IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY Nos. B43 and B64 of 2018

BETWEEN:

DANIEL ALEXANDER LOVE and BRENDAN CRAIG THOMS
Plaintiffs

and

COMMONWEALTH OF AUSTRALIA
Defendant

PLAINTIFFS' REPLY TO THE DEFENDANT'S FURTHER SUBMISSIONS

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. The issues addressed in these submissions are those outlined in paragraph [3] of the Defendant's Further Submissions dated 8 November 2019 (**DFS**).

Part III: Section 78B notices

3. Further notices have been issued under section 78B of the *Judiciary Act 1903* (Cth).

Part IV: Plaintiff's argument in reply

Proposition 1: Section 51(xix) of the Constitution does not allow the Parliament to treat as an alien a person who cannot answer the description of an alien according to the "ordinary understanding" of that word

4. The Plaintiffs support Proposition 1.[1] The proposition is supported by authority.[2] As

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1 The etymology of 'alien' indicates belonging to another place: ***Nolan v Minister for Immigration and Ethnic Affairs*** (1988) 165 CLR 178, 183 ('***Nolan***'). Although the same passage in ***Nolan*** went on to equate 'belonging to another place' to 'a citizen or subject of a foreign state as a means of expressing a person's lack of relationship with a country', the frequent occurrence of dual nationality in the modern world indicates that citizenship of another state is a method that results in a number of false positives in indicating such a lack of connection with a particular country.

2 *Pochi v MacPhee* ('***Pochi***') (1982) 151 CLR 101, 109 (Gibbs CJ): 'Clearly, the Parliament cannot … expand the power under s 51(xix) to include persons who could not possibly answer the description of 'aliens' in the ordinary understanding of the word'. See paragraph [59] of the Special Case Submissions of the Plaintiff filed 2 April 2019 (**SCS**) and paragraphs [3]-[4] of the Plaintiff's Reply Submissions filed

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expressed by Gibbs CJ in the cited passage in ***Pochi***, it does not fall to the Parliament to determine who is an alien under s 51(xix) of the Constitution.[3]

Proposition 2: The ordinary understanding of an alien is informed by the common law of Australia

5. Proposition 2 accurately reflects the role that the common law of Australia plays as 'the ultimate constitutional foundation in Australia'.[4]

6. The Commonwealth's argument at paragraphs [6]-[11] of the DFS is tangential to the issues arising from the propositions raised by the Court for consideration and comment. The Court's construction of s 51(xix) in *Singh v Commonwealth of Australia* ('***Singh***'),[5] to address a different question of construction (namely, whether a child born in Australia to parents who were not Australians and whose connection with Australia at the time of their daughter's birth was best described as incidental was an alien for the purpose of s 51(xix))[6] is of little relevance to the propositions raised by the Court or the circumstances of this Special Case.

7. The Commonwealth misstates the law in one key respect.[7] By reference to the *jus soli*, alone,[8] which was the theory preferred by the common law in 1901,[9] the Plaintiffs would not have been regarded as Australian nationals. However, under the principle of *jus sanguinis*, which was, in 1901, a longstanding statutory modification to the common law, the Plaintiffs would have obtained the status of Australian nationals through their Australian parents.[10]

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26 April 2019 (**PRS**). The statement of the proposition by Gibbs CJ is confirmed by Gleeson CJ in ***Singh*** (2004) 222 CLR 322, 329; [5].

3 See also the acknowledgement of this by the Defendant at [13] of the DFS. Despite this acknowledgement, the Defendant advances a contrary proposition that the Parliament can change the meaning of the Constitutional provision, again, at [7] of the DFS.

4 *Wik Peoples v Queensland* (1996) 187 CLR 1, 182 (Gummow J).

5 (2004) 222 CLR 322.

6 The issue faced by the Court in ***Singh*** (2004) 222 CLR 322.

7 At [10] of the DFS, the Commonwealth states that both Plaintiffs would have been aliens under both the *jus soli* and *jus sanguinis* principles.

8 And ignoring their status as Indigenous Australians.

9 ***Singh*** (2004) 222 CLR 322, 340; [30] (Gleeson CJ).

10 'The contemporary legal position with which the founders were familiar' (the language of Callinan J) is set out in some detail in the PRS at [9]. The discussion draws on the following passages in ***Singh*** (2004) 222 CLR 322 to set out that legal position: 332; [10] and 350; [50] (Gleeson CJ), 359; [81]-[82] and 361-362; [86]-[89] (McHugh J), 429; [304] (Callinan J) and in ***Pochi*** (1982) 151 CLR 101, 107-108 (Gibbs

8. It is unhelpful, as the Defendant does,[11] to speak of the common law 'confining' the meaning of 'aliens' in s 51(xix).[12] It is also misleading to suggest[13] that Parliament has any role in determining the meaning of 'aliens' in s 51(xix). Parliament may grant privileges to persons who are Constitutional aliens.[14] It can also exercise 'negative powers' to remove those privileges from Constitutional aliens and authorise the Executive to detain and remove such persons from the country. Those negative powers cannot be exercised in respect of any person who is not a Constitutional alien, no matter what terminology Parliament uses. The meaning of 'alien' in s 51(xix) is, ultimately, a question of construction for the Court applying principles of statutory construction which are particularly adapted to construing constitutions that allow them to carry out the specialised role they play in allowing societies to evolve, while maintaining continuity between the past and present.[15]

9. The relevance of the common law of Australia in informing the ordinary understanding of an alien in the present case is not determinable by merely looking at decisions of the Court which dealt with circumstances and issues quite different from those raised by the circumstances here.[16] None of the past decisions have dealt with the proposition that Indigenous Australians may be aliens under s 51(xix). It is to deal with this very different element that the common law, with its appreciation of the role of Indigenous Australians in the Australian constitutional framework, has a particularly vibrant capacity to inform the ordinary understanding of an alien and assist the construction of s 51(xix).

10. The DFS ignore the core question before the Court. They are in error, for that reason, in asserting[17] that Proposition 2 is not capable of providing assistance in construing s. 51(xix) in this case.

Proposition 3: According to the common law, an alien is a person who does not have the

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CJ). The submission assumes that any modern application of the *jus sanguinis* principle does not limit the right to pass on one's national heritage by descent only to male persons.

11 In [8], [9] and [10] of the DFS.

12 The proposition is that the common law informs the ordinary understanding of the he word 'aliens'.

13 DFS, [7].

14 Including the statutory construct of citizenship: see s 35 *Citizenship Act 2007* (Cth) which provides for a person over 14 years of age to cease to be a citizen in certain circumstances. Section 35 was inserted by the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth).

15 ***Singh*** (2004) 222 CLR 322, 334-335; [16]-[18]. Further authorities are cited in the PRS at [14].

16 Including ***Singh*** (2004) 222 CLR 322.

17 DFS, [9].

permanent protection of and owe permanent allegiance to the Crown in right of Australia.

11. Proposition 3 is supported by authority and, it would seem, uncontroversial. The concept of 'alien' is feudal in origin, the concept of 'allegiance' having derived from the Gothic ancestors of the English people.[18] Holdsworth states that, in English law, it is the duty of allegiance, owed by a subject to the Crown, that differentiates the subject from the alien.[19] The obligations of a non-alien who owes allegiance are more than the obligation to obey the law. A resident alien, in contrast to the permanent allegiance of a subject, is said to owe local and temporary allegiance to the monarch.[20]

12. The relationship between sovereign power and the person who is a non-alien (that is, in Australia, the relationship between Crown and non-alien) is mutual. The Crown owes obligations to the non-alien.[21] There is some authority to indicate that the relationship between the Crown and a resident alien is also mutual and may extend beyond the time that the person resides in Australia.[22] There is no suggestion, however, that the relationship between the Crown and a resident alien is permanent. Indeed, while the British subject owed permanent allegiance to the Crown, the alien, if resident within the Kingdom, owed, at most, no more than local and temporary allegiance to the Crown.[23] *Calvin's Case*[24] held, inter alia, that allegiance to the sovereign is due by the law of nature and cannot be altered.[25]

13. These authorities establish the content of Proposition 3 as a correct expression of the common law as it relates to the meaning of 'alien'.

14. The DFS, at [12]-[18], address irrelevant topics and concepts. It suffices to note that the equivalence expressed[26] between lacking the statutory status of citizenship and, as a result,

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18 Blackstone, *Commentaries on the Laws of England* (1765), bk 1, ch 10, p 354.
19 Sir William Holdsworth, *A History of English Law,* 3rd ed (1944), vol 9, p. 72 cited in ***Singh*** (2004) 222 CLR 322, 386; [164] (Gummow, Hayne and Heydon JJ).
20 ***Singh*** (2004) 222 CLR 322, 387; [165] (Gummow, Hayne and Heydon JJ).
21 ***Singh*** (2004) 222 CLR 322, 387; [166] (Gummow, Hayne and Heydon JJ).
22 ***Singh*** (2004) 222 CLR 322, 388; [166] (Gummow, Hayne and Heydon JJ).
23 ***Singh*** (2004) 222 CLR 322, 388; [168] (Gummow, Hayne and Heydon JJ).
24 (1609) 7 Co Rep 1a [77 ER 377].
25 (1609) 7 Co Rep 1a, 25a [77 ER 377, 407] (cited in ***Singh*** (2004) 222 CLR 322, 389; [170] (Gummow, Hayne and Heydon JJ)).
26 DFS, [14].

carrying the Constitutional status of an alien is unprincipled and wrong.[27]

15. Proposition 3 accurately describes the state of the common law as it has developed, specifically, with respect to the meaning of 'alien' in s 51(xix). Foundation for it is found in the judgment of Gummow, Hayne and Heydon JJ in ***Singh*** at [200]. The Plaintiffs repeat and rely upon what is said in paragraph [65] of the SCS.

Proposition 4: The common law's recognition of customary native title logically entails the recognition of an Aboriginal society's laws and customs and in particular that society's authority to determine its own membership.

16. As a matter of logic, the recognition of customary native title must be premised on the
10 prior recognition of the laws and customs of the Indigenous groups within which the rights which constitute native title are created and maintained.[28] Rights can only exist in the social context which provides recognition of those rights.

17. The conclusion based on logic is endorsed by many of the discussions of native title in *Mabo v Queensland (No 2)* (***'Mabo (No 2)'***).[29] For example, Brennan J noted that the previous refusal to recognise native title depended on a discriminatory denigration of Indigenous inhabitants, their social organisation and their customs.[30] Brennan J also spoke of entrenching a discriminatory rule which, because of the supposed position on the scale

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27 This non-equivalence operates in both directions. A person who has been naturalised and become a citizen may, nonetheless, because she was and remains an alien, be stripped of citizenship. See ***Meyer v Poynton*** (1920) 27 CLR 436, 441. The Parliament has passed legislation to achieve this in the case of people designated as foreign fighters or terrorists. It is noticeable that such legislation is drafted to operate with regard to people with dual citizenship. This is consistent with dual citizens (those who owe allegiance to another power) being regarded as *still* having the status of alienage after becoming citizens. This applies the dictum about allegiance to another power at birth being determinative of alienage status from ***Singh*** (2004) 222 CLR 322, 400; [205] (Gummow, Hayne and Heydon JJ). (As is made clear at PRS [5]-[6], the Plaintiffs' argument in the Special Cases is that the dictum in ***Singh*** (2004) 222 CLR 322, 400; [205] which produces the anomalous result that Australians born in Australia to Australian citizens may still be Constitutional aliens was not necessary to the decision in ***Singh*** and should not be applied in future cases.) The *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) inserted section 35 into the *Australian Citizenship Act 2007* to provide that a person aged 14 years or older ceases to be an Australian citizen if: (a) the person is a national citizen of a country other than Australia; and (b) the person: (i) serves in the armed forces of a country at war with Australia; or (ii) fights for, or is in the service of, a declared terrorist organisation; and (c) the person's service or fighting occurs outside Australia.

28 Part of the changed circumstances of Australian society since 1901 is the understanding attained of the profound nature of Aboriginal customs and laws, particularly as they relate to land. See ***Millirrpum v Nabalco*** (1971) 171 FLR 141, 167.2 and ***Re Toohey; ex parte Meneling Station*** (1982) 158 CLR 327, 356.9, per Brennan J.

29 (1992) 175 CLR 1.

30 ***Mabo (No 2)*** (1992) 175 CLR 1, 40

of social organisation of the Indigenous inhabitants, denies them a right to occupy their traditional lands.[31] And Brennan J expressed the conclusion that, 'once it is accepted that indigenous inhabitants in occupation of a territory when sovereignty is acquired by the Crown are capable of enjoying proprietary interests in land … the rights and interests in land which they had heretofore enjoyed under the customs of their community are seen to be a burden on the radical title of the Crown'.[32] Each observation in respect of native title necessarily is premised upon the recognition of the customs of an Indigenous community in which those rights which make up the native title arise.[33]

18. The recognition of the ability of the Aboriginal society's authority to determine its own membership is, in logical terms, just as inherent in the recognition of native title as is the recognition of customs, generally.[34] For native title to exist, the customs must ordain that certain individuals or groups have rights to carry out certain activities on or in respect of particular land. For those customs to operate in that way, however, the society must, at a prior logical point, be able to determine that the individuals or groups involved are the individuals or groups capable of being granted those rights. If an Aboriginal group in which rights are enjoyed could not determine who were members of the group so as to be capable of holding and exercising such rights, the rights would cease to be rights. Rather, they would become the dividend of a chaotic struggle for dominance not dissimilar to Thomas Hobbes' nasty and brutish state of nature.[35]

19. The ability to determine membership is reflected in Brennan J's description of what has become known as the 'three-part test'. His Honour stated that membership of the Indigenous people depends on biological descent from the Indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among those people.[36] The description was framed for the purpose of recognising native title. While it is a logical construction, it functions as a useful, but not necessarily exclusive, evidentiary tool for determining whether a person is an Indigenous Australian and whether a person is a member of a

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31 ***Mabo (No 2)*** (1992) 175 CLR 1, 42.
32 ***Mabo (No 2)*** (1992) 175 CLR 1, 52.
33 See also Toohey J's observation in ***Mabo (No 2)*** (1992) 175 CLR 1, 187: 'There must, of course, be a society sufficiently organised to create and sustain rights and duties'.
34 It has been held that there is no simple dichotomy between traditional laws and customs that are connected to land and waters and those that are not: ***Rubibi v Western Australia (No 5)*** [2005] FCA 1025, [376].
35 Thomas Hobbes, *Leviathan*, (Oxford University Press, 1651, 1965 Reprint), part 1, chapter 13, p 96-97.
36 ***Mabo (No 2)*** (1992) 175 CLR 1, 70.

particular First Nations group.[37]

20. It follows that Proposition 4 is logically correct but is also supported by the foundational authority as to the content of the common law as it relates to native title and Indigenous Australians.

21. Most of what is submitted by the Commonwealth in relation to Proposition 4 is of no relevance to the propositions raised by the Court. The composition of a clan or group including whether a particular person receives recognition by particular 'elders' or 'other persons enjoying traditional authority' is already a question that is resolved by reference to Aboriginal customary laws and customs.[38]

10 ***Proposition 5: The common law must be taken to have comprehended a unique obligation of protection owed by the Crown to an Aboriginal society, requiring it to protect each member of that society.***

Proposition 6: Corresponding to the Crown's obligation of protection is the permanent allegiance which each member of an Aboriginal society owes to the Crown.

22. Central to Propositions 5 and 6 is a recognition that, upon the establishment of the first English settlement, the colonists brought the common law such that '[t]he common law became the common law of all subjects within the Colony who were equally entitled to the law's protection as subjects of the Crown'.[39] The DFS appear to assert, upon becoming British subjects, Indigenous Australians' role as persons who had cared for
20 the continent for up to 80,000 years was subsumed into the new status and the common law regarded Indigenous Australians as the same as every other person born in Australia.[40] The decision and reasoning in ***Mabo (No 2)*** show this not to be the case. The unique position of Indigenous Australians is illustrated by the circumstance that no Aboriginal people living at the time of settlement (including the Plaintiffs' Aboriginal ancestors) depended for their status as British subjects upon the doctrines of either *jus soli* or *jus sanguinis.* The Aboriginal people who inhabited Australia immediately prior

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37 As was pointed out in the PRS (at [30]), the usefulness of the evidentiary test must not be allowed to dominate reality. As we said, the last person standing in a massacre is no less Indigenous for having no other person to recognise her as such.

38 ***Mabo (No 2)*** (1992) 175 CLR 1, 59-60 (Brennan J). See also *Aplin on behalf of the Waanyi People v Queensland* [2010] FCA 625, [256] to [260] per Dowsett J.

39 ***Mabo (No 2)*** (1992) 175 CLR 1, 38 (Brennan J).

40 DFS, [43]-[44].

to European settlement obtained their status as British subjects[41] *because* they were the Indigenous inhabitants.[42] For that reason, Aboriginality was the crucial and central characteristic which transformed them into British subjects (and, therefore, non-aliens in their homelands).

23. The Commonwealth's submission, effectively, is that the grant of subjecthood to Aboriginal Australians was a 'once-and-for-all' act that had the effect of transforming those Aboriginal Australians present in the colonies into British subjects such that, from that point, further classification or distinction was unnecessary.[43] But the common law recognises that the unique position of Aboriginal Australians survived colonisation; survived federation; survived the emergence of Australia as a fully independent and self-governing country during the period from the time of the Balfour Declaration at the 1926 Imperial Conference to the passing of the *Australia Acts 1986* (UK); and gives rise, in particular circumstances, to native title rights. There is no better *example* of the common law's ability to adapt to recognise the special status of Aboriginal Australians than recognition that native title subsists in parts of Australia where it has not been destroyed.[44]

24. The common law duty of protection of the sovereign owed to each subject has been described in the following manner: 'But between the sovereign and the subject there is without comparison a higher and greater connexion: for as the subject oweth to the King his true and faithful ligeance and obedience, so the Sovereign is to govern and protect his subjects'.[45]

25. The provision of governance and protection of the Crown is of particular benefit in any

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41 Which meant that they 'owed allegiance to the Imperial sovereign entitled to such rights and privileges and subject to such liabilities as the common law and applicable statutes provided': ***Mabo (No 2)*** (1992) 175 CLR 1, 38 (Brennan J).

42 *Campbell v Hall* (1774) 1 Cowp 204, 208; [1774] ER 1045, 1047.

43 DFS, [43] and [44].

44 Brennan J said in ***Mabo (No 2)*** (1992) 175 CLR 1, 39 that 'It would be a curious doctrine to propound today that, when the benefit of the common law was first extended to Her Majesty's indigenous subjects in the Antipodes, its first fruits were to strip them of their right to occupy their ancestral lands'. It would be as anomalous for the construction of the Constitution in the shadow of the common law to strip Indigenous inhabitants of their connection with their ancestral country by making them aliens in that country. Indeed, it would be a very curious anomaly for a person who satisfies the three-part test (and, thus, has an established enduring connection to Australian lands and waters) and holds community communal native title to also be considered 'alien' to Australia, liable to expulsion and deportation, and, thus, withdrawal from that person of their entitlement potentially *forever* to exercise their rights of native title.

45 ***Calvin's Case*** (1608) 7 Co Rep 1; ER 378.

community to those at risk of exploitation and dispossession. The act of colonisation placed both Aboriginal members of the society and the social organisations of which they formed part in great jeopardy. The dispossession, devastation and degradation described by Deane and Gaudron JJ in ***Mabo (No 2)*** indicates that the protection and governance owed by the Crown was ineffective in practice.[46] Nonetheless, the promise of the sovereignty of the Crown and the common law is protection from such depredations. It is in return for that promise that, from the moment of sovereignty, Aboriginal Australians owed allegiance to the Crown. The obligations of protection and governance extended, in the strictures of the common law, to recognition of the customs and laws and the social groupings in which Aboriginal Australians were organised in order to preserve the rights to land that those social groupings granted and maintained. Just as the obligation of protection is of great importance, the mutual obligation of allegiance, in the case of Aboriginal Australians, runs deep. These mutual obligations, arising as they do from the common law's recognition of rights flowing from time immemorial, cannot be put asunder through the mere happenstance of an Aboriginal child being born overseas.

26. It is unnecessary, therefore, that the common law recognise the existence of a fiduciary duty between the Crown and Indigenous Australians. Authority is clear that the factors giving rise to a fiduciary duty are nowhere exhaustively defined.[47] Toohey J in ***Mabo (No 2)*** found that the power of the Crown to alienate land the subject of the traditional rights and interests of Indigenous Australians was sufficient to attract regulation by Equity to ensure that the position of the Crown is not abused. The fiduciary relationship was found to arise out of the power to extinguish native title.[48]

27. The power to alienate rights to land is but one aspect of the power of the sovereign of a colonised land. The making of laws about the nationality of Aboriginal Australians is another relevant aspect of that power. Equity has the potential to regulate actions by which Aboriginal Australians might, otherwise, be deprived of being full members of the polity which now governs the Australian continent and be physically excluded from their traditional homelands by forcible deportation. There is no reason in principle why

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46 ***Mabo (No 2)*** (1992) 175 CLR 1, 104.5, 105.3, 108.7 and 109.5.

47 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 68; 96-97; and 142 (cited by Toohey J in ***Mabo (No 2)*** (1992) 175 CLR 1, 200).

48 ***Mabo (No 2)*** (1992) 175 CLR 1, 203.

a fiduciary duty cannot be found to arise, although it is not necessary in these cases. In any event, were that to ensue, the common law, in following equity, would find that alien, in its ordinary meaning, does not include Aboriginal Australians.

28. It follows that the Commonwealth's argument that a fiduciary duty does not involve mutuality of obligation is of no significance.[49] The permanent allegiance to the Crown flows from being, and remaining, a full member of the Australian polity.

Proposition 7: It follows that a person whom an Aboriginal society has determined to be one of its members cannot answer the description of an alien according to the ordinary understanding of that word.

10 29. For the reasons outlined with respect to Propositions 1 to 6 above, the Plaintiffs adopt Proposition 7.

30. In response to the Commonwealth's reliance on *Kartinyeri v The Commonwealth* (***'Kartinyeri'***),[50] the Plaintiffs repeat and rely on the submissions made orally at the hearing held on 8 May 2019.[51] Gaudron J's observation must be understood in the context of other comments that her Honour had made on the nature of citizenship, namely, that it is a wholly statutory concept.[52]

31. Further, her Honour's quote in ***Kartinyeri*** was merely an example proffered of how the so-called 'race power' in s 51(xxiv) could not be used as a valid basis to support a law depriving people of a particular racial group of their citizenship. The case had nothing to
20 do with the scope of Commonwealth Parliament's power in s 51(xix). Plainly, her Honour was not observing that Aboriginality was irrelevant to alienage.

32. The concerns expressed by the Commonwealth at [49] are alarmist and exaggerated. A conclusion that a person who meets the 'three-part test' of Aboriginality cannot answer the description of an alien according to the ordinary understanding of that word does not involve the recognition by the common law of some parallel sovereignty status of Aboriginal Australians. In practical terms, if the Court made findings in accordance with

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49 DFS, [18] and [42].
50 (1998) 195 CLR 337, 366; [40].
51 Transcript of hearing held 8 May 2019, L1524 to L1595.
52 Her Honour said as much in *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'.

Propositions 1 to 7, the Commonwealth Parliament would simply lack capacity to authorise the expulsion or deportation of Aboriginal Australians from Australia (and to exercise any incidental powers, such as confining the person to immigration detention). Further, each of the concerns raised by the Commonwealth are of no consequence for the following reasons.

33. **First**, most Aboriginal Australians are Australian citizens within the meaning of the *Australian Citizenship Act 2007* (Cth), in any event, having been born in Australia and born to at least one Australian citizen or permanent resident parent. The Commonwealth Parliament has already exercised a legislative choice not to treat such persons as aliens (regardless of whether it has an entitlement to do so).[53]

34. **Second**, even if some Aboriginal Australians are not Australian citizens at birth, many will choose to become citizens (for example, Mr Love's sister).[54] Exercising that choice statutorily immunises those Aboriginal Australians from detention and deportation or exclusion. But, that protection is not absolute. They would be subject to general laws permitting citizens (who were also aliens) to be stripped of citizenship and the benefits that attend that status.[55]

35. **Third**, a finding that the Plaintiffs are not aliens would not 'impair the proper administration of'[56] the *Australian Citizenship Act 2007* (Cth) and the *Migration Act 1958* (Cth). Neither an alien nor a non-alien is exempt from the requirement to establish, at a point of entry, to a border officer, their identity and their lawful right to enter and remain in Australia. Even a non-alien Australian citizen would find it near impossible to enter Australia without a valid right of entry.[57] The immigration power[58] permits the exclusion

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53 Examples being people owing allegiance (pursuant to foreign law) to other countries because their (mainly non-Indigenous) parents or grandparents were nationals of an overseas country. (As is made clear at PRS [5]-[6], the Plaintiffs argument in the Special Case is that the dictum in ***Singh*** (2004) 222 CLR 322, 400; [205] which produces the anomalous result that Australians born in Australia to Australian citizens may be Constitutional aliens was not necessary to the decision in ***Singh*** and should not be applied in future cases.)

54 Mr Love Special Case, [23(f)].

55 While s 35 of the *Australian Citizenship Act 2007* (Cth) and related provisions are directed at particular quite restricted circumstances involving conduct said to antagonistic to Australian interests, the power to deport aliens may be exercised by statutes which do not require justification or cause to be shown. The draconian and untrammelled nature of the aliens power is articulated by reference to authority at [20]-[22] of the SCS.

56 DFS at [49].

57 The quarantine power, s 51(ix) permits detention at the border in the case of infectious diseases for purposes of quarantine.

58 *Constitution* s 51(xxvii).

of non-aliens who are not part of the Australian community.[59] Any putative issues relating to a person's status as an alien arises only when it becomes necessary to determine whether the Commonwealth has power to deport or expel the person from Australia.

36. **Fourth**, 'problems at the border'[60] are unlikely to arise with respect to identifying whether a particular person is beyond the reach of the aliens power. Aside from unlawful maritime arrivals, the number of individuals likely to present at a point-of-entry without evidence of some lawful entitlement to enter would be very rare. If it ever did occur, such an issue is not fundamentally different to a departmental officer deciding questions of fact in other migration contexts (such as whether a person is a refugee because the person has a 'well-founded fear of persecution').

37. **Fifth**, the 'inevitability' of litigation directed at whether the *Migration Act 1958* (Cth) can validly apply to a person who purports to be Aboriginal is not a reason to avoid giving proper meaning to the word 'alien' in s 51(xix). The Commonwealth appears to be concerned that people may attempt to make specious claims of Aboriginality to defeat the operation of the *Migration Act 1958* (Cth).[61] To the extent that that truly is a risk, it is one that can be resolved at an administrative level or by a court.[62] If the Executive or the Parliament were concerned about courts dealing with issues that require the determination of factual issues through the receipt of evidence[63] in the context of the limited jurisdiction courts have to review migration decisions due to the operation of part 8 of the *Migration Act 1958* (Cth), amendments can be made to the *Australian Citizenship Act 2007* (Cth) providing for a pathway to citizenship (on the basis of being an Australian Aboriginal) and amendments can be made to the *Migration Act 1958* (Cth) providing for merits review in the Administrative Appeals Tribunal in the remaining cases where a factual dispute arises.

38. None of these perceived problems are insurmountable or outweigh the need to give proper meaning to the word 'alien' in s 51(xix).

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59 ***Potter v Minahan*** (1908) 7 CLR 277, 288-289 (Griffith CJ).

60 DFS at [49].

61 It is hard to see any circumstance in which this would be a proper basis to construe a constitutional power differently to what, otherwise, would be its ordinary meaning.

62 Which appears to be impliedly acknowledged at DFS, [37].

63 A task with which courts have, historically, been familiar.

Conclusion

39. Aboriginal Australians are not 'alien' to Australia. They never have been. Their inhabitation of Australia pre-dated European settlement by some 80,000 years. Aboriginal Australians obtained their *initial* grant of British subjecthood status *because* they were the Indigenous inhabitants of Australia at the time of European settlement. Although the constitutional concept of 'alien' is based on conceptions of 'allegiance', an understanding of that concept based *solely* on its feudal underpinnings and divorced from the history of Australian settlement and the connection of Aboriginal people to Australian land cannot alone be determinative.

10 40. The common law recognises the unique position which Aboriginal Australians occupy as the original inhabitants of Australia. That unique position has given rise to the ability to hold land in the form of native title and ought, similarly, to give rise to recognition of their non-alien status under the Constitution.

Part V: Orders sought

41. For the reasons outlined in the SCS, the PRS, oral submissions made to the Court on 8 May 2019 and herein, the Plaintiffs submit that the answers to the questions in each of the Special Cases should be: (1) 'No'; and, (2) 'the Defendant'.

Part VI: Oral argument

42. The Plaintiffs require 30 minutes to reply to the oral submissions of the Commonwealth.

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Dated: 22 November 2019

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