IN THE HIGH COURT OF AUSTRALIA
BRISBANE 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

SPECIAL CASE SUBMISSIONS OF THE PLAINTIFFS

Part I: Publication on the internet

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

Part II: Statement of issues

2. The task for this Court is the same as that referred to by Kirby J in *Shaw v Minister for Immigration and Multicultural Affairs* (***Shaw***)[1]: 'to give meaning to the constitutional word "aliens" not for some other purpose but solely for the purpose of defining the operation of the fundamental law of the Australian nation and people'.[2]

3. In undertaking that task, this Court is required to determine whether an Aboriginal Australian with at least one parent who is an Australian; who was born outside of Australia; who first arrived in Australia as a young child; has only departed Australia for brief, temporary periods; and is not an Australian citizen, is an "alien" for the purposes of s 51(xix) of the Constitution.

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[1] (2003) 218 CLR 28.
[2] *Shaw* (2003) 218 CLR 23, 60 [89] (Kirby J).

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4. The Plaintiffs' contend that the answer to that question is 'No'.

5. For descendants of Australia's first peoples, an indelible part of the Australian community, to be 'aliens' for the purposes of Australia's Constitution, is antithetical to their indigeneity and to the social, democratic and political values which underpin and are protected by the Constitution.[3] The concept of Aboriginality is inconsistent with the concept of alienage.

Part III: Section 78B notices

6. Notices have been issued under section 78B of the *Judiciary Act 1903* (Cth).

Part IV: Reasons for judgment below

10 7. This proceeding is brought in the Court's original jurisdiction.

Part V: Material facts

8. The material facts are set out in the Special Cases, of which a summary is below.

Mr Love

9. Daniel Alexander Love was born on 25 June 1979 in the Independent State of Papua New Guinea (**PNG**).[4] Mr Love became a citizen of PNG upon his birth.[5] He has not yet

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[3] The overwhelming endorsement of the amendments proposed to the Constitution in the vote on the *Constitution Alteration (Aboriginals) 1967*, which amended amending s 51(xxvi) and deleted s 127 (discussed in more detail in footnote 47, below), added a new normative context to constitutional values such as the rule of law; the separation of powers; responsible and representative government; and freedom of religion.

[4] Special Case Book for matter B43 of 2018 (*Love v Commonwealth of Australia*) (**Love SCB**) at 38, [24(a)]. Mr Love's family connections with the then Territory of Papua began with his paternal grandfather. Mr Love's paternal grandfather was born in Brisbane (**Love SCB** at 33, [19(a)]) and served 1,145 days of active overseas service (including in the Middle East and in both the Territory of Papua and the Territory of New Guinea) with the Australian Military Forces. That service ended with his demobilisation on 4 February 1946 in the Territory of Papua (**Love SCB** at 33, [19(c) to 19(f)]). Mr Love's paternal grandfather married Mr Love's paternal grandmother in the Territory of Papua (**Love SCB** at 33, [19(h)]). Mr Love's paternal grandmother was certified as an Australian citizen on 4 December 1961 (**SCB** at 34, [20(e)]). Thereafter, the family travelled between the Territory of Papua and Australia. On or about 27 April 1980, Mr Love's paternal grandparents moved permanently to Australia (**Love SCB** at 35, [20(h)]). Mr Love's father was born on 1 November 1954 in Port Moresby in the Territory of Papua (**Love SCB** at 35, [21(a)]). Mr Love's father returned to his own birthplace of Port Moresby as a secondary school student (**Love SCB** at 35, [21(c)]) and, like his father before him, met his life partner in Papua (**Love SCB** at 36, [21(f)]), marrying her on 28 July 1984 (**Love SCB** at 36, [21(g)]). Prior to their marriage, the plaintiff's parents had another child on 24 July 1976 who is the plaintiff's sister (**Love SCB** at 37, [23(a)]). The children's parents later married before they became permanent residents of Australia from, at the latest, 18 October 1985 (**Love SCB** at 34, [21(c)]. The Plaintiff's sister became an Australian citizen on 28 October 2009 (**Love SCB** 37, [23(f)]).

[5] **Love SCB** at 80, line 20 to line 40. (**Exhibit SC-1** to Special Case [*Constitution of the Independent State of Papua New Guinea 1975* (PNG) section 66(1)]).

acquired the status of Australian citizen.

10. Mr Love's father was an Australian citizen by birth.[6] His mother was a PNG citizen.[7] Mr Love is also an Australian Aboriginal man. He identifies, and is recognised, as a member of the Kamilaroi people.[8] Mr Love travelled back and forth between Australia and PNG between 9 November 1981 and October 1985.[9] He moved permanently to Australia on 25 December 1984, at the age of 5.[10] He was granted a permanent residence visa (Class BF transitional (permanent) visa). He has only departed Australia once (between 8 February 1985 and 18 October 1985, when he visited PNG).[11] He has therefore resided in Australia, permanently, since he was 6 years of age. He is now 39 years of age.

11. On 25 May 2018, Mr Love was convicted of an offence against s 339 of the Criminal Code (Qld) and was sentenced to 12 months imprisonment.[12] His visa was cancelled by the Minister for Home Affairs' (**the Minister**) delegate under s 501(3A) of the *Migration Act 1958* (Cth) (**Migration Act**).[13] On 10 August 2018, he was taken into immigration detention.[14] On 27 September 2018, the decision to cancel his visa was revoked under s 501CA(4) by the Minister's delegate and he was released from immigration detention.[15]

Mr Thoms

12. Mr Thoms was born on 16 October 1988 in New Zealand.[16] He became a New Zealand citizen upon his birth.[17] At the time of his birth, Mr Thoms was entitled to acquire Australian citizenship under s 10B of the *Australian Citizenship Act 1948* (Cth) (the **1948 Act**). He has not yet acquired the status of an Australian citizen.[18]

13. Mr Thoms' mother is an Australian citizen by birth. His father was, at the time of his

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[6] **Love SCB** at 35, [21(b)].
[7] **Love SCB** at 36, [22(b)].
[8] **Love SCB** at 38, [24(e) and 24(f)].
[9] **Love SCB** at 38, [24(g)].
[10] **Love SCB** at 38, [24(h)].
[11] **Love SCB** at 38, [24[j] to 39, [24(k)].
[12] **Love SCB** at 39, [27].
[13] **Love SCB** at 39, [28].
[14] **Love SCB** at 39, [29].
[15] **Love SCB** at 39, [30].
[16] Special Case Book for matter B64 of 2018 (*Thoms v Commonwealth of Australia*) (**Thoms SCB**) at 29, [15(a)].
[17] **Thoms SCB** at 29, [15(b)].
[18] **Thoms SCB** at 29, [15(d)].

birth, a New Zealand citizen.[19] Mr Thoms is also an Australian Aboriginal man. He identifies, and is accepted by other people as, a member of the Gunggari people.[20] He is a common law holder of native title.[21] The claims of the Gunggari People were recognised by the Federal Court of Australia in 2012 and 2014.[22]

14. Mr Thoms first came to Australia on 19 December 1988.[23] He has permanently resided in Australia since 23 November 1994 when he was first granted a Special Category Visa (SCV).[24] He temporarily travelled from Australia to New Zealand in 1997/98 and 2002/03.[25] He has permanently resided in, and not departed from, Australia since 9 January 2003.[26] He is now 31 years of age.

10 15. On 17 September 2018, Mr Thoms was convicted of an offence against s 339(1) and s 47(9) of the Criminal Code (Qld) and was sentenced to 18 months imprisonment.[27] He commenced court-ordered parole on 28 September 2018.[28] On 27 September 2018, his visa was cancelled by the Minister's delegate under s 501(3A) of the Migration Act.[29] On 28 September 2018, he was taken into immigration detention.[30] Mr Thoms remains in immigration detention.[31]

Part VI: Plaintiff's argument

16. In *Pochi v MacPhee* (***Pochi***),[32] Gibbs CJ (with whom Mason and Wilson JJ agreed) said that, for the purposes of s 51(xix), the Commonwealth Parliament may treat as an alien, 'any person who was born outside Australia, whose parents were not Australians and who
20 has not been naturalised as an Australian'.[33] In *Nolan v Minister for Immigration and*

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[19] **Thoms SCB** at 28, [14(b)]. (On 26 January 2009, Mr Thoms' father became an Australian citizen (**Thoms SCB** at 28, [14(f)]).)
[20] **Thoms SCB** at 30, [15(m)].
[21] **Thoms SCB** at 30, [15(n)].
[22] *Kearns on behalf of the Gungarri People #2 v State of Queensland* [2013] FCA 651; *Foster on behalf of the Gungarri People #3 v State of Queensland* [2014] FCA 1318.
[23] **Thoms SCB** at 29, [15(e)].
[24] **Thoms SCB** at 29, [15(f)].
[25] **Thoms SCB** at 29, [15(h)].
[26] **Thoms SCB** at 29, [15(j)].
[27] **Thoms SCB** at 32, [20]-[21].
[28] **Thoms SCB** at 32, [22].
[29] **Thoms SCB** at 32, [23].
[30] **Thoms SCB** at 32, [24].
[31] **Thoms SCB** at 32, [25].
[32] (1982) 151 CLR 101.
[33] ***Pochi*** (1982) 151 CLR 101 at 109-10 (Gibbs CJ).

Ethnic Affairs (***Nolan***),[34] a majority of this Court approved Gibbs CJ's statements in *Pochi*[35]. The *Pochi* definition is a conjunctive one in that it incorporates criteria that, if not collectively met, qualifies a person as an 'alien'.

17. The *Pochi* definition did not consider, and no case since *Pochi* has considered, whether a person who is an Aboriginal Australian; at least one of whose parents is an Australian;[36] who was born outside of Australia; who first arrived in Australia as a young child; who has only departed Australia for brief, temporary periods; and who is not an Australian citizen (**the common circumstances of the Plaintiffs**), is an 'alien' for the purposes of s 51(xix) of the Constitution.

10 18. The common circumstances of the Plaintiffs mean that they cannot be 'aliens' for the purposes of s 51(xix) of the Constitution, because:

(a) Aboriginal Australians cannot be 'alien' to Australia, irrespective of where they were born;

(b) Aboriginal Australians born overseas are, instead, 'non-alien, non-citizens';

(c) the Plaintiffs do not, and have never, owed allegiance to a foreign sovereign power;

(d) the statutory definition of citizen is distinct from, and does not control, the constitutional definition of alien and, therefore, that the Plaintiffs are not Australian citizens pursuant to Australian citizenship legislation does not

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[34] (1988) 165 CLR 178.

[35] ***Nolan*** (1988) 156 CLR 178 at 185 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ).

[36] It is inherent in the '***Pochi*** test' that being born to one Australian parent, but born overseas, places one outside the bounds of the test and the conclusion to which it points. The exception to alien status, of a person born overseas who is a citizen by parentage, was maintained in ***Nolan*** (1988) 156 CLR 178, 183 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ) (in the very passage said to equate the concepts of non-citizenship and alienage) and the *Pochi* test was expressly supported therein at 186 (same plurality). In *Doe d Auchmuty v Mulcaster* (***Auchmuty***) (1826) 5 B & C 771 [108 ER 287] (cited by McHugh J in *Singh v The Commonwealth and Another* (***Singh***) (2004) 222 CLR 322, 358 [78] and Gaudron in ***Nolan*** at 192), a loyalist colonist retained his status as a natural born British subject after independence. Although he returned to live in the United States, his American-born children were entitled to the privileges of natural born British subjects of the Crown of Great Britain including the right to inherit land. The case was decided pursuant to the *British Nationality Act 1730* (UK). The problems associated with the Plaintiffs' potentially owing allegiance to more than one sovereign (discussed by McHugh J. in **Singh** at [83] and [84]) are resolved in the present case by the Plaintiffs' permanent residence in Australia from when they were children. The "two parents born overseas/aliens/non-citizens" element of the Pochi test has been adopted in this Court on repeated occasions: **Shaw** (2003) 218 CLR 28, 43 [32] (Gleeson CJ., Gummow and Hayne JJ.); *Re Minister for Immigration and Multicultural Affairs and Another; Ex Parte Te and Re Minister for Immigration and Multicultural Affairs; Ex Parte Dang* (***Te and Dang***) (2002) 212 CLR 162, 169 [15] (Gleeson CJ.), 185 [81] (McHugh J.), and 194 [114] (Gummow J.).

automatically mean that they are aliens; and

(e) the Plaintiffs' case does not seek to overturn, or require substantial departure from, the established line of authority following *Pochi*. Rather, it urges the Court to acknowledge a necessary and discrete addendum to existing principles which addendum is, itself, anticipated by the open way in which the existing principles are stated.

19. Each of these arguments is addressed in turn, below.

The consequences for Mr Love and Mr Thoms if they are "aliens"

20. Section 51(xix) of the Constitution provides that the Commonwealth Parliament has, subject to the Constitution, the power to make laws for the peace, order and good government of the Commonwealth with respect to 'naturalization and aliens'.

21. Provided that a person falls within the description of an 'alien', 'the power of the Parliament to make laws affecting that person is unlimited unless the Constitution otherwise prohibits the making of the law'.[37] A person who meets the constitutional description of an 'alien' is liable to deportation or expulsion, so long as the person remains an alien and their removal is authorised by statute and may be subject to associated restrictions, however unjust or contrary to human rights, provided they do not amount to punishment.[38] Lord Atkinson explained in *Attorney-General (Canada) v Cain*[39] that:

> one of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government or to its social or material interests.[40]

22. Section 189 of the Migration Act requires an officer (within the meaning of that Act) to detain a person: (1) who is present in the migration zone; and (2) who the officer

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[37] *Re Patterson; Ex parte Taylor* (***Re Patterson***) (2001) 207 CLR 391 at 424 [100] (McHugh J).

[38] *Robtelmes v Brenan* (1906) 4 CLR 395; ***Re Patterson*** (2001) 207 CLR 391 at 476 [258] (Kirby J). See also *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (***Lim***) (1992) 176 CLR 1, 27-29 (Brennan, Deane and Dawson JJ.), 57 (Gaudron J.), 70 (McHugh J.); *Al-Kateb v Godwin* (***Al-Kateb***) (2004) 219 CLR 562, 573 [4] (Gleeson CJ, dissenting), 595 [74] (McHugh J); *Plaintiff S156/2013 v Minister for Immigration* (***Plaintiff S156***) (2014) 254 CLR 28, 42-43; [23]-[25] (the Court)

[39] [1906] AC 542.

[40] *Attorney-General (Canada) v Cain* [1906] AC 542 at 543 (Lord Atkinson).

reasonably suspects is an unlawful non-citizen.

23. The Migration Act (and the instruments made under it) are the legislative manifestation of the Commonwealth Parliament's conferral on the Executive of the powers to admit, refuse to admit and expel aliens from Australia.

24. A condition imposed by the Migration Act, relevant in the case of each plaintiff, is the condition that each of them must meet the 'character test' under s 501 of the Migration Act to continue to hold a visa. The visa of each of the plaintiffs was cancelled pursuant to s 501(3A) of the Migration Act because the respective plaintiff ceased to satisfy that test following his criminal convictions.

10 ***Argument***

Aboriginal Australians are not aliens

25. Aboriginal Australians are a permanent part of the Australian community.[41] Some estimates of how long the Aboriginal people inhabited Australia prior to European settlement place the interval at 50,000 years.[42] In *Gerhardy v Brown* (***Gerhardy***),[43] Deane J placed the estimate at forty millennia.[44]

26. Once representatives of the Imperial Sovereign had settled particular land in Australia, and made that land into colonies, the common law, so far as it was applicable to the position of that colony, was received. On reception, the Aboriginal people became

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[41] The Uluru Statement from the Heart, adopted by the National Constitutional Convention at Uluru in May 2017, spoke of Indigenous tribes as 'the first sovereign Nations of the Australian continent and its adjacent lands [who] possessed it under our laws and customs [...] according to the common law from "time immemorial", and according to science more than 60,000 years ago'. 'The sovereignty is a spiritual notion: the ancestral tie between the land, or mother nature, and the [Indigenous] peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty. It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown." (Final Report of the Referendum Council, 30 June 2017, *Uluru Statement from the Heart*, at p i. < https://www.referendumcouncil.org.au/sites/default/files/report_attachments/Referendum_Council_Final_Report.pdf> accessed 27 March 2019).

[42] Halsbury's Laws of Australia at [5-5] quoting White J P and Lampert R, 'Creation and Discovery' in *Australians, an Historical Library: Australians to 1788*, Mulvaney D J and White J P (eds), Fairfax Syme & Weldon Associates, Sydney, 1987, pp 11-13. Recent scientific work indicates that the period of Indigenous habitation may date back to 80,000 years. See: Helen Davidson and Carla Wahlquist, *Australian dig finds evidence of Aboriginal habitation up to 80,000 years ago*, The Guardian, 20 July 2017 at https://www.theguardian.com/australia-news/2017/jul/19/dig-finds-evidence-of-aboriginal-habitation-up-to-80000-years-ago (accessed 19 March 2019).

[43] (1985) 159 CLR 70.

[44] ***Gerhardy*** (1985) 159 CLR 70 at 149 (Deane J).

subjects of the Imperial Sovereign.[45] The common law rule in force at the commencement of the Constitution was that every person was either a British subject or an alien[46] and the concept of 'alien' for section 51(xix) was closely linked with the concept of being subject to the dominion of the Imperial Sovereign. Aboriginal people were not considered to be aliens for the purpose of section 51(xix) at federation.[47]

What does it mean to be 'Aboriginal'?

27. It has been observed that the concept of 'race' is culturally and socially constructed.[48] In 2003, the Australian Law Reform Commission described the concepts of 'race' and 'ethnicity' as 'social, cultural and political constructs, rather than matters of scientific "fact"'.[49] The word 'Aboriginal' (and its cognate expressions) have had various meanings over time in Australian law. In *Jiro Muramats v Commonwealth Electoral Officer for Western Australia*,[50] Higgins J said, for a Western Australian electoral Act, 'those are aboriginals (for Australian Acts) who are of the stock that inhabited the land at the time that Europeans came to it'.[51]

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[45] *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 37-38 (Brennan J). (See also 80-81 (Deane and Gaudron JJ) and 182 (Toohey J)).

[46] *Re Ho* (1975) 10 SASR 250 at 253 (Bray CJ).

[47] Opinion of Geoffrey Sawer, Appendix 3 to the 'Report from the Select Committee on Voting Rights of Aborigines, Part 1', *Commonwealth Parliamentary Papers,* 1961, vol. 2, p 37; Report from the Select Committee on Voting Rights of Aborigines Part 1 at [24]-[27].
Any suggestion that ss 51 (xxvi) and 127 of the Constitution undermined, or otherwise impacted, Aboriginals' status as British citizens (and subsequently as Australian citizens following introduction of the 1948 Act) became irrelevant in May 1967 (a date preceding the births of both Plaintiffs). On 27 May 1967, a federal referendum was held. The referendum asked two questions. The first related to altering the balance of numbers in the Senate and the House of Representatives. The second (and relevant question) related to determining whether two references in the Constitution (ss 51(xxvi) and 127) to Aboriginal people should be removed. The *Constitution Alteration (Aboriginals) 1967* received assent on 10 August 1967. The consequence was that s 127 of the Constitution was repealed and the words 'other than the aboriginal race in any State' were removed from s 51(xxvi). For the first time in 1967, Aboriginal people were counted as 'people of the Commonwealth' for the purposes of reckoning the population for the House of Representatives pursuant to s 24 of the Constitution. Prior to the referendum in 1962, Aboriginal people were permitted, but not required, to enrol to vote by the *Commonwealth Electoral Act 1962* (Cth). In 1965, the Queensland Parliament passed the *Elections Act Amendment Act 1965* (Qld) which similarly granted an optional franchise to Aboriginal people and Torres Strait Islanders.[47] This process of legislative change and constitutional amendment together shows a design on the part of the polity to formally integrate Aboriginal people into the community as 'complete' Australians capable of exercising political power through the exercise of the franchise. In any event, it has been held that the right to vote (for example) is not necessarily inconsistent with alienage or vice versa. See Gleeson CJ in **Te and Dang** (2002) 212 CLR 162, 173 [30] cited with approval by Callinan J. in **Shaw** (2003) 218 CLR 28, 84 [176].

[48] Sarah Pritchard 'The Race Power in section 51(xxvi) of the Constitution' (2011) 51(2), *Australian Indigenous Law Review* 44 at 50.

[49] Australian Law Reform Commission, *Report on the Protection of Human Genetic Information*, Report No 96 (2003) at 36.42.

[50] (1923) 32 CLR 500.

[51] (1923) 32 CLR 500 at 507 (Higgins J).

28. By the 1980s, a three-part definition for determining whether a person met the description of an 'Aboriginal person' had emerged.[52] Under that test, 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 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).

29. In 1983, the New South Wales Parliament enacted the *Aboriginal Land Rights Act 1983* (NSW). Section 4(1) of that Act, for the first time in any statute in any Australian jurisdiction, defined 'Aboriginal' in accordance with the three-part test.[53] In *Commonwealth v Tasmania*,[54] Deane J said the meaning of the term 'Australian Aboriginal' had come to mean 'a person of Aboriginal descent, albeit mixed, who identifies himself as such and who is recognized by the Aboriginal community as an Aboriginal'.[55]

30. By the time of *Mabo v Queensland (No 2)* (***Mabo (No 2)***),[56] the meaning of 'Aboriginal' appeared settled. Brennan J said that '[m]embership of the indigenous people depends on biological descent from the indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among those people'.[57]

31. As far back as 1976, the Victorian Supreme Court had acknowledged that the words 'Aborigine' and 'Aboriginal' have been used to describe persons in groups or societies irrespective of mixture of blood. Lush J said that that view 'is supported by the consideration that for a long time it has been widely known that there remain very few persons of the full blood'.[58]

32. The development of the meaning of the word 'Aboriginal' has come to encompass a

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[52] See, for example the Australian Law Reform Commission, *Report on the Protection of Human Genetic Information*, Report No 96 (2003) at 36.14 and Dr John Gardiner-Garden *Defining Aboriginality in Australia* (Department of the Parliamentary Library, Current Issue Brief No. 10 (2002-03).

[53] *Aboriginal Land Rights Act 1983* (NSW) s 4(1): '*[i]n this Act, except in so far as the context or subject-matter otherwise indicates or requires—"Aboriginal" means a person who— (a) is a member of the Aboriginal race of Australia; (b) identifies as an Aboriginal; and (c) is accepted by the Aboriginal community as an Aboriginal.*'

[54] (1983) 158 CLR 1.

[55] *Commonwealth v Tasmania* (1983) 158 CLR 1 at 274 (Deane J).

[56] (1992) 175 CLR 1.

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

[58] *Re Brynning* [1976] VR 100 at 103 (Lush J).

discernible group of people who meet the three-part test of descent, self-identification and community acceptance. Both Mr Love and Mr Thoms are Aboriginal Australians in that sense. Both men are descended from the people who inhabited Australia immediately prior to European settlement.[59] Both men identify as Aboriginal Australians. Both men are accepted by members of their community as Aboriginal Australians.

33. The development of the conventional understanding of the meaning of the word 'Aboriginal' means that persons who are capable of meeting that description constitute a narrow class. Each member of the class is able to identify Aboriginal ancestry. Each member must have sufficient connection with their Australian Aboriginality for them to self-identify as Aboriginal. Each member must have a sufficient connection with other members of the Aboriginal community, ordinarily resident in Australia, for those other members to accept the person as an Aboriginal Australian.

34. A construction of the aliens power that has the potential to include Aboriginal Australians, as that identifier is now understood, has the consequence that persons who are descended from an Aboriginal Australian, who self-identify as an Aboriginal Australian, and who are accepted by other Aboriginal Australian as Aboriginal, are potentially aliens. Such a construction is incongruous with the unique historical status of Aboriginal Australians as the first inhabitants of Australia.

35. Aboriginal Australians, as that identifier is now understood, are persons who could not possibly meet the description of aliens. An Aboriginal Australian person's descent from other Aboriginal Australians, self-identification and community acceptance is so closely connected with being 'Australian' (as that concept is ordinarily understood) to take an Aboriginal Australian beyond the reach of the aliens power.

Impact of native title for Mr Thoms

36. In ***Mabo (No 2)***, this Court recognised the concept of native title in Australia for the first time. In rejecting the previously accepted theory of *terra nullius*, Justice Brennan explained that '[w]hatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled

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[59] The preamble to the *Native Title Act 1993* (Cth) (**NTA**) recognises this prior residence: '[t]he people whose descendants are now known as Aboriginal peoples ... were the inhabitants of Australia before European settlement'.

colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted'.[60]

37. With the rejection of *terra nullius* came the first judicial recognition in Australia of the relationship that Aboriginal Australian people had with the lands and waters of Australia. That connection had existed tens of thousands of years before, and had survived, European settlement and the Imperial Sovereignty that came with settlement.

38. In ***Mabo (No 2)***, Brennan J said that, since European settlement of Australia, 'many clans or groups of indigenous people have been physically separated from their land and have lost their connexion with it. But that is not the universal position'.[61] Relevantly, it is not the position of Mr Thoms who is a native title holder over particular lands and waters situated at Mitchell in the State of Queensland.

39. At common law, native title is a group of rights and interests that Aboriginal people and Torres Strait Islanders have in lands or waters. A majority of this court said, in *Commonwealth v Yarmirr*,[62] 'at common law the native title rights and interests survived acquisition of sovereignty and ... an express act of recognition by the new sovereign was not necessary to their being recognised'.[63] That is supported by the requirement that '[a]fter sovereignty is acquired, native title can only be extinguished by some positive act expressed to achieve that purpose generally'.[64]

40. The 'group of rights' theory is partly an incident of the common law but it is also partly an incident of Aboriginal law and customs. That is because '[n]ative title has its origin in the traditional laws acknowledged and the customs observed by the indigenous people who possess the native title'.[65] The *existence* of native title rights for a particular place, therefore, is guaranteed by the common law but the *content* of those rights are determined by reference to Aboriginal law and customs. The people in whom the rights are vested (whether a community, group or an individual) is also determined by reference to Aboriginal law and customs.

41. Mr Thoms is a member of the Gunggari people. He is a holder of judicially-recognised

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[60] ***Mabo (No 2)*** (1992) 175 CLR 1, 42 (Brennan J).
[61] ***Mabo (No 2)*** (1992) 175 CLR 1, 59 (Brennan J).
[62] (2003) 208 CLR 1.
[63] (2003) 208 CLR 1, 50 [46].
[64] *State of Western Australia v Commonwealth* (1995) 183 CLR 373, 422 (Mason CJ, Brennan, Deane, Toohey Gaudron and McHugh JJ).
[65] *Fejo v Northern Territory of Australia* (1998) 195 CLR 96, 128 [46] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). See also ***Mabo (No 2)*** (1992) 175 CLR 1, 58 (Brennan J).

common law native title rights in respect of certain lands and waters around the town of Mitchell in the State of Queensland. The 'group of rights' that the Gunggari people have in respect of their native title area includes the right to: (1) access and be present on the land and water; (2) camp in the area; (3) conduct religious and spiritual activities in the area; (4) maintain the area from physical harm; and (5) teach, on the native title area, the physical and spiritual attributes of the area.[66]

42. Exercise of those native title rights necessarily requires the permission to be present on the lands and waters the subject of the determination area. A determination that a person is an 'alien' has, as has been observed, the effect of rendering that person's right to continued presence in Australia subject to withdrawal by the Executive (such determination being regulated by the laws of the Commonwealth Parliament). The capacity of the Executive to exercise that power in respect of an Aboriginal Australian who is a native title holder of lands and waters in Australia is unsatisfactory and wholly inconsistent with a person's ability to enjoy or exercise their native title rights.

43. This Court should prefer a construction of 'alien' for s 51(xix) of the Constitution that does not include an Aboriginal Australian, with a judicially recognised common law native title claim over particular lands and waters, because such a person could not possibly meet the description of an 'alien' within the meaning of that provision.

Native title not 'necessary'

44. Simply because common law native title in relation to a particular place has been extinguished does not mean that an Aboriginal person, without a recognised common law connection to specific ancestral land, does not still have a unique connection with Australia.[67]

45. As Brennan J said in ***Mabo (No 2)***, native title is recognised as a 'burden on the Crown's

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[66] *Kearns on behalf of the Gunggari People #2 v State of Queensland* [2012] FCA 651 (order 3); *Foster on behalf of the Gunggari People #3 v State of Queensland* [2014] FCA 1318 (order 8).

[67] See, for example, **NTA** preamble: "[Aboriginal peoples and Torres Strait Islanders] have been progressively dispossessed of their lands ... The people of Australia intend ... to ensure that Aboriginal peoples ... receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire ... it is important to recognise that many Australian Aboriginal peoples ... because they have been dispossessed of their traditional lands, will be unable to assert native title rights and interests and that a special fund needs to be established to assist them to acquire land ... this law, together with initiatives ... agreed by the Parliament from time to time is intended to be ... special measure[s] for the advancement and protection of Aboriginal peoples ... and is intended to further advance the process of reconciliation among all Australians ..."

radical title when the Crown acquires sovereignty over a territory'.[68] Native title can, by some act, be extinguished. But '[t]he exercise of a power to extinguish native title must reveal a clear and plain intention to do so, whether that action be taken by the Legislature or the Executive'.[69]

46. Extinguishment of native title may have happened over two hundred years ago. It may have occurred by necessary implication from a dealing with land by the Crown that is inconsistent with the continued recognition of native title (such as the grant of an estate in fee simple). But extinguishment of native title does not extinguish an Aboriginal person's connection with land. Extinguishment of native title, as far as the common law is concerned, merely unburdens the Crown's radical title from an inconsistent claim.

47. Similarly, an Aboriginal Australian without any native title claim (either because it cannot be proven or the whole of the land has been subject to an inconsistent dealing by the Crown) does not necessarily have any less of an identifiable and real connection with the country from which their ancestors descended. As the Uluru Statement from the Heart (quoted above at footnote 41) describes this connection: "the ancestral tie between the land, or mother nature, and the [Indigenous] peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors" remains.[70]

48. Interpreting 'alien' in a way that ensures that Aboriginal Australians – who necessarily have a connection to Australia, and its lands and waters, by reason of their Aboriginality – do not come within the definition of "alien" can be reconciled with the existing dicta of this court in ***Pochi***[71] and ***Singh***[72] that say that there are people who could not possibly meet the description of "alien" in s 51(xix), for the reasons outlined below.

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[68] ***Mabo (No 2)*** (1992) 175 CLR 1, 51 (Brennan J).
[69] ***Mabo (No 2)*** (1992) 175 CLR 1, 64 (Brennan J).
[70] See, for example, the observations of Blackburn J in *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 167: 'the fundamental truth about the Aboriginals' relationship to the land is that, whatever else it is, it is a religious relationship'. His Honour, after quoting Professor Stanner said, (at 357): "This explanation renders intelligible and logical the statutory definition of 'traditional Aboriginal owners' [in *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)], a definition which reflects the spiritual and cultural significance of land for Aboriginals'. This statement was referred to by Brennan J in in *Re Toohey; ex parte Meneling Station Pty. Ltd.* (1982) 158 CLR 327, 356.
[71] ***Pochi*** (1982) 151 CLR 101, 109 (Gibbs CJ); 112 (Mason J agreeing); 116 (Wilson J agreeing).
[72] (2004) 222 CLR 322 at 383.

The Plaintiffs are not "aliens" they are "non-alien, non-citizens"

49. The majority of this Court said in ***Nolan***, by reference to its Latin origins, that the word 'alien', means 'belonging to another person or place'.[73] Similarly, Gaudron J (in dissent) in ***Nolan***, also by reference to its Latin origin, stated that an 'alien' is 'in essence, a person who is not a member of the community which constitutes the body politic of the nation from whose perspective the question of alien status is to be determined'.[74] Similarly, Gummow, Hayne and Heydon JJ in ***Singh*** referred to an alien as someone who "belonged to another".[75]

50. People directly descended from inhabitants of Australia prior to 1788 do not belong to any place other than Australia. They are a 'special class of Australians'.[76]

51. The existing jurisprudence recognises that Australia's emergence as an independent nation and the divisibility of the British Crown produced 'different reference points for the application of the word "alien"' .[77] However, those changes do not impact the unique historical status of Aboriginal Australians such that they are liable to be "aliens".

52. The concept of there being a 'non-alien, non-citizen' category has previously been recognised. In ***Re Patterson***, Gaudron, McHugh, Kirby and Callinan JJ found that a citizen of the United Kingdom who migrated to this country in the 1960s shared allegiance with Australians to a common monarch. Despite never having become a citizen, Mr Taylor was a subject of the Queen of Australia and could not be an "alien" for the purpose of Australia's deportation laws. Instead, he belonged to a new class of Australian resident, the 'non-alien non-citizen'.[78]

Absence of allegiance to a foreign sovereign power

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[73] ***Nolan*** (1998) 165 CLR 178, 183 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey JJ), citing *Milne v Huber* 17 Fed Cas 403 at 306.

[74] ***Nolan*** (1998) 165 CLR 178, 189-190 (Gaudron J).

[75] (2004) 222 CLR 322, 395 (Gummow, Hayne and Heydon JJ).

[76] This reference to a 'special class of Australians' was used by Kirby J in ***Re Patterson*** (2001) 207 CLR 391, 488.

[77] ***Nolan*** (1998) 165 CLR 178 at 186 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ). ***Re Patterson*** (2001) 207 CLR 39 at 408 [36] (Gaudron J).

[78] The subsequent overruling of the specific conclusion of the Court in ***Patterson*** does not detract from the significance of the concept. (See the comments of McHugh J in ***Shaw*** (2003) 218 CLR 23, 4; [45] regarding the extent to which ***Re Patterson*** should be treated as authority.) Kirby J. spoke of the applicant in ***Shaw*** as neither an alien nor a citizen at 50 [60] and 56 [78]. Kirby J. also referred to the concept in ***Te and Dang*** (2002) 212 CLR 162, at 210 [177]-[178].

53. In *Re Minister for Immigration and Multicultural and Indigenous Affairs Ex Parte Ame*[79] (***Ame's Case***), this Court stated that the defining characteristic of an 'alien' remains the 'owing of allegiance to a foreign sovereign power'.[80] Gummow, Hayne and Heydon JJ reached the same conclusion in ***Singh***.[81] In that regard, for the reasons which follow, the Plaintiffs do not, and have never, owed allegiance to a foreign sovereign power.

54. Both Plaintiffs departed their countries of birth as young children and have permanently resided in Australia since they were 6 years of age. They did not, as children, have the capacity to form an allegiance to a foreign sovereign power. In *R v Director-General of Social Welfare for Victoria; Ex parte Henry and Anor* (***Ex Parte Henry***),[82] Stephen J referred to children 'lacking full capacity' and stated that a child 'could not in the eye of the law have any mind; he was not capable of forming an intention on the subject'. In the same case, Murphy J referred to that incapacity lasting until a child turned 18 years of age.[83] A child's lack of capacity to formulate allegiances was acknowledged by Kirby J in ***Te and Dang***.[84] The proposition is supported by the provisions of Australian citizenship legislation referred to by Gaudron J in *Sykes v Cleary*.[85]

55. The Plaintiffs' lack of capacity, prior to the commencement of their permanent residence in Australia, means that they cannot have formed an allegiance to their birth countries. Their permanent presence in Australia; their forming of close relationships with other Australians and becoming the parent of Australian citizens, as well as their identification as Aboriginal Australians, all indicate that their allegiance is to the Australian nation.[86]

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[79] (2005) 222 CLR 429.

[80] ***Ame's Case*** (2005) 222 CLR 439 at 458-459 [35] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ).

[81] (2004) 222 CLR 322 at 383 [154] (Gummow, Hayne and Heydon). In ***Singh*** at 351 [58], McHugh J. held the contrary proposition, namely, that the meaning of "aliens" turns on whether the person in question owes a duty of permanent allegiance to the Queen of Australia.

[82] (1975) 133 CLR 369 at 377 (Stephen J). His Honour cited the case of *In re Macreight; Paxton v Macreight* (1885) 30 Ch D 165 at 168 (Pearson J). In *Potter v Minahan* (1908) 7 CLR 277, 294-296, Barton J. referred to common law rules preventing a person from forming the necessary intention to change their domicile until the person is of full age.

[83] ***Ex Parte Henry*** (1975) 133 CLR 369 at 388.

[84] (2002) 212 CLR 162 at 214; [191] (Kirby J).

[85] (1992) 176 CLR 77, 133-134, including in footnotes 15 and 21.

[86] A person can indicate allegiance by informal actions of this kind. See *Doe v Acklam* (1824) 2 B & C 771 [107 ER 572] (***Acklam***) cited by McHugh J. in Singh (2004) 222 CLR 322 at 383 at 357 [77]. The Court in ***Acklam*** held that an election to continue residing in the United States was an election to become citizens of the United States and to shed allegiance to the Crown of Great Britain. In any event, consistent with ***Auchmuty*** (1826) 5 B

"Non-citizen" does not equal "alien"

56. It is not in dispute that the Plaintiffs are not Australian citizens. In the cases relevant to the aliens power considered by this court over the past four decades, two different approaches have been taken to whether non-citizenship, necessarily, connotes that a person is an alien.[87]

57. The first is that the concepts of 'non-citizen' and 'alien' are synonymous with one another such that, as a consequence, if a person is not an Australian citizen, they are automatically an alien. The competing and, in the Plaintiffs' submission, preferred view, is that they are distinct concepts such that the statutory definition of citizen cannot redefine the
10 constitutional concept of alien with the further result that it does not follow, from the fact that the Plaintiffs are not Australian citizens, that they are, necessarily, aliens.

58. The view that the concepts are synonymous is said to arise from the majority judgment in ***Nolan***,[88] and its subsequent adoption by Brennan, Deane, Dawson JJ[89] and, separately, Toohey J in ***Lim***, [90] by the majority in ***Shaw*** and by McHugh J in *Bonnie Hwang (an infant by her next friend Li Xia Yu) v Commonwealth of Australia & Anor; and Roger Wenjie Fu (an infant by his next friend Hui Ling Huang) v Commonwealth of Australia & Anor* (***Hwang***)[91].

59. In ***Pochi***, Gibbs CJ with whom Mason and Wilson JJ agreed, observed that the Commonwealth Parliament 'cannot, simply by giving its own definition of "alien",
20 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'.[92] This is the genesis of the view for which the Plaintiffs contend. More recently, Gleeson CJ similarly observed

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& C 771 [108 ER 287] (cited by McHugh J. in ***Singh*** at 358 [78] and Gaudron J. in ***Nolan*** (1988) 165 CLR 178 at 192, discussed above at footnote 36), the allegiance of each Plaintiff's Australian parent to the Australian sovereign should properly be regarded as passing to the respective Plaintiff unless and until that Plaintiff, consistent with ***Acklam***, chose to shed that allegiance. In contrast with the former American colonists in ***Acklam***, as the text (in [55] of these submissions) indicates, the Plaintiffs have acted to confirm and continue that Australian allegiance. Neither mere failure to formally acquire citizenship nor inactivity can turn a non-alien into an alien: Gaudron J. in ***Nolan*** (1988) 165 CLR 178, 193.

[87] This is not surprising when, as the history of external territories, raised by the facts relied upon in ***Ame's Case*** (2005) 222 CLR 439 reveals, "citizenship" is, itself, a concept that has variable meanings. This was noted as occurring in the broader context by Kirby J. at 471 [76] (footnote 74), citing articles by Rubinstein and Bozniak.

[88] ***Nolan*** (1988) 165 CLR 178, particularly at 183-184. Note that McHugh J., in ***Te and Dang*** (2002) 212 CLR 162, 187 [85], stated that, on this point, ***Re Patterson*** overruled the majority Justices in ***Nolan***.

[89] (1992) 176 CLR 1 at 25-26.

[90] (1992) 176 CLR 1 at 46.

[91] (2005) 80 ALJR 125; [2005] HCA 66 at [18].

[92] ***Pochi*** (1982) 151 CLR 101 at 109 (Gibbs CJ).

in ***Re Patterson*** that "the Parliament cannot, by some artificial process of definition, ascribe the status of alienage to whomsoever it pleases".[93] Gaudron J (in dissent) had previously said in ***Lim*** that "Citizenship is a concept which is entirely statutory (therefore) it cannot control the meaning of 'alien' in s 51(19) of the Constitution'.[94] Put cogently by McHugh J in ***Singh***, the 'concept of nationality and citizenship' are 'irrelevant to determining the meaning of 'aliens' in s 51(xix)' and '[d]iscussion of those concepts in this constitutional context merely invites error.'[95]

60. The following seven reasons establish why this latter approach ought to be preferred.

61. **First**, this view has, as its roots, the unassailable maxim in constitutional law that 'a stream cannot rise higher than its source'.[96] Thus, 'alien' cannot simply mean 'non-citizen' because such a construction would allow Parliament, through citizenship legislation, to exclusively determine the scope and extent of the 'aliens' power in s 51 of the Constitution. If 'alien' always meant 'non-citizen' the 'stream and its source' doctrine would be contravened.

62. **Second**, the concept of 'citizenship' is an entirely statutory concept.[97] The concept of Australian citizenship has existed since the commencement on 26 January 1949 of the *Nationality and Citizenship Act 1948* (**1948 Act**).[98] Before the commencement of the 1948 Act, the concept of Australian citizenship (per se) did not exist. A person who was a British subject immediately before 26 January 1949 became, on that date, an Australian citizen if, immediately prior to that date, he/she had been ordinarily resident in Australia

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[93] ***Re Patterson*** (2001) 207 CLR 391 at 400; [7] (Gleeson CJ). See also, Gleeson CJ in ***Singh*** (2004) 222 CLR 322 at 329; [4]-[5] and ***Te and Dang*** (2002) 212 CLR 162, 173 [31].

[94] ***Lim*** (1992) 176 CLR 1 at 54. Prior to ***Lim***, Gaudron J made a substantially similar comment in ***Nolan*** (1988) 165 CLR 178 at 191. There, her Honour stated, that the 'statutory definition of "alien" cannot control the constitutional meaning of "alien" as a person not a member of the community constituting the body politic of Australia" and at 191, "power to define the circumstances in which a person may become an alien cannot be simply 'at large''.

[95] (2004) 222 CLR 322, 347 [49] (McHugh J). McHugh J. also said at 374 [122] that "non-citizen" for the *Migration Act* is not synonymous with the constitutional meaning of "alien". Gleeson CJ in ***Singh*** (at 329 [4]-[5] emphasised the qualification that Parliament cannot simply expand the power to include persons who could not possibly answer the description of aliens in the Constitution. See also Kirby J. in ***Shaw*** (2003) 218 CLR 28, 57 [79] (endorsing earlier statements of Gaudron J.) and 61 [94]; Gaudron J. in ***Te and Dang*** (2002) 212 CLR 162, 179 [53]-[54]; as well as McHugh J. at 186 [85]; and Kirby J. at 205 [159] and 209-210 [175]. See, also, Kirby J. in ***Ame's Case*** (2005) 222 CLR 439, 481-482 [114]-[115] and 484 [120].

[96] *Australian Community Party v Commonwealth* ***(Communist Party Case)*** (1951) 83 CLR 1 at 258 (Fullagar J). The maxim is cited in ***Singh*** (2004) 222 CLR 322 (describing judicial power) at 330; [6].

[97] ***Lim*** (1992) 176 CLR 1 (judgment of Gaudron J).

[98] See, in particular, ss 10 and 25.

for a period of at least five years.[99] Simply put, 'alien' is a constitutional concept and 'citizen/non-citizen' is a legislative dichotomy whose legally effective limits are defined by the limits of the powers provided for in s 51 of the Constitution.

63. **Third**, apart from in section 44, there is no mention of 'citizen', 'citizenship' or 'Australian citizen', in the Constitution. This is by express design. 'Australian citizenship' was discussed briefly in the 1891 Convention[100] and more comprehensively in the 1898 Convention[101] (in the context of debating the provisions that ultimately became ss 117 and 51). It was decided that neither of those words, nor any definition of them, would be included in the Constitution. McHugh J stated in ***Singh*** that this was a 'deliberate omission' that:

> "... [leads] to the irresistible conclusion that the *Constitution* does not confer on the Parliament of the Commonwealth a *broad* power concerning citizenship and nationality. Instead, the *Constitution* has given the Parliament of the Commonwealth a limited specific power to control the entry of persons into Australia and to regulate the rights and privileges of aliens in Australia."[102]

64. **Fourth**, the 'non-citizen' equals 'alien' view renders useless the 'immigration' power in the Constitution. This consequence was explained concisely by Kirby J in ***Re Patterson***:

> "Had the word 'alien' possessed in 1900 the meaning asserted for it in these proceedings by the respondent there would, logically, have been no need for a power over "immigration". The aliens power, as applicable to every non-Australian subject or citizen, native born or naturalised, would have sufficed to sustain all conceivable laws on migration or migrants ... It was precisely because the power over aliens did not extend to British subjects that the supplementary legislative power was needed in the Constitution." [103]

65. **Fifth**, in ***Ame's Case***, the majority moved away from the concept of non-citizen as equivalent to alien. Despite being an Australian citizen by birth, Mr Ame was still

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[99] **1948 Act**, s 25(1)(d).

[100] See, for example, the reference in Edmund Barton's speech about the concept of the Australian people as citizens of both a federal and state entity: *Record of the Debates of the Australasian Federal Convention* (Sydney 1891) Vol I at 93-95.

[101] The question whether the notion of citizenship should be included in the Constitution was most emphatically asked by Dr John Quick during the Melbourne session of the convention debates: *Official Record of the Debates of the Australasian Federal Convention* (Melbourne 1989) Vol V at 1767.

[102] ***Singh*** (2004) 222 CLR 322 at 378; [134] (McHugh J).

[103] ***Re Patterson*** (2001) 207 CLR 391 at 483-84; [275] (Kirby J) (footnotes omitted).

considered to be an 'alien' because the defining characteristic of 'alien' was 'owing of allegiance to a foreign sovereign power'. As Kirby J stated, "[t]he notion that nationality (including for constitutional purposes) is fixed in every case by the place of birth is not one that gained the acceptance of this Court in *Singh*."[104] Since ***Singh*** and ***Ame's Case,*** in determining whether a person is an alien, the emphasis has changed to whether they owe obligations to a sovereign power other than Australia.

66. **Sixth**, this Court has not been provided with a proper opportunity to test the outer limits of the consequences of the view that 'non-citizen' equates to 'alien' through the application of the proposition to people with uniquely Australian characteristics (Indigenous Australians), until now.

67. **Finally**, with respect to Mr Thoms, but for his name not being registered with the Australian consulate in New Zealand within 18 years of his birth, he satisfied the relevant criteria for gaining citizenship by descent provided for in s 10B of the 1948 Act (as amended to the time of his birth). The failure of a person, or that person's parent, to complete the administrative task of registration cannot (in addition to their not having citizenship) have, as a consequence, the attribution of alien status. That must particularly be so where Mr Thoms has resided in Australia, with an Australian citizen parent, for almost his whole life. The position is different in that regard to ***Singh***, whose parents were never Australian citizens.

68. With respect to Mr. Love, because he was born out of wedlock (albeit, to parents who married after his birth) and because his father, not his mother, was an Australian citizen, he was precluded from obtaining citizenship by descent by registration at the Australian consulate within five years of his birth (see s 11 of the 1948 Act as amended at the time of Mr. Love's birth). Notions such as whether one's parents are married or whether one's Australian descent comes via one's mother or father cannot, it is submitted, be determinative of whether a person is or is not an alien for the purpose of s. 51(xix).

Existing authority is not disturbed

69. "[B]irth outside Australia will generally mean that the person born is, and will be treated as, an alien for most purposes"[105] (emphasis added). Answering "no" to the first question

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[104] ***Ame's Case*** (2005) 222 CLR 439 at 482; [114] (Kirby J) (footnotes omitted).
[105] ***Singh*** (2004) 222 CLR 322 at 428 [302] (Callinan J). See, also, ***Te and Dang*** (2002) 212 CLR 162, 170 [18] (Gleeson CJ).

posed in these special cases will not change the accuracy of that statement. The Plaintiffs do not seek to overturn the established line of authority commencing with *Pochi*. Rather, they seek to have this court acknowledge the type of necessary, discrete counter-example anticipated by the modifier "generally" in Callinan J.'s formulation of the principle. It is appropriate in this case because the Plaintiffs are persons who, despite being born overseas, are uniquely Australian. The Plaintiffs urge this Court to do no more than the task that was summarised by Gummow, Hayne and Heydon JJ in *Singh* as follows: [106]

> The questions about the construction of the *Constitution,* which fall for decision in this Court, require particular answers to particular questions arising in a live controversy between parties. The task of the Court is not to describe the metes and bounds of any particular constitutional provision; it is to quell a particular controversy by deciding whether, in the circumstances presented in the matter, the relevant constitutional provisions do or do not have the consequence for which a party contends.

Conclusion

70. For the reasons outlined above, an Aboriginal Australian with at least one parent who is an Australian; who was born outside of Australia; who first arrived in Australia as a young child; has only departed Australia for brief, temporary periods; and is not an Australian citizen, is not an "alien" for the purposes of s 51(xix) of the Constitution. It is antithetical to a person's Australian indigeneity for them to be considered an "alien" in this country.

Part VII: Orders sought

71. The Plaintiffs submit that the answers to the questions in each of the Special Cases should be: (1) 'No'; and, (2) 'the Defendant'.

Part VIII: Oral argument

72. The Plaintiffs require 3 hours to advance their oral argument in respect of both Special Cases.

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[106] ***Singh*** (2004) 222 CLR 322 at 383 [152] (Gummow, Hayne and Heydon JJ).