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

PLAINTIFFS' REPLY SUBMISSIONS

Part I: Publication on the internet

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

Part II: Reply submissions

The Non-citizen/Alien Equivalence?

2. In [9] to [19] of its submissions, the Commonwealth pursues the argument that, because the Plaintiffs are non-citizens according to the Migration Act, they are aliens for the purpose of s 51(xix) of the Constitution.
3. The invalidity of that conclusion is acknowledged at [13] of the Commonwealth's submissions where it is stated that the Parliament cannot, simply by giving its own definition of "alien", expand the power under s 51(xix) to include persons who could

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not possibly answer the description of "aliens" in the ordinary understanding of the word.[1]

4. The Plaintiffs rely upon their primary submissions at [56]-[68] and the authorities cited therein. The equivalence of "non-citizen" under Commonwealth legislation and "alien" under the Constitution should not be accepted.[2]

The Plaintiffs' Position concerning ***Singh***

5. In [20]-[30] of their submissions, the Commonwealth argues, on the basis of the reasons of the plurality in ***Singh***,[3] that a person who owes allegiance to a foreign state by being a subject or citizen of that foreign state is, *ipso facto*, an alien. It is inherent in the reasons of the plurality in ***Singh***, and the submissions of the Commonwealth, that the foreign allegiance concerned is an allegiance created by the domestic law of the foreign state in question.

6. The Plaintiffs do not seek to challenge the result in ***Singh***. The Plaintiffs submit, however, that the use of foreign allegiance (imposed by foreign domestic law) as a determining criterion does not capture the concept of "otherness" or "foreignness" contained in the ordinary meaning of "alien". Neither was it necessary to decide the issue that arose in ***Singh***. Ms Singh's "otherness" was sufficiently captured by the foreign citizenship of both of her parents, and the incidental nature of her birth in Australia. Applied outside the facts of ***Singh***, itself, or closely analogous circumstances such as those in *Koroitamana v Commonwealth*[4] (***Koroitamana***), foreign allegiance (imposed by foreign domestic law) as a determining criterion produces results that are neither just nor in accord with a principled approach to the construction of s 51(xix).

A Principled Approach to interpreting the meaning of "alien" in s 51(xix)

(a) Nationality Law in England and the Colonies in 1901

7. The plurality in ***Singh*** appear to eschew any benefit from (or even the possibility of) construing s 51(xix) when the Constitution came into effect in 1901.[5] It is submitted that this rejection, and the resulting way in which the plurality utilised the history of the law of nationality, was in error.

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[1] The Commonwealth cites Gibbs CJ.'s judgment in ***Pochi*** (1982) 151 CLR 101, 109.
[2] See the comments of Gleeson CJ. in ***Singh*** (2004) 222 CLR 322, 329; [5]: '*Everyone agrees that the term "aliens" does not mean whatever Parliament wants it to mean*'.
[3] Chiefly at (2004) 222 CLR 322, 398; [200] and 400; [205] (Gummow, Hayne and Heydon JJ.).
[4] (2006) 227 CLR 31.
[5] (2004) 222 CLR 322, 398; [199]-[200] (Gummow, Hayne and Heydon JJ.).

8. As to the latter, it is a fundamental assumption of the Australian legal system that statutes have a definite legal meaning. Australia knows no doctrine of statutory uncertainty.[6] Thus, the word "alien" in s 51(xix) had an ascertainable meaning in 1901.[7] It is submitted that orthodox principles of construction,[8] starting with its meaning in 1901,[9] must be applied to determine the meaning of "alien" in s 51(xix), 120 years into the history of the indissoluble union which the Constitution brought into existence.[10]

9. The meaning of "alien" in 1901 is not difficult to ascertain. A convenient starting point is the recommendations made by *Report on the Royal Commissioners for Inquiring into the Laws of Naturalisation and Alienage* (1869) (**Royal Commission**).[11] The principal attributes of the law as it stood after the changes enacted following that Royal Commission were permissive of persons seeking status as a British subject, whether by way of *jus soli* or *jus sanguinis*, notwithstanding the moderate (generational) winding back recommended by the Royal Commission, namely:

   (a) those who were born within the dominion of the British Crown (subject to the recommendation that children so born of foreign parentage be treated as British subjects unless and until such children disclaim such status and choose foreign allegiance);

   (b) those who were born outside those dominions of British parentage[12] (subject to the recommendation that the transmission of British nationalities in families settled abroad should be limited to the first generation); and[13]

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[6] *Brown v Tasmania* (***Brown***) (2017) 261 CLR 328, 428; [306] (Gordon J.).

[7] Gibbs CJ. saw no difficulty in ascertaining the content of contemporary law applying in England and the Australian colonies in ***Pochi*** (1982) 151 CLR 101, 107-108.

[8] See, in this context, ***Singh*** (2004) 222 CLR 322, 331-340; [10]-[28] (Gleeson CJ) and at 348-350; [52]-[56] (McHugh J).

[9] ***Singh*** (2004) 222 CLR 322, 332; [10] (Gleeson CJ.): "*The relevance of contemporary legal usage was that it formed part of the context in which the expression 'trading corporations' was adopted, and an understanding of that context was necessary to a conclusion about the constitutional meaning of the expression*". See also at 350; [50] (McHugh J.) (discussing this Court's use of historical background to construe s 92 in *Cole v Whitfield* (1988) 165 CLR 360). See also at 385; [159] the comments of Gummow, Hayne and Heydon JJ.

[10] ***Singh*** (2004) 222 CLR 322, 385; [159] (Gummow, Hayne and Heydon JJ.).

[11] Historical context was considered in ***Singh*** (2004) 222 CLR 322 by both McHugh J. (at 359; [81]-[82] and at 361-62; [86]-[89]) and Callinan J. (at 428-29; [303]-[304]). The same context was considered in briefer terms by Gummow, Hayne and Heydon JJ. (at 390-91; [174]-[175]).

[12] In ***Singh*** (2004) 222 CLR 322 at 359; [82] McHugh J. points out that this was long established in English law, arising from the *British Nationality Act 1730*, which extended British subject status to grandchildren as well as children of British subjects.

[13] ***Singh*** (2004) 222 CLR 322, 429; [304] (Callinan J.). His Honour stated, it is submitted, correctly: "It may be safely accepted that this was the contemporary legal position with which the founders were familiar. The proposition is supported by the earlier comments of Gibbs CJ. in ***Pochi*** (1982) 151 CLR 101, 107-108.

(c) allegiance to a foreign power (as a disqualifying factor) must be by Australian law and not the domestic law of another country.[14]

10. The Plaintiffs' special cases require this Court to consider what has changed in the legal and social landscape since 1901 to transform that meaning so that the law is (on the Commonwealth's case) no longer sufficiently permissive such that children, incidentally born outside Australia[15] to an Australian parent, and who are Aboriginal Australians, are sufficiently "other" so as to be alien to Australia.

11. In considering that question, the Court is guided by the principle of construction that courts do not impute to the legislature an intention to abrogate or curtail fundamental rights and freedoms in the absence of unmistakeable and clear language to that effect.[16] It is submitted that nothing in the changes to the social and legal landscape since 1901 demands the transformation of the meaning of "alien" from something that recognises a person incidentally born overseas to an Australian parent as a member of the Australian community to something that regards that same person as inherently "the other" and excluded from that community.

12. It is submitted that the construction of s 51(xix) which treats the Plaintiffs as Australian nationals[17] rather than aliens is supported by the provisions of the *Australian Citizenship Act 1948* ("the 1948 Act") as it stood at the time of their respective births.[18] In each case, the 1948 Act granted to persons born to an Australian parent overseas a right (by simple registration at an Australian consulate)[19] to become citizens by descent. Although Mr Love was excluded by the fact that his parents were not married at the time of his birth and his father, rather than his mother, was an Australian national, the provisions of the 1948 Act may be seen as an imperfect effort to reflect in

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[14] ***Singh*** (2004) 222 CLR 322, 430; [308] (Callinan J.).

[15] In ***Singh*** (2004) 222 CLR 322, 429; [304] (Callinan J.). His Honour reproduced an extract from the Royal Commission which included the statement that (emphasis added): "[...] *Birth abroad is often merely accidental, while of those British subjects who go to reside in foreign countries a great number certainly prize British nationality for themselves, and wish that it should be enjoyed by their children.*"

[16] ***Singh*** (2004) 222 CLR 322, 335; [19] (Gleeson CJ.).

[17] These reply submissions use "national" as an antonym of "alien". It is a term used by Kirby J. For example, see ***Singh*** (2004) 222 CLR 322, 404; [220] (Kirby J.).

[18] Love SC [24(c)] at SCB, 38 and Thoms SC [15(c)] at SCB, 29: Mr Love was born on 25 June 1979. Mr Thoms was born on 16 October 1988.

[19] At the time of Mr. Love's birth, s. 11(1) of the 1948 Act provided that citizenship by descent was subject to the child's birth being registered at the Australian consulate within five years after its occurrence or such further period as the Minister allowed. At the time of Mr. Thoms' birth, s. 10B(1) of the 1948 Act provided (under the heading "Citizenship by Descent") that citizenship was subject to registration at an Australian consulate within 18 years after the person's birth.

legislation those people whom the Parliament regarded as, despite their being born overseas, people who were not "aliens" under s 51(xix) of the Constitution.[20]

13. It is entirely consistent with the understanding of nationality law in England and the Australian colonies at the time of federation, and the life of the polity created by the Constitution in the nearly 12 decades since federation, that people in the situation of the Plaintiffs, that is, children born overseas of an Australian parent, fall outside the reach of "aliens" in s 51(xix) of the Constitution.

(b) Settled Construction Principles, s 51(xix) and Aboriginal Australians

14. The status of the Plaintiffs as Indigenous Australians is not a matter that would have been regarded as relevant by the contemporary version of nationality law with which the founders were familiar. That Indigenous Australians might travel sufficiently to be born outside the dominions of the Crown was not likely to be a matter that troubled the drafters of the Constitution. Neither were the founders likely to have given great weight, if any, to Indigenous Australians' spiritual connection with the Australian continent over 80,000 years. For these reasons, the importance of a person's status as an Aboriginal Australian, in determining that person's status as an Australian national, is part of a changed understanding of s 51(xix) arising as a result of changes in Australian society. Applying settled principles for construing a national constitution, the changed understanding:

    (a) involves expectations differing most widely from expectations cherished in 1901;[21]

    (b) involves an answer adapted to the changed necessities of a current generation;[22]

    (c) results from the Court's exploration of potential inherent in the meaning of the words in s 51(xix);[23]

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[20] As discussed below, the Commonwealth's reliance on foreign allegiance (pursuant to foreign domestic law) as the definitive criterion in all situations treats these provisions of the 1948 Act and subsequent iterations thereof as a deemed naturalisation process even of persons born in Australia of an Australian parent.

[21] See the extract of Alfred Deakin's speech on the Judiciary Bill in 1902 cited in ***Singh*** (2004) 222 CLR 322, 334; [16] (Gleeson CJ.).

[22] See the extract of Alfred Deakin's speech on the Judiciary Bill in 1902 cited in ***Singh*** (2004) 222 CLR 322, 334; [17] (Gleeson CJ.).

[23] ***Singh*** (2004) 222 CLR 322, 335; [18] (Gleeson CJ.).

(d) results from the flexible application of s 51(xix) to the changed circumstances since 1901[24] as part of the need for the Constitution to apply 'not for a single occasion, but for the continued life and progress of the community'.[25]

15. The relevant changes and necessities include the increasing understanding of: (1) the relationship of Indigenous Australians to, and in, the Australian community flowing from their status as Indigenous Australians;[26] (2) their 80,000 years of custodianship of the Australian continent before federation;[27] (3) their spiritual relationship to the land on which the modern Australian community exists;[28] and (4) their membership of the people of the Commonwealth at federation and since.[29]

16. This increasing understanding is reflected in the overwhelming endorsement of the question in the 1967 referendum[30] and in decisions of this Court including the Court's decision to reframe the common law so far as it relates to the native title rights of Indigenous Australians to their traditional land.[31]

17. It is entirely consistent with settled principles for construing the Constitution, in the light of the changing circumstances since 1901, that the Plaintiffs, as Aboriginal Australians, be recognised as a special class of Australians whose Australian nationality is not denied by their being born overseas as children of their respective Indigenous Australian parents.

Certain Problems Associated with Foreign Allegiance as the Universal Indicator of Alienage

(a) The Abundance of Double Citizenship, Then and Now

18. The plurality in ***Singh*** state that, in terms of British legal history, what remained "unaltered" over time was that alienage referred to persons who owed allegiance to another sovereign power.[32] This definitional statement does not describe the content of the nationality law of England or the Australian colonies at any time prior to 1901.[33] Sir William Blackstone acknowledged this by identifying the problems of countries other than Britain claiming that British subjects according to British law were citizens

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[24] ***Singh*** (2004) 222 CLR 322, 348-49; [53] (McHugh J.). His Honour cites *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29, 81 (Dixon J.).
[25] ***Singh*** (2004) 222 CLR 322, 349; [53] (McHugh J.). His Honour cites *Commonwealth v Kreglinger and Fernau Ltd* (1926) 37 CLR 393, 413 (Isaacs J.).
[26] Plaintiffs' submissions, [32], particularly footnote 59, and [36]-[48]
[27] Plaintiffs' submissions, [25], and [36]-[48]
[28] Plaintiffs' submissions, [25], and [36]-[48]
[29] Plaintiffs' submissions, [26], [32], and [36]-[48]
[30] Plaintiffs' submissions, [26], footnote 47
[31] ***Mabo (No 2)*** (1992) 175 CLR 1 at 70 (Brennan J.).
[32] (2004) 222 CLR 322, 395; [190] (Gummow, Hayne and Heydon JJ.).
[33] See ***Singh*** (2004) 222 CLR 322, 363; [91] (McHugh J.).

of these other countries.[34] The plurality acknowledge the problem of double allegiance in England at the time of the Royal Commission[35] and that the problem of double allegiance after the loss by George III of his American colonies led to the outbreak of war between Great Britain and the United States in 1812.[36]

19. Section 44(i) of the Constitution acknowledges that persons may be Australian nationals and yet be subjects or citizens of a foreign power. This extends even to natural born Australians.[37] In ***Re Canavan***, a person born in Canada[38] was found, although an Australian citizen by descent pursuant to s. 11 of the 1948 Act at the time of her birth,[39] to be a Canadian citizen.

10 20. The simple difficulty is that, if owing foreign allegiance were a universal determinant of alienage, one would not expect to find widespread double citizenship either in 1870 or in 2018. Of greater concern, if the foreign citizens discussed in ***Canavan*** were aliens at birth (because they owed foreign allegiance), the citizenship granted by the 1948 Act amounts to a form of naturalisation. Accordingly, such citizens are susceptible to de-naturalisation and possible deportation.[40] This would be an unexpected result.

*(b) Relying on **Nolan***

21. The plurality in ***Singh*** relied,[41] for its finding of foreign allegiance as the criterion for alienage, on a passage in ***Nolan*** to the effect that "alien" means "nothing more than a citizen or subject of a foreign state".[42] The majority in ***Nolan*** did, as cited by the

20 plurality in ***Singh***, engage in a discussion of the meaning of "alien", starting with its Latin precursor, "alienus" meaning belonging to another person or place. The sentence cited in ***Singh*** was from *Milne v Huber*.[43] However, the majority in ***Nolan***, in adapting the passage, identified the need to expand the definition by excluding from "alien" "a person who, while born abroad, is a citizen by reason of parentage".[44]

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[34] ***Singh*** (2004) 222 CLR 322, 360; [83] (McHugh J.). His Honour cites Blackstone, *Commentaries on the Laws of England* (1765), bk 1, c 10, p 358.
[35] ***Singh*** (2004) 222 CLR 322, 392 [181] (Gummow, Hayne and Heydon JJ.).
[36] ***Singh*** (2004) 222 CLR 322, 393 [181] (Gummow, Hayne and Heydon JJ.).
[37] *Re Canavan* (***Re Canavan***) (2017) 91 ALJR 1209, 1214; [15] and 1217-18; [34] (Per Curiam).
[38] (2017) 91 ALJR 1209, 1225-26; [94] (Per Curiam).
[39] ***Re Canavan***, case C18/2017, written submissions of the Attorney-General of the Commonwealth (www.hcourt.gov.au/cases/case_c11-2017), [82], footnote 141
[40] *Meyer v Poynton* (1920) 27 CLR 436, 441 (Starke J.).
[41] ***Singh*** (2004) 222 CLR 322, 400; [205] (Gummow, Hayne and Heydon JJ.).
[42] ***Nolan*** (1988) 156 CLR 178, 183 (Mason CJ., Wilson, Brennan, Deane, Dawson and Toohey JJ.).
[43] (1843) 17 Fed Cas 403 (US) (Circuit Court, District of Ohio).
[44] ***Nolan*** (1988) 156 CLR 178, 183 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ.).

22. While the addition to the definition was not relevant for the purposes of the decision in ***Singh***, the omitted clause does signal that caution must be used in applying the criterion of foreign allegiance to a person whose connections to the Australian community are through their having an (Aboriginal) Australian national as a parent.

The Plaintiffs' Rejection of their Foreign Citizenship by Voluntary Acts

23. In paragraphs [24] to [28] of its Submissions, the Commonwealth argues that the reliance by the Plaintiffs on their voluntary actions to express their allegiance to Australia and not their place of birth is unsupported by authority.

24. Reliance on these actions by the Plaintiffs is only necessary if the doctrine of foreign allegiance imposed by foreign domestic law is held to apply outside the particular facts of ***Singh*** including to claims to Australian nationality based on having an (Aboriginal) Australian parent.

25. In the event that such reliance does become necessary, the Plaintiffs rely on [53]-[55] of their primary submissions.

26. In addition, the idea that allegiance bestowed by foreign or domestic law can be abandoned or renounced by voluntary actions is supported by the doctrine of constitutional imperative as, most recently, discussed in ***Re Canavan***.[45]

Technical Objections to Relying on Aboriginality as a Basis for Australian Nationality

27. In [31]-[41] of their submissions, the Commonwealth argues that the status of the Plaintiffs as Aboriginal Australians is irrelevant to their claims to be Australian nationals. Much of what is said in these paragraphs has been responded to, above.[46]

28. In [33] of its Submissions, the Commonwealth relies on certain comments of Gaudron J in *Kartinyeri v Commonwealth*[47] to reinforce its arguments relying on ***Singh***. The remarks of Gaudron J are directed to the scope of the race power in section 51(xxvi), in particular, whether it could be used as a basis of depriving persons of a particular racial group of their citizenship or their rights as citizens on the basis of their race.[48] Her Honour's observation was that race does not give rise to a relevant difference necessitating such a drastic special law.[49] Gaudron J.'s observations add nothing to the

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[45] (2017) 91 ALJR 1209, 1218; [37]-[39] and 1218-19; [43]-[46] (Per Curiam).
[46] Particularly, at [14]-[16].
[47] *Kartinyeri v Commonwealth (Hindmarsh Island Bridge Case)* (***Kartinyeri***) (1998) 195 CLR 337.
[48] ***Kartinyeri*** (1998) 195 CLR 337, 366; [40] (Gaudron J.). (Such a power, if it existed, would go beyond affecting naturalised Australians. Not being based on s 51(xix), it would apply to third (or more) generation Australians who were identifiable as "the people of any race". Hence Gaudron J.'s concern to assuage concern that the race power might presage drastic solutions.)
[49] ***Kartinyeri*** (1998) 195 CLR 337, 366; [40] (Gaudron J.).

Commonwealth's argument based on the foreign allegiance criterion as the universal determinant of alienage.

29. In [35]-[36] of its submissions, the Commonwealth identifies what it describes as three curious consequences that would result from Aboriginal Australians being treated as Australian nationals because of their Indigenous status even if they were born outside Australian territory. The first two consequences appear to involve concerns about uncertainty and changeability arising from the need for status as an Aboriginal Australian to be confirmed by self-identification and acceptance by other Aboriginal Australians as part of the three part test.

10 30. In terms of the appropriateness of the test, the Plaintiffs rely upon their primary submissions and the authorities cited therein.[50] Second, it is important to note that the facts establishing Aboriginal identity are satisfied with regard to each Plaintiff.[51] Importantly, it would be a misunderstanding of the three part test for Aboriginality[52] (and a trivialization of Indigenous culture through its interaction with the requirements of legal proof) to regard an Aboriginal person's status as Aboriginal as some kind of virtual existence depending on each element of the test being satisfied. An Aboriginal person born to two Aboriginal persons is no less Aboriginal by being too young to have a conscious identity as such. And, in the middle of a massacre or epidemic, an Aboriginal elder does not become any less Aboriginal by being the last woman
20 standing, thereby, having no living person to recognise her Aboriginality.

31. The third "curious result" fastens on to an assumed indelible status as an Aboriginal person and deduces hypothetical Aboriginal Australians unwillingly bound to Australian nationality. It suffices to say that the Plaintiffs' position[53] is that Aboriginal Australians, because of their inherent connection to the Australian polity, are not capable of being denied Australian nationality and treated as alien. To the extent that other Australian nationals have a right to abandon their connection to Australia and renounce their Australian nationality, that right is similarly available to Indigenous Australians.

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[50] Plaintiffs' submissions, [28]-[33]

[51] See Plaintiffs' submissions, [32]. See Love SCB: 31, [17]; 32, [18]; 38, [24(e)-(f)]. See Thoms SCB: 25, [8]; 26, [11(e) and (f)]; 28, [13(k) and (l)]; 30, [15(m) and (n)].

[52] See *Commonwealth v Tasmania*, (1983) 158 CLR 1, 274 (Deane J.); ***Mabo (No 2)*** (1992) 175 CLR 1, 70 (Brennan J.); and *Eatock v Bolt* (2011) 197 FCR 261, 304; [188]-[189] (Bromberg J.).

[53] As articulated in Plaintiffs' Submissions at [35].

32. In [39]-[41] of its submissions, the Commonwealth discusses the distinctions between the law of native title and nationality law. The Plaintiffs rely on their primary submissions.[54] It suffices to say that the universal application of foreign allegiance as an unqualified determinant of alienage produces many curious results. One of these is that a person whose connection with Australia sufficient (and unbroken through many generations despite the progressive dispossession of her peoples' lands)[55] to have their native title rights recognised by Australian law would not have a sufficiently close connection with Australia to avoid being an alien for the purposes of s 51(xix) of the Constitution.

10 33. It is the Plaintiffs' case that that is such a curious and unjust result that it throws great doubt upon the construction of s 51(xix) of the Constitution which the Commonwealth presses upon the Court. Such a construction should not be adopted.

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[54] Plaintiffs' submissions, [36]-[48]
[55] See the preamble to the *Native Title Act 1993* (Cth).