Citizenship Act (ss 7-9)[140] was headed "THE STATUS OF BRITISH SUBJECT" and s 7 gave "the status of a British subject" in Australia to various persons, including those who by a law for the time being in force in the United Kingdom were citizens of that country. "Alien" was defined (in s 5(1)) as meaning a person who did not have "the status of a British subject" and was not "an Irish citizen or a protected person". Part II of the Citizenship Act was repealed by s 7 of the *Australian Citizenship Amendment Act* 1984 (Cth) ("the 1984 Citizenship Act"). This repeal was with effect from 1 May 1987[141]. All reference to "the status of a British subject" was removed. In the meantime, the *Australia Act* 1986 (Cth) ("the Australia Act") had come into force on 3 March 1986. Thereafter, as *Sue v Hill*[142] decided, the United Kingdom ceased to exercise any remaining functions with respect to the legislative, executive and judicial arms of government of the Commonwealth and the States, and exercises of sovereignty by the United Kingdom could have no legal consequences for this country.

154 Section 39 of the Electoral Act was renumbered as s 93[143] and then amended in 1985[144], again with effect from 1 May 1987[145]. The result was that thereafter the entitlement to enrolment was, with a material exception, confined to Australian citizens. In its present form, s 93 preserves the entitlement to enrolment of those who were enrolled immediately before 26 January 1984 and who would be British subjects within the meaning of the Citizenship Act if that statute had continued in force unamended.

155 Further, s 5A of the Citizenship Act, which was added in 1984[146], treated persons in the position of the prosecutor as permanent residents for the purposes

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140 Part II was substituted by s 6 of the 1969 Act for the previous Pt II which had been headed "BRITISH NATIONALITY"; see the tracing of the legislative steps involved by Gaudron J in *Sue v Hill* (1999) 199 CLR 462 at 527-528 [171].

141 s 2(2) of the 1984 Citizenship Act and *Commonwealth of Australia Gazette*, S68, 24 April 1987.

142 (1999) 199 CLR 462 at 490-503 [59]-[96], 528 [172]-[173].

143 By s 5 of the *Commonwealth Electoral Legislation Amendment Act* 1984 (Cth).

144 By the *Statute Law (Miscellaneous Provisions) Act (No 2)* 1985 (Cth), Sched 1.

145 See s 2(5) of the *Statute Law (Miscellaneous Provisions) Act (No 2)* 1985 (Cth) and ss 2(2) and 7 of the 1984 Act and *Commonwealth of Australia Gazette*, S68, 24 April 1987.

146 By s 5 of the 1984 Citizenship Act.

of the Citizenship Act. Section 13, also added in 1984[147], provided for the grant by the Minister, at discretion, of certificates of Australian citizenship to certain permanent residents. However, the prosecutor has not acquired a certificate of Australian citizenship, nor has he otherwise been naturalised in this country. Nor is it suggested on his behalf that, by birth, adoption or descent within the meaning of the Citizenship Act[148], he has ever been an Australian citizen.

156 The basis upon which the Migration Act rested was changed significantly in 1984. The definition of "immigrant" was removed and the provisions in which it had appeared were amended, with effect from 2 April 1984, by the *Migration Amendment Act* 1983 (Cth) ("the 1983 Migration Act"). The criterion of "non-citizen" was substituted. Section 38(3) of the 1983 Migration Act dealt with persons in the position of the prosecutor. It gave to entry permits in force before its commencement effect thereafter as if in force under the amended legislation. However, the evident intent to base the statute thenceforth substantially upon the aliens power (s 51(xix)) was manifested in s 3 of the 1983 Migration Act. This stated:

> "The title of the Principal Act is amended by omitting 'Immigration, Deportation and Emigration.' and substituting 'the entry into, and presence in, Australia of aliens, and the departure or deportation from Australia of aliens and certain other persons'."

157 Nevertheless, when issues of validity arise "[t]he question is not one of intention but of power, from whatever source derived"[149]. The Australian legislation to which reference has been made represented in Australian law the process by which British subjects became or might become citizens of the independent nation states into which, over a lengthy period, the British Empire was transformed[150]. The term "external" rather than "foreign" was used in s 51(xxix), in the words of Barwick CJ, "to include within the subject matter inter-colonial matters which in Imperial days may not have been regarded as foreign affairs"[151]. Laws which concern the relationship between Australia and the United Kingdom, and operate upon the status in this country of persons born in the United Kingdom and who are presently British citizens, and which provide

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147 By s 11 of the 1984 Citizenship Act.

148 Div 1 of Pt III (ss 10-11).

149 *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 135; *R v Hughes* (2000) 74 ALJR 802 at 806 [15]; 171 ALR 155 at 160.

150 See *Sue v Hill* (1999) 199 CLR 462 at 527 [171].

151 *New South Wales v The Commonwealth* (1975) 135 CLR 337 at 360.

for the circumstances in which they may be removed from Australia, are properly to be characterised as laws with respect to external affairs[152].

158 At all material times since the amendments made by the 1983 Migration Act, the prosecutor has been a "non-citizen" for the purposes of the Migration Act. That term is defined in s 5(1) so as to identify a person who is not an Australian citizen. A "non-citizen" who is in Australia and who holds a visa is in effect a "lawful non-citizen"; a non-citizen without such a visa is an "unlawful non-citizen" and is liable to detention and removal from Australia. That follows from the combined operations of ss 13, 14, 189 and 198 of the Migration Act.

159 At the root of the prosecutor's case is the complaint that he has become one of those people whose predecessors agreed "to unite in one indissoluble Federal Commonwealth" in the terms of the preamble to the *Commonwealth of Australia Constitution Act* 1900 (Imp). That recital was designed to emphasise that, whilst the Commonwealth of Australia was "clothed with the form of law" by an Imperial statute, the Constitution was "founded on the will of the people whom it [was] designed to unite and govern"[153]. That circumstance does not found a case for the prosecutor.

160 The prosecutor also urges that long ago he became absorbed into the Australian community, in the sense of the established but "very vague conception"[154] found in decisions of this Court limiting the reach of the immigration and emigration power. The corollary is then put that his lack of Australian citizenship cannot render him subject to the valid operation of laws such as the Migration Act. The legislative status of the prosecutor at the time of his arrival as a British subject under Australian law and the years that he has spent in Australia are said to constrict the application to the prosecutor of the Migration Act, and to place him in a class apart from other settlers who have not become Australian citizens. The doctrine of absorption was devised as a limitation upon the power to eject those otherwise reached by the immigration

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152 *Kirmani v Captain Cook Cruises Pty Ltd [No 1]* (1985) 159 CLR 351 at 379-380, 385, 436; *Kenny v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 42 FCR 330 at 347-348. See also *R v Sharkey* (1949) 79 CLR 121 at 136-137, 149, 157, 163; *De L v Director-General, NSW Department of Community Services* (1996) 187 CLR 640 at 650.

153 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 285.

154 The phrase is that of Dixon J in *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 577.

power, persons who might have been British subjects. The prosecutor seeks to turn that doctrine to account in a different way. He asserts his absorption as an answer to legislation that is based upon the power with respect to aliens and which reflects changes since he arrived here to the nationality laws of Australia and the United Kingdom.

The prosecutor's visas

161 Under the Migration Act, a visa is a permission granted by the Minister to a non-citizen to either or both (a) travel to and enter Australia and (b) remain in this country (s 29). A permanent visa entitles the holder to remain in Australia indefinitely (s 30). If the holder of a visa leaves Australia, that person may re-enter the country if the visa permits re-entry (s 79). Section 34 of the Migration Act creates a class of permanent visas known as absorbed person visas, entitling the holders to remain in Australia but not to re-enter the country. So far as presently relevant, a non-citizen who on 2 April 1984 was in Australia and before that date had ceased to be an immigrant is taken by force of s 34(2) of the Migration Act to have been granted an "absorbed person visa" on 1 September 1994. It is accepted by the parties that the prosecutor may be taken to have been granted such a visa.

162 Further, the litigation has been conducted on the footing that immediately before 1 September 1994 the prosecutor held a permanent entry permit and, by force of reg 4 of the Migration Reform (Transitional Provisions) Regulations (Cth)[155], that entry permit continued in effect on and after 1 September 1994 as a transitional (permanent) visa, which permitted the prosecutor to remain in Australia indefinitely.

163 On 7 February 1996, the prosecutor was convicted in the New South Wales District Court at Tamworth on eight counts of offences against the *Crimes Act* 1900 (NSW). All the offences were committed against children. There were two counts of sexual intercourse, three of indecent assault and three of indecent acts. The events covered a period between 1981 and 1994. On one of the counts of sexual intercourse with a child, contrary to s 66C(1) of the *Crimes Act* 1900 (NSW), the prosecutor was sentenced to a term of six years imprisonment, with a minimum term of three years and six months from 7 February 1996; on the other counts, he was sentenced to concurrent terms of lesser periods. The prosecutor was released on parole on 6 August 1999.

164 On 4 September 1999, the Minister for Immigration and Multicultural Affairs, the Honourable Philip Ruddock, cancelled the prosecutor's transitional

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155 SR No 261/1994.

(permanent) visa. This step was taken under s 501 of the Migration Act. Sub-sections (2) and (3) of s 501 specify distinct procedures for the cancellation of visas on what are called "character grounds". Sub-section (2) was relied upon at that stage. It authorises cancellation if the Minister "reasonably suspects" that the person in question "does not pass the character test" and the person does not satisfy the Minister that the test is passed. After the cancellation decision, the prosecutor was detained in immigration detention under s 189. Section 15 of the Migration Act had the effect that, on the cancellation of his visa, the prosecutor became an unlawful non-citizen and thus liable to detention or removal from Australia under ss 189 and 198 of that statute.

165 Decisions made under s 501 by the Minister personally are outside the avenue of review by the Administrative Appeals Tribunal which is provided by s 500(1)(b). No decisions under s 501, by whomever made, are reviewable by the Migration Review Tribunal under Pt 5, or the Refugee Review Tribunal under Pt 7 (s 500(4)(b)). The prosecutor instituted proceedings in this Court on 2 March 2000. Thereafter, consent orders were made for prohibition and certiorari in respect of the decision by the Minister of 4 September 1999. The Minister appears to have understood the prosecutor's case to have been that the requirements of natural justice had not been met in making the decision under s 501(2). It should be noted that the rules of natural justice are expressly excluded by s 501(5) from decisions under sub-s (3) but not from those under sub-s (2).

166 On 12 April 2000, the prosecutor was released from immigration detention. However, on 28 May 2000, the Minister directed the preparation of a submission to consider possible cancellation, this time under s 501(3), for consideration by Senator Patterson. By a departmental minute dated 26 June 2000, a submission was put to her which sought an indication as to whether she wished a further submission to be provided under s 501(2) or s 501(3). On 28 June, the respondent indicated that the submission should be provided under s 501(3). That submission then was provided to her by minute dated 29 June and this was followed by the decision of 30 June which is challenged in these proceedings.

167 Section 501(3) states that "[t]he Minister may … cancel a visa that has been granted to a person" if "the Minister reasonably suspects that the person does not pass the character test" and "the Minister is satisfied that the … cancellation is in the national interest". The criterion that the Minister be

"satisfied" is to be understood as requiring the attainment of that satisfaction reasonably[156].

168 The expression "does not pass the character test" is given content by sub-ss (6) and (7) of s 501. A person does not pass the character test if that person has a "substantial criminal record" (s 501(6)(a)). That criterion is satisfied if, among other matters listed in s 501(7), the person has been sentenced to a term of imprisonment of 12 months or more (par (c) of s 501(7)). The criteria in the other paragraphs in s 501(6) contain evaluative rather than purely objective elements. An example is par (b), association with a person, group or organisation "whom the Minister reasonably suspects has been or is involved in criminal conduct". However, given par (c), it plainly was open to the respondent reasonably to suspect that the prosecutor did not pass the character test. It was a question whether the respondent was reasonably satisfied that the cancellation of the prosecutor's transitional (permanent) visa was "in the national interest". On 30 June 2000, the respondent declared she was so satisfied and decided that his transitional (permanent) visa should be cancelled.

169 The effect of s 501F(3) was that the prosecutor was taken also to have suffered cancellation of his absorbed person visa because the respondent, by the cancellation of the transitional (permanent) visa, is taken to have cancelled the other visa. On 6 July 2000, the prosecutor again was placed in immigration detention. He remained there until this Court made its orders on 7 December 2000.

The present application

170 The prosecutor puts his claim to relief by way of prohibition and certiorari on various grounds.

171 First, it is said that, upon the proper construction of s 501, the respondent was not "the Minister" identified therein as the repository of the power she purported to exercise. The contentions here are that (a) s 501(4) requires that the power under s 501(3) be exercised only by the Minister for Immigration and Multicultural Affairs "personally", and to the exclusion of any other Minister of State for the Commonwealth holding office under the Constitution and, in any event, (b) the respondent does not hold such an office. Contention (a) is a matter of construction; (b) a question involving the interpretation of Ch II of the Constitution.

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156 The authorities for that proposition are collected in the judgment of Gleeson CJ and Gummow J in *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 75 ALJR 679 at 692 [73]; 178 ALR 421 at 438.

172 Secondly, the prosecutor submits that in any event the powers held by the respondent of detention (under s 189) and removal from Australia (under s 198) have no application to him. This is said to be because (a) those powers could only be engaged under the terms of the legislation if the prosecutor were a non-citizen required to hold a visa to remain in Australia and, who, not holding such a visa, is an "unlawful non-citizen"; (b) the prosecutor, whilst a "non-citizen" in the statutory sense because he is not an Australian citizen, enjoys a status under the Constitution which does not require any permission under the laws of the Commonwealth for him lawfully to remain in Australia and at liberty; and (c) to the extent that provisions of the Migration Act require him to hold an appropriate visa in order lawfully to remain here and at liberty, they are beyond power. At bottom, these submissions turn upon the scope of the power under s 51(xix) of the Constitution to legislate with respect to "Naturalization and aliens". The prosecutor maintains that he is not an "alien" within that provision. He also contends that he has become one of "the people of the Commonwealth" within the meaning of s 24 of the Constitution. This is said to confer, or to contribute to the conferral of, the status referred to in (b) above.

173 Finally, on the footing that his previous submissions all fail, the prosecutor contends that the respondent, in the conduct of this particular matter, for various reasons fell into jurisdictional error. One of these reasons is said to be that Senator Patterson did not appreciate, or insufficiently appreciated, that, by choosing the particular decision-making path she selected from choices provided by the legislative scheme, she was denying the prosecutor an opportunity to make further submissions.

174 It is convenient, as far as practicable, initially to put to one side the questions of validity and to consider the other issues, beginning with those of construction of the Migration Act.

The construction of the Migration Act

175 Section 496 was introduced by the *Migration Legislation Amendment Act* 1989 (Cth). It provides that the Minister, may by writing signed by that officer, delegate to a person any of the Minister's powers under the Act and that the delegate, in the exercise of that power, is subject to the directions of the Minister[157]. With effect from 1 June 1999, the *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act* 1998 (Cth)

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157 A delegate empowered under s 496 to grant, refuse or cancel visas is not required personally to perform all the administrative and clerical tasks connected with the exercise of the delegated power (s 497).

("the 1998 Act")[158] repealed what was then s 501 and substituted s 501 in its present form. The 1998 Act added ss 501A-501H. In providing in sub-s (4) of s 501 that the power under sub-s (3) may only be exercised by the Minister personally, s 501 effected an implied partial repeal of the delegation provision in s 496[159].

176 Section 496 of the Migration Act is an express power of delegation. It was not involved here. The significance of s 496 is that it indicates the scope and purpose of the statement in s 501(4) as to the personal exercise by "the Minister" of the power in s 501(3). The presence of an express, and limited, statutory power of delegation does not necessarily exclude the existence of an implied power of a Minister to act through the agency of others[160]. But the power under s 501(3) is not an administrative function which may be exercised by the Minister through a duly authorised officer of the department the Minister administers. Section 501(4) makes this plain. Nor is the contrary suggested in the submissions in support of the respondent. The task here is to determine whether the respondent fell within the statutory description of "the Minister".

177 The term "Minister", when used in the Act means, unless the contrary intention appears, one of the Queen's Ministers of State for the Commonwealth appointed by the Governor-General under s 64 of the Constitution. Paragraph (h) of s 17 of the *Acts Interpretation Act* 1901 (Cth) ("the Interpretation Act") so provides.

178 Section 64 of the Constitution states:

> "The Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish.
>
> Such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Federal Executive Council, and shall be the Queen's Ministers of State for the Commonwealth.

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158 Item 23 in Sched 1.

159 *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 353-354 [9], 375-376 [67]-[69].

160 *O'Reilly v State Bank of Victoria Commissioners* (1983) 153 CLR 1 at 11-12, 18-20, 30-32; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 37-38; *Re Reference Under Section 11 of Ombudsman Act 1976 for an Advisory Opinion; Ex parte Director-General of Social Services* (1979) 2 ALD 86 at 93-95.

> After the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives."

179 The immediate point of issue here does not concern the administration of a department of State, a matter discussed by Murphy J in *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth*[161]. What is at stake is the identification of the repository of a particular power created and conferred by a law of the Commonwealth, s 501(3) of the Migration Act. Observations by Burchett J in *GTE (Aust) Pty Ltd v Brown*[162] apply to this case. In *Brown*, in the course of considering decisions purportedly made pursuant to a power conferred by s 8 of the *Customs Tariff (Anti-Dumping) Act* 1975 (Cth), Burchett J said[163]:

> "But I do not have to decide, for the purposes of the present case, whether a Department of State can be administered, consistently with s 64, by a Minister to whom that Department has not been specifically allocated by the Governor-General. It is not the administration of a Department of State with which this case is concerned, but the performance of a particular statutory function."

180 The primary task is to identify the repository or repositories of the statutory power. In *Re Reference Under Section 11 of Ombudsman Act 1976 for an Advisory Opinion; Ex parte Director-General of Social Services*, Brennan J said[164]:

> "An act done in purported exercise of a statutory power is valid if the act falls within the statutory provision which confers the power. Prima facie an act will not fall within the statute unless it be done by the person in whom the statute reposes the power … Validity is thus dependent upon the identity of the authority and the doer of the act."

181 Since the earliest times in the history of the Commonwealth, legislative provision has been made whereby powers conferred by a particular statute may be exercised by a Minister other than that Minister charged with the administration of the statute under the executive arrangements made pursuant to

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161 (1977) 139 CLR 54 at 87.

162 (1986) 14 FCR 309.

163 (1986) 14 FCR 309 at 340.

164 (1979) 2 ALD 86 at 93.

Ch II of the Constitution. In *R v Judd*[165], the Court considered a provision of the *War Precautions Act* 1914 (Cth) that an offence against that statute was not to be prosecuted upon indictment except in the name of the Attorney-General. It upheld an indictment in the name of another Minister who, the evidence showed[166], was acting for and on behalf of the Attorney-General. The decision rested upon the application of s 19 of the Interpretation Act. This provides that, where in an Act any Minister is referred to, the reference is to be deemed to include any Minister or member of the Executive Council "for the time being acting for or on behalf of such Minister". In argument in this Court in *Judd*, it was said that s 19 appears to have been taken from s 7 of the *Acts Interpretation Act* 1890 (Vic)[167]. In this litigation, no reliance is placed upon s 19.

182 The identity of the repository of the power conferred by s 501(3) depends upon the identification by the use of the expression "the Minister". Section 19A of the Interpretation Act supplies the answer. So far as relevant, it states that, if a provision of an Act refers to a Minister by using the expression "the Minister" without specifying which Minister is referred to and if for the time being two or more Ministers administer the provision in question, then, unless the contrary intention appears, the reference is to any one of those Ministers. This is the effect of pars (aa) and (b) of s 19A(1) of the Interpretation Act. Section 501(3) of the Migration Act is a provision upon which s 19A of the Interpretation Act operates in this way.

183 Section 65 of the Constitution states:

> "Until the Parliament otherwise provides, the Ministers of State shall not exceed seven in number, and shall hold such offices as the Parliament prescribes, or, in the absence of provision, as the Governor-General directs."

Section 51(xxxvi) authorises the making of laws with respect to:

> "[m]atters in respect of which this Constitution makes provision until the Parliament otherwise provides".

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165 (1919) 26 CLR 168.

166 *R v Judd* (1919) 19 SR (NSW) 59 at 59-60.

167 (1919) 26 CLR 168 at 170. See also *Bainbridge-Hawker v The Minister of State for Trade and Customs* (1958) 99 CLR 521 at 526-527, 553, 557; *Zoeller v Attorney-General (Cth)* (1987) 76 ALR 267 at 279; *Attorney-General (Cth) v Foster* (1999) 84 FCR 582 at 594.

Parliament has made "other provision" by the *Ministers of State Act* 1952 (Cth) ("the Ministers of State Act"). After amendments effected by the *Ministers of State and Other Legislation Amendment Act* 2000 (Cth) ("the 2000 Act"), s 4 of the Ministers of State Act reads:

> "The number of the Ministers of State must not exceed:
>
> (a) in the case of those designated, when appointed by the Governor-General, as Parliamentary Secretary – 12; and
>
> (b) in the case of those not so designated – 30."

184 The respondent is a Senator and a member of the Federal Executive Council. Section 62 of the Constitution states:

> "There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the Governor-General and sworn as Executive Councillors, and shall hold office during his pleasure."

The effect of s 64 of the Constitution is that those officers appointed as the Queen's Ministers of State for the Commonwealth must be members of the Federal Executive Council.

185 On 10 March 2000, there was signed by His Excellency the Governor-General and sealed with the Great Seal of Australia an instrument headed "APPOINTMENT OF PARLIAMENTARY SECRETARY". It stated:

> "I, WILLIAM PATRICK DEANE, Governor-General of the Commonwealth of Australia, pursuant to sections 64 and 65 of the Constitution, hereby appoint SENATOR THE HONOURABLE KAY CHRISTINE LESLEY PATTERSON, a member of the Federal Executive Council, to administer THE DEPARTMENT OF FOREIGN AFFAIRS AND TRADE AND THE DEPARTMENT OF IMMIGRATION AND MULTICULTURAL AFFAIRS.
>
> Further, pursuant to section 4 of the *Ministers of State Act 1952*, I designate SENATOR THE HONOURABLE KAY CHRISTINE LESLEY PATTERSON as PARLIAMENTARY SECRETARY.
>
> I direct SENATOR THE HONOURABLE KAY CHRISTINE LESLEY PATTERSON to hold the office of PARLIAMENTARY SECRETARY TO THE MINISTER FOR FOREIGN AFFAIRS and the office of PARLIAMENTARY SECRETARY TO THE MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS."

186 By instrument signed by His Excellency the Governor-General and sealed with the Great Seal of Australia on 21 October 1998, headed "APPOINTMENT OF MINISTER OF STATE", the Governor-General, stating that he acted pursuant to ss 64 and 65 of the Constitution, appointed the Honourable Philip Ruddock, a Member of the House of Representatives and a member of the Federal Executive Council, to hold the office of Minister for Immigration and Multicultural Affairs and directed that he administer the Department of Immigration and Multicultural Affairs. Under the current Administrative Arrangements Order signed by the Governor-General and sealed with the Great Seal of Australia on 21 October 1998, the Migration Act is administered by "a Minister of State administering" that department.

187 Putting to one side any questions of the constitutional competence of any of the above steps, the position is that (i) the respondent, Senator Patterson, was appointed under s 64 of the Constitution to administer the Department of Immigration and Multicultural Affairs; (ii) she became a Minister of State for the Commonwealth by operation of s 64 of the Constitution; (iii) as such a Minister she was directed by the Governor-General under s 65 of the Constitution to hold the office of Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs; and (iv) she is a Minister of State administering the provisions of the Migration Act. That state of affairs attracts the operation of s 19A of the Interpretation Act. The respondent is one of the Ministers administering s 501(3) and thus falls within the term "the Minister" as a repository of the power conferred by that provision. The decision of the respondent made on 30 June 2000 with respect to the prosecutor thus answered the requirement in s 501(4) that the power under sub-s (3) thereof only be exercised by the Minister personally.

188 The questions of construction which are involved in reaching this conclusion thus should be decided adversely to the case presented by the prosecutor. Questions of the constitutional competence of the respondent's appointment are conveniently put to one side, pending consideration of the prosecutor's submissions that, in making the decision in question, the respondent fell into jurisdictional error so as to attract the relief sought in these proceedings.

Jurisdictional error

189 There will have been a constructive failure to exercise the power reposed in the respondent by s 501(3) or, as Gibbs J put it in *Sinclair v Maryborough Mining Warden*[168], a "purported but not a real exercise of [her] functions", if the

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168 (1975) 132 CLR 473 at 483. See also *Wade v Burns* (1966) 115 CLR 537 at 555, 562, 568-569; *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 267-269; *Re Coldham; Ex parte Brideson* (1989) 166 CLR 338 at 349-350;

(Footnote continues on next page)

respondent precluded herself from exercising the power according to law; she will have done so if she misconceived what in law was involved in the exercise of that power.

190 The point which the prosecutor makes here arises in the following way. As has been indicated above, ss 501 and 501C were introduced into the Migration Act at the same time in 1998. They operate together. Section 501C(3) of the Migration Act obliged the respondent, as soon as practicable after making her decision of 30 June 2000 under s 501(3), to give the prosecutor in the way she considered appropriate in the circumstances, a written notice setting out the decision and particulars of what s 501C(3) identifies as "the relevant information". That is defined in s 501C(2), so far as relevant, as information that the respondent considered "would be the reason, or a part of the reason" for making her decision. Paragraph (b) of s 501C(3) required the respondent to invite the prosecutor to make representations about the revocation of her decision. Sub-section (4) conferred a limited power of revocation. It states:

> "The Minister may revoke the original decision if:
>
> (a) the person makes representations in accordance with the invitation; and
>
> (b) the person satisfies the Minister that the person passes the character test (as defined by section 501)."

As has been indicated earlier in these reasons, the history of the prosecutor was such that he could not pass the character test because he plainly had a "substantial criminal record" for par (a) of s 501(6). Accordingly, the power of revocation under s 501C(4) could never be enlivened in his case. Different circumstances might have arisen if, for example, the ground relied upon had been the prosecutor's association with a person or group or organisation whom the Minister reasonably suspected of involvement in criminal conduct (par (b) of s 501(6)).

191 By letter dated 3 July 2000 addressed to the prosecutor, headed "NOTICE OF VISA CANCELLATION UNDER SECTION 501 OF THE MIGRATION ACT 1958" and signed by an officer of the department identified as "Director Character Section", the prosecutor was notified that on 30 June the respondent

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Public Service Association (SA) v Federated Clerks' Union (1991) 173 CLR 132 at 143-144; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 577, 594-595; *Minister for Immigration v Eshetu* (1999) 197 CLR 611 at 641 [102]; *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 74 ALJR 1348 at 1356 [31]; 174 ALR 585 at 594-595.

had decided to cancel his transitional (permanent) visa. Various documents were enclosed with the letter, this being in apparent discharge of the obligation to supply the "relevant information" required by sub-ss (2) and (3) of s 501C. The letter continued:

> "Pursuant to section 501C(3) of the *Migration Act* 1958 you are hereby invited to make representations to the Parliamentary Secretary to have this original decision revoked. Please provide your representations within seven (7) days of the receipt of this letter."

As we have indicated, in the circumstances of the present case, that invitation was one to engage in a futile exercise.

192 The enclosed "relevant information" included both the departmental minutes of 26 June and 29 June 2000. All of that material is to be considered, in terms of the definition of "relevant information" in s 501C(2), as information the respondent considered would be the reason or part of the reason for the making of the decision of 30 June. The Attorney-General, who intervened in support of the respondent, sought to quarantine from the decision-making process any material in the earlier minute. In that regard, reference was made to the Western Australian mining legislation considered in *Hot Holdings Pty Ltd v Creasy*[169]. However, given the structure of the present legislation, including the definition of "relevant information", *Hot Holdings* does not bear upon the prosecutor's case.

193 The prosecutor invites attention to pars 12, 13 and 14 of the first minute. These are the final three paragraphs in the section of the minute under the heading "ISSUES". They purport to pose for the respondent the consequences of a choice by her to proceed under sub-s (2) or sub-s (3) of s 501. The paragraphs state:

> "12. If you decide that a submission is required to consider possible cancellation of Mr Taylor's visa, this Minute contains two options in relation to the possible cancellation of Mr Taylor's visa – under either s501(2) or s501(3). It is entirely up to you, which, if either, of these options (if any) you may wish to consider.
>
> 13. If you decide to consider Mr Taylor's case under s501(2), then Mr Taylor must be accorded natural justice prior to the making of a decision whether or not to cancel his visa. Under s501(2) you may cancel a visa if: (1) you reasonably suspect that the person does not pass the character test; and (2) the person does not satisfy you that he passes the

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169 (1996) 185 CLR 149.

> character test. If you were to cancel his visa after having considered any comments he makes, Mr Taylor would from that point of time be detained and subsequently removed from Australia.
>
> 14. Alternatively, if you decide to consider Mr Taylor's case under s501(3), then there is no requirement to accord natural justice prior to the making of a decision. Under s501(3) you may cancel a visa if: (1) you reasonably suspect that the person does not pass the character test; and (2) you are satisfied that the cancellation is in the national interest. However, you should note that if a decision to cancel Mr Taylor's visa is made under s501(3), he will be detained as soon as your decision to cancel is served upon him. He must then be given notice as soon as practicable thereafter of the decision and of relevant information and *an opportunity to make representations seeking revocation of the decision*, see s501C(3) and (4)." (emphasis added)

194 What was not explained to Senator Patterson was that, in the circumstances of the present case, her power to revoke the decision would only arise if the prosecutor could satisfy her that he passed the character test, which, given his criminal record, he could not do.

195 The concluding words in par 14, "see s501C(3) and (4)", indicate the statutory support for the preceding propositions in the sentence. The suggestion to the reader, who has not been provided with an explanation of how the sub-sections would operate in the circumstances of the particular case, is that the obligation to give the prosecutor the opportunity to make representations seeking revocation of a decision under s 501(3) to some extent remedies or balances the absence of a requirement to afford him natural justice prior to the making of the decision. That is the point made in the first sentence of par 14. The whole of par 14 is put as the alternative to proceeding under s 501(2), a matter dealt with in par 13. It is there emphasised that the prosecutor must be accorded natural justice prior to the making of a decision under the earlier sub-section.

196 In the absence of any evidence providing a further explanation of the reasons, or the parts of the reasons, for the respondent making her cancellation decision of 30 June, it is to be taken that she exercised her discretion under s 501(3) to cancel the prosecutor's transitional (permanent) visa on an erroneous footing. This is that, if she did cancel the visa, the legislation required there then to be given to the prosecutor, in terms of par 14 of the minute, "an opportunity to make representations seeking revocation of [that] decision". The result of this misconception as to what the exercise of the statutory power entailed was that there was, in the meaning of the authorities, a purported but not a real exercise of the power conferred by s 501(3). On that footing, prohibition and certiorari properly lay.

197 That conclusion makes it unnecessary to consider the further grounds upon which the prosecutor alleges reviewable error which would attract relief under s 75(v).

Constitutional issues

198 There remain the arguments presented by the prosecutor which are based in the Constitution. The constitutional questions he agitates fall under two heads. The first is concerned with the position of Parliamentary Secretary. The second the status of the prosecutor as a "non-citizen". As will appear, neither of these questions should be answered favourably to the prosecutor's case.

199 However, there is a significant distinction between the two questions. Resolution of the first is necessary for the Court to determine whether the relief granted to the prosecutor is to be supported by s 75(v) of the Constitution on the footing that the respondent is an "officer of the Commonwealth". Somewhat paradoxically, the denial by the prosecutor that there can be, consistently with Ch II of the Constitution, an office of Minister of State identified as Parliamentary Secretary, would have the consequence that his claim to relief fell outside s 75(v).

200 In the past, the point has been assumed rather than decided, but it should be taken that the common law doctrine respecting the acts of de facto officers has no application to the officers spoken of in s 75(v). In any event, the common law doctrine appears to posit the existence of an office but a defective title to that office[170].

201 If the prosecutor's case required s 75(v) to be put to one side, it would nevertheless be possible to support the relief given to him by the general remedial provisions of the Judiciary Act, such as ss 31 and 33, the "matter" being one involving the interpretation of the Constitution, within the meaning of s 30(a) of that statute.

202 However, it is appropriate for the Court to deal with the basis upon which it granted relief and to determine those issues which are necessary for it to express its conclusion on that point. As will become apparent, the respondent is an officer of the Commonwealth to whom s 75(v) applies.

203 The same is not true of the second constitutional question. This is not concerned with the source of the jurisdiction of the Court to make its orders and the status of the responsibility, but with the constitutional status of the prosecutor

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170 *Cassell v The Queen* (2000) 74 ALJR 535 at 537-538 [19]; 169 ALR 439 at 443.

as a "non-citizen". The conclusions reached earlier in these reasons respecting reviewable error in relation to the treatment of the prosecutor are based on matters of legislative construction, not constitutional invalidity. That is enough to decide the case. However, what has been said in other judgments in this case respecting invalidity makes it appropriate to deal with the matter and to affirm legislative validity, lest silence be taken as assent to the contrary position.

204 We turn to deal, in order, with the two constitutional questions we have identified.

Parliamentary Secretaries

205 The prosecutor pointed to the provision in s 65 of the Constitution that the Minister of State holds such offices as the Governor-General directs and fixed upon the phrase in s 64 "appoint officers to administer such departments … as the Governor-General in Council may establish", in particular the words "to administer". The prosecutor does not contend that the only administration of a department of State of the Commonwealth permitted by the Constitution is one conducted by no more than one Minister of State. The submission is that a Minister of State must have the overall superintendence and direction of a department, so that an element of subordination of one Minister to the other would deny to the subordinate the conduct of an administration within the meaning of s 64. Such a subordinate will not have been appointed under s 64 as a Minister of State for the Commonwealth.

206 The respondent then points to advice given on 23 May 2000 by the Australian Government Solicitor concerning the implications of the appointment of Senator Patterson under s 64 of the Constitution. Paragraph 11 of that advice states:

> "It is up to Mr Ruddock and Senator Patterson to decide the administrative parameters in which they will exercise their shared Ministerial powers. There is no legal requirement that dictates whether Mr Ruddock or Senator Patterson will attend to particular administrative matters. However, there may well be preferred administrative arrangements that the Prime Minister requires to be followed or that Mr Ruddock as the 'senior' Minister requires to be followed."

207 Reference also should be made to the exception in s 44 of the Constitution, to the incapacity otherwise imposed by par (iv) of that section upon those holding any office of profit under the Crown of being chosen or sitting as a Senator or a Member of the House of Representatives, in favour of "the office of any of the Queen's Ministers of State for the Commonwealth". Section 66 of the Constitution states:

> "There shall be payable to the Queen, out of the Consolidated Revenue Fund of the Commonwealth, for the salaries of the Ministers of State, an annual sum which, until the Parliament otherwise provides, shall not exceed twelve thousand pounds a year."

The Parliament "otherwise provides" by s 5 of the Ministers of State Act. As amended by the 2000 Act, s 5 provides an annual sum for salaries of all of those identifed in s 4 of the 2000 Act as Ministers of State, that is including those designated and appointed by the Governor-General as Parliamentary Secretaries. The effect of the submissions by the prosecutor, although not so stated in terms, would be the invalidity of the provisions of the 2000 Act providing for those Ministers designated as Parliamentary Secretaries. If that were so, there would be no "office of profit" in existence which would attract disqualification under s 44(iv) of the Constitution.

208 The issues which thus arise in the past have attracted differences of opinion between distinguished constitutional lawyers. In 1981, the Senate Standing Committee on Constitutional and Legal Affairs reported into the constitutional qualifications of members of Parliament. In Ch 6 of that Report extracts were set out from opinions held by the Attorney-General's Department from Mr G E Barwick QC and Mr D I Menzies QC. In his Opinion, Sir Garfield Barwick stated[171]:

> "The office of a Queen's Minister of State is not described as such in the Constitution. Its identity is to be gathered from sections 64 and 65. The Governor-General may appoint officers who hold office during pleasure. If such an officer is a Minister of State, his office is that of a Minister of State. The office is that of administering a Department of State. It is that office to which [s 44(iv)] does not apply. Not only is the singular used in the text of the sub-section, but in the nature of things it seems to me the office of administering a Department is a single office. The form of the sections (64 and 65) further suggests that the office should be occupied by one incumbent, though there may be some room logically for admitting the possibility of a joint occupancy of the office of officers jointly responsible for the administration of the department in question.
>
> In my opinion, however, the right construction of the Constitution requires that there should be a sole occupant of the office, and but one officer responsible for the administration of a department.

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171 Australia, Senate, Standing Committee on Constitutional and Legal Affairs, *The Constitutional Qualifications of Members of Parliament*, (1981) at 68-69.

> But, whatever the propriety of that view, it is to my mind certain that an officer assisting the Minister who occupies the office of administering a Department of State cannot be said himself to occupy the office itself. The very description of 'assistant' denies the possibility."

209 Sir Douglas Menzies took a contrary view. He said that he did not read s 64 of the Constitution as[172]:

> "requiring that only one person may be appointed to administer a department and I consider that the Governor-General could appoint a number of officers to administer a department and in particular the Department of Defence. I would see no objection to one Member of Parliament being appointed Minister of Defence and other members appointed Assistant or Junior Ministers of Defence provided that the appointment in each case is to administer the Department. *In my opinion to administer a department includes to take part in the administration of a department*. The division of labour among the Ministers would I think properly be a matter ultimately for arrangement by the Prime Minister who is responsible for advising the Governor-General to make the appointments. Any officer so appointed could of course participate in the sum provided by Parliament under s 66 without incurring any disqualification under s 44." (emphasis added)

The balance of academic opinion has supported the construction given to s 44 by Sir Douglas Menzies[173].

210 The decision in *Zoeller v Attorney-General (Cth)*[174] turned in part upon the application of s 19 of the Interpretation Act, to which reference has been made earlier in these reasons, because another Minister, Mr Duffy, had acted for and on behalf of the Attorney-General whilst the Attorney was on leave for medical reasons. The case also turned in part upon the proposition that two Ministers, Mr Hayden and Mr Duffy, had, contrary to s 64 of the Constitution, been appointed (though without any subordination of one to the other) to

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172 Australia, Senate, Standing Committee on Constitutional and Legal Affairs, *The Constitutional Qualifications of Members of Parliament*, (1981) at 69.

173 Sawer, "Councils, Ministers and Cabinets in Australia", in Griffith (ed), *Public Law*, (1956), 110 at 124; Enid Campbell, "Ministerial Arrangements", Appendix 1.G to vol 1, *Royal Commission on Australian Government Administration*, (1976), 191 at 202-203; Lindell, "Responsible Government", in Finn (ed), *Essays on Law and Government*, (1995), vol 1, 75 at 91-92.

174 (1987) 76 ALR 267.

administer the one Department of Foreign Affairs and Trade. The result was said to be that Mr Duffy was not himself a Minister competent under s 19 to act for and on behalf of the Attorney. These submissions were rejected by Beaumont J. After referring to the opinions expressed by Professor Sawer and Professor Campbell, his Honour concluded[175]:

> "There is nothing in the terms of s 64 which would require it to be read down in the manner suggested by the applicant. The language is general enough and there is no logical reason to restrict the administrative arrangements which might be desirable in the interests of good government. On the contrary, there is every reason to suppose that flexibility was desirable and therefore intended to be conferred. Nor, in my view, is the principle of responsible government any obstacle: both Ministers would remain answerable to Parliament. In my opinion, to confine the operation of s 64 in the way contended for by the applicant would require explicit language. In the absence of such language, the provisions should be liberally construed so as to afford a proper opportunity to the Executive to introduce administrative arrangements which are appropriate in the particular circumstances."

211 This reasoning should be accepted. The Court should favour a construction of s 64 which is fairly open and which allows for development in a system of responsible ministerial government.

212 The content of the various principles and practices which together may be identified in Australia as comprising "responsible government" is a matter of continued debate between constitutional lawyers, political scientists and politicians themselves[176]. In *Egan v Willis*, Gaudron, Gummow and Hayne JJ said[177]:

> "It should not be assumed that the characteristics of a system of responsible government are fixed or that the principles of ministerial responsibility which developed in New South Wales after 1855 necessarily reflected closely those from time to time accepted at Westminster. Moreover, what are now federal and State co-operative legislative schemes involve the enactment of legislation by one Parliament

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175 (1987) 76 ALR 267 at 278-279.

176 Lindell, "Responsible Government", in Finn (ed), *Essays on Law and Government*, (1995), vol 1, 75 at 76.

177 (1998) 195 CLR 424 at 451 [41] (footnotes omitted).

> which is administered and enforced by Ministers and officials at another level of government, not responsible to the enacting legislature."

To these considerations there may be added provisions now made in various State constitutions for qualified "fixed-term" Parliaments[178] and the existence in Australia of popularly elected, rather than nominated, upper houses, including the Senate, which hold or assert the power to block supply. Moreover, those upper houses may not be controlled by the political party or coalition of parties, members of which form the current administration. Thus, in Australia, the proposition "the Ministers are responsible to the Parliament for the actions of the Crown"[179] is not without its ambiguities.

213 In *Lange v Australian Broadcasting Corporation*, the Court observed[180]:

> "Sections 62 and 64 of the Constitution combine to provide for the executive power of the Commonwealth, which is vested in the Queen and exercisable by the Governor-General, to be exercised 'on the initiative and advice'[181] of Ministers and limit to three months the period in which a Minister of State may hold office without being or becoming a senator or member of the House of Representatives."

After referring to other provisions of the Constitution, the Court continued[182]:

> "The requirement that the Parliament meet at least annually, the provision for control of supply by the legislature, the requirement that Ministers be members of the legislature, the privilege of freedom of speech in debate, and the power to coerce the provision of information provide the means for enforcing the responsibility of the Executive to the organs of representative government. In his *Notes on Australian Federation: Its Nature and Probable Effects*[183], Sir Samuel Griffith pointed out that the effect of responsible government 'is that the actual

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178 *Constitution Act* 1902 (NSW), ss 24, 24B; *Constitution Act* 1975 (Vic), ss 8, 66; *Constitution Act* 1934 (SA), ss 28A, 41.

179 *New South Wales v The Commonwealth* (1975) 135 CLR 337 at 365.

180 (1997) 189 CLR 520 at 558.

181 *Theodore v Duncan* [1919] AC 696 at 706.

182 (1997) 189 CLR 520 at 559.

183 (1896) at 17.

> government of the State is conducted by officers who enjoy the confidence of the people'. That confidence is ultimately expressed or denied by the operation of the electoral process, and the attitudes of electors to the conduct of the Executive may be a significant determinant of the contemporary practice of responsible government[184]."

What might be seen to be central characteristics of responsible government were well understood by those framing the Constitution. Writing of the system of government established in colonial New South Wales in the middle of the nineteenth century, Sir Victor Windeyer said that "responsible government connotes a relationship of the executive to the legislature" and continued[185]:

> "The structure of the legislature is not vital, provided there be an elected representative body in it. Responsible government in the colonies meant only the application there of the constitutional usages of Great Britain. It had become accepted that the Sovereign must choose as her ministers persons having the confidence and support of a majority in the House of Commons; that when they ceased to command this support ministers must resign; that ministers must themselves be members of Parliament, that is, either in the Lords or the Commons. Add to all this, the doctrine that the Sovereign, in all ordinary matters, acts on the advice of ministers, who in law must take responsibility for the acts of the Crown, you then have the Crown acting on the advice of and by ministers responsible to Parliament. None of these requirements is part of the written law of England. And there are only incomplete references to any of them in the constitutions of any of the self-governing dominions or colonies."

214 In the Constitution also, much was left unsaid. Harrison Moore, after referring to s 64 as a provision made with a view to the Cabinet system, wrote

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184 Reid and Forrest, *Australia's Commonwealth Parliament (1901-1988),* (1989) at 319, 337-339.

185 Windeyer, "Responsible Government – Highlights, Sidelights and Reflections", (1957) 42 *Royal Australian Historical Society Journal and Proceedings* 257 at 271. See also Todd, *Parliamentary Government in the British Colonies,* 2nd ed (1894), Ch XVII; Jenks, *The Government of Victoria (Australia),* (1897), Chs XXII, XXXI. The position of the colonial governors, after the grant of responsible government, was not without its difficulties, as Isaacs J explained in *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404 at 457. Governors acted on local Ministerial advice but were bound by their Instructions issued in London. See *Yougarla v Western Australia* [2001] HCA 47.

that this did not preclude "very extensive modifications to that system", and continued[186]:

> "There is no recognition of the Cabinet, for, as pointed out, the Federal Executive Council is not necessarily identical in constitution or functions with the Cabinet. There is no recognition of the collective responsibility of the Ministers of State; sec 64 treats them as separate administrative officials; and there is no hint of a Prime Minister. There is nothing to prevent the virtual establishment of Ministries elected by Parliament[187] which at one time found some favour in Australia, though they cannot be given the fixity of tenure which the instability of political parties has recommended to many persons. All that has been done is to establish a Parliamentary Executive; the rest is left, as in England and the Colonies generally, to custom and convention."

215 In 1891, at the Sydney Convention, Sir Samuel Griffith had expressed fears that the federal structure, particularly the presence of the Senate, would be incompatible with the accountability of Ministers to the House of Representatives[188]. Sir Samuel Griffith's conclusion was[189]:

> "that it is well to have a constitution so elastic as to allow of any necessary development that may take place."

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186 *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 168-169.

187 The newspaper accounts of the formation of the Fisher Government in 1908 are that the Ministers were selected by the Labour members of the Commonwealth Parliament in caucus, and that their offices were assigned on the recommendation of the Prime Minister. [See also Miller, "David Syme and Elective Ministries", (1953) 6 *Historical Studies* 1; McHenry, "The Origins of Caucus Selection of Cabinet", (1955) 7 *Historical Studies* 37.]

188 *Official Report of the Debates of the Australasian Federal Convention*, (Sydney), 4 March 1891, vol 1, at 34-35.

189 *Official Report of the Debates of the Australasian Federal Convention*, (Sydney), 4 March 1891, vol 1, at 37.

216 It has been said that the outcome of the deliberations of the Conventions "was a very meagre set of provisions relating to the executive branch of government", which, "mask rather than prescribe the workings of the executive"[190]. The reasons for this were various[191]:

> "The executive branch of government was shrouded in mystery, partly attributable to the uncertain scope and status of the prerogative. The task of committing its essential features to writing was daunting indeed. Moreover, the price of undertaking that task would be a loss of flexibility in the future development of the executive. Politicians who were the beneficiaries of half a century of colonial constitutional development placed a high value upon such flexibility."

The development of federal Cabinet is a case in point. Writing in 1987, in *Minister for Arts Heritage and Environment v Peko-Wallsend Ltd*, Bowen CJ observed[192]:

> "The Governor-General, except in very limited instances, acts on the advice of his Minister or Ministers conveyed to him in Executive Council. Often the advice flows from a decision of Cabinet. However, Cabinet is not mentioned in the Constitution and is not in any formal legal sense the Executive. ...
>
> It is a body which functions according to convention. The number of departments of State and, in consequence, the number of Ministers may vary from government to government. Until 1956 it was the practice for all members of the ministry, including Ministers without portfolio, to sit as members of Cabinet. Beginning with the Menzies ministry sworn in on 11 January 1956 the practice was introduced of a Cabinet comprising some but not all members of the ministry[193]. Since then this inner circle of ministers has generally been referred to as the Cabinet. When Cabinet meets it is customary for particular members of the outer ministry to attend when matters concerning or affecting their particular departments are before Cabinet for decision."

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190 Crommelin, "The Executive", in Craven (ed), *The Convention Debates 1891-1898: Commentaries, Indices and Guide*, (1986), vol 6, 127 at 147.

191 Crommelin, "The Executive", in Craven (ed), *The Convention Debates 1891-1898: Commentaries, Indices and Guide*, (1986), vol 6, 127 at 147.

192 (1987) 75 ALR 218 at 222, 225.

193 *Parliamentary Handbook*, 17th ed (1971) at 512.

217 In *Egan v Willis*, Gaudron, Gummow and Hayne JJ said[194]:

> "A system of responsible government traditionally has been considered to encompass 'the means by which Parliament brings the Executive to account' so that 'the Executive's primary responsibility in its prosecution of government is owed to Parliament'[195]. The point was made by Mill, writing in 1861, who spoke of the task of the legislature 'to watch and control the government: to throw the light of publicity on its acts'[196]. It has been said of the contemporary position in Australia that, whilst 'the primary role of Parliament is to pass laws, it also has important functions to question and criticise government on behalf of the people' and that 'to secure accountability of government activity is the very essence of responsible government'[197]."

218 The Constitution does not require that particular Ministers, or any number thereof, be members of one or other chamber. There has developed a practice, of which the Attorney-General, who himself appeared in this case, informed the Court, whereby a Minister is "represented" by another Minister in the chamber of which the first Minister is not a member.

219 Provision is made by Standing Orders in respect to those departments under a form of administration in which more than one Minister participates. With respect to Senator Patterson, Standing Order 12(1)[198] provides:

> "Any senator appointed a parliamentary secretary under the *Ministers of State Act 1952* may exercise the powers and perform the functions conferred upon ministers by the procedures of the Senate, but may not be asked or answer questions which may be put to ministers under standing order 72(1) or represent a minister before a legislation committee considering estimates."

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194 (1998) 195 CLR 424 at 451 [42].

195 Kinley, "Government Accountability in Australia and the United Kingdom: A Conceptual Analysis of the Role of Non-Parliamentary Institutions and Devices", (1995) 18 *University of New South Wales Law Journal* 409 at 411.

196 *Considerations on Representative Government*, (1861) at 104.

197 Queensland, Electoral and Administrative Review Commission, *Report on Review of Parliamentary Committees*, (October 1992), vol 1, par 2.23.

198 As amended on 4 April 2000.

Order 72(1) states:

> "At the time provided questions may be put to ministers relating to public affairs, and to other senators relating to any matter connected with the business on the Notice Paper of which such senators have charge."

220 The central purpose of responsible government is secured by the requirement in s 64 of the Constitution for administration of the departments of State by Ministers who are members of one or other Houses of the Parliament. It is for each chamber by its own internal procedures and regulations to provide systems which facilitate the accountability of Ministers for the particular form of administration of the department of State in question.

221 The objections taken to the existence under the Constitution of the office held by the respondent, and to the validity of her appointment to it and of enabling legislation in the 2000 Act, should be rejected.

Citizenship

222 The submissions of the prosecutor on this branch of the case somewhat fluctuated in argument. Reference already has been made to his reliance upon the preamble to the Imperial statute. It also was submitted that the prosecutor had become one of "the people of the Commonwealth" identified in s 24 of the Constitution, and one of "the people of [a] State" identified in s 7, and that he had been absorbed into the Australian community. Even if those broad propositions respecting ss 7 and 24 were accepted as having a relevant constitutional content, it would be necessary to show how their application denied the statutory competence of the respondent to make the decision which in turn triggered the operation of the statutory powers of detention and removal. The substance of the prosecutor's case appears to be that the respondent acted without jurisdiction in deciding to cancel the prosecutor's transitional (permanent) visa because the power in s 501(3) upon which she relied had to be read down, to preserve the validity of the section, so as to shorten its reach and deny its classification of a person in the position of the prosecutor as an "unlawful non-citizen" within the meaning of the Migration Act.

223 At the time of the enactment of s 501 in 1998 and thereafter, the prosecutor was not an Australian citizen, and his allegiance was, as a British citizen, to the Crown in right of the United Kingdom. Nevertheless, the prosecutor submits either that he was not an "alien" when he first arrived in Australia and that he could not thereafter validly be the object of a law with respect to aliens, or that, if he was an alien when he first arrived, he had ceased to be so and could not thereafter validly be the object of such a law. It is said that alienage and citizenship (acquired by one of the methods for which provision is made in the Citizenship Act) between them do not occupy the relevant universe

of discourse, and that it did not follow that, as a non-citizen, the prosecutor was an alien. The prosecutor's submissions should not be accepted. We turn to explain why this is so and begin with the matter of allegiance.

Allegiance

224 "Allegiance" examines the relationship between an individual and a sovereign power from the point of view of the individual, and principally by reference to duties and obligations which the individual may owe to that sovereign power. In a monarchy, questions of allegiance may be personified and, if that is done, insufficient attention may be given to identifying the distinction between relevant separate sovereign powers. The notion of personal allegiance "lay at the very root of the feudal system"[199], but long before federation that state of affairs had ceased to exist. In 1886, Lord Coleridge CJ had explained[200] that allegiance was due from subjects to the Crown in "the politic" not the "personal capacity" of the sovereign. In *Sue v Hill*[201], Gleeson CJ, Gummow and Hayne JJ discussed this and other senses in which the term "the Crown" has been used in constitutional theory derived from the United Kingdom.

225 It is important to recognise that questions of allegiance and of alienage require identification of a relationship to which there are two parties: the individual and the sovereign power. Becoming, or ceasing to be, an alien will not, in every case, depend upon joint action by both the parties to the relationship. Either the individual or the sovereign power may so act that an individual who was not an alien becomes one and, in consequence, does not thereafter owe allegiance to that sovereign power. It is, therefore, important to identify the sovereign power to whom the individual is said to be alien.

226 It is necessary to return to some of the matters considered earlier in these reasons under the heading "The status of the prosecutor in Australia". The notion that an individual became a British subject at birth anywhere within the dominions of the Imperial Crown and by reason of allegiance to the Imperial Crown, had been abandoned both in the United Kingdom and in Australia before the birth of the prosecutor. The post-war legislation in both countries, the 1948 UK Act and the Citizenship Act, recognised that the metaphysical indivisibility of the Imperial Crown no longer made constitutional or political sense. Notions of allegiance as the factum upon which nationality laws and status turned were

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199 *In re Stepney Election Petition. Isaacson v Durant* (1886) 17 QBD 54 at 65.

200 *In re Stepney Election Petition. Isaacson v Durant* (1886) 17 QBD 54 at 65-66.

201 (1999) 199 CLR 462 at 497-503 [83]-[94].

accommodated to international realities consequent upon the disappearance of the British Empire.

227 Those realities were reflected in the *Royal Style and Titles Act* 1953 (Cth). This recited an agreement reached at a meeting of British Commonwealth Prime Ministers in London in December 1952 that "the Style and Titles at present appertaining to the Crown are not in accord with current constitutional relationships within the British Commonwealth". Section 4 of the statute stated the assent of the Parliament to the adoption by Her Majesty, for use in relation to the Commonwealth of Australia and its Territories, of the Royal Style and Titles:

> "… of the United Kingdom, Australia and Her other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith".

Thereafter, and even before the removal, by the *Royal Style and Titles Act* 1973 (Cth), of the specific reference to the sovereignty of the United Kingdom[202], it was plain that in so far as notions of allegiance were concerned the sovereign had several and distinct politic capacities. The 1953 statute, as the preamble indicated, was an exercise of the legislative power with respect to external affairs.

228 There remained nothing in notions of allegiance to the Crown in the one Imperial politic capacity. That in turn had several consequences. First, it emphasised the point later made in *Sue v Hill*[203] that, whilst the references in covering cl 2, the Schedule, and other provisions of the Constitution, to the sovereign identify that person for the time being occupying the hereditary office of sovereign of the United Kingdom, the legislative and executive powers and functions entrusted by Ch I and Ch II of the Constitution to the sovereign are enjoyed in respect of the Australian body politic.

229 The second point concerns s 117 of the Constitution. This states:

> "A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State."

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202 The Royal Style and Titles now reads "Queen of Australia and Her other Realms and Territories, Head of the Commonwealth".

203 (1999) 199 CLR 462 at 488-489 [53]-[56], 493 [67]-[68], 502 [93], 525-526 [163]-[165].

It may be accepted that, at the time of federation, the state of subjection identified in s 117 was to the indivisible Imperial Crown. But, as a result of the changes made in the constitutional relationships within the British Commonwealth which were reflected in the various statutory provisions that were made between 1948 and 1953 and are mentioned earlier, the allegiance owed by the subjects spoken of in s 117 was to the Crown in its Australian politic capacity[204]. There no longer was in constitutional theory or political reality the Imperial Crown of earlier days. To continue to read s 117 as it had been read initially would have been to deprive it of any useful operation.

230 The third point is that there remained nothing in notions of allegiance to the Imperial Crown which restrained the exercise of legislative power to make further changes to the Citizenship Act and to withdraw the advantages conferred by the statutory formulation "status of British subject" upon those born in the United Kingdom who had been permitted by Australian law to enter and remain in Australia.

231 Writing in 1982, that is to say even before the *Australia Act* 1986 (Cth), Gibbs CJ, with the agreement of Mason J and Wilson J, said in *Pochi v Macphee*[205]:

> "The allegiance which Australians owe to Her Majesty is owed not as British subjects but as subjects of the Queen of Australia."

232 Moreover, as Gibbs CJ pointed out in the same passage, the meaning of the term "aliens" in s 51(xix) of the Constitution did not depend on its meaning from time to time under laws in force in the United Kingdom. A law with respect to aliens may confer rights or benefits upon such persons. An example is the preservation by s 93 of the Electoral Act of the enrolment of certain persons who are not Australian citizens.

"The people of the Commonwealth"

233 The phrase in s 24 of the Constitution "directly chosen by the people of the Commonwealth" (upon which the prosecutor relies) is a broad expression to identify the requirement of a popular rather than an indirect vote. Section 41 of the Constitution operated to secure in the federal franchise the female franchise which had been acquired before federation in South Australia and Western

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204 cf *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 186.

205 (1982) 151 CLR 101 at 109.

Australia. However, in other respects, the selection of those of the population from among whom electors would be selected was left by s 30 of the Constitution to laws made by the Parliament[206]. Those laws also would determine the qualification of electors of senators (s 8). The phrase "directly chosen by the people of the State" appearing in s 7, upon which the prosecutor also relies, deals with Senate elections. It is of no more assistance for his case than the phrase in s 24 upon which he relies.

234 That the Parliament has included among the electors it selects, by a law supported by ss 8 and 30, persons who are not citizens does not thereby deny to those persons the character of aliens within the meaning of s 51(xix) of the Constitution. If it matters, it may be observed that in the past in England specific provision has been made to deny the franchise to aliens[207].

Alienage

235 Two further propositions should be noted. The first is that the power to make laws with respect to "aliens" supports a law for the removal of them from positions of advantage otherwise enjoyed, including laws for their deportation[208]. The second is that persons may acquire the status or character of alienage by reason of supervening constitutional and political events not involving any positive act or assent on the part of the person concerned. A British subject could be rendered an alien by reason of loss of territory of the British Crown. This might come about, as in the case of the recognition by Britain of the independence of the United States, by statute recognising a new sovereignty over the territory in question[209]. A further example is the consequence attributed in *In re Stepney Election Petition. Isaacson v Durant*[210] to the succession in 1837 of Queen Victoria as sovereign of the United Kingdom of Great Britain and Ireland, but not of Hanover; those who had been born in Hanover became subjects of the new ruler of Hanover and ceased to be British subjects. Other examples are

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206 *McGinty v Western Australia* (1996) 186 CLR 140 at 279.

207 In 1698, the House of Commons resolved that no alien had any right to vote in elections of members or to serve in Parliament: *British Digest of International Law*, (1965), vol 6 at 261.

208 *Robtelmes v Brenan* (1906) 4 (Pt 1) CLR 395 at 404, 415, 418-419; *Pochi v McPhee* (1982) 151 CLR 101 at 106.

209 *Kenny v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 42 FCR 330 at 339.

210 (1886) 17 QBD 54.

provided by legislation dealing with the consequences of the grant of independence outside the Commonwealth to countries such as Burma[211].

236 Those who by reason of Australian citizenship had been British subjects under the law of Australia and who ceased to be British subjects under the law of the United Kingdom by virtue of the *Burma Independence Act* 1947 (Imp) also ceased to be British subjects under the law of Australia. Section 2 of the *Nationality and Citizenship (Burmese) Act* 1950 (Cth) brought about that result in Australian law. On the other hand, the special provisions made by the Citizenship Act for Irish citizens had the result, for a time, that in Australian law Irish citizens were to be treated on the footing that by taking certain steps they would become entitled to be treated as if they had the status of British subjects[212].

237 The relationship between Australia and New Guinea provides a striking instance of the loss of citizenship by reason of constitutional changes[213]. The *Papua New Guinea Independence Act* 1975 (Cth) provided that Australia ceased to have any sovereignty, sovereign rights or rights of administration in respect of or appertaining to the whole or any part of Papua New Guinea. In exercise of the regulation-making power conferred by s 6, reg 4 of the Papua New Guinea Independence (Australian Citizenship) Regulations[214] provided that a person who immediately before independence day on 16 September 1975 was an Australian citizen and who, on independence, became a citizen of Papua New Guinea, ceased on that day to be an Australian citizen.

238 Plainly, Gibbs CJ was correct when, in *Pochi v Macphee*[215], he said that "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". However, the situation that arose with the establishment of the independent state of Papua New Guinea and the supporting Australian legislation considered above may suggest

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211 See in the United Kingdom the provisions of the *Burma Independence Act* 1947 (Imp) considered in *Bulmer v Attorney-General* [1955] Ch 558 at 562. See further *British Digest of International Law*, (1965), vol 5 at 222-230.

212 See *Stapleton v The Queen* (1952) 86 CLR 358 at 377; *Kenny v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 42 FCR 330 at 339-347.

213 See Pryles, *Australian Citizenship Law*, (1981) at 45.

214 SR No 180/1975.

215 (1982) 151 CLR 101 at 109.

that Gibbs CJ expressed the power too narrowly, or that he did not mean to state it exhaustively, when he said in the same passage in *Pochi v Macphee*[216]:

> "[T]he Parliament can in my opinion 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".

239 The prosecutor, on the other hand, contends that the formulation by Gibbs CJ is too wide. This is said to be because there has to be a qualification or exception to the reach of the legislative power to put beyond its exercise those who were not aliens when they arrived in Australia and who had been absorbed into the Australian community before the constitutional and political developments in relations between the United Kingdom and Australia which otherwise would bring them within the scope of the power.

240 That submission, for several reasons, should not be accepted. First, there is a real likelihood that persons born in the United Kingdom after the commencement in 1949 of the Citizenship Act were objects for the exercise of the aliens power in s 51(xix) of the Constitution. The status of British subject conferred or recognised in Australia by force of Imperial legislation no longer existed at the time of the birth of the prosecutor. Part I of the 1914 Imperial Act, which had defined those who were natural born British subjects, had been repealed by the 1948 UK Act; the 1920 Nationality Act which had adopted Pt I in Australia had been repealed by the Citizenship Act. Thereafter, there remained no Imperial legislation applying in Australia by paramount force or adopted in Australia which defined those who were British subjects or who had the status of British subjects by reference to allegiance owed to the Imperial Crown. After 1949, in determining those who were British subjects or who had that status for the purposes of Australian law, one turned only to the Citizenship Act, and in particular to s 7, as indicated earlier in these reasons.

241 The matter may be looked at somewhat differently by asking whether, at the time of the purported application to him of s 501(3) of the Migration Act by the decision of the respondent, the prosecutor was a citizen or subject of a foreign state and had not become an Australian citizen. That was the interpretation given to "alien" in the joint judgment of six members of the Court in *Nolan v Minister for Immigration and Ethnic Affairs*[217]. Writing long before, in 1833, in his *Commentaries on the Constitution of the United States*[218], Story had answered the

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216 (1982) 151 CLR 101 at 109-110.

217 (1988) 165 CLR 178 at 183.

218 (1970 reprint), vol 3, §1694.

question of who would be considered aliens entitled to sue in the courts of the United States by saying that the general answer was "any person, who is not a citizen of the United States". Undoubtedly, at the time of the enactment of s 501(3) and the exercise of power thereunder, the prosecutor was a citizen of a foreign power. That had become so no later than 4 March 1986[219].

242 The prosecutor seeks to escape the consequences of this reasoning by emphasising (i) that he did not enter Australia as an alien in the constitutional sense; and (ii) that supervening political and constitutional developments and events over which he has had no control cannot be effective to render him an alien in the constitutional sense. We have indicated above the serious doubts as to whether proposition (i) can be accepted. In any event, proposition (ii) should be rejected. The prosecutor had not taken the steps which the Citizenship Act afforded for the acquisition of Australian citizenship. His past enjoyment of the statutory status, under Australian law, of a British subject gave him, under that law, certain advantages other aliens did not possess. But the prosecutor had enjoyed those advantages as an alien, not because he was placed in some intermediate position where, although a British citizen for the purposes of the law of the United Kingdom, and not a citizen for the purposes of Australian law, in Australia he was not to be considered an alien.

243 At common law, as understood at the time of federation, the relationship between an alien and the English community where the alien was to be found depended upon a distinct set of criteria. These put to one side persons classed as alien enemies and gave to those classified as alien friends certain rights with respect to the acquisition and retention of personal property (but not real property), certain powers of testation and capacity to institute proceedings in English courts[220] and other rights[221] (and obligations[222]). To some extent, the common law extended to resident friendly aliens rights which may be said to some degree to have rendered them members of the community in which they resided. Nevertheless, aliens they remained. Loss of the status of alien had to be

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219 *Sue v Hill* (1999) 199 CLR 462 at 503 [95]-[96], 528 [173].

220 *Arnerich v The King* [1942] NZLR 380.

221 Halsbury, *The Laws of England*, (1907), vol 1, at 306-312. See also *Kahn v Board of Examiners (Vict)* (1939) 62 CLR 422 at 430-431, 441-443; *Street v Queensland Bar Association* (1989) 168 CLR 461 at 505, 554.

222 See as to conscription of friendly aliens in wartime: *Polites v The Commonwealth* (1945) 70 CLR 60 and *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 384-385 [98].

achieved by letters of denization[223], or, as indicated earlier in these reasons, by legislation.

244 The distinction drawn between friendly and enemy aliens serves a further purpose. It shows that, by itself, the term "alien" at common law, and in the Constitution, is not a term of disapprobation. That it is such a term at times appeared as a motif in the orchestration of the prosecutor's submissions denying the term could apply to him after the period he has spent in this country.

The Australian community

245 The prosecutor seeks to redefine alienage for the purposes of s 51(xix) of the Constitution as one who at the time the issue arises is not a member of the Australian community. He denies the competence of the Parliament to transform that relationship between the individual and the community by legislative redefinition of the criterion for admission and continued membership of it. The prosecutor submits that he had become a member of the Australian community in the necessary sense and that legislation which would lead to his classification as an "unlawful non-citizen" was ineffective to change that relationship by rendering him an alien.

246 The notion of an Australian community and of the absorption into it of persons not born in Australia appears first to have been developed in the judgments in *Potter v Minahan*[224]. That case concerned a British subject born in Australia, whose permanent home was in Australia, and who therefore, it was said, was a member of the Australian community. This Court held that he was not, on returning to Australia from abroad, an immigrant in respect of whose entry the Parliament might legislate under the power conferred by s 51(xxvii) of the Constitution. It had been submitted that the immigration legislation did not apply to exclude Australian born British subjects or to those with Australian domiciles of origin. The Court denied that the case was to be determined by what Griffith CJ called "the mere application of the rules either of nationality or of domicil"[225] and that the return of the respondent to his native land after temporary absence could not be described as "immigration"[226]. Isaacs J said[227]:

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223 Halsbury, *The Laws of England*, (1907), vol 1, at 312-313.

224 (1908) 7 CLR 277.

225 (1908) 7 CLR 277 at 288.

226 (1908) 7 CLR 277 at 289-290.

227 (1908) 7 CLR 277 at 308.

> "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."

247 There is no reason to conflate the criteria by which there is gauged the scope of the powers of the Parliament on the one hand with respect to naturalisation and aliens, and on the other with respect to immigration and emigration. The distinct considerations which led to the inclusion of the two heads of power in s 51 suggest otherwise. Further, the notion of absorption into the Australian community is one which, the decisions of the Court with respect to the immigration power show, is not easy of application and turns into constitutional facts many details of the lives of individuals.

Precedent and prudence

248 For these reasons, the submissions for the prosecutor should not be accepted. In any event, their acceptance would require reconsideration of the reasoning in *Pochi v Macphee*[228] and of the reasoning and the decision itself in *Nolan v Minister for Immigration and Ethnic Affairs*[229]. *Pochi* was a decision of four members of the Court. The judgment of Gibbs CJ had the concurrence of Mason J and Wilson J. *Nolan* was a decision of the whole Court in which there was a joint judgment of six members and one dissenting judgment. *Pochi* was decided in 1982. Reliance upon its reasoning by the Parliament is manifest in the adoption by the 1983 Migration Act of the criterion of operation of "non-citizen". Reference to this change is made earlier in these reasons. In the last 17 years, innumerable decisions must have been made and rights and liabilities determined upon that legislative basis.

249 Moreover, in addition to the criteria mentioned in *John v Federal Commissioner of Taxation*[230], there is the prudential consideration that this Court should not embark upon the reconsideration of an earlier decision where, for the resolution of the instant case, it is not necessary to do so. The present dispute may, as we have indicated, be decided upon issues of construction which do not involve calling into question any earlier decisions of the Court.

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228 (1982) 151 CLR 101.

229 (1988) 165 CLR 178.

230 (1989) 166 CLR 417 at 438-439.

250 In the early days of the Court, Higgins J declared[231]:

> "Nothing would tend to detract from the influence and the usefulness of this Court more than the appearance of an eagerness to sit in judgment on Acts of Parliament, and to stamp the Constitution with the impress which we wish it to bear. It is only when we cannot do justice, in an action properly brought, without deciding as to the validity of the Act, that we are entitled to take out this last weapon from our armoury".

Higgins J drew support for this statement from what had been said by the United States Supreme Court in a case[232] later described by Frankfurter J[233] as a classical exposition.

251 A striking example of the precept that the Court should not decide constitutional questions unless necessary for the decision in the case is provided by the judgment of Starke J in *Universal Film Manufacturing Co (Australasia) Ltd v New South Wales*[234]. The majority decided the case on the footing that upon the proper construction of the statute in question, assuming it to be valid, no liability of which the plaintiff complained was imposed upon it. Starke J was of the contrary view but nevertheless declined to go on to consider validity. His Honour said[235]:

> "I refrain from doing so because I am in entire agreement with the view of the majority that the jurisdiction of this Court to determine whether a statute contravenes the Constitution should only be invoked, and according to the settled practice of this Court is only invoked, when it is found necessary to secure and protect the rights of a party before it against unwarranted exercise of legislative power to his prejudice."

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231 *Attorney-General for NSW v Brewery Employés Union of NSW* (1908) 6 CLR 469 at 590.

232 *Chicago & Grand Trunk Railway Company v Wellman* 143 US 339 at 344-345 (1892).

233 *Poe v Ullman* 367 US 497 at 505-506 (1961). See also the further authorities collected by Brandeis J in *Ashwander v Tennessee Valley Authority* 297 US 288 at 347-348 (1936) and see *Immigration and Naturalization Service v St Cyr* 69 USLW 4510 at 4514 (2001).

234 (1927) 40 CLR 333.

235 (1927) 40 CLR 333 at 356.

In the same case, Isaacs ACJ, one of the majority, declared[236]:

> "Some very powerful arguments were addressed to us on the subject of invalidity. In the circumstances no expression of judicial opinion on that subject would be in accordance with recognized practice or be more than *obiter*. I therefore say nothing on that subject but reserve my opinion for a future occasion should the necessity arise."

252 That settled practice has continued[237] and should be retained.

External affairs

253 It remains only to add that, even if we be wrong in the conclusions we have expressed concerning the scope of the legislative power with respect to "aliens", the application to the prosecutor of the legislation in question in this litigation may be supported as an exercise of the power with respect to external affairs. What those laws do is resolve questions of status in Australia of British citizens consequent upon the termination of legal linkage in the past treated as part of the "bonds of Empire". Earlier in these reasons we have referred to the reasoning in earlier authorities which support that approach to the matter.

Conclusion

254 The prosecutor succeeded on the ground of the constructive failure of the respondent to exercise her jurisdiction under s 501(3) of the Migration Act. The remaining grounds respecting statutory construction have not been established.

255 For these reasons, we joined in the orders made on 7 December 2000.

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236 (1927) 40 CLR 333 at 347.

237 *Lambert v Weichelt* (1954) 28 ALJ 282 at 283; *Re East; Ex parte Nguyen* (1998) 196 CLR 354 at 361-362 [16]-[18]; *Cheng v The Queen* (2000) 74 ALJR 1482 at 1492 [58]; 175 ALR 338 at 350; *Re Macks; Ex parte Saint* (2000) 75 ALJR 203 at 242 [202]; 176 ALR 545 at 596.

256 KIRBY J. This Court has made absolute orders for certiorari and prohibition, the latter prohibiting the Minister for Immigration and Multicultural Affairs ("the Minister") from further proceeding on a decision concerning Mr Graham Taylor ("the prosecutor")[238]. For the second time[239], this Court has required the release of the prosecutor from detention in which he had been held in anticipation of his removal from Australia as an alien without a valid visa[240].

The facts and issues

257 The facts, relating to the respondent's arrival in Australia as a British subject in 1966, his criminal convictions in 1996, and the purported cancellations of his visa by the Minister in 1999 and the Minister's Parliamentary Secretary, Senator Kay Patterson ("the respondent") in 2000, are elaborated in other reasons[241]. So are the provisions of the legislation, relied on by the prosecutor[242]. In challenging the decision of the respondent to cancel his visa, the prosecutor relied on four grounds. Those grounds give rise to the four issues argued in these proceedings:

(1) Whether the prosecutor is an "alien" within the meaning of s 51(xix) of the Constitution and therefore subject to an exercise of power under s 501(3) of the *Migration Act* 1958 (Cth) to cancel his visa, rendering him liable to removal from Australia ("the aliens issue").

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238 Transcript of proceedings, 7 December 2000 at lines 12208-12225.

239 *Re Minister for Immigration and Multicultural Affairs; Ex parte Taylor* was heard by Callinan J on 16 March 2000. On 12 April 2000, Callinan J, by consent, made absolute orders for prohibition and certiorari in respect of the Minister's decision of 4 September 1999.

240 The visa class said to be applicable to the prosecutor was that known as "transitional (permanent) visa", being the continuation of certain visas or entry permits granted before 1 September 1994: Migration Reform (Transitional Provisions) Regulations (Cth), reg 4. Another class of permanent visa, suggested to be applicable, was the "absorbed person visa", permitting the recipient to remain in, but not to re-enter, Australia: *Migration Act* 1958 (Cth), s 34(1).

241 Reasons of McHugh J at [92]-[97]; reasons of Callinan J at [351]-[357].

242 As to the relevant provisions of the *Migration Act*, see reasons of Gaudron J at n 13, [23]-[27]; reasons of McHugh J at [94], [96] and the reasons of Callinan J at [364]-[366]. As to the *Ministers of State Act* 1952 (Cth) and *Ministers of State and Other Legislation Amendment Act* 2000 (Cth), see the reasons of Gummow and Hayne JJ at [183].

(2) (a) Whether the federal law and instrument of appointment pursuant to which the respondent was appointed Parliamentary Secretary to the Minister were authorised by s 64 of the Constitution and lawfully constituted the respondent "the Minister" for the purposes of the *Migration Act*; and

(b) Whether, if the respondent was "the Minister" for such purposes, she was "the Minister personally" within s 501(4) of the *Migration Act*, a requirement for the exercise of the power afforded to the Minister under s 501(3) ("the Assistant Minister issue").

(3) (a) Whether the jurisdictional fact that the respondent, as Minister, be reasonably satisfied that it was "in the national interest" that the prosecutor's visa be cancelled could not be established on the facts proved; or

(b) Whether the respondent, as Minister, in purporting to cancel the prosecutor's visa "in the national interest" acted in a way that was so unreasonable that no reasonable repository of the power could have made that decision so that the respondent exceeded any power she had under s 501(3) of the *Migration Act* in making the decision affecting the prosecutor ("the national interest issue").

(4) Whether, in making that decision, the respondent took into account an irrelevant consideration in deciding to proceed under s 501(3) of the *Migration Act*, namely the allegedly expressed preference of the Minister to proceed under that sub-section ("the Minister's preference issue").

The aliens issue

258 *Priority of the issue*: It is appropriate to deal first with the prosecutor's argument that he was not, at the time of the respondent's decision under s 501(3) of the *Migration Act*, an "alien". If that argument is correct, it places the prosecutor beyond the power of the Parliament to enact a law providing, in effect, for his deportation and removal from the Australian community. The respondent accepted that the circumstance that the prosecutor "may have been '*absorbed into the Australian community*'" (emphasis in original) meant that he was no longer an immigrant. He was thus beyond the reach of federal legislation resting on the constitutional head of power with respect to "immigration"[243]. This

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243 Constitution, s 51(xxvii).

concession was properly made, both as a matter of law[244] and as a matter of fact[245].

259 Nevertheless, whatever may have been the case earlier, the *Migration Act* now rests for its constitutional validity, in relevant respects, upon the additional power conferred on the Federal Parliament to make laws with respect to "naturalization and aliens"[246]. On this basis, contrary to its predecessors, and even to its own earlier expression[247], the *Migration Act* now relies on the distinction between "citizens" and "non-citizens". Its stated purpose is to "regulate, in the national interest, the coming into, and presence in, Australia of non-citizens"[248].

260 The prosecutor, a non-citizen, asserted that, despite this change, he was not an "alien". If he could make this submission good, the *Migration Act*, and specifically s 501, would have no constitutional applicability to him. As I shall later explain, no real attempt was made to support the validity of s 501 by reference to other heads of constitutional power[249]. If, therefore, the prosecutor could succeed on this first challenge, he was entitled to succeed in the proceedings. As the *Migration Act* presently stands (and perhaps as it could ever conceivably be expressed) he would be beyond the power of the Minister, the respondent (as Assistant Minister) and the Department of Immigration and Multicultural Affairs ("the Department") to remove him from Australia, as they had so persistently attempted to do.

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244 *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 64-65, 109-110, 137 ("*Ex parte Walsh and Johnson*"); *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 295.

245 Having regard to the 34 years that had elapsed between the arrival of the prosecutor in Australia and the Assistant Minister's decision, together with his upbringing in Australia, his familial and other connections with Australia and the fact that he had never left Australia following his arrival as a child.

246 Constitution, s 51(xix).

247 The replacement of the term "alien" with "non-citizen" was effected by the *Migration Amendment Act* 1983 (Cth), s 4, which came into operation on 2 April 1984.

248 See the *Migration Act*, s 4.

249 Such as the external affairs power (s 51(xxix)) or the implied nationhood power: cf *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 614-616 [221]-[224]. See my reasons below at [316]-[317].

261 The foregoing are reasons why this Court must deal with the aliens issue. It is raised by a party with an interest to do so. Additionally, it is of considerable importance to the many thousands of people living in Australia who are non-citizen British subjects and who are thus in the same class as the prosecutor. On the view of the Constitution propounded by the respondent, they are all subject to present or future laws which could authorise, or require, their removal, individually or as a class, from Australia where they have not become Australian citizens.

262 *A constitutional word*: The word "alien", appearing in s 51(xix) of the Constitution, is necessarily a constitutional word. It must be construed according to its meaning, as derived from its context. That context is, in part, provided by the language, and apparent purpose, of other provisions of the Constitution. In part, it is provided by the historical context against the background of which the Constitution is to be read and the changing circumstances to which it has had to be applied since its adoption in 1900.

263 A number of the provisions of the Constitution must first be noticed. Nowhere in the document is the status of "citizen" expressed except in s 44(i) which concerns the disqualification from election as a Senator or a Member of the House of Representatives of a "subject or a citizen of a foreign power"[250]. Elsewhere, the Constitution is silent about citizenship although, as the power with respect to "naturalization" has developed[251], it has come to be used for the acquisition of Australian citizenship[252]. The concept of citizenship in Australia has evolved in harmony with the emergence of Australia to full nationhood and independence[253].

264 Several provisions in the Constitution relating to nationality reflect the circumstances of 1900. Before and at that time, and long afterwards, the nationality of Australians was that of British subject. This is reflected in s 34 which provides, relevantly, that[254]:

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250 See *Sue v Hill* (1999) 199 CLR 462.

251 Constitution, s 51(xix).

252 *Nationality and Citizenship Act* 1948 (Cth) (later called the *Australian Citizenship Act*).

253 Brazil, "Australian Nationality and Immigration", in Ryan (ed) *International Law in Australia*, 2nd ed (1984), Ch 8; cf *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 25-26.

254 Constitution, s 34. The qualifications of a Senator are the same as those of a Member of the House of Representatives: Constitution, s 16.

> "Until the Parliament otherwise provides, the qualifications of a member of the House of Representatives shall be …
>
> (ii) [he or she] 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."

Reference is made elsewhere in the Constitution to the same status. Thus, in s 117, it is provided that: "A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State." This provision should not be regarded as having been overtaken by events and rendered a dead letter[255]. It is a provision of continuing application and effectiveness[256].

265 In addition to the foregoing references to the status of "a subject of the Queen" (equivalent to "British subject"), two other aspects of the Constitution may be noticed. First, the Note to the Schedule to the Constitution, being the oath or affirmation of allegiance to the monarch, provides that, in the place of Her Majesty Queen Victoria there mentioned, "[t]he name of the King or Queen of the United Kingdom of Great Britain and Ireland for the time being is to be substituted from time to time". Secondly, the very many references to the Queen throughout the Constitution, and to the Queen and the Crown in the preamble and covering clauses of the Imperial Act (which helped give birth to the Constitution[257]), make plain the nature of the polity thereby established. It is a constitutional monarchy under the Crown for a people who had "agreed to unite in one indissoluble Federal Commonwealth"[258] under legal conditions whereby they owed allegiance to an identified monarch whom they accepted as their own.

266 The foregoing textual considerations are reinforced by an awareness of the history of the provisions. The Constitution was framed by people well aware of their status as British subjects but also familiar with the Constitution of the United States which had, in several of its provisions, referred to the status of citizenship[259]. The legislative power with respect to "naturalization and aliens"

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255 As in the case of s 74 of the Constitution (appeals to the Privy Council): see *Kirmani v Captain Cook Cruises Pty Ltd [No 2]* (1985) 159 CLR 461 at 465.

256 eg *Street v Queensland Bar Association* (1989) 168 CLR 461.

257 *Commonwealth of Australia Constitution Act* 1900 (Imp) (63 & 64 Vict c 12).

258 Preamble to the *Commonwealth of Australia Constitution Act*.

259 eg Art IV, s 2; Fourteenth Amendment (i).

was contained in the original 1891 draft for the Constitution[260]. It was doubtless borrowed from the *Federal Council of Australasia Act* 1885 (Imp) and the *British North America Act* 1867 (Imp) where it had appeared in like terms[261]. Adaptations of the same head of power have been included in numerous post-independence federal constitutions of the Commonwealth of Nations[262].

267 There was some debate during the Australian Constitutional Conventions of the 1890s as to whether the word "citizen" should be included in the Constitution[263]. However, in the words of Quick and Garran, "[w]hatever be the reason, rightly or wrongly, the term 'citizen' has been rejected and does not appear in the Constitution"[264]. Where nationality was referred to in the text, it denoted British nationality. To this extent, when it came into force, the Constitution reflected the political realities of that time[265]:

> "In their political relations, as subjects of the Queen, the people are considered as inhabitants and individual units of the Empire over which Her Majesty presides. That is the widest political relationship known to British law. 'I am a British subject,' is equal in practical and Imperial significance to the proud boast of the Roman '*civis Romanus sum*'.

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260 See Pryles, *Australian Citizenship Law* (1981) at 1.

261 *British North America Act* 1867 (Imp) (now Canadian Constitution), s 91(25); *Federal Council of Australasia Act* 1885 (Imp), s 15(i). The latter Act was repealed by the *Commonwealth of Australia Constitution Act*, s 7.

262 See eg Constitution of India, Art 246, Seventh Sched, List I – Union List, par 17 referring to "Citizenship, naturalisation and aliens"; see also Constitution of Malaysia, Art 5(5) referring to "enemy alien", and Art 74(1), Ninth Sched, List I – Federal List, par 5 referring to "Federal citizenship and naturalization; aliens".

263 In the 1898 Convention Dr John Quick proposed that the Constitution should confer power on the Federal Parliament to make laws with respect to "Commonwealth citizenship" or alternatively contain a definition of citizenship. The proposal was defeated by 21 votes to 15. Presciently, an apprehension was expressed that, under such a power, the Parliament might affect the rights of natural-born subjects and even withdraw their birthright. See *Official Record of the Debates of the Australasian Federal Convention*, Third Session, Melbourne (1898), vol 2 at 1750-1768; Pryles, *Australian Citizenship Law* (1981) at 9.

264 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 957.

265 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 957.

> Subjects of the Queen, or British subjects, have rights, privileges, and immunities secured to them by Imperial law ... The whole naval and military strength of the Empire, and the assistance of its highest courts of justice, may be invoked for the vindication of those rights, privileges, and immunities."

268 As will be shown, this supranational concept of British nationality survived well into the latter part of the twentieth century. It did so both in popular ideology and, more relevantly for present purposes, in the express status recognised by Australian law. It was certainly the position obtaining when the prosecutor arrived in Australia in 1966. It remained the case thereafter until the changes brought about in the 1980s.

269 *The people and "electors"*: There were other expressions in the Constitution to which the prosecutor called attention as lending colour to the meaning of the word "alien" in s 51(xix). These related to the several references to "the people" of Australia who, it was suggested, afforded the touchstone by reference to which "aliens" were defined for constitutional purposes. Thus the Constitution is stated to be binding on the "people of every State and of every part of the Commonwealth"[266]. The Senate is to be chosen "by the people of the State"[267] and the members of the House of Representatives are to be elected by "the people of the Commonwealth"[268].

270 The Constitution also envisages a status of "elector"[269]. For the alteration of the text of the Constitution it is necessary to have the affirmative vote of "the electors qualified to vote for the election of members of the House of Representatives" in each State and Territory[270]. Thus, "electors" enjoy a specially privileged standing among "the people of the Commonwealth". They do so, not by virtue of a State law, or of federal law, but by virtue of the Constitution itself. Somehow, for the prosecutor to fail, the notion of "alien", appearing in that document, would have to be reconciled with the concept of a polity in relation to whom some "people" and "electors" (of whom he was one) were designated "aliens". Although that might happen, it would certainly be an odd result that a constitutional "elector" and a person who, by law, has long been one of the "people of the Commonwealth" could at the same time be an "alien", liable to visa imposition, cancellation and involuntary removal from Australia.

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266 *Commonwealth of Australia Constitution Act*, s 5.

267 Constitution, s 7.

268 Constitution, s 24.

269 Constitution, s 30.

270 Constitution, s 128.

271 Quick and Garran suggested, in 1901, that "the people of the Commonwealth" represented "the nearest approach in the Constitution to a designation equivalent to citizenship"[271]. Those authors thought the expression was "intended to indicate membership of the Federal community"[272]. Territorially, they observe, such people "may be called Australians, but constitutionally they are described as British subjects or subjects of the Queen"[273]. Relying on these suggestions, the prosecutor submitted that the only way to define "alien", for constitutional purposes, was to conceive a status in relation to which the person concerned was "alien". By this test, the prosecutor argued, a person like him could not be an "alien" in relation to the Australian nation, to other constitutional "electors" or to "the people of the Commonwealth". Attempts by legislation or regulation, retrospectively, to convert him from a non-alien to an alien could therefore not succeed. Certainly, they could not succeed without the clearest possible legislation effecting such a change and provision to him of access to a court and due process of law to determine the lawfulness of the alteration in his particular case.

272 *Early common law on aliens*: The assumption, reflected in the Constitution, of a dichotomy between "aliens" (as a subject of federal legislative power) and British subjects (as the original form of Australian nationality) is given support both by the common law that existed before the Constitution and by statute law, British and Australian, that shortly followed it.

273 By the common law, an alien was one "who is born out of the allegiance of our sovereign lord the king"[274]. According to authority, the word "is a legal term ... It implies being born out of the liegeance of the king, and within the liegeance of some other state"[275]. In recognition of the way in which the common law had mixed notions of allegiance to the person of the monarch, or

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271 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 957.

272 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 957.

273 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 957.

274 Co Litt 128b, 129a; *Calvin's Case* (1608) 7 Co Rep 1a [77 ER 377]; *Collingwood and Pace* 1 Ventris 413 at 422 [86 ER 262 at 267-268]; *Doe d Thomas v Acklam* (1824) 2 B & C 779 [107 ER 572].

275 *Daubigny v Davallon* (1794) 2 Anst 462 at 468 [145 ER 936 at 937-938]; see also *In re Stepney Election Petition; Isaacson v Durant* (1886) 17 QBD 54.

the Crown and territory over which the Crown had dominion, it made few exceptions to the principle[276]. Blackstone explained that "an alien is one who is born out of the king's dominions, or allegiance ... The *Common Law ... stood absolutely so*, ... 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'"[277].

274 Identifying who was an "alien", and who a British subject, was often important in the century before the Australian Constitution was adopted. This was because of the limitations which the common law was sometimes held to impose upon the ownership of real property by aliens and access to the legal remedies incident thereto[278]. Thus, in the United States of America, following the Declaration of Independence of 1776, it frequently became essential to differentiate between citizens of the United States and aliens[279]. Amongst aliens it was later significant to identify those who were British subjects because of the terms of the treaty between the United States and Great Britain of 1794 by which British subjects, by virtue of their allegiance to the King, enjoyed privileges of holding land in the United States that had previously been owned by them[280]. For these purposes, persons born in British dominions and colonies outside Britain itself were uniformly regarded as "aliens". However, they were all treated, equally uniformly, as British subjects[281].

275 There seems little doubt that, in 1900, in the view of the law applicable in Australia, a British subject was one who owed allegiance to the Queen. This meant the Queen of the United Kingdom. At that time, and for decades thereafter, the view prevailed in the law that the Crown was one and indivisible throughout the British Empire[282]. Allegiance to the Crown, and the monarch who was for the time being its visible and personal embodiment, was the common

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276 *Daubigny v Davallon* (1794) 2 Anst 462 at 468 [145 ER 936 at 937-938].

277 Cited in *Ex parte Dawson* NY 3 Bradf Sur 130 at 136 (1855).

278 *Jackson v Wright* NY 4 Johns 75 at 78-79 (1809).

279 eg *Hollingsworth v Duane* 12 Fed Cas 356 at 358 (1801).

280 *Jackson v Wright* NY 4 Johns 75 at 78-79 (1809).

281 eg *Kelly v Harrison* 1 Am Dec 154 at 156 (1800); *Hollingsworth v Duane* 12 Fed Cas 356 at 358 (1801); *The Inhabitants of Manchester v The Inhabitants of Boston* 16 Mass 230 at 235 (1819).

282 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 152.

element of nationality shared by all British subjects, including those born in Australia.

276 It would be a distortion of history to rewrite these legal and political realities as they existed in 1900 and as they found reflection in the text of the Australian Constitution. Within that document, at least at 1900, the repeated references to "subject of the Queen" represented the precise opposite of "alien". At that time, by the common law and the then understanding of the Constitution, there is no possible doubt that a "subject of the Queen", wherever born and however owing that allegiance, was not and could not be an "alien" for Australian legal purposes. If the criterion for interpreting the Constitution is the meaning attributed to a word, particularly a technical legal word, in 1900 understandings of that word, a person owing allegiance to the Crown and the monarch of the United Kingdom could not, constitutionally, be an "alien" in Australia[283]. However, in my view, 1900 understandings are an important starting point but by no means the end of the inquiry[284].

277 *Post-1901 statutes*: That the Constitution drew the foregoing delineation is reflected in countless federal statutes enacted under legislative powers conferred by the Constitution.

278 Such statutes included some which were concerned with aspects of immigration, naturalization, aliens, electoral and other matters. The concept of the status of a British subject, common throughout the Empire, was one recognised by law and upheld by the government and the Privy Council[285] in the United Kingdom. However, at the time of Federation, the people of the Commonwealth also attached high importance to the exclusion from Australia of "non-white" people. Before Federation, the colonists had enacted laws to this end. They devised means for maintaining and extending such laws federally, including by incorporating in the Constitution the legislative power over immigration[286]. Such a power was needed because, for this purpose, the legislative power with respect to "aliens" would have been insufficient. Many British subjects were "non-white". Yet they could not be excluded at the borders

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283 Pryles, *Australian Citizenship Law* (1981) at 20 concerning attempts to establish a uniform law of nationality throughout the British Empire and Dominions.

284 *Grain Pool (WA) v The Commonwealth* (2000) 74 ALJR 648 at 665 [90]; 170 ALR 111 at 133-134.

285 *Cunningham v Tomey Homma* [1903] AC 151 at 156-157 concerning the status of a Japanese native in British Columbia who had become a British subject through naturalization; see also *Quong Wing v The King* (1914) 18 DLR 121.

286 Constitution, s 51(xxvii).

of Australia on the ground that they were "aliens". Had the word "alien" possessed in 1900 the meaning asserted for it in these proceedings by the respondent there would, logically, have been no need for a power over "immigration"[287]. The aliens power, as applicable to every non-Australian subject or citizen, native born or naturalized, would have sufficed to sustain all conceivable laws on migration or migrants. Migrants, not born in Australia, unless naturalized, would forever be "aliens" and subject to federal regulation, including expulsion, on that ground alone.

279 It was precisely because the power over aliens did not extend to British subjects that the supplementary legislative power was needed in the Constitution. That power, once included, was quickly used. The seventeenth statute enacted by the new Federal Parliament was the *Immigration Restriction Act* 1901 (Cth). Relying on the immigration power, rather than the aliens power, that Act prohibited immigration into the Commonwealth of certain persons[288], without differentiation as to nationality, including those who failed a dictation test in a European language[289]. This was the expedient that had been introduced to circumvent the opposition of the British Colonial Office to differentiation by the Australian settlers, their parliaments and governments, among British subjects based on their race and skin colour. Although "members of the King's regular land or sea forces"[290] were exempted from the prohibition on immigration, as were those "duly accredited to the Government of the Commonwealth by the Imperial or any other Government or sent by any Government on any special mission"[291], there was no general exemption from the *Immigration Restriction Act* on the basis of nationality, British or otherwise. Clearly, therefore, at the foundation of the Commonwealth, British subjects could be excluded from Australia, including on racial grounds.

280 The *Immigration Restriction Act* contained the first federal provision for deportation from Australia. Any person who was convicted of any crime of violence against the person and who, after the expiration of their sentence, failed a dictation test in a European language, was liable to be deported by order of the Minister. This power applied only to "[a]ny person who is not a British subject

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287 *R v Macfarlane; Ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518 at 556-557.

288 *Immigration Restriction Act* 1901 (Cth), s 3(a)-(g).

289 *Immigration Restriction Act*, s 3(a): see *R v Carter; Ex parte Kisch* (1934) 52 CLR 221; *R v Wilson; Ex parte Kisch* (1934) 52 CLR 234. The test remained part of the law until the enactment of the *Migration Act* in 1958.

290 *Immigration Restriction Act*, s 3(i).

291 *Immigration Restriction Act*, s 3(l).

either natural-born or naturalized under a law of the United Kingdom or of the Commonwealth or of a State"[292]. This provision was thus a clear indication, from the start, that British subjects, once they entered Australia and were in the Commonwealth, enjoyed a protected position. That protection derived, in effect, from the fact that they shared the nationality of the people of the Commonwealth, in the sense that they shared a common allegiance. They were thus entitled to the protection of the Crown in its Australian dominion. They were not "aliens".

281 A similar view of the apposition between British subjects and aliens can be found in the *Naturalization Act* 1903 (Cth)[293]. This provided that:

> "A person to whom a certificate of naturalization is granted shall in the Commonwealth be entitled to all political and other rights powers and privileges and be subject to all obligations to which a natural-born British subject is entitled or subject in the Commonwealth".

Naturalization, the process by which a person changes status from being an alien to non-alien[294], was thus treated as inapplicable to, and unnecessary for, "a natural-born British subject". Neither aspect of the head of power in s 51(xix) of the Constitution applied to such a person.

282 By the middle of the twentieth century, a number of relevant events had occurred which ultimately found reflection in federal legislation[295]. These included the passage, and Australian adoption, of the *Statute of Westminster*[296]; the emergence to effective independence of the several self-governing dominions of the Crown, including Australia; the perils of the Second World War and post-War dangers which sharpened Australia's separate national consciousness; and the not unrelated post-War migration programme which extended well beyond 1966 when the prosecutor arrived, as a boy, with his family.

283 In 1947 the Federal Parliament enacted the *Aliens Act*. Although legislative definitions cannot control the meaning of "alien" where appearing in the Constitution, it is worth noting that the *Aliens Act* picked up, in 1952, the

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292 *Immigration Restriction Act*, s 8.

293 s 8.

294 *Union Colliery Co of British Columbia v Bryden* [1899] AC 580 at 585-587 by reference to *British North America Act* 1867 (Imp), s 91(25).

295 Pryles, *Australian Citizenship Law* (1981) at 24, 29.

296 The *Statute of Westminster* 1931 (UK) was adopted by Australia in the *Statute of Westminster Adoption Act* 1942 (Cth).

definition of "alien" contained in the *Nationality and Citizenship Act* 1948 (Cth) as "a person who is not a British subject, an Irish citizen or a protected person"[297]. The *Nationality and Citizenship Act* 1948 also defined "a British subject" for the purposes of Australian law as "a person who, under this Act, is an Australian citizen or, by an enactment for the time being in force in [a specified country of the Commonwealth of Nations] is a citizen of that country"[298]. It also provided for the acquisition of Australian citizenship at birth[299], by descent[300] and, in the case of a British subject or Irish citizen, by a process of registration[301] without obligation to swear an oath of allegiance. However, in the case of an "alien", naturalization was required[302], as was the taking of an oath of allegiance to the King[303].

284 The foregoing recognition of the special, persisting status in Australia of British subjects (and, anomalously after 1949, Irish citizens) was continued by the *Migration Act*[304]. That Act introduced enlarged powers of deportation of persons from Australia. In the case of "any alien" it was sufficient that the person should have been sentenced to imprisonment for one year or longer[305] or have engaged in conduct which appeared to the Minister to warrant deportation[306]. In the case of "an immigrant" (and hence including possibly a British subject, Irish citizen or protected person who was not an "alien" and had not been absorbed into the Australian community) deportation could still be ordered if the immigrant was convicted of an offence and been sentenced to imprisonment for one year or longer within five years of entry into Australia[307]

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297 *Nationality and Citizenship Act* 1948, s 5(1); *Aliens Act* 1947 (Cth), s 4(1) as amended by *Aliens Act* 1952 (Cth), s 3.

298 s 7.

299 *Nationality and Citizenship Act* 1948, s 10.

300 *Nationality and Citizenship Act* 1948, s 11.

301 *Nationality and Citizenship Act* 1948, ss 12, 13.

302 *Nationality and Citizenship Act* 1948, s 15.

303 *Nationality and Citizenship Act* 1948, s 16, Sched 2.

304 s 5(1) (as originally enacted).

305 *Migration Act*, s 12 (as originally enacted).

306 *Migration Act*, s 14(1) (as originally enacted).

307 *Migration Act*, s 13 (as originally enacted).

or, within that time, was engaged in conduct which appeared to the Minister to warrant deportation[308]. The differentiation in treatment, relevantly, of British subjects can only be explained upon the assumption, as at 1958, that they were not aliens. To deport them, the immigration power was required. But by the clear authority of this Court, that power would only extend for the time prior to the absorption of the immigrant into the Australian community[309], fixed arbitrarily in the *Migration Act* at five years.

285 In 1973, the citizenship law was again amended to eliminate the difference in the methods of acquisition of Australian citizenship by British subjects and aliens[310] and to require all persons granted Australian citizenship, including British subjects, to swear allegiance to the Queen in her capacity as "Queen of Australia"[311].

286 In 1983 the *Migration Act* was again amended, this time to substitute the definition of "non-citizen" for "alien", being a person "who is not an Australian citizen"[312]. The amendments so introduced came into effect on 2 April 1984 and the definition remains in the *Migration Act*. A further 1984 amendment to the *Australian Citizenship Act*, deleting all reference to the "status of British subject" and the special position of British subjects, took effect on 1 May 1987[313]. It is pursuant to that change that the purported attempt has been made to alter the rights of non-citizen British subjects in Australia in relation to orders made by or for the Minister for their permanent removal from Australia.

287 *Electoral and other federal laws*: The early special status of British subjects in Australia, who were neither born in Australia, nor descended from or adopted by anyone born in Australia, endured long after the passage of the *Nationality and Citizenship Act* 1948 when the concept of Australian citizenship was introduced for the first time. This is demonstrated by their continued electoral rights and duties. In 1981, when the *Commonwealth Electoral Act* 1918

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308 *Migration Act*, s 14(2) (as originally enacted).

309 *Ex parte Walsh and Johnson* (1925) 37 CLR 36.

310 *Australian Citizenship Act* 1973 (Cth), ss 14, 15, 16.

311 *Australian Citizenship Act*, Sched 2, as amended. The title had been introduced by the *Royal Style and Titles Act* 1973 (Cth).

312 *Migration Act*, s 5 as amended by the *Migration Amendment Act* 1983 (Cth), s 4.

313 The amendments to the *Australian Citizenship Act* taking effect on 1 May 1987 are explained in *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 195-196 per Gaudron J ("*Nolan*").

(Cth) was amended[314] to confer the entitlement to enrol and to vote on "Australian citizens" as such, there was no immediate attempt by the Parliament, retrospectively, to deprive non-citizen British subjects, who were already on the electoral roll, of the constitutional status of an "elector" or the privilege and obligation to vote in federal and State elections and in referenda for the alteration of the Constitution[315].

288 By s 93 of the *Commonwealth Electoral Act*, those persons entitled to enrol are all persons who have attained 18 years of age and who are either Australian citizens or "persons (other than Australian citizens) who would, if the relevant citizenship law had continued in force, be British subjects within the meaning of that relevant citizenship law and whose names were [on the roll] immediately before 26 January 1984"[316]. This was the formula by which the alteration of the *Migration Act*, in its qualification of the acquisition of Australian citizenship, was reflected in respect of the "electors" of the Commonwealth.

289 In addition to his reliance on the foregoing statutes as confirming his exclusion from the constitutional expression "alien", the prosecutor also referred to the special duties cast on British subjects ordinarily resident in Australia to register under the *National Service Act* 1951 (Cth)[317]. Whilst it is true that that Act also imposed duties of registration on persons "not being British subjects but being persons ordinarily resident in Australia" who otherwise qualified, the treatment in that Act of "British subjects", without reference to those of Australian birth or descent or adoption and those outside such categories, is yet another indication, well into the twentieth century, that the classification of British subject was regarded as applicable to persons such as the prosecutor without differentiation.

290 The legislative provisions that I have outlined therefore bear out the prosecutor's submission that people who, like him, arrived as British subjects in Australia in the 1960s, although not citizens and never becoming citizens, were treated by Australian law as members of a special class of Australians. At least until the changes in federal law enacted in 1984, coming into full effect in 1987,

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314 *Statute Law (Miscellaneous Amendments) Act* 1981 (Cth), s 32.

315 Voting by electors is compulsory at each election: *Commonwealth Electoral Act*, s 245(1). The word "elector" is defined in s 4 of that Act to mean "any person whose name appears on a Roll as an elector". By s 93(1)(b)(ii) persons such as the prosecutor were on such a roll. At the time of the prosecutor's enrolment, such enrolment was compulsory: s 101(1).

316 *Commonwealth Electoral Act*, s 93(1)(b)(ii).

317 s 10(1)(a). The Act has since been repealed.

they were treated as full and equal members of the Australian community and nation. They shared rights and duties akin to those which, following the introduction of the concept of citizenship in 1948, Australian citizens enjoyed as such. Their status might, by 1987, have become in some respects anomalous. That anomaly has now been terminated in most, but not all, matters. However, against this background of history and law, the question remains whether it was constitutionally competent for the Parliament, under the *Migration Act*, to provide, in effect, for the permanent removal from Australia of such a British subject who had arrived before 1987, on the basis that the person always was, or had somehow become, an "alien".

291 *Overseas decisions*: Against the inference of a special status, to which the foregoing Australian considerations shepherd the mind, two lines of judicial authority were mentioned in argument. The first involved holdings by United States Circuit Courts that the provision by State law for[318], or the fact of voting in, federal, State and county elections[319], could not confer citizenship of the United States on a citizen or subject of a foreign State. United States citizenship could only be secured under the naturalization laws of that country. Until naturalization, the non-citizen would remain an alien.

292 This authority is irrelevant to the Australian position. After independence in 1776, there was a complete severance between the United States and the Crown for the purposes of nationality. The position in Australia was the opposite, as the cited constitutional and statutory provisions make clear. For persons in the class of the prosecutor, who had arrived in Australia and enrolled before the stipulated date of 26 January 1984[320], what was involved was not an over-generous and exceptional grant to a foreigner of the privilege of voting. It was the imposition, uniformly throughout the nation, by federal law, of undifferentiated rights and duties on a person not regarded as a foreigner but treated, for constitutional and statutory purposes, as an equal member of the Australian community and nation.

293 Secondly, mention was made of a decision in England in 1920 by which a natural born German (Prussian) subject, naturalized in Australia as a subject of the King, was denied recognition in the United Kingdom as a British subject and treated as an alien in that country[321]. This decision is also distinguishable. The Australian naturalization law, in terms, limited the operation of a certificate of

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318 *Lanz v Randall* 14 Fed Cas 1131 (1876).

319 *City of Minneapolis v Reum* 56 Fed Rep 576 (1893).

320 *Commonwealth Electoral Act*, s 93(1)(b)(ii).

321 *Markwald v Attorney-General* [1920] 1 Ch 348.

naturalization to the provision of political and other rights, and the imposition of obligations, "in the Commonwealth"[322], that is, in Australia. It did not purport to operate throughout the British Empire. That would have been inconsistent with the then prevailing notion of the respective legislative functions of the Imperial and of the Australian Parliaments, as well as the territorial limitations governing laws made by a legislature such as the Federal Parliament and the then prevailing rules of private international law.

294 In approaching the meaning of "aliens" in the Constitution, this Court is not today governed in any way by the opinions of courts of other countries. In giving meaning to the repeated references in the Constitution to "a subject of the Queen" and to Australian legislation relating to a "British subject", it is essential to recognise that, in important respects, Australia gave that status its own particular statutory meaning for its own purposes as a country of immigrants, at first deriving principally from the British Isles. Indeed, in due course, a claim for international recognition of the particular Australian status of "British subject" was expressly disavowed[323].

295 *Contrary decisions of this Court*: In two decisions of this Court a view of the constitutional power over "aliens" has been adopted which appears contrary to that urged for the prosecutor. In *Pochi v Macphee*[324], Gibbs CJ, with the concurrence of Mason J and Wilson J concluded 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". However, that decision is not conclusive of the present issue. Mr Pochi had been born in Italy in 1939 and did not become an Australian citizen by naturalization. He was not by birth, descent or adoption a British subject. His case did not, therefore, determine the point now in contention.

296 However, in *Nolan*[325] the issue was squarely presented for decision. Mr Nolan had been born in the United Kingdom. It was accepted that he was a citizen of that country and therefore a subject of the Queen. He came to Australia just before his tenth birthday. He lived in Australia, continuously, for almost eighteen years, half of them in prison. A Ministerial order to deport him was challenged for want of legislative power to support it in his case. The legislative power propounded to validate the *Migration Act*, in its application to

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322 *Naturalization Act* 1903 (Cth), s 8.

323 Brazil, "Australian Nationality and Immigration", in Ryan (ed) *International Law in Australia*, 2nd ed (1984) at 222.

324 (1982) 151 CLR 101 at 109-110 ("*Pochi*").

325 (1988) 165 CLR 178.

Mr Nolan, was that over aliens. His argument that he was not an alien because he was a British subject was rejected by a majority of this Court[326]. Gaudron J alone dissented[327]. The majority took the issue to be concluded by the decision in *Pochi*. However, as I have explained, the status of the deportee in that case was quite different; a matter acknowledged in passing by the majority[328].

297 The majority in *Nolan* were influenced by the undoubted emergence of Australia, and other like dominions of the Crown, as "independent nations with a distinct citizenship of their own"[329]. They were also influenced by the changes in federal legislation and in particular the deletion from the *Australian Citizenship Act* 1973 (Cth)[330] of the definition of "alien" in terms that excluded British subjects[331]. However, in this respect, the majority apparently overlooked the words of Gibbs CJ in *Pochi*[332]:

> "[T]he 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".

298 Before naturalization, the word "alien", ordinarily understood, undoubtedly applied to Mr Pochi. It was much less certain that it applied to Mr Nolan. However, the majority in *Nolan* took the question of principle to have been determined by "plain and unambiguous words" in *Pochi*[333]. In dissent, Gaudron J considered that the application of the constitutional power with respect to aliens had not been fully explored in argument in the earlier case. With respect, her Honour was quite correct.

299 In these proceedings, the prosecutor sought to distinguish the ratio decidendi of *Nolan* on various grounds. He emphasised that no reference had

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326 Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ.

327 *Nolan* (1988) 165 CLR 178 at 187.

328 *Nolan* (1998) 165 CLR 178 at 184-185.

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

330 *Australian Citizenship Amendment Act* 1984 (Cth).

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

332 (1982) 151 CLR 101 at 109.

333 (1988) 165 CLR 178 at 185.

been made, in the majority's analysis in *Nolan*, to the status of Mr Nolan as an "elector" of the Commonwealth, which was the linchpin of his contention that such a person could not be an "alien" in Australia for constitutional or other legal purposes[334]. I regard such attempts to distinguish *Nolan* as valiant but unconvincing. If that decision stands, it is fatal to the prosecutor on his first point. The prosecutor sought leave, if necessary, to reargue the matter so decided in *Nolan*. If leave is required[335], I would grant it.

300 *Nolan should be overruled*: The reasoning of Gaudron J in *Nolan* is compelling. With respect, I consider that of the majority to be unconvincing. The basic flaw in the latter was the assumption that the terms "non-citizen" and "alien" were synonymous. The gradual recognition of the divisibility of the Crown, the emergence to independent nationhood of countries such as Australia and the recognition (including in Her Majesty's title) of a separate capacity as Queen of Australia do not permit the erasure of established historical, constitutional and legal facts.

301 Nor do these developments allow the retrospective alteration of the status of persons in the class of the prosecutor from non-alien to alien. Least of all do they do so without legislation that unambiguously expresses a purpose to effect such a radical change and providing those affected with the opportunity to be heard before such a change is made in their cases. The proposition that such change was competent to the Parliament, under the aliens power, must be tested not only by reference to the prosecutor's case but by reference to all other non-citizen British subjects who may have lived in Australia even longer and have worked, voted and raised children here at the invitation of Australia under conditions promising, up to the 1980s, constitutional and legal treatment equal to that accorded to Australian citizens.

302 The majority's consideration in *Nolan* of the constitutional and statutory provisions that equated other British subjects with Australian citizens, before the changes brought about in 1984 and 1987, is incomplete and inconsistent. It omits any analysis of the acceptance of such persons, as envisaged by the Constitution[336] as full participants in the Australian political process and the preservation of that status by law that is still in full operation[337]. The

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334 The point was, however, noticed by Gaudron J: *Nolan* (1988) 165 CLR 178 at 191.

335 *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311 at 316; *Philip Morris Ltd v Commissioner of Business Franchises (Vict*) (1989) 167 CLR 399; *Brownlee v The Queen* (2001) 75 ALJR 1180 at 1199-1200 [101]-[107]; 180 ALR 301 at 326-328.

336 Constitution, s 34(ii).

337 *Commonwealth Electoral Act*, s 93(1)(b)(ii).

introduction by statute, and then only in 1948, of the non-constitutional notion of citizenship[338] scarcely justified the retrospective imposition, on a very large class of non-citizen British subjects in Australia, of the constitutional status of alien. Such imposition is especially untenable where members of that class have long since been absorbed amongst the people of the Commonwealth and accorded by them the full civil and political rights and duties of Australian nationality.

303 For the respondent it was conceded, correctly in my view, that there were limits on the power of the Parliament to determine who is to be an alien. That must be so. For example, it would not, in my view, be competent to the Parliament to enact a law declaring that all Aboriginal persons were aliens; or that all persons of Chinese descent in Australia were aliens – although necessarily all such latter persons came to Australia, or were descended from those who came, from outside Australia. If, as this Court has held, the legislative power over immigrants does not, for the purposes of deportation, extend once such persons are absorbed into the Australian community[339], I see no reason of principle why a less protective rule should be applied to persons in the class of British subject migrating to Australia prior to 1987. In the words of Knox CJ in *Ex parte Walsh and Johnson*[340]:

> "[A] person who has originally entered Australia as an immigrant may, in course of time and by force of circumstances, cease to be an immigrant and becomes a member of the Australian community. [He or she] may, so to speak, grow out of the condition of being an immigrant and thus become exempt from the operation of the immigration power."

304 If when that person arrived, he or she was a British subject when that status was accorded constitutional and statutory equivalence to Australian nationality, that person was likewise beyond the operation of the naturalization and aliens power. If such application could be revived in such a person's case, and applied retrospectively, it could (in terms of principle) be revived and applied to other persons and groups within Australia who themselves, or whose families, were made up of immigrants and those descended from, or adopted by, them. A line must be drawn, as it was in *Ex parte Walsh and Johnson*[341]. In my view, that line excludes a person such as the prosecutor. He never was an "alien" for the purposes of the Constitution. At least in his case, when the attempt was made to treat him as an "alien" (if that was the purpose of the *Migration Act*) he

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338 cf Constitution, s 44(i).

339 *Ex parte Walsh and Johnson* (1925) 37 CLR 36.

340 (1925) 37 CLR 36 at 64.

341 (1925) 37 CLR 36.

had been absorbed into the people of the Commonwealth. Once so absorbed, he could not *ex post facto* be deprived of his nationality status as a non-alien[342]. In particular, he was not subject to legislative or executive power to order his deportation, any more than this could be done in the case of another Australian whose nationality status is now that of a citizen. Only after due process of law and a judicial order (as in extradition) may a citizen be involuntarily removed from Australia.

305 *Basis for non-alien status*: The prosecutor propounded two legal bases, in addition to his absorption within the Australian community, to sustain the submission that he was not an alien when the respondent's order was made against him. Primarily, he relied on his inclusion amongst the "people of the Commonwealth" as explained above. I accept that this status, which the prosecutor continues to enjoy as an "elector" of the Commonwealth, makes it unlikely that he is concurrently an "alien". However, it is not necessarily conclusive. Nationality is usually, but not always, a requirement for voting rights[343]. So it is appropriate to consider the prosecutor's second submission.

306 The substantial legal ground, in this second argument, derives from the idea essential to the legal status of alienage. It is an idea of a technical kind. As explained, it is bound up in notions of allegiance and duties of loyalty. In 1900, it is incontrovertible that, in the case of British subjects, such notions drew no distinction between those born overseas and those born in Australia, or descended from or adopted by, natural-born Australians. The issue is whether that situation changed at some unidentified time in the ensuing century, in a way that made a person such as the prosecutor an alien when he arrived in 1966 or susceptible to being retrospectively rendered so at some later time.

307 In *Nolan*, this Court considered that such a change had occurred. But the majority did not explain when, or how, the change had come about. In so far as their decision rested on the change in the Queen's role to that of Queen of Australia and the separate allegiance owed to her in that right (as distinct from in

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342 See also *Korematsu v United States* 323 US 214 (1944); *Afroyim v Rusk* 387 US 253 at 257 (1967); *Vance v Terrazas* 444 US 252 at 263, 272 (1980).

343 *City of Minneapolis v Reum* 56 Fed Rep 576 (1893). In the United Kingdom, certain Commonwealth citizens, who are not citizens of the United Kingdom, are by law entitled to vote for, and sit in, the United Kingdom Parliament. See *Representation of the People Act* (2000) (UK), ss 1, 2, and the *British Nationality Act* 1981 (UK), s 37(1), Sched 3, s 52(6), Sched 7 excluding the *Act of Settlement* (1700), s 3 in relation to citizens of Commonwealth countries and of the Republic of Ireland; see *Halsbury's Laws of England*, 4th ed, reissue, vol 4(2), par 66, n 6, 7.

the right of the United Kingdom[344]), their Honours did not explain why the allegiance owed to the Queen by her subjects in Australia did not itself also change and adapt with the self-same evolution to independence. If that evolution could occur imperceptibly in the case of the British subjects who after 1948 were styled "Australian citizens"[345], there is no reason why the same changes did not occur in the case of other British subjects, permanently resident in Australia prior to 1987, who, in other respects, were treated as having all the privileges and duties equivalent to Australian nationality.

308 The suggestion that one group changed their allegiance and the other did not is unconvincing. Thousands of people in the same class as the prosecutor would doubtless give the same explanation for why they did not seek naturalization as Australian citizens as he did: they did not consider it necessary. Having regard to the circumstances of their migration and the constitutional and legal status which they enjoyed in Australia after their arrival, they were entitled, if arriving before 1987, to so conclude. Once, after their arrival, they were absorbed into the Australian community they could not, retrospectively, be reclassified as "aliens" for constitutional purposes. They were not only beyond the operation of the immigration power. They were also then beyond the aliens power. To the extent that *Nolan* decides otherwise, it should be overruled.

309 There are still further reasons that sustain this conclusion. If it was the purpose of the *Migration Act*, retrospectively, to change the nationality status of the prosecutor from a non-citizen British subject in Australia to an alien, then, because such a change would significantly affect the person's legal rights[346], ordinary principles of statutory construction suggest that this could only be done by legislation expressed in plain terms[347]. Considerations inherent in Ch III of the Constitution also support the argument that any such change might only be effective if made with due notice to the person concerned and the provision of a real opportunity to be heard in a court of law as to whether such a change could or should be made in that person's case.

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

345 And for a time thereafter were also described as "British subjects": see *Commonwealth Electoral Act*, s 93.

346 Including, if removed, the effective right to be an elector and to take part in Australian political affairs as well as the entitlement to be protected from certain forms of discrimination in accordance with s 117 of the Constitution.

347 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 186; *R v Hughes* (2000) 74 ALJR 802 at 816 [65]-[66]; 171 ALR 155 at 173-174; *Durham Holdings Pty Ltd v New South Wales* (2001) 75 ALJR 501 at 506 [28]; 177 ALR 436 at 443.

310 In light of the foregoing, it is unnecessary to examine all of the additional justifications. Nor is it essential to delay long over a question that divided the majority in this Court in *Ex parte Walsh and Johnson*[348]. There, Knox CJ and Starke J were of the view that the offending section of the *Immigration Act* 1901 (Cth)[349] should be read down, so that upon its proper construction it did not apply in a way that would be beyond constitutional power. The other member of the majority, Higgins J, was of the view that, in relation to persons invoking relief in this Court, the provision itself was constitutionally invalid. In my opinion, the former course is the correct one to take. Although s 501 of the *Migration Act* appears on its face to apply to "a person", that is, *any* person, it must be read down to remain within the constitutional power of the Parliament. Such a course may be taken[350]. Taking it preserves the validity of the *Migration Act* in respect of those "persons" to whom it may apply. Such persons will not include Australian citizens or other non-citizen British subjects in the same class as the prosecutor.

311 *Confirmation of the preferred construction*: My conclusion is not antithetical to the basic idea which lay behind the reasoning of the majority in *Nolan*. This was that the Constitution must be construed today with a full recognition of its operation as the basic law of a wholly independent nation, a status which Australia did not fully enjoy in 1900 when the Constitution was adopted. In fact, these proceedings illustrate quite clearly how, in the construction of the Constitution, it is impossible to adopt, even with respect to a technical or legal word such as "alien", the meaning that would have been attributed to that word in 1900[351]. The same is true, in my view, of the expression "subject of the Queen" appearing in s 117 of the Constitution. With the qualification as to the ambit of that expression inherent in my resolution of the present case, I would agree with the majority in *Nolan* that that phrase should be treated "as referring, in a modern context, to a subject of the Queen in right of Australia"[352]. It is entirely consonant with my approach to the interpretation of the Constitution to accept that the meaning of constitutional words vary over time. That meaning is to be ascertained by reference to the essential

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348 (1925) 37 CLR 36.

349 s 8AA.

350 *Acts Interpretation Act* 1901 (Cth), s 15A.

351 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 599-600 [186]-[187]; *Grain Pool (WA) v The Commonwealth* (2000) 74 ALJR 648 at 665 [90]; 170 ALR 111 at 133-134; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 75 ALJR 52 at 79-80 [136]-[137]; 176 ALR 219 at 256-257.

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

characteristics of the concept signified by the words, not by searching, as such, for how the framers in 1900 would have read them or intended them to operate.

312 It is beyond doubt that, in the course of a century, the essential characteristics of an "alien" in the Australian constitutional context changed. The change was parallel to, and arose for much the same reasons as that which led this Court to hold, in 1999, that "a subject or a citizen of a foreign power" in s 44(i) of the Constitution included a subject of the Queen and a citizen of the United Kingdom[353]. Such a conclusion would have been completely unthinkable in 1900. Yet it is natural today. Similarly, I would be prepared to accept that citizens of the United Kingdom, coming to Australia after May 1987, might be treated as "aliens" for constitutional purposes, after notions of Australian citizenship had replaced references to British subjects[354]. At that date, the special privilege accorded to British subjects to be enrolled as electors was also terminated[355]. Some publicity attached to these changes, as it did to certain transitional privileges. The notion of what amounted to Australian nationality under the Constitution had by that time altered.

313 All immigrants, including non-citizen British subjects, arriving in Australia after May 1987 at the latest may be taken to be aware, or could be advised, that the privileged position accorded before that time to non-citizen British subjects was thenceforth terminated. However, such termination did not, in my view, operate retrospectively on the class of persons who arrived before that time. So far as their electoral privileges and duties were concerned, it did not purport to do so[356]. So far as the *Migration Act* was concerned, it did not have the power to do so, at least in respect of immigrants who have been absorbed into the community and are members of the people, and electors, of the Commonwealth.

314 To decide in this way is not to surrender to conclusive legislative definition the meaning of the constitutional word "alien". That cannot be allowed. It is simply to recognise the slow evolutionary change in the meaning of that word, as of all constitutional expressions. It accepts that, by the mid 1980s, the constitutional word had come to be susceptible to a meaning different

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353 *Sue v Hill* (1999) 199 CLR 462.

354 *Migration Amendment Act* 1983 (Cth), s 4. The *Nationality and Citizenship Act* 1948 was amended by the *Australian Citizenship Amendment Act* 1984 (Cth), s 5.

355 S*tatute Law (Miscellaneous Provisions) Act (No 2)* 1985 (Cth), s 2(5), Sched 1, with effect from 1 May 1987: *Australian Citizenship Act*, ss 2(2), 7; *Commonwealth of Australia Gazette*, S68, 24 April 1987.

356 *Commonwealth Electoral Act*, s 93(1)(b)(ii).

from that which it had earlier enjoyed. In a sense, the legislation by that time recognised, and gave effect to, this evolution. But before the legislation, the uniquely privileged status of non-citizen British subjects in Australia, who had migrated to this country, was sustained by the Constitution as well as by federal law.

315 The foregoing propositions can be tested thus. If a change in nationality status could be effected in respect of the prosecutor in the way supported by the respondent in this case, a law could be enacted by the Parliament, even today, expelling all non-citizen British subjects who migrated to Australia before May 1987, at least those who had not been naturalized. Similar laws have been given effect in other countries. The possibility is not therefore wholly theoretical. In my view, any such law in Australia would be beyond the power of the Federal Parliament. It does not become valid because it applies only to selected persons within the class.

316 *External affairs power*: The suggestion that, even if it was not competent for the Parliament to provide for the deportation of the prosecutor as an "alien" it could do so under the external affairs power[357] is, in my respectful opinion, equally unpersuasive. If that suggestion was advanced for the respondent in argument it must have been so softly and quickly that I missed it[358]. And unsurprisingly so.

317 The "external affairs" power begs the very question to be determined. If the prosecutor has been absorbed into the Australian community, and is no longer an "immigrant" or an "alien", the basis for providing for his removal from Australia is no longer a feature "external" to Australia. It is well and truly positioned as an "internal" Australian matter, to do with a "subject of the Queen" who is one of the "people of" the Australian Commonwealth and an "elector"[359]. After 35 years of residence in Australia and after the constitutional and statutory laws that have applied to him over that time, that is what the prosecutor is. It would be equally untenable to say that deporting an Australian citizen is an "external affair" because the place to which the deportation would be effected is overseas. Self-fulfilling prophesies of such a kind should not be accepted by this Court in giving meaning to the Constitution.

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357 Reasons of Gummow and Hayne JJ at [253].

358 In her written submissions, the respondent said it was "not necessary" to consider the external affairs power or the migration power. The migration power is clearly unavailable as it was common ground that the prosecutor had been absorbed into the Australian community. No other head of power was relied on.

359 cf *Levy v Victoria* (1997) 189 CLR 579 at 626.

318 *Conclusion: order beyond power*: It follows that the purported decision of the respondent to "cancel a visa ... granted to" the prosecutor rested on a statutory provision that was beyond power of the Parliament because s 501(3) of the *Migration Act* could have no application to a person such as the prosecutor. This conclusion, without more, sustains the orders made by the Court and announced on 7 December 2000. I would rest my decision, joining in those orders, upon this ground. It is therefore not strictly necessary for me to deal with the remaining issues in the proceedings. However, as there is disagreement in the Court on the aliens issue and as the other issues were fully argued and are important for constitutional reasons, as well as for the due administration of the *Migration Act*, I will state, as briefly as I can, my conclusions and my reasons in respect of them.

The Assistant Minister issue

319 *Validity of Assistant Minister's appointment*: The only person authorised to make the decision referred to in s 501 of the *Migration Act* is "the Minister". By the *Acts Interpretation Act* 1901 (Cth), this means one of the Queen's Ministers of State for the Commonwealth[360] as described in the Constitution[361]. Unless the contrary appears in the Act, it means the Minister for the time being administering the provision in question[362]. In the case of s 501 of the *Migration Act*, the Minister is thus the Minister for Immigration and Multicultural Affairs. However, where there are two or more such Ministers, administering the provision in respect of the relevant matter, any one of them is empowered to act[363]. A precondition for the validity of the decision is that the person making it properly answers to the description of "Minister" in terms of the Constitution.

320 The prosecutor complained that a Parliamentary Secretary, such as the respondent, was not, by the *Ministers of State and Other Legislation Amendment Act* 2000 (Cth) or otherwise, a Minister, still less a Minister administering a Department as, it was suggested, s 64 of the Constitution requires. The arguments on this issue are set out in the reasons of other members of the

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360 *Acts Interpretation Act*, s 17.

361 s 64.

362 *Acts Interpretation Act*, s 19A(1).

363 *Acts Interpretation Act*, s 19A.

Court[364]. So are the applicable constitutional provisions[365]. On this issue I agree in the reasons of Gummow and Hayne JJ[366].

321 However, it is as well that I make it clear that I do not agree with the opinion that, were the prosecutor to succeed in his objection to the constitutional validity of the appointment of the respondent as Parliamentary Secretary, this would paradoxically have put his claim outside s 75(v) of the Constitution[367]. It would be alarming if that could be so. It would seriously undermine the effectiveness of s 75(v) as a provision of cardinal importance for upholding the rule of law in the Commonwealth. Section 75(v) says nothing about the capacity in which the officer of the Commonwealth concerned has acted. It merely describes the officer as the party respondent and a person amenable to the constitutional writ that this Court has issued. Senator Patterson is such a person. She purports, relevantly, to be an officer of the Commonwealth. She is a Senator of the Commonwealth and asserts a capacity to act under statute as a Minister and repository of statutory power conferred on her by the Parliament. As such, she is as much an "officer of the Commonwealth" as is a judge of a federal court[368]. She is therefore amenable to process for which s 75(v) provides if she acts, or purports to act, beyond her lawful constitutional or other legal powers.

322 The jurisdiction and power of this Court to grant relief does not depend upon the ultimate validity or lawfulness of the respondent's powers. If it were otherwise, demonstration of constitutional invalidity would be placed beyond constitutional redress – a conclusion incompatible with the language, purpose and history of s 75(v) of the Constitution. From the start, this Court has taken an

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364 Reasons of Gleeson CJ at [8]-[16]; reasons of Gaudron J at [56]-[63]; reasons of Gummow and Hayne JJ at [205]-[221].

365 Reasons of Gleeson CJ at [12]; reasons of Gaudron J at [58]-[59]; reasons of Gummow and Hayne JJ at [178], [183].

366 Reasons of Gummow and Hayne JJ at [205]-[221].

367 Reasons of Gummow and Hayne JJ at [199]-[200]. An analogous problem arises, and has been sensibly solved, in respect of the finding that an administrative act is a nullity. That finding does not deprive the Court so finding of the jurisdiction and power to renounce, and give effect to, its conclusion; cf Taggart, "Rival Theories of Invalidity in Administrative Law: Some Practical and Theoretical Consequences", in Taggart (ed), *Judicial Review of Administrative Action in the 1980s*, (1986) at 70-102; Forsyth, "The legal effect of unlawful administrative acts: the theory of the second actor explained and developed", (2001) 35 *Amicus Curiae* 20.

368 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 399.

ample view of the reach of this provision. In my view, it should not even hint that a change is in the wind.

323 *Meaning of "the Minister personally"*: The prosecutor alternatively argued that, even if the respondent were validly appointed a Minister, she was not the repository of the power contemplated by s 501(4) of the *Migration Act*. That sub-section requires that the power under s 501(3), to cancel a visa "in the national interest", may "only be exercised by the Minister personally". The purpose of such a requirement (which is an exceptional one) is obviously to reflect the seriousness of the particular decision; the fact that it deprives the person subject to it of the protections of the rules of natural justice and of the code of procedure contained in the *Migration Act*; and that, for such decisions, the Minister personally should be accountable to the Parliament and thereby to the people of Australia[369]. The present Minister (Mr Ruddock), when explaining the introduction of the provision in the *Migration Act*[370], justified the removal of the person without the benefit of natural justice by saying[371]:

> "Parliament should be notified of the making of such decisions ... The minister is very accountable for his actions to the parliament, his colleagues and the people of Australia."

324 The prosecutor submitted that only the ministerial head of the Department concerned could fulfil the stated role. He argued that, to permit the decision to be made by someone other than the Minister would be to debase the adverb "personally". As that word was introduced into the *Migration Act* in 1998, it should not be read as extending to a subordinate "Minister" who did not then have the responsibility of administering the Department concerned.

325 There is no merit in this argument. If persons such as the respondent may be appointed as Parliamentary Secretaries, and if they are "Ministers" for constitutional purposes, then, subject to their being appointed to administer the Act in relation to the provision in question, there is no reason why s 501(4) should not be read as extending to them. The purpose of requiring a personal decision is equally achievable. Persons such as the respondent must, by the

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369 *Migration Act*, s 501C(5); see also s 502(2). Provision is made for the Minister to give notice of certain matters before each House of the Parliament: *Migration Act*, s 501C(9).

370 *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act* 1998 (Cth).

371 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 2 December 1998 at 1233.

Constitution, be members of one of the Houses of the Parliament[372]. They are, therefore, ultimately accountable in Parliament and, in that way, rendered answerable to the people of Australia. Political sanctions might be attached to an erroneous or unjust decision. The *Migration Act* contains large powers of Ministerial delegation. By s 496(1), the Minister is permitted, by a written instrument, to "delegate to a person any of the Minister's powers under this Act". All that s 501(4) provides is that the Minister cannot delegate to an official the making of the decision under s 501(3) of the *Migration Act*. He or she must make that decision personally. Provided that the person making the decision answers to the description "Minister", and makes the decision personally, the requirements of s 501(4) are fulfilled[373]. The separate submission based on that sub-section, in the case of an Assistant Minister, fails.

The "national interest" issue

326 *Introduction of "national interest" decisions*: The introduction of a statutory power to permit the Minister personally to make a decision that the visa of a person affected be refused or cancelled (and the person removed from Australia) "in the national interest" occurred in 1998[374]. The Minister, proposing the enlargement of his powers in circumstances which contemplated the exclusion of the requirements of natural justice and of the code of fair procedures otherwise applicable[375], told the Parliament that "in exceptional or emergency circumstances, the minister, acting personally, will be given powers to act decisively on matters of visa refusal, cancellation and the removal of non-citizens"[376]. In a part of his speech subtitled "Emergency cases" he said[377]:

> "From time to time, there will be emergency cases involving non-citizens who may be a significant threat to the community. These people may be threatening violence or some other act of destruction, or

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372 Constitution, s 64.

373 *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 351-352 [5].

374 Pursuant to the *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act*.

375 cf *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 75 ALJR 889 at 921 [179]; 179 ALR 238 at 282.

376 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 2 December 1998 at 1230.

377 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 2 December 1998 at 1233.

> have a prior history of serious crime. In these emergency circumstances, the minister, again acting personally, should have the power to act without notice and have them taken into detention.
>
> Once the visa is cancelled, the non-citizen will have a right to make a submission to the minister as to why the cancellation should be revoked. Natural justice will apply in such cases. However, if they cannot satisfy the minister that they pass the character test, they should be removed immediately."

327 Unfortunately, this statement did not tell the whole story. Because the only conditions for the exercise of the power under s 501(3) are that the Minister reasonably suspects that the person does not pass the character test and is satisfied that the refusal or cancellation is in the national interest, any submission to the Minister could relevantly address only such criteria. By s 501(5) the rules of natural justice and the code of procedure contained in the *Migration Act* do not apply to the decision. Because "the character test" makes reference in one paragraph to the existence of a "substantial criminal record"[378], as defined, and because that definition includes a person "sentenced to a term of imprisonment of 12 months or more"[379], no submission pertinent to the "character test" criterion could be relevant in the case of a person such as the prosecutor. Objectively, the precondition was fulfilled. Subject to the Minister's satisfaction, in his case, that "cancellation is in the national interest"[380], there was therefore no room for the rules of natural justice and fair procedure to apply. Indeed, they were expressly excluded. And the justification for the exclusion, given to the Parliament, was that the case could not be delayed by the niceties of natural justice and fair procedure. It was an "emergency case". It required swift action. If the person were in Australia, it necessitated prompt removal[381].

328 The prosecutor's application was argued on the basis that, to ground relief in the form of the constitutional writ of prohibition which he sought (and the auxiliary writ of certiorari claimed to render the constitutional writ effective), it was necessary to establish not merely that any decision made under s 501 of the *Migration Act* was wrong in law but that it disclosed a more fundamental defect. This was that it manifested a jurisdictional error. It was as if there had never been a lawful exercise of the power conferred by s 501(3) of the *Migration Act* by reason of the absence of a relevant "jurisdictional fact" necessary to enliven

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378 *Migration Act*, s 501(6)(a).

379 *Migration Act*, s 501(7)(c).

380 *Migration Act*, s 501(3)(d).

381 *Migration Act*, s 198.

that power[382]. Because the proceedings were argued on this basis, I will not reopen the question of whether the constitutional writs in Australia afford relief on a different and broader basis[383]. The remedy of injunction referred to in s 75(v) of the Constitution never depended on the establishment of an error of jurisdiction. The other remedies referred to in the paragraph may also be, for constitutional purposes, unconfined by this most elusive and unsatisfactory limitation[384]. But I will leave that question to another day.

329 The prosecutor submitted that the "jurisdictional fact" of "the national interest" was wholly absent in his case and thus that the respondent's purported decision based on s 501(3) of the *Migration Act* was invalid. Where such an argument is being considered, it is not a court's function to substitute its opinion on the merits for that of the repository of the power[385]. Rather its function is to ask whether the satisfaction required by law, as a precondition to the exercise of the power, had, or could reasonably have, been formed[386].

330 Obviously, the precondition that the Minister be satisfied that the refusal or cancellation is "in the national interest" cannot be met simply because the Minister subjectively had such satisfaction. If, objectively, there is no reasonably arguable foundation for it, the precondition will not exist. In this regard, the law, including in Australia, has come a long way since *Liversidge v Anderson*[387]. On the other hand, the designation of the Minister as the repository of the power, and the specification that the Minister personally must exercise the power of the kind mentioned in s 501(3) of the *Migration Act*, obviously reflect the importance, potential controversy and need for political accountability in such a decision and the high responsibility that Ministers bear in protecting the national interest in

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382 cf *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 158 [59].

383 cf *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 75 ALJR 889 at 927-928 [210]-[214]; 179 ALR 238 at 290-292.

384 *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 74 ALJR 1348 at 1366-1368 [78]-[85]; 174 ALR 585 at 608-611.

385 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 629 [56].

386 *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 430, 432.

387 [1942] AC 206; cf *R v Inland Revenue Commissioners; Ex parte Rossminster Ltd* [1980] AC 952 at 1011; *Brader v Ministry of Transport* [1981] 1 NZLR 73 at 77-78; *South Australia v O'Shea* (1987) 163 CLR 378 at 418-419.

this and other fields. What is the "national interest" does not readily lend itself to the compartmentalisation of the considerations involved[388].

331 The wide range of subject matters that may be taken into account in making decisions "in the *public* interest" has been acknowledged by this Court[389]. The present *Migration Act* deals with many subjects of great importance to the composition and safety of the Australian community. It would be contrary to principle for the words "in the *national* interest" to be given a confined meaning. However broad may be the jurisdiction conferred by the constitutional writs, they do not permit a court to substitute for the satisfaction of the Minister, provided by the Act of Parliament, the satisfaction of judges who are not accountable to the Parliament or the people in the same way as the Minister[390].

332 All of the above being said, it is impossible to regard the matters placed before the respondent as sufficient to sustain a reasonable or rational conclusion that the cancellation of the prosecutor's visa was "in the *national* interest". As such, the power conferred by s 501(3) was not enlivened. There was no "emergency". Nor could the particular case of the prosecutor be regarded as involving a significant threat to the *nation* as a whole or the community of the *nation*.

333 The absence of emergency for the nation was shown by the very history of the case. The original decision of the Minister was made under s 501(2) of the *Migration Act*. Decisions under that sub-section are not exempt from the obligations of natural justice and the code of procedural fairness. No event occurred, or was suggested, between the original decision by the Minister and the purported decision by the respondent under s 501(3) of the *Migration Act* which converted the case into one in which cancellation of the visa was justified "in the *national* interest". The prosecutor had returned to his home in Gunnedah under parole supervision. He did so again when Callinan J, eventually by consent, quashed the original decision of the Minister. Those who advised the Minister (and later the respondent) to take the decision under s 501(3) of the *Migration Act* must be taken to have known that doing so would effectively deprive the prosecutor of the only relevant factual grounds for withholding a decision to cancel his visa. These were grounds based on discretionary considerations connected with his very long residence in Australia, his family connections, his

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388 See *Ashby v Minister of Immigration* [1981] 1 NZLR 222 at 225.

389 *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216-217.

390 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 629 [56].

maternal dependant, his lack of real connection with his country of birth and his compliance with parole conditions and efforts at rehabilitation.

334 None of the foregoing considerations were relevant to the precondition for the exercise of the power under s 501(3) of the *Migration Act*. Save for these proceedings challenging the existence of "the national interest", the only factual matter upon which the prosecutor could make submissions to the Minister once a decision was made under s 501(3), was the applicability of the "character test". But that test was objectively satisfied. In such circumstances, to invite the prosecutor to make submissions was an exercise in futility. The information provided to the respondent by the Department[391] to the effect that, if she proceeded in the prosecutor's case under s 501(3) of the *Migration Act*, he would be given an opportunity to make representations seeking the revocation of the decision, was technically correct. But, as must have been known to the officials propounding that course to the respondent, it was an empty facility. I regret to say that in my view, it was a misleading assurance. Candour would have required drawing to the respondent's attention the very serious consequences which a decision under s 501(3) of the *Migration Act* would have in effectively removing from the decision-making equation the only discretionary considerations that could weigh against the removal from Australia of a permanent resident of more than 30 years standing.

335 *No reasons for "the national interest"*: By s 501C(3) of the *Migration Act*, the respondent was required to give a person in the position of the prosecutor, being the holder of a visa, in effect, the reasons for her decision so far as they were specific to him[392]. Although the respondent's decision, served on the prosecutor, purports to record her requisite satisfaction there is no indication, in the reasons, of the features of the case that, belatedly, elevated it to the *emergency* category requiring, as a consequence, deprivation of the protections of natural justice and the code of procedural fairness. Still less does that document even begin to justify cancellation on the grounds of "the *national* interest".

336 The expression "the national interest" is different from "the public interest". In the *Migration Act*, it takes colour from the emergency circumstances in which it applies and the peremptory procedures which then, exceptionally, govern the case. The justification of the belated invocation of "national interest" was perfunctory and misleading. It appeared to equate the existence of a relevant "national interest" to the presence of a "substantial criminal record". However, as the latter is one of the considerations applicable to the other precondition (namely the Minister's reasonable suspicion that the person does not pass the

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391 Minute of 26 June 2000 ("the second minute").

392 *Migration Act*, s 501C(2), (3).

"character test"), something more was obviously intended by requiring, additionally, that the danger to the national interest justified the Ministerial decision.

337 A further misleading aspect of the minute provided to the respondent was that it referred to a decision of "the High Court" in *In re Application of Amalgamated Anthracite Collieries Ltd*[393]. In the context, such a reference would ordinarily be read by a Minister as one to a decision of this Court. In fact, the case referred to was an English decision and a rather unhelpful one, written over seventy years ago, which suggested that courts would wholly surrender to the Executive judgment as to whether some element of the "national interest" had arguably been established. That may have been the law in England in 1927. It is not the law in contemporary Australia[394].

338 Because the minute was served on the prosecutor with no other relevant materials that the respondent took into account, subject to what follows on the next issue, it must have constituted her sole reasons for deciding as she did. Whilst it might be said that the general problem of paedophilia and criminal offences against children is one involving "the national interest", the decision to be made by the Minister under s 501(3) of the *Migration Act* is not made at such a level of abstraction. It is one personal to the visa holder. Correctly, this was the way it was treated by the respondent. On that level, the materials contained in the minute, upon which the respondent based her decision, did not afford any reasonable or rational foundation for a conclusion that cancellation of the prosecutor's visa was "in the *national* interest". The jurisdictional fact necessary to attract the second condition of which a Minister was to be satisfied before making a decision under s 501(3) was, therefore, not present. Accordingly, the Minister's decision was flawed by jurisdictional error. This reasoning provides an additional, and alternative, foundation for the orders of this Court in which I joined.

339 *Conclusion: jurisdictional error*: The conclusion on the last-stated issue relieves me of having to consider the alternative way in which the prosecutor put his challenge to the validity of the decision made pursuant to s 501(3) of the *Migration Act*. This was that the exercise of the discretion by the Minister was itself so unreasonable that no rational repository of the power in question could have utilised it in the circumstances of this case[395]. The provision of the power to

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393 (1927) 43 TLR 672 at 673.

394 *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 204.

395 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 648-651 [123]-[128].

the Minister under s 501(3) of the *Migration Act* can be inferred to have been given on the assumption that he or she would act "according to the rules of reason and justice, not according to private opinion ... according to law, and not humour"[396].

340 I will not examine that question further. It is unnecessary to do so in light of my last-stated conclusion. However, I part from this section of my reasons with an expression of disquiet. The documentation suggests that, even today, public administration in Australia can sometimes be blind not only to the law but to elementary requirements of fair procedure. There was no justification in this case for depriving the prosecutor, as if in a matter involving emergency action in the national interest, of the opportunity to be heard before attempting to uproot him from a country in which he had lived, since a boy, for more than 30 years. To come to the opposite conclusion required a conception of procedural fairness which is completely alien to that upheld by the law of this country.

The ministerial preference issue

341 *Argument of an irrelevant consideration*: Finally, the prosecutor submitted, in the alternative, that the respondent's decision under s 501(3) was vitiated by her consideration of a legally irrelevant matter, that being the statement to the respondent that the Minister favoured proceeding under s 501(3) of the *Migration Act*.

342 The passage to which objection was taken was contained in an early minute addressed to the respondent concerning the prosecutor's case[397]. At the time the first minute was received, the Departmental officer involved was enquiring whether the respondent required from the Department a submission concerning the prosecutor's visa and, if so, whether such submission should be made under sub-ss (2) or (3) of s 501 of the *Migration Act*. The first minute, relevantly, said:

> "[A]ll the powers vested in the Minister by the *Migration Act* would be available to you. Although Minister Ruddock has indicated that consideration should be given to cancelling Mr Taylor's visa under subsection 501(3), you are not bound to follow that course. You would be acting as an independent decision-maker, and hence Minister Ruddock cannot in law, dictate, limit or bind you in the exercise of your powers as a decision-maker. Having said that, Minister Ruddock's preference is

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396 *Sharp v Wakefield* [1891] AC 173 at 179 (footnote omitted) cited in *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 431.

397 See further the reasons of Gummow and Hayne JJ at [193] ("the first minute").

> something that you would be entitled to take into account when deciding how to proceed."

343 On the assumption that the respondent was empowered to substitute for the Minister, and to make the decision which s 501(3) of the *Migration Act* contemplated, the prosecutor argued that the respondent was obliged in law to exercise the discretion wholly for herself. On this basis, it was irrelevant, and prejudicial to the independent exercise of the discretion, to seek to influence her (as it was said the official had done) by referring to the preference of the Minister. Political, hierarchical and personal considerations, in the context of the relations between the respondent (as Assistant Minister), the Minister and other colleagues, would (so it was suggested) make it extremely difficult for the respondent, knowing of the desires of the constitutional head of the Department with primary responsibility for the administration of the *Migration Act*, to reach a fully independent and different judgment of her own. In terms of political realities and administrative practicalities there is some force in this submission. In other circumstances, the dangers to the independent exercise by repositories of statutory power inherent in the communication of ministerial views, have been identified by the courts[398].

344 *Conclusion: no defect*: However, I am not convinced that this defect is made out, although I regard this as a borderline case. The quoted passage indicated no more than a "preference" on the part of the Minister. The signification of that "preference" must be read with the cautionary words by which the official correctly emphasised the personal character of the respondent's decision and that the Minister's preference did not bind her. The respondent was not, in relation to the Minister, in the same position as a subordinate official or a tribunal. The law expects persons elected to the Parliament and appointed as Ministers to be strong-minded, not supine followers of their colleagues or officials. They know that, for their mistakes, they personally may be rendered accountable in the Parliament and to the electorate. Personal opprobrium could not always readily be shifted to a senior colleague, blamed for expressing a "preference". I do not regard it as having been irrelevant to inform an Assistant Minister, if lawfully appointed, of the administrative practice and preferences of the Minister with the primary obligation to administer the *Migration Act*. Consistency in public administration (so long as it is lawful, fair and not unreasonable) is a desirable virtue.

345 In any case, the decision made by the respondent in response to the first minute was no more than a preliminary one in relation to the consideration of further advice from the Department. It is in that further advice that material was

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398 *Singer v Statutory and Other Offices Remuneration Tribunal* (1986) 5 NSWLR 646 at 650, 655, 656-658.

placed before the Minister which directly affected the prosecutor. Although it is true that, indirectly, the first minute initiated the course that was intended to lead on to very serious consequences for the prosecutor, it did not, as such, determine a question affecting his rights[399]. It remained open to the respondent to reject the submission based on s 501(3) of the *Migration Act* when it was ultimately made; although in fact she did not do so.

346 It follows that the complaint raised under this fourth issue should be rejected. It forms no part of my reasons for supporting the orders of the Court.

Orders

347 The prosecutor was therefore entitled to succeed on the aliens issue. In my view, even if that had not been so, he would also have been entitled to success on the national interest issue considered by me. However, his arguments on the other issues failed.

348 The orders made by this Court quashed the decision of the respondent, prohibited her from further proceeding on that decision and ordered her to pay the costs of the proceedings. The foregoing are my reasons for joining in those orders.

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399 cf *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 at 159.

349 CALLINAN J. This case is concerned with the status, and liability, by reason of criminal conduct to deportation, of an immigrant to this country from the United Kingdom who has spent all of his life in Australia from a very young age.

350 The case was argued over three days in November 2000. On 7 December 2000, the Court made orders absolute for certiorari and prohibition in which I joined. The Court announced that reasons would be given at a later date.

Case history

351 The prosecutor migrated to Australia in 1966 with his family from the United Kingdom. They entered this country as subsidised migrants under a scheme developed and promoted in the United Kingdom and this country[400].

352 The prosecutor has been absorbed into the Australian community and regards himself in all respects as an Australian citizen. He has been enrolled on the electoral roll since he attained 18 years.

353 On 7 February 1996, the prosecutor was convicted on his own pleas of guilt in the Tamworth District Court of sexual assault of persons between 10 and 16 years of age over a period of some 14 years. He was sentenced to a minimum term of three and a half years.

354 On 4 November 1999, two police officers and three officers of the Department of Immigration and Multicultural Affairs ("the Department") came to his home at Gunnedah in New South Wales and served him with a warrant and a notice of cancellation of visa under s 501(2) of the *Migration Act* 1958 (Cth) ("the Act"). He was arrested and admitted to the Silverwater Metropolitan Remand and Detention Centre.

355 On 16 March 2000, I heard an application by the prosecutor for prerogative relief pursuant to s 75 of the Constitution. I then indicated that I would, subject to the clarification of one factual matter, be minded to grant an order nisi on the ground of a breach of the rules of natural justice but not on any ground of unreasonableness. I adjourned the matter to 18 April 2000. The respondent in those proceedings consented to orders of the kind that I had been minded to make. Accordingly on 12 April 2000 I made orders absolute by consent in favour of the prosecutor, who was then released from detention and he returned to live in Gunnedah.

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400 Agreement between Australia and the United Kingdom relating to an assisted passage migration scheme (London, 28 May 1962). ATS 1962 No 3; UNTS 434 at 219.

356 On 30 June 2000 the respondent, the Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs decided to cancel the prosecutor's Transitional (Permanent) Visa under s 501(3) of the Act. Her decision records the respondent's opinion that the prosecutor "does not pass the character test", her satisfaction that cancellation of the prosecutor's visa is in the national interest, and that she has exercised her discretion to cancel the prosecutor's visa.

357 On 6 July 2000 the prosecutor was arrested in Gunnedah and detained in a Migrant Centre where he remained until an order of this Court for his release was made on 7 December 2000.

The current proceedings

358 On 21 August 2000 Kirby J ordered that the current application for prerogative writs of prohibition and certiorari, and a declaration, be heard by the Full Court. The following are the grounds upon which that relief is sought:

> "1. No decision by Minister personally
>
> 1.1 Section 4 of the *Ministers of State Act 1952* as amended by section 3 of the *Ministers of State and Other Legislation Act 2000* is beyond the legislative power of the Commonwealth.
>
> 1.2 The direction of his Excellency the Governor-General to the Respondent to hold the office of Parliamentary Secretary to the Minister for Foreign Affairs and Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs and to designate her as Parliamentary Secretary pursuant to the said section 4 of the *Ministers of State Act 1952* and to administer the Department of State connected with such office, which direction was published on Friday, 10 March 2000 in the Gazette of the Commonwealth Number S116 is invalid.
>
> 1.3 The Respondent not being the Minister acting personally, the decision is void because it could only be made by the Minister acting personally.
>
> 2. Unreasonableness
>
> 2.1 The giving and making of the said decision was in excess of jurisdiction because it is so unreasonable that no reasonable repository of the power to give and make it could have done so
>
> > (a) The Respondent was required to be satisfied that any cancellation of the [prosecutor]'s visa was in the national interest, which requirement was independent of and additional to the

requirement that she was to hold a reasonable suspicion that the [prosecutor] did not pass the character test, and she did not. In particular, the Respondent gave and made her decision on the erroneous assumption that the requirement involved a consideration of and only of the [prosecutor]'s criminal record, which assumption was created in paragraph 10 of the Department's brief to her.

(b) The previous decision to cancel the [prosecutor]'s visa, made by the Minister for Immigration and Multicultural Affairs under s 501(2) of the Act, which decision was ultimately quashed in this Court, did not assert any element of 'national interest'. The Respondent's reasons do not identify any aspect of national interest independent of or additional to failure to pass the character test, and there was none.

(c) The [prosecutor] is aged forty (40) years and has been a permanent resident of Australia for thirty-three (33) years. The [prosecutor] since arrival aged seven (7) years has never travelled outside Australia.

(d) The [prosecutor] although not a citizen is completely absorbed into Australian society and continues to be accepted by the community in which he has resided.

(e) The [prosecutor] has no emotional attachment to the United Kingdom and no real memory of the United Kingdom.

(f) The [prosecutor]'s family, including his elderly mother resident in Gunnedah in the state, lives in Australia save for his sister, who is the [prosecutor]'s only remaining relative in the United Kingdom.

(g) The deportation of the [prosecutor] will cause undue hardship to his family, including the possibility of further unwarranted public opprobrium experienced by his mother and referred to by the trial judge in the remarks on sentencing, in particular to his mother.

(h) The [prosecutor] has good prospects of rehabilitation, and deportation will in all the circumstances greatly diminish the prospects.

(i) The denial of natural justice to the [prosecutor].

> 3. The [prosecutor] is neither immigrant nor alien
>
> 3.1 The *Migration Act 1958* is not a valid law of the Commonwealth in so far as it treats or purports to treat the [prosecutor] as an immigrant or alien, he having lost his status as immigrant by effluxion of time and by absorption into the Australian community, and he being at the time of his arrival in 1966 and ever since a British subject and thus not an alien, of which non-alien status he could not retrospectively be deprived.
>
> 4. Irrelevant considerations
>
> 4.1 The Respondent in making the purported decision took into account an irrelevant consideration, namely Minister Ruddock's expressed preference that the [prosecutor]'s visa be cancelled under section 501(3) of the Act."

359 The respondent argued ground 3.1 first. The text of the Constitution offers little guidance as to who should be taken to be an alien. The preamble recites:

> "WHEREAS *the people* of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown …" (emphasis added)

In s 7 reference is again made to "the people" of the States. Section 8 refers to "electors" and provides that their qualification shall be as prescribed by the Constitution, or by the Parliament. Section 24, which is concerned with the constitution of the House of Representatives, also uses the word "people", as does s 25.

360 Section 44 does use the word "citizen". It renders, among others, a "citizen of a foreign power" incapable of being chosen as a senator or a member of the House of Representatives. Its use, in juxtaposition with "subject" (of a foreign power), may be taken as an expression of an intention to embrace the nationals of either monarchical or republican states.

361 Section 51(xix) confers power upon the Parliament to make laws with respect to naturalization and aliens. The Constitution contains no definition of "alien".

362 Sections 51(xxvi) and (xxviii) should also be noted. They confer power to make laws for, "the people of any race …", and immigration and emigration, respectively.

363 Another expression used in the Constitution is "resident", in s 117, which states:

> "A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State."

The Act

364 The Act no longer uses the term "alien", nor does it in any way currently distinguish between immigrants from the United Kingdom and immigrants from elsewhere. The expression now used in the Act is "non-citizen". Section 4 of the Act states its object:

> "**Object of Act**
>
> (1) The object of this Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens.
>
> (2) To advance its object, this Act provides for visas permitting non-citizens to enter or remain in Australia and the Parliament intends that this Act be the only source of the right of non-citizens to so enter or remain.
>
> (3) To advance its object, this Act requires persons, whether citizens or non-citizens, entering Australia to identify themselves so that the Commonwealth government can know who are the non-citizens so entering.
>
> (4) To advance its object, this Act provides for the removal or deportation from Australia of non-citizens whose presence in Australia is not permitted by this Act."

365 Section 501 of the Act is as follows:

> "**Refusal or cancellation of visa on character grounds**
>
> *Decision of Minister or delegate - natural justice applies*
>
> (1) The Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test.
>
> (2) The Minister may cancel a visa that has been granted to a person if:

(a) the Minister reasonably suspects that the person does not pass the character test; and

(b) the person does not satisfy the Minister that the person passes the character test.

Decision of Minister - natural justice does not apply

(3) The Minister may:

(a) refuse to grant a visa to a person; or

(b) cancel a visa that has been granted to a person;

if:

(c) the Minister reasonably suspects that the person does not pass the character test; and

(d) the Minister is satisfied that the refusal or cancellation is in the national interest.

(4) The power under subsection (3) may only be exercised by the Minister personally.

(5) The rules of natural justice, and the code of procedure set out in Subdivision AB of Division 3 of Part 2, do not apply to a decision under subsection (3).

Character test

(6) For the purposes of this section, a person does not pass the ***character test*** if:

(a) the person has a substantial criminal record (as defined by subsection (7)); or

(b) the person has or has had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct; or

(c) having regard to either or both of the following:

(i) the person's past and present criminal conduct;

(ii) the person's past and present general conduct;

the person is not of good character; or

(d) in the event the person were allowed to enter or to remain in Australia, there is a significant risk that the person would:

(i) engage in criminal conduct in Australia; or

(ii) harass, molest, intimidate or stalk another person in Australia; or

(iii) vilify a segment of the Australian community; or

(iv) incite discord in the Australian community or in a segment of that community; or

(v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way.

Otherwise, the person passes the ***character test***.

Substantial criminal record

(7) For the purposes of the character test, a person has a ***substantial criminal record*** if:

(a) the person has been sentenced to death; or

(b) the person has been sentenced to imprisonment for life; or

(c) the person has been sentenced to a term of imprisonment of 12 months or more; or

(d) the person has been sentenced to 2 or more terms of imprisonment (whether on one or more occasions), where the total of those terms is 2 years or more; or

(e) the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution.

Periodic detention

(8) For the purposes of the character test, if a person has been sentenced to periodic detention, the person's term of imprisonment

is taken to be equal to the number of days the person is required under that sentence to spend in detention.

Residential schemes or programs

(9) For the purposes of the character test, if a person has been convicted of an offence and the court orders the person to participate in:

(a) a residential drug rehabilitation scheme; or

(b) a residential program for the mentally ill;

the person is taken to have been sentenced to a term of imprisonment equal to the number of days the person is required to participate in the scheme or program.

Pardons etc.

(10) For the purposes of the character test, a sentence imposed on a person is to be disregarded if:

(a) the conviction concerned has been quashed or otherwise nullified; or

(b) the person has been pardoned in relation to the conviction concerned.

Conduct amounting to harassment or molestation

(11) For the purposes of the character test, conduct may amount to harassment or molestation of a person even though:

(a) it does not involve violence, or threatened violence, to the person; or

(b) it consists only of damage, or threatened damage, to property belonging to, in the possession of, or used by, the person.

Definitions

(12) In this section:

court includes a court martial or similar military tribunal.

imprisonment includes any form of punitive detention in a facility or institution.

sentence includes any form of determination of the punishment for an offence."

366 It is also necessary to refer to s 501C which provides as follows:

"**Refusal or cancellation of visa - revocation of decision under subsection 501(3) or 501A(3)**

(1) This section applies if the Minister makes a decision (the ***original decision***) under subsection 501(3) or 501A(3) to:

(a) refuse to grant a visa to a person; or

(b) cancel a visa that has been granted to a person.

(2) For the purposes of this section, ***relevant information*** is information (other than non-disclosable information) that the Minister considers:

(a) would be the reason, or a part of the reason, for making the original decision; and

(b) is specifically about the person or another person and is not just about a class of persons of which the person or other person is a member.

(3) As soon as practicable after making the original decision, the Minister must:

(a) give the person, in the way that the Minister considers appropriate in the circumstances:

(i) a written notice that sets out the original decision; and

(ii) particulars of the relevant information; and

(b) except in a case where the person is not entitled to make representations about revocation of the original decision (see subsection (10)) - invite the person to make representations to the Minister, within the period and in the manner ascertained in accordance with the regulations, about revocation of the original decision.

(4) The Minister may revoke the original decision if:

(a) the person makes representations in accordance with the invitation; and

(b) the person satisfies the Minister that the person passes the character test (as defined by section 501).

(5) The power under subsection (4) may only be exercised by the Minister personally.

(6) If the Minister revokes the original decision, the original decision is taken not to have been made. This subsection has effect subject to subsection (7).

(7) Any detention of the person that occurred during any part of the period:

(a) beginning when the original decision was made; and

(b) ending at the time of the revocation of the original decision;

is lawful and the person is not entitled to make any claim against the Commonwealth, an officer or any other person because of the detention.

(8) If the Minister makes a decision (the ***subsequent decision***) to revoke, or not to revoke, the original decision, the Minister must cause notice of the making of the subsequent decision to be laid before each House of the Parliament within 15 sitting days of that House after the day on which the subsequent decision was made.

(9) If the person does not make representations in accordance with the invitation, the Minister must cause notice of that fact to be laid before each House of the Parliament within 15 sitting days of that House after the last day on which the representations could have been made.

(10) The regulations may provide that, for the purposes of this section:

(a) a person; or

(b) a person included in a specified class of persons;

is not entitled to make representations about revocation of an original decision unless the person is a detainee.

(11) A decision not to exercise the power conferred by subsection (4) is not reviewable under Part 5 or 7."

367 It is the prosecutor's submission that by the date of the respondent's decision, 30 June 2000, he had lost his status as an immigrant by effluxion of time and by absorption into the Australian community, and that therefore the power of the Parliament under s 51(xxvii) of the Constitution to affect the prosecutor has been lost. For this latter proposition the prosecutor relied on *Ex parte Walsh and Johnson; In re Yates*[401]. There Knox CJ said this[402].

> "It seems to me to follow from the opinions expressed in that case, that a person who has originally entered Australia as an immigrant may, in course of time and by force of circumstances, cease to be an immigrant and becomes a member of the Australian community. He may, so to speak, grow out of the condition of being an immigrant and thus become exempt from the operation of the immigration power. The power to make laws with respect to immigration would, no doubt, extend to enable Parliament either to prohibit absolutely or to regulate as it might think fit immigration into Australia, but, in my opinion, it does not extend to enable Parliament to prohibit or regulate anything which is not immigration, and the decision in *Potter v Minahan*[403] shows that, when the person seeking to enter the Commonwealth is a member of the Australian community, his entry is not within the power to make laws with respect to immigration."

368 The prosecutor's submission on this aspect must be accepted. Indeed, ultimately it was conceded by the respondent to be correct. The prosecutor has been absorbed into the community. He is beyond the reach of the immigration power conferred upon the Parliament by the Constitution.

369 May, however, the relevant provisions insofar as the respondent seeks to apply them to the prosecutor, be sustained under s 51(xix) of the Constitution? This depends upon whether the prosecutor is an alien. The term "alien" was considered by this Court in *Pochi v Macphee*[404] when the Act did contain a definition which excluded a British subject from its operation. In that case, Gibbs CJ (with whom Mason J and Wilson J agreed) said this[405]:

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401 (1925) 37 CLR 36.

402 (1925) 37 CLR 36 at 64-65. See also at 110-111 per Higgins J, 137 per Starke J.

403 (1908) 7 CLR 277.

404 (1982) 151 CLR 101.

405 (1982) 151 CLR 101 at 111.

"[Section] 51(xix) provides ample power to enact legislation providing for the deportation of aliens. The question whether the immigration power would extend to the case of an immigrant who has become absorbed into the community - a question on which opinions in this Court have in the past been divided - does not arise when the immigrant is an alien.

The argument was put in another way by submitting that the fact that the plaintiff has become totally absorbed into the Australian community meant that he is no longer an alien. This argument is impossible to maintain. It was well settled at common law that naturalization could only be achieved by Act of Parliament - even action by the Crown under the prerogative could not give an alien the status of a British subject … The common law rules as to alienage were no doubt feudal in origin, but there is nothing antiquated in the notion that a person's nationality is not changed by length of residence or by an intention permanently to remain in a country of which he is not a national. There are strong reasons why the acquisition by an alien of Australian citizenship should be marked by a formal act, and by an acknowledgement of allegiance to the sovereign of Australia. The *Australian Citizenship Act* validly so provides."

370 The prosecutor argues, in effect, that the Parliament has legislated with respect to a class of people, British subjects of whom the prosecutor is one, in such a way as to put them beyond the reach of the provisions under which the respondent was acting here: for example, by enacting s 93(1)(b)(ii) of the *Commonwealth Electoral Act* 1918 (Cth) ("the Electoral Act"), entitling the prosecutor to enrolment on the electoral rolls[406]. It is submitted that the

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406 "**93 Persons entitled to enrolment and to vote**

(1) Subject to subsections (7) and (8) and to Part VIII, all persons:

…

(b) who are:

…

(ii) persons (other than Australian citizens) who would, if the relevant citizenship law had continued in force, be British subjects within the meaning of that relevant citizenship law and whose names were, immediately before 26 January 1984:

(A) on the roll for a Division; or

(Footnote continues on next page)

legislation prescribed or otherwise provided, as contemplated by, for example, ss 8 and 30 of the Constitution, the qualifications for electors. Accordingly, it is argued, the prosecutor enjoys the status of one of the people of Australia, a person entitled to choose the members of the House of Representatives, a status inconsistent with that of an alien.

371 The constitutional power to legislate with respect to aliens includes the power to affect their status, and that, the argument goes, is what the Electoral Act s 93(1)(b)(ii) has done in respect of the prosecutor by according him the status of an elector, thereby making him one of the people of Australia. Such a view is not inconsistent with what Barton J said in *Ferrando v Pearce*[407] :

> "It is trite law that any community is entitled to determine by its Parliament of what persons the community is to be composed. Hence sub-sec xix of sec 51 of the Constitution."

372 Section 117 and, also perhaps s 34(ii), of the Constitution are relevant. For a long time, it could not seriously be doubted that a British subject of the Queen living permanently in Australia was also an Australian. The majority in *Sue v Hill*[408] accepted however, that the relationship between Australia and the United Kingdom (and their citizens) might alter by an evolutionary process[409], or by a process of transformation[410]. In *Nolan v Minister for Immigration and Ethnic Affairs*[411] a majority of this Court said that "subject of the Queen" in s 117

(B) on a roll kept for the purposes of the *Australian Capital Territory Representation (House of Representatives) Act* 1973 or the *Northern Territory Representation Act* 1922;

shall be entitled to enrolment."

407 (1918) 25 CLR 241 at 253.

408 (1999) 199 CLR 462.

409 (1999) 199 CLR 462 at 487-490 [50]-[60] per Gleeson CJ, Gummow and Hayne JJ.

410 (1999) 199 CLR 462 at 526-529 [168]-[175] per Gaudron J.

411 (1988) 165 CLR 178.

of the Constitution by then meant subject of the Queen of Australia. In that case, Gaudron J said in a passage not affected by her Honour's dissent[412]:

> "…in the case of a community whose membership is conditional upon allegiance to a monarch, the status of alien corresponds with the absence of that allegiance. At least this is so where the criterion for membership of the community remains constant."

373 In the same way as the evolutionary process, to which the majority in *Sue v Hill*[413] referred, transformed the meaning of the monarch as used in the Constitution, that process should also have transformed a subject of the monarch born in the United Kingdom - but having lived permanently as a subject of the monarch in this country for the period that this prosecutor has - into one of the people of Australia and a citizen of this country.

374 The language of s 44 of the Constitution is specific and quite different from the language of ss 8, 24 and 30 of the Constitution, and deals with a different topic, membership of the Parliament. *Sue v Hill* does not therefore stand as an obstacle to the conclusion that the prosecutor is a citizen of this country.

375 The respondent relied upon the decision of the United States Circuit Court (Miller J) in *Lanz v Randall*[414]. But as Kirby J points out[415], the history of the parting of the ways between England and (what became) the United States of America is so different from ours that the authorities of the latter country have little or nothing to say about the relationship between Australia and the United Kingdom, and the citizens of the latter who became absorbed into the Australian community, and certainly those who did so before the enactment of the *Australia Acts* 1986 (Cth and UK).

376 I would not, with respect, regard the reasoning and decision in *Nolan*[416] as decisive of this case. There does not seem to have been comprehensive argument with respect to, and detailed consideration given by this Court to the collective

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412 (1988) 165 CLR 178 at 186.

413 (1999) 199 CLR 462.

414 14 Fed Cas 1131 (1876). Miller J was an Associate Justice of the United States Supreme Court sitting as the Circuit Justice.

415 Reasons of Kirby J at [291]-[292].

416 (1988) 165 CLR 178.

effect and relevance of ss 8, 24 and 30 of the Constitution, although Gaudron J did refer in passing to the status of Mr Nolan as an elector[417]. But to the extent, if any, that it might stand as an obstacle, with the same anxiety but for the same reasons as are expressed by McHugh J[418], I would overrule it despite that it is a comparatively recent decision of six Justices[419].

377 In the end, however, it is unnecessary to decide finally whether ss 8, 24 and 30 of the Constitution together with the provisions of the Electoral Act, so far as they apply to the prosecutor, have the effect of precluding his treatment as an alien, whether under the Act or otherwise or whether the Act which is directly concerned with the citizenship of migrants to this country has an entirely different effect, because of the reasoning and conclusions of Kirby J with which I agree[420].

378 I also agree with the reasons for judgment of McHugh J that the prosecutor, as a subject of the Queen resident in Australia at the end of the evolutionary process to which I have referred, became a subject of the Queen of Australia, and that the rights conferred on him by s 117 of the Constitution are protected[421].

379 It is unnecessary for me to deal with all of the other grounds upon which the prosecutor relies. However, because of their importance and the lengthy argument advanced on them, I should state my views on some aspects of grounds 1.1, 1.2, 1.3 and 2.1.

380 I agree with Kirby J that there is no constitutional impediment to the appointment of assistant ministers to perform duties as ministers, and that s 501(4) of the Act may, and should here, be read as extending to an assistant minister[422].

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417 (1988) 165 CLR 178 at 189.

418 Reasons of McHugh J at [89]-[91].

419 As I pointed out in *Grincelis v House* (2000) 201 CLR 321 at 337-338 [45]-[46], three Justices of this Court (Gibbs, Stephen and Mason JJ) in *Griffiths v Kerkemeyer* (1977) 139 CLR 161 effectively overruled the six Justices (Dixon CJ, McTiernan, Williams, Webb, Fullagar and Taylor JJ) who had decided *Blundell v Musgrave* (1956) 96 CLR 73 only twenty-one years earlier.

420 Reasons of Kirby J at [281], [300]-[302], [308], [312].

421 Reasons of McHugh J at [131].

422 Reasons of Kirby J at [323]-[325].

381 I largely agree with Kirby J[423] that however broad may be the jurisdiction to grant prerogative relief pursuant to s 75 of the Constitution, it will not generally permit this Court to substitute, for the satisfaction of the Minister, the satisfaction of judges who are not accountable to the Parliament or the people in the same way as is a Minister. If a Court might, in some situations do so, this is not one in which it may or should.

382 It is for these reasons that I joined in the orders which have been pronounced by the Court.

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423 Reasons of Kirby J at [331].