IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN No. B43 of 2018

DANIEL ALEXANDER LOVE
Plaintiff

and

COMMONWEALTH OF AUSTRALIA
Defendant

and

ATTORNEY-GENERAL FOR THE STATE OF VICTORIA
Intervener

BETWEEN No. B64 of 2018

BRENDAN CRAIG THOMS
Plaintiff

and

COMMONWEALTH OF AUSTRALIA
Defendant

and

ATTORNEY-GENERAL FOR THE STATE OF VICTORIA
Intervener

SUBMISSIONS OF ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)

Filed on behalf of the Attorney-General for the State of Victoria (intervening)
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Part I: PUBLICATION

1 These submissions are in a form suitable for publication on the internet.

Part II: BASIS OF INTERVENTION

2 The Attorney-General for the State of Victoria (**Victoria**) received notices under s 78B of the *Judiciary Act 1903* (Cth), and filed a Notice of Intervention in response on 11 November 2018, on the question whether members of an Aboriginal society have such a strong claim to the protection of the Crown that they may be said to owe permanent allegiance to the Crown (**supplementary question**).

3 The Attorney-General for the State of Victoria intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the plaintiffs, to argue that, because the plaintiffs are Aboriginal persons who are members of an Aboriginal society, and because of the recognised mutual and unique relationship between members of Aboriginal societies and the land and waters of Australia, the plaintiffs are not "aliens" within the meaning of s 51(xix) of the Constitution.

4 Victoria has given a notice under s 78B of the *Judiciary Act 1903* (Cth) in respect of its arguments in this submission.

Part III: MATERIAL FACTS

5 The facts by reference to which the questions reserved are to be answered are set out in the special cases agreed by the parties in the respective proceedings.

6 Victoria submits that, applying the principles it contends for, each of the following facts in the special case is separately dispositive of the question:

(a) that each plaintiff is an Australian Aboriginal person, in accordance with the test for Aboriginality accepted by the parties in this case; and

(b) that Mr Thoms is a holder of native title rights and interests determined under the *Native Title Act 1993* (Cth) (Native Title Act).

7 Victoria submits that, in light of the accepted Aboriginality of Mr Love and Mr Thoms, and applying the principles Victoria contends for, it is irrelevant that the plaintiffs were born outside Australia, are citizens of another country, and are not citizens of Australia.

Part IV: ARGUMENT

Introduction

8 The supplementary question asks whether members of an Aboriginal society have such a strong claim to protection of the Crown that they may be said to owe permanent allegiance to the Crown. Victoria understands the question to be posed in terms that, if answered "yes", the plaintiffs thereby would be "non-aliens"[1] who fall outside "the class embraced by the constitutional term 'aliens'".[2] In particular, the references to "allegiance" and to "protection of the Crown" echo the feudal origins of the discourse.[3]

10 9 The supplementary question is articulated in seven steps. In summary, Victoria:

(a) embraces steps 1, 2, 4 in the terms expressed;

(b) supports the end to which steps 3, 5 and 6 are directed and proposes an alternative formulation of those steps;

(c) agrees in the conclusion expressed in step 7.

10 Victoria has intervened because the State is engaged in a process of working with Aboriginal Victorians[4] to consider and advance one or more treaties between Aboriginal Victorians and the State. For that purpose, Victoria has enacted the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic). By the

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1 Following the plurality in *Singh v Commonwealth* (2004) 222 CLR 322 (Gummow, Hayne and Heydon JJ) (***Singh***) at 382 [149]-[150], Victoria uses "non-alien" as a neutral descriptor to avoid the use of terms which necessarily foreclose proper examination of the question in issue in this case.

2 *Singh* (2004) 222 CLR 322 at 382 [149] (Gummow, Hayne and Heydon JJ).

3 As the Court has explained (eg *Singh* (2004) 222 CLR 322 at 386-7 [164]-[166], 388 [168]), under mediaeval, feudal theory, a 'subject of the Crown' was traditionally one who was said to owe a duty of permanent allegiance (or fidelity or loyalty) to the sovereign power (the body politic conventionally described as being represented by the 'Crown'). Under this theory, the vassal or subject's allegiance was accompanied by an imputed reciprocal duty of 'protection' owed by the 'sovereign power' to the 'non-alien', again adopting the categories and language of *Singh*. See also *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 (***Shaw***) at 37 [11] (Gleeson CJ, Gummow and Hayne JJ).

4 '**Aboriginal Victorians** are Victorian traditional owners, clans, family groups and all other people of Aboriginal and Torres Strait Islander descent who are living in Victoria': *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic), preamble (**Treaty Act**).

Treaty Act and other Acts (referred to below), Victoria has recognised "the special relationship of Aboriginal peoples with their land".[5]

Victoria's argument – Aboriginal relationship to the land is a unique relationship to Australia sufficient to deny alienage, in the same manner as citizenship

11 *Aliens and citizens.* The central issue is the meaning of the constitutional power with respect to "aliens".[6] It is wrong to begin with citizenship law[7] or to assert that current citizenship law decides the case.[8] Resort to so-called "settled principles"[9] does not provide an answer: in none of the Court's decisions to the effect that a foreign citizen who is not an Australian citizen has the status of an alien, has it fallen to the Court to decide the status of an Aboriginal person born outside Australia to an Australian citizen parent.[10] *Pochi v Macphee*[11] did not consider that question, and no case since *Pochi* has considered it. And "citizenship" itself has an evolving and changing legislative history.[12]

12 A power with respect to "aliens" clearly implies a distinction drawn with an alternative, "non-alien". The most basal distinction is the one between "self" and "other"; the Constitution is open as to how "self" is defined.

13 *Who is an alien?* As noted in *Nolan*, "alien", "[a]s a matter of etymology … means belonging to another person or place" and can be "used as a descriptive word to

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5 *Traditional Owner Settlement Act 2010* (Vic), preamble; *Aboriginal Heritage Act 2006* (Vic), s 3.

6 *Singh* (2004) 222 CLR 322 at 382 [150].

7 It has been noted that s 51(xix) permits (or may permit) creation of a law with respect to citizenship and nationality: *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 (***Shaw***) at 38-40 [15]-[22] (Gleeson CJ, Gummow and Hayne JJ, Heydon J concurring at 187 [190]; *Singh* (2004) 222 CLR 322 at 375 [125] (McHugh J). But to begin with the *Australian Citizenship Act 2007* (Cth) (cf Defendant's Further Submissions, 8 November 2019, [8]) is to invert the process of enquiry: *Singh* (2004) 222 CLR 322 at 382 [150] (Gummow, Hayne and Heydon JJ).

8 See, generally, *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 (***Nolan***); *Singh* (2004) 222 CLR 322 at 383 [153] (Gummow, Hayne and Heydon JJ); see also 374 [122] (McHugh J).

9 See Defendant's Submissions, 15 April 2019, [8].

10 *Love v Commonwealth; Thoms v Commonwealth*, Transcript of hearing (8 May 2019) pp 48-49, lines 2093-2112. In *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, Gaudron J applied exactly such analysis to general statements of the Court in previous cases: at 409 [39]; as also did the plurality in *Singh* (2004) 222 CLR 322 at 399-400 [203]-[204].

11 *Pochi v Macphee* (1982) 151 CLR 101 (***Pochi***); Plaintiffs' Submissions, 2 April 2019, [17].

12 See *Singh* (2004) 222 CLR 322.

describe *a person's lack of relationship with a country*".[13] As noted in *Singh*, "one feature about the use of the word … was constant: it was that the alien 'belonged to another'".[14] The search is for what nature of relationship distinguishes a non-alien. It may be accepted that, as a matter of ordinary language, "alien" means a foreigner, defined usually as a citizen or subject of a foreign state[15] (and who is not also a citizen of Australia). The citizen/alien dichotomy may be the ordinary or usual case, but as these submissions argue, it is not the rule for this case.[16] To make citizenship per se the rule is to give Parliament the unfettered power that *Pochi* denies.[17] If citizenship is a guide to who is an alien, it must be because there are characteristics which underlie citizenship which are the obverse of alienage. These characteristics have been given the labels "permanent", "allegiance" and "protection".

14 As these submissions argue, what matters are the principles underlying those characteristics, not the label itself and not the mediaeval particulars of the characteristics. Further, it is vital to recognise that these are characteristics deemed or imputed by the law as a consequence of status, rather than "an actual disposition to fidelity" that has been consciously or subjectively subscribed by the citizen.[18] As the Court has said, the search is not for definitions or taxonomies, but for the principle or principles underlying them.[19]

15 Accordingly, the prior question raised by this case is – *if an alien is one who is not ourself, who does not belong to this country, what principles underlie who belongs or*

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13 *Nolan* (1988) 165 CLR 178 at 183 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey JJ, *Singh* (2004) 222 CLR 322 at 400 [205] (Gummow, Hayne and Heydon JJ) (emphasis added).

14 *Singh* (2004) 222 CLR 322 at 395 [190] (Gummow, Hayne and Heydon JJ).

15 Ibid.

16 Being a citizen of a foreign state cannot be the only rule for when a person is an alien, because if it were merely sufficient to hold or be entitled to hold foreign citizenship, that would make almost half the population of Australia aliens: an estimate that 45% of Australian citizens are also foreign citizens has recently been put before the Court: *Re Canavan* [2017] HCATrans 200 (17 Oct 2017), p 99, line 4016: Mr Bennett QC referring to expert evidence tendered. An earlier estimate by the Australian Citizenship Council, chaired by Sir Ninian Stephen, estimated that as of 2000, there were at least 4.4 million Australians who were dual citizens: see Australian Citizenship Council, *Australian Citizenship for a New Century* (Feb 2000). The estimate was based on surveys undertaken by the Department of Immigration and Multicultural Affairs in late 1999.

17 *Pochi* (1982) 151 CLR 101 at 109; Defendant's Submissions, 15 April 2019, [13]; see also *Singh* (2004) 222 CLR 322 at 383 [151]-[153].

18 *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 198-9 [129] (Gummow J); *Singh* (2004) 222 CLR 322 at 386-388 [165]-[166].

19 *Singh* (2004) 222 CLR 322 at 368 [169] (Gummow, Hayne and Heydon JJ).

does not belong to Australia? Accepting that citizenship is one such bond, the common law of Australia and statutes of Victoria and other Australian jurisdictions acknowledge the existence of other bonds of relationship and belonging which should be recognised as having characteristics of the same nature, depth and significance as those expressed in citizenship.

16 *Belonging to the land.* Shortly put, there exists a unique relationship between members of Aboriginal societies and the land and waters of Australia[20] to which each Aboriginal society and, by extension, its members, belongs. This relationship is:[21]

(a) spiritual and cultural;

(b) an emanation and expression of Aboriginal societies;

(c) deep and enduring ("permanent");

(d) reciprocal or mutual;

(e) recognised by the Court in *Mabo No 2*,[22] *Yorta Yorta*,[23] *Griffiths*[24] and related jurisprudence; and

(f) acknowledged by Victorian statutes and legislation of the Commonwealth and other States (referred to below).

17 *The quality of belonging to land is equivalent to that of citizenship.* Because of those features, the bond between members of an Aboriginal society and the land is:

(a) a reciprocal relationship of belonging;

(b) uniquely held by a class of "Australians";

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20 Intending to evoke, in accordance with the rules of Aboriginal societies, the well-known summary by W E H Stanner, *The Boyer Lectures: After the Dreaming* (1968): "No English words are good enough to give a sense of the links between an Aboriginal group and its homeland. Our word 'home' … does not match the Aboriginal word that may mean 'camp', 'hearth', 'country', 'everlasting home', 'totem place', 'life source', 'spirit centre' and much more all in one. Our word 'land' is too spare and meagre." in W E H Stanner *The Dreaming and Other Essays* (Black Inc, Melbourne, 2009), p 206.

21 *Western Australia v Ward* (2002) 213 CLR 1 at 64-65 [14] (Gleeson CJ, Gaudron, Gummow and Hayne JJ) (***Ward***); *Northern Territory v Griffiths* (2019) 93 ALJR 327 (***Griffiths***) at 370-373 [168]-[184] as to the specific case, and 373 [187], 380 [230] generally (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ; Gageler J agreeing 382 [240]; Edelman J agreeing 383 [253]); and 394 [313]-[314] (Edelman J).

22 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 (***Mabo No 2***).

23 *Yorta Yorta v Victoria* (2002) 214 CLR 422 (***Yorta Yorta***).

24 *Griffiths* (2019) 93 ALJR 327.

(c) uniquely relates to Australia; and

(d) equivalent in permanence, reciprocity and strength to the current tests under which an Australian citizen is not an alien.

18 The relationship to the land and waters of Australia of members of Aboriginal societies:

(a) is an inherent attribute of being a member of Aboriginal society;

(b) is illustrated by those members of Aboriginal societies who hold or may hold native title rights and interests under the Native Title Act;

(c) is not restricted to those who hold or claim native title rights and interests or other statutory titles;

(d) is held by members of Aboriginal societies whose native title rights and interests have been extinguished; and

(e) is held by members of Aboriginal societies who have been dispossessed of traditional lands or separated from those lands.

19 This does not require a member of an Aboriginal society to establish a relationship to a particular area of land or waters, because the relationship to the land and waters of Australia exists as a result of membership of an Aboriginal society itself. This is so even if, as a result of European colonisation, an Aboriginal person may lack knowledge of the particular area of land and waters that, as a matter of traditional law and custom, they may be from. At the most basic and fundamental level, Aboriginal Australians are *of* the lands and waters of Australia, as a matter of status.[25]

20 *The role of the common law of Australia.* There is one common law of Australia. Axiomatically, the common law is coherent and consistent, and the Court is concerned to ensure that it rests and develops on principled grounds. In that respect, contrary to the Commonwealth's supplementary submissions, the common law of

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25 This accords with the principle that it is not the subjective knowledge or intention of a particular person that dictates whether they fall within or without the aliens power: *Pochi* (1982) 151 CLR 101 at 111 (Gibbs CJ); *Singh* (2004) 222 CLR 322 at 397-398 [197]-[198] (Gummow, Hayne and Heydon JJ). See also *Re Canavan* (2017) 263 CLR 284 at 307-309 [47]-[54] rejecting the argument that proof of knowledge of foreign citizenship is necessary for the application of s 44(i) of the Constitution.

Australia's understanding and recognition of the existence and features of Aboriginal society and of the nature and extent of Aboriginal belonging to the land and waters of Australia, is relevant and dispositive. That recognition is expressed in the Court's jurisprudence on customary native title, on the Native Title Act and on the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). Relevant statutes of the Commonwealth, States and Territories express the same understanding and recognition.

21 In particular, there is recognition of a system or systems of law and societies which is or are *indigenous to Australia*. For present purposes, the most pertinent element of Aboriginal law and custom is that a member of Aboriginal society *belongs to Australia*, "an organic part of one indissoluble whole" with the land and everything on it.[26]

22 As a member of an Aboriginal society, the relationship of an Aboriginal person with Australia is uniquely Australian: they are a member of a society of persons which is only of, and only relating to, Australia. That relationship is and should be characterised for constitutional purposes as of the same nature and quality as the relationship between an Australian citizen and the Australian polity.[27] Each plaintiff, being a member of an Aboriginal society according to a test accepted as common ground by the parties,[28] as a consequence, should be taken not to be aliens.

23 In the unique circumstances of Aboriginal societies, Victoria's argument supplements, without otherwise disturbing, the existing law on who is an alien.[29]

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26 See *Griffiths* (2019) 93 ALJR 327 at 379 [223] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

27 *Singh* (2004) 222 CLR 322 at 386-388 [164]-[166].

28 It is not necessary to define Aboriginality further for present purposes. Victoria acknowledges that other definitions can and do apply in various contexts: *Eatock v Bolt* (2011) 197 FCR 261 at 300-305 [167]-[190] (Bromberg J). See also the *United Nations Declaration on the Rights of Indigenous Peoples* (UN doc A/RES/61/295, 13 September 2007) (supported by Australia, 3 April 2009) (**UNDRIP**), art 33(1): 'Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. …'

29 No prior decision of the Court with respect to s 51(xix) is reversed. Responsive to the special facts of the present case, the Court is 'quelling a particular controversy by deciding whether, in the circumstances presented in the matter, the relevant constitutional provisions do or do not have the consequence for which a party contends': *Singh* (2004) 222 CLR 322 at 383 [152] (Gummow, Hayne and Heydon JJ).

24 It is consistent with the evolution of the common law of Australia informed by developments in Australia's legal and constitutional history and by the common law's recognition of the prior ownership of Australia by its indigenous peoples, that the constitutional term "alien" should be understood as excluding members of an Aboriginal society in view of the permanent and reciprocal relationship with the land and waters of Australia which Aboriginal societies uniquely hold. Such a step is a coherent and logical development of the common law of Australia.

The supplementary question – Preliminary

25 Turning to the supplementary question and its steps, there are two further general propositions of relevance.

26 **First**, "changes in *national* and international circumstances may affect the application of the term 'alien'", and demonstrably have.[30] This case presents an example of changes in national circumstances (specifically, the recognition by the common law of customary native title and by statute of the special relationship of Aboriginal societies with the land and waters of Australia) raising a new issue for decision. Accordingly, generally accepted principles expounded thus far regarding the scope of s 51(xix) are of relevance but cannot preclude further development by the Court. There is nothing contrary to principle in developing the law with respect to alienage in response to such national circumstances.

27 **Secondly**, s 51(xix) confers a power to make laws with respect to a class of persons.[31] It follows that a class of persons may logically fall outside of that power. It has come to pass that citizens, as defined by statute, as a class, fall outside of the term 'alien'. However, that does not foreclose that other classes of persons may also fall outside of the term 'alien'. The Commonwealth accepts that "Aboriginal people, as a class, were not and are not 'aliens'".[32] Merely because an Aboriginal person is also a citizen of a foreign country does not make one an alien for the purposes of s 51(xix).

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30 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439 at 458-9 [35] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ).

31 *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 315 (Brennan J).

32 Defendant's Submissions, 15 April 2019, [32] (emphasis as in original).

Steps 1 and 2: *Section 51(xix) of the Constitution does not allow the Parliament to treat as an alien a person who cannot answer the description of alien according to the 'ordinary understanding' of that word. The ordinary understanding of an "alien" is informed by the common law of Australia*:

28 Step 1 reflects the statement of Gibbs CJ in *Pochi*.[33] Read in context, Gibbs CJ did not purport to state an exhaustive definition of the meaning of "alien", but rather a clear case.[34]

29 Further, confirming step 2, "the meaning of 'aliens' in the Constitution cannot depend on the law of England. It must depend on the law of Australia".[35]

10 **Step 3**: *According to the common law, an alien is a person who does not have the permanent protection of and owe permanent allegiance to the Crown in right of Australia.*

30 With respect to step 3, Victoria submits, that, while the common law of Australia provides the necessary tools for determining the issue in the stated case, step 3 as presently framed does not capture all that is necessary. To the extent that step 3 is expressed in terms of the feudal concepts of "allegiance" and "protection",[36] it imposes on Aboriginal societies concepts and classifications which are foreign to Aboriginal societies; and which are not necessary to resolve the stated case. Rather, the common law of Australia's recognition of the inherent features of Aboriginal society, originally expressed in the common law of customary native title, provides
20 the relevant step.

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33 (1982) 151 CLR 101 at 109. It has been frequently quoted since, including in *Singh* (2004) 222 CLR 322 at 329 [4]-[5] (Gleeson CJ) and 383 [153] (Gummow, Hayne and Heydon JJ).

34 This was not the sole test of who is an alien, nor (contrary to the Commonwealth's supplementary submissions) the outer boundaries of the meaning of 'alien': Defendant's Further Submissions, 8 Nov 2019, [5], Defendant's Submissions, 15 April 2019, [10]-[12].

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

36 As noted frequently, the English common law of alienage was based on mediaeval and feudal theories of the mutual bonds of vassal and liege lord: *Pochi* (1982) 151 CLR 101 at 111 (Gibbs CJ, Mason and Wilson JJ agreeing); *Nolan* (1988) 165 CLR 178; *Shaw* (2003) 218 CLR 28 at 37 [11]; *Singh* (2004) 222 CLR 322 at 386-8 [164]-[166].

31 The meaning and etymology of "alien" is a helpful reminder of what is to be defined. The phrase from *Nolan, "belonging to the country"* has already been noted.[37] Further:

> As a matter of etymology, "alien", from the Latin *alienus* through Old French, means belonging to another person or place.[38]
>
> ...
>
> An alien (from the Latin *alienus* – belonging to another) is, in essence, 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.[39]

10 32 These etymologies point to alienage being a status determined by *belonging*, or more relevantly lack of belonging, to land or community within or part of a polity. Accordingly, the search is for principles which measure and define the features and strength of the relationship of belonging.

33 In analysing step 3, there are three important characteristics, embedded in the concepts of "allegiance" and "protection" and "Crown",[40] that are critical to the identification of the underlying principles necessary to answer the stated case and the supplementary question posed.

(a) **First**, putting aside the historical particularities of "allegiance" and "protection", what those labels describe is a connection between claimant
20 and another which is *relational*. That is, the distinction between an alien and a non-alien turns on the nature of the relationship between the claimant and the person or place.

A non-alien has a unique or special relationship with the land and community and body politic of which the non-alien claims membership. While that relationship has traditionally been expressed in terms that the non-alien owes a duty of allegiance to the polity and is said to be owed protection in return by the governing power of the polity, that mode of

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37 "Alien" is 'used as a descriptive word to describe a person's lack of *relationship with a country*': *Nolan* (1988) 165 CLR 178 at 183 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey JJ) (emphasis added). To similar effect is the notion of identifying 'persons belonging to the country', referred to in *Shaw* (2003) 218 CLR 28 at 39 [18] (Gleeson CJ, Gummow and Hayne JJ); Heydon J concurring at 187 [190]).

38 Ibid (emphasis added).

39 *Nolan* (1988) 165 CLR 178 at 189 (Gaudron J) (emphasis added).

40 *Sue v Hill* (1999) 199 CLR 426 at 497-502 [83]-[91] (Gleeson CJ, Gummow and Hayne JJ); *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 363 (Dixon J).

expression reflects the particularities of the terms' feudal origins. The feudal forms of expression are abstractions that are axiomatic and descriptive of a conclusion, rather than necessarily having specific content.[41] Accordingly, the feudal tests should not be taken as the exclusive means of recognising who is a non-alien.

(b) **Secondly**, of equal, if not greater, significance is that this particular relationship is, or is regarded by the law as being, *permanent* and *enduring*.[42]

(c) **Thirdly**, the relationship must be one that is *reciprocal* or *mutual*.[43] Focusing on non-aliens, a non-alien owes duties or obligations to the sovereign power, and the sovereign power has corresponding duties or obligations to a non-alien. As noted, those duties or obligations of allegiance or protection, are, generally speaking, abstract. Nonetheless, they indicate, when considering the constitutional definition of "aliens", that an alien must lack a relationship that is reciprocal or mutual in nature with Australia.

34 In summary, a non-alien has a unique relationship with the polity that an alien *does not have*. In the case of Aboriginal societies, that unique relationship is between Aboriginal people and land and waters of Australia. See for example, Victorian legislation at [42] below.

35 In conclusion, Victoria proposes that step 3 be expressed so that rather than being framed solely in terms of correlative "allegiance" to and "protection" of a sovereign power, the reciprocal relationship should encompass a permanent or enduring bond, of belonging to Australia, so that the common law would recognise members of Aboriginal societies as having a reciprocal relationship to Australia which is of equivalent permanence, depth and reciprocity to that of a citizen. Thus Victoria proposes step 3 be expressed:

According to the common law of Australia, an alien is a person who does not either (a) have the permanent protection of and owe permanent allegiance to the

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41 *Singh* (2004) 222 CLR 322 at 387-388 [165]-[166] (Gummow, Hayne and Heydon JJ).
42 *Singh* (2004) 222 CLR 322 at 387-388 [165]-[166] (Gummow, Hayne and Heydon JJ).
43 *Singh* (2004) 222 CLR 322 at 387-388 [166] (Gummow, Hayne and Heydon JJ).

Australian polity, expressed through citizenship of Australia; or (b) permanently belong to the land and waters of Australia, expressed through membership of an Aboriginal society.

Step 4: *The common law's recognition of customary native title logically entails the recognition of an Aboriginal society's laws and customs (and, in particular, that society's authority to determine its own membership).*

36 Victoria agrees with step 4. The first part is decided and explained in *Yorta Yorta*.[44]

37 In particular, of relevance to this matter, the Court's jurisprudence establishes that native title rights and interests are inalienable (except to the Crown itself),[45] highlighting the permanency of Aboriginal belonging to the land and waters of Australia.[46]

38 The recognition of a member of an Aboriginal society's belonging to the land and waters as precluding alienage does not require that the Aboriginal person be the holder of native title rights and interests under the Native Title Act or be an applicant or member of a native title claim group. Being a holder or claimant of native title rights and interests is an indication of membership of an Aboriginal society; but is not the only test. As the Court has noted: "traditional Aboriginal land is not used or enjoyed only by those who have primary spiritual responsibility for it. Other Aboriginals or Aboriginal groups may have spiritual responsibility for the same land".[47] And the Court can recognise that those dispossessed of traditional lands or

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44 *Yorta Yorta* (2002) 214 CLR 422 at 441 [37], 442 [40] 445 [49]-[50] (Gleeson CJ, Gummow and Hayne JJ). Although formally responsive to the Native Title Act, this decision sets out matters which logically also appertain to holders and claimants of customary native title recognised in *Mabo No 2.*

45 *Mabo No 2* (1992) 175 CLR 1 at 70 (Brennan J).

46 A continuing physical connection between a community claiming native title and the claim area is not necessary to establish native title – rather it is the nature of the content of the connection in accordance with Aboriginal laws and customs: *Ward* at 85-86 [64] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *De Rose v South Australia (No 2)* (2005) 145 FCR 290 at 306 [62] (Wilcox, Sackville and Merkel JJ), not affected by *Western Australia v Brown* (2014) 253 CLR 507 at 522-523 [37], 528 – 529 [60]-[62].

47 *Yanner v Eaton* (1999) 201 CLR 351 at 373 [37] (Gleeson CJ. Gaudron, Kirby and Hayne JJ) (***Yanner***) citing *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327at 358 (Brennan J).

separated from those lands[48] still have a unique relationship with the land and waters of Australia generally, or the right to that relationship.[49]

39 For present purposes, the extinguishment of native title does not extinguish or terminate the spiritual or traditional relationship of the Aboriginal society to the land and waters of Australia. So much may be taken as recognised by *Griffiths*[50] (as it was, earlier, in respect of regulation short of extinguishment, in *Yanner*[51]). As stated in *Griffiths*:

> the connection [to land] is spiritual. That is, the connection is something over and above and separate from "enjoyment" in the sense of the ability to engage in activity or use. Spiritual connection identifies and refers to a defining element in a view of life and living. It is not to be equated with loss of enjoyment of life or other notions and expressions found in the law relating to compensation for personal injury. Those expressions do not go near to capturing the breadth and depth of what is spiritual connection with land.[52]

40 Given that the indigenous inhabitants of Australia "had neither ceded their lands to the Crown nor suffered them to be taken as the spoils of conquest",[53] extinguishment of native title is rather an external consequence of colonial and settler law and government action, as explained in *Mabo No 2*,[54] and not any diminution of the relationship of Aboriginal societies to Australian land and waters.

41 Nor, contrary to the underpinning of native title, in the requirement of "connection", need it be shown that the Aboriginal belonging to the land is traceable substantially unaltered to the time before sovereignty: in determining the status of members of

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48 *De Rose v South Australia (No 2)* (2005) 145 FCR 290 at 306 [62].

49 In any particular case, the allocation and exercise of responsibility for land will be regulated by the norms of the Aboriginal society concerned, and may vary according to the age, knowledge and circumstances of an individual and the nature and position of the Aboriginal society. (But that there is a special and unique relationship with land as an inherent feature of Aboriginal societies may be taken as given.) The *Aboriginal Heritage Act 2006* (Vic), in the structure of its definition of 'traditional owner', recognises that not all members of Aboriginal society have the same role. It includes not only Aboriginal persons with a responsibility for significant Aboriginal places, but also a member of a family or clan where the family or clan is recognised as having such responsibility. Moreover, the *Treaty Act* recognises that Aboriginal Victorians reach beyond 'traditional owners'.

50 *Griffiths* (2019) 93 ALJR 327.

51 *Yanner* (1999) 201 CLR 351 at 373 [38] (Gleeson CJ. Gaudron, Kirby and Hayne JJ).

52 *Griffiths* (2019) 93 ALJR 327 at 373[187] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ). See also the plurality's references to a loss of a "sense" of connection rather than connection itself: at 335 [2], 351 [84], 355 [98], 369-370 [165], 376 [204], 377 [206], 378 [217], 379 [223].

53 *Mabo No 2* (1992) 175 CLR 1 at 29 (Brennan J).

54 And recognised in the Preamble to the Native Title Act. See also *Griffiths* (2019) 93 ALJR 327 at 341 [26] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

Aboriginal societies, it is the present relationship of Aboriginal society to the land and waters, and the contemporary expression of that unique relationship to Australia, which is relevant.

42 The unique Aboriginal relationship with the land is widely attested as a present and on-going feature of Aboriginal society, distinct from (albeit recognised in) native title.[55] It sits side by side with the acknowledged reality that Aboriginal societies are, and are descendants of, the first people, the original people, of Australia. For example (emphases added), belonging to the land is recognized by statutes, both generally and in particular terms:

10 Section 1A(2) of the *Constitution Act 1975* (Vic) recognises that Victoria's Aboriginal people:

(a) have a *unique status as the descendants of Australia's first people*; and

(b) have a *spiritual, social, cultural and economic relationship with their traditional lands and waters within Victoria*; and

(c) have made a *unique* and irreplaceable contribution to the identity and well-being of Victoria.

The *Traditional Owner Settlement Act 2010* (Vic) relevantly provides, in the preamble:

> It is now expedient, as a means of reconciliation, to provide for agreements to be
> 20 negotiated between the State and traditional owner groups to enable Aboriginal cultures to be recognised, *in particular the recognition of the special relationship of Aboriginal peoples with their land* …

The *Charter of Human Rights and Responsibilities Act 2006* (Vic) (s 19(2)) provides (and the *Human Rights Act 2019* (Qld), s 28 provides in similar terms):

> Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community—
>
> …
>
> (c) to maintain their kinship ties; and
>
> (d) to maintain *their distinctive spiritual, material and economic relationship with the*
> 30 *land and waters and other resources with which they have a connection* under traditional laws and customs.

The purposes of the *Aboriginal Heritage Act 2006* (Vic) (s 1) relevantly are:

(c) to strengthen the *ongoing right to maintain the distinctive spiritual, cultural, material and economic relationship of traditional owners with the land and waters*

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55 *Ward* (2002) 213 CLR 1 at 64-65 [14] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

and other resources with which they have a connection under traditional laws and customs;

43 The relevance of these and similar statutory provisions is two-fold:

(a) they express solemn statutory recognition by polities of Australia that there is a unique relationship between Aboriginal societies and the land and waters; and

(b) they point to the need to frame consideration of who is an "alien" by reference to Australian conditions that reach beyond the feudal concepts that underlay the common law in the past.

10 44 There is a further relevant consequence of recognising the existence of Aboriginal law and custom and Aboriginal society and the prior ownership of the land of Australia by Aboriginal societies: the recognition of a community and a system or systems of law which are indigenous to Australia.

45 In the circumstances of this matter, a relevant element of that law is the sense of belonging to land for Aboriginal persons as members of Aboriginal societies. Those who are bound by that law – members of Aboriginal societies – should be recognised by the common law as being part of Australia, belonging to Australia, by ties of Aboriginal law and custom, which are relevant to the determination of alienage and as powerful as the formal bonds of citizenship. The ties to Australia of a member of
20 Aboriginal society should be judged by the common law to preclude accepted members of Aboriginal societies being "aliens" in the constitutional sense. This is entirely consistent with the Court's decision in *Mabo No 2* and is a logical, principled development of the common law and the application of its analysis of the position of indigenous Australians in a way that promotes coherence of the law.

46 The *second part* of step 4, that recognition of Aboriginal society entails recognition of that society's rules for constituting itself (determining membership) logically flows from the general premise, and has been accepted by judicial decision[56], is

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56 *Commonwealth v Tasmania (Tasmanian Dams Case)* (1983) 158 CLR 1 at 273-274 (Deane J); *Mabo No 2* (1992) 175 CLR 1 at 70 (Brennan J); see also discussion in *Eatock v Bolt* (2011) 197 FCR 261 at 300-305 [167]-[190] (Bromberg J).

embodied in statutes such as the Native Title Act[57], and is recognised by international declarations.[58]

47 The factual inquiry would not, contrary to the Commonwealth's submission,[59] create administrative problems or impair the due administration of Commonwealth law.[60] Further, the argument that, if the High Court were to hold that Aboriginal persons were not aliens for the purpose of s 51(xix), this would "fracture the understanding of the aliens power … by creating a class of persons of uncertain size and definition" is undermined, in part, by the Commonwealth's acknowledgment that most Aboriginal persons will be Australian citizens.[61] And the case is not to be resolved "by an
10 apprehension of extreme examples and distorting possibilities".[62]

Steps 5 and 6: *The common law must be taken to have comprehended a unique obligation of protection owed by the Crown to an Aboriginal society, requiring it to protect each member of that society. Corresponding to the Crown's obligation of protection is the allegiance which each member of an Aboriginal society owes to the Crown.*

48 Victoria addresses Steps 5 and 6 together, as they seem proposed as equivalents of the feudal concepts in the relationship of a subject or citizen and the sovereign power.

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57 Native Title Act, ss 61, 66B, 190B(3); 251A; 251B. See also *Aboriginal Land Rights Act 1983* (NSW), s 4(1) and *Aboriginal Lands Act 1995* (Tas) s 3A. Well-known and lively contests over group composition in native title claims show both (a) the rigour and vitality of community self-definition; and (b) that the Commonwealth's fears about opportunistic identification as 'Aboriginal' are misplaced. It is not on a whim that Aboriginal persons identify as Aboriginal, or are accepted by their community. Any suggestion that it may be demonstrates a lack of understanding of the historical, social and spiritual depth of Aboriginal identity. Cf *Rubibi v Western Australia (No 6)* [2006] FCA 82; *Rose on behalf of the Kurnai Clans v Victoria* [2010] FCA 460; *Briggs v Aboriginal Heritage Council* [2019] VSC 25; *Kemp v Native Title Registrar* (2006) 153 FCR 38; *Northern Territory v Doepel* (2003) 133 FCR 112.

58 UNDRIP, art 9: 'individuals have the right to belong to an Indigenous community … in accordance with the traditions and customs of the community'; art 35: 'Indigenous peoples have the right to determine the responsibilities of individuals to their communities.'

59 See Defendant's Further Submissions, 8 November 2019, [49].

60 Even the question of citizenship, upon which the Commonwealth focuses, may involve factual findings and analysis for the purposes of the Constitution (albeit in the context of foreign citizenship): see, in context of s 44 of the Constitution, *Re Roberts* (2017) 91 ALJR 1018.

61 Defendant's Further Submissions, 8 November 2019, [47].

62 *Shaw* (2003) 218 CLR 28 at 43[32]; *Singh* (2004) 222 CLR 322 at 383 [152], 384 [155].

49 It is not necessary to adopt steps 5 and 6 in the terms expressed. Rather, leading to the same conclusion, the relationship between members of Aboriginal society and Australia is the equivalent of the relationship between an Australian citizen and Australia, such that an accepted member of Aboriginal society cannot answer the description of "alien" in the constitutional sense of that word.

50 The basis for Victoria's submission is that:

(a) the common law recognises the existence of Aboriginal societies which were and are "of the land" which today forms part of the nation state of Australia;

(b) the common law acknowledges that Aboriginal societies belong to the land of Australia, by a unique and deep spiritual relationship with the land and waters;

(c) the relationship of members of Aboriginal society with the land and waters of Australia is mutual and permanent – a reciprocal relationship as meaningful as that between a citizen and the Australian polity.

51 Put another way, the relationship to the land of members of Aboriginal societies is so distinctively and uniquely Australian, that persons acknowledging and accepted by Aboriginal society cannot be an alien of Australia.

52 *Canadian special fiduciary relationship?* Steps 5 and 6 may invite consideration of Canadian jurisprudence on First Nations, in which the Supreme Court of Canada has identified a limited special duty of protection of the Crown owed to First Nations (aboriginal) peoples of Canada, sometimes referred to as a special fiduciary relationship.[63] This is not a standard private law trust, political trust[64] or a public

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63 *Guerin v The Queen* [1984] 2 SCR 335; *Delgamuukw v British Columbia* [1997] 3 SCR 1010; *Wewaykum Indian Band v Canada* [2002] 4 SCR 245 at 293-295; *Haida Nation v British Columbia* [2004] 3 SCR 511 at [18]; *Ermineskin Indian Band and Nation v Canada* [2009] 1 SCR 222; Peter W Hogg, Patrick J Monaghan, Wade K Wright, *Liability of the Crown* 4th ed (Carswell, 2011), pp 372-379; Thomas Isaac *Aboriginal Title* (Native Law Centre, University of Saskatchewan, 2006) pp 34, 40-42.

64 Of the kind referred to in *Kinloch v Secretary of State for India* (1882) 7 App Cas 719; *Tito v Waddell (No 2)* [1977] 1 Ch 106 at 207, 211, 217; *Aboriginal Development Commission v Treka Aboriginal Arts And Crafts Ltd* [1984] 3 NSWLR 502.

trust,[65] but a *sui generis* fiduciary duty, one of three "duties of the Crown" founded on a common law principle recognised in Canada as the "honour of the Crown".[66]

53 Clearly, if the obligation is to have meaningful content, a considerable body of material needs to be assembled and considered to make a coherent and convincing case. On the other hand, the obligation of protection which a nation state owes to its citizens or subjects is not defined with any great particularity or in other than abstract terms.[67]

54 Stimulated by dicta of Deane J in *Mabo No 1*,[68] a fiduciary duty was part of the argument in *Mabo No 2,* discussed at length only by Toohey J.[69] It was argued at length in *Wik,*[70] but there has been no substantive development of the concept of a Canadian type of fiduciary obligation in Australia. The present case is not a suitable vehicle for its consideration, when there are other paths to resolution. In that respect, Victoria agrees with the Commonwealth's submission[71] that whether the common law of Australia comprehends a unique obligation to protect members of an Aboriginal society in a fiduciary or quasi-fiduciary sense has not been argued and should not be decided in this case.

Step 7: *It follows that a person whom an Aboriginal society has determined to be one of its members cannot answer the description of an alien according to the ordinary understanding of that word.*

55 Victoria supports this conclusion, with the addition that such a person cannot answer the description of an alien "according to the constitutional meaning of that word".

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65 As discussed in *Randwick Corporation v Rutledge* (1959) 102 CLR 54 at 76 (Windeyer J).

66 The other duties are 'to consult and accommodate' and, 'to seek and obtain consent': Isaac, n 63, pp 35–40. See also Kirsty Gover 'The Honour of the Crowns: State-Indigenous Fiduciary Relationships and Australian Exceptionalism' (2016) 38 *Sydney Law Review* 339, 351 – 357.

67 *Singh* (2004) 222 CLR 522 at 387-388 [165]-[166].

68 *Mabo v Queensland [No 1]* (1988) 166 CLR 186 at 228.

69 *Mabo No 2* (1992) 175 CLR 1, 199-205; argument at 11-12, 15-16.

70 *Wik Peoples v Queensland* (1996) 187 CLR 1, arguments of Appellants: at 12-13, 19-20; interveners at 27; Qld at 38-40; Cth at 45; WA at 51-3; NT at 58-9; 60-1; cf SA at 56 fn 251.

71 Defendant's Further Submissions, 8 November 2019, [42].

PART V: TIME ESTIMATE

56 Victoria estimates that it will require approximately 1 hour for presentation of oral submissions.

Dated 22 November 2019

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ATTACHMENT: LEGISLATIVE RECOGNITION OF THE CONNECTION OF ABORIGINAL PERSONS WITH THE LAND

VICTORIAN LEGISLATION

Constitution Act 1975 **(Vic)**, s 1A(2), recognises that Victoria's Aboriginal people:

(a) have a unique status as the descendants of Australia's first people; and

(b) have a spiritual, social, cultural and economic relationship with their traditional lands and waters within Victoria; and

(c) have made a unique and irreplaceable contribution to the identity and well-being of Victoria.

Aboriginal Heritage Act 2006 **(Vic)**, s 1, states that the purposes of that Act relevantly are:

...

(c) to strengthen the ongoing right to maintain the distinctive spiritual, cultural, material and economic relationship of traditional owners with the land and waters and other resources with which they have a connection under traditional laws and customs; and

(d) to promote respect for Aboriginal cultural heritage, contributing to its protection as part of the common heritage of all peoples and to the sustainable development and management of land and of the environment.

Section 7 of that Act provides that:

A person is a traditional owner of an area if:

(a) the person is an Aboriginal person ['a person belonging to the indigenous peoples of Australia': s 3] with particular knowledge about traditions, observances, customs or beliefs associated with the area; and

(b) the person—

(i) has responsibility under Aboriginal tradition for significant Aboriginal places located in, or significant Aboriginal objects originating from, the area; or

(ii) is a member of a family or clan group that is recognised as having responsibility under Aboriginal tradition for significant Aboriginal places located in, or significant Aboriginal objects originating from, the area.

Charter of Human Rights and Responsibilities Act 2006 **(Vic)** relevantly provides (s 19(2)):

Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community—

...

(c) to maintain their kinship ties; and

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(d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

Traditional Owner Settlement Act 2010 **(Vic)** relevantly recites:

> Aboriginal peoples have lived for more than a thousand generations in this State. They maintained complex societies with many languages, kinship systems, laws, polities and spiritualities. They enjoyed a close spiritual connection with their country and developed sustainable economic practices for their lands, waters and natural resources. Land formed the basis of their existence and identity and was owned and managed according to traditional laws and customs. They had a special relationship with their lands, which held great meaning to them. ...
>
> It is now expedient, as a means of reconciliation, to provide for agreements to be negotiated between the State and traditional owner groups to enable Aboriginal cultures to be recognised, in particular the recognition of the special relationship of Aboriginal peoples with their land, to recognise traditional owner rights and for rights to be conferred on identified traditional owner groups.

Advancing the Treaty Process with Aboriginal Victorians Act 2018 **(Vic)** relevantly recites:

> The State acknowledges the diversity of Aboriginal Victorians, their communities and cultures, and the intrinsic connection of traditional owners to Country.
>
> Aboriginal Victorians are Victorian traditional owners, clans, family groups and all other people of Aboriginal and Torres Strait Islander descent who are living in Victoria. ...

Yarra River Protection (Wilip-gin Birrarung murron) Act 2017 **(Vic)** provides:

> **Preamble**
>
> The Yarra River is of great importance to Melbourne and Victoria. It is the intention of the Parliament that the Yarra River is kept alive and healthy for the benefit of future generations.
>
> This Act recognises the intrinsic connection of the traditional owners to the Yarra River and its Country and further recognises them as the custodians of the land and waterway which they call Birrarung.
>
> In the Woi-wurrung language of the traditional owners, Wilip-gin Birrarung murron means "keep the Birrarung alive". The following statement (in the Woi-wurrung language and in English) is from the Woi-wurrung—
>
> *Woiwurrungbaluk ba Birrarung wanganyinu biikpil*
>
> *Yarrayarrapil, manyi biik ba Birrarung, ganbu marram-nganyinu*
>
> *Manyi Birrarung murrondjak, durrung ba murrup warrongguny, ngargunin twarnpil*
>
> *Birrarungwa nhanbu wilamnganyinu*
>
> *Nhanbu ngarn.ganhanganyinu manyi Birrarung*
>
> *Bunjil munggany biik, wurru-wurru, warriny ba yaluk, ba ngargunin twarn*

Biiku kuliny munggany Bunjil

Waa marrnakith-nganyin

Balliyang, barnumbinyu Bundjilal, banyu bagurrk munggany

Ngarn.gunganyinu nhanbu

nyilam biik, nyilam kuliny – balit biik, balit kuliny: balitmanhanganyin manyi biik ba Birrarung. Balitmanhanganyin durrungu ba murrupu,

ba nhanbu murrondjak!

We, the Woi-wurrung, the First People, and the Birrarung, belong to this Country. This Country, and the Birrarung are part of us.

10 The Birrarung is alive, has a heart, a spirit and is part of our Dreaming. We have lived with and known the Birrarung since the beginning. We will always know the Birrarung.

Bunjil, the great Eagle, the creator spirit, made the land, the sky, the sea, the rivers, flora and fauna, the lore. He made Kulin from the earth. Bunjil gave Waa, the crow, the responsibility of Protector. Bunjil's brother, Palliyang, the Bat, created Bagarook, women, from the water.

Since our beginning it has been known that we have an obligation to keep the Birrarung alive and healthy—for all generations to come.

COMMONWEALTH LEGISLATION

As the Court has summarised in several cases, the ***Aboriginal Land Rights (Northern***

20 ***Territory) Act 1976*** **(Cth)** gives effect to the well-known Woodward Royal Commission established to report on "appropriate means to recognise the traditional rights and interests of Aborigines in and in relation to land …"[72] "***Traditional Aboriginal owners***", the primary right holders, are defined under s 3(1) as:

> A local descent group of Aboriginals who:
>
> (a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and
>
> (b) are entitled by Aboriginal tradition to forage as of right over that land.

Aboriginal and Torres Strait Islander Heritage Protection Act 1984 **(Cth)** (s 3):

30 > *"**Aboriginal**"* means a member of the Aboriginal race of Australia, and includes a descendant of the indigenous inhabitants of the Torres Strait Islands.
>
> "***Aboriginal tradition***" means the body of traditions, observances, customs and beliefs of Aboriginals generally or of a particular community or group of Aboriginals, and includes

---

72 *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 354-358 (Brennan J); *Risk v Northern Territory* (2002) 210 CLR 392 at 408 – 411 [43]-[53] (McHugh J) at 415-417 [73]-[76] (Gummow J). See also *Risk v Northern Territory* (2000) 105 FCR 109 at 114-117 [17]-[21] (French and Kiefel JJ).

any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships.

"***significant Aboriginal area***" means:

(a) an area of land in Australia or in or beneath Australian waters;

(b) an area of water in Australia; or

(c) an area of Australian waters;

being an area of particular significance to Aboriginals in accordance with Aboriginal tradition.

10 QUEENSLAND LEGISLATION

Aboriginal Land Act 1991 **(Qld)** (ss 3, 5, 6, 7):

3 Aborigines particularly concerned with land etc.

(1) For the purposes of this Act, an Aborigine is particularly concerned with land if the Aborigine—

(a) has a particular connection with the land under Aboriginal tradition; or

(b) lives on or uses the land or neighbouring land.

(2) For the purposes of this Act, Aboriginal people are particularly concerned with land if—

(a) they are members of a group that has a particular connection with the land under Aboriginal tradition; or

(b) they live on or use the land or neighbouring land.

5 Meaning of Aboriginal people

Aboriginal people are people of the Aboriginal race of Australia.

6 Meaning of Aborigine

An Aborigine is a person of the Aboriginal race of Australia.

7 Meaning of Aboriginal tradition

Aboriginal tradition is the body of traditions, observances, customs and beliefs of Aboriginal people generally or of a particular group of Aboriginal people, and includes any such traditions, observances, customs and beliefs relating to particular persons, areas, objects or relationships.

Aboriginal Cultural Heritage Act 2003 **(Qld)** (s 5):

Principles underlying Act's main purpose

The following fundamental principles underlie this Act's main purpose—

(a) the recognition, protection and conservation of Aboriginal cultural heritage should be based on respect for Aboriginal knowledge, culture and traditional practices;

(b) Aboriginal people should be recognised as the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage;

(c) it is important to respect, preserve and maintain knowledge, innovations and practices of Aboriginal communities and to promote understanding of Aboriginal cultural heritage;

(d) activities involved in recognition, protection and conservation of Aboriginal cultural heritage are important because they allow Aboriginal people to reaffirm their obligations to "law and country";

(e) there is a need to establish timely and efficient processes for the management of activities that may harm Aboriginal cultural heritage.

10 ***Human Rights Act 2019*** **(Qld)** (s 28):

Cultural rights—Aboriginal peoples and Torres Strait Islander peoples

(1) Aboriginal peoples and Torres Strait Islander peoples hold distinct cultural rights.

(2) Aboriginal peoples and Torres Strait Islander peoples must not be denied the right, with other members of their community—

(a) to enjoy, maintain, control, protect and develop their identity and cultural heritage, including their traditional knowledge, distinctive spiritual practices, observances, beliefs and teachings; and

(b) to enjoy, maintain, control, protect, develop and use their language, including traditional cultural expressions; and

20 (c) to enjoy, maintain, control, protect and develop their kinship ties; and

(d) to maintain and strengthen their distinctive spiritual, material and economic relationship with the land, territories, waters, coastal seas and other resources with which they have a connection under Aboriginal tradition or Island custom; and

(e) to conserve and protect the environment and productive capacity of their land, territories, waters, coastal seas and other resources.

(3) Aboriginal peoples and Torres Strait Islander peoples have the right not to be subjected to forced assimilation or destruction of their culture.

30 **WESTERN AUSTRALIAN LEGISLATION**

Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016 **(WA)** (ss 4, 5, sch 1):

4 Purpose

The purpose of this Act is to recognise the Noongar people as the traditional owners of the Noongar lands.

5 Recognition of the Noongar people

(1) Parliament acknowledges and honours the Noongar people as the traditional owners of the Noongar lands.

(2) Parliament recognises —

(a) the living cultural, spiritual, familial and social relationship that the Noongar people have with the Noongar lands; and

(b) the significant and unique contribution that the Noongar people have made, are making, and will continue to make, to the heritage, cultural identity, community and economy of the State.

Schedule 1 -- Noongar recognition statement

Noonakoort moort nitja burranginge noongar boodja
Noonakoort moort kwomba
Djinunge nitja mungarrt — koorah
Noonakoort moort yirra yarkinje kwomba noongar boodja
Koorah — nitja — boordahwan
Noonakoort moort yarkinje noongar boodja
Nyidiung koorah barminje noonakoort moort
Wierrnbirt domberrinje
Noonakoort moort koort boodja
Nitja gnulla moorditj karrl boodja

All our Noongar people stand here on Noongar land.
Past, present and future.
We stand strong on our land.
The mungart tree symbolises our strength and survival.
All of our people stand firm on our land.
Our people are here to stay — we will always be.

We, the Noongar people, are the traditional owners of South West Western Australia, and have been since before time immemorial. As the First People of South West Western Australia, we continue to practise the laws and customs of our culture. Through this culture, we continue to hold rights, responsibilities and obligations in relation to our people, traditional lands and waters.

We, the Noongar people, are the largest single Aboriginal cultural bloc on the Australian continent. We belong to one of the oldest surviving living cultures on this earth. As a people, we have a common ancestral language, and a similar history and spirituality. We know that our traditional country is south and west of a line that stretches from Geraldton in the north to Cape Arid in the south-east, and that the spirit of this place can never be conquered.

Noongar culture, spirit and economy have always depended on the resources of Noongar *boodja*. Families still return to the *biddi* (paths) of our ancestors. Our people continue to refer to natural landmarks, especially hills and waterways when

describing which families belong to different areas of Noongar *boodja*. Although barriers may exist, it is still in our hearts, in our blood, it is still our country.

Our living culture, which is long and continuing in this part of the world, begins with Noongar people. This is the opportunity for all Western Australians to experience the ancient tradition of respect, relationships and reciprocity with Noongar people. We have survived.

LEGISLATIVE DEFINITIONS OF "ABORIGINAL" AND RELATED TERMS

COMMONWEALTH LEGISLATION

Aboriginal Land Grant (Jervis Bay Territory) Act 1986 **(Cth)** (s 2):

Aboriginal means a person who is a member of the Aboriginal race of Australia.

Aboriginal and Torres Strait Islander Act 2005 **(Cth)** (s 4):

Aboriginal person means a person of the Aboriginal race of Australia.

Native Title Act 1993 **(Cth)** (s 253):

Aboriginal peoples means peoples of the Aboriginal race of Australia.

Racial Discrimination Act 1975 **(Cth)** (s 3):

Aboriginal means a person who is a descendant of an indigenous inhabitant of Australia but does not include a Torres Strait Islander.

Torres Strait Islander means a person who is a descendant of an indigenous inhabitant of the Torres Strait Islands.

NEW SOUTH WALES LEGISLATION

Aboriginal Land Rights Act 1983 **(NSW)** (s 4)(1)

Aboriginal Housing Act 1988 **(NSW)** (s 4):

Aboriginal person means a person who:

(a) is a member of the Aboriginal race of Australia, and

(b) identifies as an Aboriginal person, and

(c) is accepted by the Aboriginal community as an Aboriginal person.

SOUTH AUSTRALIAN LEGISLATION

Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981 **(SA)** (s 4):

> **traditional owner** in relation to the lands means an Aboriginal person who has, in accordance with Aboriginal tradition, social, economic and spiritual affiliations with, and responsibilities for, the lands or any part of them.

Maralinga Tjarutja Land Rights Act 1984 **(SA)** (s 3):

> **Aboriginal person** means a person who is a descendant of an indigenous inhabitant of Australia
>
> **traditional owner**, in relation to the lands, means an Aboriginal person who has, in accordance with Aboriginal tradition, social, economic and spiritual affiliations with, and responsibilities for, the lands or any part of them.

TASMANIAN LEGISLATION

Aboriginal Lands Act 1995 **(Tas)** (s 3A):[73]

> (1) An Aboriginal person is a person who satisfies all of the following requirements:
>
> (a) Aboriginal ancestry;
>
> (b) self-identification as an Aboriginal person;
>
> (c) communal recognition by members of the Aboriginal community.
>
> (2) The onus of proving that a person satisfies the requirements referred to in subsection (1) lies on that person.

WESTERN AUSTRALIAN LEGISLATION

Aboriginal Affairs Planning Authority Act 1972 **(WA)** (s 4):

> **Aboriginal** means pertaining to the original inhabitants of Australia and to their descendants.

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[73] *Bleathman v Taylor* [2007] TASSC 82 (Blow J)

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN No. B43 of 2018

DANIEL ALEXANDER LOVE
Plaintiff

and

COMMONWEALTH OF AUSTRALIA
Defendant

and

ATTORNEY-GENERAL FOR THE STATE OF VICTORIA
Intervener

BETWEEN No. B64 of 2018

BRENDAN CRAIG THOMS
Plaintiff

and

COMMONWEALTH OF AUSTRALIA
Defendant

and

ATTORNEY-GENERAL FOR THE STATE OF VICTORIA
Intervener

ANNEXURE TO THE SUBMISSIONS OF ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)

ANNEXURE: LIST OF RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES AND STATUTORY INSTRUMENTS

1. The list of relevant constitutional provisions, statutes and statutory instruments referred to in these submissions are:

1) *Aboriginal Heritage Act 2006* (Vic) (as currently in force)

2) *Aboriginal Land Rights Act 1983* (NSW) (as currently in force)

3) *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (as currently in force)

4) *Aboriginal Lands Act 1995* (Tas) (as currently in force)

5) *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) (as currently in force)

6) *Australian Citizenship Act 2007* (Cth) (as currently in force)

7) *Charter of Human Rights and Responsibilities Act 2006* (Vic) (as currently in force)

8) *Commonwealth of Australia Constitution Act 1900*, s 51(xix) (as currently in force)

9) *Constitution Act 1975* (Vic) (as currently in force)

10) *Human Rights Act 2019* (Qld) (as currently in force)

11) *Judiciary Act 1903* (Cth) (as currently in force)

12) *Native Title Act 1993* (Cth) (as currently in force)

13) *Traditional Owner Settlement Act 2010* (Vic) (as currently in force)