10 IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY No. B43 of 2018

BETWEEN: **DANIEL ALEXANDER LOVE**
Plaintiff

and

COMMONWEALTH OF AUSTRALIA
Defendant

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No. B64 of 2018

BETWEEN: **BRENDAN CRAIG THOMS**
Plaintiff

and

COMMONWEALTH OF AUSTRALIA
Defendant

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PLAINTIFF'S OUTLINE OF ORAL ARGUMENT

Part I: Publication on the internet

1. This outline of oral argument is suitable for publication on the internet.

Part II: Outline of propositions

The reasons of the plurality in Singh v Commonwealth[1] ***(Singh)*** *should be restricted to the facts*

40 *of that case*

2. A majority of the members of this Court in ***Singh*** did not support the proposition for which the Commonwealth contends in this case,[2] namely, that a person's owing allegiance to a foreign state or sovereign (by being a citizen or subject of that foreign state under its laws) is solely determinative of whether the person is an alien for s 51(xix). ***Singh*** turned on its own unique facts and legal issues.
3. ***Singh*** was about a child who was born in Australia while her parents (who were Indian citizens) were temporarily resident in Australia. ***Singh*** did not consider issues of nationality by descent.[3] It did not consider the circumstances presented by the Plaintiffs' cases, namely,

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[1] (2004) 222 CLR 322, particularly, [190], [200] and [205]; Joint Book of Authorities (**JBA**) Vol. 9 Tab 50.
[2] Gleeson CJ: 340-341, in [30] (**JBA** Vol. 9 Tab 50 p. 3565-3566); Kirby J at 419, [272] (Vol. 9 Tab 50 p. 3644).
[3] *Singh* 401, [209]-[212] (**JBA** Vol. 9, Tab 50 p. 3626).

that they were born to an Australian national parent while that parent was outside of Australia.

4. A majority of this Court said in *Nolan v Minister for Immigration and Ethnic Affairs* (***Nolan***) that 'alien' '*exclude[s] a person who, while born abroad, is a citizen by reason of parentage*'.[4] That observation is consistent with Gibbs CJ's previous statements in *Pochi v McPhee* (***Pochi***).[5] ***Pochi*** is the only authority, to date, that has contemplated Australian nationality by descent.

5. The decision in ***Singh*** did not give sufficient attention to nationality law in 1901. The term 'alien' had an ascertainable meaning in 1901. The 1869 Royal Commission report, referred to by Callinan J in ***Singh***,[6] explained that there were two classes of natural-born British subjects. The **first class** (British subjects by birth) was at issue in ***Singh***. The **second class**, those people who were born out of the dominion of the British Crown, but whose fathers or grandfathers were British, is analogous to the Plaintiffs' circumstances and represented the 'contemporary legal position with which the founders were familiar'.[7] (This view is consistent with Quick and Garran,[8] cited by Gibbs CJ in ***Pochi***.)[9]

6. The approach taken by the *Australian Citizenship Act 1948* in deeming citizenship is inconsistent with a view that any foreign allegiance is definitive of alienage. Because 'aliens' are susceptible to harsh government action, the Court would be slow to construe s 51(xix) as taking away rights[10] that were bestowed on classes of people in 1901.

7. A definition of alien that depends on foreign law produces arbitrary consequences. Applying the test of foreign allegiance (by domestic law) as determinative would mean that almost *every* child born outside of Australia to one or more Australian citizen parent is an alien at birth.[11]

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[4] (1988) 165 CLR 178 at 183 (**JBA** Vol 8 Tab 35 p. 2852).
[5] (1982) 151 CLR 101 at 109 (**JBA** Vol 8 Tab 38 p. 2973): '*[T]he Parliament can in my opinion treat as an alien any person who was born outside Australia, whose parents were not Australians* [...].'
[6] *Report of the Royal commissioners for inquiring into the laws of naturalization and allegiance* (1869), quoted in ***Singh*** (2004) 222 CLR 322 at 428 [303] (**JBA** Vol 9 Tab 50 p. 3653).
[7] ***Singh*** (2004) 222 CLR 322 at 429 [304] (**JBA** Vol 9 Tab 50 p. 3654); see also 361 [86], 362 [89] and 363 [91] (**JBA** Vol 9 Tab 50 p. 3586, 3587 and 3588).
[8] Quick and Garran, *The Annotated Constitution of Australia*, p 599 (**JBA** Vol 10, p. 3963).
[9] (1982) 151 CLR 101, 107-108 (**JBA** Vol 8 Tab 38 p. 2971-2972).
[10] ***Singh*** (2004) 222 CLR 322 at 335 [19] (**JBA** Vol 9 Tab 50 p. 3560)
[11] See, now, *Australian Citizenship Act 2007* s 16. (**JBA** Vol 1, Tab 4 p. 189)

8. The domestic law of foreign countries should not be allowed to determine the meaning of the Australian Constitution: ***Singh*** per Callinan J at 430 [308][12] and McHugh J at 344 [39][13]; *Pochi* per Gibbs CJ at 109[14]; *Re Canavan* (2017) 91 ALJR 1209 at [71][15].

Aboriginal Australians are not aliens

9. The Constitution is an enduring document and must be construed according to changes in the national and international context.

10. Although nationality law in 1901 said nothing specifically about the position of Aboriginal Australians, changes in the national and international context, since 1901,[16] are such that, in construing s 51(xix), the Court should recognise that Aboriginal Australians cannot have 'alienage' imposed upon them through the mere incident of their being born overseas.

11. Australian values have changed since 1901 from a concern about race[17] to a concern about equality before the law and recognising the unique position of, and protecting, Indigenous peoples.[18]

Dated: 8 May 2019

S J Keim SC K E Slack A J Hartnett

[12] **JBA** Vol 9 Tab 50 p. 3655-3656.
[13] **JBA** Vol 9 Tab 50 p. 3569.
[14] **JBA** Vol 8 Tab 38 p. 2973.
[15] **JBA** Vol 8 Tab 41 p. 3049.
[16] For example, the decision of this Court in *Queensland v Mabo (No 2)* (1992) 175 CLR 1 (**JBA** Vol 7, Tab 31, p. 2403); the enactment of the *Racial Discrimination Act 1975* (Cth) (enacted to implement the *International Convention on the Elimination of All Forms of Racial Discrimination*); the *United Nations Declaration on the Rights of Indigenous Peoples*.
[17] The relationship has been described judicially as 'religious': *Millirrpum v Nabalco* (1971) FLR 141 at 167 (**JBA** Vol 7 Tab 33 p 2655). This Court has observed that Aboriginal Australians' relationship with land is spiritually and culturally significant: *Re Toohey; ex parte Meneling Station* (1982) 158 CLR 327 at 357 (**JBA** Vol 9, Tab 6 p. 3361).
[18] *Mabo (No 2)* (1992) 175 CLR 1, 29-30 (Brennan J) (**JBA** Vol 7 Tab 31 p. 2431-32).