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 SUBMISSIONS

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PART I PUBLICATION

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

PART II ISSUES

2. These matters were heard on 8 May 2019, and the Court reserved its decision.

3. On 11 October 2019, the Court sent the parties a letter inviting submissions on a 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. More particularly, the question was said to arise in this way:

10 a) **Proposition 1:** Section 51(xix) of the Constitution does not allow the Parliament to treat as an alien a person who cannot answer the description of an alien according to the "ordinary understanding" of that word.

b) **Proposition 2:** The ordinary understanding of an alien is informed by the common law of Australia.

c) **Proposition 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.

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

e) **Proposition 5:** 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.

f) **Proposition 6:** Corresponding to the Crown's obligation of protection is the permanent allegiance which each member of an Aboriginal society owes to the Crown.

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

Each of those propositions is addressed below.

PART III NOTICE OF CONSTITUTIONAL ISSUE

4. A s 78B notice annexing the Court's letter of 11 October 2019 was sent to the Attorneys-General of the States and Territories on 18 October 2019.

PART IV ARGUMENT

Proposition 1: Section 51(xix) of the Constitution does not allow the Parliament to treat as an alien a person who cannot answer the description of an alien according to the "ordinary understanding" of that word

5. This proposition, which effectively restates a limit on the aliens power described in *Pochi v Macphee*,[1] is not disputed: see Commonwealth's primary submissions dated 15 April 2019 (**CPS**) at [13]. Importantly, however, that limit identifies the outer bounds of Parliament's power to define criteria for the status of alienage: see CPS at [10]-[12].

Proposition 2: The ordinary understanding of an alien is informed by the common law of Australia

6. It is true that the common law "informs" the meaning of the word "alien" in s 51(xix). The legal history of England – together with that of other major legal systems of the Western world – provides important context in understanding that word.[2] The "ordinary understanding" of "alien" cannot be identified from a dictionary, or by reference to the meaning that would be identified by a hypothetical "person on the street". Instead, the historical "legal usage and understanding" of the term, including but not limited to its usage and understanding at common law, is an important part of ascertaining its meaning.[3]

7. This Court has already examined the historic legal usage and understanding of the word "alien" in considerable detail. Informed by that examination, in a number of cases the Court has held that while the common law "informs" the meaning of "alien", the historic criterion (or criteria) for alienage at common law does not confine the scope of the power

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1 (1982) 151 CLR 101 (***Pochi***) at 109 (Gibbs CJ).

2 *Singh v Commonwealth* (2004) 222 CLR 322 (*Singh*) at 332 [12], 340-341 [30] (Gleeson CJ), 384 [157], 388-395 [170]-[190] (Gummow, Hayne and Heydon JJ).

3 *Singh* (2004) 222 CLR 322 at 331-332 [10], 340 [26]-[27] (Gleeson CJ). See, more generally, *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 (Brennan CJ, Dawson, Toohey and Gummow JJ), particularly the authorities referred to in fns 46 and 47.

conferred on Parliament by s 51(xix): see CPS at [10]-[13]. The Court so held because it accepted that, in 1900, "questions of nationality, allegiance and alienage were matters on which there were changing and developing policies, and which were seen as appropriate for parliamentary resolution".[4] In other words, part of the reason s 51(xix) was included in the Constitution was to empower Parliament to change the common law rules concerning alienage.

8. The conclusion that the common law does not confine s 51(xix) is powerfully illustrated by *Singh*.[5] In that case, the Court held that s 51(xix) empowered Parliament to treat persons as aliens despite the fact that they would not have been aliens under a common law rule that had been recognised for four hundred years.[6] The common law rule was that, subject to very limited exceptions, a person born within the Sovereign's territory was not an alien. The plaintiff in *Singh*, who was born in Australia, was clearly a person who would have owed allegiance and been owed protection according to the common law. Despite that fact, the Court held that she was an alien. It is therefore part of the *ratio* of *Singh* that the existence and content of the correlative obligations of protection and allegiance that would have derived from the common law do not prevent Parliament from legislating under s 51(xix) to treat a person as an alien.

9. Given that the common law rule that had been recognised since *Calvin's Case* does not confine the power conferred by s 51(xix), it is difficult to see how any other common law rule could do so. Accordingly, even if the Court were to find that at common law there would be an obligation of protection owed by the Crown to the members of each Aboriginal society (as is suggested by Proposition 5), there would be no basis to hold that that obligation confined s 51(xix). To find otherwise would give a newly recognised common law rule greater significance in determining the "ordinary understanding" of the word "alien" than was given to a long-established common law rule on that very topic. For that reason, Proposition 2 is not capable of bearing the weight required of it in the chain of reasoning of which it forms a part.

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4 *Koroitamana v Commonwealth* (2006) 227 CLR 31 (***Koroitamana***) at 37 [9] (Gleeson CJ and Heydon J); *Singh* (2004) 222 CLR 322 at 340-341 [30] (Gleeson CJ), 391 [176]–[177] (Gummow, Hayne and Heydon JJ).

5 (2004) 222 CLR 322.

6 *Calvin's Case* (1608) 7 Co Rep 1a; 77 ER 377.

10. While common law criteria for alienage do not confine the power under s 51(xix), they are of assistance here. That is because 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.[7] In this case, because both plaintiffs were born outside Australia, both would have been aliens under the common law. That is itself sufficient to conclude that they fall within the reach of s 51(xix). In addition, both plaintiffs are also citizens of a foreign state. For that further reason, as the plurality observed in *Singh*, "as a matter of ordinary language"[8] both plaintiffs are aliens, regardless of any characteristic "said to take a person outside [the] reach" of the power.[9]

11. For either or both of the above reasons, the plaintiffs fall within the "ordinary understanding" of the word "alien", as the meaning of that word is informed by the common law. Either one of those reasons would be sufficient, and in combination they mean that both plaintiffs are far removed from the boundaries of the power conferred by s 51(xix).[10]

Proposition 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

12. It is necessary to distinguish two different questions, being (i) the existence (and nature) of obligations arising between the Crown and a "non-alien",[11] and (ii) the criteria for assessing whether a person is a non-alien or an alien. Contrary to Proposition 3, the common law did not adopt as the criterion for alienage, or as a definition thereof, the existence or absence of obligations arising between a person and the Crown. Those obligations were consequences of a person's status, rather than determinants of that status.

13. To put the point at the level of principle, "alienage" is a legal status:[12]

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7 *Singh* (2004) 222 CLR 322 at 340-341 [30] (Gleeson CJ), 259 [81] (McHugh J), 413-414 [250]–[251] (Kirby J), 428 [300] (Callinan J); *Koroitamana* (2006) 227 CLR 31 at 37 [9] (Gleeson CJ and Heydon J) and 49 [62] (Kirby J).

8 (2004) 222 CLR 322 at 400 [205] (Gummow, Hayne and Heydon JJ).

9 (2004) 222 CLR 322 at 398 [200] (Gummow, Hayne and Heydon JJ).

10 See Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 599, quoted in *Singh* (2004) 222 CLR 322 at 386 [163] (Gummow, Hayne and Heydon JJ).

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

12 *Ford v Ford* (1947) 73 CLR 524 at 529 (Latham CJ) (emphasis added).

> A person may be said to have a status in law when he belongs to a class of persons who, by reason only of their membership of that class, have rights or duties, capacities or incapacities, specified by law which do not exist in the case of persons not included in the class … . These consequences follow as a matter of law from the fact of membership of a particular class of persons.

14. As the concept of alienage did not have an "established and immutable legal meaning"[13] at the time of Federation, s 51(xix) left it to the Parliament to specify the criteria by which status as a citizen (non-alien) would be acquired or lost.[14] That is why it is the "settled position" of the Court that it is for the Parliament to create and define the status of Australian citizenship,[15] and that all persons who lack that status are "attributed the status of alien".[16] It is inherent in those propositions that obligations of protection and allegiance are consequences that follow upon satisfaction of the criteria specified by Parliament. To reason in reverse (as is implicit in Proposition 3) is to use the common law to deny Parliament's authority to create and define the relevant status.

15. Separately from the point made above, given the apparent weight that Proposition 3 bears in the chain of reasoning, it is important to emphasise that care must be taken not to assimilate the duties of allegiance and protection that are consequent upon citizenship with other legal doctrines that invoke the notion of "protection" in a quite different sense.

16. It is often said that a citizen owes allegiance to the Crown and is entitled to the correlative protection of the Crown. While those propositions are not controversial, the content of these "abstract" obligations (particularly the duty of protection) is "not spelled out".[17] Nevertheless, the meaning of the word "protection" in this context is not at large. Instead,

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13 *Koroitamana* (2006) 227 CLR 31 at 37 [9] (Gleeson CJ and Heydon J), citing *Singh* (2004) 222 CLR 322 at 340–341 [30] (Gleeson CJ), 395 [190] (Gummow, Hayne and Heydon JJ), 414 [252] (Kirby J); see also, 393 [183] (Gummow, Hayne and Heydon JJ).

14 *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 (***Ex parte Te***) at 171 [24], 173 [31], 175 [39] (Gleeson CJ); *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 (***Shaw***) at 35 [2] (Gleeson CJ, Gummow and Hayne JJ, with whom Heydon J agreed at 87 [190]); *Singh* (2004) 222 CLR 322 at 329 [4] (Gleeson CJ), 371 [116] (McHugh J); *Koroitamana* (2006) 227 CLR 31 at 38 [11] (Gleeson CJ and Heydon J) and 41 [28] (Gummow, Hayne and Crennan JJ). See also *Meyer v Poynton* (1920) 27 CLR 436 at 440–441 (Starke J).

15 *Koroitamana* (2006) 227 CLR 31 at 46 [48] (Gummow, Hayne and Crennan JJ), citing *Ex parte Te* (2002) 212 CLR 162 at 173 [31] (Gleeson CJ), 180 [58] (Gaudron J), 188–189 [90] (McHugh J), 192 [108]–[109] (Gummow J), 215–216 [193]–[194] (Kirby J), 219–220 [210]–[211] (Hayne J), 229 [229] (Callinan J). See also *Singh* (2004) 222 CLR 322 at 329 [4] (Gleeson CJ), 397–398 [197] (Gummow, Hayne and Heydon JJ).

16 *Shaw* (2003) 218 CLR 28 at 35 [2] (Gleeson CJ, Gummow and Hayne JJ, Heydon J agreeing at 87 [190]).

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

as the plurality in *Singh* observed, "it may very well be that these obligations find expression in Australia's exercise of its right, but not duty, in international law to protect its nationals".[18] That identification of the content of the word "protection" in the present context accords with the Court's recognition (this time in the context of the *Refugees Convention*) that the right to "protection" that accompanies status as a citizen directs attention to "the diplomatic or consular protection extended abroad by a country to its nationals".[19]

17. The above observations highlight that the "duty of protection" that arises with respect to citizens is not a duty to protect them from harm inside the country of nationality.[20] Any duty to protect persons from harm inside Australia would apply to citizens and aliens (with the exception of members of an invading force) alike.[21] As Gummow J said in *Re Minister for Immigration and Multicultural Affairs; Ex parte Te*, "it is clear that an alien, other than an enemy alien, is, whilst resident in Australia, entitled to the protection which the law affords to Australian citizens".[22] As such, the duty to provide protection from risks of harm within a country cannot aptly be described as a "duty of protection" that is consequent upon a person's status as a subject or citizen. Further, it is not possible to reason from the existence of a duty of protection of that kind to the conclusion that a person is not an alien.

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18 *Singh* (2004) 222 CLR 322 at 387-388 [166] (Gummow, Hayne and Heydon JJ) (emphasis added). See also *Joyce v Director of Public Prosecutions* [1946] AC 347 (***Joyce***), 370-371 (Lord Jowitt), holding that an alien abroad who held a British passport (obtained by fraud) enjoyed the de facto protection of the Crown (plainly meaning protection under international law), and was under a reciprocal duty of allegiance, such that he could be guilty of treason. *Joyce* remains good law: see *R (on the application of Hicks) v Secretary of State for the Home Department* [2006] EWCA Civ 400 at [22], [34], [37] (Pill LJ); *Minister for Immigration and Ethnic Affairs v Petrovski* (1997) 73 FCR 303 at 307-308 (Burchett J); *VSAB v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 239 at [54] (Weinberg J).

19 *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 222 CLR 1 at 8 [19] (Gleeson CJ, Hayne and Heydon JJ), [63] (McHugh J); *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at 10 [21] (Gleeson CJ), 21-22 [61]-[66] (McHugh and Gummow JJ). See also *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at 557 [112] (Hayne and Bell JJ). Of course, a State might choose to extend "protection" of the relevant kind even to persons who are aliens: see, eg, the category of "British protected persons" discussed in Laurie Fransman, *Fransman's British Nationality Law* (3rd ed, 2011) at 130 [5.2].

20 Compare *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 222 CLR 1 at 24 [64] (McHugh J).

21 *Ex parte Te* (2002) 212 CLR 162 at 197-199 [125]-[130] (Gummow J); *Bradley v The Comonwealth* (1973) 128 CLR 557 at 582-583 (Barwick CJ and Gibbs J); *Joyce* [1946] AC 347 at 366. The seminal authority is *Calvin's Case* (1608) 7 Co Rep 1a, 6a-6b [77 ER 377, 384]. See also Glanville Williams, "The Correlation of Allegiance and Protection" (1948) 10 *Cambridge Law Journal* 54; H Lauterpacht, "Allegiance, Diplomatic Protection and Criminal Jurisdiction Over Aliens" (1947) 9 *Cambridge Law Journal* 330, 339.

22 (2002) 212 CLR 162 at 197 [125].

18. The above point is significant in this case because, if the Crown owes a "unique obligation of protection" to an Aboriginal society (as Proposition 5 suggests), that obligation seems to be something akin to a fiduciary duty to protect indigenous persons. But even if it be assumed (the point not yet having been decided, and it not being appropriate for decision here: see [42] below) that it is the law of Australia that the Crown owes a duty to indigenous persons to "protect their interests in transactions with third parties",[23] such a duty, whilst protective in a broad sense, would not be relevant to status as a non-alien. That is so for at least two reasons. *First*, such a duty would not concern "protection" of the relevant kind (ie diplomatic or consular protection). *Second*, under the law of fiduciaries, only the fiduciary owes a duty. The person to whom the fiduciary duty is owed does not owe any corresponding or correlative duty to the fiduciary. Accordingly, it would be impossible to use the law of fiduciaries as a basis for finding the existence of a reciprocal obligation of allegiance.

Proposition 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

19. Proposition 4 contains two propositions – the first general, the latter specific – and it is convenient to deal with them in that order.

"The common law's recognition of customary native title logically entails the recognition of an Aboriginal society's laws ..."

20. For the reasons that follow, the common law's recognition of customary native title logically entails only an indirect "recognition" of some kinds of Aboriginal customary laws for limited purposes. As such, the common law "recognises" the laws of an Aboriginal society only in a limited and qualified sense.

21. From the outset, it is necessary to recall that Aboriginal customary laws in general are not part of the municipal law in force in Australia. This proposition was established at an early time,[24] and has never been departed from. That is why Aboriginal customary laws

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23 Cf *Guerin v The Queen* [1984] 2 SCR 335 at 383 (Dickson J).

24 *R v Murrell* (1834) 1 Legge 72. This case is reported only very imperfectly in Legge's reports. A more adequate report can be found at: www.law.mq.edu.au/research/colonial_case_law/nsw/cases/

relating to crime, marriage, secret business, and so forth are not part of the body of law applied and enforced by the municipal courts of Australia.[25] Rather, Aboriginal customary laws have been treated by the courts as a factum that may, depending on the context, be relevant to the application of the common law or statutory law, or the enlivening of some doctrine thereof.[26]

22. The above position reflects the fact that, in terms of common law legal theory, the law in Australia has been administered since the acquisition of sovereignty by the British Crown on the basis that, so far as the legal dichotomy between "settled" territories and "conquered" or "ceded" ones is concerned, Australia was "settled".[27] As such, upon the Crown acquiring sovereignty over Australia, Aboriginal persons became entitled only "to such rights and privileges and subject to such liabilities as the common law and applicable statutes provided".[28] Aboriginal persons did not retain any residual sovereignty over the

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case_index/1836/r_v_murrell_and_bummaree/. It should be noted that in two earlier decisions of the Supreme Court of New South Wales it was held that, whilst English laws applied for the protection of Aboriginal persons (so, for example, a settler could be tried and punished for murder of an Aboriginal person), the courts would not concern themselves with the dealings of Aboriginal persons as between themselves. This was on the basis that "[w]e interfere not with their own habits, customs or domestic regulations, but leave them to adjust their own disputes and differences amongst themselves": *R v Boatman and Bulleye* (1832) NSW Sel Cas (Dowling J) 6 at 7; *R v Dirty Dick* (1829) NSW Sel Cas (Dowling J) 2 at 3-4. These cases ceased to represent the law after the decision in *R v Murrell*. Even during the time when they did represent the law, these two cases were not instances of the common law "recognising" Aboriginal customary laws so much as expressing an indifference to them so far as the dealings of Aboriginal persons *inter se* were concerned.

25 In *Walker v New South Wales* (1994) 182 CLR 45 at 49, which involved an Aboriginal person who had been charged with offences under the *Crimes Act 1990* (NSW), Mason CJ rejected a submission by Walker's counsel that "customary Aboriginal criminal law is something which has been recognized by the common law and which continues to this day, in the same way that *Mabo [No 2]* decided that the customary law of the Meriam people relating to land tenure continues to exist".

26 For example: where an Aboriginal person acting in accordance with Aboriginal law might meet the criteria for a common law defence of acting in accordance with an honest claim of right (as in *Walden v Hensler* (1987) 163 CLR 561); where an obligation of secrecy existing under Aboriginal law is a factual basis for enlivening a fiduciary obligation of confidence (*Foster v Mountford* (1976) 14 ALR 71); where obligations arising under Aboriginal customary law concerning the use of ritual knowledge might also give rise to a fiduciary obligation to take action in the courts to prevent improper exploitation of that knowledge (*Bulun Bulun v R & T Textiles Pty Ltd* (1998) 86 FLR 244); where infringement of copyright in sacred art, which infringement also involves a breach of Aboriginal law, might give rise to an entitlement to additional damages to reflect the cultural harm (*Milpurrurru v Indofurm Pty Ltd* (1994) 130 ALR 659 at 692-695 (von Doussa J)).

27 As per the well known passage from Blackstone's Commentaries, Bk I, ch.4, quoted in full by Brennan J in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 34-35.

28 *Mabo* (1992) 175 CLR 1 at 38 (Brennan J). See also 80 (Deane and Gaudron JJ): "It follows that, once the establishment of the Colony was complete on 7 February 1788, the English common law, adapted to meet the circumstances of the new Colony, automatically applied throughout the whole of the Colony as the domestic law except to the extent (if at all) the act of State establishing the Colony overrode it. Thereafter, within the Colony, both the Crown and its subjects, old and new, were bound by the common law";

territory of Australia.[29] As Mason CJ put it, "*Mabo (No 2)* is entirely at odds with the notion that sovereignty adverse to the Crown resides in the Aboriginal people of Australia. The decision is equally at odds with the notion that there resides in the Aboriginal people a limited kind of sovereignty embraced in the notion that they are 'a domestic dependent nation'".[30]

23. As is well known, in *Mabo v Queensland (No 2)* (***Mabo***) it was held that Australia was not, prior to the acquisition of sovereignty by the British Crown, "terra nullius".[31] That holding did not overturn the legal classification of Australia as a "settled" place. Indeed that classification was not even squarely challenged.[32] However, the pre-*Mabo* understanding as to the consequences of Australia's classification as "settled" was qualified in a limited but important way. Specifically, the central holding of *Mabo* was that the common law recognises certain rights and interests in relation to land where the existence of such rights and interests pre-date the acquisition of sovereignty by the British Crown. As Brennan J put it, "[t]he preferable rule equates the indigenous inhabitants of a settled colony with the inhabitants of a conquered colony in respect of their rights and interests in land".[33]

24. The critical issue in *Mabo* was, when the British Crown first acquires sovereignty over a place, is there a common law presumption in favour of the continued existence of pre-existing rights and interests in relation to land? (cf. pre-existing laws *per se*). If there is such a presumption then, on the acquisition of sovereignty over Mer in 1879, the common law would be presumed to have recognised the pre-existing rights in relation to land of the Meriam people. In resolving that critical issue, the Court was required to choose between two contrary lines of authority.

Commonwealth v Yarmirr (2001) 208 CLR 1 (***Yarmirr***) at 99 [204] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

29 *Commonwealth v Yarmirr* (2001) 208 CLR 1 at [204] (McHugh J); *Coe v Commonwealth* (1978) 52 ALJR 334; *Coe v Commonwealth* (1979) 53 ALJR 403.

30 *Coe v Commonwealth* (1993) 118 ALR 193 at 200 (Mason CJ).

31 *Mabo* (1992) 175 CLR 1 at 40-42, 45, 58 (Brennan J, Mason CJ and McHugh J agreeing), 109 (Deane and Gaudron JJ), 180 (Toohey J).

32 (1992) 175 CLR 1 at 37-38, 43, 57 (Brennan J); and also his Honour's description of the argument at 26. See also 180 (Toohey J).

33 (1992) 175 CLR 1 at 57 (Brennan J, Mason CJ and McHugh J agreeing); see also 82-83, 86-87, 100 (Deane and Gaudron JJ), 184 (Toohey J).

a) One line of authority, arising from cases in Africa, was in favour of the existence of the presumption. That line of authority is best represented by the "rule" stated by Viscount Haldane in *Amodu Tijani v Secretary, Southern Nigeria*,[34] which was relied on by Brennan J in *Mabo*,[35] that "[a] mere change in sovereignty is not to be presumed as meant to disturb rights of private owners".[36]

b) Another line of authority, arising from cases in India, was to the effect that the only property rights that survived the acquisition of sovereignty were property rights that the new Sovereign, by word or deed, recognised.[37]

25. The former line of authority was preferred, with the consequence being that, as subsequently summarised in *Members of the Yorta Yorta Aboriginal Community v Victoria* (***Yorta Yorta***), "[w]hat survived [the acquisition of sovereignty] were rights and interests in relation to land or waters".[38]

26. The whole basis of the jurisprudence of native title is therefore the common law's recognition and protection of pre-existing rights and interests in relation to land, not the recognition and protection of pre-existing laws *per se*. The latter are only indirectly significant in the sense that they are the means by which the incidents of the rights and interests in land are to be "ascertained".[39] It follows that with native title, as with the other areas of law referred to at [21] above, traditional Aboriginal law and custom is not part of the applicable law *per se*, but rather is a factum which is relevant to the application of the common law. That is well illustrated by the important explanation of how native title rights arise that was given in *Fejo v Northern Territory* :[40]

> Native title has its origin in the traditional laws acknowledged and the customs observed by the indigenous people who possess the native title. Native title is neither

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34 [1921] 2 AC 399 at 407.
35 (1992) 175 CLR 1 at 56.
36 (Emphasis added). Brennan J (with whom Mason CJ and McHugh J agreed) endorsed this line of authority in *Mabo* (1992) 175 CLR 1 at 57. To similar effect also 81-82 (Deane and Gaudron JJ), 183-184 (Toohey J).
37 Best represented by the Privy Council's statement in *Vajeningji Joravarsingji v Secretary of State for India* (1924) LR 51 Ind App 357 at 360, relied on by Dawson J in *Mabo* (1992) 175 CLR 1 at 123. Dawson J's dissenting conclusion on this issue is set out at 127.
38 (2002) 214 CLR 422 at 441 [37] (Gleeson CJ, Gummow and Hayne JJ).
39 *Mabo [No 2]* (1992) 175 CLR 1, 70, point #6 (Brennan J) and see also 61 ('determined'); also 110 (Deane and Gaudron JJ: '…ascertained by reference to that traditional law or custom').
40 (1998) 195 CLR 96 at 128 [46] (emphasis in the original) (citations omitted). See also *Mabo* (1992) 175 CLR 1 at 59 (Brennan J): "Native title, though recognized by the common law, is not an institution of the common law…".

> an institution of the common law nor a form of the common law tenure but it is recognised by the common law. There is, therefore, an intersection of traditional laws and customs with the common law. The underlying existence of the traditional laws and customs is a necessary pre-requisite for native title but their existence is not a sufficient basis for recognising native title.

27. The fact that native title is recognised only at the "intersection" of Aboriginal customary law and the common law has the consequence that the "recognition" of Aboriginal customary law is limited and qualified in four significant ways.

28. **First**, as already explained, such "recognition" by the common law is, at best, indirect. It is not Aboriginal customary laws that are directly recognised by the common law, but pre-existing property interests.

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29. **Secondly**, the "intersection" at which native title rights are recognised is a relatively narrow one. Only those Aboriginal customary laws that generate rights and interests in relation to land or waters are even potentially capable of generating rights and interests that are recognised by the common law. This excludes, as noted at [21] above, Aboriginal laws on other topics such as marriage, crime, secret or ceremonial business, obligations to share resources, etc.[41]

30. **Thirdly**, any "recognition" (such as it is) of Aboriginal customary law is constrained by two further criteria, both of which must be satisfied. They are that the customary laws: (1) must be "traditional", i.e. form part of "the body of law and customs acknowledged and observed by the ancestors of the [native title holders] at the time of sovereignty";[42]

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41 For example, in *Akiba v Queensland (No 3)* (2010) 204 FCR 1, 129-131 [505]-[510] Finn J held that a law or custom of the Torres Strait, under which certain persons were under an obligation to provide accommodation, sustenance and access to resources to certain other persons, could not be said to give rise to rights properly characterised as rights 'in relation to land or waters' (and therefore capable of recognition as native title rights). "[T]he rights in question are *not* rights in relation to land or waters. They are rights in relation to persons" (130 [508]) (emphasis in original). To take another example, in *Ward v Western Australia* (2002) 213 CLR 1 at 274-275 [644]-[645], Callinan J regarded the right to control and protect the use of culturally significant knowledge (being knowledge which is restricted to elders) as not being a right 'in relation to land'.

42 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at 456 [86]. See also: 441 [38] ("laws or customs having a normative content and deriving, therefore, from a body of norms or normative system – the body of norms or normative system that existed before sovereignty"); 444 [44] ("rights or interests in relation to land or waters…that find their origin in pre-sovereignty law and custom"); 444 [46] ("the origins of the content of the law or custom concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown. It is only those normative rules that are 'traditional' laws and customs"); 454 [79] ("rights and interests rooted in pre-sovereignty traditional laws and customs"). See now s 223(1)(a) of the *Native Title Act 1993* (Cth). See also *Mabo* (1992) 175 CLR 1 at 60.

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and (2) continue to be acknowledged and observed in a way that is "substantially uninterrupted since sovereignty".[43]

31. **Fourthly**, rights and interests in relation to land or waters which are inconsistent with the common law are denied recognition as native title rights or interests.[44] This precludes any kind of "recognition" (even indirect) being given to some significant Aboriginal customary laws.[45] Furthermore, significant rights and interests that were originally recognised by the common law have in many cases been extinguished by valid exercise of sovereign power inconsistent with the continued right to enjoy native title.[46] The inherent susceptibility of native title to extinguishment has been removed only to some extent, and only at a statutory and not a constitutional level, by the *Racial Discrimination Act 1975* (Cth)[47] and the *Native Title Act 1993* (Cth).[48]

32. The qualifications set out above demonstrate that any "recognition" by the common law of Aboriginal customary laws is indirect and limited. Further, such recognition is not uniform. The fact that, even with respect to property rights, the common law may treat different indigenous groups differently depending on matters such as how European settlement and "dispossession"[49] has affected those groups, the extent to which they have continued to acknowledge and observe traditional laws and customs, and the extent to which traditional laws are inconsistent with the common law or statute law, demonstrate that any analogy with native title law cannot provide a firm foundation for a general principle concerning the relationship between the Crown and all indigenous persons. There is no universal "recognition" of traditional laws and customs from which can be extrapolated some general obligation on the part of the Crown to "protect" Aboriginal societies or their members, or that could give rise to reciprocal obligations of allegiance.

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43 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at 456 [87]. Some amount of "change" and "adaptation" of the laws is consistent with the satisfaction of these criteria: see 455 [82]-[83], 456-457 [89]. See now s 223(1)(a) of the *Native Title Act 1993* (Cth).

44 *Mabo* (1992) 175 CLR 1 at 59 (Brennan J); *Yarmirr* (2001) 208 CLR 1 at [76]. See now s 223(1)(c) of the *Native Title Act 1993* (Cth).

45 For example, in *Yarmirr* (2001) 208 CLR 1, it was held that customary laws conferring rights of exclusive possession of areas of sea and seabed were inconsistent with common law public rights of fishing and navigation.

46 *Mabo* (1992) 175 CLR 1 at 63, 69 (Brennan J). In *Wik Peoples v Queensland* (1996) 187 CLR 1 at 84-85 Brennan CJ identified three types of exercise of sovereign power that extinguish native title. Although his Honour was in dissent as to the result in *Wik*, his taxonomy of extinguishment given there is orthodox, and was quoted with approval by Gleeson CJ in *Wilson v Anderson* (2002) 213 CLR 401, 416-417 [4].

47 Sections 9 and 10; *Mabo v Queensland (No.1)* (1988) 166 CLR 186.

48 See esp ss 10 and 11; *Western Australia v Commonwealth* (*Native Title Act case*) (1995) 183 CLR 373.

49 *Mabo* (1992) 175 CLR 1 at 69 (Brennan J)

33. Those matters highlight that the question of the status of Aboriginal persons must be approached case-by-case. There is no basis to reach an omnibus conclusion applicable to all Aboriginal persons. Instead, as is the case for all other persons, questions of status must be resolved case-by-case, and by reference to the generally applicable law.

"...and in particular that society's authority to determine its own membership"

34. In addressing this issue, it is helpful to contrast the position of Aboriginal societies in Australia with the very different position in the United States. American law recognises the "Indian tribes" as bodies politic that retain a measure of sovereignty. They exercise "inherent sovereign authority over their members and their territories" as "domestic dependant nations".[50] The tribes are considered "separate sovereigns pre-existing the Constitution" and having certain inherent sovereign powers, including the continuing power to make laws prescribing criteria for tribal membership, as well as being unconstrained by certain provisions of the US Constitution.[51] Having become subject to the overriding sovereignty of the United States, Indian tribes are "no longer possessed of the full attributes of sovereignty", but they are "a separate people, with the power of regulating their internal and social relations".[52] They have "retained some elements of quasi-sovereign authority" (specifically, "[t]he retained tribal authority relates to self-governance"),[53] being regarded as having "a semi-independent position when they have preserved their tribal relations"[54] (albeit that this limited sovereign status exists "at the sufferance of Congress"[55]).

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50 *Oklahoma Tax Commission v Citizen Band Potawatomi Tribe of Okla.* 498 US 505 at 509 (Rehnquist CJ for the Court) (1991), quoting *Cherokee Nation v Georgia* 5 Pet 1, 17, 8 L Ed. 25 (1831).

51 *Santa Clara Pueblo v Martinez* 436 US 49 at 56 (Marshall J for the Court) (1978).

52 *United States v Kagama,* 118 US 375 at 381–382 (Miller J) (1886)

53 See eg *Rice v Cayetano* 528 US 495, 518 (Kennedy J for the Court) (2000) ; *Fisher v The District Court Of The Sixteenth Judicial District Of Montana, In And For The County Of Rosebud* 424 US 382, 390 (per curiam) (1976).

54 *United States v Kagama*, 118 US 375 at 381 (Miller J) (1886).

55 *United States v Wheeler* 435 US 313 at 323 (Stewart J for the Court) (1978).

35. It is a concomitant of this remnant sovereignty that an Indian tribe in the United States possesses a broad and general right to make laws defining membership of the "tribe" (ie a right of the breadth apparently posited by Proposition 4). Thus:

- "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community"[56];
- "unless limited by treaty or statute, a Tribe has the power to determine tribal membership"[57];
- "[a]n Indian tribe has the power to define membership as it chooses, subject to the plenary power of Congress".[58]

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36. It is because the residual sovereign authority of Indian tribes "relates to self-governance" and entails "'natural rights in matters of local-self-government" that those tribes have "the power of regulating their internal and social relations" through the making and enforcing of law.[59]

37. The position under the common law of Australia is very different. In the absence of recognition of any remnant sovereignty held by Aboriginal societies, the common law lacks the basis for recognising, as part of the law in force in Australia, any Aboriginal customary laws according to which Aboriginal societies may have a broad and general authority to determine their own memberships. That is not to deny that the existence of

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an Aboriginal "society" is a necessary pre-requisite for the existence of native title rights,[60] or that, for the purposes of native title law, the membership of such a society is determined according to traditional laws and customs.[61] But it is to acknowledge that, whilst in practice the courts may not be routinely called upon to to enter into disputes about native title group membership, they can and do rule on such matters if necessary.[62]

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56 *Santa Clara Pueblo v Martinez*, 436 US 49 at 72 (Marshall J for the Court) (1978).

57 *Adams v Morton*, 581 F 2d 1314 at 1320 (Kilkenny J) (9th Cir 1978); an almost identical statement was made in *US v Wheeler* 98 S Ct 1079 at 1085, fn 18.

58 *Williams v Gover*, 490 F 3d 785 (Kleinfeld J) (9th Cir 2007).

59 *Santa Clara Pueblo v Martinez* 436 US 49 at 55-56 (Marshall J for the Court) (1978).

60 *Yorta Yorta* (2002) 214 CLR 422 at 445 [50] (Gleeson CJ, Gummow and Hayne JJ).

61 *Mabo* (1992) 175 CLR 1 at 70 (Brennan J). See now s 225(a) of the *Native Title Act 1993* (Cth).

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62 Eg *Aplin on behalf of the Waanyi People v Queensland* [2010] FCA 625 at [18] (Dowsett J). For another example of such a dispute see *TR (Deceased) on behalf of the Kariyarra – Pipingarra People v WA* [2016] FCA 1158, esp at [40]-[43]. Further, a court may of course be required in the course of native title litigation to determine more fundamental questions about the composition of an Aboriginal society. An example is the

Accordingly, while membership of Aboriginal societies is determined according to traditional laws and customs, where that membership manifests in legal rights and obligations the determination of membership is ultimately justiciable before, and determinable by, Australian courts rather than the Aboriginal society itself.

38. The Plaintiffs propose (PS [28]) that the identification of the members of Aboriginal society should proceed by reference to a "three-part definition" (which, of course, is not the same as the test for being a native title holder). While that three part test has been adopted in the exegesis of various statutes, it would not be appropriate to adopt that definition as an implied constitutional limit on the aliens power: see CPS at [36]-[38].

10 ***Proposition 5: 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***

39. Proposition 5 should not be accepted. The preceding propositions do not establish a logical foundation for it.

40. As discussed above with respect to Proposition 3, it is not correct to assimilate the coordinate duties of allegiance and protection as they relate to status as a citizen (or non-alien) with other legal doctrines with different provenance and nature that use the term "protection". However, to the extent that Proposition 5 seeks to build on Proposition 4,
20 that appears to be what the argument involves.

41. As the discussion of Proposition 4 demonstrates, the common law recognises Aboriginal customary laws in only a limited and indirect way. Further, to the extent that such laws are recognised (including as a factum for the existence of native title rights and interests in land), the common law does not cast that recognition as creating any "obligation of protection". Indeed, the common law's acknowledgment of the capacity to extinguish native title suggests that the law of native title could not itself create any duty of "protection" even if that word was used in a wider sense. It would produce a strange

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30 *Rubibi* native title claim, where the Federal Court had to resolve a dispute between indigenous people as to the composition of the relevant Aboriginal society whose members hold the native title rights in and around Broome: *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.

asymmetry if principles that are derived from native title (which result in a defeasible property right) somehow led to the result that there is an implied constraint on the aliens power (particularly in circumstances where the Court has held that the races power in s 51(xxvi) is not subject to an implied constraint that it must be exercised for the benefit of Aboriginal people[63]).

42. Even if the Court were to assume that the common law of Australia comprehended a unique obligation to protect members of Aboriginal society in a fiduciary or quasi-fiduciary sense (the correctness of which has not been argued and should not be decided in this case[64]), an obligation of protection of that kind would concern protection from harm within Australia. As such, it cannot be equated with a duty of "protection" in the sense in which that word is used relative to alienage (which, as discussed above, involves protection under international law of a diplomatic or consular kind). Furthermore, a fiduciary duty would not give rise to any reciprocal duty of allegiance on members of Aboriginal society: see [18] above. The absence of any such reciprocal duty highlights the difference between any obligation of protection that might arise in a fiduciary context and an obligation of protection of the kind correlative to a duty of allegiance.

43. None of the propositions leading up to Proposition 5 support the conclusion that the common law made "unique" provision concerning the status of the members of an Aboriginal society as aliens or otherwise. That is not surprising. As was expressly recognised in *Mabo*, the acquisition of sovereignty by the Crown had the effect that the inhabitants of Australia became British subjects.[65] Thereafter, for the entire period from British settlement until the mid-1980s,[66] every person born in Australia had the status of a British subject (or later Australian citizen), and was thereby entitled to the protection of, and owed allegiance to, the Crown. That was the position whether or not the person was a member of an Aboriginal society (that being "irrelevant"[67] to the person's status).

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63 *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

64 As Professor Finn has observed, "we should … be particularly cautious in our embrace of the approaches found suited to the circumstances of other common law countries", because "we lack either treaty or entrenched constitutional provisions on which to build a body of law (including a fiduciary law) capable of sustaining distinctive rights in indigenous people, distinctive obligations in the State and its agencies": Paul Finn, "The Forgotten "Trust": The People and the State", Ch 5, *Equity: Issues and Trends* (1995, Federation Press), p 138.

65 *Mabo* (1992) 175 CLR 1 at 38, fn 93 (Brennan J). See also 182 (Toohey J).

66 *Australian Citizenship Amendment Act 1986* (Cth).

67 "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.

44. Simply put, members of Aboriginal societies were entitled to the "protection" of the Crown in the relevant sense in the same way as, and pursuant to the same law as, every other person born in Australia. There was no occasion for the common law to develop or recognise any "unique obligation" to protect members of any Aboriginal society (in the sense relevant to alienage), for there was no gap to be filled. No doubt for that reason, there does not appear to be a single authority holding that the common law had the content identified in Proposition 5.

Proposition 6: Corresponding to the Crown's obligation of protection is the permanent allegiance which each member of an Aboriginal society owes to the Crown

45. With respect to Proposition 6, the Commonwealth repeats and relies on what it says above with respect to Propositions 2 – 5, which appear to be premises of Proposition 6.

Proposition 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

46. With respect to Proposition 7, the Commonwealth repeats and relies on what it says above with respect to Propositions 2 – 6.

47. We again emphasise that these cases do not concern the status of Aboriginal people as a class. Aboriginal people who are born in Australia will (with few, if any, exceptions) be Australian citizens accordingly to the generally applicable law. These cases concern two people who were born outside Australia, who upon their births became citizens of foreign countries, and who failed to apply for Australian citizenship notwithstanding that their descent from Australian citizens made them eligible for such citizenship. The legal framework that governs their status is of long-standing, and draws no distinctions based on race, as is entirely appropriate for a legal regime governing citizenship and migration. The factual circumstances that now confront the Court do not reveal any defect in the legal regime, but are the direct consequence of the failure of the plaintiffs to apply for Australian citizenship when they were eligible to do so. That failure does not call for any revision of the settled and coherent body of law concerning the meaning of "alien" in s 51(xix) of the Constitution.

48. In particular, it does not call for the implication into the Constitution of a limitation on legislative power that is based on race, which is what would be involved if the Court were to find that Aboriginal persons (or a subset of such persons who hold native title) owe

"permanent allegiance" to the Crown such that they cannot be "aliens". To make such an implication would be contrary to the evident purpose of the 1967 amendments to the Constitution to remove differential operations based on race. It may also be perceived as placing Aboriginal people in an unequal position, because once it is recognised (as *Singh* established) that one way to identify alienage is by reference to whether a person owes allegiance to a foreign power, to deny the capacity of an Aboriginal person to owe such allegiance (or to disregard the consequences of such allegiance even when it is freely given) is to deny the autonomy of Aboriginal people. For the above reasons, the law was correctly stated by Gaudron J in *Kartinyeri v The Commonwealth*, who said:[68]

> Rights deriving from citizenship inhere in the individual by reason of his or her membership of the Australian body politic and not by reason of any other consideration, including race. To put the matter in terms which reflect the jurisprudence that has developed with respect to anti-discrimination law, race is simply irrelevant to the existence or exercise of rights associated with citizenship. So, too, it is irrelevant to the question of continued membership of the Australian body politic.

Proposition 7 is contrary to that passage, and should not be adopted.

49. Finally, a revision of the settled and coherent body of law concerning s 51(xix) of the kind contemplated in the Court's letter would create a gap in the long-recognised sovereign right to determine whether persons who are not subjects or citizens of Australia may enter and remain in Australia.[69] It would also re-introduce a category of non-citizen non-alien (contrary to the overruling of *Re Patterson; ex parte Taylor*[70] in *Shaw*[71]). That step should not be taken. It would fracture the understanding of the aliens power upon which Parliament has long relied,[72] by creating a class of persons of uncertain size and definition who would stand outside both the *Australian Citizenship Act 2007* (Cth) and the *Migration Act 1958* (Cth). That would impair the proper administration of both Acts. Members of that class, even if born outside Australia and even if citizens of another country (perhaps travelling on a foreign passport), may be entitled to enter and reside in

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68 (1998) 195 CLR 337 at 366 [40] (emphasis added).

69 See, eg, *Robtelmes v Brenan* (1906) 4 CLR 395 at 401-402 (Griffith CJ).

70 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391.

71 *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28.

72 This Court having held that the effect of Australia's emergence as a fully independent sovereign nation with its own distinct citizenship was that "the word 'alien' in s 51(xix) of the Constitution had become synonymous with 'non-citizen'": *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 25 (Brennan, Deane and Dawson JJ, with whom Mason CJ agreed); *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 183–184 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ).

Australia without the need to apply to become Australian citizens or to be granted a visa. Their right to enter would depend not on their status (as citizens or non-citizens holding visas), but on the answers to factual questions involving an unspecified degree of biologicial connection and self and group identification (however those matters are established for constitutional purposes, group identification in particular being a live question in circumstances where the special case concerning Mr Love contains evidence of recognition by just one person).[73] That would create administrative problems at the border, for there would be no practicable way to resolve the fact specific and evaluative questions of descent, self-identification and group-identification during, for example, an airport arrival interview. Finally, in any case where a person can make a plausible claim to be an Aboriginal person, it would inevitably result in litigation directed at whether the *Migration Act* (including the provisions authorising the imposition of conditions on visas, visa cancellation for breach of those conditions, and detention and removal) can validly apply to the person at all, thereby converting administrative law challenges into litigation raising factual questions about descent, self-identification and group-identification.

PART V ESTIMATE OF TIME

50. The Commonwealth estimates that it will require 1.5 hours for presentation of oral submissions in response to the Court's letter.

Dated: 8 November 2019

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[73] See *Singh* (2004) 222 CLR 322 at 387-388 [166] (Gummow, Hayne and Heydon JJ).

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

ANNEXURE TO THE DEFENDANT'S SUBMISSIONS

LIST OF CONSTITUTIONAL PROVISIONS, STATUTES AND STATUTORY INSTRUMENTS REFERRED TO IN SUBMISSIONS

1. *Australian Citizenship Act 2007* (Cth), current.
2. *Constitution of Australia* ss 51(xix) and (xxvi), current.
3. *Judiciary Act 1903* (Cth) s 78B, current.
4. *Migration Act 1958* (Cth), current.
5. *Native Title Act 1993* (Cth) ss 10, 11, 223(1)(a) and (c), 225(a), current.
6. *Racial Discrimination Act 1975* (Cth) ss 9 and 10, current.