IN THE HIGH COURT OF AUSTRALIA

BRISBANE OFFICE OF THE REGISTRY

NO B43 OF 2018

BETWEEN: **DANIEL ALEXANDER LOVE**

Plaintiff

AND: **COMMONWEALTH OF AUSTRALIA**

Defendant

NO B64 OF 2018

BETWEEN: **BRENDAN CRAIG THOMS**

Plaintiff

AND: **COMMONWEALTH OF AUSTRALIA**

Defendant

DEFENDANT'S FURTHER REPLY SUBMISSIONS

Filed on behalf of the Commonwealth by:

Australian Government Solicitor
Level 11
145 Ann Street
Brisbane Qld 4000

Date of this document: 29 November 2019

Contact: Gavin Loughton
File ref: 18008385 / 18010918

Telephone: 02 6253 7203
Fax: 07 3360 5799
Lawyer's E-mail: baden.powell@ags.gov.au

PART I PUBLICATION

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

PART II REPLY TO PLAINTIFFS' SUBMISSIONS

Proposition 1

2. Parliament may define the circumstances in which a person will have the legal status of "alien", provided that it does not purport to treat as an alien a person "who could not possibly answer [that description within] ... the ordinary understanding of the word".[1] Subject to that limit, Parliament can "determine who is an alien".[2] So much is illustrated by *Singh v Commonwealth* (2004) 222 CLR 322 (***Singh***), for Ms Singh was an alien only because of legislation that had that effect (she would not have been an alien otherwise). That does not mean that Parliament "change[d] the meaning of the Constitutional provision".[3] It means only that, because the word "alien" did not have a fixed legal meaning in 1901,[4] it was open to Parliament to exercise the power conferred on it by s 51(xix) to determine who would have the status of alien, provided it did not seek to ascribe to that concept a meaning it could not possibly bear. Parliament did so using the statutory mechanism of the *Australian Citizenship Act 1948* (see [4] below).

Proposition 2

3. The Plaintiffs are wrong to attribute to the Commonwealth a submission that "both Plaintiffs would have been aliens under both the *jus soli* and *jus sanguinis* principles".[5] The Commonwealth submitted that "the 'ordinary understanding' of the word 'alien' includes at least any person who would have been an alien under the *jus soli* (common law) or *jus sanguinis* theories", and that "because both plaintiffs were born outside Australia, both would have been aliens under the common law" [ie, *jus soli*].[6] That

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1 Commonwealth's primary submissions (**CPS**), [12]; *Pochi v Macphee* (1982) 151 CLR 101 at 109, (Gibbs CJ).

2 Cf. Plaintiffs' further submissions (**PFS**), [4].

3 PFS, fn 3.

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

5 PFS, [7] and fn 7.

6 Commonwealth's further submissions (**CFS**), [10].

submission is correct, as the plaintiffs concede.[7] It follows that, in order to accept the plaintiffs' submissions, the Court would have to find that the "ordinary meaning" of the word alien does not include persons who would have been aliens under the common law as it had existed for hundreds of years prior to Federation. That cannot be right.

Proposition 3

4. It may be accepted that citizenship is a statutory status.[8] But the *Australian Citizenship Act 2007* (Cth) is supported by s 51(xix) as the mechanism by which Parliament has exercised its power to determine "those to whom is attributed the status of alien",[9] and the *Migration Act 1958* (Cth) is supported by s 51(xix) in establishing legal rights and duties by reference to a person's status as a non-citizen. Accordingly, unless such legislation is held invalid (i.e., because that legislation treats certain persons as aliens "who could not possibly answer the description of 'aliens' in the ordinary understanding of the word"), the consequence of a person not being a citizen is that they are an alien. That submission is not "unprincipled and wrong";[10] indeed, it reflects the considered jurisprudence of the Court.[11]

5. It is the plaintiffs' failure to recognise the role of Parliament in specifying the criteria that determines whether a person is an alien that leads to their surprising submission that a person can simultaneously be both a citizen and an alien: PFS [14] fn 27. That is incorrect. A dual citizen is not an alien *while* they are a dual citizen, and therefore Parliament could not *while that person is a dual citizen* make that person the object of command under s 51(xix). However, where Parliament has under s 51(xix) exercised its power to determine who should be attributed the status of alien by removing the Australian citizenship of such a person (the person falling within the class of people who can answer the description of an "alien" by reason of the person's foreign citizenship), that person is *henceforth* an alien, and can be made the object of command of a law passed under

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7 PFS, [7].

8 PFS, [12].

9 *Shaw* (2003) 218 CLR 28 at 35 [2]. See also *Ex parte Te* (2002) 212 CLR 162 at 169-171 [15]-[24] (Gleeson CJ), 187-188 [86]-[88] (McHugh J), 200 [136] (Gummow J), 220 [221] (Hayne J).

10 PFS, [14].

11 CPS, [14]-[20].

s 51(xix). Of course, no issue arises in this case as to any limits on the power of Parliament to remove the citizenship of a person, and that issue therefore should not be addressed.

Propositions 5 and 6

6. Upon settlement, Aboriginal persons within Australia became British subjects through the operation of the common law.[12] They thereby became "entitled to such rights and privileges and subject to such liabilities as the common law and applicable statutes provided".[13] No-one "stripped Indigenous inhabitants of their connection with their ancestral country by making them aliens in that country": cf PFS fn 44. These proceedings do not involve any stripping of status. Instead, they raise the separate question whether it is open to Parliament to treat as aliens persons who were born outside of Australia, who thereby became foreign citizens, and who could have, but did not, take steps under the generally applicable law to affirm their connection to Australia by applying for citizenship. The plaintiffs invite error by treating these proceedings as raising the question whether Parliament could remove citizenship from Aboriginal persons even if they were born in Australia and were not foreign citizens. That would be a very different case.

7. The plaintiffs do not contend that the Court should recognise the existence of a fiduciary duty between the Crown and Indigenous Australians: PFS [26]. It follows that no party or intervener contends that the Court should decide that question. It is therefore unnecessary to address the plaintiffs' tentative submissions on that topic.

PART III REPLY TO VICTORIA

8. The Commonwealth notes that the submissions filed by the Attorney-General for Victoria extend substantially beyond responding to the Court's question as to 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". Victoria advances a distinct positive argument to the effect that the plaintiffs are not aliens "because the plaintiffs are Aboriginal persons who are members of an Aboriginal society, and because of the

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12 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 38, see also fn 93 (Brennan J); "Opinion By Geoffrey Sawer", 26 July 1961, Appendix III to the "Report from the Select Committee on Voting Rights of Aborigines, Part One", Commonwealth Parliamentary Papers, 1961, Vol. 2, p. 37.

13 *Mabo [No 2]* (1992) 175 CLR 1 at 38 (Brennan J).

recognised mutual and unique relationship between members of Aboriginal societies and the lands and waters of Australia".[14]

9. If Victoria wished to advance an argument of such a kind, it had ample opportunity to intervene at an earlier stage of the proceeding.[15] It did not do so. Instead, at a late stage of the proceeding, after the special case had been agreed, and after submissions were filed and an oral hearing held, Victoria now attempts to take advantage of a letter from the Court to make submissions going beyond the issues raised by that letter.[16] Indeed, to the substantial extent that Victoria's submissions depend on characterising the plaintiffs as members of "Aboriginal societies" (see further [27]ff below),[17] the submissions could not fairly be accepted in circumstances where the special case does not include facts concerning whether the plaintiffs are members of such "societies" (noting also that the plaintiffs' statements of claim made no allegations about this).

10. Nevertheless, if the Court receives Victoria's submissions, the Commonwealth responds to the central arguments raised by those submissions as follows.

The asserted equivalence between a relationship to land and allegiance to a body politic

11. Victoria seeks to reconceptualise the law of alien status in a radical way, by proposing that the status of non-alien can arise from a connection between persons and land. That is inconsistent with the fundamental basis of the law of alien status, which has always concerned the connection between persons and the sovereign or body politic.

12. Victoria seeks to stigmatise the notions which underlie the modern law of citizenship —

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14 Victoria submissions (**VS**), [3].

15 Section 78B Notices were issued by the respective plaintiffs on 14 September 2018 and 12 December 2018, raising the questions of whether the respective plaintiffs were Aboriginals and thereby not aliens for the purposes of s 51(xix).

16 The invitation by the Court by correspondence dated 11 October 2019 was for the parties to make submissions on "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". Victoria, however, seeks to marginalise the relevance of allegiance, contending instead 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": **VS**, [3].

17 Contrary to VS [22], there was no "test accepted as common ground" for the parties, for the parties' submissions did not depend on membership of an "Aboriginal society".

in particular the notion of 'allegiance' — as "feudal" or "medieval" and therefore non-essential (see eg VS [8], [14], [43(b)], [48]). This is wrong as a matter of both history[18] and principle. As to history, the conclusion of the most recent scholarship is that:[19]

> [J]ust as Bracton [writing in the 13th century] represented an era where the legal reasoning was based on the division between the free and the unfree status, so Sir John Fortescue and Thomas Littleton [writing in the 15th century] represent the new age where the legal relationship among human beings is conceptualised with constant reference to the allegiance to a political unit (a kingdom or a State).

13. The development in legal thinking referred to in the above passage is reflected in *Calvin's Case*,[20] where Lord Coke provided a detailed explanation of "allegiance". He said (substituting a translation, in italics, where the original appears in Latin[21]):

> Ligeance is a true and faithful obedience of the subject to his Sovereign... *Legiance is a bond of faith*; and *allegiance is as it were the essence of the law. Legiance is a ligament, as it were a tying together of minds*[22], *just as a ligament is a connection of limbs and joints* etc. As the ligatures or strings do knit together the joints of all the parts of the body, so doth ligeance join together the Sovereign and all his subjects *quasi uno ligamine*[23]...as the subject oweth to the King his true and faithful ligeance and obedience, so the Sovereign is to govern and protect his subjects, *to rule and protect the subjects*; so as between the sovereign and his subjects there is *a double and reciprocal tie because just as the subject is bound in obedience to the king, so the king is bound to the protection of the subject; and therefore allegiance is properly so called from ligando* [tying] *because it contains within itself a two-way tie.* And therefore it is holden in 20 H[enry] VII 7, 8a [a Year Book reference] that there is a liege or ligeance between King and his subject.

14. Shorn of its antiquated forms of expression, Coke's account reflects the modern theory.[24]

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18 In fact, the deployment of the concept of "allegiance" as a central component of a law of alien status is a marker of the end of the medieval age and the beginning of the modern era: see Keechang Kim, *Aliens in Medieval Law. The Origins of Modern Citizenship* (Cambridge University Press 2000), which overtakes much earlier scholarship, in particular the account of Holdsworth cited in *Singh v Commonwealth* (2004) 222 CLR 322, 386-397 [164]. Kim at 228-229 summarises the older accounts, including Holdsworth's, which his book shows to be flawed.

19 Kim, *Aliens in Medieval Law. The Origins of Modern Citizenship* (Cambridge University Press 2000) at 9 (emphasis added).

20 (1608) 7 Co Rep 1a, 4b-5a [77 ER 377, 382].

21 The translations are taken from Steve Sheppard (ed), *The Selected Writings and Speeches of Sir Edward Coke*, vol 1 (Indianapolis Liberty Fund 2003), 175-176.

22 The word in the Latin original is 'mentium' (plural of 'mens'), and might be translated as 'mind, disposition, heart': Lorna Hutson, 'Rhetoric and Law' in Michael MacDonald (ed), *The Oxford Handbook of Rhetorical Studies* (OUP 2017), 405.

23 Not translanted in Sheppard (n 21 above), but apparently meaning "[a]s if in a single band or tie".

24 For completeness, it should be noted that there is of course one aspect of Coke's theory that is not modern: namely, that the bond of allegiance arises by operation of the law of nature rather than (only) by operation by municipal law: (1608) 7 Co Rep 1a, 12b-14b [77 ER 377, 391-394].

The notion of "allegiance" that he described – the "tying together of minds" and "a double and reciprocal tie" of mutual obligations between the Sovereign and subjects – remains centrally relevant to a person's status as a citizen or alien.

15. Since *Calvin's Case*, it has never been questioned that status as an alien turns on the absence of the requisite connection between a person and the Sovereign (albeit that the Sovereign is now to be understood only in the sense of the "'politic', not the 'personal capacity' of the sovereign"[25]). Thus, in *Nolan v Minister of State for Immigration and Ethnic Affairs*,[26] Gaudron J explained that an alien 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".[27] To the same effect, in *Koroitamana v Commonwealth*,[28] Gleeson CJ said that the aliens power confers on Parliament "the capacity to decide who will be admitted to formal membership of the Australian community".[29] And, in *Singh*,[30] Gummow, Hayne and Heydon JJ said of the status of alienage that "[t]he central characteristic of that status is, and always has been, owing obligations (allegiance) to a sovereign power other than the sovereign power in question (here Australia)".[31]

16. These passages demonstrate that an alien is a person who lacks the requisite relationship with a body politic, because the person has not been admitted to membership of that body politic. To treat that notion of "allegiance" as non-essential – as Victoria invites the Court to do – and to substitute in its place a focus on a relationship between persons and land, would be to discard the essence of the legal concept of "alienage".

17. The unbroken line between Coke's theory of allegiance and the modern law concerning the body politic known as the "Commonwealth of Australia" can be discerned in the analysis in *Thomas v Mowbray*, where Gummow and Crennan JJ said:[32]

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25 *Singh* (2004) 222 CLR 322 at [165], [198] (Gummow, Hayne and Heydon JJ, referring to a "*bilateral* relationship (between sovereign power and individual)").

26 (1988) 165 CLR 178 at 189.

27 Ibid.

28 (2006) 227 CLR 31.

29 (2006) 227 CLR 31 at 38 [11].

30 *Singh* (2004) 222 CLR 322, particularly at 386-388 [163]-[166], 388-389 [170]-[172], 395 [190], 398 [198], 398 [200].

31 *Singh* (2004) 222 CLR 322 at [200].

32 (2007) 233 CLR 307 at 362 [142].

> The notion of a 'body politic' cannot sensibly be treated apart from those who are bound together by that body politic. That has been so in English law for centuries. For example, the preamble to The Ecclesiastical Appeals Act 1532 stated that the realm of England was 'governed by one supreme head and King...unto whom a body politic compact of all sorts and degrees of people...be bound and owe to bear, next to God, a natural and humble obedience'. The obverse of that obedience and allegiance was the sovereign's obligation of protection. This notion of a compact sustaining the body politic cannot be weakened and must be strengthened by the system of representative government for which the Constitution provides.

18. The body politic known as "the Commonwealth of Australia" was formed when, as the Preamble to the Constitution recites, certain *people* "agreed to unite in one indissoluble Federal Commonwealth". As the text of the Constitution shows, the relevant relationship is a relationship between *persons*.[33] It is not a relationship between a person (or society) and an *area of land and waters*. That is not to deny the significance, in other contexts, of a relationship of that kind. It is simply to recognise that it is not the relationship with which status as an alien or non-alien is concerned. Thus:

a) a relationship to land and waters gives rise to property rights and, in the case of Aboriginal persons, may also reflect profound spiritual connections;

b) a relationship to a body politic gives rise to a certain legal status and reciprocal obligations of protection and obedience.

19. Running (a) and (b) together is a category mistake. To have a deep connection to a specific part of the physical continent of Australia does not give one a connection to the body politic known as "the Commonwealth of Australia". So much is obvious from the fact that a deep connection of Aboriginal persons to land and waters long preceded the creation of that body politic. Indeed, such connections likewise long preceded the acquisition of British sovereignty over the continent of Australia. Yet, while that acquisition of sovereignty resulted in the creation of reciprocal rights and obligations between the sovereign and all Aboriginal persons by reason of their new status as British subjects,[34] that status in no way derived from the rights or interests in land or waters that existed under the traditional laws and customs of each Aboriginal society.

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33 See also *Davis v Commonwealth* (1988) 166 CLR 79, 110 (Brennan J): 'The Constitution summoned the Australian nation into existence, thereby conferring a new identify on the people who agreed to unite 'in one indissoluble Federal Commonwealth'...' (underlining added).

34 *Mabo (No 2)* (1992) 175 CLR 1 at 38 fn 93 (Brennan J), 182 (Toohey J).

20. Consistently with the above, no authority has been identified that holds (or even suggests) that having a connection to the land or waters over which a body politic has sovereignty somehow constitutes a person as a member of that body politic.[35] The Court is invited to make law, of a wholly novel kind.

21. Victoria's submissions that "the relationship of an Aboriginal person with Australia is uniquely Australian: they are a member of a society of persons who is only of, and only relating to, Australia" is fundamentally ambiguous: VS [22] (likewise VS [15], [17]). The submission is doubtless true insofar as "Australia" refers to the continent of Australia (or, more correctly, a specific area within that continent). But it is mere assertion insofar as "Australia" refers to the body politic known as "the Commonwealth of Australia". Aboriginal societies pre-date the creation of that body politic, and their continued existence and vitality does not depend on that body politic. The ambiguity results from Victoria's failure to observe the cautionary observation of Dixon J in *R v Sharkey* (1949) 79 CLR 121 at 153, who approved the observation of Professor Harrison Moore that:

> ...the term ['Commonwealth'] is in fact used in several senses connected so closely that it is peculiarly important to distinguish them. First, it is as already explained, the territorial community, the 'single entity', the 'new State or nation,' established under the Act (eg secs iii and iv). Secondly, it describes the territory occupied by that community...

22. Insofar as the law of alien status is concerned, it is only the first sense that matters. When VS [22] asserts that "the relationship of an Aboriginal person with Australia is uniquely Australian", it elides the different senses of the word "Australia". While the Commonwealth acknowledges and respects the deep and strong connection between Aboriginal persons and the lands and waters of Australia, it does not follow that a connection of that kind creates a privileged connection with the Australian body politic, such that factors that would allow Parliament to treat any other person as an alien must be disregarded where those factors pertain to an Aboriginal person. That should not be held to be the law.

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[35] As Coke put it in *Calvin's Case* (1608) 7 Co Rep 1a, 11b-12a [77 ER 377, 391]: 'no man will affirm, that England itself, taking it for the continent thereof, doth owe any ligeance or faith'; rather, allegiance is 'to the King'.

Victoria's deployment of the law of native title

23. Upon settlement of Australia,[36] the common law of England was received in Australia and status as a British subject was determined by place of birth, subject to statutory modification providing for status to also be determined by reference to descent. Under the statutory regimes applicable at the time of the birth of both plaintiffs, where an Australian citizen had children overseas, those children were eligible for Australian citizenship where certain statutory criteria were satisfied.[37] That statutory regime is the legal manifestation of the sovereign power to determine the criteria for formal membership of the Australian body politic.[38]

24. The common law principles that underpin native title do not provide any foundation for an indigenous form of citizenship that stands outside the generally applicable statutory regime. Those principles recognise that rights and interests in relation to land and waters may burden the Crown's radical title, provided that those rights and interests relate to land and waters, were possessed at sovereignty, and exist pursuant to traditional laws and customs the observance of which has "continued substantially uninterrupted since sovereignty".[39] Those rights and interests may, however, be extinguished by inconsistent act of the Crown, for the simple reason that "Sovereignty carries the power to create and to extinguish private rights and interests in land within the Sovereign's territory".[40]

25. Once that is recognised, native title law cannot support the argument that a member of Aboriginal society cannot be treated as an alien because to do so would break the connection with land and waters. To accept that argument would be to treat native title as a fetter on the exercise of sovereign powers that would break the link between Aboriginal societies and their traditional lands and waters, when such a fetter has been denied.

26. Further, if native title law were to be relevant to status as an alien, that law would need to be approached as a coherent whole. Yet Victoria seeks to cherry pick from native title

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36 *Mabo (No 2)* (1992) 175 CLR 1 at 37-38, 43, 57 (Brennan J), 180 (Toohey J).

37 The applicable criteria were satisfied for Mr Thoms, but not for Mr Love: Love Special Case [24(c)]; Thoms Special Case [15(c)].

38 *Robtelmes v Brenan* (1906) 4 CLR 395 at 401-402 (Griffith CJ); *Re MIMA; Ex parte Te* (2002) 212 CLR 162 at 171 [21], 172 [24] (Gleeson CJ).

39 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 432, 457 [87].

40 *Mabo (No 2)* (1992) 175 CLR 1 at 63 (Brennan J).

law.[41] For example, it asserts that the requisite "relationship to the land and waters of Australia" exists even with respect to Aboriginal societies that have "been dispossessed of traditional lands or separated from those lands".[42] That is contrary to the approach adopted in the context of native title, where *Members of the Yorta Yorta Aboriginal Community v Victoria*[43] establishes that a break in the continuous observance of laws and customs prevents the common law from recognising native title in the lands and waters to which a society was previously connected,[44] thereby denying the very connection that Victoria asserts is the foundation for its proposed special rule that members of such societies are incapable of being aliens (irrespective of any other facts pertaining to such persons, including foreign citizenship). In effect, Victoria contends for a deemed relationship with land and waters, even if no such relationship exists in fact: VS [38] (last sentence) and fn 49 (asserting that "the special and unique relationship with land may be taken as a given", apparently even in the case of those dispossessed from their traditional lands or where the relevant society has arisen or re-formed post-sovereignty). No such deemed or assumed relationship arises in other areas of native title law, and to accept one with respect to s 51(xix) can only produce incoherence in the law.

Membership of "Aboriginal society" as a criterion of status

27. The central premise of Victoria's submissions is that membership of an Aboriginal society entails a unique, permanent and reciprocal relationship with the land and waters of Australia: see eg VS [16]-[19], [22], [35], [38], [45], [49]. Victoria contends not that being an Aboriginal person *per se* confers a unique status on such a person under the law of citizenship, but that this status flows from being a member of an "Aboriginal society". Thus, it is said, "[e]ach plaintiff, being a member of an Aboriginal society … should be taken not to be aliens".[45]

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41 Contrary to VS [20] and [45], where Victoria purports to be relying on "coherent and consistent" development of the law and says that the common law of native title is "relevant and dispositive". Another example is VS [41], where the law of native title is expressly set aside, and it is asserted that it is only the "present relationship of Aboriginal society to land and waters" that is relevant.

42 VS [18](e).

43 (2002) 214 CLR 422 (***Yorta Yorta***).

44 A break the consequences of which is illustrated, for example in *Risk v Northern Territory* [2006] FCA 404 at [812], [820], [938]; see also [530], [554], [665] (Mansfield J).

45 VS [22]. See also VS [19], where Victoria submits that its argument "does not require a [individual] member of an Aboriginal society to establish a relationship to a particular area of land or waters,

28. This argument raises more questions than it answers.[46] The concept of the "Aboriginal society" was first relied upon by this Court in *Yorta Yorta* as a way to test whether traditional laws and customs still exist. "Aboriginal society" was defined as "a body of persons united in and by its acknowledgment and observance of a body of law and customs".[47] The Court continued:

> [53] When the society whose laws or customs existed at sovereignty ceases to exist, the rights and interests in land to which those laws and customs gave rise, cease to exist. If the content of the former laws and customs is later adopted by some new society, those laws and customs will then owe their new life to that other, later society and they are the laws acknowledged by, and customs observed by *that later society* [emphasis in original], they are not laws and customs which can now properly be described as being the laws and customs of the earlier society…

10 29. Thus, an "Aboriginal society" is not simply a grouping of Aboriginal persons who satisfy the plaintiffs' proposed three-part test. It is a society where it can be shown that its laws and customs have maintained "a continuous existence and vitality since sovereignty".[48] Victoria simply asserts that this aspect of native title law can be put to one side, and that all that is relevant is the present relationship of Aboriginal society to land and waters: VS [41]. The justification for cherry picking in that way is unexplained, and would produce profound uncertainty as to what kind of relationship to land and waters would need to be established to take members of Aboriginal society outside the reach of s 51(xix).

30. Further, if membership of Aboriginal society is used as a determinant of legal status (such
20 that membership of an Aboriginal society = non-alien), that will raise difficulties, and have invidious consequences, that Victoria's submissions do not even acknowledge, let alone address. This is because the post-sovereignty histories of Aboriginal societies are not all the same. There are parts of Australia where the effects of dispossession have been

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becase the relationship to land and waters exists as a result of membership of an Aboriginal society itself". It is only in applying its test that Victoria abandons its focus on "Aboriginal society", no doubt because there are no facts going to whether any such society exists: see VS [6]-[7].

46 As the Court has observed, "[i]dentifying a society that can be said to continue to acknowledge laws and customs will, in many cases, be very difficult": *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 432, 446 [52]. There are many cases the illustrate the difficulties that have arisen. See, eg, the *Rubibi* litigation (*Rubibi v WA (No 5)* [2005] FCA 1025; *Rubibi v WA (No 6)* [2006] FCA 82; on appeal *WA v Sebastian* (2008) 173 FCR 1) and the Torres
30 Strait Sea claim (*Akiba v Queensland (No 3)* (2010) 204 FCR 1, esp at 57 [175]).

47 *Yorta Yorta* (2002) 214 CLR 422 at 445 [49].

48 Ibid at 444-445 [47].

heaviest in which there may be Aboriginal persons who cannot be members of any Aboriginal "society" as that term is defined in *Yorta Yorta* because no such society exists, whether or not there are currently Aboriginal communities in those areas.[49] Denied the possibility of membership of an Aboriginal society, Victoria's argument would result in two classes of Aboriginal persons, some of whom would be incapable of being aliens, and some of whom would not be. As such, Victoria's argument does not provide any basis for any general rule concerning the status of Aboriginal persons.

Reply to Victoria's submissions on certain of the propositions

31. ***Preliminary propositions***: Contrary to Victoria's submissions, there has been no "change in national circumstances" (cf VS [26]) that calls for a radical departure from existing principles regarding alienage. In particular, for the reasons explained above, insofar as Victoria's submissions turns on the recognition by the common law of native title, that provides no basis to reconceptualise the limits of the aliens power. Furthermore, Victoria appears to misconstrue the Commonwealth's submissions, by imputing to the Commonwealth a submission that no Aboriginal persons were aliens at Federation (VS [27]; cf. DPS [32]). The point the Commonwealth was seeking to make was that whether any particular Aboriginal person was an alien fell to be considered by reference to established principles, which did not recognise or treat Aboriginal persons "as a class" any differently to any other person. (Thus some Aboriginal persons *might* have been aliens, if they had been born outside Australia, but all Aboriginal persons born within Australia would not have been aliens.)

32. ***Proposition 1***: Victoria acknowledges that one feature of the word alien has always been constant: it was that an alien "belonged to another": VS [13]. It also accepts that "as a matter of ordinary language" alien means "a citizen or subject of a foreign state": VS

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[49] For example, in relation to parts of the Sydney region, in *Gale v Minister for Land & Waters Conservation for the State of NSW* [2004] FCA 374 at [127] Madgwick J found as follows: "the coming of the British and their colonization of New South Wales meant in time the destruction of all traditional Aboriginal societies, in the sense of peoples, in those parts of New South Wales relevant to this claim, though fortunately not of people of degrees of Aboriginal descent … [T]here is now no real doubt that for a long time there has been no acknowledgement or observance by any known person … of anything like the body of traditional laws and customs that regulated pre-1788 Aboriginal life, including people's relations to and in respect of land". See also *Woromi Local Aboriginal Land Council v Minister for Lands for the State of New South Wales (No 2)* [2008] FCA 1929, [168] (Bennett J).

[13]. That is sufficient to resolve these cases. The plaintiffs' status as foreign citizens means that they are persons it is open to Parliament to treat as aliens by a law passed under s 51(xix). That is not to claim for the Parliament the unfettered power that *Pochi* denies, because to conclude that s 51(xix) authorises a law that treats a foreign citizen as an alien is well within the "ordinary meaning" of "alien". That is the very point made in *Singh*, where it was said (adopting the language of six Justices in *Nolan*) that alien "means, as a matter of ordinary language, 'nothing more than a citizen or subject of a foreign state'".[50]

33. ***Proposition 3:*** Victoria's reformulation of Step 3 asks the Court to create what is in effect an entirely new category of "non-citizen non-alien" under "common law", unconnected to the principles that inform the existing law: VS [30]. The submission entails that the relationship between a person and the body politic that is embodied in the notion of "allegiance" can be "equivalent" to the deep connection between Aboriginal societies and their lands and waters: cf VS [35] (also VS [17], [45], [49]). That proposes a comparison of incommensurable concepts. While both forms of connection are important, they are fundamentally different, being connections of different kinds, between different things.[51] The question is not whether "the relationship of members of Aboriginal society with the land and waters of Australia is ... as meaningful as that between a citizen and the Australian polity": cf VS [50(c)] (emphasis added). The question is whether the first of those relationships is a substitute for the second. As it involves a totally different topic, plainly it is not. The principle for which Victoria contends is unsupported by any authority or principle. The Court is simply invited to create new law, immunising one part of Australian society from laws that apply to all others. It is respectfully submitted that the Court should decline that invitation.

34. ***Proposition 4*:** The common law's recognition of Aboriginal societies as a necessary precursor to the continuing existence of traditional laws and customs does not mean that the common law recognises those societies as having permanent status. To the contrary, as discussed above, the common law recognises that it is a factual question whether or

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50 (2004) 222 CLR 322, 400 [205] (Gummow, Hayne and Heydon JJ) (emphasis added). See also 383 [154] (Gummow, Hayne and Heydon JJ).

51 Cf VS [34], which initially correctly acknowledges the need for a relationship "with the polity", but then slides to treating the relavant relationship as "between Aboriginal people and the land and waters of Australia".

not any particular societies have maintained the requisite connection to their lands and waters from the acquisition of sovereignty to the present, that being a precondition to the existence of native title. Nor does the fact that native title rights and interests are inalienable (otherwise than by voluntary surrender to the Crown) create any relevant "permanency" (cf VS [37]), given that sovereignty carries the power to extinguish such rights and interests.[52]

35. Finally, the recognition of the indigenous relationship to land in State legislation says nothing as to the meaning of "alien": cf VS fn 49, [42]. If anything, it demonstrates that these matters are for the political and parliamentary sphere, not the judicial one.

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Stephen Donaghue	**Nick Wood**	**Julia Watson**
Solicitor-General of the Commonwealth	Owen Dixon West	Owen Dixon West
T: (02) 6141 4139	T: (03) 9225 6392	T: (03) 9225 6642
stephen.donaghue@ag.gov.au	nick.wood@vicbar.com.au	juliawatson@vicbar.com.au

Counsel for the Defendant

[52] *Mabo (No 2)* (1992) 175 CLR 1 at 63 (Brennan J).