

BETWEEN:

**DANIEL ALEXANDER LOVE and BRENDAN CRAIG THOMS**  
Plaintiffs

10 and

**COMMONWEALTH OF AUSTRALIA**  
Defendant

**PLAINTIFFS' REPLY TO THE INTERVENER'S SUBMISSIONS**

20 **Part I: Publication on the internet**

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

**Part II: Statement of issues**

2. These submissions respond to the submissions filed by the Attorney-General for the State of Victoria (the *Intervener*) on 22 November 2019 (the '**Intervener's Submissions**').

**Part III: Plaintiff's response to Attorney-General to the State of Victoria's submissions**

30 3. ***Intervener's argument:*** The Plaintiffs agree with paragraph [8] of Intervener's Submissions and note the basis upon which the Interveners have intervened as articulated in the Intervener's Submissions.<sup>1</sup> The Plaintiffs adopt paragraph [11] of the Intervener's Submissions. The submissions that the Intervener makes in paragraph [11], in particular that citizenship law is *not* determinative of whether a person meets the constitutional description of an 'alien', are broadly the submissions that are made by the Plaintiffs.<sup>2</sup> The Plaintiffs adopt the first sentence of paragraph [12] of the Intervener's Submissions but do not comment on the second sentence of the submissions. The Plaintiffs also adopt



<sup>1</sup> Intervener's Submissions (filed 22 November 2019) at [9] and [10].

<sup>2</sup> SCS (filed 2 April 2019) at [16] to [18] and [56] to [58]; Plaintiff's reply submissions (filed 26 April 2019) ('**PRS**') at [1] to [4]; Plaintiff's Reply to the Further Submissions of the Defendant (filed 22 November 2019) ('**PRFSD**') at [14].

paragraphs [13] and [14] of the Intervener's Submissions.

4. The theme of the Intervener's Submissions (at paragraph [15]) is broadly consistent with the underlying conclusion, developed in the Plaintiffs' submissions, that Aboriginal Australians occupy a special position in the Australian community that takes them outside the concept of 'alien' for constitutional purposes.<sup>3</sup> The Plaintiffs acknowledge the submissions that the Intervenor makes with respect to Victorian legislation but does not wish to be heard or express a view on the operation of any Victorian legislation.
5. The Plaintiffs' written submissions in response to Propositions 4 to 6 explain the way in which the common law has developed such that Aboriginal Australians cannot meet the description of 'alien' for the purposes of section 51(xix).<sup>4</sup> To the extent that the Intervener's Submissions reference developments in statutory law as relevant to determining how the law generally has adapted to recognise the special status of Aboriginal Australians in Australian law, the Plaintiffs agree that the Court can take such legislative developments into account.<sup>5</sup>
6. The Plaintiffs adopt the Intervener's Submissions in respect of the relationship that Aboriginal Australians have to lands and waters articulated in paragraph [16(a)] to [16(e)].<sup>6</sup> With respect to paragraph [17] of the Intervener's Submissions, the Plaintiffs do not consider it necessary for the Court to conclude that the '*bond between members of an aboriginal society and the land is ... equivalent in permanence, reciprocity and strength to the current tests under which an Australian citizen is not an alien*'.<sup>7</sup> The Plaintiffs maintain the submission that the statutory concept of citizenship does not determine whether the Plaintiffs are aliens for the purposes of section 51(xix).<sup>8</sup>

<sup>3</sup> See, for example, PRS at [14] to [17].

<sup>4</sup> PRFSD at [16] to [28].

<sup>5</sup> To reason by reference to principles laid down in statute is not inconsistent with the common law method. As Lord Diplock said in *Erven Warnink BV v J Townsend & Sons (Hull) Ltd* [1979] AC 731, 743 '[w]here over a period of years there can be discerned a steady trend in legislation which reflects the view of successive parliaments as to what the public interest demands in a particular field of law, development of the common law in that part of the same field which has been left to it ought to proceed upon a parallel rather than a diverging course'. See also *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 and *PGA v The Queen* (2012) 245 CLR 355.

<sup>6</sup> But, with respect to paragraph 16(f), the Plaintiffs repeat what they have said at [4] of these submissions regarding their position on Victorian legislation – check para number not changed in amendments.

<sup>7</sup> Otherwise, the Plaintiff adopts the Intervener's Submissions in respect of paragraphs [17(a)] to [17(c)].

<sup>8</sup> See SCS at [57]. (*Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162, 179; [53] 'the fact that [a person] is not an Australian citizen is irrelevant if he is not an alien'.)

7. The Plaintiffs adopt the Intervener's Submissions in respect of paragraphs [18] to [21]. As to paragraph [22], the Plaintiffs adopt the first and last sentence of the Intervener's submissions. The Plaintiffs accept that Aboriginal Australians are uniquely Australian in that they are '*a member of a society of persons which is only of, and only relating to, Australia*'. In respect of the second sentence of paragraph [22], because the Plaintiffs have emphasised that the statutory concept of citizenship is not determinative as to whether a person is capable of meeting the constitutional description of 'alien', the Plaintiffs' submission is that the Court does not need to conclude that the relationship between Aboriginal Australians and Australia is of the '*same nature and quality*' as the relationship between an Australian citizen and the Australian polity.
8. In respect of paragraph [23] of the Intervener's Submissions, the Plaintiffs repeat and rely on their submission that the mere fact that a person has allegiance to another country at birth, according to a foreign law, is of no assistance in determining who is sufficiently 'other' to be an 'alien' for section 51(xix).<sup>9</sup>
9. The Plaintiffs understand the submission that the Intervener makes at paragraph [24] of its submissions to be a statement that the constitutional term 'alien' should be taken not to comprehend people who are Aboriginal Australians. The Plaintiffs adopt that submission.
10. The Plaintiffs adopt paragraphs [25] and [26] of the Intervener's Submissions. In relation to paragraph [27], the Plaintiffs do not accept that the statutory concept of citizenship has any relevance in determining whether the person answers the constitutional description of an 'alien' in section 51(xix).
11. **Propositions 1 and 2:** The Plaintiffs adopt paragraphs [28] and [29] of the Intervener's Submissions.
12. **Proposition 3:** The Plaintiffs do not adopt the Intervener's Submissions at paragraphs [30] and [33] to [35]. The Plaintiffs refer the Court to the submissions made in response to the Defendant's Further Submissions in relation to proposition 3.<sup>10</sup> The Plaintiffs adopt paragraph [31] of the Intervener's Submissions. In respect of paragraph [32] of the

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<sup>9</sup> PRS at [5] to [6].

<sup>10</sup> PRFDS at [11] to [15].

Intervener's Submissions, the Plaintiffs' submission is that the Intervener's expression of the concept of '*belonging*' is one form of expressing the inherent and underlying characteristics that go to the difference between an 'alien' and a 'non-alien'

13. **Proposition 4:** The Plaintiffs adopt paragraphs [36] to [41] of the Intervener's Submissions. The Plaintiffs adopt paragraphs [42] and [43] of the Intervener's Submissions and, simply, note the references to Victorian legislation to the extent that they provide foundation for the Intervener's Submissions.<sup>11</sup>

14. The Plaintiffs adopt paragraphs [44] to [47] of the Intervener's Submissions but repeat the submission that the Court does not need to accept the Intervener's proposition, that  
10 '*belonging to land*', for Aboriginal Australians through Aboriginal law and custom, is equivalent to the formal bonds created by the statutory concept of citizenship, in order to answer the question posed in the special cases.

15. **Propositions 5 and 6:** The Plaintiffs broadly agree with the Intervener's Submissions at paragraphs [49] to [51]. The Plaintiffs note the Intervener's Submissions on the issue of the law of fiduciaries at paragraphs [52] to [54] and refers the Court to its written submissions on the topic in the submissions made by the Plaintiffs' in response to the further submissions of the Defendant.<sup>12</sup>

16. **Proposition 7:** The Plaintiffs note the conclusion expressed in the Intervener's Submissions at paragraph [55] and observe that their submissions differ in respect of some  
20 matters of detail in the Propositions put forward.

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<sup>11</sup> The Plaintiffs have indicated that they do not wish to be heard on the operation of Victorian legislation.  
<sup>12</sup> PRFSD at [25] to [28].