10 IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY No. B43 of 2018

BETWEEN: **DANIEL ALEXANDER LOVE**
Plaintiff

and

COMMONWEALTH OF AUSTRALIA
Defendant

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No. B64 of 2018

BETWEEN: **BRENDAN CRAIG THOMS**
Plaintiff

and

COMMONWEALTH OF AUSTRALIA
Defendant

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PLAINTIFFS' OUTLINE OF ORAL ARGUMENT FOR RESUMED HEARING

Part I: Publication on the internet

1. This outline of oral argument is suitable for publication on the internet.

Part II: Outline of propositions

The Court should receive Victoria's submissions

2. The Plaintiffs submit that the Court should receive Victoria's submissions. They were prepared in response to a s 78B notice issued by the Commonwealth.

Victoria's response

40 3. Victoria's submissions are complementary, in various respects, to the Plaintiffs' submissions (although they differ in respect of some matters of detail[1]). Essentially, the key difference between the Plaintiffs' and Victoria's positions is that the Plaintiffs do not consider it necessary for the Court to find that the bonds between Aboriginal societies and Australia are equivalent to the statutory concept of Australian citizenship.[2] The Plaintiffs' submission is that, *at its core*, the constitutional concept of alien in s 51(xix) cannot include Aboriginal Australians. The statutory concept of citizenship is not relevant to determining whether a person is beyond the reach of the aliens power.[3]

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[1] Plaintiff's Reply to the Intervener's Submissions (**PRIS**) (filed 29 November 2019) at [16].
[2] **PRIS** at [6], [7], [10] and [14].
[3] *Minister for Immigration and Multicultural Affairs; ex parte Te* (2002) 212 CLR 162 at 179; [52] (Gaudron J).

10 ***Response to Defendant's submissions***:

4. Proposition 1: The Commonwealth acknowledges that there is a constitutional limitation to the Commonwealth Parliament's power to designate people as 'aliens'.[4] It is for this Court to determine whether the Plaintiffs fall within the constitutional meaning of 'alien'.
5. The Commonwealth attempts to use dicta in *Singh v Commonwealth* (***Singh***)[5] to show the breadth of the 'aliens' power. ***Singh*** should be understood in the context of its facts. That case involved vastly different circumstances to the Plaintiffs' cases. In ***Singh***, the Court rejected Ms Singh's argument that the *jus soli* theory solely controlled who was an alien.[6]
6. The Plaintiffs have a many-layered connection with Australia. Each is born to an Australian citizen parent and each is the descendent of ancestors who were the original inhabitants of
20 Australia. Those original inhabitants of Australia were made British subjects, and therefore owed an allegiance to the Crown, as a result of Australia's settlement by Great Britain.
7. Proposition 2: The common law is not rigidly confined to cases that have previously considered s 51(xix). For hundreds of years prior to Federation the law on British subjecthood was 'permissive'. If a person was not a natural born subject under the *jus soli* theory, there were other pathways to subjecthood (such as *jus sanguinis*). The options were not binary.[7] The development of the common law is relevant to ascertain what 'alien' means. No case has decided whether an Aboriginal Australia, born outside Australia to an Australian citizen parent, is contemplated by the constitutional term 'alien' in section 51(xix). It is due to the unique factual scenario that arises in each of the Plaintiffs' cases
30 that recourse to the common law relevant to the role of Indigenous Australians in the Australian constitutional framework is permissible and necessary.
8. In interpreting the term 'alien', the Plaintiffs submit that weight ought to be given to the role of Aboriginal Australians as the First Peoples of what is now the Australian community. The Plaintiffs regard *Mabo (No 2)*[8] as providing an understanding of the history of Australia, including European settlement, and the imposition of the sovereignty of the British Crown that accords with the true facts of history. The construction of constitutions, and the development of the common law are evolving processes,[9] responding to changing social stimuli.

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[4] **DFRS** at [2].
[5] (2002) 222 CLR 322.
[6] ***Singh*** (2002) 222 CLR 322 at 332, [11] (Gleeson CJ).
[7] ***Singh*** (2002) 222 CLR 322 at 359-60, [82] (McHugh J) and 428, [303] to [304] (Callinan J).
[8] (1992) 175 CLR 1.
[9] ***Singh*** (2002) 222 CLR 322 at 334-45, [16]-[18] (Gleeson CJ).

9. Proposition 3: For the Court to answer the questions in the special case in the way that the Plaintiffs contend, the Court does not need to decide that any provision of the *Citizenship Act 2007* (Cth) or the *Migration Act 1958* (Cth) is invalid. If the Plaintiffs are not aliens, the detention and deportation power in s 189 of the *Migration Act 1958* (Cth) will simply not apply to the Plaintiffs.

10. The Plaintiffs submit that, on the Commonwealth's approach to ***Singh***, a person *can* simultaneously be both a citizen and an alien (within the constitutional meaning of that word). This is because the Commonwealth Parliament has the power to de-naturalise citizens and to deport and expel them from Australia, simply because it has decided to, once again, treat them as aliens.[10]

11. The existence of dual citizenship highlights the problematic nature of using dicta in ***Singh***, that allegiance to a foreign power is the criterion of alienage, as determinative.[11]

12. Propositions 5 and 6: contrary to the Commonwealth's submissions,[12] the Plaintiffs do not ask this Court to decide whether the Commonwealth Parliament could remove citizenship from Aboriginal Australians.

13. Aboriginal Australians such as the Plaintiffs have a strong connection to Australia. They do not '*belong to another place*'. Were the Plaintiffs to be aliens they would be stripped, by way of formal classification, of their connection to their ancestral country by being determined to be alien to Australia.

Dated: 5 December 2019

S J Keim SC K E Slack A J Hartnett

[10] *Meyer v Poynton* (1920) 27 CLR 436 at 440-41 (Starke J).
[11] See, for example, *Re Canavan* (2017) ALJR 1209.
[12] **DFRS** at [6].