HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY S 192 / 2021

BETWEEN:

MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS

First Appellant

MINISTER FOR HOME AFFAIRS

Second Appellant

AND

SHAYNE PAUL MONTGOMERY

Respondent

AMENDED SUBMISSIONS OF RESPONDENT

PART I: PUBLICATION

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

PART II: ISSUES

2. The following issues arise:
   a. **Power:** Is the appeal incompetent by reason that it attempts to appeal *habeas corpus* orders without clear statutory mandate within s24(1)(a) *Federal Court of Australia Act 1976* (Cth) (**FCA Act**)? (**Section V.A** below)
   b. **Discretion:** If the appeal is competent, should leave to appeal the interlocutory orders be refused? (**Section V.B** below)
   c. **Scope of any appeal:** Must any appeal be limited to the correctness of the primary judge's decision to grant *habeas corpus* in the light of the matters before the primary judge, assessed at the date of judgment? (**Section V.C** below)
   d. **Disposition of any appeal:** Should the primary judge's decision be upheld, for the reasons given by the primary judge and/or the Notice of Contention Ground? (**Section V.D** below)

e. ***Love:*** Only if the appeal has not been resolved at an earlier stage:

(i) Do the Appellants require leave to re-open *Love v Commonwealth* (2020) 270 CLR 152 (***Love***)?

(ii) If so, should leave be refused?

(iii) If leave is granted, was *Love* correctly decided?

(iv) If *Love* was correctly decided, should the Court refuse to permit the Appellants to argue its application to Mr Montgomery?

(v) Should cultural adoption be recognised? (**Section V.E** below).

Each question, to the extent it is reached, should be answered in the affirmative.

PART III: SECTION 78B NOTICES

3. The Appellants have given a notice under s 78B of the *Judiciary Act 1903* (Cth).

PART IV: CONTESTED MATERIAL FACTS

4. Subject to the following, Mr Montgomery agrees with the facts set out in the Appellants' submissions at [6]-[12] and chronology dated 28 January 2022.

5. In late 1997, the year he arrived in Australia, aged 15, Mr Montgomery was placed at Dundalli House, a shelter for homeless Aboriginal youth at Windsor, Brisbane. He was educated there in Aboriginal culture, including on country by Aboriginal Elders.[1]

6. In 1998, Mr Montgomery participated in his first Aboriginal cultural ('*kippa*') ceremony on Stradbroke Island. This is a forerunner to full initiation.[2]

7. Since shortly after that time, Mr Montgomery was registered as an Aboriginal person with Centrelink and with Aboriginal legal and health services.[3]

8. In early 2000, Mr Montgomery was the subject of full initiation on Mununjali country near Beaudesert, Queensland, by Mununjali Elders.[4]

[1] Affidavit of Shayne Montgomery dated 7 April 2021 (**Montgomery affidavit**) [14]-[15], [17], [22]-[23] Respondent's Book of FurtherMaterials (**RBM**) **8, 9**: see *Montgomery v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1423 (**Reasons**) at [53](f), (g) Cause Removed Book (**CRB) 23**.
[2] Montgomery affidavit [20], [24]-[30] **RBM 9, 10**; Reasons [53](k) **CRB 23-24**; Affidavit of Dr Fiona Powell dated 21 May 2021 (**Dr Powell affidavit**) [121] **RBM**.
[3] Montgomery affidavit [31], [101] **RBM 11, 24**; Reasons [53](l), (s), [65] **CRB 24-25, 29-30**.
[4] Montgomery affidavit [84]-[95] **RBM 21-22**; Reasons [53](p)-(r) **CRB 24**. The group is variously spelled 'Mununjali' and 'Munanjali', among other variants. Nothing turns on these variations.

9. From the date of Mr Montgomery's detention on 21 February 2019, he provided substantial information about his Aboriginality to the Department, including three interviews in February 2020 in which he explained: (1) that he is an Aboriginal man and had undergone initiation on country; (2) that his paternal grandmother told him that their Ngapuhi Maori ancestors married into an Australian Aboriginal clan and that he has Aboriginal ancestors within his family, but that he does not know if he is directly descended from these Aboriginal ancestors; and (3) that his mother had a long lineage in Australia and did not know whether she had an Aboriginal ancestor.[5]

10. Mr Montgomery amended his application on 9 November 2020, to raise grounds contending that he met the tripartite test for Aboriginality.[6] On 11 October 2021 these grounds were removed into this Court on the Attorney-General's application.[7]

11. The Appellants' submissions (**AS**) [11] mischaracterise the application that is the subject of this appeal. On 19 October 2021, Mr Montgomery filed a further amended application in the Federal Court which did not allege that Mr Montgomery was, in fact, an Aboriginal Australian. Rather, it sought *habeas corpus* on the confined ground that his detention was unlawful by reason that the detaining officer lacked the reasonable suspicion required under s 189 of the *Migration Act* 1958 (Cth) (**Act**).[8]

12. The Minister relied solely on the evidence of Mrs McBroom, who had read the affidavits filed by Mr Montgomery and his mother; but had not read the affidavits of six Elders and family members attesting to Mr Montgomery's Aboriginality and membership of the Mununjali people, nor read the affidavit of expert anthropologist, Dr Fiona Powell.[9] Mrs McBroom knew Mr Montgomery had been adopted by the Mununjali people but her suspicion that he was an alien was based on an understanding that an Aboriginal Australian must have 'the lineage of Aboriginal bloodlines'.[10] She had read legal advice but the Appellants chose not to disclose it.[11]

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[5] Montgomery affidavit [102]-[104] **RBM 25,** Reasons [53](d), (e), (t), (v) **CRB 23, 25**.
[6] Reasons [12] **CRB 11-12**.
[7] Reasons [12], [14] **CRB 11-12**. That application was discontinued on 2 December 2021.
[8] Reasons [15]-[17] **CRB 12-14**.
[9] Reasons [56], [59](3), [65], [66] **CRB 26, 28-30**; Transcript of proceedings, *Montgomery v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (Federal Court, NSD 500 of 2020, SC Derrington J, 28 October 2021 2021) (**Transcript 28 Oct 2021**) 112 :11-18, 31-33, 41-47 **RBM 1008**.
[10] Reasons [64] **CRB 29**; Transcript 28 Oct 2021 104:24-26 **RBM 1000**.
[11] Reasons [59](3), [60] **CRB 28**.

PART V: ARGUMENT

A. THE APPEAL IS NOT COMPETENT

13. As a threshold issue,[12] an appeal from orders 3, 4 and 5 of the Federal Court made on 15 November 2021 is not competent.[13] In *Wall v The King [No. 1],* the Court held that no appeal lies from an order of a competent Court for the issue of a writ of *habeas corpus* discharging a detained person from custody, unless a right of appeal is specifically given by the Legislature[14] (the **preclusion principle**).

14. The writ of *habeas corpus* is of 'immemorial antiquity',[15] the 'stable bulwark of our liberties'[16] and serves as 'the great palladium of the liberties of the subject'[17]:

> In the course of time certain rules and principles have been evolved; and many of these have been declared so frequently and by such high authority as to become elementary. Perhaps the most important for our present purpose is that which lays it down that if the writ is once directed to issue and discharge is ordered by a competent Court, no appeal lies to any superior Court.[18]

15. The rationale for the preclusion principle is, as stated in *Re Bolton; Ex parte Beane*:[19]

> The law of this country is very jealous of any infringement of personal liberty (*Cox v Hakes*[20]) and a statute or statutory instrument which purports to impair a right to personal liberty is interpreted, if possible, so as to respect that right: *R v Cannon Row Police Station (Inspector)*.[21]

16. The preclusion principle applies because this case concerns the removal into this court of an appeal wholly pursuant to statute, under s 24(1)(a) of FCA Act,[22] against three orders which together are encompassed within the preclusion principle.

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[12] *Ex parte Walsh and Johnson; Re Yates* (1925) 37 CLR 36, at 43, 72 (Isaacs J); 125 (Higgins and Rich JJ); 129-130 (Starke J; Knox CJ agreeing at 58). Similarly, *Secretary of State for Home Affairs v O'Brien* [1923] AC 603 (***Home Secretary v O'Brien***) at 604, 608 (Earl of Birkenhead).
[13] Orders 15 November 2021 **CRB 56**; Notice of objection to competence **CRB 135-137**.
[14] *Wall v The King; Ex parte King Won [No. 1]* (1927) 39 CLR 245 (***Wall v The King [No. 1]***) at 250-251 (Knox CJ, Gavan Duffy, Powers, Rich, Starke JJ).
[15] *Home Secretary v O'Brien* [1923] AC 603 at 609 (Earl of Birkenhead).
[16] Sir William Blackstone, *Commentaries on the Laws of England,* (1765), Bk 1, (**Blackstone)**, at 131-133, referring to the *Habeas Corpus Ac*t of Charles II as 'a second Magna Charta'.
[17] Charles James Fox MP, House of Commons 1777, cited in Paul D Halliday, *Habeas Corpus - From England to Empire* (Belknap Press, Cambridge Massachusetts, 2010) (**Halliday**), at 303.
[18] *Home Secretary v O'Brien* [1923] AC 603 at 609-610.
[19] (1987) 162 CLR 514, 520-521, 523 (Brennan J) (citations included).
[20] (1890) 15 App Cas 506 at 527.
[21] (1922) 91 LJKB 98 at 106.
[22] As opposed to the appellate jurisdiction under section 73 of the *Constitution* cf *Attorney-General v Ah Sheung* (1906) 4 CLR 949 at 951 (Griffith CJ, Barton, O'Connor JJ); *Collis v Smith* (1909) 9 CLR 490 (Griffith CJ, Barton, O'Connor, Isaacs JJ); *Lloyd v Wallach* (1915) 20 CLR 299 (Griffiths CJ, Isaacs, Higgins, Gavan Duffy, Powers, Rich JJ) distinguished in *Wall v The King [No 1]* (1927) 39 CLR 245 at 251.

17. In *Thompson*,[23] the Full Federal Court held that the generality and breadth of s 24 did not specifically abrogate hallowed common law principles, holding that s 24(1)(a) did not allow an appeal from an acquittal. Justice Deane reasoned by analogy with the absence of any appeal from release upon the issue of the writ of *habeas corpus*. In *Davern,*[24] this Court approved *Thompson.*

18. Preclusion of appeal in the absence of an express statutory provision is consistent with the history of *habeas corpus* as 'the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement'.[25]

10 19. This is a history[26] which the Australian colonies and then the States and Commonwealth share,[27] without alteration except by express enactment.[28] Further, the preclusion principle is a means by which the Court acts as a safeguard of individual liberty in accordance with its function under the *Constitution*[29] and, as part of the law and practice of *habeas corpus,* forms part of one of the defining characteristics of the supervisory role of all superior Courts.[30] Thus, at the time of Federation, the preclusion of appeal was a recognised feature of *habeas corpus* recently restated by the House of Lords in 1890 in *Cox v Hakes.*[31]

20. If the decisions in the *Tampa* case[32] and *AJL20*[33] are said to stand against the preclusion principle, they can be distinguished or should be treated as decided *per incuriam*. While

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[23] *Thompson v Mastertouch TV Service Pty Ltd [No. 3]* (1978) 38 FLR 397 (***Thompson***) at 412-414 (Deane J, Smithers and Riley JJ agreeing).
[24] *Davern v Messel* (1984) 155 CLR 21 at 32-33 (Gibbs CJ, Wilson and Dawson JJ agreeing); 46-54 (Mason and Brennan JJ), 63 (Murphy J).
[25] *Home Secretary v O'Brien* [1923] AC 603 at 609; *Eshugbayi Eleko v Officer Administering The Government Of Nigeria (No 1)* [1928] AC 459 at 467; see also Robert Sharpe, *The Law of Habeas Corpus* (Clarendon Press, Oxford, 1976) at 198-200.
[26] *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 105 [159] (Gageler J); *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 (***NAAJA***) at 610-611 [94]-[96] (Gageler J).
[27] Halliday at 293-295; David Clark and Gerard McCoy *Habeas Corpus – Australia, New Zealand and the South Pacific* (2nd ed, Federation Press, Sydney, 2018) (**Clark and McCoy**) at 20-21; B H McPherson, *The Reception of English Law Abroad* (Supreme Court of Queensland Library, Brisbane, 2007) at 218-224 and *passim* and see *Re Glass* (1869) 6 W W & A'B (L) 103 (Stawell CJ, Barry, Williams JJ).
[28] For a case in which statutory intervention negated the principle, see *Ex parte Sampson; Re Governor of HM Prison at Malabar* (1966) 66 SR(NSW) 501, at 506-507 (Wallace P and Holmes JA), 515 (Moffit A-JA).
[29] *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at [67] (Gageler J).
[30] *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 518 [98]-[99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[31] (1890) 15 App Cas 506. That case concerned the construction of a statutory definition of appellate jurisdiction in the Judicature Act in terms materially the same as s 24 of the Federal Court Act.
[32] *Ruddock v Vadarlis* (2001) 110 FCR 491.
[33] *Commonwealth v AJL20* (2021) 95 ALJR 567 (***AJL20***).

both cases were an appeal to the Full Federal Court pursuant to s 24 of the Federal Court Act,[34] in neither case was the issue of competence raised or referred to in argument or decision. Nor was the order framed in the traditional terms of *habeas corpus* orders, perhaps because of then doubts as to the capacity of the Federal Court to issue *habeas corpus*[35]; doubts which were not resolved until December 2020.[36]

B. LEAVE TO APPEAL SHOULD BE REFUSED

21. The challenged orders are interlocutory[37] and leave to appeal should be refused.

22. Mr Montgomery's successful reinstatement of his liberty is the wrong vehicle to explore the Appellants' core objectives of having *Love* overturned or limited. Leaving the Appellants to pursue those objectives in a separate, properly constituted and argued, suit causes them no substantial injustice,[38] and reduces the public expense and administration of Mr Montgomery's detention, pending determination of his request for revocation of the cancellation of his visa: see further **Sections C and E** below.

C. ANY APPEAL MUST BE LIMITED TO ERROR

23. An application for *habeas corpus* is 'directed to the justification for the detention of the subject' *at the time of the hearing* of the application for the writ.[39] Any appeal, must be limited to the correctness of the primary judge's decision to grant *habeas corpus* in the light of the matters before the primary judge at the date of hearing below.

24. The correctness or application of *Love* was not before the Federal Court at the date of hearing because the Appellants had removed that issue to this Court. Whether the Appellants could establish lawful justification for Mr Montgomery's detention thus necessarily assumed, as the primary judge did, that *Love* that was binding on her. Were

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[34] In the case of *AJL20*, as in the present instance, removed into the High Court pursuant to s 40 of the *Judiciary Act*, but against two separate decisions, one for damages for false imprisonment.
[35] *Ruddock v Vadarlis* (2001) 110 FCR 491 at 517 [101] (Beaumont J); *Alsalih v Manager, Baxter Immigration Detention Facility* (2004) 136 FCR 291 at 304-305 [41]-[43] (Selway J; Clark and McCoy) at 26-27; *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 416 (***McHugh trial)*** **at** [96]-[97] (Anderson J).
[36] *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 283 FCR 602 (***McHugh***) at [2], [74], [75], [187], [248] (Allsop CJ, Besanko, Mortimer JJ) (11 December 2020).
[37] *McHugh* (2020) 283 FCR 602 at 611 [21] (Allsop CJ)). Leave to appeal an interlocutory order is required under s 24(1A) of the Federal Court Act and s 24(1C)(a) does not apply: *Talacko v Talacko* (2010) 183 FCR 297, 308 – 9 [41] - [43] (Ryan J); *Hastwell v Kott Gunning* [2021] FCAFC 70 at [20] (McKerracher, Kerr and Charlesworth JJ); *Marriner v Smorgon* [1989] VR 485; *Ryan v Attorney-General (Vic)* [1998] 3 VR 670; *Bowden v Yoxall* [1901] 1 Ch 1.
[38] *Ah-Chee v Stuart* [2019] FCAFC 165 at [11]; *Rawson Finances Pty Ltd v Deputy Commissioner of Taxation* [2010] FCAFC 139 at [5].
[39] *McHugh* (2020) 283 FCR 602 at [270]-[272], [288], [299], [340]. See also above on the common law history of *habeas corpus.*

the Court to explore the correctness, or application, of *Love* in this removed appeal, it could never demonstrate error in the grant of *habeas corpus.*

25. Further, as argued at **Section E.4** below, any attempt to argue about the application of *Love* in the context of cultural adoption could not be entertained because the primary judge, correctly, did not entertain a trial on the facts bearing on the question.

D. NO ERROR ESTABLISHED ON THE APPEAL

26. The primary judge was correct, both for the reasons her Honour gave, and those in the Notice of Contention, in restoring Mr Montgomery to his liberty.

27. **Reasons**: Having put in issue the lawfulness of his detention, Mr Montgomery did not have to establish anything further[40] (*contra* AS [52]-[53], [56], [58]). At law, his detention was *prima facie* unlawful.[41] It was for the detainers to prove otherwise.[42]

28. By reason of what was at stake,[43] that evidence had to be strong, clear and cogent.[44] Relevantly, it was for the Appellants to prove that the detaining officer had a reasonable suspicion that Mr Montgomery is not Aboriginal Australian.[45]

29. Each of the Appellants' main arguments at AS [61] and [62] fails to demonstrate error in her Honour's reasoning. As to AS [61], it fails to grapple with the full package of interlocking reasons why her Honour found that the Appellants had failed to discharge the onus of showing that Mrs McBroom's belief was reasonable on the basis of what was reasonably capable of being known by her:

    a. On one view, *Love* is not confined to the understanding of the first limb of the tripartite test that Mrs McBroom adopted; and

    b. Mrs McBroom was aware that Mr Montgomery had, on a number of occasions, claimed to have biological descent; and

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[40] Reasons [55] **CRB26**.
[41] *Ruddock v Vadarlis* (2001) 110 FCR 491 at 510 [73] (Black CJ).
[42] *Lewis v Australian Capital Territory* (2020) 94 ALJR 740 at [24] (Gageler J); *CPCF v Minister for Immigration & Border Protection* (2015) 255 CLR 514 at 574 [173] (Crennan J) and 655 [511] (Keane J); *Watson v Marshall* (1971) 124 CLR 621 at 626 (Walsh J); *R v Carter; Ex parte Kisch* (1934) 52 CLR 221 at 227 (Evatt J); *Brown v Lizars* (1905) 2 CLR 837 at 853-854.
[43] *Evidence Act* 1995 (Cth) s 140; *NAAJA* (2015) 256 CLR 569 at 610 – 611 [94]–[96] (Gageler J); *McHugh* (2020) 283 FCR 602 at 618 [54], 662 [270]-[272].
[44] *McHugh* (2020) 283 FCR 602 at 619 [57], see also 618 – 620 [53]-[60], 659 – 665 [254]-[283].
[45] *McHugh* (2020) 283 FCR 602 at 619 – 620 [60] (Allsop CJ); 627 [92] (Besanko J), 661-663 [267]--[273] (Mortimer J). See also Transcript of proceedings, *Montgomery v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (High Court, s173/2021, Justice Keane, 27 October 2021), 4:54-57, 8:251-254. **RBM** 1087, 1091

c. Mrs McBroom knew that Mr Montgomery had been adopted by the Mununjali people, and relying on Allsop CJ in *McHugh*, it was open to conclude that the first limb of the tripartite test may be satisfied by adoption under traditional law and custom; and

d. Mr Montgomery had been accepted for decades by the Commonwealth (through Centrelink) to be Aboriginal; and

e. There is no room for any presumptions in favour of the Executive where the liberty of the subject is concerned.[46]

30. As to AS [62], the Appellants mischaracterise the primary judge's finding. Her Honour's comment that 'it seems unlikely that further evidence as to Mr Montgomery's ancestry may be uncovered' was not a finding with respect to what might be uncovered if relevant enquiries were made of Commonwealth agencies; it meant only that the time for Mr Montgomery to be put to proof on the question of his ancestry had not yet arrived.[47]

31. Her Honour correctly applied the principles in *Goldie*[48] in finding that Mrs McBroom had a duty to make inquiries of Centrelink, in circumstances where Mrs McBroom knew that the Commonwealth had long acted on the basis that Mr Montgomery was an Aboriginal person (Reasons [65]). A state of mind is not objectively reasonable if it does not have regard to all relevant material. Enquiries of Centrelink were essential because Mrs McBroom could not reasonably deprive someone of their liberty in disregard of the known fact that another Commonwealth agency had considered Mr Montgomery to be Aboriginal for decades.

32. **Notice of contention:** The appeal should be dismissed because the opinion of Mrs McBroom was not shown to be reasonable on a further ground, namely that she had ignored available, uncontradicted, sworn,[49] expert evidence bearing on her suspicion.[50]

33. At trial, Mr Montgomery relied upon a sworn, uncontradicted, expert report by Dr Fiona Powell that addressed the detail and the context of his claim to be Aboriginal.[51] Mrs McBroom chose, for reasons unexplained, not to inform herself of this report.

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[46] Reasons [61]-[63] and [65] CRB 28-30.
[47] Reasons [63] CRB 29.
[48] *Goldie v Commonwealth* [2002] FCAFC 100 at [4]-[6] (Gray, Lee, Stone JJ).
[49] For the significance of this, see *Gardiner v Taungurung Land and Waters Council* [2021] FCA 80 at [271] (Mortimer J).
[50] Notice of Contention (**CRB 133-134**).
[51] Dr Powell affidavit **RBM 28-974**.

34. Dr Powell's report was directly relevant to Mrs McBrooms's opinion, and its reasonableness. Mrs McBroom's evidence was that she understood that for a person to be Aboriginal for the purposes of the Constitution that person must have 'the lineage of Aboriginal bloodlines'.[52] In Dr Powell's report is the statement of an Elder:

> Shayne's bloodline is Mununjali and he was brought into this by being reared up by our family – he was taught our ways and is one of us now. He belongs to this country now…[53]

The report by Dr Powell spoke directly to the legal test as understood and applied by the detaining officer to form her suspicion for the purposes of s 189.

35. The primary judge erred at Reasons [66] in dismissing as legally irrelevant Mrs McBroom's failure to consider Dr Powell's report. Her Honour's speculation as to what was the 'likely' effect on the detaining officer's suspicion misunderstands the nature of the precondition to lawful detention under s 189. A mental state is not reasonable if it is formed on an incomplete analysis of available material that could bear on the formation of that mental state.[54]

36. Mrs McBroom had been responsible for Mr Montgomery's detention for over 120 days.[55] She formed her opinion after a full opportunity for reading of all available material bearing on Mr Montgomery's Aboriginality. The failure to engage with that material was not reasonable. For this reason also, the appeal should be dismissed.

E. *LOVE*

E.1 Leave to re-open *Love* is required

37. The Appellants' submission that *Love* does not contain a *ratio decidendi* is both disrespectful and wrong. It is disrespectful because it impugns the crystal clear statement in the judgment of Bell J at [81]. It is wrong because the *ratio*, so stated at *Love* [81], is then embodied in the Court's formal answers to Question 1 in each case at 321-322 of the reported judgment. The ratio can in turn be traced to key passages in the four separate judgments of the majority.[56]

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[52] Transcript 28 Oct 2021 104:24-26, 43-46 **RBM 1000**.
[53] Dr Powell affidavit [78(a)] **RBM 80**. See also at [16], [17], [63]-[65] (including Table 1), [79](b)], [82] and [83] **RBM 49, 72-74, 81, 82**.
[54] *Goldie v Commonwealth* [2002] FCAFC 100 at [4], [6].
[55] 120 of the almost 1000 days that he was detained. This was not a spur of the moment suspicion, as in an arrest: compare *Hyder v Commonwealth* (2012) 217 A Crim R 571, especially at [15].
[56] *Love* (2020) 270 CLR 152 at 190-191 [74]-[76] and 192 [81] (Bell J), 259 [284] (Nettle J), 281 – 282 [366]-[367], 284 [374] (Gordon J) and 290 [398] and [458] (Edelman J).

38. That justices forming a majority may differ in the expression of some of their reasoning has never been a reason to deprive a decision of this Court, or any appellate court, the status of *ratio.* Were it so, the certainty of our legal system would collapse.

39. The Appellants' attempt to deny to *Love* a *ratio*, in the aim of circumventing the leave requirement, is all the more astonishing for any litigant, let alone a Model Litigant, when in multiple proceedings since *Love* they have submitted that there was a *ratio,*[57] and the plurality of this Court readily expressed the *ratio* in *Chetcuti*.[58] If yet more support be needed, the Federal Court identified it in *Helmbright*.[59]

40. The Appellants' attempt at AS [16] to manufacture uncertainty in the *ratio* by discerning differences between Nettle J and the remainder of the majority judgments with respect to the meaning of the third element of the tripartite test should be soundly rejected. All four majority judges have joined in adopting the tripartite test from *Mabo [No 2]* at page 70 as *sufficient* for the statement of the principle and the resolution of the case (without foreclosing the possibility that in subsequent cases the test may be further explicated or developed).[60] How the third limb is to be *applied* and *proven* in any particular case will be worked out from time to time. Those ordinary workings out of principle do not cast the third limb into the posited inescapable legal obscurity. Nor should it be forgotten that in the present case the Appellants have had no difficulty accepting that Mr Montgomery satisfies the third limb of the test.[61]

41. *Love* differs fundamentally from *Taylor*[62] (contra AS [18]). As explained in *Te* and *Shaw*, there was no *ratio decidendi* in *Taylor concerning* the aliens power because each justice

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[57] *McHugh trial* [2020] FCA 416 at [198] (Anderson J); *Webster v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 277 FCR 38 (***Webster***) at 39 [4], [49] (Rares J); *Helmbright v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2)* [2021] FCA 647 (***Helmbright***) at [5], [6], at [79], [89]-[95], [97], [103]-[108], [118]-[122], [134]-[149], [171]-[228], [235], [238], [242], [250], [254] (Mortimer J); *Hirama v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 648 (Mortimer J) (***Hirama***); and Ministers' Submissions on habeas corpus in *Montgomery v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*, NSD 500 of 2020, 10 November 2021 (**Ministers' trial submissions**) [2], [14], [39], [50] **RBM 980, 988, 991**

[58] *Chetcuti v Commonwealth* (2020) 95 ALJR 704 (***Chetcuti***) at 710 -711 [13]-[14] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

[59] *Helmbright* [2021] FCA 647 at [118]-[122], [134]-[149], [171]-[228].

[60] *Love* (2020) 270 CLR 152 (Bell J) at 192 [80]; obiter, at 341 [451] and 317 [458] (Edelman J).

[61] Reasons at [68] (**CRB 31**).

[62] *Re Patterson: Ex Parte Taylor* (2001) 207 CLR 391 (***Taylor***).

held that Taylor was not an alien on wholly different bases.[63] In contrast, in this case, the basis is expressed to be, and was, the same.

E.2 Leave to re-open *Love* should be refused

42. Leave to re-open *Love* should be refused for basic reasons that go to the heart of this Court's institutional authority under Chapter III as the final arbiter of matters under both the Constitution and general law.

43. The Appellants are no more than disappointed litigants. They ran arguments in *Love* over two hearings. They put everything they wanted to put. Their arguments were soundly rejected, by a narrow majority, for detailed reasons clearly expressed in the judgments. Nothing relevant has changed. The Appellants (correctly[64]) do not suggest that a change in the composition of the Court is a reason for them to be given another go. No unanticipated mischief has come to light. The Appellants (that is, more precisely, the Executive under Chapter II of the Constitution) just do not like the result which they obtained from this Court (acting under Chapter III of the Constitution). That dislike gives them no claim or right to disrupt the legal certainty and authority flowing from the decision of this Court given on 11 February 2020.[65]

44. Against those incontrovertible facts, this Court will maintain its authority by firmly adhering to its previous decision. The Appellants remain free to administer the law as declared by this Court, and otherwise set in train lawful statutory or administrative steps that they consider advisable in response to the decision in *Love*; much as did the Executive and the Parliament in response to this Court's decision in *Mabo [No 2]*.

45. Attempts by parties to have this Court reopen its decisions are rare. Even the Commonwealth, as the most frequent litigant before this Court over its history, has attempted a reopening on very limited occasions. Successful re-openings are few.[66]

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[63] *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 (***Te***) at 187 [86]-[87] (McHugh); 199 -200 [133], [136] (Gummow J); *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 (***Shaw***) at 44-45 [35] - 45 [39], 47 [49] (McHugh J), 56 [78] (Kirby J).

[64] *Queensland v Commonwealth* (1977) 139 CLR 585 (***Second Territory Senators case***) (1977) 139 CLR 585 at 594 (Barwick CJ); *Damjanovic & Sons Pty Ltd v Commonwealth* (1968) 117 CLR 390 at 408 (Windeyer J); and *Shaw* (2003) 218 CLR 28 at 56 [76] (Kirby J).

[65] The comments of Dixon J in *Attorney-General (NSW) v Perpetual Trustee Co Ltd* (1952) 85 CLR 237 at 243-244 apply aptly to *Love.* Also cited in *Second Territory Senators case* (1977) 139 CLR 585 at 620.

[66] The majority concern (i) reversals turning on *Engineers*,(ii) s 92 cases, and (iii) cases on ss 117 and 122. In the last decade, arguably there has been only one re-opening and overruling: see provisional list of cases "overruled, disapproved or confined" in Joshua Thomson and Madeleine Durand, "Overruling Constitutional Precedent", (2021) 95 *Australian Law Journal* 139 at pp 142- 143.

Before re-opening, the Court always balances the damage that would be done to its authority and to the stability of the legal system by the re-opening against the harm that might follow from allowing a clearly erroneous decision to remain on the books. A 'strongly conservative cautionary principle'[67] leads the Court to refuse re-opening unless that balance of harms tilts clearly in favour of re-opening.

46. That constitutional questions are involved only heightens the requirement that a re-opening should occur 'only with great caution and for strong reasons'.[68] A decision should not be re-opened merely to 'allow the re-agitation of arguments which did not prevail in the earlier decision'.[69] Leave to re-open should only be granted if the decision involves a question of vital constitutional importance and is 'manifestly wrong'.[70] That is a threshold reached when, for example, the majority overlooked authority or a statute, or their judgment is illogical.[71] There is no manifest error if the issue is one on which reasonable minds could come to different conclusions.[72]

47. Against the exacting standard required for a re-opening, the five arguments at AS [20]-[24] fall markedly short. They collapse into the following plea: *Love* was decided only two years ago; it was novel; it addressed a fundamental question; not many people have acted on it; we, the Appellants, claim that we do not understand precisely what it stands for; and we assert (without proof) it will cause us difficulty. If that were the standard for a re-opening, the Court would be deluged with re-opening applications.

48. The point at the heart of *Love* is clear and easy to understand: Aboriginal Australians, as such, have such bonds of attachment to this nation and its territory that they form part of the people uniting in the federation and are beyond the reach of the Parliament to subject to the disabilities of aliens.

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[67] *Wurridjal v Commonwealth* (2009) 237 CLR 309, 352 [70] (French CJ).
[68] *Second Territory Senators case* (1977) 139 CLR 585 at 602 (Stephen J), 620 (Aickin J); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 554 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow, Kirby JJ) citing *Hughes & Vale Pty Ltd v New South Wales* (1953) 87 CLR 49 at 102 (Kitto J); *Jones v Commonwealth* (1987) 61 ALJR 348 at 349 (Mason C.J., Wilson, Brennan, Deane, Dawson and Toohey JJ).
[69] *NAAJA* (2015) 256 CLR 569 at 629 – 630 [162] (Keane J).
[70] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 554 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow, Kirby JJ).
[71] The analysis of Aickin J in *Second Territory Senators case* (1977) 139 CLR 585 at 624 – 625 suggested that error became manifest over a course of decisions subsequent to the original decision in question. He further stated, relevantly, 'Generally speaking, satisfaction that it is wrong has not alone been regarded as sufficient': at 625. See also 599 (Gibbs J). See also *Applicant WAIW of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1621 at [7] (Finkelstein J).
[72] Thompson and Durand, 'Overruling Constitutional Precedent' (2021) 95 *Australian Law Journal* 139 at 153 which concludes that *Love* is not a case of manifest or 'demonstrable error' but one where reasonable minds may differ, which is not in and of itself sufficient reason to overturn it.

49. Since *Love* addressed a *new* question, on *new* facts - is an Australian Aboriginal an 'alien' - past cases could not automatically answer it.[73] *Love* leaves the previous authorities in place, in their own terms and applicable to their facts,[74] and adds a further dimension, specific to the position of Aboriginal persons who are not citizens. It aligns with past authority and identifies a limit on the power under s 51(xix), consistently with the undisputed principle[75] set down in *Pochi v Macphee.*[76] The outcome in *Love* is not contrary to any previous decision of this Court.[77]

50. The Appellants' alleged uncertainties and difficulties with *Love* are mere posturing. If real issues have to be worked out over time, such as the application of *Love* in the context of cultural adoption, that can be done in the right case consistent with the judicial method.[78] If the concern is about proof, already the Federal Court has resolved several disputes of this kind, noting that the Appellants have not seen need to appeal in any of those cases.[79] Further, the tripartite test has been applied by the Commonwealth itself in various other contexts since the 1970s.[80]

51. Nor is it a positive reason to re-open a decision that it has only stood for a short time and not many people have taken advantage of it. Trying to re-open a recent decision will usually suffer its own fate, as seen in *Williams [No 2].*[81] In any event, since February 2020, *Love* has been independently acted upon – it has resulted in at least 10 people regaining their liberty, 'the most elementary and important of all common law rights',[82] as well as in those people not being deported or deprived of their connection to country.

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[73] *Taylor* (2001) 207 CLR 391, at 409 [39] (Gaudron J); *Singh v Commonwealth* (2004) 222 CLR 322 (***Singh***) at 399-400 [203]-[204] (Gummow, Hayne and Heydon JJ).
[74] *Logan v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 278 FCR 419 (Colvin J) at 434 [78].
[75] *Love* (2020) 270 CLR 152 at 171 [7] (Keifel CJ); 183 [50], 187 [64] (Bell J); 194 [87] (Gageler J); 218 [168] (Keane J), 236-237 [236], 244 [252] (Nettle J), 270 – 271[309]-[310], [326]- [327] (Gordon J); 305 – 308 [401], [433]-[436] (Edelman J); *Chetcuti* (2021) 95 ALJR 704 at 715 [37] (Gordon J); 722 [66], [68] (Edelman J); 729 [103]-[104] (Steward J); *Singh v Commonwealth* (2004) 222 CLR 322 (***Singh***) at 329 [4]-[5] (Gleeson CJ) and 383 [151]-[153] (Gummow, Hayne and Heydon JJ).
[76] *Pochi v Macphee* (1982) 151 CLR 101 (***Pochi***) at 109 (Gibbs CJ, with whom Mason J at 112 and Wilson J at 116 agreed)
[77] *Love* (2020) 270 CLR 152 at [50]-[63] (Bell J), [250]-[255] (Nettle J), [309]-[311], [321]-[322], [332]-[333] (Gordon J), [423]-[431] (Edelman J); cf the minority view at 220 [175] (Keane J),
[78] *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at [86].
[79] *McHugh* (2020) 283 FCR 602, *Helmbright* [2021] FCA 647; *Hirama* [2021] FCA 648.
[80] Lorna Lippmann, *Generations of Resistance: Aborigines Demand Justice,* (2nd ed, Longman Cheshire, Melbourne, 1991) at 88: the Commonwealth adopted what is now known as the tripartite test as its "'working definition' of Aboriginality in the administration of its programs" in 1978. See also *Love* (2020) 270 CLR 152 at 192, [80], footnote 167 (Bell J).
[81] (2014) 252 CLR 416.
[82] *Trobridge v Hardy* (1955) 94 CLR 147 at 152 (Fullagar J).

No other factor identified in *Commonwealth v Hospital Contribution Fund*[83] or *John v Commissioner of Taxation*[84] supports re-opening of *Love.*

E.3 *LOVE* WAS CORRECTLY DECIDED

52. **The issue:** The issue in *Love* was whether it was open to the Parliament, in reliance upon the 'aliens' power in s 51(xix), to subject each of Mr Love and Mr Thoms to the disabilities under ss 189 and 196 of the *Migration Act* of deprivation of liberty for the purpose of removal from Australia to some other place, where they each claimed to be Aboriginal Australians; did not hold citizenship under the *Citizenship Act 2007* (Cth); but did hold citizenship of another place, New Zealand or PNG.

53. **A restatement of the essence of the majority:** The majority judgments each contain an integrated set of reasons with a common core that we would restate around the answers to six key enquiries:

a. a question of common law method in response to the correction of historical error: following *Mabo [No 2]'s* rejection of *terra nullius* as based on a false understanding of the history of this country pre and post Settlement, would a proper restatement of the common law of status recognise that Aboriginal Australians, as such, and without further enquiry into their place of birth, were members of the political communities forming in the Colonies and later the nation, then considered as British subjects? Answer: yes.

b. a question of constitutional context: did Aboriginal people, as such, and without further enquiry into place of birth, form part of 'the people' uniting in the new federation and entitled and subject to the rights, privileges and responsibilities of 'the people' under the Constitution, both at 1901 and as confirmed by the 1967 referendum? Answer: Yes.

c. a question of constitutional method: where a challenge is raised to a law on the ground that is not supported by the 'aliens' power, or any other status power, is it the role of this Court to be satisfied of every matter of fact and law which bears upon whether the person impacted by the law is an alien? Answer: yes.

d. a question of constitutional meaning: does the 'aliens' power have an essential meaning, or an ordinary understanding, including as informed by international law

[83] (1982) 150 CLR 49 at 56-58 (Gibbs J, with whom Stephen J at 59 and Aickin J at 66 agreed).
[84] (1989) 166 CLR 417 at 438-439.

considerations, and if so, what is it? Answer: yes, the essential meaning or ordinary understanding of 'alien' is a person who belongs to another place.

e. a question of intermediate constitutional application: if *Robtelmes v Brenan*[85] had come before this Court in 1906, with the subject of deportation being an Aboriginal Australian, would the correct result have been different so far as the 'aliens' power was relied upon? Answer: yes, an Aboriginal Australian, as such, and without further enquiry into place of birth, could not lawfully have been deported immediately post federation under the 'aliens' power.

g. the question of ultimate constitutional application: do any of the 1920, 1948, or 1984 Acts of nationality or citizenship, or Australia's progress over the 20th century to a fully independent nation, require different answers at the present day to the previously posed questions? Answer: no. That the Parliament has progressively enacted increasingly comprehensive nationality or citizenship laws, in reliance upon the 'aliens' power amongst others, does not have the necessary consequence that any person who does not hold citizenship from time to time is an 'alien' who can be subjected to the disabilities that only an 'alien' can suffer. It remains for the Court to decide, based upon the characteristics that the person possesses and does not possess, whether they are an 'alien' within the scope of the power at the relevant time. Aboriginal Australians are not.

54. **The common law of status:** While the Constitution cannot be reduced to the common law, it is informed by it.[86] *Love* recognises that, on and from Settlement until it was progressively displaced by statute post Federation, the common law of status needs to be restated consistently with the common law of land title in *Mabo [No 2]*. Aboriginal people, as such, became members of the political communities forming in the Colonies and later the nation, by reason of being the inhabitants of the lands and waters, and the descendants of those inhabitants, under traditional laws and customs which governed the membership of those societies. Membership, at that time, was under the guise of 'British subjects', or to use the nomenclature of the time, 'natural born British subjects'. The condition for membership was residence in the Colonies either at or after settlement. Birth in the colonies, whether before Settlement or after settlement, was not a necessary

[85] (1906) 4 CLR 395.
[86] The Rt Hon Sir Owen Dixon, *Jesting Pilate*, (Federation Press, 3rd ed, 2019) 247.

element of this acquisition of status. *Calvin's Case*[87] remained good as far as it went without being exhaustive.

55. This restatement of the common law principle of status is not wholly new. A number of writings in the 19th century already recognised it.[88] From 1828, on passage of the *Australian Courts Act*,[89] Aboriginal people who inhabited Australia obtained their status as British subjects because they were Indigenous inhabitants subject to jurisdiction of the imported law of England. To the extent *Love* may be thought to require a common law development, it is justified on the methodological reasoning given by Gummow J in *Wik*:[90] as a restatement of the common law of status because the previous understanding of it was based on false assumptions of historical fact.

56. Once it is accepted, following *Mabo [No 2]*, that at and after Settlement Aboriginal societies observed and acknowledged traditional laws and customs which bound them to the lands and waters of Australia in profound, two-way, spiritual, cultural and metaphysical connections, it would be 'incongruous' or 'necessarily inconsistent' for the common law, on the one hand, to recognise that the radical title of the Crown to the land can be burdened by the rights and interests arising from those traditional laws and customs but, on the other hand, to say that those very societies observing and upholding those traditional laws and customs – including as to membership of those societies – could be fragmented or torn asunder by treating *Calvin's Case*[91] as an exhaustive statement of the law of status[92]. The common law could not, with the consistency, logic and the inherent justice and fairness that are its mark, have permitted the Executive of one of the newly formed Colonies to detain and deport all Aboriginal persons who could not satisfy *Calvin's Case*[93].

57. Expanding the notion of 'natural born' British subject to include all Aboriginal persons, as such, is consistent with the method by which the common law and later statute

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[87] (1608) 7 Co Rep 1a [77 ER 377]
[88] *Love* (2020) 270 CLR 152 at 251[267], 257 [277] (Nettle J).
[89] 9 Geo IV, c 83. From the passage of that Act, English law was applied generally to Aborigines in the colonies of NSW and Van Diemen's Land: B H McPherson, *The Reception of English Law Abroad* (2007) at 195, 261. The NSW Supreme Court reached a similar conclusion in May 1827: *R v Lowe* [1827] NSWLR 4 at 867-868 (Forbes CJ, Stephen J). See also *Wik Peoples v Queensland* (1996) 187 CLR 1 at 181 (Gummow J).
[90] (1996) 187 CLR 1 at 180-182.
[91] (1608) 7 Co Rep 1a [77 ER 377]
[92] *Love* (2020) 270 CLR 152 at 183 [52], 189 [71], 190 [74] (Bell J); 253 [272] (Nettle J); 273-274 [336]-[341] (Gordon J); 312-315 [447] – [454] (Edelman J); cf 201 [104], 204 [110] (Gageler J).
[93] (1608) 7 Co Rep 1a [77 ER 377].

developed. Mr Brazil's 1984 article[94] demonstrates that, around Federation, the concept of 'natural born British subject' was already considered to include persons with paternal descent from a British subject. Consistently with this, the 1914 Imperial Act[95] and the 1920 Australian Act[96] embodied this very form of drafting device.

58. **Constitutional context:** A fundamental constitutional insight of *Love* is that, consistent with a proper restatement of the common law under the first proposition above, or even without it, at federation the people who came together as referred to in the covering clauses and relevant sections of the Constitution included all persons who exhibited the necessary bond of social attachment with the territory of the new nation, of which *par exemplar* Aboriginal people qualified as such and without further enquiry as to whether they satisfied *Calvin's Case*. They formed part of the compact between the new Commonwealth and the people, being one of the compacts eloquently referred to by Alfred Deakin on 18 March 1902.[97] To hold otherwise, once we have the insights of *Mabo [No 2]*, would be 'incongruous' or 'necessarily inconsistent' with the recognition of Aboriginal societies and traditional laws and customs in that case.

59. Indeed, if being a member of the 'people of the Commonwealth' were a definition of being a non-alien, then s 127 of the *Constitution* was an acknowledgment that, but for its terms, "Aboriginal natives" were "people of the Commonwealth"; and its removal in 1967 confirmed that, at the heart of the new federation, the Aboriginal persons had always been fully part of the compact as "people of the Commonwealth". A like submission is made about the significance of the original exclusion of the Aboriginal people, as a whole, from the races power in s 51(xxvi) and the 1967 referendum recognition that s 51(xxvi) should now include a power to make special laws for their benefit, again as a whole. This Constitutional recognition of Aboriginal Australians and their claim on a place in the polity of Australia provides a strong textual basis for recognition of the non-alien status of "Aboriginal natives".[98]

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[94] Patrick Brazil "Australian Nationality and Immigration", in K W Ryan (ed), *International Law in Australia*, (2nd ed, 1984) (**Brazil**) 210 at 212; *Love* (2020) 270 CLR 152 at 199 [98] (Gageler J).
[95] *British Nationality and Status of Aliens Act 1914* (Imp); Brazil at 213.
[96] *Nationality Act 1920* (Cth); Brazil at 214.
[97] Australia, House of Representatives, *Parliamentary Debates* (Hansard), 18 March 1902, Second Reading Speech, Judiciary Bill 1902, page 10965.
[98] *Love* (2020) 270 CLR 152, 278 [355] (Gordon J), 296-298 [410], 307-308 [436] (Edelman J); cf 204 [110] (Gageler J), 222 [179]-[180] (Keane J).

60. **Constitutional method:** As Williams J stated in the *Communist Party case*,[99] speaking specifically of the 'aliens' power, it is the Court's duty to be satisfied that the person to whom the impugned law is applied is 'in fact and in law' an alien. That task requires the Court to ascertain the essential meaning, or ordinary understanding, of the constitutional term 'alien' at the appropriate level of generality; just as much as in the case of another status power, marriage, the Court was required both in the *First Marriage Case*[100] and in the *Same Sex Marriage Case*[101] to identify the essential meaning of "marriage" before it could answer questions of validity of a law. The *Pochi* limitation[102] requires as much[103] (contra AS [34]-[35]).

61. That essential meaning, or ordinary understanding, will be shaped by legal usages, and may need to accommodate wider changing realities, such as Australia's move to a fully independent nation or the progressive displacement of common law rules of status by statute; but it remains the task of this Court to declare it.

62. With respect, it would be an error to hold that the *Pochi* limitation means nothing more than the Court not the Parliament finally determines if legislation is within power; that the Court ascertains status 'only through the application of positive law, the enactment of which inheres in the legislative power itself'; or that no parameters can be discerned within the 'aliens' power itself for the Court to police other than that the Parliament may freely choose 'at least' from any of the principal options in play for nationality at 1900 or any hybrid of them.[104]

63. If a person possesses one or more of the criteria which may often be associated with alienage, such as foreign allegiance, or non-citizenship, or birth outside Australia, that cannot allow Parliament to subject the person to the 'aliens' power without further consideration of the surrounding circumstances. Such reasoning would impermissibly allow non-constitutional concepts, such as a statute, an historical common law position

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[99] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 222.
[100] *Attorney-General (Vic) v Commonwealth* (1962) 107 CLR 529.
[101] *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441.
[102] (1982) 151 CLR 101 109 (Gibbs CJ, with whom Mason J, 112 and Wilson J, 116 agreed); *Singh* (2004) 222 CLR 322 at 329 [4]-[5] (Gleeson CJ), 374 [124] (McHugh J) and 383 [153] (Gummow, Hayne & Heydon JJ).
[103] See also *Attorney-General (NSW), ex rel Tooth & Co Ltd v Brewery Employees' Union of NSW* (1908) 6 CLR 469 at 614-615 (Higgins J) (*Union Label Case*): the powers of the Federal Parliament with respect to heads of power that include a power to define the subject matter are not practically unlimited. Dissenting in that pre-*Engineers* case, the mode of analysis of Higgins J has been adopted by the Court: *Grain Pool of WA v Commonwealth* (2000) 202 CLR 479, 494 -495 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); 529-530 [128] (Kirby J). Contra *Love* (2020) 270 CLR 152 at 219 – 220 [172] (Keane J).
[104] Cf *Love* (2020) 270 CLR 152 at 193 – 195 [86]-[88], 200 [100] (Gageler J).

or foreign law, to determine the scope of a constitutional head of power.[105] If the Appellants' arguments were accepted, it would, for example, allow Australian citizens who hold also foreign allegiance to be brought within the aliens power on the basis that Parliament was entitled to treat those with foreign citizenship as aliens and 'one *possible* understanding of the word "alien" is that it includes person who were born overseas [and] who are foreign citizens' (cf AS [36]).[106]

64. The role of the Court in respect to status powers does not sit in sharp divide to its role with other powers. As Gleeson CJ recognised in *Singh*,[107] a great number of powers in s 51 contain terms that have a legal meaning and their constitutional signification can understood only by reference to legal usages and understandings. His Honour instanced, in a long list, not only the 'aliens' power, but also the corporations power. There is a continuum of powers, some informed by legal usage more than others, and status powers may sit near one end of the continuum; but that cannot be a warrant for the Court to allow Parliament to designate the outer limits of the power nor to deprive the power of any essential meaning or ordinary understanding.

65. **Constitutional meaning:** The 'aliens' power has an essential meaning, or ordinary understanding, of a person who belongs to another place.[108] Alienage, like marriage, is a social institution or bond, to which the law attaches legal shape and consequence.[109] *Love* thus provides an answer, adapted to the unique circumstances of Aboriginal Australians, to the search for the essential meaning of alien and, what distinguishes a non-alien from an alien. The search is not for definitions or taxonomies, but for the principles underlying them.[110]

66. At Federation, there was no fixed or immutable meaning of 'alien'.[111] The law then in force was imperial law, a mixture of common law and statute. Since Federation, the Court has considered a variety of tests for the meaning of alien, in a variety of factual circumstances. These include 'membership of the Australian community' (whether

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[105] *Love* (2020) 270 CLR 152 at 264-269, [304]- [322] (Gordon J); 185 [59] (Bell J).
[106] *Love* (2020) 270 CLR 152 at 268 [316].
[107] *Singh* (2004) 222 CLR 322 at 331 - 332 [10].
[108] *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 (***Nolan***) at 183 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey JJ); *Singh* (2004) 222 CLR 322 at 395 [190]; 400 [205] (Gummow, Hayne and Heydon JJ).
[109] *Love* (2020) 270 CLR 152 at [401] (Edelman J).
[110] *Singh* (2004) 222 CLR 322 at 368 [169] (Gummow, Hayne and Heydon JJ).
[111] *Shaw* (2003) 218 CLR 28 at 42 [28]; *Singh* (2004) 222 CLR 322 at 381 [145], 384 [157]-[158] and 395 [190] (Gummow, Hayne and Heydon JJ).

aligned with the scope of the "immigration" power, or enrolment on the electoral roll); place of birth; descent; status in international law (as a British subject or as a citizen); and foreign allegiance, or combinations thereof. Throughout, there has been an essential meaning of being a stranger or other, who did not belong here.

67. This meaning is confirmed when one has regard to comparative and international law, which is properly available given one is dealing with a power which is necessarily both inward and outward facing. For Australia to impose the ultimate disability upon a person of deprivation of liberty and forced removal to another place because the person is an alien necessarily engages the outside world – the place to which the person is removed. As the International Court of Justice powerfully expressed the point in the *Nottebohm Case*[112]:

> According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having its basis in a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual person upon whom it is conferred, either directly by the law or as a result of the act of authorities, is in fact more closely connected with the population of the State conferring nationality than with any other State [emphasis added].

68. **Intermediate constitutional application:** It is useful to pause the frame at federation. If an early law of the new Parliament had taken the form of the Act under scrutiny in 1906 in *Robtelmes v Brenan*, but with the disability of deportation being imposed upon Aboriginal people, on a correct understanding of the 'aliens' power, an Aboriginal person, as such, could have had the law declared invalid. Such a person was not a constitutional 'alien' for the reasons given above and would not have needed to satisfy *Calvin's Case*[113] to obtain relief.

69. There was no fixed definition of "Aboriginal" at Federation. To the extent that there were definitions, they were in colonial legislation and in the administrative discretion of "Boards of Protection".[114] These tests and practices operated for various purposes of social control or welfare, and typically adopted percentages of "blood" or assessments of

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[112] *Lichtenstein v Guatemala,* ICJ Rep 1955at 4 see also *Love* (2020) 270 CLR 152 at 270 [259], [260] (Nettle J).
[113] (1608) 7 Co Rep 1a [77 ER 377]
[114] John McCorquodale, 'The Legal Classification of Race in Australia', *Aboriginal History*, vol. 10, 1986 at 724. Based on an analysis of over 700 pieces of legislation, there were at least 67 different definitions of Aboriginal people; John Gardiner-Garden, "Defining Aboriginality in Australia", Department of the Parliamentary Library, Current Issues Brief No 10 2002-03 (2003). See eg Victoria's "Half-Caste Act" (*Aborigines Protection Act 1886* (Vic), s 4; *Aborigines Protection Act 1886* (WA); *Aborigines Protection and Restriction on the Sale of Opium Act 1897* (Qld); *Aborigines Protection Act 1909* (NSW); Anna Doukakis, *The Aboriginal People, Parliament and "Protection" in New South Wales 1856 – 1916* (2006).

appearance and pigmentation, all now discarded as repugnant. In the absence of detailed definition, the term had and has a vernacular meaning: "the terms do not call for the courts to make an ethnological inquiry of a scientific, historical or scholarly character".[115] Whatever these uncertainties, 'Aboriginal natives' of Australia were not within the scope of 'aliens' at Federation.

70. **Ultimate constitutional application:** It is contrary to basic constitutional principle to commence the inquiry with statutory citizenship law[116] or to assert that current statutory citizenship law decides the case.[117] This, however, is not to say that certain of the defining or central characteristics[118] of non-alienage do not overlap often with most[119] forms of statutory citizenship. Plainly they do. Equally plainly, statutory citizenship does not confine or define the natural meaning of the Constitutional head of power nor set its outer bounds.[120]

71. The Parliament could, and for many years did, as with the marriage power, leave the question of status to be governed by the common law or State and Territory law. Over the course of the 1920, 1948 and 1984 Acts, it progressively introduced a more comprehensive framework around the question of membership of the political community, as well as progressively freeing that framework from British origins. The

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[115] *Muramtas v Commonwealth Electoral Officer (WA)* (1923) 32 CLR 500 at 506-507 (Higgins J); *Ofu-Koloi v The Queen* (1956) 96 CLR 172 at 175 (Dixon CJ, Fullagar and Taylor JJ).

[116] To begin with the *Citizenship Act* is to invert the process of enquiry: *Singh* (2004) 222 CLR 322 at 382 [150] (Gummow, Hayne and Heydon JJ), citizenship cannot control the meaning of "alien": *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 54 (Gaudron J). "Alien" is a "constitutional" term: *Love* (2020) 270 CLR 152 at 263 [300] (Gordon J); the constitutional meaning of "alien" is not susceptible to legislative alteration: *Chetcuti* (2021) 95 ALJR 704 at 736 [132], footnote 267 (Steward J).

[117] In addition to previous note, see *Nolan* (1988) 165 CLR 178; *Taylor* (2001) 207 CLR 391 at 435-436 [132], 469-470 [238], 490 [297], 491-492 [303]; *Shaw* (2003) 218 CLR 28 at 36 [9] (Gleeson CJ, Gummow, Hayne JJ) 57 [80], 61 [94], 63-64 [101] (Kirby J); *Singh* (2004) 222 CLR 322 at 382-383 [151], [153] (Gummow, Hayne and Heydon JJ), 374 [122] (McHugh J) 329 [4]-[5] (Gleeson CJ); *Koroitamana v Commonwealth* (2006) 227 CLR 31 at 54-55 [81]; *Chetcuti* (2021) 95 ALJR 704 at [37]-[38] (Gordon J) [60]-[86] (Edelman J) [103]-[105], [145] (Steward J). See also Peter Gerangelos, "Reflections upon Constitutional Interpretation and the Aliens Power: *Love v Commonwealth"* (2021) 95 ALJ 109, 113.

[118] *Love* (2020) 270 CLR 152 at 304 [429] (Edelman J): To describe characteristics as "central" or "defining" is not to exhaust the characteristics or meaning of "alien"; it is merely to describe a frequent or general case. This present case is *sui generis* and out of the ordinary run.

[119] See, for example, the situation of Grace Heiner, as explored at *Heiner v Minister for Immigration and Citizenship* [2013] FCA 617, see especially [1]-[6] and [46]. Ms Heiner was born outside Australia to two non-citizen parents. She had never lived in Australia, but was entitled to Australian citizenship; *Nolan* (1988) 165 CLR 178 at 183-185 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ): "an acceptable general definition"; *Singh* (2004) 222 CLR 322 at 395 [190]; *Love* (2020) 270 CLR 152 at 264 [304] – [305] (Gordon J).

[120] *Chetcuti* (2021) 95 ALJR 704 at 739 [145] (Steward J), referring to *Pochi v Macphee* (1982) 151 CLR 101 at 109-110; and at 720 - 723 [60]-[70] (Edelman J). Similarly, in *Taylor* (2001) 207 CLR 391, Gaudron J applied exactly such analysis to general statements of the Court in previous cases: at 409 [39]; as also did the plurality in *Singh* (2004) 222 CLR 322 at 399-400 [203]-[204] (Gummow, Hayne and Heydon JJ).

significance of that law for alienage is no more than a person who does not from time to time hold statutory citizenship is not entitled to the benefits and burdens which under the law of land attach to the statutory status of citizen. Absence of statutory citizenship is not a declaration by Parliament that the person is a constitutional alien.[121] Nor does it, of itself, subject the person to any disability of an alien. If some other law of the Parliament, here the *Migration Act,* seeks to impose the disabilities of an alien upon the person, that presents the question for the Court's determination – is the person in fact and in law an alien – rather than answering it.[122] And the answer to that question remains the same at 1901 as today, although the progressive insights of the 20th century allow the Court now more comfortably to answer it.

72. The Court may take into account "profound socio-political imperatives not conceived of at the time of Federation"[123] – including the unique and special relationship between Aboriginal people and the Australian territory and polity that existed at 1901 even if not then fully recognised – just as much as it has taken into account the profound and important developments traced in *Nolan,*[124] *Sue v Hill*,[125] *Ame,*[126] *Shaw,*[127] *Singh*[128] and *Chetcuti*[129] amongst others.

73. The majority reasoning in *Love* is consistent with the status and recognition given by Australian polities to the existence of Aboriginal societies inhabiting the territory of Australia prior to sovereignty and their unique and spiritual connection to land.[130] That status and recognition has been the subject of a long course of development in Australian law. Over the fifty years since *Milirrpum*, its implications have been worked out, within

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[121] No inference should be drawn from the criteria for citizenship selected by Parliament from time to time: cf *Love* (2020) 270 CLR 152 at 170 [3] (Kiefel CJ). To so reason is to again simply to invert the process of enquiry.
[122] *Singh* (2004) 222 CLR 322 at 541 (Gummow, Hayne and Heydon JJ).
[123] *Love* (2020) 270 CLR 152 at 256 [275] (Nettle J) and at 188 – 189 [69]- [70] (Bell J).
[124] (1988) 165 CLR 178 at 186.
[125] (1999) 199 CLR 462 at 487-490 [50]-[60] (Gleeson CJ, Gummow and Hayne JJ); 526-529 [168]-[175] (Gaudron J).
[126] *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439 at 458-459 [35] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ): changes in the national and international context in which s 51(xix) is to be applied may have important bearing upon its practical operation, summarizing and citing *Sue v Hill, Shaw* and *Singh.*
[127] *Shaw* (2003) 218 CLR 28 at 36 [10], 38 [14] (Gleeson CJ, Gummow and Hayne JJ).
[128] *Singh* (2004) 222 CLR 322 at 395 [190] 398 [199] (Gummow Hayne and Heydon JJ);
[129] (2021) 95 ALJR 704, eg at 718 [53], 719-720 [58], 723 – 727 [73]- [91] (Edelman J); 728 – 729 [96] – [105], 731–739 [112]–[143] (Steward J).
[130] *Love* (2020) 270 CLR 152, 183 [52], 189-190 [70]-[74] (Bell J); 245 [253], 248- 249 [256], 248-257 [262]-[278] (Nettle J) 260 – 261 [289] – [290], 262 [297]-[298], 272 [335], 276- 277 [348]-[349], 282 [370] (Gordon J), 286-287 [391]-[392], 289 [396], 296-298 [410]-[414], 311 [445], 312 – 316 [447]-[454] (Edelman J); see also *Helmbright* [2021] FCA 647 at [171]-[210].

the various legislative, administrative and judicial departments of the governments of the federation. It is expressed in the Court's landmark cases: on standing,[131] on customary native title,[132] under statutory systems in the Aboriginal Land Rights Act,[133] in State land rights legislation,[134] in the *Native Title Act.*[135] It is founded equally on expressions of legislative recognition in all jurisdictions of Aboriginal heritage and cultural protection, land rights and indigenous rights.[136] These acknowledge the existence of spiritual and cultural relationships[137] of belonging of Aboriginal societies which *Love* recognises as having characteristics antithetical to "alienage".

74. In this respect, the core reasoning of the majority in *Love* springs from the "fundamental truth" that Aboriginal people inhabited this land and lived according to laws and customs that are recognised by Australian law. *Love* reflects "the experience of the nation and the insights generated by that experience".[138] *Love* identifies a unique set of connections with Australia that justifiably show that members of Aboriginal societies belong to Australia, in its senses of a people, of a land and as a polity, and are thus "non-aliens".

75. **Answers to some objections: (1) Race v indigeneity:** The majority did not determine *Love* on the basis of one's Aboriginal "race".[139] Any conceptual overlap between Aboriginal societies and the concept of "race" is unhelpful and immaterial. [140]

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[131] *Onus v Alcoa of Australia Ltd* (1982) 149 CLR 27 at 32, 36 (Gibbs CJ), 43 (Mason J), 45 (Murphy J), 62 (Wilson J).
[132] *Mabo v Queensland [No 2]* (1992) 174 CLR 1.
[133] *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 356-358.
[134] See eg SA legislation in *Gerhardy v Brown* (1985) 159 CLR 70 at 89, 97, 124, 149.
[135] Including *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 366 [40]; *Yanner v Eaton* (1999) 201 CLR 351 at 372-373 [37]; *Western Australia v Ward* (2002) 213 CLR 1 (***Ward***), 64-65 [14], 85-86 [62]-[64]; (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 (***Yorta Yorta***); *Northern Territory v Griffiths* (2019) 269 CLR 1 (***Griffiths***) at 89-92 [168]-[184], 95 [187], 105-106 [223], 107 [230] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ; Gageler J agreeing at 111 [240]; Edelman J agreeing at 113 [253]), and 131-132 [309]-[314] (Edelman J).
[136] See Appendix A. The relevance of these statutory provisions is two-fold: (a) they express solemn statutory recognition by polities of Australia that there is a unique relationship between Aboriginal societies and land and waters; and (b) they point to the need to frame consideration of who is an "alien" by reference to contemporary Australian conditions that reach beyond the feudal concepts that underlay the common law in the past.
[137] *Ward* (2002) 213 CLR 1 at 64-65 [14] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Griffiths* (2019) 269 CLR 1 at [168]-[184], [187], [230] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ; Gageler J agreeing [240]; Edelman J agreeing [253]); and [313]-[314] (Edelman J).
[138] *NAAJA* (2015) 256 CLR 569 at 630 [162] per Keane J.
[139] *Love* (2020) 270 CLR 152, 189 [71], 190 [73] (Bell J); 245- 246 [256], 248 [263], 253–254 [270]-[272] (Nettle J) 260-261 [289]-[290], 262 [297]-[298], 272 [335], 276- 277 [348]-[349], 282-283 [370] (Gordon J), 311 [445], 312-314 [447]-[452] (Edelman J); see also *Helmbright* [2021] FCA 647 at [171]-[210].
[140] It is inimical to modern sensibility to make distinctions based on 'race', but it has to be recognised s 51(xxvi) and the repealed s 127 both referred to race in connection with Australian Aboriginals. That may be considered as reflecting prevailing colonial attitudes at the time of Federation: Henry Reynolds and Marilyn Lake, *Drawing The Global Colour Line - White Men's Countries and the Question of Racial Equality* (2008) 48(2) Journal of British Studies 551.

76. It would be wrong to ignore indigeneity as a criterion relevant to alienage on the basis that it is said to be equivalent to creating a 'race-based' limitation to the aliens power or because it would otherwise be racially discriminatory. To the contrary, to ignore indigeneity would constitute 'a failure to accord different treatment appropriate to that difference [which] also constitutes discrimination.'[141]

77. **(2) Connection with the body politic:** It is incorrect to say that the unique bond that Aboriginal Australians have with Australia is not with the body politic of Australia (contra AS [42]-[43]). It is the body politic(s)[142] of Australia that affords the status, respect and recognition to Aboriginal societies.[143]

78. **(3) Connection with particular land or waters:** A member of an Aboriginal society does not need to establish a relationship to a particular area of land or waters, because the relationship to the land and waters of Australia exists as a result of membership of an Aboriginal society itself. This is so even if, as a result of European colonisation, an Aboriginal person may lack knowledge of the particular area of land and waters that, as a matter of traditional law and custom, they may be from. Aboriginal Australians are *of* the lands and waters of Australia, as a matter of status.[144]

79. **(4) Sovereignty:** *Love* is not an abrogation of sovereignty, but an exercise of sovereignty (this Court fulfilling its function of authoritatively interpreting the Constitution). *Love* does not confer legislative or constitutional authority on Elders of Aboriginal societies to decide who is, and who is not, an alien. There is no creation of or abdication to a parallel system of law making[145] capable of displacing valid laws of the Parliament. Rather, the Court is applying the paramount law, the Constitution, acknowledging that it fixes limits to the valid extent of legislation, and that, within the limits determined in *Love*, there is scope for the law to recognise the existence and effect, as a matter of history and continuing social fact,[146] of the reality of Aboriginal communities, constituted by and in

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[141] *Street v Queensland Bar Association* (1989) 168 CLR 461, 571 (Gaudron J). Also, see *Love* (2020) 270 CLR 152 at 315-316 [453]-[454] (Edelman J).
[142] *Love* (2020) 270 CLR 152 at 308 [438] (Edelman J).
[143] See footnote 137 above
[144] This accords with the principle that it is not the subjective knowledge or intention of a particular person that dictates whether they fall within or without the aliens power: *Pochi* (1982) 151 CLR 101 at 111 (Gibbs CJ); *Te* (2002) 212 CLR 162 at 198-1999 [129] (Gummow J); *Singh* (2004) 222 CLR 322 at 386-388 [165]-[166]; 397-398 [197]-[198] (Gummow, Hayne and Heydon JJ); *Love* (2020) 270 CLR 152 at 247 [259] (Nettle J), 303-305 [428]-[430] (Edelman J). See also *Re Canavan* (2017) 263 CLR 284 at 307-309 [47]-[54] rejecting the argument that proof of knowledge of foreign citizenship is necessary for the application of s 44(i) of the Constitution.
[145] *Yorta Yorta* (2002) 214 CLR 422 at 443-444 [44]; *Love* (2020) 270 CLR 152 at 277 [201] (Keane J).
[146] *Love* (2020) 270 CLR 152 at 257 [277] (Nettle J).

accordance with their traditional law and custom.

80. The position of Elders is important in the structure of Aboriginal societies and part of the laws and customs that define those societies. But Elders have no sovereign functions and *Love* gives them none. Traditional law and custom necessarily includes laws and customs as to how the community is composed. This is no different to the recognition of native title rights and interests, which are equally an expression of the traditional laws and customs.

81. *Love* does not challenge the sovereignty of the polities of the Commonwealth, States and Territories; rather, *Love* acknowledges that the assertion of sovereignty by the Crown did not extinguish fundamental connections between Aboriginal inhabitants and the territory of Australia.

82. **(5) Workability:** *Love* is not unworkable. There are but a handful of non-alien non-citizens who have been identified since the decision. Whether or not it supplements a passport,[147] a passport is merely an administrative tool; its modern form is entirely statutory and it is not a matter of constitutional significance.

E.4 CULTURAL ADOPTION SHOULD NOT BE REACHED

83. The Court should not entertain the Appellant's arguments at AS [51]-[56]. Those arguments were never put to the primary judge, because the question of how the first limb of the tripartite test may apply in the context of cultural adoption had been removed into this Court at the time of the hearing below. After that removal, all of Mr Montgomery's evidence, save for his and his mother's affidavits, were admitted only for the fact of their existence, not for the truth of their content.[148] The trial judge made no findings on any of the evidence, since none were required.

84. AS [53] proceeds on the implicit premise that there is a pure question of law that this Court can decide, that is wholly independent of the evidence that Mr Montgomery had available but was not permitted to rely upon; indeed, independent of any evidence at all on the question in this Court. The argument involves: (1) 'biological descent' is essential

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[147] *Love* (2020) 270 CLR 152 at 226 [198] (Keane J). The holding of a passport can require 'complex inquiry' involving 'routine' error, see *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2)* [2020] FCA 843; (2020) 170 ALD 538 at [20]-[24], [137]-[138]. The official history, published for the Department of Foreign Affairs and Trade, evidences many complexities in the issue and administration of Australian passports: Jane Doulman and David Lee, *Every Assistance and Protection: A History of the Australian Passport* (2006).

[148] Reasons [23] **CRB 16**; *Coulton v Holcombe* (1986) 162 CLR 1 at 7-8 (Gibbs CJ, Wilson, Brennan and Dawson JJ); *O'Brien v Komesaroff* (1982) 150 CLR at 310, 319.

to the first limb of the tri-partite test; (2) 'biological descent' can never include adoption; and (3) 'biological descent' is measured by 'genes'. AS [54] urges the Court that it can impose these limitations upon the 'aliens' power, without pausing to enquire how these limitations may sit with other areas of the law, such as native title, where cultural adoption has been regularly deployed in identifying Aboriginality.

85. This premise, and the accompanying submission, cannot be sustained. If the role of cultural adoption in assessing Aboriginality is to be determined for the purpose of the 'aliens' power, it should be against a case where the parties have had the opportunity of a trial to provide a sound basis upon which to decide the question; and where the large implications for related areas of law can properly be considered. These essential exercises cannot be conducted within the confines of a removed appeal against *habeas.*

86. To identify but one point at which evidence and proper findings would be essential, AS [53] seeks to avoid the use of blood quotients by its appeal to "genes", as if that provides an incontrovertible objective and scientific basis to determine the question. But the Court has no evidence to prove that there is a genetic test for aboriginality. And there is material available as constitutional fact suggesting there may be no such test.[149] And even if there were shown to be such a test, there would need to be full argument as to whether it could be conclusive of non-alienage.[150] Suppose a person was the great grandchild of a person adopted by traditional custom and law by an Aboriginal community whose intervening forebears all identified as and were accepted as Aboriginal. It would be a nonsense for Australian constitutional law to render that person non-Aboriginal when every other area of Australian law would not do so.[151]

87. To identify but one point at which the implications for related areas of law would need to be considered, in native title law the courts have <u>not</u> embraced a narrow notion of

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[149] Lynn B Jorde and Stephan P Wooding, 'Genetic Variation, Classification and "Race"' (2004) 36(11) *Nature Genetics,* 28; J Gardiner-Garder, *The Definition of Aboriginality: Research Note 18*, 2000-01 (2000) Parliament of Australia, 1; see also the UNESCO studies which concluded that there is no group which constitutes a race ipso facto: *Tasmanian Dam Case* (1983) 158 CLR 1 at 243; Peter Wade, "Human nature and race", *Anthropological Theory* (2004) Vol 4, at 157-172.

[150] See Australian Law Reform Commission (**ALRC**) and Australian Health Ethics Committee of the National Health and Medical Research Council (**AHEC**) Joint Inquiry: ALRC 96 *Essentially Yours: The Protection of Human Genetic Information in Australia* 28 March 2003 (**Joint Inquiry**) [36.1]-[36.10]; and [36.41], cited by Bromberg J in *Eatock v Bolt* (2011) 197 FCR 261 at 300-301 [169]-[170]. Also see Joint Inquiry at [36.11]-[36.12], [36.56]-[36.70] and *Shaw v Wolf* (1998) 83 FCR 113 at 137.

[151] For example, in the criminal law, see *Stevenson v Yasso* [2006] 2 Qd R 150, 162-163 [38] (per McMurdo P), 173 [81] (per McPherson JA), Fryberg J agreeing at 189 [133]).

'biological descent' or of 'genes govern all'. This would need to be properly taken into context in an appropriate case. [152]

88. In summary, the Court should refuse to entertain AS [51]-[56] on the grounds that it would be both unfair to Mr Montgomery[153] and ultimately futile as the Court does not have the evidentiary material and full range of argument it needs to resolve it.

E.5 IF THE COURT DOES REACH CULTURAL ADOPTION?

89. It is difficult for Mr Montgomery to put a full submission if the Court reaches this stage. At a minimum, he would need to put before this Court, without limitation, all of the affidavit material which at trial was admitted only under limitation.

10 90. He would argue, at that point, that the evidence establishes that a profound feature of the traditional laws and customs of many Aboriginal societies, and certainly the one in issue in this case, is membership of the society can be established under traditional authority by adoption; and that blood quotients or genes do not determine the outer limits of membership of such societies. This proposition is expressed in compressed form but would require much unpacking and substantiation from the evidence.

91. He would further argue that the reference to 'biological descent' in *Mabo [No 2]* should be understood as a shorthand summary of the usual, but not exclusive, form of social formation, and as including *sub silentio* persons who form part of an Aboriginal society by adoption in accordance with the traditional laws and customs of that society.

20 Alternatively, the first limb of the tripartite test should be supplemented to recognise

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[152] Neither time nor space allows discussion of the many relevant authorities. They include: *Ward* (2000) 99 FCR 316 at 378-379 [232], 379 - 380 [233]-[235]; *De Rose v South Australia [No 1]*, (2003) 133 FCR 325 at 342 [54] (Wilcox, Sackville, Merkel JJ); *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, 448 [9], 449-459 [113]-[117]; *Akiba v Queensland (No 3)* (2010) 204 FCR 1 59-59 [182], 62-63 [196]-[201]; *Banjima People v Western Australia (No 2)* (2013) 305 ALR 1 at 97 [598]; *Narrier v Western Australia* [2016] FCA 1519, [301]; *Peterson on behalf of the Wunna Nyiyaparli People v Western Australia* [2016] FCA 1528 at [101]-[102]; *Smirke on behalf of the Jurruru People v State of Western Australia (No 2)* [2020] FCA 1728 at 225 [765]. See also *Webster* (2020) 277 FCR 38 at 46 – 47 [41] – [48] and Second Appellant's position on the issue in *Hirama* [2021] FCA 648 as recorded by the Court at [34]-[35].

[153] *O'Brien v Komesaroff* (1982) 150 CLR 310 at 319 (Mason J); *Water Board v Moustakas* (1988) 180 CLR 491 at 497 (Mason CJ, Wilson, Brennan and Dawson JJ); *Coulton v Holcombe* (1986) 162 CLR 1 at 7-8 (Gibbs CJ, Wilson, Brennan and Dawson JJ); *BQQ15 v Minister for Home Affairs* [2019] FCAFC 218 at [42]. Relevant additional factors are: legal representation at trial (*Sun v Minister for Immigration and Border Protection* (2016) 243 FCR 220 at 248 [92]); whether the issue was not raised below for some strategic reason (*Linkhill Pty Ltd v Director, Officer of the Fair Work Building Industry Inspectorate* (2015) 240 FCR 578 at 595 [70]); and whether the indulgence would give rise to prejudice to the respondent (*Iyer v Minister for Immigration and Multicultural Affairs* [2000] FCA 1788 at [62]). Every one of these barriers to the Court granting the indulgence sought by the Appellants exists here. Further, the Appellants' case is directly at odds with its case before the trial judge: see Ministers' trail submissions [2], [6], [39] and [48] **RBM** 980-981, 988 and 990: *University of Wollongong v Metwally [No 2]* (1985) 59 ALJR 481 at 483 (Gibbs CJ and Mason, Wilson, Brennan, Deane and Dawson JJ.)

expressly that a person customarily adopted in accordance with the traditional laws and customs of an Aboriginal society, and otherwise satisfying the balance of the test, is an Aboriginal for the purposes of s 51(xix) of the Constitution.

92. Mr Montgomery would then supplement his argument with the following points, in summary. *First*, the applicable principle, recognised by Australia in acceding to the Declaration on the Rights of Indigenous Peoples, is that "'Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions ..."[154]

93. *Second*, most if not all societies recognise some form of adoption or social incorporation. Thus, Roman law had highly developed rules under which adoption created a result in law in all respects akin to blood descent. Adoption conferred full participation of the adoptee in the status of the adopter.[155] Australian law recognises adoption, both under domestic law[156] and under foreign law,[157] as do Aboriginal and Torres Strait Islander societies,[158] and as recognised by statute.[159]

94. *Third,* as to how an Aboriginal community constitutes itself and determines its membership, there is no reason for imposing a requirement that the traditional laws and customs or the Aboriginal society concerned satisfy a "native title test" (that is, that the traditional laws and customs (and the society which generates and observes them) be traced substantially unbroken to a time before sovereignty). The respondent would adopt the analysis of Mortimer J in *Helmbright*[160] on this point. The reason that an Aboriginal normative system must have existed before sovereignty as a necessary prerequisite for native title to land is because such native title is a qualification on the radical title of the

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[154] United Nations Declaration on the Rights of Indigenous Peoples (UN doc A/RES/61/295, 13 September 2007) (supported by Australia, 3 April 2009) (**UNDRIP**), art 33(1).
[155] Each of "Descent (*origo*), manumission, election and adoption make a man a citizen (*civis*)" Code of Justinian, C 10. 40. 7, cited in P E Nygh, "The Reception of Domicil into English Private International Law", *Tasmanian University Law Review,* vol 1 (1961), p 555; Hugh Lindsay, "Adoption and Succession in Roman Law", *Newcastle Law Review*, vol 3 (1998), 57 – 81.
[156] Longstanding practices as to wardship of orphaned or abandoned children, as well as the regularization of *de facto* adoption, were Ccodified and systematized in eg *Adoption Act 1895* (NZ), ss 7, 12 (consolidated in *Infants Act 1908* (NZ)); *Adoption of Children Act 1896* (WA), ss 7, 8; *Child Welfare Act 1923* (NSW), s 127; *Adoption of Children Act 1926* (UK); *Adoption of Children Act 1928* (Vic); *Matrimonial Causes Act 1959* (Cth), s 4 'adopted', s 6; *Family Law Act 1975* (Cth), s 4 'adopted', 'child';
[157] *Re Pratt, Deceased* (1963) 80 WN(NSW) 1416 (McLelland CJ in Eq).
[158] As noted at footnote 154 above.
[159] *Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Act 2020* (Qld), recognising Torres Strait Islander custom ('Ailan Kastom' in kriol). As to Canadian First Nations see: see *Re Kitchooalik and Tucktoo* (1972) 28 DLR (3d) 483 (recognition of Inuit customary adoption); *Indian Act 1970* (Canada), R.S.C. 1970, c. I-6 (customary adoption).
[160] [2021] FCA 647.

Crown acquired at the time of sovereignty.[161] No such qualification is inherent in deciding that Aboriginals are non-aliens – there is no intersection of two sets of interests in land. Rather, there is a contemporary enquiry – the question 'who is an Aboriginal today' is to be answered by reference to current norms and customs of the Aboriginal community concerned. Proof of native title may be accepted as a gold standard of proof of Aboriginal identity, but it is not the sole standard of proof, nor should it be a minimum standard. As the Court stated in *Griffiths*, a defining feature of Aboriginality (attachment to the land, and cultural and religious responsibility for it) continues whether or not native title exists.[162]

10 95. *Fourth*, a logical application of the *ratio* in *Love* would hold as follows. Given the common law recognises that Indigenous laws and customs can confer on to people who are customarily adopted membership to an Aboriginal society and rights and duties with respect to land and waters from which they form the same powerful and spiritual connection to land and waters, it would be incongruous if the common law recognised traditional laws and customs but those people who, under those traditional laws and customs, are customarily adopted were considered 'aliens'.[163] So construing the first limb is also consistent with the focus by each of the majority in *Love* on the concept of indigeneity and connection to land in explaining the limit on s 51(xix) of the Constitution, as opposed to the concept of "race".[164]

20 96. *Fifth,* the Appellants' submissions (AS [55]) that recognising customary adoption in the tripartite test would create uncertainty in the scope of s 51(xix) and practical difficulties in the administration of the Act are undemonstrated, extreme and irrelevant.[165] The fact that the Commonwealth has voluntarily used the tripartite test for its own purposes since the 1970s[166] is enough to show that there are limited, if any, real practical difficulties that

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[161] *Yorta Yorta* (2002) 214 CLR 422 at 441 [37] –[38] (Gleeson CJ, Gummow and Hayne JJ).
[162] Attachment to the land, and cultural and religious responsibility for it) continue whether or not native title exists: *Griffiths* (2019) 269 CLR 1 at 105-106 [223] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ); see also 89 - 95 [168]-[184] as to the specific case, and 95 [187], [230] generally (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ; Gageler J agreeing at [240]; Edelman J agreeing at [253]); and [313]-[314] (Edelman J).
[163] *Love* (2020) 270 CLR 152 at 262 [298] (Gordon J), 253 - 254 [271]-[272] (Nettle J), 315 – 316 [454] (Edelman J);
[164] *Love* (2020) 270 CLR 152 at 190 [73] (Bell J), 245 – 246 [256] (Nettle J), 282 – 283 [370] (Edelman J); *Helmbright* [2021] FCA 647 at [171]-[210].
[165] The Constitution is not construed by reference to such hypotheticals: *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 380-381 [87]-[88]; *Egan v Willis* (1998) 195 CLR 424 at 505 [160]; *Grain Pool of WA v Commonwealth* (2000) 202 CLR 479 at 492 [16]; *Love* (2020) 270 CLT 152 at 316 [455].
[166] Lorna Lippmann, *Generations of Resistance; Aborigines Demand Justice,* 2nd ed. (Longman Cheshire. Melbourne, 1991) p 88; see also *Love* (2020) 270 CLR 152 at 192 [80], fn 167 (Bell J).

arise from that test. Proving descent by traditional law and custom is no less an objective criterion than proving strict biological descent and 'difficulty of proof is not a legitimate basis to hold that a resident member of an Aboriginal society can be regarded as an alien in the ordinary sense of the term'.[167]

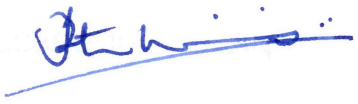
F. COSTS

97. Mr Montgomery is impecunious and his legal team operates pro bono (on a conditional costs basis). In circumstances where the Appellants raise new issues on appeal and use Mr Montgomery's matter as a vehicle to bring a test case before the Court in order to overturn Love, Mr Montgomery respectfully seeks an order that the Appellants pay his costs on a party-party basis, irrespective of the outcome of the proceeding. Specifically, Mr Montgomery opposes the relief sought by the Appellants in order 3 (as to the proceeding below) and, in the case of order 4, intends to seek his costs of the current proceeding).

PART VI: TIME ESTIMATE

98. The Respondent estimates that he will require approximately 3 hours for presentation of oral submissions.

Dated: ~~4 March 2022~~ 5 April 2022



…….
J T Gleeson SC
Banco Chambers
Tel: 02 8239 0200
clerk@banco.net.au

…….
P G Willis SC
Aickin Chambers
Tel: 03 9225 8446
pg_willis@vicbar.com.au

…….
M L L Albert
Castan Chambers
Tel: 03 9225 8265
matthew.albert@vicbar.com.au

…….
E R Tadros
Owen Dixon Chambers
Tel: 03 9225 6812
etadros@vicbar.com.au

Counsel for the respondent

[167] *Love* (2020) 270 CLR 152 at 258 [281] (Nettle J).

APPENDIX A TO THE SUBMISSIONS OF THE RESPONDENT

Without being in any way exhaustive, below is a list of current legislation recognising Aboriginal societies, Aboriginal heritage and cultural protection, the unique and spiritual connection of Aboriginal and Torres Strait Islanders to land and waters, land rights, and Indigenous rights.

No	Title	Provision(s)	Version
Commonwealth			
	Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)		Current Compilation
	Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)		Current, Compilation
	Native Title Act 1993 (Cth)		Current, Compilation
New South Wales			
	National Parks and Wildlife Act 1974 (NSW)	s 30K; Div 10	Current, Compilation
	Aboriginal Land Rights Act 1984 (NSW)		Current, Compilation
	Adoption Act 2000 (NSW)	s 4; Pt 2, Divs 2, 3	Current, Compilation
	Aboriginal Languages Act 2017 (NSW);		Current, Compilation
Northern Territory			

	Heritage Act 2011 (NT);		Current, Compilation
Queensland			
	Torres Strait Islander Land Act 1991 (Qld)		Current, Compilation
	Aboriginal Cultural Heritage Act 2003 (Qld)	s 5	Current, Compilation
	Torres Strait Islander Cultural Heritage Act 2003 (Qld)	ss 4, 5	Current, Compilation
	Human Rights Act 2019 (Qld)	s 28	Current, Compilation
	Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Act 2020 (Qld)		Current, Compilation
South Australia			
	Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981 (SA)		Current, Compilation
	Maralinga Tjarutja Land Rights Act 1984 (SA)		Current, Compilation
Tasmania			
	Aboriginal Lands Act 1995 (Tas)	No 98	Current, Compilation No. 98 1 July 2019 – present

Victoria			
	Constitution Act 1975 (Vic), s 1A(2)	s1A(2)	Current, Compilation No. 223, 17 March 2021 – present
	Aboriginal Heritage Act 2006 (Vic)		Current, Compilation No. 025, 1 July 2021 - present
	Charter of Human Rights and Responsibilities Act 2006 (Vic), s 19(2)	s19(2)	Current, Compilation No. 14, 6 April 2020 – present
	Traditional Owner Settlement Act 2010 (Vic)		Current, Compilation No. 25 1 December 2020 – present
	Yarra River Protection (Wilip-Gin Birrarung Murron) Act 2017 (Vic)		Current, Compilation No 008, 24 February 2022 – present
	Advancing the Treaty Process with Aboriginal Victorians Act 2018 (Vic)		Current, Compilation No. 001, 1 August 2018 - present
Western Australia			
	Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016 (WA)	ss 4, 5, sch 1	Current, Compilation No. 2, 6 June 2016- present

	Aboriginal Cultural Heritage Act 2021 (WA)	ss 4(2), 8, 9, 10	Current, Compilation No. 1, 23 December 2021 - present

ANNEXURE TO THE SUBMISSIONS OF THE RESPONDENT

Pursuant to paragraph 3 of the *Practice Direction No 1 of 2019,* the Respondent set below a list of the particular constitutional provisions and statutes referred to in their submissions.

No	Title	Provision(s)	Version
	Constitution	ss51(xix), (xxvi), 127	Current, Compilation No. 6, 29 July 1977 - present
	Evidence Act 1995 (Cth)	s140	Current Compilation
	Federal Court of Australia Act 1976 (Cth)	S24	Current Compilation
	Judiciary Act 1903 (Cth)	ss40, 78B	Current (Compilation No. 48, 1 September 2021 – present)
	Migration Act 1958 (Cth)	s189, 196	Current, Compilation No 152, 1 September 2021 – present
	See also legislation referred to in Appendix A.		