HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S192 of 2021

BETWEEN:

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs

First Appellant

Minister for Home Affairs

Second Appellant

and

Shayne Paul Montgomery

Respondent

PROPOSED SUBMISSIONS OF THE NORTHERN LAND COUNCIL

Part I: Certification as to form of submissions

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

Part II: Basis of intervention

2. The Northern Land Council (the **NLC**) is a Land Council established under s 21 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (the **ALRA**) and is recognised as a representative Aboriginal/Torres Strait Islander body under Part 11 of the *Native Title Act 1993* (Cth) (the **NTA**).

3. The NLC seeks leave to intervene, or to be heard as amicus curiae, in support of the Respondent with respect to Ground 1(b)(i) that absent evidence that the Respondent is biologically descended from the Mununjali people (or other Indigenous people) his detention is authorised by s 189 of the *Migration Act 1958* (Cth) (**CRB 121**) (if it falls for decision in this case: see Part IV(A)).

Part III: Why leave to intervene or to be heard should be granted

4. The NLC exists to represent and advance the interests of Aboriginal peoples[1] in relation to land and waters within the area of the NLC, being the northern half of the Northern Territory: ALRA s 23; NTA s 203B; affidavit Shelley Landmark 9 March 2022. The governance, representative character, and functions of the NLC were considered by this Court in *Northern Land Council v Quall* (2020) 94 ALJR 904. The NLC has represented Aboriginal peoples in numerous land rights cases in this Court and has appeared as an intervener in others, such as *Wik Peoples v*

[1] The submissions refer to Aboriginal peoples and Aboriginal Australians, rather than Indigenous peoples, given the context provided by the legislation and cases in issue.

Queensland (1996) 189 CLR 1 and *Yanner v Eaton* (1999) 201 CLR 351.

5. The ruling on the special cases in ***Love*** *v Commonwealth; Thoms v Commonwealth* (2020) 270 CLR 152 is that "Aboriginal Australians (understood according to the tripartite test in ***Mabo*** *v Queensland [No 2]* (1992) 175 CLR 1 at 70) are not within the reach of the 'aliens' power conferred by s 51(xix) of the *Constitution*". The Commonwealth parties contend that because of the reference to "biological descent" by Brennan J in *Mabo*, a "genetic relationship" between Aboriginal persons and their forebears is integral to the limitation in s 51(xix). They leave open whether this is necessary or appropriate in other contexts: AS [52], [54].

6. The reliance upon the point made by Brennan J suggests that this contention could carry over to native title. The concern is not fanciful given that the statutory concept of native title in s 223 of the NTA is drawn from what his Honour said in *Mabo*.[2] The traditional titles of Aboriginal peoples that are recognised in accordance with the ALRA (s 71) and NTA (s 223) derive from principles of descent that are not confined to genetic heritage: see Part IV(D). In other contexts, authority holds that Aboriginal descent implies some genetic heritage,[3] albeit that may be an open question where there is self-identification and community acceptance.[4]

7. The Aboriginal Australians within the limitation in s 51(xix) identified in *Love* necessarily include those peoples whose traditional interests in their country are recognised in accordance with the ALRA and NTA. If, as AS [52]–[54] contends, for the purposes of s 51(xix), these peoples must have a genetic relationship with their forebears because *Love* references *Mabo* at 175 CLR 70(6) where Brennan J wrote of "biological descent", the implication (that the NLC resists) is that this is the nature of "descent" required for the recognition of traditional titles to land.

8. The application to intervene is in the category of case of indirect affectation by the extra curial operation of the Court's disposition of Ground 1(b)(i),[5] similar to that of the Anangu Pitjantjatjaraku with interests in the management of Pitjantjatjara

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2 *Western Australia v Ward* (2002) 213 CLR 1 at [16] (Gleeson CJ, Gaudron, Gummow and Hayne JJ) referring to (1992) 175 CLR 1 at 70.

3 *Gibbs v Capewell* (1995) 54 FCR 503 at 507 (Drummond J) and *Shaw v Wolf* (1998) 83 FCR 113 at 118, 120 referring to "descent" cf at 137 "genetic" (Merkel J), both in the context of the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) providing that an elector or candidate be an "Aboriginal person", defined as a "person of the Aboriginal race of Australia" (ss 4, 101-102).

4 *Attorney-General (Cth) v Queensland* (1990) 25 FCR 79 125 at 148 (French J); *Eatock v Bolt* (2011) 197 FCR 261 at [188]-[189] (Bromberg J).

5 *Levy v Victoria* (1996) 189 CLR 579 at 602 (Brennan CJ).

lands given leave to intervene in *Gerhardy v Brown*.[6] The NLC seeks to be heard to protect the interests Aboriginal peoples have under federal laws from the incursion that could occur on the Commonwealth case that biological descent is integral to who are Aboriginal Australians,[7] not simply to contend for what it considers to be desired points of interpretation.[8]

9. In any case, irrespective of whether the Commonwealth contention carries over to other fields, the NLC, as a representative Aboriginal body, can present the viewpoint of Aboriginal peoples on the possible ramifications of that contention.[9]

10. The submission that the NLC seeks to advance, which adds to the Respondent's case for rejecting the Commonwealth contention, is that if, for the purpose of the limitation in s 51(xix) of the *Constitution*, the legal status of Aboriginal peoples is to depend upon an element of descent, then that must be understood as referring to principles of descent recognised by the Aboriginal peoples concerned in accordance with their customs and traditions (cf RS [91] that the tripartite test be supplemented to recognise customary adoption).

Part IV: Submissions

A. *The Minister did not show that Mr Montgomery is not an Aboriginal Australian*

11. The NLC adopts the Respondent's submissions that the Minister failed to prove a reasonable suspicion that Mr Montgomery is not an Aboriginal Australian so as to justify his detention: RS [26]–[31]; reasons of trial judge [2021] FCA 1423 (**TJ**) at [53], [55], [64], [68] **CRB 22-7, 29, 31**.[10]

12. The detaining officer was "satisfied that Mr Montgomery meets the second and third limbs of the tripartite test but suspected he did not satisfy the first limb", on the basis that a person must show biological descent and adoption is not sufficient: TJ [57(2)] **CRB 28**. Even on a narrow view of descent, in circumstances where Mr Montgomery claimed to have Aboriginal ancestors, identified as a Mununjali man, and had been accepted as such by Mununjali people (TJ [53(m)–(w)] **CRB 24-5**),

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6 (1985) 159 CLR 70, referred to in *Levy v Victoria* (1996) 189 CLR 579 at 602 (Brennan CJ).

7 Compare "the concept of legislative trespass" in the former constitutional practice of intervention before the enactment of s 78A of the *Judiciary Act 1903* (Cth) recounted in *Corporate Affairs Commission v Bradley* [1974] 1 NSWLR 391 at 399-400 (Hutley JA), quoted in *Levy v Victoria* (1997) 189 CLR 579 at 602-3 (Brennan CJ).

8 *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319 at 331 (Dixon J), quoted in *Levy v Victoria* (1996) 189 CLR 579 at 602 (Brennan CJ).

9 *Love* (2020) 270 CLR 152 at [134] (Gageler J).

10 *McHugh v Minister for Immigration* (2020) 283 FCR 602 at [61] (Allsop CJ), [340] (Mortimer J).

that mutual recognition (self-identification and community acceptance) is probative of descent.[11]

13. The procedural history suggests that this case may not squarely present the point now in issue. Habeas corpus is traditionally a summary procedure where the facts are established.[12] Whether a person is an Aboriginal Australian is a question of fact.[13] Mr Montgomery's claim for a declaration that he is not an alien within the meaning of s 51(xix) on the ground that he is Aboriginal (**CRB 70, 79**),[14] having been removed to this Court, was not determined by the trial judge: TJ [14]–[15] **CRB 12**. The trial judge declined to receive evidence relevant to custom because of the confined nature of the proceeding: TJ [23], [66] **CRB 16, 30**; RS [32]–[36].

14. Noting that it is not open to an intervener to disturb the course taken by the parties to the litigation,[15] these same concerns are raised by the Respondent: RS [83]–[90]. A matter of such importance – what it is to be an Aboriginal Australian – with potential implications beyond the limitation in s 51(xix), should not be determined other than in a properly cast proceeding in which that issue is squarely confronted from the outset.[16] Hitherto, it had been accepted that the limitation in s 51(xix) did not depend upon strict biological descent.[17] The Respondent points to prudential considerations that the right facts may not exist to test the issue.[18]

B. *A contextual note on Aboriginal identity*

15. In *The World of the First Australians*, the distinguished anthropologists Ronald Berndt and Catherine Berndt observed, in the context of European disturbance of the inextricable link in Aboriginal tradition between place and name, that:[19]

> *Another result of alien impact, and of increasing estrangement from traditional Aboriginal ways, is the attempt to arrive at a general social identification in terms of Aboriginality, labels, not tribal names, like Jamadji*

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11 *McHugh v Minister for Immigration* (2020) 283 FCR 602 at [107]-[111] (Besanko J).

12 Aronson et al, *Judicial Review of Administrative Action and Government Liability* (7th Ed 2021) at [17.120], quoting Wilmot CJ, *Opinions on the Writ of Habeas Corpus* (1758) Wilm 77 at 107.

13 *Love* (2020) 270 CLR 152 at [75] (Bell J).

14 The course taken in *Helmbright v Minister for Immigration (No 2)* [2021] FCA 647 (Mortimer J).

15 *News Ltd v South Sydney District Rugby League Football Club* (2003) 215 CLR 563 at [1], [9] (Gleeson CJ), [87]-[88] (Gummow J), [136] (Kirby J), [233] (Callinan J).

16 Cf *McHugh v Minister for Immigration* (2020) 283 FCR 602 at [396] (Mortimer J).

17 *Webster v Minister for Immigration* (2020) 277 FCR 38 at [41]-[43] (Rares J) holding that cultural adoption needs to be by the people from which the person is descended biologically, although the case turned on an absence of evidence of the customs of the people concerned: [1]-[2], [47]-[48]; *Hirama v Minister for Home Affairs* [2021] FCA 648 (Mortimer J) at [32]-[35] on agreed facts supporting a declaration of status tracing descent to an antecedent who had been culturally adopted.

18 Cf *Zhang v Commissioner of Police* (2021) 95 ALJR 432 at [21]-[22] (the Court).

19 (5th Ed 1988) at 35-36 (first published 1964).

('friend'), Nunga or Nyoongar ('people'), Wonggai or Wongi ('speech'), are used to signify 'people of Aboriginal descent' as contrasted with 'white people'.

In the tradition that to "name your 'people', first define your place", various terms are found in recent regional histories of Australian colonialism, such as Koori (NSW, Vic and Tas), Yolngu (NT), Wiradjuri (NSW), Tiwi (NT), and so forth.[20]

16. In *Aboriginal Societies and the Common Law*, Professor McHugh writes of the "twilight period" of "protection" and "assimilation" where the settler-state, through its laws, asserted the capacity to define Aboriginal status or membership, the most fundamental processes in an indigenous polity.[21] In Australia, there was a bewildering array of legislative and administrative acts that imposed genetically and fractionally based (blood quantum) definitions of Aboriginality. These were racist in overtone, contained in discriminatory measures, and reflected the misconceptions of Aboriginal social organisation that underpinned the doctrine of terra nullius.[22] The viewpoint was that of the dominant ("white") society, or as Higgins J put it in *Muramats v Commonwealth Electoral Officer (WA)*, when dealing with laws disenfranchising an Aboriginal vote: "Whom would Australians treat as aboriginal natives of Australia?" His Honour answered: "those aboriginals … who are of the stock that inhabited the land at the time Europeans came to it".[23]

17. "Aboriginality" as conveying pan-Australian connections as well as local and personal identity is responsive to these past official definitions imposed by the dominant society,[24] abandoning biological characteristics in favour of Aboriginal self-identification and community acceptance (mutual recognition), albeit with a biological component of Aboriginality (descent) often expressed or implied.[25] A "tripartite test" of descent, self-identification and community acceptance is often traced to the Commonwealth's *Report on a Review of the Administration of the*

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20 Rowse, "Aboriginal nomenclature", *The Oxford Companion to Australian History* (2001) at 10.

21 *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (2004) at 217-8.

22 See the survey of those measures in McCorquodale, "The Legal Classification of Race in Australia" (1986) 10 *Aboriginal History* 1; Rowley, *The Destruction of Aboriginal Society* (1970) Appendix A: Who is an Aboriginal? Also, Beazley, "Aboriginal Australians and the Common Law" (2021) 95 *Australian Law Journal* 609 at 616-8, and on those misconceptions about social organisation, see *Mabo* (1992) 175 CLR 1 at 32-43 (Brennan J).

23 (1923) 32 CLR 500 at 507.

24 *Shaw v Wolf* (1998) 83 FCR 113 at 119 (Merkel J) quoting Jordan, "Aboriginal Identity: uses of the past, problems for the future?", Beckett, *Past and Present–The Construction of Aboriginality* (1988).

25 Tomkinson, "Aboriginality", *The Oxford Companion to Australian History* (2001) at 12.

Working Definition of Aboriginal and Torres Strait Islanders (1981).[26] The Report's recommendation was based on a realisation that assessments of descent were unreliable and capable of giving offence, and failed to take account of self-identification and community acceptance.[27]

18. So, in *Hackett v Secretary, Department of Communities and Justice*, Basten JA observed that this tripartite description recognises that there are "social and cultural determinants of indigeneity which are not reflected in the concept of descent",[28] and if descent is a biological concept, it may be unduly restrictive.[29] As his Honour also noted, that concept has underlying assumptions of genetic classification based on racial groupings that have well and truly been "debunked": race and ethnicity are social, cultural and political constructs, rather than matters of scientific fact.[30]

19. This is consistent with the *United Nations Declaration on the Rights of Indigenous Peoples*, which may inform a contemporary understanding of these issues,[31] in providing that "it is the right of Indigenous peoples to determine their own identity or membership in accordance with their customs and traditions" (article 33.1). It accords with the shift in other common law jurisdictions in the application of customary law that looks to a person's connection with an indigenous culture.[32]

C. *The limitation in s 51(xix) does not depend on biological descent*

20. The contention (AS [51]–[55]) that the limitation in s 51(xix) identified in *Love* depends upon biological descent sits uncomfortably with the majority's view that this is not a race-based limitation, or as Gordon J noted, the inquiry is not just a question of descent or what s 51(xxvi) calls "race".[33] The majority judgments do not mark the limitation in s 51(xix) as one of race, equated to descent (and implied

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26 Cited in *Love* (2020) 270 CLR 152 at [23] fn 97 (Kiefel CJ), [80] fn 167 (Bell J); also referring to Gardiner-Garden, *Defining Aboriginality in Australia* (Department of Parliamentary Library 2003) that recounts these developments. We have been unable to obtain a copy of the 1981 Report, and the references that follow are based on the ALRC Report next mentioned.

27 Quoted in ALRC, *Recognition of Aboriginal Customary Laws* (Report 31: 1986) at [91].

28 (2020) 379 ALR 248 at [147].

29 (2020) 379 ALR 248 at [148], citing de Plevitz and Croft, "Aboriginality under the Microscope: The Biological Descent Test in Australian Law" (2003) 3 *QUTLJJ* 104 at 111.

30 (2020) 379 ALR 248 at [148]-[149], quoting ALRC, *Essentially Yours: The Protection of Human Genetic Information in Australia* (Report 96: 2003) at [36.34]-[36.35], [36.41]-[36.42].

31 *Love* (2020) 270 CLR 152 at [73] (Bell J); and in the context of an influence on the common law, *Mabo* (1992) 175 CLR 1 at 42 (Brennan J).

32 *Takamore v Clarke* [2012] 1 NZLR 573 at [183] (Glazebrook and Wild JJ), [305] (Chambers J). The outcome in *Takamore* concerning Maori burial customs and the duty of an executrix was affirmed on appeal without reference to those dicta: [2012] 2 NZLR 733.

33 (2020) 270 CLR 152 at [370]. And see the review of *Love* in *Helmbright v Minister for Immigration (No 2)* [2021] FCA 647 at [171]-[210] (Mortimer J).

as genetic). As Bell J put it, the concern with a "race-based limitation" is "overstated"; the limitation depends upon recognition of the "cultural and spiritual dimensions of the distinctive connection between indigenous peoples and their traditional lands".[34] The majority point is that the common law recognises, and is taken always to have done so,[35] ongoing Aboriginal communities (or societies) united in the observance of customs and traditions that have their origins in the normative systems that existed upon the Crown acquiring sovereignty – the permanent exclusion from Australia of a member of such an Aboriginal community, as if an "alien", is inconsistent with that recognition.[36]

10 21. What Deane J said in the *Tasmanian Dams Case* about descent, identification and community recognition when referring to Aboriginal Australians in the context of s 51(xxvi) is different.[37] Whether "race" must have a biological (genetic) element does not arise.[38] While descent is a thread common to the dicta of Deane J in the *Tasmanian Dams Case*[39] and Brennan J in *Mabo*, the settings differ. The former is concerned with a collective Aboriginal identity (or Aboriginality). The latter is concerned with inheritance and transmission within an Aboriginal community (or society): see Part IV(D). *Yorta Yorta* notes that the rights to country recognised by the new sovereign order included the rules of indigenous law and custom dealing with the "transmission" of those rights, which may be altered or adapted over
20 time.[40] The rules are effective to govern the inheritance and transmission of rights to country in the common law's recognition of native title, but they operate as part

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34 (2020) 270 CLR 152 at [73]. For similar references to unique connection, see [276]-[278] (Nettle J), [298] (Gordon J), [391]-[392] (Edelman J). In contrast, the minority apprehended a race-based limitation: [43]-[44] (Kiefel CJ), [126]-[133] (Gageler J), [147], [177] (Keane J).

35 On the declaratory theory of the common law, see *Wik Peoples v Queensland* (1996) 187 CLR 1 at 179 (Gummow J).

36 *Chetcuti v Commonwealth* (2020) 95 ALJR 1 at [39]-[40] (Nettle J) citing *Love* (2020) 270 CLR 152 at [58]-[62], [69] (Bell J), [249]-[254] (Nettle J), [316]-[322] (Gordon J), [429] (Edelman J).

37 *Commonwealth v Tasmania (Tasmanian Dams Case)* (1983) 158 CLR 1 at 274.

38 Cf *Tasmanian Dams Case* (1983) 158 CLR 1 at 243-5 (Brennan J); *King-Ansell v Police* [1979] 2 NZLR 531 at 542-3 (Richardson J). Also, the efficacy of a law enacted for Aboriginal peoples does not require that the objects of the law all be Aboriginal according to some definition. So, in *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 461-2 (Mason CJ, Brennan, Deane, Gaudron and McHugh JJ), reference was made to the observations of Deane J that "people of any race" is apposite to refer to all Aboriginal Australians collectively and any identifiable racial sub-group among Aboriginal Australians, but not his Honour's further remarks about descent, self-identification and recognition. To similar effect, *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at [77] (Gummow and Hayne JJ), [122] (Kirby J).

39 *Commonwealth v Tasmania (Tasmanian Dams Case)* (1983) 158 CLR 1 at 274.

40 *Yorta v Yorta v Victoria* (2002) 214 CLR 422 at [44] (Gleeson CJ, Gummow and Hayne JJ).

of a wider normative system that goes to defining Aboriginal status or membership (belonging), which is not dependent upon the holding of native title.[41]

22. Further, the reference in the ruling in *Love* to "Aboriginal Australians (understood according to the tripartite test in *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 70)", and any assumption about the concept of descent, simply reflects how each of Mr Thoms and Mr Love met that test.[42] The facts of the special cases included that they were descended from particular known antecedents who were members of particular Aboriginal communities.[43] To the extent the majority reasons refer to "biological descent", they generally do so in the context of reciting the facts of the special cases, the plaintiffs' submissions, or the dicta of Brennan J in *Mabo*.[44]

23. Even working with the phrase "biological descent", as Allsop CJ said in *McHugh v Minister for Immigration* when dealing with *Love* and the s 51(xix) limitation:[45]

> *... it is far from clear, and not the subject of debate before us, by what relevant normative standard or standards the question of biological descent for the purposes of the tripartite test is to be assessed: is it genealogical or biological descent strictly by blood, or does it include other features, such as adoption, that may be encompassed within (if applicable) traditional Aboriginal law or custom? The question is to be posed and answered using the correct frame of reference or normative standard.*

The normative standard is set by the customs of the Aboriginal peoples concerned.

D. *Relevant principles of descent*

24. The NLC seeks to make eight related points in opposition to the Commonwealth contention that the descent of Aboriginal Australians must be "biological descent" and in support of its submission that the concept of descent is to be understood as referring to principles of descent recognised by the Aboriginal peoples concerned in accordance with their customs and traditions.

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41 *Love* (2020) 270 CLR 152 at [268]-[272], [277]-[278] (Nettle J); also [70]-[71] (Bell J), [357], [362] (Gordon J), [451] (Edelman J). Perhaps illustrated by *Risk v Northern Territory* (2007) 240 ALR 75 (French, Finn and Sundberg JJ) that the Larrakia experienced interruption in the possession of native title while remaining a community bound by tradition and custom: see [15], [104].

42 Argument, (2020) 270 CLR 152 at 156, 161-2, and [22] (Kiefel CJ), [77] (Bell J), [116] (Gageler J), [178] (Keane J), [287]-[288] (Nettle J), [387]-[388] (Gordon J), [461]-[462] (Edelman J).

43 Detail is set out in (2020) 270 CLR 152 at [222]-[235] (Nettle J).

44 (2020) 270 CLR 152 at [76] (Bell J), [291]-[292] (Gordon J), [366] (Edelman J); also [242] (Nettle J), referring to the submission by reference to "descent" not "biological descent". The judgment of Gordon J has some explication of the legal concept of Aboriginality at [366]-[372]. The special cases did not raise whether a person not within the *Mabo* tripartite test may nonetheless be an Aboriginal Australian for the purpose of the limitation in s 51(xix): [80] (Bell J), [368] (Gordon J), [458] (Edelman J).

45 (2020) 283 FCR 602 at [65], also [396] (Mortimer J).

25. *First*, *Mabo* does not require strict biological descent. The passage in *Mabo* mentioned in the ruling in *Love* is part of a "summary" by Brennan J of the common law of Australia with reference to land titles. At point (6), his Honour précised that:[46]

> *Native title to particular land ..., its incidents and the persons entitled to thereto are ascertained according to the laws and customs of the indigenous people who, by those laws and customs, have a connexion with the land. ... Membership 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.*

This is a summary of his Honour's earlier consideration of the inheritance and transmission of traditional rights to country, which included the observations that:[47]

> *The incidents of a particular native title relating to inheritance, the transmission or acquisition of rights and interests on death or marriage, the transfer of rights and interests in land and the grouping of persons to possess rights and interests in lands are matters to be determined by the laws and customs of the indigenous inhabitants. ... Of course in time the laws and customs of any people will change and the rights and interests of the members of the people among themselves will change too. But so long as the people remain as an identifiable community, the members of whom are identified by one another as members of that community living under its laws and customs, the communal native title survives to be enjoyed by the members according to the rights and interests to which they are respectively entitled under the traditionally based laws and customs, as currently acknowledged and observed.*

26. In *Western Australia v Ward*, in rejecting a contention by the State that native title depends upon biological descent, Beaumont and von Doussa JJ observed that:[48]

> *When these two passages are read together, we think it plain that his Honour was not intending to lay down as an invariable requirement that there be strict 'biological descent'. Rather, we understand Brennan J to be expressing a requirement that there be an identifiable community with an entitlement to the present enjoyment of native title rights in relation to land arising from the adherence to traditionally based laws and customs. A substantial degree of ancestral connection between the original native title holders and the present community would be necessary to enable a group to be identified as one acknowledging and observing the traditional laws and customs under which the native title rights were possessed at sovereignty.*

Hence, in that case, membership of the Miriwung and Gajerrong community did not exclude people adopted (or grown up). The suggestion that Brennan J was

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46 (1992) 175 CLR 1 at 70.

47 (1992) 175 CLR 1 at 61.

48 (2000) 99 FCR 316 at [232].

laying down a requirement of strict biological descent is also implausible given his Honour's reference to the findings of Moynihan J on remitter that the features of life in the Murray Islands included that marriage and adoption involved the provision or exchange of produce central to the social fabric of Meriam people,[49] and that the practice of customary adoption in the Torres Strait is well known.[50]

27. *Second*, the Commonwealth contention jars with the accepted position that the traditional titles of Aboriginal people to country derive from wider principles of descent. The Preamble to the NTA, which expresses the "moral foundation upon which the [Act] rests",[51] declares that the "people whose descendants are now known as Aboriginal peoples and Torres Strait Islanders were the inhabitants of Australia before European settlement".[52] The cases hold that nothing in the definition of "native title" in s 223 requires a biological link. The statutory concept, drawn from what Brennan J said in *Mabo*,[53] does not limit native title rights to those which have passed to the biological descendants of the Aboriginal people who held those rights at sovereignty.[54] Similarly, where gaining rights to country at the time of European settlement depended upon descent, despite shifts in lines or the manner of descent caused by the impacts of European settlement, the normative system underpinning the continued transmission of rights has not changed.[55]

28. A similar position exists under the ALRA with respect to the restoration of Crown land in the Northern Territory to Aboriginal control upon inquiry into a "traditional land claim" made by "traditional Aboriginal owners", defined as a "local descent group of Aboriginals" who have common spiritual affiliations with sites on land that place the group under a primary spiritual responsibility for the sites and land

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49 Quoted in (1992) 175 CLR 1 at 18.

50 ALRC, *Recognition of Aboriginal Customary Laws* (Report 31: 1986) at [383]; *Eatts v Gundy* [2015] Qd R 559; see now, *Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Act 2020* (Qld).

51 *Northern Territory v Alyawarr* (2005) 145 FCR 442 at [63] (Wilcox, French and Weinberg JJ).

52 The "Aboriginal peoples" holding rights protected by the NTA (s 223) are descendants of the people who occupied Australia prior to European settlement and the acquisition of radical title by the Crown: *Hollier v Registrar of National Native Title Tribunal* (1998) 82 FCR 186 at 192 (Goldberg J; Black CJ and Ryan JJ agreeing).

53 *Western Australia v Ward* (2002) 213 CLR 1 at [16] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

54 *De Rose v South Australia* (2003) 133 FCR 325 at [200] (Wilcox, Sackville and Merkel JJ). In a similar vein, spouses who marry into a group recruited by descent, adoption or birthplace may have a requisite connection to country under community custom: *Northern Territory v Alyawarr* (2005) 145 FCR 442 at [113]-[117] (Wilcox, French and Weinberg JJ), applied *Gumana v Northern Territory* (2007) 158 FCR 349 at [135]-[143] (French, Finn and Sundberg JJ).

55 *Griffiths v Northern Territory* (2007) 165 FCR 391 at [141] (French, Branson and Sundberg JJ), affirming (2006) 165 FCR 300 at [501] (Weinberg J).

concerned: ss 3, 11–12, 50, 71. In *Northern Land Council v Olney*, a Full Federal Court held, in relation to a claim by the Larrakia (a language group), that the operative principle of descent will be one that is recognised as applying in respect of the particular group, which may change over time, and which should not be interpreted only in a biological sense. It is a principle of descent "deemed relevant" by the group.[56]

29. *Third*, although inquiries about traditional titles to country are concerned with an ancestral connection of a present day Aboriginal community or group with the original indigenous inhabitants of country, and the question of s 189 of the *Migration Act 1958* (Cth) being read down by the limitation in s 51(xix) of the *Constitution* identified in *Love* is framed by reference to whether an individual person is an Aboriginal Australian, that affords no justification for any difference in approach. One's sense of identity (or belonging) in Aboriginal society is defined by country, kin, and group membership.[57]

30. *Fourth*, these approaches to the membership of Aboriginal communities reflect the normative standards of Aboriginal peoples by which principles of descent may extend to what anthropologists term "filiative" links or "filiation". In an anthropological sense, descent is a culturally recognised sequence of parent-child links. Transforming adoption into descent as the basis for filiation requires community acceptance based on customary principles where recognition (or non-recognition) is neither arbitrary nor contingent.[58] Customary adoption by a local country group or within a wider community may be of a person who has, or is assumed to have, an Aboriginal genetic heritage, for example, where someone is "grown up" by a group other than the group into which the person is born.[59] But the relevant customs and traditions may not be so confined. There may be variety in customary practice. What matters is that these possibilities underscore the point that

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56 (1992) 34 FCR 470 at 485 (Northrop, Hill and O'Loughlin JJ), quoting Toohey J as the Aboriginal Land Commissioner in the *Finniss River Land Claim*.

57 *Griffiths v Northern Territory* (2016) 337 ALR 362 at [334]-[335] (Mansfield J), referring to the anthropological evidence of Dr Palmer and Ms Asche; see further, Palmer, *Australian Native Title Anthropology* (2018) at 200 that kinship "defines a person's place within his or her social universe".

58 Palmer, *Australian Native Title Anthropology* (2018) at 220-222; Sutton, *Native Title in Australia: An Ethnographic Perspective* (2003) at 188-9. Also, in the native title context, while it is for a group to determine its own composition, it cannot arrogate to itself the right to arbitrarily determine who is or is not a member; the group must act in accordance with custom: *Aplin v Queensland* [2010] FCA 625 at [267] (Dowsett J), cited in *Love* (2020) 270 CLR 152 at [368] fn 605.

59 Aboriginal family and child care arrangements among a wider community are mentioned in ALRC, *Recognition of Aboriginal Customary Laws* (Report 31: 1986) at [230].

descent is a social construct that ultimately turns on social acceptance because customs are, as *Yorta Yorta* notes, "socially derivative".[60]

31. *Fifth*, none of this is to say that descent by genetic heritage from the original inhabitants of Australia is not part of Aboriginality, or that genetic heritage does not matter to Aboriginal peoples. Rather, an insistence on genetic make-up as some "objective criterion" (AS [55]) harkens back to the genetic and fractionally based definitions imposed upon Aboriginal peoples, previously rejected as unsatisfactory. The point is that Aboriginal status or membership is "more than descent" and that mutual recognition in accordance with custom and tradition appropriately places emphasis on cultural rather than genetic considerations.[61] So, in *Hands v Minister for Immigration,* while it was not necessary to deal with any legal question about the definition of Aboriginal status to resolve the importance of the representations made by Mr Hands about the effects of his deportation on the Aboriginal community into which he had been incorporated, Allsop CJ remarked:[62]

> *That said, nearly 30 years after the Royal Commission into Aboriginal Deaths in Custody, two decades after the Stolen Generations Report…, and after nearly forty years of recognition of land rights based on Aboriginal community of title (see [ALRA])), it is surely now part of Australian society's cultural awareness and appreciation that kinship, family and community lie at the heart of Aboriginal society, underpinning its laws, rules, and social behaviour.*

32. *Sixth*, the dilemma posed by the Commonwealth contention is that an Aboriginal community may be recognised as holding a traditional title to the possession of their country, enforceable "as against the whole world",[63] under which rights may be acquired by some community members through customary adoption, yet absent evidence of biological descent, they may be deported as "aliens". That is antithetical to the recognition of native title, which includes recognition of the customary inheritance and transmission of rights and duties.[64] The contention, if accepted, would introduce incoherence, and undermine the efficacy of native title.[65]

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60 *Yorta v Yorta v Victoria* (2002) 214 CLR 422 at [52] (Gleeson CJ, Gummow and Hayne JJ).

61 Coombs, Brandl, Snowdon, *A Certain Heritage* (1981) at 30; also, ALRC, *Recognition of Aboriginal Customary Laws* (Report 31: 1986) at [89], [91].

62 (2018) 267 FCR 628 at [50] (Markovic and Steward JJ agreeing).

63 The form of the declaration of the common law native title of the Meriam peoples made in *Mabo* (1992) 175 CLR 1 at 217. Section 225(e) of NTA speaks of possession to the "exclusion of all others".

64 *Love* (2020) 272 CLR 152 at [272] (Nettle J), [362] (Gordon J).

65 Compare *Hirama v Minister for Home Affairs* [2021] FCA 648 (Mortimer J) at [32]-[35] where the agreed facts supporting a declaration of status for the purposes of s 51(xix), tracing descent to an

33. *Seventh*, in varying contexts, Federal Court authority holds that self-identification and community acceptance are probative of descent, while treating that as a biological concept,[66] albeit whether some Aboriginal genetic heritage is necessary may be open.[67] The better view, in the NLC's submission, is to understand the concept of descent as capturing the principles of descent that are recognised by the Aboriginal peoples concerned in accordance with their customs and traditions determining status or membership, which may not be confined to a European view of genealogy. As the operative principles are determined according to custom, and not personal whim,[68] the importance of descent is in no way diminished.

34. *Eighth*, this is a no more exacting or difficult, or somehow less objective, criterion than biological descent (AS [55]),[69] as is illustrated by Mr Montgomery's difficulty in recalling the lineage of his forebears but his unchallenged evidence of community incorporation: TJ [53(k)-(s), (v), (w)] **CRB 23-6**. Insisting on proof of pedigree is alien, and likely to cause offence, to peoples with oral traditions, and is likely to produce error and injustice. The difficulties in historical recall are well known. They include the ban on calling the names of the dead, the "shallowness" of genealogical recall in Aboriginal societies (tending to recall only as far back as grandparents or a single grandparent), and the Aboriginal "hearsay rule" that proscribes the telling of stories about persons that one has never met.[70] As the anthropologist, Professor Morphy, observed of Yolngu traditions, "landscape and myth are … machines for the suppression of history" so that past divisions over

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antecedent who had been culturally adopted, accorded with an earlier native title determination for the group made under the NTA.

66 *Attorney-General (Cth) v Queensland* (1990) 25 FCR 125 at 132-3 (Spender J) in relation to "Aboriginal" in Letters Patent for the Royal Commission into Aboriginal Deaths in Custody; *Gibbs v Capewell* (1995) 54 FCR 503 at 510 (Drummond J) in relation to ATSIC candidates and electors that are "Aboriginal persons"; *McHugh v Minister for Immigration* (2020) 283 FCR 602 at [107]-[111] (Besanko J) in relation to *Love* and s 51(xix).

67 *Attorney-General (Cth) v Queensland* (1990) 25 FCR 79 at 148 (French J); *Eatock v Bolt* (2011) 197 FCR 261 at [188]-[189] (Bromberg J).

68 Cf *Milirrpum v Nabalco (Gove Land Rights Case)* (1971) 17 FLR 141 at 267 (Blackburn J) that the evidence shows "a subtle and elaborate system … which provided a stable order of society … remarkably free from the vagaries of personal whim or influence".

69 Citing *Love* (2020) 270 CLR 152 at [271], but there Nettle J referred to "descent" not "biological descent" as an objective criterion familiar to the common law of status. In Anglo legal traditions, adoption, as with legitimation, gives the child the rights and privileges of the parent, and while adoption is a statutory creation, it is equally treated as a "container of rights" in resolving questions of status: Cleveland, "Status in Common Law" (1925) 38 *Harvard Law Review* 1074 at 1084-5.

70 *Griffiths v Northern Territory* [2006] FCA 903 at [429], [433] (Weinberg J) referring to the evidence of the anthropologist, Professor Basil Sansom. The passages are omitted from the report in (2006) 165 FCR 300. On shallow recall of genealogies and family history, and limits to archival records, see Palmer, *Australian Native Title Anthropology* (2018) at 147-50.

country are "masked".[71] The experience of proof of descent by an archival paper trail has proved to be unsatisfactory.[72] The spectre of genetic testing as a means of proving one's kin could only widen the gulf between Aboriginal and European understandings of kinship and belonging.[73] The arguments of administrative convenience put by the Commonwealth parties (AS [55]) cannot control the point of principle in issue.

Part V: Length of oral argument

35. If given leave to be heard orally, the NLC estimates that it requires up to approximately 15 minutes to present oral argument.

10 Dated: 9 March 2022

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71 Morphy, "Colonialism, history and the construction of place: The politics of landscape in Northern Australia", Benders (ed), *Landscape, Politics and Perspectives* (1993) at 236, quoted in Palmer, *Australian Native Title Anthropology* (2018) at 141.

72 On proof of descent by archival records subjected to expert evidence and contestation, see *Shaw v Wolf* (1998) 83 FCR 113 at 128-31 (Merkel J). The report in 163 ALR 205 at 222-62 sets out the findings on the individual candidates for ATSIC election, calling in aid *Briginshaw v Briginshaw* (1938) 60 CLR 336 and resolving archival doubts on descent in favour of oral history. The exercise caused Merkel J to lament that descent ought not be viewed as a technical concept, rather than a social construct, and that Aboriginal identity should not be determined by institutions that are not representative of Aboriginal people: 83 FCR 113 at 137. The decision led to the promulgation of rules for an Indigenous Electors Roll considered in *Patmore v Independent Indigenous Advisory Committee* (2002) 122 FCR 559 (Gray, Merkel and Downes JJ) and *Clements v Independent Indigenous Advisory Committee* (2003) 131 FCR 28 (Gray ACJ, Merkel and Downes JJ).

73 ALRC, *Essentially Yours: The Protection of Human Genetic Information in Australia* (Report 96: 2003) at [36.33]-[36.34].

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S192 of 2021

BETWEEN:

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs

First Appellant

Minister for Home Affairs

Second Appellant

and

Shayne Paul Montgomery

Respondent

ANNEXURE

Pursuant to paragraph 3 of Practice Direction No. 1 of 2019, the Northern Land Council sets out below a list of the particular constitutional provisions, statutes and statutory instruments referred to in its submissions.

No	Description	Version	Provisions
1.	*Constitution*	Current (Compilation No 6, 29 July 1977 to present)	ss 51(xix), 51(xxvi)
2.	*Aboriginal and Torres Strait Islander Commission Act 1989* (Cth)	Compilation from 1 January 2005 to 23 March 2005	ss 4, 101-102
3.	*Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)	Current (Compilation No 44, 14 December 2021 to present)	ss 3, 11-12, 50 23, 71
4.	*Migration Act 1958* (Cth)	Current (Compilation No 152, 1 September 2021 to present)	s 189
5.	*Native Title Act 1993* (Cth)	Current (Compilation No 47, 25 September 2021 to present)	Preamble, ss 203B, 223, 225, 253