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 SUBMISSIONS

Filed on behalf of the Defendant by:

Australian Government Solicitor
Level 11
145 Ann Street
Brisbane Qld 4000

Date of this document: 15 April 2019

Contact: Baden Powell
File ref: 18008385 / 18010918

Telephone: 07 3360 5766
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 ISSUES

2. The sole issue that arises for determination by the Court in these proceedings is whether either or both of the Plaintiffs is an "alien" within the meaning of s 51(xix) of the Constitution. Applying settled principles, both Plaintiffs are aliens.

PART III NOTICE OF CONSTITUTIONAL ISSUE

3. The Commonwealth is satisfied that notices given by Mr Love (Love SCB 5) and Mr Thoms (Thoms SCB 8) comply with s 78B of the *Judiciary Act 1903* (Cth).

10

PART IV MATERIAL FACTS

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

5. The parties' agreement to the facts in the special case is not an agreement that those facts are relevant.[1] Here, the Commonwealth submits that most of the facts in the special case are irrelevant. That follows because either of the following facts is sufficient, without more, to establish that each Plaintiff is within the reach of laws passed pursuant to s 51(xix) of the Constitution:

20 a) First, at the time the Minister cancelled the visa of each Plaintiff (and, indeed, at all other times), that Plaintiff was not an Australian citizen (Love SCB 38 [24(c)-(d)]; Thoms SCB 29 [15(c)-(d)]).[2]

b) Second, at the time the Minister cancelled the visa of each Plaintiff (and, indeed, at all other times), that Plaintiff was a citizen of a foreign country[3] (Papua New

---

1 Love SCB 29 [2]; Thoms SCB 24 [2].

2 Each Plaintiff was born outside Australia (Papua New Guinea, in the case of Mr Love: Love SCB 38 [24(a)]; New Zealand in the case of Mr Thoms: Thoms SCB 29 [15(a)]). As such, neither fell within s 10 of the *Australian Citizenship Act 1948* (Cth) as in force at the time each plaintiff was born.

30 3 As neither Plaintiff is an Australian citizen, it is unnecessary, and therefore undesirable, to examine the scope of s 51(xix) with respect to persons who are citizens of *both* Australia and a foreign country.

Guinea, in the case of Mr Love: Love SCB 38 [24(b)]; New Zealand in the case of Mr Thoms: Thoms SCB 29 [15(b)]).

6. For completeness, the Commonwealth submits that each of the following matters is irrelevant to whether Mr Love or Mr Thoms is an "alien":

   a) whether or not Mr Love[4] or Mr Thoms[5] is an Aboriginal person;

   b) the fact that Mr Thoms is a common law holder of native title.[6]

PART V ARGUMENT

7. Section 51(xix) of the Constitution relevantly provides that the federal Parliament has power to make laws with respect to "naturalization and aliens".

8. The scope of that power has been examined by this Court on many occasions. Certain principles ought now to be regarded as settled. The application of those settled principles is fatal to the Plaintiffs' cases. Accordingly, it is useful to start with the settled principles, before responding to the Plaintiffs' submissions regarding the significance of Aboriginal identity, and ownership of native title rights or interests, to their status.

Settled principles

"Non-citizens" are "aliens"

9. "The power to make laws with respect to aliens, unlike the majority of the powers conferred by s 51 of the Constitution, is not a power to make laws with respect to a function of government, a field of activity or a class of relationships: it is a power to make laws with respect to a class of persons."[7]

---

4 Mr Love's paternal great grandparents – Frank Wetherall and Maggie Alford – were "descended in significant part from people who inhabited Australia immediately prior to European settlement": Love SCB 31–32 [17]–[18]. Mr Love identifies as a descendant of the Kamilaroi tribe, and is recognised as a descendant of that tribe by Janice Margaret Weatherall, who is an elder of that tribe: Love SCB 38 [24].

5 Mr Thoms' maternal great, great grandmother – Sarah Hazzard (or "Hazard") (nee Brennan) – was, through her mother Maggie, "descended in significant part from people who inhabited Australia immediately prior to European settlement": Thoms SCB 25 [8]. Mr Thoms identifies, and is accepted by other Gungarri People, as a member of the Gungarri People: Thoms SCB 29–30 [15].

6 Thoms SCB 30 [15(n)].

7 *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 315 (Brennan J). See also *New South Wales v Commonwealth (Workchoices)* (2006) 229 CLR 1 at 110 [163], 153 [321] (Gleeson CJ, Gummow, Hayne,

10. For the purpose of identifying the persons who fall within the class comprising "aliens", the Constitution did not "commit Australia to uncompromising adherence"[8] to either of the two leading theories prevailing at the time of Federation which, respectively, attributed controlling importance to place of birth (*jus soli*) or descent (*jus sanguinis*).[9] Instead, it left Parliament free to select or adapt one, both or a mixture of these theories as criteria for citizenship or alienage.[10] That is what Parliament has subsequently done.[11]

11. It was necessary for s 51(xix) to leave it to Parliament to define (within limits) the class of persons who would have the legal status of "alien", because the concept of alienage did not have an "established and immutable legal meaning" [12] at the time of Federation. Instead, "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".[13] Pertinently to the present case, one of the precise issues about which "a difference of legal theory [was] possible" at the time of

---

Heydon and Crennan JJ); *Actors v Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 181 (Gibbs CJ), 206–207 (Mason J).

8 *Koroitamana v Commonwealth* (2006) 227 CLR 31 (***Koroitamana***) at 37 [9] (Gleeson CJ and Heydon J).

9 *Singh v Commonwealth* (2004) 222 CLR 322 (***Singh***) at 341 [30] (Gleeson CJ), 359 [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).

10 *Koroitamana* (2006) 227 CLR 31 at 37 [9] (Gleeson CJ and Heydon J), 46 [50] (Gummow, Hayne and Crennan JJ), 49 [62] (Kirby J). See also, for example, *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439 (***Ex parte Ame***) at 482 [115] (Kirby J).

11 As was recognized in *Koroitamana* (2006) 227 CLR 31 at 46 [50], where Gummow, Hayne and Crennan JJ characterised "[t]he combination of criteria of place of birth and of descent found in para (a) of s 10(2) of the Citizenship Act" as an "instance of the subsequent legislative working out of the cross-currents between the approaches to concepts of alienage and citizenship understood in 1900".

12 *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).

13 *Koroitamana* (2006) 227 CLR 31 at 37 [9] (Gleeson CJ and Heydon J), quoting *Singh* (2004) 222 CLR 322 at 340–341 [30] (Gleeson CJ). See also *Singh* (2004) 222 CLR 322 at 391 [176]–[177] (Gummow, Hayne and Heydon JJ), relevantly with respect to the position in Britain: "[f]irst, the subjects of naturalisation, indelibility of allegiance, nationality and alienage were matters of lively controversy in Britain during the latter part of the nineteenth century. Secondly, and no less importantly, that led to legislative change. ... Due account of the existence of this controversy and of developments in British statutory law on the subject, must be taken in considering the meaning to be given to 'aliens' in s 51(xix). Both the existence of the controversy, and the developments in British statutory law, at the very least tend to deny that in 1901 there was an accepted fixed legal meaning to the term derived from the common law as understood in *Calvin's Case*."

Federation was the status of "children born of the subjects of one power within the territory of another".[14]

12. Section 51(xix) left it to the Parliament to resolve the "cross-currents and uncertainties"[15] in the law relating to aliens, citizenship and allegiance by defining the circumstances in which a person will have the legal status of "alien".[16] 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,[17] and that all persons who lack that status are "attributed the status of alien".[18]

13. Of course, that power has limits.[19] As Gibbs CJ observed in *Pochi v Macphee* (***Pochi***), "the Parliament cannot, simply by giving its own definition of "alien", expand the power under s 51(xix) to include persons who could not possibly answer the description of 'aliens' in the ordinary understanding of the word".[20] But the existence of limits does not deny that the power conferred on Parliament by s 51(xix) is "wide",[21] and that it must be construed "with all the generality which the words used admit".[22]

---

14 *Singh* (2004) 222 CLR 322 at 393 [183] (Gummow, Hayne and Heydon JJ), quoting Hall, *A Treatise on International Law*, 4th ed (1895), 234.

15 *Singh* (2004) 222 CLR 322 at 341 [30] (Gleeson CJ). See also *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 (***Ex parte Te***) at 173 [31] (Gleeson CJ).

16 *Ex parte Te* (2002) 212 CLR 162 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).

17 *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).

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

19 *Pochi v Macphee* (1982) 151 CLR 101 (***Pochi***) at 109 (Gibbs CJ); *Ex parte Te* (2002) 212 CLR 162 at 173 [31], 175 [39] (Gleeson CJ), 205 [159] (Kirby J); *Singh* (2004) 222 CLR 322 at 329–330 [4]–[5] (Gleeson CJ), 429 [305] (Callinan J); *Koroitamana* (2006) 227 CLR 31 at 38 [12] (Gleeson CJ and Heydon J), 54–55 [81] (Kirby J). Cf Plaintiffs' submissions at [61], the proposition that the word "alien" in s 51(xix) of the Constitution has become synonymous with "non-citizen" does not conflict with the principle in *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

20 (1982) 151 CLR 101 at 109.

21 *Koroitamana* (2006) 227 CLR 31 at 38 [11] (Gleeson CJ and Heydon J); *Hwang v Commonwealth* (2005) 80 ALJR 125 at 130 [18] (McHugh J).

22 *Singh* (2004) 222 CLR 322 at 384 [155] (Gummow, Hayne and Heydon JJ), invoking principles outlined in *Grain Pool (WA) v Commonwealth* (2000) 202 CLR 479 at 492 [16] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

14. The Plaintiffs' case involves the assertion that the Court should find that they are not "aliens" irrespective of their status (or lack thereof) under the *Australian Citizenship Act 2007* (Cth) (**Citizenship Act**). On the settled doctrine of this Court, that assertion must be rejected. It is inconsistent with numerous authorities, including *Lim v Minister for Immigration, Local Government and Ethnic Affairs*[23] (***Lim***), where Brennan, Deane and Dawson JJ (with whom Mason J agreed), referring to the joint judgment of six Justices in *Nolan v Minister for Immigration and Ethnic Affairs*[24] (***Nolan***), said "it was recognised that the effect of Australia's emergence as a fully independent sovereign nation with its own distinct citizenship ... that the word 'alien' in s 51(xix) of the Constitution had become synonymous with 'non-citizen'".[25]

10 15. While *Nolan* was "temporarily, in disfavor"[26] as a result of the decision of the majority in *Re Patterson; Ex parte Taylor*[27] (***Re Patterson***), "its authority [was] restored"[28] by the majority in *Shaw v Minister for Immigration and Multicultural Affairs*[29] (***Shaw***). There, a majority of the Court (Gleeson CJ, Gummow and Hayne JJ, Heydon J agreeing) held that "[t]he power conferred by s 51(xix) supports legislation determining those to whom is attributed the status of alien".[30]

16. At present, the legislation that performs that role is the Citizenship Act. That Act exhaustively provides for when a person has the status of an Australian citizen.[31] It is an agreed fact that neither Plaintiff is such a citizen.[32] Importantly, one reason that neither Plaintiff acquired Australian citizenship at the time of his birth,

20

---

23 (1992) 176 CLR 1.

24 (1988) 165 CLR 178.

25 *Lim* (1992) 176 CLR 1 at 25 (emphasis added). Compare Gaudron J at 53, who held that "[i]t is no doubt correct to say that 'alien' has become synonymous with 'non-citizen' and that that was accepted by this Court in *Nolan*" (although her Honour went on to query when that occurred, and what effect it had in relation to persons (if any) who were not then aliens but did not become citizens). See also *Nolan* (1988) 165 CLR 178 at 183–184 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ). See also *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 313 (Brennan J), 375 (Toohey J); *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 (***Re Woolley***) at 11–12 [14]–[15] (Gleeson CJ).

26 *Re Woolley* (2004) 225 CLR 1 at 11 [15] (Gleeson CJ).

27 (2001) 207 CLR 391.

28 *Re Woolley* (2004) 225 CLR 1 at 11 [15] (Gleeson CJ).

29 (2003) 218 CLR 28.

30 *Shaw* (2003) 218 CLR 28 at 35 [2]. Their Honours also discuss and criticise the decision in *Re Patterson* at 44–45 [34]–[39]. 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 [211] (Hayne J).

30

31 Citizenship Act s 4(1).

32 Love SC [24(d)]; Thoms SC [15(d)].

notwithstanding that each had one parent who was an Australian citizen, is that each was born outside Australia.[33] The Plaintiffs have not submitted that it was outside the legislative power of the Parliament to adopt birth outside Australia as a criterion negating the automatic conferral of Australian citizenship.[34] Nor could they credibly have done so, given the long history of status as a British subject turning on the location of birth. Absent any such challenge to the Citizenship Act, it necessarily follows that the Plaintiffs accept that Parliament could validly provide that they are not Australian citizens.[35]

17. *Nolan*, *Lim* and *Shaw* establish that this Court does not recognize the existence of a category of "non-alien, non-citizen". The Plaintiffs' submission to the contrary depends on *Re Patterson*, but that decision no longer represents the law,[36] as indeed members of the majority in *Re Patterson* subsequently acknowledged.[37]

18. Accordingly, as persons who are not Australian citizens, the Plaintiffs are, and always have been, aliens. In *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship*, Crennan, Bell and Gageler JJ observed that the principles for which *Lim* stands as authority include that "laws authorising or requiring the detention" of non-citizens are "laws with respect to aliens within s 51(xix) of the Constitution".[38] The same is true of laws with respect to the removal of non-citizens.

---

33 Love SC [24(c)]; Thoms SC [15(c)].

34 Cf *Koroitamana* (2006) 227 CLR 31 at 42 [33] (Gummow, Hayne and Crennan JJ), which records that the effect of the applicants' submission in that case was that s 10(2) of the Citizenship Act, which added as a criterion for Australian citizenship by birth in Australia that at least one parent was at that time an Australian citizen, was invalid in its application to the circumstances of the applicants.

35 Indeed, the absence of any basis for complaint about the manner in which Parliament has exercised its power to define eligibility for Australian citizenship is underscored by the fact that both Plaintiffs were eligible, from the time of their birth, to apply for Australian citizenship (although in light of their criminal records they may now have difficulty succeeding in any such application: Citizenship Act s 16(2)(c)).

36 Plaintiffs' submissions at [52]. The Plaintiffs' submissions at [59]–[64] draw from the dissenting views of Gaudron J, Kirby J and McHugh in different cases. And the Plaintiffs' submission at [65] that the Court "moved away from the concept of non-citizen as equivalent to alien" in *Ex parte Ame* (2005) 222 CLR 439 is wrong.

37 For example, in *Ex parte Ame* (2005) 222 CLR 439 at 480–481 [110], Kirby J held that "the constitutional doctrine in *Nolan* has, for the time being, been restored"; "it must be accepted that *Nolan* and *Shaw* [s]tate the applicable constitutional rule". Earlier, in *Singh* (2004) 222 CLR 322 at 419 [272], Kirby J held: "[A]t this time, the *Citizenship Act* denies [the plaintiff] Australian citizenship. That provision of the *Citizenship Act* is valid; based on the aliens power. In consequence, the *Migration Act* may make provision for her removal as an alien "non-citizen". To similar effect, in *Re Woolley* (2004) 225 CLR 1 at 18 [38] n 37, McHugh J held that *Shaw* is authority for the proposition that "all non-citizens are aliens for the purposes of s 51(xix) of the Constitution".

38 (2013) 251 CLR 322 at 369 [138].

Indeed, it has been said that it "cannot be doubted" that a law with respect to the expulsion of a "non-citizen" is a law with respect to "aliens".[39]

19. Given the many clear statements of this Court in the passages just cited, it necessarily follows from the agreed facts that neither Plaintiff is an Australian citizen that the aliens power supports the operation of s 198 of the *Migration Act 1958* (Cth) (***Migration Act***) with respect to each Plaintiff. No other fact is necessary to support that conclusion.

Citizens of foreign countries

20. Further and in any case, it is authoritatively established that Parliament may validly choose to treat a citizen of a foreign country as an alien.

21. The decision in *Singh v Commonwealth*[40] (***Singh***) establishes that "the legal status of alienage has as its defining characteristic the owing of allegiance to a foreign sovereign power".[41] Whether or not a person also has some <u>other</u> characteristic (such as having been born to an Australian parent, or having other deep ties to Australia) is immaterial. That is because, as Gummow, Hayne and Heydon JJ explained in *Singh*:[42]

> The 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). <u>That definition of the status of alienage focuses on what it is that gives a person the status: owing obligations to another sovereign power</u>. It does not seek to define the status, as the plaintiff sought to submit, by pointing to what is said to take a person *outside* its reach.

The Plaintiffs make the same error that was identified in *Singh*.

---

39 *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 (***Nystrom***) at 610 [139] (Heydon and Crennan JJ), see also 572 [3] (Gummow and Hayne JJ). See also *Vella v Minister for Immigration and Border Protection* (2015) 90 ALJR 89 at 91–92 [14]–[15] where, in the context of an application to extend the limitation period under s 486A(2) of the Migration Act, Gageler J described an argument that would involve re-opening the decision in *Shaw* as "ambitious".

40 (2004) 222 CLR 322.

41 *Ex parte Ame* (2005) 222 CLR 439 at 458 [35] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ). See also *Singh* (2004) 222 CLR 322 at 398 [200] (Gummow, Hayne and Heydon JJ). In *Koroitamana* (2006) 227 CLR 31, this Court confirmed that stateless persons are also "aliens" for the purposes of s 51(xix), thereby demonstrating that allegiance to a foreign power is a <u>sufficient</u> characteristic to render a person an alien, rather than a <u>necessary</u> characteristic, as had in fact been foreshadowed in *Singh* (2004) 222 CLR 322 at 395 [190] (Gummow, Hayne and Heydon JJ).

42 (2004) 222 CLR 322 at 398 [200] (<u>underlined</u> emphasis added).

22. The *ratio* of *Singh* is embodied in the conclusion of Gummow, Hayne and Heydon JJ that:[43]

> It was common ground that the plaintiff is a citizen of India. She is, therefore, a citizen of a foreign state. She is a person within the naturalization and aliens power.

23. As both Plaintiffs are agreed to be citizens of a foreign state, they can succeed only if *Singh* is overruled. Yet the Plaintiffs do not dispute the correctness of *Singh*.

24. The Plaintiffs attempt, instead, to distinguish *Singh* by contending that, despite the fact that they are and always have been citizens of foreign countries, they "do not, and have never, owed allegiance to a foreign sovereign power".[44] The basis for that submission is that they were infants when they came to Australia, and therefore did not have "the capacity to form an allegiance to a foreign sovereign power".[45]

25. That submission is untenable. Most obviously, it does not in fact distinguish *Singh*, which concerned a 6-year old girl who was a citizen of India. The Court's reasoning attributed no significance to her status as a minor. As Gummow, Hayne and Heydon JJ explained: "[a]s a citizen of India the plaintiff has obligations, 'owes allegiance', to a nation other than Australia. She is, therefore, a person within the class referred to in s 51(xix) as 'aliens'."[46]

26. Further, contrary to the Plaintiffs' submissions,[47] whether a person owes allegiance to a foreign country does not depend on their mental state or their "capacity" to form such a mental state.[48] "Allegiance" is a legal duty that arises from having the legal status of "subject" or "citizen". That is clearly demonstrated by this Court's analysis in the closely related context of s 44(i) of the Constitution, which uses the phrase "a subject or a citizen of a foreign power". In *Re Canavan*, this Court held that "as a matter of the ordinary meaning" of those words, "proof of actual allegiance as a state of mind is

---

43 (2004) 222 CLR 322 at 400 [205].
44 Plaintiffs' submissions at [53].
45 Plaintiffs' submissions at [54].
46 (2004) 222 CLR 322 at 381 [144]. See also their Honours' detailed discussion of the concept "allegiance" as relevant to alienage at 386 [163]ff. The Plaintiffs' reliance in the Plaintiffs' submissions at [54] on the observations of Stephen J in *R v Director-General of Social Welfare for Victoria; Ex parte Henry* (1975) 133 CLR 369 at 377, and on *Paxton v Macreight* (1885) 30 Ch D 165 at 168, is misplaced. Both those passages are about domicile. Domicile turns on, *inter alia*, intention. Alienage does not. The passages are, therefore, irrelevant.
47 Plaintiffs' submissions at [54].
48 See *Ex parte Te* (2002) 212 CLR 162 at 214–215 [191] (Kirby J).

not required", the words being concerned instead with "the existence of a duty to a foreign power as an aspect of the status of citizenship".[49] That reasoning was essential to the finding in *Re Canavan* that numerous politicians were incapable of being chosen as members of the Federal Parliament by reason of s 44(i) of the Constitution, notwithstanding the undisputed fact that they were unaware of their foreign citizenship at the time of their purported election.[50]

27. In light of the above, the facts that the Plaintiffs are citizens of a foreign country means that they are within the reach of s 51(xix), irrespective of whether they subjectively consider themselves to owe allegiance to the relevant foreign country.[51]

28. For the sake of completeness, the Plaintiffs' apparent suggestion that it is "inherent" in the "definition" of an "alien" in *Pochi* that being born to one Australian parent, in a foreign country, means that a person cannot be an "alien" is a syllogistic fallacy.[52] The proposition in *Pochi* that a person "who was born outside Australia, whose parents were not Australians, and who has not been naturalized as an Australian" is an alien does not entail acceptance of the proposition that the absence of any one of those elements means that a person is not an alien. As Gummow, Hayne and Heydon JJ explained in *Singh*: "[i]t would be wrong ... to take what was said by Gibbs CJ [in

---

49 (2017) 91 ALJR 1209 at 1216 [26].

50 Contrary to the Plaintiffs' submissions at footnote 86, *Doe d Thomas v Acklam* [1824] 2 B&C 779 [107 ER 572] does not stand for the proposition that a person can "indicate allegiance" by "election". In *Acklam*, the change of allegiance was due to the operation of a treaty, not to someone making an "election". Specifically, the Court in *Acklam* held that an American colonist (one "Ludlow") ceased to be a British subject by operation of the treaty between Great Britain and the United States made in 1783 at the conclusion of the American Revolution. Abbott CJ, delivering the judgment of the Court, said (at 796) that by the treaty his Majesty "relinquishes all claim to the government" of the former American colonies. This was important because "a relinquishment of the government of a territory, is a relinquishment of authority over the inhabitants of that terriory; a declaration that a State shall be free, sovereign, and independant, is a declaration, that the people composing the State shall no longer be considered as subjects of the Sovereign by whom such a declaration is made." The treaty automatically applied to Ludlow by reason of "his continued residence in those States" (at 795). It is only in the loosest sense of the word "election" that it could be said that Ludlow changed allegiance by "election", ie, by not leaving America before the commencement of the treaty so as to change his place of residence and thus take his circumstances outside those covered by the treaty. That was the "election", if such it can be called, made by the British colonist in *Doe d Auchmuty v Mulcaster* (1826) 5 B & C 771 [108 ER 287], being the other old English case cited by the Plaintiffs. The true position is well demonstrated by *In Re Adam* (1837) 1 Moo PC 460 [12 ER 889]. That case shows the inefficiacy of seeking to "indicate allegiance" by election. There, various "informal acts" over a long period of time reflecting Mr Adam's absorption into the community, and apparently demonstrating allegiance to the Crown of Great Britain (including even the quasi-formal act of swearing allegiance to His Majesty) were held to be ineffective to alter the alien status of a natural born Frenchman.

51 *Singh* (2004) 222 CLR 322 at 384–385 [158] (Gummow, Hayne and Heydon JJ).

52 Plaintiffs' submissions at [16] and n 36.

Pochi] as necessarily treating a person born in Australia as beyond the reach of the aliens power. That question did not arise and was not decided in *Pochi*."[53]

Conclusion concerning s 51(xix)

29. The Plaintiffs do not contend that any of the cases discussed above were wrongly decided and ought to be re-opened. On the authority of those cases, their claims must be dismissed. Contrary to the Plaintiffs' suggestion,[54] to accept their submissions would not involve simply the acknowledgement of a "discrete addendum to existing principles". It would require a radical departure from settled principles.

30. Applying those settled principles, the Plaintiffs are aliens. That is sufficient to resolve the questions reserved for the consideration of the Full Court. Nevertheless, for completeness, the Commonwealth responds to the Plaintiffs' specific submissions regarding the supposed significance of Aboriginal identity, and ownership of native title rights or interests, to alienage.

Aboriginality does not prevent a person from being an alien

31. At the time of Federation, the common law, as supplemented by statute, governed the status of British subjects in Australia.[55] Pursuant to that law, there is no doubt that Aboriginal people, as a class, were not "aliens".[56] The same is obviously true today. The Commonwealth does not contend, as the Plaintiffs conceived it might,[57] that ss 51(xxvi) (before or after its amendment in 1967) or 127 (before its repeal in 1967) had or has any bearing on the alienage or otherwise of Aboriginal people.

32. Acceptance of the proposition that Aboriginal people, as a class, were not and are not "aliens" does not entail the proposition that any particular Aboriginal person is not an "alien". Whether a particular Aboriginal person is an "alien" falls to be considered by reference to the established principles outlined above. Applying those principles, an Aboriginal person who is not a citizen of Australia is within the reach of the aliens

---

53 *Singh* (2004) 222 CLR 322 at 400 [203].
54 Plaintiffs' submissions at [18(e)], [69].
55 *Pochi* (1982) 151 CLR 101 at 107–108 (Gibbs CJ).
56 Plaintiffs' submissions at [26].
57 Plaintiffs' submissions at [26] and n 47.

power. That is most obviously so where, as here, the person is a citizen of a foreign country. In either case, the person's status as an Aboriginal person is "irrelevant".[58]

33. The Plaintiffs' contention that Aboriginal people cannot be "aliens" has no support in authority, constitutional principle or legal history.[59] As Gaudron J explained in *Kartinyeri v Commonwealth*:[60]

> 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, is it irrelevant to the question of continued membership of the Australian body politic.

10 34. That analysis is entirely consistent with *Singh,* for plainly an Aboriginal person is capable of owing allegiance to a foreign power (as both Plaintiffs do). In common with all other such persons, an Aboriginal person who owes such allegiance is within the reach of the aliens power.

35. In those circumstances, it is unnecessary to decide whether either of the Plaintiffs ought to be regarded as an Aboriginal person, or to fix on the criteria for making such an assessment.[61] Attempts to define aboriginality in various contexts has a long, fraught and complex history.[62] There is no occasion to enter that discourse, particularly in a constitutional setting, when it should be accepted that Aboriginality (however defined) is not a characteristic that excludes a person from the scope of the aliens power.

20 36. It is, however, apt to note that if the Plaintiffs' submissions that Aboriginal persons (ascertained by reference to the so-called "three-part definition"[63]) cannot be aliens

---

58 "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 cited in John Chesterman "Natural-born subjects? Race and British Subjecthood in Australia (2005) 51(1) *Australian Journal of Politics and History* 30–39.

59 See also Plaintiffs' submissions at [34], where they submit that the attribution of alienage to persons who are "descended from an Aboriginal Australia, who self-identify as an Aboriginal Australian, and who are accepted by other Aboriginal Australian[s] as Aboriginal" is "incongruous with the unique historical status of Aboriginal Australians as the first inhabitants of Australia". And at [66], the Plaintiffs assert that "Indigenous Australians" have "uniquely Australian characteristics".

60 (1998) 195 CLR 337 at 366 [40] (emphasis added).

61 Cf Plaintiffs' submissions at [27]–[35].

30 62 The history is discussed in detail in ALRC *Essentially Yours; Report on the Protection of Human Genetic Information* (No. 96, 2003) Ch 36; *Eatock v Bolt* (2011) 197 FCR 261 at 300–305 [167]–[190] (Bromberg J).

63 The Plaintiffs, at [28], embrace a "three-part definition" as follows: "[A] person is an Aboriginal person if: (1) the person is a member of the Aboriginal race (a *descent* question); (2) the person identifies as an

were to be accepted, that would produce three consequences that are at least as "curious" (and unattractive) as that identified by Gleeson CJ and Heydon J in *Koroitamana v Commonwealth*[64] (***Koroitamana***):

a) **First**, whether Parliament could treat a non-citizen as an "alien" would depend on the choices or views of individuals (eg, of a person as to whether to identify as an Aboriginal person, and of the relevant Aboriginal community about whether to accept them as such, noting that such choices or views might change over the course of the person's lifetime). Accordingly, acceptance of the Plaintiffs' submissions would, like the submissions rejected in *Singh*, involve "a considerable fetter on the power of the federal Parliament to identify those who are to be treated, whether for domestic or international purposes, as nationals of Australia".[65] The legislative power of the Parliament would expand or contract depending on the potentially changeable choices and views of individuals.

10

b) **Secondly**, the class of people said by the Plaintiffs to be immune from the status of alienage may not aptly be described as "narrow".[66] But whether wide or narrow, the boundaries of the class would be uncertain, as it would depend on the application of fact-specific and evaluative questions such as whether a particular person identifies as, and is accepted by the relevant community as, an Aboriginal person.

20

c) **Thirdly**, if (contrary to the first point above) persons cannot simply bring themselves in and out of power by changing their self-identification, Aboriginality may be seen as an "indelible" status.[67] Thus, if Aboriginal persons could never be aliens for the purposes of Australian law, this may expose them to disabilities under foreign law. Acceptance of the Plaintiffs' argument might

---

Aboriginal person (a *self-identification* question); and (3) the person is accepted by other members of the Aboriginal community, as an Aboriginal person (a *community acceptance* question)."

64 (2006) 227 CLR 31 at 38 [13].

65 (2004) 222 CLR 322 at 396–397 [193] (Gummow, Hayne and Heydon JJ), quoted with approval in *Koroitamana* (2006) 227 CLR 31 at 38 [13] (Gleeson CJ and Heydon J).

66 Cf Plaintiffs' submissions at [33]. Acceptance of the Plaintiffs' contention would appear to entail that, indefinitely into the future, any persons who trace any ancestry to people who inhabited Australia before European settlement, and who identify and are identified as Aboriginal, are members of the body politic.

30

67 As to the problems arising from the "indelibility" of the status of British subjecthood in the late 19th century, see *Singh* (2004) 222 CLR 322 at 389–390 [173]–[176] (Gummow, Hayne and Heydon JJ).

therefore bind all Aboriginal persons involuntarily to the Australian nation, regardless of their personal circumstances and preferences. That is a most unattractive consequence of the Plaintiffs' submissions.

37. Further, it logically follows from the Plaintiffs' adoption of the "three-part definition" that persons with Aboriginal descent could cease to be aliens after their arrival in Australia, because their status would change at the point at which they and the relevant Aboriginal community identify or recognise them as Aboriginal. Yet that cannot be correct, for it has long been established that the only way that a person can cease to be an alien is by naturalisation, which can in turn be achieved only by or under an Act of Parliament.[68] As a corollary of that proposition, it is "well-settled"[69] that a person cannot lose the status of alienage by reason of their activities in Australia following their arrival, including by reason of activities that involve the formation of "connections" to the Australian community.[70] Indeed, in *Pochi*, the Court characterised the plaintiff's argument that his absorption into the Australian community meant that he was no longer an "alien" as "impossible to maintain".[71] Subsequent arguments of a similar kind have likewise been squarely rejected.[72]

38. Accordingly, contrary to the Plaintiffs' submissions,[73] their activities since their arrival in Australia cannot affect their status as aliens. That is why the many facts in the special cases directed to those activities are irrelevant. The depth of any connections that they have formed to Australia is likewise irrelevant to the constitutional issue

---

68 See, for example: *Pochi* (1982) 151 CLR 101 at 111 (Gibbs CJ); *Ex parte Te* (2002) 212 CLR 162 at 179–180 [56]–[58] (Gaudron J), 194–195 [116] (Gummow J), 219–220 [210] (Hayne J).

69 *Nystrom* (2006) 228 CLR 566 at 610 [142], 611 [147] (Heydon and Crennan JJ).

70 *Shaw* (2003) 218 CLR 28 at 43 [31] (Gleeson CJ, Gummow and Hayne JJ, with whom Heydon J agreed), citing *Ex parte Te* (2002) 212 CLR 162. For example, in *Ex parte Te*, Hayne J relevantly said at 219 [210]: "The status of an alien is not lost or altered by the fact that the person in question may have lived in Australia for a long time, or may have cut all the ties which once existed with the body politic of the place where that person was born or with the country of which he or she was formerly a subject or citizen."

71 (1982) 151 CLR 101 at 111 (Gibbs CJ, Mason J agreeing at 112, Wilson J agreeing at 116).

72 *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 295 (Mason CJ); *Ex parte Te* (2002) 212 CLR 162 at 171–172 [25]–[26] (Gleeson CJ), 180–181 [57]–[59], 182–183 [69] (Gaudron J), 191–192 [107]–[109], 193–195 [113]–[119] (Gummow J), 219–220 [210] (Hayne J); *Re Patterson* (2001) 207 CLR 391 at 472–473 [247] (Gummow and Hayne JJ); *Re Woolley* (2004) 225 CLR 1 at 54–55 [147]–[148] (Gummow J); *Nystrom* (2006) 228 CLR 566 at 610 [140]–[142] (Heydon and Crennan JJ); *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 345 [37] (Kiefel CJ, Bell, Keane and Edelman JJ).

73 Plaintiffs' submissions at [55].

raised by these cases, as are any explanations for why the Plaintiffs have not exercised their right to apply to be naturalised.[74] As Gleeson CJ explained in *Re Minister for Immigration and Multicultural Affairs v Te*:[75]

> [T]here are many people who entered Australia as aliens, who have lived here for long periods and have become absorbed into the community, whose activity of immigration has long since ceased, but who have never sought formal membership of the community. There may be various reasons why they have not done so. In some cases, such a step might require the renunciation of other rights and privileges, or the severance of ties they wish to maintain. Whether by design, or simply as the result of neglect, they remain aliens.

Holding native title does not prevent a person from being an alien

39. In addition to the established principles discussed above which entail that native title is irrelevant to Mr Thoms' status as an "alien", the following additional observations may be made.

40. It may be accepted that, while native title rights may be characterised as "proprietary, usufructuary or otherwise",[76] native rights also reflect the existence of a connection under traditional laws or customs of a spiritual, cultural and economic relationship between native title holders and the land.[77] As Gleeson CJ, Gaudron, Gummow and Hayne JJ said in *Western Australia v Ward,* the connection which "Aboriginal peoples have with 'country' is essentially spiritual".[78] This was also emphasised in the recent judgment of this Court in *Northern Territory v Griffiths on behalf of the Ngaliwurru and Nungali Peoples*.[79]

41. Nevertheless, while it may readily be acknowledged that the connection between native title holders and land is more than proprietary, it does not follow that the fact that a person is a member of a group that holds native title takes the person outside the scope of the legislative power conferred by s 51(xix). Three points are pertinent.

    a) **First**, the established principles discussed above identify status as an alien by reference not to the strength of a person's connection with Australia, but to

---

74 Cf Plaintiffs' submissions at [67]–[68]. Under the present form of the Citizenship Act, persons in the positions of the Plaintiffs could apply for Australian citizenship under s 16.

75 (2002) 212 CLR 162 at 172 [27].

76 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 (***Mabo (No 2)***) at 70 (Brennan J).

77 *Native Title Act 1993* (Cth) s 223(1), defining the expressions "native title" or "native title rights and interests".

78 (2003) 213 CLR 1 at 64 [14].

79 [2019] HCA 7 at [187] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

whether the person has the legal status of being an Australian citizen, or whether the person owes allegiance to a foreign power. Those matters are entirely independent of native title, and may be answered differently for different native title holders. To ascribe significance to native title as a barrier to status as an "alien" is therefore to attempt to bring about a profound change to the nature of the relevant legal question. The law concerning native title provides no legal basis for that attempt.[80]

b) **Secondly**, a decision under the Migration Act to remove from Australia a non-citizen who holds native title rights or interests does not extinguish those rights or interests simply because the person (in the immediate term) cannot feasibly exercise those rights or interests.[81] But, even it if did extinguish those rights, such extinguishment is plainly within the power of Parliament. The aliens power cannot properly be confined to ensure that there is no extinguishment of native title.

c) **Thirdly,** the fact that the existence of a special spiritual relationship to a particular area cannot be relevant to the aliens power can be illustrated by reference to the position of certain nationals of Papua New Guinea. As Finn J noted in the *Torres Strait Sea and Seabed Native Title case* (*Akiba v Qld (No 3)*),[82] Australia acknowledges "that some PNG citizens maintain traditional customary associations with areas or features" in the Torres Strait "in relation to their subsistence or livelihood or social, cultural or religious activities". Yet it could not be seriously contended that any citizens of Papua New Guinea who,

---

80 Neither *Mabo (No 2)*, nor any subsequent case, cast doubt on the propositions that Great Britain assumed sovereignty over Australia, and thus that the common law of England became the common law of all the subjects within the colony, and that Australian Aboriginals became British subjects owing allegiance to the Imperial Sovereign: see *Mabo (No 2)* (1992) 175 CLR 1 at 38 (Brennan J). It was accepted early in the cases that Aboriginal persons are subjects of the King: *R v Lowe* [1827] NSWKR 4; (1788) Sel. Cas. (Kercher) 4 at 867 (Forbes CJ), 868 (Stephen J).

81 Cf Plaintiffs' submissions at [42].

82 (2010) 204 FCR 1 at 77 [257]. By Art 10 of the *Treaty between Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the area between the two Countries* (1985) ATS 4 there is established an area within the central part of the Torres Strait known as the "Protected Zone" which includes areas of land, sea and seabed over which Australia has sovereignty.

by reason of traditional law and custom, may have traditional rights[83] in areas of the Torres Strait over which Australia has sovereignty cannot be "aliens" within the meaning of s 51(xix). That is a practical illustration of the fact that to ask a question about the existence of native title rights is to ask a question that does not intersect with the scope of the aliens power under s 51(xix).

Answers to questions

42. The existence of the facts set out at [5] above, and the irrelevance of the matters set out at [6], means that the Plaintiffs' submissions at [35] are incorrect when they submit that the Plaintiffs as Aboriginal Australians "are persons who could not possibly meet the description of aliens."

43. The answers to the questions in each special case should be: (1) Yes; and (2) the Plaintiff.

PART VI ESTIMATE OF TIME

44. The Commonwealth estimates that it will require approximately 1.5 hours for the presentation of oral argument in both matters.

Dated: 15 April 2019

.....	.....	.....
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

[83] Albeit rights that are generally incapable of being recognised as "native title rights and interests" under the *Native Title Act 1993* (Cth) since the Act defines those rights as being the rights and interests of "Aborignal peoples or Torres Strait Islanders" (a group of whom PNG nationals, in general, are not members).