HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

NO S192 OF 2021

BETWEEN: **MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS**

First Appellant

MINISTER FOR HOME AFFAIRS

Second Appellant

AND: **SHAYNE PAUL MONTGOMERY**

Respondent

SUBMISSIONS OF APPELLANTS AND ATTORNEY GENERAL FOR THE COMMONWEALTH (INTERVENING)

Filed on behalf of the Appellants and Attorney General for the Commonwealth (intervening)

PART I PUBLICATION

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

PART II ISSUES

2. On 29 November 2021, Keane J made orders removing into this Court the Appellants' appeal from orders made by SC Derrington J that required the Respondent to be released from immigration detention. The central issue in the appeal is whether her Honour erred in concluding that the Respondent's detention was not authorised and required by s 189 of the *Migration Act 1958* (Cth) (**Migration Act**), notwithstanding the undisputed facts that the Respondent is not an Australian citizen and does not hold a visa. The learned primary judge was persuaded that *Love v Commonwealth* (2020) 270 CLR 152 (***Love***) had the consequence that s 189 authorised and required the Respondent's detention only if the officer who detained him reasonably suspected that he was not an "Aboriginal Australian"[1] according to the tripartite test in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (***Mabo (No 2)***). While the detaining officer subjectively held such a suspicion, the primary judge held that that suspicion was not reasonable, notwithstanding the absence of any evidence that the Respondent satisfied the first limb of the tripartite test.

3. Against that background, the following questions arise:

   a) Should *Love* be overruled? (**Ground 1(a)**)

   b) If *Love* is not overruled:

      i. in the absence of evidence that the Respondent is biologically descended from the Munanjali people (or, alternatively, from any Aboriginal or Torres Strait Islander person), should the primary judge have concluded that s 189 applied to him in accordance with its terms? (**Ground (1)(b)**)

      ii. further or alternatively, even if s 189 validly applies only to a person who is reasonably suspected of being an alien, did the primary judge err in concluding that the detaining officer's suspicion that the Respondent was an alien was not reasonable? (**Ground 2**)

   c) Does this Court have jurisdiction to hear an appeal from the grant of a writ of habeas corpus, an order in the nature of habeas corpus or an order that the applicant be

[1] This expression is used where referring to the terminology adopted in *Love*. The Appellants otherwise adopt the preferred terminology of "Aboriginal and Torres Strait Islander" persons.

released from detention forthwith (together, **habeas**) removed from the Full Federal Court? (**Notice of objection to competency**)

PART III NOTICE OF CONSTITUTIONAL ISSUE

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

PART IV AUTHORISED REPORT

5. The decision appealed from is *Montgomery v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1423 (CRB 5) and the associated judgment in respect of costs, [2021] FCA 1444 (CRB 58). Neither judgment is reported.

PART V FACTS

6. The Respondent was born on 18 December 1981 in Auckland, New Zealand: CRB 17, [26]. He is a citizen of New Zealand: CRB 10, [1]. He arrived in Australia on 11 August 1997, aged 15, and was granted a Class TY Subclass 444 Special Category (Temporary) Visa: CRB 10, [1].

7. The Respondent's biological mother is Australian. His biological father is from the Ngapuhi tribe of the Maori people of New Zealand: CRB 23, [53(d)].

8. On 8 March 2018, the Respondent was sentenced to 14 months' imprisonment for an offence of aggravated burglary and commit offence in dwelling: CRB 17, [29]. On 10 July 2018, while the Respondent was incarcerated, a delegate of the Second Appellant (the **Minister**) cancelled the Respondent's visa as was required by s 501(3A) of the Migration Act: CRB 17, [30]. On 12 July 2018, the Respondent requested a revocation of the cancellation of the visa: CRB 17, [31].

9. On 21 February 2019, immediately following his release from criminal custody, the Respondent was taken into immigration detention: CRB 10, [3], 17, [29]. There then followed a series of exchanges in which the Department requested, and the Respondent provided, further information regarding his revocation application: CRB 17-19, [32]-[43].

10. On 5 May 2020, the Respondent filed an application in the Federal Court seeking mandamus requiring the determination of the revocation application: CRB 19, [44]. On 7 May 2020, the Minister determined not to revoke the cancellation: CRB 19, [44]. The application in the Federal Court was then amended to seek review of that non-revocation decision (CRB 11, [8]), and also to seek habeas and a declaration that the Respondent is

not an "alien" within the meaning of s 51(xix) because he is an Aboriginal person: CRB 11, [12].

11. The Respondent's claim for habeas rested on the proposition that s 189 of the Migration Act did not authorise his detention because "he is a Mununjali man and does not need to have a biological Aboriginal ancestor to be Aboriginal according to the traditional laws and customs of the Mununjali people": CRB 10, [4]-[5]. In response to that claim, the Appellants accepted that the Respondent identifies as an Aboriginal person, and that following a process of cultural adoption he had been recognised as a Mununjali man by persons enjoying traditional authority amongst those people: CRB 10, [4]. Nevertheless, the Appellants did not accept that the Respondent satisfies the tripartite test in *Love*, because he is not biologically descended from any Aboriginal or Torres Strait Islander person (Mununjali or otherwise): CRB 10, [4]; 23, [53(v), (w)]. Specifically, the detaining officer was not satisfied that the Respondent met the first limb of the tripartite test, her understanding being that a person "must show biological descent and therefore adoption is not sufficient to satisfy the first limb": CRB 28, [59(2)].

12. On 15 November 2021, the primary judge granted habeas (for reasons published on 19 November 2021). The Minister filed a notice of appeal on 25 November 2021, and that appeal was then removed into this Court. The Respondent has objected to the competency of the appeal. The Appellants will address that objection in reply.

PART VI ARGUMENT

A. *LOVE* SHOULD BE OVERRULED (Ground 1(a))

(i) Leave to re-open is not required

13. Leave is not required to re-open *Love* because, notwithstanding Bell J's statement in *Love* at [81], no *ratio decidendi* emerges from the reasons of the members of the majority.

14. The *ratio decidendi* of a case is a statement of principle which, applied to the material facts, is sufficient to explain the result in the case.[2] The rules concerning the identification of *ratio* are as follows. *First*, dissenting opinions are to be ignored.[3] *Secondly*, a *ratio*

[2] Walker, *Oxford Companion to Law* (1980) (entry on 'ratio decidendi'); Sir Rupert Cross and J W Harris, *Precedent in English Law* (4th ed, 1991) (**Cross and Harris**) at 49, 72.

[3] *Federation Insurance Ltd v Wasson* (1987) 163 CLR 303 at 314 (Mason CJ, Wilson, Dawson and Toohey JJ); *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 563 [112] (Gaudron, McHugh and Gummow); Cross and Harris at 91-92.

reflects the reasoning of a majority of the court as a whole, and not simply that of a majority of the majority of judges.[4] *Thirdly*, for the purpose of identifying a *ratio*, any reasoning that is not necessary to an individual judge's decision is ignored. Reasoning is "necessary" for these purposes if it is an actual step in the reasoning to the ultimate conclusion adopted by the judge,[5] notwithstanding that the issue might have been decided the same way for reasons narrower than those in fact relied upon.[6]

15. Applying the first rule, for the purposes of determining whether *Love* has a *ratio,* the dissenting judgments of Kiefel CJ, Gageler and Keane JJ are to be ignored. Applying the second and third rules, the question is whether there is any legal proposition that is common to *all four* of the other Justices that, when applied to the facts, is sufficient to explain the result in the case. Apparently recognising the difficulty identifying a *ratio* in light of the divergent reasoning of the majority, Bell J recorded at [81] that the members of the majority had authorised her to say that they each agreed that "Aboriginal Australians" (understood according to the tripartite test in *Mabo (No 2)*) are not within the reach of the power conferred by s 51(xix). Her Honour described the difference between the members of the majority with respect to Mr Love as "about proof, not principle". Plainly enough, however, that characterisation of the differences between the reasons of the majority cannot obviate the need to give careful attention to the reasons themselves.

16. Upon inspection of those reasons, it is apparent that there is a fundamental difference between the analysis of Bell, Gordon and Edelman JJ on the one hand, and Nettle J on the other, with respect to the meaning of the third limb of the tripartite test. Justice Nettle understood the third limb to require recognition as a member of an Aboriginal society that has remained "continuously united in and by its acknowledgment and observance of laws and customs deriving from before the Crown's acquisition of sovereignty over the territory, including the laws and customs which allocate authority to elders and other persons to decide questions of membership of the society".[7] That proposition was essential to his Honour's reasons, the existence of such a traditional society providing the

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4 *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 (***Ex parte Te***) at [86] (McHugh J); *Victoria v Commonwealth* (1971) 122 CLR 353 at 382 (Barwick CJ).

5 *Bristol-Myers Squibb Co v F H Faulding & Co Ltd* (2000) 97 FCR 524 at [148]-[156], [160] (Finkelstein J); Cross and Harris at 49, 72; Justice Stephen Gageler and Brendan Lim, "Collective Irrationality and the Doctrine of Precedent" (2014) 38 *Melbourne University Law Review* 525 (**Gageler and Lim**) at 545-546.

6 *Deakin v Webb* (1904) 1 CLR 585 at 604-605 (Griffith CJ); Cross and Harris at 58-59.

7 *Love* (2020) 270 CLR 152 at [278]; see also [284], [287].

basis for the "unique obligation of protection owed by the Crown to the society" and the reciprocal "permanent allegiance" owed by members of the society on which his Honour founded his ultimate conclusion that "Aboriginal Australians" who were recognised as members of such a society could not be aliens.[8] Thus, for Nettle J, the third limb of the tripartite test could be satisfied *only* upon proof of recognition of the person's membership *by persons having authority under laws and customs observed since before the Crown's acquisition of sovereignty*.[9] Justice Nettle recognised that this meant only a subset of Aboriginal and Torres Strait Islander persons cannot be treated as aliens.[10] By contrast, the judgments of the other members of the majority do not support, and are generally inconsistent with, that interpretation of the third limb.[11]

17. The tripartite test is the means by which the majority in *Love* held that the class of persons who are "non-aliens" is defined. The difference identified above means there was no consistent reasoning amongst the majority as to the definition of that class. The significance of the difference is demonstrated by the result in *Love*, where on the same set of agreed facts Bell, Edelman and Gordon JJ held that Mr Love satisfied the tripartite test, while Nettle J held that the question of Mr Love's status had to be remitted for determination. The order for remittal demonstrates the significance of the difference in the reasoning when identifying the facts that were "material" to the application of the proposition of law set out in [81], there being no majority support for the view that the facts upon which Bell, Edelman and Gordon JJ relied were sufficient.[12] That demonstrates that the difference was not as to what *had been* proved in respect of Mr Love, but rather as to what *had to be* proved in order to be a member of the class of "non-alien".

18. The end result is the same as that which existed following *Re Patterson; Ex parte Taylor*.[13] In that case, the Court divided 4:3, with the majority agreeing that there was a category

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8 *Love* (2020) 270 CLR 152 at [278]-[280], [284].

9 See *Chetcuti v Commonwealth* (2020) 95 ALJR 1 at [39], where Nettle J summarised how *Love* should be "properly understood", in terms that reflect his Honour's reasoning, but not that of other members of the majority.

10 *Love* (2020) 270 CLR 152 at [282].

11 *Love* (2020) 270 CLR 152 at [76] (Bell J), [289]-[292], [366]-[368], [371] (Gordon J), [451] (Edelman J).

12 Walker, *Oxford Companion to Law* (1980) (entry on 'ratio decidendi'), stating that "a ratio must be discovered by determining what facts were deemed material to the decision and what proposition of law justified that decision on these material facts"; *Chetcuti v Commonwealth* (2020) 95 ALJR 1 at [28] (Nettle J); cf *Helmbright v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2)* [2021] FCA 647 (***Helmbright***) at [107]-[108] (Mortimer J).

13 (2001) 207 CLR 391 (***Re Patterson***).

of non-citizen non-alien, but disagreeing as to the criteria that defined the persons within that category.[14] The result was that the "reasoning of none of the majority Justices had the support of four of the seven Justices"[15] and no *ratio* could be extracted from it in respect of s 51(xix). On that basis, the Court in *Shaw*[16] held that *Re Patterson* was ineffective to overrule *Nolan v Minister for Immigration and Ethnic Affairs*.[17] Similarly here, the differences in the way the majority in *Love* defined the class of non-citizen non-aliens mean that that judgment does not constrain the Court in the determination of this appeal.

(ii) Alternatively, to the extent necessary, leave to re-open should be granted

19. In the alternative, leave is sought to re-open *Love*. There is no "definite rule" as to when the Court will reconsider a previous decision,[18] and no requirement that the previous decision be shown to be "manifestly" or "clearly" wrong.[19] Instead, the Court undertakes an evaluative exercise of a number of factors.[20] For the following reasons, those factors weigh heavily in favour of granting leave to re-open *Love*.

20. *First,* there are material differences between the reasoning of members of the majority.[21] Those differences are not limited to those concerning the meaning of the third limb of the tripartite test that are identified above. Instead, the majority advanced fundamentally different reasons as to *why* certain persons are within the class of non-alien. Justice Bell focused on the fact that some Aboriginal and Torres Strait Islander persons have a special connection to their *traditional* lands or waters, which her Honour held meant that they "belong" to Australia in such a way that they cannot be "aliens".[22] Adopting a wider approach, and positing a link of a kind quite different to that recognised in the native title context, Gordon and Edelman JJ held that Aboriginal and Torres Strait Islander persons

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14 See *Ex parte Te* (2002) 212 CLR 162 at [86] (McHugh J), summarising the divergent reasons of the majority.
15 *Ex parte Te* (2002) 212 CLR 162 at [86] (McHugh J); see also at [136] (Gummow J, with whom Hayne J agreed at [211]), [19] (Gleeson CJ). See also *Shaw v Minister for Immigration and Ethnic Affairs* (2003) 218 CLR 28 (***Shaw***) at [35]-[39] (Gleeson CJ, Gummow and Hayne JJ; Heydon J agreeing).
16 (2003) 218 CLR 28 at [36]-[37] (Gleeson CJ, Gummow and Hayne JJ; Heydon J agreeing).
17 (1988) 165 CLR 178 (***Nolan***).
18 *Wurridjal v Commonwealth* (2009) 237 CLR 309 (***Wurridjal***) at [67], [69] (French CJ).
19 *Wurridjal* (2009) 237 CLR 309 at [70] (French CJ); Thompson SC and Durand, *Overruling Constitutional Precedent* (2021) 95 ALJ 139 at 145.
20 Those factors usually being identified by reference to *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 (***John***) at 438.
21 *John* (1989) 166 CLR 417 at 438; *Jones v Bartlett* (2000) 205 CLR 166 at [207] (Gummow and Hayne JJ), and see also at [233]-[235] (Kirby J).
22 *Love* (2020) 270 CLR 152 at [73]-[74] (Bell J).

have an historical and spiritual connection to the land and waters of Australia *generally,* which similarly meant that they "belonged" to Australia and could not be "aliens".[23] By contrast, Nettle J did not focus on connections to land and waters (whether general or particular). Instead, in his Honour's view (which was not supported by any other member of the majority), some Aboriginal and Torres Strait Islander persons "have so strong a claim to the permanent protection of – and thus so plainly owe allegiance to – the Crown in right of Australia that their classification as aliens lies beyond the ambit of the ordinary understanding of the word."[24] The differences within the reasoning of the majority were therefore stark.

21. *Secondly,* the majority's approach to the relevance of status as an Aboriginal person for the reach of s 51(xix) was entirely novel. It was not carefully worked out in a succession of cases.[25] It did not form part of a "definite stream of authority".[26] To the contrary, by creating a *sui generis* limitation on s 51(xix) that has the consequence that some Aboriginal persons are non-citizen non-aliens, the majority undermined the previously settled understanding of the relationship between citizenship and alienage.

22. *Thirdly,* as explained further below, there are substantial difficulties or uncertainties[27] arising from the decision. They relate both to the *content* of the test to identify persons who are non-aliens (including because of Nettle J's narrower conception of the content of the third limb) and to the *practical administration* of the test (ie how officers involved in the day-to-day administration of the Act should respond when non-citizens assert that they meet the tripartite test). Uncertainties also exist as to whether any (and, if so, which) parts of the Act can validly apply even to persons who are accepted to be non-aliens.

23. *Fourthly,* those difficulties or uncertainties arise in the context of a fundamental provision of the Constitution and involve a question of vital constitutional importance[28] relating to

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[23] *Love* (2020) 270 CLR 152 at [301]-[302], [333]-[335], [347]-[348] (Gordon J); [447]-[451] (Edelman J).
[24] *Love* (2020) 270 CLR 152 at [252] (Nettle J). See also at [272].
[25] *Wurridjal* (2009) 237 CLR 309 at [69] (French CJ), citing *John* (1989) 166 CLR 417 at 438-439. See also *Shaw* (2003) 218 CLR 28 at [39] (Gleeson CJ, Gummow and Hayne JJ), noting that *Re Patterson* did not "rest on a principal carefully worked out in a significant succession of decisions", "inconvenience" flowed from the decision, and the Minister had moved "as quickly as may be in this Court" to obtain a reconsideration of it.
[26] *Wurridjal* (2009) 237 CLR 309 at [67], [68] (French CJ), citing *Queensland v Commonwealth ("Second Territory Senators' Case")* (1977) 139 CLR 585 (***Second Territory Senators' Case***) at 630 (Aickin J).
[27] See *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at [114] (Gaudron, McHugh and Gummow JJ).
[28] *Wurridjal* (2009) 237 CLR 309 [68] (French CJ), citing *Second Territory Senators Case* (1977) 139 CLR 585 at 630 (Aickin J); see also *Stevens v Head* (1993) 176 CLR 433 at 462-463 (Deane J).

a central "attribute of sovereignty":[29] the power to determine who is a member of the Australian body politic.

24. *Finally*, the decision in *Love* has not been independently acted upon in a way that militates against consideration.[30] By the time of the hearing of these proceedings, it will have stood for a little over two years. In that time, there is nothing to suggest that a significant number of persons who satisfy the tripartite test, but who are *not* Australian citizens, have acted in reliance on the decision, or indeed that anyone else has done so.

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(iii) *General principles concerning* s *51(xix)*

25. Section 51(xix) of the Constitution relevantly confers upon the Commonwealth Parliament legislative power with respect to "aliens". However, for the purpose of identifying the class comprising "aliens", the Constitution did not "commit Australia to uncompromising adherence"[31] to either of the two leading theories prevailing at the time of Federation which, respectively, attributed controlling importance to place of birth (*jus soli*) or descent (*jus sanguinis*).[32] Instead, recognising that at that time the concept of alienage did not have an "established and immutable legal meaning",[33] the Constitution assigned to Parliament itself the central role in defining that class. Thus, it is the "settled understanding"[34] of s 51(xix) that it has two aspects, the first of which is the power to define the circumstances in which a person will have the legal status of "alienage"[35] (or, as sometimes expressed, the power to determine who will be admitted to formal membership of the Australian body politic[36]). That aspect of the power extends, at least,

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29 *Love* (2020) 270 CLR 152 at [167] (Keane J); see also [6], [14] (Kiefel CJ); [130], [138] (Gageler J) [138]; [404] (Edelman J) (describing the right to exclude or expel aliens as an "inherent and inalienable right of every sovereign and independent nation", citing *Fong Yue Ting v United States* 149 US 698 at 711 (1893)); *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at [92] (Nettle J).

30 *Wurridjal* (2009) 237 CLR 309 [69] (French CJ), citing *John* (1989) 166 CLR 417 at 438-439 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

31 *Koroitamana v Commonwealth* (2006) 227 CLR 31 (***Koroitamana***) at [9] (Gleeson CJ and Heydon J).

32 *Singh v Commonwealth* (2004) 222 CLR 322 (***Singh***) at [30] (Gleeson CJ), [81] (McHugh J), [183] (Gummow, Hayne and Heydon JJ), [250]-[251] (Kirby J), [300] (Callinan J); *Koroitamana* (2006) 227 CLR 31 at [9] (Gleeson CJ and Heydon J), [62] (Kirby J); *Love* (2020) 270 CLR 152 at [6]-[7] (Kiefel CJ), [167] (Keane J).

33 *Koroitamana* (2006) 227 CLR 31 at [9] (Gleeson CJ and Heydon J), citing *Singh* (2004) 222 CLR 322 at [30] (Gleeson CJ), [190] (Gummow, Hayne and Heydon JJ), [252] (Kirby J).

34 *Chetcuti v Commonwealth* (2021) 95 ALJR 704 (***Chetcuti***) at [12] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

35 *Chetcuti* (2021) 95 ALJR 704 at [12] (Kiefel CJ, Gageler, Keane and Gleeson JJ); *Shaw* (2003) 218 CLR 28 at [2] (Gleeson CJ, Gummow and Hayne JJ, with whom Heydon J agreed at [190]); *Singh* (2004) 222 CLR 322 at [4] (Gleeson CJ), [116] (McHugh J); *Koroitamana* (2006) 227 CLR 31 at [11] (Gleeson CJ and Heydon J) and [28] (Gummow, Hayne and Crennan JJ); *Love* (2020) 270 CLR 152 at [5] (Kiefel CJ), [83]-[86], [90], [94] (Gageler J), [166] (Keane J), [236] (Nettle J), [326] (Gordon J).

36 *Love* (2020) 270 CLR 152 at [62]-[63] (Bell J), [94] (Gageler J), and see also (implicitly) [18], [33] (Kiefel CJ), [177] (Keane J), [398] (Gordon J), [395], [438] (Edelman J); *Ex parte Te* (2002) 212 CLR 162 at [24],

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to allowing Parliament to select or adapt one, both or a mixture of the two leading theories – place of birth or descent – as the applicable criteria for membership.[37] It also extends to allowing Parliament to exclude foreign citizens from membership, and thereby to treat them as aliens.[38] (The second aspect of the power conferred by s 51(xix) is to make laws with respect to persons who have the legal status of alienage, but that aspect is not in question in this appeal.)

26. Recognition of the first aspect of the aliens power has the necessary consequence that, subject only to the qualification in the next paragraph, an "alien" is no more and no less than a person who has not been admitted to formal membership of the community that constitutes the Australian body politic according to the prevailing test for membership prescribed by law. The persons who hold the status of "alien" can be identified *only* by reference to that prevailing test (which, while originally a common law test, has long been governed by legislation supported by the first aspect of s 51(xix)). They therefore cannot be identified, as a matter of constitutional fact,[39] by the direct application of the "ordinary meaning" of alien. Since 2 April 1984, the Migration Act has relied upon the first aspect of s 51(xix) to treat "all non-citizens as aliens".[40] For that reason, while "citizenship" is a statutory concept,[41] it is a statutory concept with constitutional significance, because under the prevailing test for membership the class of "aliens" to whom the second aspect of s 51(xix) applies comprises all persons who do not hold statutory citizenship.

27. The qualification referred to above on the first aspect of the aliens power is that identified by Gibbs CJ in *Pochi v Macphee* (***Pochi***): "the Parliament cannot, simply by giving its own definition of 'alien', 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".[42] While the existence of this qualification is undoubted, it is important to

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[39] (Gleeson CJ); *Koroitamana* (2006) 227 CLR 31 at [11] (Gleeson CJ and Heydon J); *Nolan* (1988) 165 CLR 178 at 189 (Gaudron J).

[37] *Koroitamana* (2006) 227 CLR 31 at [9] (Gleeson CJ and Heydon J), [50] (Gummow, Hayne and Crennan JJ), [62] (Kirby J). See also *Love* (2020) 270 CLR 152 at [7] (Kiefel CJ), [100] (Gageler J), [167] (Keane J); *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439 (***Ex parte Ame***) at [115] (Kirby J).

[38] *Ex parte Ame* (2005) 222 CLR 439 at [35] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ); *Singh* (2004) 222 CLR 322 at [32] (Gleeson CJ), [200], [205] (Gummow, Hayne and Heydon JJ).

[39] *Love* (2020) 270 CLR 152 at [88] (Gageler J).

[40] *Chetcuti* (2021) 95 ALJR 704 at [11] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

[41] Eg *Chetcuti* (2021) 95 ALJR 704 at [112] (Steward J); *Love* (2020) 270 CLR 152 at [305] (Gordon J), [432] (Edelman J).

[42] (1982) 151 CLR 101 at 109. See also *Ex parte Te* (2002) 212 CLR 162 at [31], [39] (Gleeson CJ), [159] (Kirby J); *Love* (2020) 270 CLR 152 at [7] (Kiefel CJ); [50], [64] (Bell J); [168] (Keane J), [236], [244] (Nettle J); [326] (Gordon J), [433] (Edelman J).

emphasise that it operates as a *limit* on Parliament's power under the *first* aspect identified above. The terms of that limit recognise that there is a range of available criteria for "alienage" from which Parliament can select, and that the criteria actually selected by the Parliament will be determinative provided Parliament does not select a characteristic or characteristics that on *no possible view* could identify an "alien" according to the ordinary understanding of the word. The *Pochi* qualification therefore does not provide any warrant for the Court to substitute a particular meaning of the term "alien" *in place of* Parliament's definition. The ordinary understanding of "alien" is relevant only to the extent that the *range of possible meanings* encompassed by that understanding marks the limit on the first aspect of s 51(xix).

28. If Parliament selects as a criterion for "alienage" a matter that was relevant under the common law, it plainly cannot be said to be treating as aliens persons "who could not possibly answer the description". For that reason, birth outside Australia is obviously a permissible criterion (that being the reason the Respondent was not an Australian citizen from birth). To use the common law in that way to illustrate the possible meanings of "alien" is not, however, to suggest that the common law with respect to alienage *confines* the first aspect of s 51(xix). That it does not do so is established by *Singh*,[43] where the Court held that it was open to Parliament to treat a person born in Australia as an "alien" despite the fact that such a person would not have been an alien under a common law rule that had existed for more than four hundred years.[44] The Court so held on the basis that, even for a person born in Australia, "owing obligations (allegiance) to a sovereign power other than the sovereign power in question (here Australia)"[45] was sufficient to bring the person within the reach of the first aspect of s 51(xix) (although Parliament may then elect *not* to treat all foreign citizens as "aliens", as it has done by permitting dual foreign and Australian citizenship). Given that the common law specifically concerning alienage does not confine the first aspect of the aliens power, there is no basis to conclude that the common law concerning a different issue (ie the persons who may qualify as a native title holders) somehow constrains that power.

29. The result is that, reflecting Australia's status as an independent nation, s 51(xix)

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43 (2004) 222 CLR 322.
44 *Calvin's Case* (1608) 7 Co Rep 1a; 77 ER 377.
45 *Singh* (2004) 222 CLR 322 at [200], [205] (Gummow, Hayne and Heydon JJ); see also [30], [32] (Gleeson CJ) to a similar effect. See also *Ex parte Ame* (2005) 222 CLR 439 at [35] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ); *Chetcuti* (2021) 95 ALJR 704 at [105] (Steward J).

empowers the Parliament to define the criteria for membership of the Australian body politic, including by reference to a person's place of birth, descent or foreign nationality. In accordance with settled principles of constitutional interpretation, that power is "wide"[46] and must be construed "with all the generality which the words used admit".[47] As Nettle J put it in *Love,* "as a general proposition, there is no difficulty in describing a child who is born outside Australia and who is a citizen of a foreign country as an 'alien' within the ordinary understanding of that word".[48] The Respondent, of course, has both those characteristics. Applying well settled principles, Parliament was therefore entitled to treat him as an alien.

30. Alternatively, if s 51(xix) directs attention to the fact that a person is not a "subject of" – ie a person owing permanent allegiance to – the sovereign of Australia (as was suggested by Steward J in *Chetcuti*[49]) then it was likewise open to Parliament to treat the Respondent as an alien. Unlike Mr Chetcuti, the Respondent has never owed permanent allegiance to the Queen of Australia. By reason of his birth in New Zealand (outside the dominions of the Queen of Australia) and his New Zealand citizenship, he owes, and has always owed, permanent allegiance to the Queen of New Zealand.

31. The question that arises is whether there should be a *sui generis* exception to the settled principles summarised above for those persons who satisfy the tripartite test. For the reasons set out below, the Court should not follow the majority's reasoning in *Love* that there is such an exception. The rules governing membership of the political community of Australia are the same for everyone.

(iv) The suggested* sui generis *exception

32. The majority in *Love* held that Parliament has no power to treat a person who satisfies the tripartite test as an "alien", irrespective of circumstances that would permit any other person to be treated as an alien. That conclusion should not be accepted.

<u>The "ordinary meaning" of "alien"</u>

33. Justices Bell, Gordon and Edelman each grounded their analysis in what their Honours

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[46] *Koroitamana* (2006) 227 CLR 31 at [11] (Gleeson CJ and Heydon J).
[47] *Singh* (2004) 222 CLR 322 at [155] (Gummow, Hayne and Heydon JJ) citing *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 at [16] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); see also *Love* (2020) 270 CLR 152 at [131] (Gageler J), [168] (Keane J), [236], [244] (Nettle J).
[48] *Love* (2020) 270 CLR 152 at [254]; also [19] (Kiefel CJ) and [147] (Keane J).
[49] *Chetcuti* (2021) 95 ALJR 704 at [105], [112] (Steward J).

considered to be the ordinary meaning of the word "alien". They identified this as being a "foreigner", an "outsider" or a person who "belongs to another".[50] Their Honours reasoned that "Aboriginal Australians", by virtue of their spiritual connection with the land and waters of Australia, could not possibly fall within those concepts.

34. In light of the principles outlined at paragraphs [27]-[29] above, it is respectfully submitted that to reason in that way involved error. The reasoning proceeds upon the basis that the word "alien" has an "intrinsic"[51] or "essential"[52] meaning. But not all words have such a meaning (as opposed to a *range* of available meanings).[53] The concept of "alien" is not as linguistically determinate as a "lighthouse"; it is not capable of being defined by reference to certain essential features. The majority's attempts to identify an "essential meaning" – by reference to the concepts of "foreigner", "outsider" or "belonging" – illustrate the problem, as they convey no more about the concept of "alienage" than the word "alien" itself. They are statements of a conclusion about the formal legal relationship between a person and the body politic, "rather than a premise upon which the relationship may be founded".[54]

35. The very existence of the first aspect of s 51(xix) – the power to determine the criteria by which status as an alien is determined – is "wholly inconsistent with the notion that a person's status as an alien or non-alien falls to be determined independently of the exercise of the power as a question of constitutional fact".[55] While s 51(vii), for example, confers a power to make laws with respect to buildings that are *in fact* lighthouses, s 51(xix) is not a power to make laws with respect to people who are *in fact* aliens as identified by the direct application of what is presumed to be the "essential" or "ordinary" meaning of that word. It is the fact that s 51(xix) is a power to legislate with respect to the very criteria for alienage[56] that explains why, in the context of s 51(xix), the principle

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50 *Love* (2020) 270 CLR 152 at [74] (Bell J), [246] (Nettle J), [296], [301]-[302], [333], [335] (Gordon J), [393]-[395], [398], [403], [437] (Edelman J).

51 *Love* (2020) 270 CLR 152 at [302] (Gordon J).

52 *Love* (2020) 270 CLR 152 at [392], [399], [437], [467] (Edelman J).

53 See the extensive literature discussed in Simon Evans, "The meaning of Constitutional Terms: Essential Features, Family Resemblance and Theory-Based Approaches" (2006) 29(3) *University of New South Wales Law Journal* 207.

54 *Love* (2020) 270 CLR 152 at [33] (Kiefel CJ).

55 *Love* (2020) 270 CLR 152 at [88] (Gageler J).

56 See Peter Gerangelos, "Reflections upon Constitutional Interpretation and the Aliens Power: *Love v Commonwealth*" (2021) 95 ALJ 109 (**Gerangelos**) at 113. Compare also the concept of "marriage" in s 51(xxxi), as defined in *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 at [33] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), which incorporates the operation of law into the definition.

from the *Communist Party Case*[57] goes no further than the *Pochi* qualification.[58]

36. The *Pochi* qualification does not support the majority in *Love* because one *possible* understanding of the word "alien" is that it includes persons who were born overseas, who are foreign citizens, and who are not Australian citizens *even if they satisfy the tripartite test*. The very fact that the Court divided 4:3 in *Love* proves that point. That being so, the *Pochi* qualification provides no support for the holding in *Love* that all persons who satisfy the tripartite test, *as a class*, are *necessarily* non-aliens. The majority's error in finding otherwise resulted from focusing exclusively on "what is said to take a person *outside* [the] reach of [s 51(xix)]", rather than on "what it is that gives a person the status" of alienage.[59]

37. The class of persons that may fall within the term "Aboriginal Australians" is not a homogenous or undifferentiated class. To the extent that some persons within that class have a connection *only* with Australia (having been born in Australia to Australian parents and not being foreign citizens), they have always been either British subjects or Australian citizens under the generally applicable law,[60] and they therefore are not aliens. To the extent, however, that an Aboriginal person's individual circumstances mean that they also have connections with other countries (including by reason of being born overseas, or by being subjects or citizens of other countries), there is no reason why their constitutional status must be the same as Aboriginal persons with no such connections.

38. The majority's conclusion that persons who satisfy the tripartite test cannot be aliens (irrespective of any circumstance that would allow any other person to be treated as an alien) was not grounded in the text of s 51(xix). In effect, it reads into s 51(xix) the words "except Aboriginal Australians".[61] That sits unhappily with the result of the 1967 referendum, for it would imply into s 51(xix) of the Constitution a qualification similar to that which was expressly removed from ss 51(xxvi) and 127 by the 1967 referendum.[62]

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57 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 262-263.
58 *Love* (2020) 270 CLR 152 at [88] (Gageler J); cf at [329] (Gordon J); Gerangelos at 113.
59 *Singh* (2004) 222 CLR 322 at [200] (Gummow, Hayne and Heydon JJ) (emphasis in original).
60 See paragraph 44 below.
61 *Love* (2020) 270 CLR 152 at [126], [133] (Gageler J). See also at [31] (Kiefel CJ); [177] (Keane J).
62 *Love* (2020) 270 CLR 152 at [44] (Kiefel CJ), [126] (Gageler J), [181]-[182] (Keane J).

Connection to land and waters as opposed to Australian body politic

39. For Bell, Gordon and Edelman JJ, "Aboriginal Australians" cannot be people who do not "belong" to Australia because of their historical and spiritual connection to the land and waters of Australia.[63] Rather than focusing upon whether an Aboriginal person has a connection to their traditional lands and waters, Gordon and Edelman JJ asserted the existence of a spiritual connection between Aboriginal persons and the land and waters of *Australia as a whole*. Thus, Edelman J referred to "the general spiritual and cultural connection that Aboriginal people have had with the land of Australia for tens of thousands of years",[64] while Gordon J referred to the relationship between the "Indigenous peoples of Australia" and "the land and waters that now make up the territory of Australia".[65]

40. The difficulty with this reasoning is that, although the majority adopted the tripartite test from native title law, it is fundamental to native title law in Australia since *Mabo (No 2)*[66] that the connection between Aboriginal persons and their land and waters is a connection held by *distinct groups* of Aboriginal people to *particular* land and waters arising from their traditional laws, customs and beliefs.[67] Indeed, the connection may exist even *to the exclusion* of other groups of Aboriginal people, which is "difficult to square with the underlying unity of common customary connection with the continental land mass".[68]

41. Justices Gordon and Edelman likely focused upon the lands and waters of *Australia as a whole* because they recognised that not all Aboriginal persons could show a connection to *particular* land and waters. As Gordon J acknowledged, "who has the necessary and sufficient connection with land or waters can be determined *only* in accordance with, and by reference to, traditional laws and customs".[69] Like native title rights, the continuation of such laws and customs may be affected by matters such as how European settlement

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63 *Love* (2020) 270 CLR 152 at [52], [73]-[74] (Bell J), [301]-[302], [333]-[335], [347]-[348] (Gordon J); [447]-[451] (Edelman J).

64 *Love* (2020) 270 CLR 152 at [450]. See also [451] (Edelman J), referring to a connection "Aboriginal people have *generally* with the lands of Australia" (italics added).

65 *Love* (2020) 270 CLR 152 at [289]. See also at [277] (Nettle J) ("an Aboriginal society's connection to country is not dependent on the identification of any legal title in respect of particular land or waters").

66 *Mabo (No 2)* (1992) 175 CLR 1 at 70 (Brennan J); see also *Love* (2021) 95 ALJR 704 at [192] (Keane J).

67 *Love* (2020) 270 CLR 152 at [9], [22], [30] (Kiefel CJ); [192], [194], [207]-[208] (Keane J). See also *Native Title Act 1993* (Cth), s 223(1); *Western Australia v Ward* (2003) 213 CLR 1 at [14] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

68 *Love* (2020) 270 CLR 152 at [207] (Keane J).

69 *Love* (2020) 270 CLR 152 at [339] (emphasis added).

and "dispossession" has affected particular groups.[70] Nevertheless, in seeking to overcome that difficulty, the effect is to produce a fundamental misalignment between the majority's reliance on a spiritual connection to land and waters (which, where it exists under native title law, invariably relates to *particular* lands and waters) and the class of Aboriginal persons ultimately held to be non-aliens. The misalignment arises because a person may satisfy the tripartite test even if that person lacks any traditional or spiritual connection to any particular land and waters under native title law.[71] The class of persons that the majority held to be non-aliens therefore extends beyond the rationale that motivated the recognition of the class.

42. Further, even putting the above difficulty to one side, it does not follow from the existence of a spiritual connection between Aboriginal persons and the land that those persons have a special relationship with the body politic known as the "Commonwealth of Australia".[72] That body politic was formed, as the Preamble to the Constitution recites, when certain *people* "agreed to unite in one indissoluble Federal Commonwealth". Thus, the relevant relationship is a relationship between persons,[73] not between a person and an *area of land and waters*. The two are importantly distinct. A relationship to *land and waters* gives rise to proprietary rights and, in the case of Aboriginal persons, may also reflect profound spiritual connections. By contrast, a relationship to a *body politic* gives rise to such rights and obligations as depend upon membership of that body politic.[74]

43. While there is a "territorial dimension" to a body politic,[75] the fact that Aboriginal persons may have a special connection with particular territory within Australia does not, in itself, say anything about their relationship with the Australian body politic.[76] Indeed, the traditional and spiritual connection between Aboriginal persons and their lands and waters is entirely indifferent to the Australian body politic. That can be illustrated by

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[70] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at [83] (Gleeson CJ, Gummow and Hayne JJ), [113] (Kirby and Gaudron JJ); *Risk v Northern Territory* [2006] FCA 404 at [812], [820], [938]; see also [530], [554], [665] (Mansfield J).

[71] In *Mabo (No 2)* the existence of such a connection was identified as a *separate and additional* requirement to demonstrate native title, over and above satisfaction of the tripartite test: *Mabo (No 2)* (1992) 175 CLR 1 at 70, points 6 and 7.

[72] See *Love* (2020) 270 CLR 152 at [31] (Kiefel CJ), [128] (Gageler J), [192]-[195], [213] (Keane J).

[73] See also *Davis v Commonwealth* (1988) 166 CLR 79 at 110 (Brennan J).

[74] See, eg, *Singh* (2004) 222 CLR 322 at [163]-[166], [170]-[172], [190], [198], [200] (Gummow, Hayne and Heydon JJ).

[75] *Love* (2020) 270 CLR 152 at [348] (Gordon J), [438] (Edelman J), citing Montevideo Convention on the Rights and Duties of States (1933) art 1.

[76] *Love* (2020) 270 CLR 152 at [193] (Keane J).

observing that the relevant traditional and spiritual connections existed long before the acquisition of British sovereignty,[77] would have been the same even if different colonies had decided to federate (with resultant differences in the territory of Australia), and would continue unaffected even if the Australian body politic ceased to exist.

44. The development of the law in *Love* was not necessary in order to recognise Aboriginal and Torres Strait Islander persons as full members of the Australian body politic. To the contrary, from the acquisition of sovereignty over Australia by the United Kingdom, the common law recognised reciprocal rights and obligations between the Crown and all Aboriginal persons then in Australia, or who were subsequently born in Australia (who in both cases automatically became British subjects).[78] That status did not derive from any rights or interests in land or waters that existed under the traditional laws and customs of any Aboriginal society. Instead, it derived from the common law rules that were applicable to everyone.[79] Accordingly, while the overwhelming majority of Aboriginal persons obviously were not aliens at the time of Federation (and are not now aliens), that is the result of generally applicable common law (and now statutory) rules. The effect of those rules is that Aboriginal persons (like any other persons) whose individual circumstances are such that they did not automatically become Australian citizens upon their birth, and who never subsequently acquired Australian citizenship (including as a result of a deliberate choice not to do so), are aliens. Of course, persons in that situation will almost invariably be citizens of another country. As a matter of ordinary language, citizens of another country can and do "belong to another",[80] whether or not they have a close spiritual connection to the land and waters of some particular part of Australia.[81] It therefore cannot be said that Aboriginal persons in that situation "cannot possibly" be aliens on the ordinary meaning of the word, so as to engage the *Pochi* limit.

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77 See *Love* (2020) 270 CLR 152 at [195] (Keane J).

78 For the position of Aboriginal persons living in Australia at the time the Crown acquired sovereignty see *Mabo (No 2)* (1992) 175 CLR 1 at 38, fn 93 (Brennan J, Mason CJ and McHugh J agreeing), 182 (Toohey J); *Campbell v Hall* (1774) ER 1045 at 1047. For the position of Aboriginal persons born thereafter, see Opinion by Professor Geoffrey Sawer dated 26 July 1961 (reproduced in Appendix III to the Report from the Select Committee on Voting Rights of Aborigines, Part One, 26 July 1961, Vol 2); *Calvin's Case* (1608) 7 Co Rep 1a [77 ER 377].

79 *Love* (2020) 270 CLR 152 at [9] (Kiefel CJ); [104]-[105], [110] (Gageler J); [160]-[162] (Keane J).

80 *Nolan* (1988) 165 CLR 178 at 183, stating that "as a matter of etymology, 'alien', from the Latin alienus through old French, means belonging to another person or place … [T]he word means, as a matter of ordinary language, 'nothing more than a citizen or subject of a foreign state".

81 Cf *Love* (2020) 270 CLR 152 at [74] (Bell J) ("an Aboriginal Australian cannot be said to belong to another place"); [246] (Nettle J); [296], [301]-[302], [333], [335] (Gordon J) (eg "the meaning…was, and remains, anchored in the concept of 'belong[ing] to another'").

Implicit conferral of political sovereignty on Aboriginal societies

45. Upon the Crown acquiring sovereignty over Australia, Aboriginal persons were legally entitled only to "such rights and privileges and subject to such liabilities as the common law and applicable statutes provided".[82] They did not retain any residual sovereignty over the territory of Australia.[83] As Mason CJ put it, "*Mabo (No 2)* is entirely at odds with the notion that sovereignty adverse to the Crown resides in the Aboriginal people of Australia".[84] *Love* implicitly challenges that state of affairs, because it makes the question whether some people are members of the Australian body politic dependent on whether they have been recognised as members of an Aboriginal society. Such recognition may be accorded liberally with respect to persons who hold only a distant connection to Australia,[85] and may include persons who are ineligible for membership of the Australian body politic pursuant to generally applicable laws. In those ways, the majority's reasoning in *Love* would "concede to a non-constitutional and non-representative non-legally-accountable sub-national group a constitutional capacity greater than that conferred on any State parliament";[86] that is, authority to determine whether a person can be excluded from the Australian body politic.

Permanent allegiance

46. Justice Nettle held that Aboriginal Australians "have so strong a claim to the permanent protection of – and thus so plainly owe allegiance to – the Crown in right of Australia that their classification as aliens lies beyond the ambit of the ordinary understanding of the word".[87] There are two reasons why that reasoning should not be accepted. *First*, it elides two different issues, being: (i) the criteria for assessing whether a person is an alien or non-alien; and (ii) the existence and nature of obligations arising between a "non-alien" and the Crown. The common law did not adopt as a *criterion* for alienage the existence or absence of obligations between a person and the Crown; rather, those obligations were *consequences* of a person's status.[88] Nettle J's reasoning therefore reverses the common

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82 *Mabo (No 2)* (1992) 175 CLR 1 at 38 (Brennan J), see also 80 (Deane and Gaudron JJ); *Commonwealth v Yarmirr* (2001) 208 CLR 1 (***Yarmirr***) at [204] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
83 *Yarmirr* (2001) 208 CLR 1 at [204] (McHugh J); *Coe v Commonwealth* (1978) 52 ALJR 334; *Coe v Commonwealth* (1979) 53 ALJR 403.
84 *Coe v Commonwealth* (1993) 118 ALR 193 at 200 (Mason CJ).
85 See, eg, *Helmbright* [2021] FCA 647.
86 *Love* (2020) 270 CLR 152 at [137] (Gageler J); see also [25] (Kiefel CJ), [197]-[200] (Keane J).
87 *Love* (2020) 270 CLR 152 at [252] (Nettle J).
88 *Ford v Ford* (1947) 73 CLR 524 at 529 (Latham CJ).

law approach. *Secondly*, while it is often said that a citizen owes allegiance to the Crown and is entitled to the correlative protection of the Crown, the "protection" referred to is the "obligations [which may] find expression in Australia's exercise of its right, but not duty, in *international law* to protect its nationals" (emphasis added).[89] That is to be distinguished from a duty to protect from harm *inside* a country,[90] which applies to citizens and aliens alike.[91] Thus, any duty of protection *within* Australia is not correlative to a duty of allegiance.

Uncertainties in content and application of tripartite test

47. *Love* has introduced a high level of uncertainty into the application of s 51(xix).[92] Whether one adopts Nettle J's narrower approach to the third limb, or the broader approach of the other members of the majority, the result is that a non-citizen's status will depend in part upon how they self-identify at any given time, and whether an Aboriginal society recognises them as a member at any given time (including after any change in the composition of the people with authority to determine that question).[93] The first limb also gives rise to difficulties,[94] as is illustrated by the Respondent's argument in this case that cultural adoption (as distinct from legal adoption) is sufficient to satisfy that limb. A question also arises as to whether a person must satisfy all three limbs of the test by reference to the *same* Aboriginal society.[95]

48. The result is that those charged with administering the Migration Act on a day-to-day basis may be required to undertake the evaluative and fact-intensive inquiry as to whether a person satisfies the tripartite test in order to ascertain their powers or duties under that

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89 *Singh* (2004) 222 CLR 322 at [166] (Gummow, Hayne and Heydon JJ) (emphasis added). See also *Joyce v Director of Public Prosecutions* [1946] AC 347 (Lord Jowitt) (***Joyce***) holding than an alien abroad holding a British passport (obtained by fraud) enjoyed de facto protection of the Crown (plainly meaning protection at international law) and was under a reciprocal duty of allegiance, such that he could be guilty of treason.

90 Compare *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 222 CLR 1 at [64] (McHugh J).

91 With the exception of members of invading forces: *Ex parte Te* (2002) 212 CLR 162 at [125]-[130] (Gummow J); *Bradley v Commonwealth* (1973) 128 CLR 557 at 582-583 (Barwick CJ and Gibbs J); *Joyce* [1946] AC 347 at 366.

92 *Love* (2020) 270 CLR 152 at [138]-[139] (Gageler J); [196]-[198] (Keane J).

93 *Love* (2020) 270 CLR 152 at [196] (Keane J).

94 See eg *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 386 ALR 405 (***McHugh***) at [65] (Allsop CJ).

95 See *McHugh* (2020) 386 ALR 405 at [101] (Besanko J); *Webster v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 277 FCR 38 (***Webster***) at [43] (Rares J).

Act.[96] That includes officials stationed at the border as well as those responsible for detaining unlawful non-citizens under the Migration Act, who must now grapple with complex questions of partial disapplication of s 189 if an unlawful non-citizen claims (commonly at least initially on the basis of little or no evidence) that they satisfy the tripartite test.[97] While the second limb of that test is relatively easy to assess (depending largely on a person's own expression of their self-identification), the other limbs are not. The third limb involves consideration of whether members of an Aboriginal society recognise the person to be a member of that society; whether those members have the requisite authority to make that determination; and (on Nettle J's approach) whether the relevant laws and customs of that society have been continuously observed since before the Crown's acquisition of sovereignty.[98] Those are difficult issues for administrative officers, including those tasked with high volume decision-making. Further, they may depend on complex inquiries, giving rise to still further complexities as to the application of the Act while those inquiries are underway.

49. Still further uncertainty arises from the fact that Bell and Edelman JJ[99] left open the possibility that satisfaction of the tripartite test is *not* the only way in which an Aboriginal Australian can be a non-alien. That gives rise to issues such as whether other types of connections with land, spiritual or otherwise, can take a person outside the reach of s 51(xix).[100] If the tripartite test were to be abandoned or liberalised (including, for example, by abandoning the first limb), the number of people who could fall within the non-alien category would grow, and the complications in administering the Migration Act, and any other laws depending on s 51(xix), would be multiplied.

(v) *Consequences for the appeal if* Love *was wrongly decided*

50. If *Love* was wrongly decided, the power and duty to detain under s 189 was enlivened simply by the detaining officer's reasonable suspicion that the Respondent was an unlawful non-citizen (it being uncontroversial that the officer held such a suspicion: CRB

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[96] See *Love* (2020) 270 CLR 152 at [198] (Keane J); see also [139] (Gageler J), referring to the potential impact on the "maintenance of an orderly national immigration program".

[97] *McHugh* (2020) 386 ALR 405 at [340] (Mortimer J); see also [66] (Allsop CJ), [76] (Besanko J).

[98] Alternatively, what may need to be shown is that there is presently an Aboriginal society; that the society was in existence at the time of the acquisition of sovereignty over Australia; and that there is a degree of historical continuity between the two: *Helmbright* [2021] FCA 647 at [138]-[141], [148(b)], [179]-[184] (Mortimer J).

[99] *Love* (2020) 270 CLR 152 at [80] (Bell J), [458] (Edelman J); cf [367] (Gordon J, concluding that satisfaction of each limb was necessary and sufficient).

[100] Michelle Foster and Kirsty Gover, 'Determining membership: Aboriginality and alienage in the Australian High Court' (2020) 31 *Public Law Review* 105 at 114.

21, [48]). On that hypothesis, there was no basis for the grant of habeas, and the appeal must be allowed.

B. EVEN IF *LOVE* IS CORRECT, THE RESPONDENT'S DETENTION WAS LAWFUL

(i) Biological descent (Ground 1(b)(i))

51. In *Mabo (No 2)*, Brennan J formulated the tripartite test as a test for membership of a native title-holding group. The tripartite test is not, and does not purport to be, a universally applicable test of Aboriginality.[101] No such test is possible, for the characteristics by reference to which Aboriginality is identified vary having regard to the purpose for which the question is asked.[102] Context is critical. The test that is appropriate for the purposes of, for example, determining eligibility for a beneficial governmental program or scholarship may bear no relationship to the test that is appropriate for determining whether a person is entitled to share in communal rights to land and waters.[103] The test that is appropriate to identifying persons who Parliament cannot treat as aliens for the purposes of s 51(xix) of the Constitution may be different again, that being a context that bears upon the breadth of a legislative power that is central to national sovereignty, and that must be ascertained as a matter of constitutional interpretation (rather than, for example, by reference to the common law of native title).

52. For the above reasons, this case does not require any attempt to be made to formulate a universally applicable test for Aboriginality. The issue raised by ground 1(b)(i) is much narrower. It arises because the majority in *Love* adopted the tripartite test as a statement of criteria (which – for two members of the majority – were *necessary* criteria[104]) to be applied to identify persons who Parliament cannot treat as aliens. It follows that the Respondent could benefit from the decision in *Love* only if he satisfies the first limb of

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[101] See, eg, *Love* (2020) 270 CLR 152 at [459] (Edelman J). If it were, then people who cannot satisfy the third limb (eg *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422) would not be Aboriginal people, which plainly is not the position.

[102] *Attorney-General (Cth) v Queensland* (1990) 25 FCR 125 at 146-147 (French J); see also RS French, "Aboriginal Identity—the Legal Dimension" (2001) 15(1) *Australian Indigenous Law Review* 18 at 19.

[103] A context in which customary adoption has in some cases informed group membership for the purposes of native title determinations: eg *Western Australia v Ward* (2000) 99 FCR 316 at [233] (Beaumont and Von Doussa JJ); *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 422 at [9] and [113]-[116]; *Smirke on behalf of the Jurruru People v Westerm Australia (No 2)* [2020] FCA 1728 at [765] (Mortimer J).

[104] *Love* (2020) 270 CLR 152 at [271] (Nettle J) and [367] (Gordon J).

that tripartite test, which requires "biological descent from the indigenous people".

53. The ordinary meaning of the phrase "biological descent" does not include kinship relationships such as those resulting from marriage or adoption.[105] Indeed, the very purpose of the first limb appears to be to *exclude* kinship relationships of that kind, in the same way that such relationships are excluded when a distinction is drawn between a "parent" and a "biological parent". The term "biological parent" is defined in the *Macquarie Dictionary* as "a person whose parenthood is based on actual conception rather than performance of the role and whose *genes have therefore been handed down* to the child" (emphasis added). That usage of "biological" is common in the law.[106] Applying that approach, a person who does not have a genetic relationship with any Aboriginal person cannot show that they are biologically "descended" from "the indigenous people".[107] To hold otherwise would be to ignore the adjective "biological", and in effect to jettison the first limb of the tripartite test, thereby significantly extending the limitation on s 51(xix) that was held to exist in *Love*.

54. Whether or not a biological descent requirement is necessary or appropriate in other contexts, that requirement is integral to the limitation on the first aspect of s 51(xix) that was identified in *Love*. That follows because the tripartite test was adopted in *Love* in order to define a class of persons who "could not possibly" come within the "ordinary understanding" of the word "alien".[108] In contexts in which it has been thought necessary for the law to specify criteria to identify Aboriginal people, descent has invariably been treated as a *necessary* — and sometimes as itself a *sufficient*—characteristic.[109] This reflects the ordinary meaning of the word "Aboriginal", which has been held to require a

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[105] See, for example, *Love* (2020) 270 CLR 152 at [368], where Gordon J referred to "Aboriginal Australians, who are descendants of the original inhabitants of this country". In *Commonwealth v Tasmania* ("*Tasmanian Dam Case*") (1983) 158 CLR 1 (***Tasmanian Dam Case***) at 274, Deane J referred to "a person of Aboriginal descent, albeit mixed …".

[106] See, eg, *Masson v Parsons* (2019) 266 CLR 544; at [50] and [54] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ); *Gibbs v Capewell* (1995) 54 FCR 503 at 507C-D. (Drummond J); *Magill v Magill* (2006) 226 CLR 551 at [101] (Gummow, Kirby and Crennan JJ); *In re G (Children)* [2006] 1 WLR 2305 at [2] (Lord Nicholls of Birkenhead), [3] (Lord Scott of Foscote) and *cf* [33] (Baroness Hale of Richmond).

[107] See *Attorney-General (Cth) v Queensland* (1990) 25 FCR 125 at 132 (Spender J, stating "[w]ishing cannot make it so"). See also at 147 (French J, quoting Toohey J as Aboriginal Land Commissioner).

[108] *Love* (2020) 270 CLR 152 at [50], [51], [74] (Bell J); [236], [272], [284] (Nettle J); [296], [374] (Gordon J); [398], [433], [437], [450] (Edelman J).

[109] As to sufficient, see *Attorney-General (Cth) v Queensland* (1990) 25 FCR 125 at 126-127 (Jenkinson J), 132-133 (Spender J), 146-148 (French J). As to necessary, see *Gibbs v Capewell* (1995) 54 FCR 503 at 507-508; *Shaw v Wolf* (1998) 83 FCR 113 at 118D-F and 120D (Merkel J).

person to have at least "some degree of descent" from the inhabitants of Australia at the time immediately prior to European settlement.[110] Accordingly, even assuming it is right to say that Aboriginal persons "cannot possibly" come within the ordinary meaning of "alien", that is of no assistance to a person who cannot show biological descent from an Aboriginal ancestor, because it is only where the biological descent limb can be satisfied that it can plausibly be said that a person "could not possibly" fall within the ordinary understanding of the word "alien" notwithstanding facts that would otherwise allow the person to be treated as an alien.

55. Further, the first limb of the tripartite test is particularly appropriate in the context of a constitutional limitation on power. It provides an "objective criterion"[111] that in many cases will be capable of being applied as a threshold criterion non-satisfaction of which will confirm, without more, that the Migration Act can safely be applied in accordance with its terms. By contrast, if "biological descent" is not required, then the limits of the legislative power of the Commonwealth (and, thus, the reach of the Migration Act) will depend entirely on the content of traditional laws and customs regarding adoption and other forms of non-biological kinship. Such laws and customs will vary between Aboriginal societies, and possibly even within societies. The result would be that, on the Respondent's case, the reach of the Migration Act could be ascertained only by reference to matters specific to particular Aboriginal societies, being matters that it may be both difficult to ascertain and that may vary over time. The uncertainty in the scope of s 51(xix) and the practical difficulties in the administration of the Migration Act already arising from *Love* would be multiplied.

56. For the above reasons, in circumstances where there was no evidence that the Respondent is biologically descended from any Aboriginal person (let alone a member of the Mununjali people[112]), nothing in *Love* justified or required any reading down of s 189(1). That section applied in accordance with its terms. There being no dispute that the detaining officer reasonably suspected that the Respondent is an unlawful non-citizen

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[110] *Attorney-General (Cth) v Queensland* (1990) 25 FCR 125 at 126-127 (Jenkinson J), 132-133 (Spender J), 147-148 (French J); *Gibbs v Capewell* (1995) 54 FCR 503 at 507-508 (Drummond J); *Shaw v Wolf* (1998) 83 FCR 113 at 118D-118F and 120D (Merkel J).

[111] *Love* (2020) 270 CLR 152 at [271] (Nettle J).

[112] Reading the tripartite test as a whole and in context, the first limb directs attention to whether a person is biological descended from members of the *same* society that a person identifies with for the purposes of the second limb, and of which the person is recognised as a member for the purposes of the third limb: see *McHugh* (2020) 386 ALR 405 at [101] (Besanko J); *Webster* (2020) 277 FCR 38 at [43].

(CRB 27, [58], [59(1)]), the primary judge should have rejected the claim for habeas on the ground that the Respondent's detention was authorised and required by s 189.

(ii) The detaining officer's suspicion that the Respondent is an alien (Ground 2)

57. Even if *Love* is correct, s 189(1) operates in accordance with its terms to authorise and require officers to detain persons who are reasonably suspected to be unlawful non-citizens *unless*, on the facts and law known or reasonably capable of being known to the officer at the time,[113] the person could not reasonably be suspected of being an alien.[114] As the Commonwealth has submitted in the *Thoms* matter (B56/2021), that qualification identifies the circumstances in which partial disapplication[115] of s 189(1) is required by s 3A of the Migration Act (and/or s 15A of the *Acts Interpretation Act 1901* (Cth)) in order to prevent s 189 from exceeding constitutional power.[116]

58. The qualification is not engaged in this case, because on the facts known to the detaining officer she reasonably suspected that the Respondent is an alien because he is a non-citizen who does not satisfy the first limb of the tripartite test. The evidence was that neither the Respondent nor his Australian mother knew whether he was the biological descendant of an Aboriginal person: CRB 23, [53(d)-(e)], and that he could not find any further information about his ancestors: CRB 25, [53(v)]. Unsurprisingly in those circumstances, the Respondent did not even claim to be descended from an Aborginal or Torres Strait Islander person, let alone from the Mununjali people (whom he first encountered when he was 16 years old): CRB 22-24 [53(c), (m) and (n)]. Instead, his claim was that he did not need to have a biological Aboriginal ancestor to be an Aboriginal person: CRB 10, [4], 25-26 [53(w), (x)].

59. The detaining officer considered the evidence that the Respondent had advanced concerning his adoption by the Mununjali people in accordance with their traditional laws and customs. However, she was not satisfied the Respondent met the biological descent

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[113] *Ruddock* (2005) 222 CLR 612 at [40] (Glesson CJ, Gummow, Hayne, Heydon JJ).

[114] cf *McHugh* (2020) 385 ALR 405 at [340] (Mortimer J); see also at [66] (Allsop CJ), [76] (Besanko J), holding that post *Love*, where a person raises a question as to whether they are an Aboriginal Australian, s 189(1) will authorise detention only if the detaining officer has a "reasonable suspicion that [the person] was not an Aboriginal Australian". However, that issue was not fully argued in *McHugh*: see at [51]-[52] and [69].

[115] *R v Poole; Ex parte Henry [No 2]* (1939) 61 CLR 634 at 652 (Dixon J), quoted in *Clubb v Edwards* (2019) 267 CLR 171 at [141] (Gageler J), [340] (Gordon J) (each using the terminology of severance), [425] (Edelman J). See also *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at [250] (Gummow, Crennan and Bell JJ).

[116] To the extent the primary judge concluded that ss 13 and 14 should be read down so as to apply only to non-citizens who do not satisfy the tripartite test (J[46(4), (5)], [48]), that conclusion was in error: see Notice of Appeal, ground 1(b)(ii).

requirement because her understanding was that "adoption is not sufficient to satisfy the first limb": CRB 28, [59(3)]. That state of satisfaction was informed by matters including the fact that the detaining officer had read *Love*, had attended Departmental training concerning that decision, and had considered legal advice regarding it: CRB 28, [59].

60. The learned primary judge, while accepting that the detaining officer subjectively suspected that the Respondent is an alien (CRB 28, [59(2)]), held that that suspicion was not reasonable: CRB 31, [68]. That finding appeared to rest on two matters.

61. *First*, her Honour suggested that there was uncertainty as to whether biological descent was a requirement of the first limb: CRB 29, [62]-[64]. With respect, however, that reasoning loses sight of the fact that the duty imposed by s 189(1) is enlivened by a reasonable *suspicion* based on the facts and law known or reasonably capable of being known to the officer at the time.[117] The primary judge (correctly) observed that the detaining officer was "not to be criticised for adhering to her view that she was, in effect, bound to take the ratio of *Love* at face value which, to her mind, meant that [the Respondent] needed to 'meet the lineage of Aboriginal bloodlines'" (CRB 29, [62]). But her Honour then went on to hold that the officer acted unreasonably by basing her suspicion on that very view. Having regard to the fact that the first limb of the tripartite test uses the words "biological descent", the ordinary meaning of that phrase, the ubiquity of biological decent as a characteristic that is relevant to establishing Aboriginality, and the fact that the detaining officer had taken legal advice (albeit that the terms of that advice were not disclosed: CRB 28, [59(3)], [60]), the understanding of the first limb adopted by the detaining officer was objectively reasonable. The primary judge erred in holding that her suspicion was not reasonable simply because there was scope to argue about that understanding: CRB 28-29, [61]-[62].

62. *Secondly*, the primary judge attributed importance to the fact that the officer knew that the Respondent had been receiving Abstudy and engaged with various Aboriginal social service providers over the years, but that no inquiries had been made with Centrelink or other Commonwealth agencies as to how that state of affairs came about (CRB 29-30, [65], 31, [68]). The Respondent's evidence was that he had in the past received some welfare services specifically designed for Aboriginal people: CRB 24-25, [53(l) and (s)]. However, his evidence was that this came about by reason of his association with elders

[117] *Ruddock* (2005) 222 CLR 612 at [40] (Gleeson CJ, Gummow, Hayne, Heydon JJ).

with whom he never claimed to have a biological connection: CRB 24-25, [53(l) and (s)]. Further, the primary judge accepted that "it seems *unlikely* that further evidence as to Mr Montgomery's ancestry may be uncovered" through the making of enquiries of other agencies: CRB 29, [63] (emphasis added). That is plainly correct, for it is improbable that those agencies would hold evidence of the Respondent's descent that neither he nor his legal representatives in the Federal Court proceedings could uncover. In those circumstances, the primary judge erred, because a suspicion is not unreasonable simply because the officer who holds it does not undertake enquiries of a kind that are unlikely to disclose relevant information.[118]

63. It follows that – even assuming *Love* to be correct and that s 189 can validly apply only in cases where the detaining officer reasonably suspects that an unlawful non-citizen is an alien – the learned primary judge erred in finding that the Respondent's detention was not authorised and required by s 189(1) of the Act.

PART VII ORDERS SOUGHT

64. The Commonwealth Parties seek the orders set out in the Notice of Appeal.

PART VIII ESTIMATE OF TIME

65. The Commonwealth estimates that it will require approximately 3 hours for the presentation of oral argument (including reply and addressing the notice of objection to competency and the notice of contention).

Dated: 28 January 2022

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[118] *cf Goldie v Commonwealth* (2002) 117 FCR 566 at [4] ("efforts of search and inquiry that are reasonable in the circumstances") and [6] ("an officer in forming a reasonable suspicion is obliged to make due inquiry to obtain material likely to be relevant to the formation of that suspicion") (Gray, Lee and Stone JJ); *Commonwealth v Okwume* (2018) 263 FCR 604 at [134] (Besanko J).

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS**
First Appellant

MINISTER FOR HOME AFFAIRS
Second Appellant

AND: **SHAYNE PAUL MONTGOMERY**
Respondent

ANNEXURE TO THE SUBMISSIONS OF THE APPELLANTS AND ATTORNEY GENERAL FOR THE COMMONWEALTH (INTERVENING)

Pursuant to paragraph 3 of the *Practice Direction No 1 of 2019*, the Appellants and the Attorney-General for the Commonwealth set out below a list of the particular constitutional provisions and statutes referred to in their submissions.

No.	Title	Provision(s)	Version
1.	*Acts Interpretation Act 1901* (Cth)	s 15A	Current (Compilation No. 36, 20 December 2018 – present)
2.	*Constitution*	ss 51(vii), (xix), (xxvi), (xxxi), 127	Current (Compilation No. 6, 29 July 1977 – present)
3.	*Judiciary Act 1903* (Cth)	s 78B	Current (Compilation No. 48, 1 September 2021 – present)
4.	*Migration Act 1958* (Cth)	ss 3A, 189, 501(3A)	Current (Compilation No. 152, 1 September 2021 – present)
5.	*Native Title Act 1993* (Cth)	s 223(1)	Current (Compilation No. 47, 25 September 2021 – present)

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