

BETWEEN:

**ALBERT**

First Plaintiff

**TOBY**

Second Plaintiff

AND

**THE COMMONWEALTH**

Defendant

**SPECIAL CASE**

1. Albert (a citizen of Australia) and Toby (a citizen of Tuvalu) were fighting with the Taliban in Afghanistan when they were captured by armed forces of the United States. Each was found by a United States Military Court to have committed the crime against United States law of “being an enemy combatant” and was sentenced on that basis to imprisonment for the term of his natural life. Until recently, they have been serving their sentences at Guantanamo Bay.
2. The United States, Australia and Tuvalu recently entered into the Enemy Combatant’s Repatriation Treaty under which Australia has become obliged to repatriate Albert to Australia to serve out the remainder of his sentence and to assist Tuvalu in repatriating Toby to Tuvalu to serve out the remainder of his sentence.
3. Albert is now held at a Commonwealth-operated prison in the Northern Territory under the *Albert Act* 2016 (Cth), section 1 of which provides “Albert shall remain in prison in the Northern Territory for the remainder of his natural life.”
4. Toby is now held in a prison in Tuvalu under the *Toby Act*, a law of the Tuvaluan Parliament, section 1 of which provides “officers of the Australian Government are hereby authorised operate a prison for the imprisonment of Toby” and section 2 of which provides “Toby shall remain in prison for the term of his natural life provided that a prison for the imprisonment of Toby continues to be operated by officers of the Australian Government.” The prison is in fact operated by officers of the Commonwealth Department of Foreign Affairs.

5. Albert and Toby have commenced proceedings against the Commonwealth in the original jurisdiction of the High Court of Australia. Albert seeks, amongst other things, a declaration that the *Albert Act 2016 (Cth)* is invalid and a writ of habeas corpus requiring his release. Toby seeks, amongst other things, a declaration that operation of the prison in Tuvalu is beyond the executive power of the Commonwealth and an injunction restraining Commonwealth officers from operating the prison.

**The following questions have been reserved for the consideration of the Full Court:**

- 1) Is the *Albert Act 2016 (Cth)* invalid on the ground that it is inconsistent with Chapter III of the Constitution?
- 2) Is operation of the prison in Tuvalu beyond the executive power of the Commonwealth?

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*The Melbourne University Law Students' Society and the Australian Association of Constitutional Law extend their sincere gratitude to Justice Gageler of the High Court for writing the 2016 Sir Harry Gibbs Constitutional Law Moot problem.*

## CLARIFICATIONS

The following clarifications have been issued in relation to the 2016 Sir Harry Gibbs Constitutional Law Moot problem. These facts now form part of the problem.

Students are permitted to draw inferences from the facts set out in the problem. Students are not permitted to invent facts additional to those given in the problem. Students are permitted to have regard to real legislation in addition to the hypothetical legislation, to the extent that students consider such legislation to be relevant.

Further information about the events outlined in the problem is as follows:

6. In 2014 Albert and Toby were captured (as described in paragraph 1).
7. In 2015 Albert and Toby were tried and sentenced by the US Military Court (as described in paragraph 1). The US Military Court was validly established according to US constitutional law under the *Military Commissions Act 2006* (US).
8. In January 2016 the Enemy Combatant's Repatriation Treaty (described in paragraph 2) was entered into and ratified by all parties. It is a treaty that imposes a general obligation on states parties to repatriate their citizens who have been found by other states parties to have been enemy combatants. The Treaty does not name Toby or Albert.
9. In March 2016 the *Albert Act* and the *Toby Act* were enacted and commenced.
10. In April 2016 Albert was returned to Australia and detained under the *Albert Act* (as described in paragraph 3). At the time of his detention Albert remained an Australian citizen.
11. Also in April 2016 Toby was returned to Tuvalu and detained (as described in paragraph 4). At the time of his detention Toby remained a Tuvaluan citizen. Tuvalu was not and is not a regional processing country under the *Migration Act 1958* (Cth).
12. The Tuvaluan prison referred to in paragraph 4 is entirely staffed by officers of the Commonwealth Department of Foreign Affairs. The officers' salaries are funded by moneys appropriated by the Commonwealth Parliament for the Department's ordinary annual operations, under *Appropriation Act No 1* (2016).