HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 09 Mar 2022 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S192/2021
File Title:	Minister for Immigration, Citizenship, Migrant Services and M
Registry:	Sydney
Document filed:	Form 27C - Intervener's submissions
Filing party:	Interveners
Date filed:	09 Mar 2022

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY No S 192 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 THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)

PART I, II & III: CERTIFICATION AND INTERVENTION

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

2. The Attorney-General for the State of Victoria (**Victoria**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the respondent in respect of grounds 1(a) and 1(b) of the notice of appeal.[1] Victoria makes no submissions regarding the notice of objection to competence, ground 2 of the notice of appeal or the notice of contention.

[1] In these submissions, in referring to the appellants, namely the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs and the Minister for Home Affairs, Victoria also refers to the Attorney-General for the Commonwealth (intervening), who has made joint written submissions (**AS**) with the appellants.

PART IV: ARGUMENT

A. INTRODUCTION

3. In summary, Victoria's submissions are as follows:

(1) The *ratio decidendi* of the decision in *Love v The Commonwealth* and *Thoms v The Commonwealth*[2] is that "Aboriginal Australians",[3] understood according to the tripartite test articulated in *Mabo [No 2]*,[4] are not within the reach of the "aliens" power conferred by s 51(xix) of the *Constitution*. This is clear from the statement made by Bell J, with the authorisation of each of the other members of the majority, at paragraph 81 of her Honour's reasons for judgment. Accordingly, the appellants require leave to re-open the decision.

(2) Leave to re-open *Love* and *Thoms* should be refused. Hypothetical complexities for those applying the decision are an insufficient basis to grant leave to re-open a recent and extensively reasoned decision of this Court. The appellants' submissions about the differences in the reasoning of the members of the majority are overstated; they ignore the reliance by each of those Justices on the significant succession of decisions of this Court that have recognised and given legal consequence to the unique relationship or connection of Aboriginal peoples with the lands and waters of Australia.

(3) If the Court revisits the decision in *Love* and *Thoms*, it should be confirmed. The Court was correct to hold that Aboriginal persons are beyond the scope of the "aliens" power. It was correct to give a meaning to the constitutional concept of "alien" that recognises and gives effect to the position of Aboriginal peoples as *indigenous to Australia*, and therefore not peoples who can be said to not "belong" to or be foreign to Australia. It was correct to accord significance to the unique relationship or connection that Aboriginal peoples have with the lands and waters

---

2 (2020) 270 CLR 152 (***Love* and *Thoms***).

3 This expression is used where referring to the terminology adopted in *Love* and *Thoms*. Although multiple terms could be used, in these submissions, Victoria otherwise refers to "Aboriginal persons" or "Aboriginal peoples". This is not to exclude Torres Strait Islanders, as indigenous to Australia, as outside these submissions. Rather, the term "Aboriginal" accords more closely with Victorian legislation: see paragraph [15] below.

4 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 (***Mabo [No 2]***) at 70 (Brennan J).

that now make up this country. It was correct to find that the nature of that connection means that Aboriginal persons are members of the body politic associated with those lands and waters. These matters are inconsistent with, and antithetical to, a characterisation of Aboriginal persons as "aliens".

(4) For the reasons given by the respondent, the National Native Title Council and the Northern Land Council, the appellants' submissions about the proper scope of the first limb of the tripartite test in the non-alienage context should not be entertained in this case. However, if the Court does consider it appropriate to entertain those submissions, the first limb of the tripartite test should be given an operation that responds to the difficulties of proof of historical genetic relationships, including because of the effects of colonisation on Aboriginal peoples. The appellants' submission that the first limb requires evidence of a genetic relationship to an Aboriginal person or a particular group of Aboriginal persons — in the sense of genes "handed down" from an Aboriginal ancestor — should therefore be rejected.

B. LEAVE TO RE-OPEN *LOVE* AND *THOMS* IS REQUIRED AND SHOULD BE REFUSED

B.1 Leave to re-open is required

4. Contrary to the submissions of the appellants, a clear *ratio decidendi* emerges from the decision of this Court in *Love* and *Thoms*. Leave is therefore required to re-open *Love* and *Thoms*.[5]

5. The *ratio decidendi* of a case is "the general rule of law that the court propounded as its reason for the decision".[6] The *ratio decidendi* of *Love* and *Thoms* is that "Aboriginal Australians", understood according to the tripartite test in *Mabo [No 2]*, are not within the reach of the "aliens" power conferred by s 51(xix).

6. Each member of the majority adopted that rule of law as their reason for the decision. That is recorded in paragraph 81 of the judgment of Bell J:[7]

> I am authorised by the other members of the majority to say that although we express our reasoning differently, we agree that Aboriginal Australians (understood according to the

---

5 See generally *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311.

6 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at [59] (McHugh J).

7 A similar style of authorisation provided by other members of the Court appears in the judgment of Mason CJ and McHugh J in *Mabo [No 2]*: (1992) 170 CLR 1 at 15-16. See also *Parker v The Queen* (1963) 111 CLR 610 at 633 (Dixon CJ).

tripartite test in *Mabo [No 2]*) are not within the reach of the "aliens" power conferred by s 51(xix) of the Constitution.

7. The effect of the authorisation given to Bell J by each of the other members of the majority is that the reasons of each member of the majority can, and must, be understood consistently with that statement. Contrary to the submissions of the appellants, this statement is a "legal proposition that is common to all four of the [majority] Justices that, when applied to the facts, is sufficient to explain the result in the case" (**AS [15]**).

8. The result in *Love* and *Thoms* can be discerned from the orders made in each of the two proceedings, which consisted of answers to the stated questions. The first stated question in each proceeding was "Is the plaintiff an 'alien' within the meaning of s 51(xix) of the *Constitution*?"

8.1 The orders made in the proceeding brought by Mr Thoms (Matter No B64/2018) answered this question as follows:[8]

> Aboriginal Australians (understood according to the tripartite test in *Mabo v Queensland* [No 2] (1992) 175 CLR 1 at 70) are not within the reach of the "aliens" power conferred by s 51(xix) of the Constitution. The plaintiff is an Aboriginal Australian and, therefore, the answer is "No".

The second sentence of the answer to the stated question is the result in the proceeding brought by Mr Thoms. The first sentence is the legal proposition that explains that result in that proceeding. It is the general rule of law propounded as the reason for the Court's decision in that proceeding (ie the *ratio decidendi* of the case).

8.2 The orders made in the proceeding brought by Mr Love (Matter No B43/2018) recorded, in the first sentence of the answer to the stated question, that the "majority considers that Aboriginal Australians (understood according to the tripartite test in [*Mabo [No 2]*]) are not within the reach of the 'aliens' power".[9] The second sentence recorded that the majority had been unable to agree as to whether Mr Love was an Aboriginal Australian on the facts stated in the special case and was therefore unable to answer the question. As Bell J explained, the difference of approach to Mr Love among the members of the majority was one of "proof, not principle".[10]

---

8 See orders made in Matter No B64/2018 (Mr Thoms) set out in the unreported version of the reasons in *Love* and *Thoms*: [2020] HCA 3.

9 See orders made in Matter No B43/2018 (Mr Love) set out in the unreported version of the reasons in *Love* and *Thoms*: [2020] HCA 3.

10 *Love* and *Thoms* (2020) 270 CLR 152 at [81] (Bell J).

9. Contrary to the submissions of the appellants (**AS [18]**), the position is not the same as in *Re Patterson; Ex parte Taylor*.[11] There, the majority decided that Mr Taylor (a British subject) was not an alien, but disagreed on the general rule of law propounded as the reason for that decision.[12] Here, the rule of law that was the reason for the decision that Mr Thoms is not an "alien" is clear. That rule of law was that "Aboriginal Australians", understood according to the tripartite test, are outside the reach of the aliens power. *This* was the reason for the Court's decision in the proceeding brought by Mr Thoms that he was not an "alien".

10. The divergence between Nettle J and the other members of the majority in relation to the result of the application of the tripartite test in Mr Love's case does not detract from the *ratio decidendi* of the decision. Nor does the approach taken by Nettle J to that third limb of the test, which the appellants seek to use to explain away paragraph 81 of the judgment (**AS [16]**). For Nettle J, just like the other members of the majority,[13] Aboriginality for the purpose of non-alienage can be identified by reference to the tripartite test, which requires "Aboriginal descent, self-identification as a member of an Aboriginal community and acceptance by such a community as one of its members".[14] In circumstances where the Commonwealth had not contested the submission made by both Mr Love and Mr Thoms that they satisfied each of the three limbs of this test,[15] nor sought to confine the operation of the test in the non-alienage context, it is unsurprising that the Court had little to say about its scope and operation. The fact that Nettle J nonetheless chose to address the form that the "acceptance" required by the third limb of the test should take,[16] does not bear on the identification of the *ratio decidendi* of the case. Nor does his Honour's conclusion that, in the absence of a concession by the Commonwealth directed to that form of acceptance,

---

11 (2001) 207 CLR 391 (***Ex parte Taylor***).

12 Gaudron J held that Mr Taylor was not an alien because he was a member of the body politic of the community of Australia; McHugh J decided the case on the basis that Mr Taylor was not an alien because he was a British subject living in Australia at the commencement of the *Royal Style and Titles Act 1973* (Cth), he resided in Australia and he was a subject of the Queen of Australia; Kirby J held that Mr Taylor was not an alien when he arrived in Australia, that he "had been absorbed into the people of the Commonwealth" and that the Parliament could not retrospectively declare him to be an alien; Callinan J agreed with the reasoning of both Kirby and McHugh JJ on Mr Taylor's status; Gleeson CJ, Gummow and Hayne JJ dissented: *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 (***Ex parte Te***) at [86] (McHugh J). See also submissions of respondent (**RS**) [41].

13 *Love* and *Thoms* (2020) 270 CLR 152 at [79]-[80] (Bell J), [291], [366]-[368] (Gordon J), [458] (Edelman J).

14 *Love* and *Thoms* (2020) 270 CLR 152 at [255], see also [286] (Nettle J).

15 *Love* and *Thoms* (2020) 270 CLR 152 at [460]-[462] (Edelman J), see also [78] (Bell J), [287] (Nettle J).

16 His Honour expressed the view that such acceptance must come from elders or other persons enjoying traditional authority within the relevant community, under laws and customs deriving from before the Crown acquired sovereignty over the territory of Australia: *Love* and *Thoms* (2020) 270 CLR 152 at [262].

further facts would need to be found in order to apply the third limb of the test to Mr Love's claim of Aboriginality.[17]

11. Had the consideration that Nettle J gave to the form of community acceptance required by the tripartite test (or the difficulties of proof associated with his Honour's application of that aspect of the tripartite test to Mr Love's claim of Aboriginality) been inconsistent with paragraph 81 of the judgment, it could be expected that Nettle J would not have joined with the other members of the majority in authorising Bell J to make this statement on his Honour's behalf — or that his Honour would have required some qualification to the statement. The appellants' submission that his Honour's approach to the third limb of the tripartite test was "essential to his Honour's reasons" (**AS [16]**) can also be put to one side — a *ratio decidendi* does not require uniformity in paths of reasoning, but instead requires the identification of a general rule of law embraced by a majority of the court that explains the result. Multiple judges of the Federal Court have had no difficulty identifying paragraph 81 of the judgment as meeting this description.[18]

B.2 Leave to re-open should be refused

12. Leave to re-open the decision in *Love* and *Thoms* should be refused. The factors relied on by the appellants do not weigh in favour of a grant of leave. The appellants seek to use this case to make the same arguments that a majority of the Court rejected approximately two years ago. A change in the composition of the bench "is not, and never has been, reason enough to overrule a previous decision" of the Court.[19]

---

17 *Love* and *Thoms* (2020) 270 CLR 152 at [287]-[288] (Nettle J).

18 *Helmbright v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2)* [2021] FCA 647 (***Helmbright (No 2)***) [2021] FCA 647 at [108] (Mortimer J); *Webster v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 277 FCR 38 (***Webster***) at [49] (Rares J); see also *Hirama v Minister for Home Affairs* [2021] FCA 648 (***Hirama***) at [9]-[10] (Mortimer J); see *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 283 FCR 602 (***McHugh FCAFC***) at [28] (Allsop CJ), [99] (Besanko J). See also RS [39].

19 *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at [70] (Hayne J), relying on *Tramways Case [No 1])* (1914) 18 CLR 54 at 69 (Barton J) and *Queensland v The Commonwealth ('Second Territory Senators Case')* (1977) 139 CLR 585 at 600 (Gibbs J).

13. Contrary to the submissions of the appellants, consideration of the matters set out in *John v Federal Commissioner of Taxation*,[20] which are typically considered when leave to re-open a decision is sought,[21] does not support a grant of leave.

14. ***Whether principle carefully worked out in significant succession of cases***. While the question whether Aboriginal persons are not "aliens" within the meaning of s 51(xix) had not previously arisen for determination,[22] the answer to that question did not emerge "out of thin air". In resolving that constitutional question, each of the majority judgments invoked a significant succession of decisions made over a period of approximately forty years,[23] in which this Court has recognised Aboriginal persons as a unique and *sui generis* class of persons by reason of their connection to country.[24]

15. The appellants fail to acknowledge the decision in *Love* and *Thoms* as the latest in this line of cases acknowledging the unique place of Aboriginal peoples in Australia, the distinctiveness of their connection with the lands and waters of Australia, and the legal consequences that flow from this recognition. These matters are also recognised in Victoria, including by the statement in Victoria's *Constitution* that Victoria's Aboriginal peoples, as the original custodians of the land on which the Colony of Victoria was established, "have a unique status as the descendants of Australia's first people" and have a "spiritual, social, cultural and economic relationship with their traditional lands and

---

20 (1989) 166 CLR 417 at 438 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ), quoting *Attorney-General (NSW) v Perpetual Trustee Co (Ltd)* (1952) 85 CLR 237 at 243-244 (Dixon J) and *The Commonwealth v Hospital Contribution Fund* (1982) 159 CLR 49 at 56-58 (Gibbs CJ).

21 *Pipikos v Trayans* (2018) 265 CLR 522 at [121] (Nettle and Gordon JJ); *Miller v The Queen* (2016) 259 CLR 380 at [39] (French CJ, Kiefel, Bell, Nettle and Gordon JJ).

22 See *Love* and *Thoms* (2020) 270 CLR 152 at [63] (Bell J), [113] (Gageler J), [294] (Gordon J), [396] (Edelman J).

23 See, in particular, *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 (***Meneling Station***) at 356-357 (Brennan J); *Mabo [No 2]* (1992) 175 CLR 1 at 15-16 (Mason CJ and McHugh J), 68-70 (Brennan J), 100 (Deane and Gaudron JJ); *Fejo v Northern Territory* (1998) 195 CLR 96 at [46] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Yanner v Eaton* (1999) 201 CLR 351 at [37]-[39] (Gleeson CJ, Gaudron, Kirby and Hayne JJ), [72]-[73] (Gummow J); *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at [9]-[10] (Gleeson CJ, Gaudron, Gummow and Hayne JJ), [242], [307] (Kirby J); *Western Australia v Ward* (2002) 213 CLR 1 (***Ward***) at [14], [64], [90] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Northern Territory v Griffiths* (2019) 269 CLR 1 (***Griffiths***) at [23], [84], [98], [153], [187], [206], [217], [223], see also [168]-[184] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ). See further *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 36 (Gibbs CJ); *Commonwealth v Tasmania* (***Tasmanian Dam Case***) (1983) 158 CLR 1 at 274-275 (Deane J); *Gerhardy v Brown* (1985) 159 CLR 70 at 117 (Brennan J), 149 (Deane J); *Western Australia v The Commonwealth ('Native Title Act Case')* (1995) 183 CLR 373 at 459 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

24 *Love* and *Thoms* (2020) 270 CLR 152 at [70]-[74] (Bell J), [268]-[272] (Nettle J), [289]-[298], [360]-[363] (Gordon J), [450]-[451] (Edelman J).

waters within Victoria",[25] and in the enactment of the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic), which is directed to a process of working with Aboriginal Victorians[26] to consider and advance one or more treaties with the State.[27]

16. It is also not correct that the decision in *Love* and *Thoms* undermines a previously settled understanding of the relationship between citizenship and alienage (**AS [21]**). Whether there is such a "settled" understanding has, itself, been contested. At Federation, the term "aliens" in s 51(xix) did not possess a fixed, immutable meaning.[28] It was not until *Pochi* that the Court determined that a non-citizen born outside of Australia, whether or not a British subject, was capable of being treated by the Commonwealth Parliament as an "alien".[29] Even following that decision, whether there was a category of "non-citizen non-alien" was a live question[30] until *Shaw.*[31] Since that decision, the Court has been required to consider various questions about the relationship between alienage and citizenship.[32] *Love* and *Thoms* simply involved the recognition of a unique and *sui generis* class of non-citizens that fall outside the concept of alienage.[33]

17. ***Difference in reasoning between the judges in the majority***. Any differences in reasoning between the members of the majority do not warrant reconsideration of *Love* and *Thoms*.

18. The differences in the majority judgments are not "stark" (*cf.* **AS [20]**). At the core of the reasoning in each of the majority judgments is the concept of "indigeneity" and the unique position of persons who are *indigenous to Australia.* The uniqueness of *indigeneity*, and

---

25 *Constitution Act 1975* (Vic), s 1A(2).

26 Aboriginal Victorians are referred to in the preamble to the Act as Victorian traditional owners, clans, family groups and all other people of Aboriginal and Torres Strait Islander descent who are living in Victoria.

27 See also *Traditional Owner Settlement Act 2010* (Vic), preamble; see also *Aboriginal Heritage Act 2006* (Vic), ss 1 and 3; *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 19(2); *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic), preamble.

28 *Singh v The Commonwealth* (2004) 222 CLR 322 (***Singh***) at [157] (Gummow, Hayne and Heydon JJ); *Love* and *Thoms* (2020) 270 CLR 152 at [69] (Bell J).

29 *Pochi v Macphee* (1982) 151 CLR 101 at 109-110.

30 See generally *Ex parte Taylor* (2001) 207 CLR 391; *Ex parte Te* (2002) 212 CLR 162.

31 *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 (***Shaw***).

32 See generally *Singh* (2004) 222 CLR 322 (whether a foreign citizen born in Australia to non-citizen parents was an "alien"); *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439 (***Ex parte Ame***) (whether a person born in Papua New Guinea in 1967 and therefore an Australian citizen at that time, became an "alien" at Papua New Guinean independence in 1975); *Koroitamana v The Commonwealth* (2006) 227 CLR 31 (***Koroitamana***) (whether a person born in Australia to non-citizen parents who was entitled to, but had not taken up, foreign citizenship was an "alien").

33 See *Chetcuti v Commonwealth* (2021) 95 ALJR 704 (***Chectcuti)*** at [14] (Kiefel CJ, Gageler, Keane and Gleeson JJ); *Love* and *Thoms* (2020) 270 CLR 152 at [74] (Bell J), [333] (Gordon J).

the significance of the distinctive "connection" of Aboriginal peoples (as indigenous inhabitants of Australia) with the land and waters that now make up this country, was central to the reasoning of each member of the majority. Thus:

(1) Justice Bell recognised the "cultural and spiritual dimensions of the distinctive connection between indigenous peoples and their traditional lands" as warranting a conclusion that "the sovereign power of this nation does not extend to the exclusion of the indigenous inhabitants from the Australian community";[34]

(2) Justice Nettle spoke of the "undoubted historical connection between Aboriginal societies and the territory of Australia" that "runs deeper than the accident of birth in the territory or immediate parentage";[35]

(3) Justice Gordon described the "unique position" of Aboriginal peoples as "the first peoples of this country" and the spiritual or metaphysical connection between the "Indigenous peoples of Australia and the land and waters that now make up the territory of Australia" as antithetical to status as an alien; her Honour spoke of the "content, nature and depth" of this connection in emphasising that an "Aboriginal Australian is not an 'outsider' to Australia";[36] and

(4) Justice Edelman noted the distinctness of Aboriginal peoples as *indigenous* and relied on the fact that "Aboriginal people have been inseparably tied to the land of Australia generally, and thus to the political community of Australia, with metaphysical bonds that are far stronger than those forged by the happenstance of birth on Australian land or the nationality of parentage".[37]

19. ***Considerable inconvenience***. The appellants have pointed to potential administrative complexities in the application of the tripartite test by administrative decision-makers (**AS [22], [47]-[49]**). There is no evidence of any inconvenience being occasioned by the Court's decision in *Love* and *Thoms*, and the mere spectre of potential inconvenience does not support a grant of leave to reopen.[38] In seeking to demonstrate potential inconvenience,

---

34 *Love* and *Thoms* (2020) 270 CLR 152 at [73] (Bell J).

35 *Love* and *Thoms* (2020) 270 CLR 152 at [276] (Nettle J).

36 *Love* and *Thoms* (2020) 270 CLR 152 at [289]-[290], [296]-[298], see also [323], [325], [333], [335], [349], [363]-[365] (Gordon J).

37 *Love* and *Thoms* (2020) 270 CLR 152 at [396], see also [405]-[410], [447]-[448] (Edelman J).

38 See *Williams v The Commonwealth [No 2]* (2014) 252 CLR 416 at [64]-[65] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

the appellants have recourse to the type of "extreme examples and distorting possibilities" about which the Court should be apprehensive.[39]

20. As Gordon J acknowledged in *Love* and *Thoms*, courts have grappled with and settled contests about the application of the tripartite test for many years.[40] And since *Love* and *Thoms*, the Federal Court has proven capable of resolving such contests in the context of non-citizens seeking declaratory or other relief on the basis that they are "Aboriginal Australians".[41] While factual issues in those matters have been novel and, at times, complex, they are capable of being, and have been, resolved.

21. Administrative decision-makers are also capable of navigating the application of the tripartite test. For example, Commonwealth administrative decision-makers apply the tripartite test to determine eligibility for certain social security benefits.[42]

22. The approach taken to assessing the respondent's claim of Aboriginality demonstrates steps that can be taken to equip administrative decision-makers to apply the tripartite test in the context of non-citizens. The relevant detaining officer had read this Court's decision in *Love* and *Thoms*, had attended Departmental training on the decision, and had access to legal advice.[43]

23. Border officials often navigate "evaluative and fact-intensive" inquiries (**AS [48]**) associated with visa criteria. For example, the definition of "spouse" in s 5F of the *Migration Act 1958* (Cth) requires persons to be in a "married relationship" (s 5F(1)). The definition of "married relationship" contains various requirements, some more easily

---

39 *Shaw* (2003) 218 CLR 28 at [32] (Gleeson CJ, Gummow and Hayne JJ); *Love* and *Thoms* (2020) 270 CLR 152 at [455] (Edelman J).

40 *Love* and *Thoms* (2020) 270 CLR 152 at [368] (Gordon J).

41 See generally *Helmbright (No 2)* [2021] FCA 647 (Mortimer J); *Webster* (2020) 277 FCR 38 (Rares J); *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 416 (***McHugh First Instance***) (Anderson J) (not disturbed on appeal regarding the application of the tripartite test: *McHugh FCAFC* (2020) 283 FCR 602).

42 *Love* and *Thoms* (2020) 270 CLR 152 at [80] (Bell J). See Department of Social Services, *ABSTUDY Policy Manual* (28 February 2022) <https://guides.dss.gov.au/sites/default/files/documents/2022-03/401-february-2022-abstudy.pdf> at 41 [10.1]; Services Australia, "Confirm your Indigenous heritage for our jobs" (10 December 2021) <https://www.servicesaustralia.gov.au/confirm-your-indigenous-heritage-for-our-jobs?context=1>; National Indigenous Australian Agency, *ISSP Post-Implementation Review* (July 2018) < https://www.niaa.gov.au/sites/default/files/publications/ISSP-review-discussion-paper-2018.pdf>.

43 Cause Removed Book (**CRB**) 27-28, Primary Judgement (**PJ**) [59]. While the Federal Court found that the suspicion held by the detaining officer that the respondent is not an "Aboriginal Australian" was not reasonable (**CRB 31, PJ [68]**), this was because the detaining officer was taken to have had access to correspondence from the Australian Government Solicitor that suggested the first limb of the tripartite test might not be as narrow as she thought, though the Court did not criticise the detaining officer for adhering to her view (**CRB 29, PJ [62]**).

ascertainable than others (s 5F(2)). While it may be straightforward to determine whether persons are in a valid marriage (s 5F(2)(a)), a more fact-intensive inquiry will be necessary to determine whether the relationship is genuine and continuing (s 5F(2)(c)). That particular requirement is made more complicated by the fact that, in determining whether persons are in a "married relationship", decision-makers are to have regard to various factors, namely the financial aspects of the relationship, the nature of the household, the social aspects of the relationship and the nature of the persons' commitment to each other.[44]

24. Migration law is replete with other examples of evaluative and fact-intensive inquiries that administrative decision-makers are required to conduct, including "officials stationed at the border" (**AS [48]**). Does a person seeking asylum have a "well-founded fear of persecution"?[45] Is a person seeking a student visa a "genuine applicant for entry and stay as a student"?[46] Has a person seeking a provisional investor visa "demonstrated a high level of management skill in relation to an eligible investment or qualifying business activity"?[47] Would a person seeking a global talent visa be an "asset to the Australian community" or, depending on their age, be of "exceptional benefit to the Australian community"?[48] Should a visa be cancelled on the basis that the presence of its holder in Australia might be a risk to "the health, safety or good order of the Australian community"?[49]

25. In any event, to the extent that the appellants seek to demonstrate that *Love* and *Thoms* has occasioned considerable inconvenience:

(1) The class of persons who are non-citizens and claim Aboriginality is likely to be small.[50] Within this class, those who might interact with border officials is likely to be an even smaller sub-class.

---

44 *Migration Regulations 1994* (Cth) (**Migration Regulations**), reg 1.15A(3).

45 *Migration Act*, s 5J.

46 Migration Regulations, sch 2, cl 500.212.

47 Migration Regulations, sch 2, cl 162.213

48 Migration Regulations, sch 2, cl 858.212(2)(c) and (f).

49 *Migration Act*, s 116(1)(e)(i); see generally *Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 3.

50 See *Love* and *Thoms* (2020) 270 CLR 152 at [455] (Edelman J).

(2) The implicit suggestion that an assertion of Aboriginality may be made on a whim "at any given time" (**AS [47]**) is not borne out by the factual findings of the Federal Court in contests regarding the tripartite test.[51]

(3) The scope of the immigration and emigration power in s 51(xxvii) is defined by concepts such as absorption into the Australian community, without being classified as unworkable or leading to considerable inconvenience.[52]

26. ***Independently acted upon***. The decision in *Love* and *Thoms* has had significant ramifications, both for Aboriginal persons facing the threat of deportation from Australia and for the broader Australian community. It is part of an evolving recognition of the unique and special status of Aboriginal peoples and their deep connection to the lands and waters that form our country, including within our constitutional framework. In addition, it has had direct consequences for a number of individuals:

(1) Mr Love himself awaits determination of the question of fact as to whether he is an "Aboriginal Australian";[53]

(2) the Federal Court has made a declaration in at least one case that a non-citizen is not an alien by reason of meeting the tripartite test;[54] and

(3) as at 31 October 2021, up to 11 persons had been released from detention on the basis that they meet or probably meet the tripartite test used in *Love* and *Thoms*, with the Department of Home Affairs continuing to assess the claims of 25 persons who may be affected by the decision.[55]

C. *LOVE* AND *THOMS* WAS CORRECTLY DECIDED

27. In the event that the Court re-examines the decision in *Love* and *Thoms*, Victoria submits it should be confirmed.

---

51 See generally *Helmbright (No 2)* [2021] FCA 647 (Mortimer J); *Webster* (2020) 277 FCR 38 (Rares J); *McHugh First Instance* [2020] FCA 416 (Anderson J); see also *Love* and *Thoms* (2020) 270 CLR 152 at [371] (Gordon J).

52 *Love* and *Thoms* (2020) 270 CLR 152 at [369] (Gordon J); *Ex parte Te* (2002) 212 CLR 162 at [24]-[26] (Gleeson CJ), [108] (Gummow J); *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 295 (Mason CJ).

53 The remitted proceedings in the Federal Court involving Mr Love (QUD 223 of 2020) is currently stayed pending delivery of judgment in this matter and *Thoms v Commonwealth of Australia* (Matter No B56/2021).

54 *Hirama* [2021] FCA 648 (Mortimer J).

55 Senate Standing Committee on Legal and Constitutional Affairs, Supplementary Budget Estimate (25 October 2021), SE21-287 Aboriginal People in Immigration Detention.

28. The members of the majority in *Love* and *Thoms* were correct to hold that Aboriginal Australians (understood according to the tripartite test in *Mabo [No 2]*) are not within the reach of the "aliens" power conferred by s 51(xix). The unique connection or relationship between Aboriginal persons and the land and waters of Australia (to which every Aboriginal person belongs) is antithetical to the constitutional concept of "alienage".

29. Such a conclusion does not introduce a race-based limitation on the scope of the "aliens" power.[56] Rather, it gives the constitutional concept of "alien" a meaning that is consistent with, and gives effect to, the position of Aboriginal persons as *indigenous to Australia*. The distinctive relationship between Aboriginal persons and the lands and waters of Australia is *inseparable from* that indigeneity,[57] and is synonymous with a "connection" to country. A legal consequence that flows from the recognition of this unique relationship or connection is that Aboriginal peoples cannot be — and never were — "alien" to this country.[58]

30. Before the decision in *Love* and *Thoms*, the term "alien" had been described by this Court as meaning "belonging to another person or place" or a "lack of relationship with a country",[59] or a person who is "not a member of the community which constitutes the body politic of the nation".[60] As Gordon and Edelman JJ recognised in *Love* and *Thoms*, fundamental to these types of descriptions is a sense of "otherness, being an 'outsider', foreignness"[61] or being a "foreigner to the political community".[62] Whether described by reference to the nation state or body politic or political community — an alien does not *belong* and is instead *foreign to*.

31. The notion of "belonging" is foundational to the relationship of Aboriginal persons with this country — Aboriginal persons *belong to* the land and waters of Australia and cannot

---

56 See *Love* and *Thoms* (2020) 270 CLR 152 at [73] (Bell J); [256] (Nettle J), see also [370] (Gordon J), [410] (Edelman J); *cf.* [44] (Kiefel CJ), [126], [133] (Gageler J), [147], [181] (Keane J).

57 *Love* and *Thoms* (2020) 270 CLR 152 at [73] (Bell J), [263], [276] (Nettle J), [289], [333], [335]-[336], [340]-[341], [363] (Gordon J), [392], [396], [450]-[451] (Edelman J).

58 *Love* and *Thoms* (2020) 270 CLR 152 at [338], [364] (Gordon J).

59 *Nolan* (1998) 165 CLR 178 at 183 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ); see also *Singh* (2004) 222 CLR 322 at [59] (McHugh J), [205], see also [190] (Gummow, Hayne and Heydon JJ).

60 *Nolan* (1998) 165 CLR 178 at 189 (Gaudron J).

61 *Love* and *Thoms* (2020) 270 CLR 152 at [296] (Gordon J).

62 *Love* and *Thoms* (2020) 270 CLR 152 at [394], [404], [410], [415] (Edelman J); see also *Chetcuti* (2021) 95 ALJR 704 at [53] (Edelman J).

be said to belong to another place.[63] For that reason, Aboriginal persons are not, and are incapable of being, *outsiders* or *foreigners to* Australia.[64] This relationship of belonging, as opposed to "otherness" or "foreignness", is inconsistent with status as an "alien" and takes Aboriginal persons outside of the scope of the meaning of this term.[65]

32. Contrary to the appellants' submissions (**AS [39]-[41]**), the fact that an Aboriginal person will not be an alien even though they may be unable to demonstrate a connection to particular land and waters under native title law, does not produce any "misalignment". The "deeper" or "fundamental" truth recognised by *Mabo [No 2]* and subsequent cases is that the spiritual, cultural and lasting connection of Aboriginal persons with the lands and waters that make up Australia has not been severed or extinguished by European settlement.[66] That connection is not dependent on the identification of legal title in respect of *particular* land or waters, because an Aboriginal person's unique relationship with the land and waters that now make up the territory of Australia exists irrespective of whether they hold or may hold native title rights and interests under the *Native Title Act 1993* (Cth), or whether such rights and interests have been extinguished.[67]

33. The appellants' suggestion (**AS [37]**) that there is a qualitative difference between the connection to lands and waters held by Aboriginal persons who also have a connection with another country and Aboriginal persons who only have a connection with the lands and waters of Australia is without basis or evidence. It ignores the significance of that connection to land and waters for *all* Aboriginal persons — by reason of their indigeneity — as recognised in *Love* and *Thoms*, by reference to the long succession of cases referred to above.[68]

---

63 *Love* and *Thoms* (2020) 270 CLR 152 at [74] (Bell J), [391], [396], [398], see [451] (Edelman J); see also [335], [349] (Gordon J); [276] (Nettle J).

64 *Love* and *Thoms* (2020) 270 CLR 152 at [335] (Gordon J), [392], [454] (Edelman J).

65 *Love* and *Thoms* (2020) 270 CLR 152 at [74] (Bell J), [296], [333], [357], [364], [374] (Gordon J), [396], [398] (Edelman J); see also [271]-[272] (Nettle J).

66 *Love* and *Thoms* (2020) 270 CLR 152 at [289], [340]-[341] and the cases cited in fn 481 (Gordon J), [451] and the cases cited in fn 782 and 783 (Edelman J).

67 *Love* and *Thoms* (2020) 270 CLR 152 at [70]-[71] (Bell J), [277] (Nettle J), [340], [365] (Gordon J), [451] (Edelman J).

68 See [14] above. Further, there may be numerous reasons why an Aboriginal person might have connections to another country, which do not detract from their connection to the lands and waters of Australia. These may include complicated historical reasons connected with the colonisation of Australia and the dispossession of Aboriginal persons from their traditional lands, which may have led some Aboriginal persons to move overseas or develop connections to another country: see *Helmbright (No 2)* [2021] FCA 647 at [38]-[45] (Mortimer J). See also *Akiba v Queensland (No 2)* (2006) 154 FCR 513 at [34]-[35] (French J); see generally, *Akiba v Queensland (No 3)* (2010) 204 FCR 1 (Finn J).

34. An Aboriginal person's connection with land and waters can also not be dismissed as irrelevant to membership of the Australian body politic (*cf.* **AS [42]-[43]**).[69] The body politic has a territorial dimension, being made up of the "intertwined dimensions of territory, permanent population, and government".[70] Because Aboriginal persons form part of an "indissoluble whole" with the land and waters that makes up that territory,[71] they are "inseparably tied" to the territory, and thus to the political community of that territory.[72] They are essential members of that community.[73] To put it another way, a relationship of belonging to the territory of Australia extends to a relationship with the body politic that is tied to that territory.[74] That is so regardless of the fact that, at the acquisition of British sovereignty, Aboriginal persons became British subjects (and members of the political community in that sense), not because of any recognition of rights or interests in land or waters, but rather because of generally applicable common law rules (**AS [44]**).

35. Despite acknowledging the "undoubted" qualification on the aliens power recognised in *Pochi* (**AS [27]**), the appellants seek to demonstrate that the decision in *Love* and *Thoms* is wrong by contending (as the Commonwealth did in *Love* and *Thoms*) that Parliament's definition of citizenship controls the meaning of "alien". While s 51(xix) "confers legislative power to determine the existence and consequences of a legal status",[75] the criteria chosen by Parliament must not control the meaning of the term "aliens".[76] That would risk circularity.[77] It is only "[w]ithin the limits of the concept of 'alien' in s 51(xix)" that Parliament is able to decide who will be treated as having the status of alienage.[78] Despite Parliament *defining* alienage to include a non-citizen, it is unable to *treat* an Aboriginal person, understood according to the tripartite test, as an "alien".

---

69 *Love* and *Thoms* (2020) 270 CLR 152 at [349] (Gordon J).

70 *Love* and *Thoms* (2020) 270 CLR 152 at [438] (Edelman J); see also [348]-[349] (Gordon J).

71 *Love* and *Thoms* (2020) 270 CLR 152 at [365] (Gordon J), [451] (Edelman J). See also *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 167 (Blackburn J); *Meneling Station* (1982) 158 CLR 327 at 356-357 (Brennan J); *Ward* (2002) 213 CLR 1 at [14] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Griffiths* (2019) at 269 CLR 1 at [153], [206], [223] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

72 *Love* and *Thoms* (2020) 270 CLR 152 at [396] (Edelman J).

73 *Love* and *Thoms* (2020) 270 CLR 152 at [398] (Edelman J).

74 *Love* and *Thoms* (2020) 270 CLR 152 at [348]-[350] (Gordon J), [396], [438]-[439] (Edelman J); see also [263] (Nettle J).

75 *Love* and *Thoms* (2020) 270 CLR 152 at [86] (Gageler J).

76 *Pochi* (1982) 151 CLR 101 at 109 (Gibbs CJ); *Singh* (2004) 222 CLR 322 at [4]-[5] (Gleeson CJ), [151]-[153] (Gummow, Hayne and Heydon JJ).

77 *Love* and *Thoms* (2020) 270 CLR 152 at [327] (Gordon J)

78 *Koroitamana* (2006) 227 CLR 31 at [11] (Gleeson CJ and Heydon J).

36. The appellants are also wrong to criticise a number of the majority Justices for reasoning from the intrinsic or essential meaning of the term "aliens" (**AS [34]**). On numerous occasions, the Court has had regard to the "ordinary",[79] "essential"[80] or "unaltered"[81] meaning of the term in determining the scope of the power in s 51(xix). Whilst s 51(xix) may refer to a subject matter that is a "topic of juristic classification",[82] this does not mean that topic does not have an essential meaning.[83]

37. For example, the power in s 51(xxi) to pass laws with respect to "marriage" also refers to a topic of juristic classification.[84] While Parliament has undoubted power to define the status of marriage (again, within power), the Court has nonetheless described the essential meaning of the term at a level of specificity (a "consensual union formed between natural persons in accordance with legally prescribed requirements"), despite narrower historical understandings and applications of that meaning.[85] Thus, although the *Marriage Act 1961* (Cth) did not at the time of the *Same Sex Marriage Case* allow for marriage between persons of the same sex, by reasoning from the essential meaning of the term the Court found that the term "marriage" in s 51(xxi) includes such a marriage.[86] Accordingly, a grant of legal status to same sex marriage is within the Commonwealth's legislative power. The obverse must also be true; reasoning from the meaning of the term, the Commonwealth Parliament could not grant the legal status of a marriage to something that does not satisfy the essential meaning of the term. In other words, it could not *treat* a relationship that is not a "consensual union formed between natural persons" — for example, a *non-consensual* relationship between two persons — as a "marriage" for the purposes of s 51(xxi). The same logic applies to the term "alien", namely, that it is possible to use the essential meaning of the constitutional term (which also provides for the assignment of a legal status) to identify classes of persons that are both capable and incapable of meeting

---

79 *Pochi* (1982) 151 CLR 101 at 109 (Gibbs CJ); *Nolan* (1998) 165 CLR 178 at 183 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ).

80 *Chetcuti* (2021) 95 ALJR 704 at [53] (Edelman J); *Singh* (2004) 222 CLR 322 at [38] (McHugh J); see also *Koroitamana* (2006) 227 CLR 31 at [28] (Gummow, Hayne and Crennan JJ).

81 *Singh* (2004) 222 CLR 322 at [190] (Gummow, Hayne and Heydon JJ); see also *Nolan* (1998) 165 CLR 178 at 184 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ).

82 *Love* and *Thoms* (2020) 270 CLR 152 at [86] (Gageler J), [400]-[401] (Edelman J).

83 *Chetcuti* (2021) 95 ALJR 704 at [57]-[59] (Edelman J).

84 *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 (***Same Sex Marriage Case***) at [14] (the Court).

85 *Same Sex Marriage Case* (2013) 250 CLR 441 at [33] (the Court); *Love* and *Thoms* (2020) 270 CLR 152 at [401] (Edelman J), *cf* at [88] (Gageler J).

86 *Same Sex Marriage Case* (2013) 250 CLR 441 at [37]-[38] (the Court).

that description. "Aboriginal Australians" is a class of persons that is *incapable* of meeting the description of "alien".

38. In any case, there are recognised limits to what Parliament can do with a juristic classification.[87] In the context of the "aliens" power, a limit has been identified by Gibbs CJ in *Pochi*.[88] Contrary to the appellants' submissions (**AS [36]-[38]**), once the connection between Aboriginal persons and Australia is properly understood as arising from a distinctive relationship with the lands and waters that make up the territory of Australia that is *inseparable from their indigeneity*, it becomes clear why Aboriginal persons cannot possibly answer the description of "alien".

10 39. Finally, the appellants' argument that *Love* and *Thoms* implicitly confers political sovereignty on Aboriginal societies should be rejected (**AS [45]**). The authority granted to elders or others with traditional authority under the third limb of the tripartite test is not authority to determine whether a person should be *excluded* from the Australian body politic but merely to decide whether a person should be *included* within their own membership. That decision is, by itself, of no immediate constitutional consequence. It is nothing more than one factor relevant to a multifactorial assessment of a person's Aboriginality. In light of *Love* and *Thoms*, it may have constitutional significance in connection with the meaning of "alien", but the ultimate "determination of the application of the concept of 'alien'" rests with the courts.[89]

20 ## D. THE TRIPARTITE TEST

40. The appellants argue that the first limb of the tripartite test, insofar as that test is used to identify whether a person is an "alien" within the meaning of s 51(xix) by reason of being an "Aboriginal Australian", requires biological descent in the form of a "genetic relationship" with an Aboriginal person, in the sense of genes "handed down" from an Aboriginal ancestor of the same society that the person identifies with and is recognised by for the purposes of the second and third limbs (**AS [52]-[53], [56]**).

41. The respondent, the National Native Title Council and the Northern Land Council each submit that the Court should not entertain this argument, on the basis that it was not put to

---

87 *Attorney-General for the State of New South Wales v Brewery Employes Union of New South Wales* (1908) 6 CLR 469 at 614-615 (Higgins J).

88 (1982) 151 CLR 101 at 109.

89 *Love* and *Thoms* (2020) 270 CLR 152 at [451] (Edelman J).

the primary judge and is therefore not the subject of any findings below, and that this is therefore not a proper vehicle to consider potentially significant implications of the argument for related areas of law.[90] Victoria supports those submissions.

42. However, if the Court rejects this submission and considers it appropriate to examine the operation of the tripartite test in the non-alienage context in this case, Victoria makes the following submissions.

43. *First,* the tripartite test must be adapted to its context, which includes contemporary understandings of Aboriginal identity.[91] As Gordon J recognised in *Love* and *Thoms*, "cultures change and evolve".[92]

44. *Second*, when assessing a person's claim of Aboriginality in the non-alienage context, "biological descent" should not be understood to require evidence of a *genetic* relationship to another "Aboriginal Australian", or to a particular group of "Aboriginal Australians". Such a requirement begs the question — how is *that* second person (or group of people) — who the first person is "genetically related" to — themselves to demonstrate their Aboriginality?

45. The appellants rely on the meaning of the term "biological parent" as incorporating a requirement that genes be "handed down" (**AS [53]**). They rely also on the "ordinary meaning" of "Aboriginal" as requiring a "'degree of descent' from the inhabitants of Australia at the time immediately prior to European settlement" (**AS [54]**). By doing so, the appellants appear to be asserting that it is necessary for a person who seeks to demonstrate their Aboriginality to provide evidence that they have genes that have been "handed down" from an original inhabitant of this country (who also must be from the same society that the person identifies with and is recognised by). This is an impractical and impossible standard. The genetic ancestry of any person is not susceptible to legal proof.[93]

---

90 In relation to the respondent, see RS [83]-[88].

91 See *Attorney-General (Cth) v Queensland* (1990) 25 FCR 125 at 145-147 (French J); *Shaw v Wolf* (1998) 83 FCR 113 at 119D-120C, 122C (Merkel J); *Hackett (a pseudonym) v Secretary, Department of Communities and Justice* (2020) 379 ALR 248 (***Hackett***) at [155]-[161] (Basten JA). See also *Love* and *Thoms* (2020) 270 CLR 152 at [73] (Bell J), citing *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007), adopted by the General Assembly 13 September 2007, supported by Australia 3 April 2009).

92 *Love* and *Thoms* (2020) 270 CLR 152 at [363] (Gordon J).

93 *Tasmanian Dam Case* (1983) 158 CLR 1 at 243-244 (Brennan J), quoting *King Ansell v Police* [1979] 2 NZLR 531 at 542 (Richardson J).

46. In addition, the historical treatment of Aboriginal people, acknowledged by the Court in *Love* and *Thoms*,[94] explains why there may be significant evidentiary difficulties in proving a "genetic" relationship with other Aboriginal persons, let alone a particular group.

47. *Third*, linking "genetics" with indigeneity has a fraught and troubled history[95] and it is generally well-accepted that there is no meaningful genetic or biological basis for at least the concept of "race".[96] The concept of biological descent should not be reduced to a question of genetics.[97] Concepts such as "blood-quantum" have been used to classify and categorise Aboriginal peoples to provide access to benefits or subject persons to detriment, such that these "flawed biological characterisations … [were] the basis for mistreatment, including for policies of assimilation involving the removal of many Aboriginal children from their families until the 1970s".[98] The Court should be wary of any implicit endorsement of such classifications and categorisations.

48. Having regard to the contemporary understanding of Aboriginality, a requirement to adduce evidence to prove a "genetic relationship" to another Aboriginal person or a group

---

94 *Love* and *Thoms* (2020) 270 CLR 152 at [337], [342]-[346], [354], [360] (Gordon J), [450], [452]-[454] (Edelman J). See also *Hackett* (2020) 379 ALR 248 at [155]-[160] (Basten JA); *Shaw v Wolf* (1998) 83 FCR 113 at 122C and 130G-131A (Merkel J); *Patmore v Independent Indigenous Advisory Committee* [2002] AATA 962 at [33]-[36] (Downes J, Estcourt DP, Muller DP); *Mason v Tritton* (1994) 34 NSWLR 572 at 588 (Kirby P); *In the Matter of Watson (No 2)* [2001] TASSC 105 at [7] (Cox CJ); de Plevitz and Croft, "Aboriginality under the Microscope: The Biological Descent Test in Australian Law" (2003) 3(1) *Queensland University of Technology Law and Justice Journal* 105 at 120; Whittaker, "White Law, Blak Arbiters, Grey Legal Subjects: Deep Colonisation's Role and Impact in Defining Aboriginality at Law" (2017) 20 *Australian Indigenous Law Review* 4 at 20-21.

95 *Hackett* (2020) 379 ALR 248 at [65]-[66] (Leeming JA), [148]-[152] (Basten JA); *Eatock* (2011) 197 FCR 261 at [169]-[171] (Bromberg J); *Attorney-General (Cth) v Queensland* (1990) 25 FCR 125 at 147 (French J); see also de Plevitz and Croft, "Aboriginality under the Microscope: The Biological Descent Test in Australian Law" (2003) 3(1) *Queensland University of Technology Law and Justice Journal* 105 at 116-117; Whittaker, "White Law, Blak Arbiters, Grey Legal Subjects: Deep Colonisation's Role and Impact in Defining Aboriginality at Law" (2017) 20 *Australian Indigenous Law Review* 4 at 20.

96 *Eatock* (2011) 197 FCR 261 at [169] (Bromberg J), relying on Australian Law Reform Commission, *Report on the Protection of Human Genetic Information* (2003) at [36.41]-[36.42].

97 "'Descent' implies not genetics as inherited essential characteristics but the historical connection that leads back to land and which claims a particular history, just as the Anzac celebrants do": Philip Morrissey, "Aboriginality and corporatism", in Michele Grossman (ed), *Blacklines: Contemporary Critical Writing by Indigenous Australians* (2003) 52 at 59.

98 *Eatock* (2011) 197 FCR 261 at [171] (Bromberg J), see also at [170]; see generally Australian Human Rights Commission, *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997), Chapters 7 and 9 regarding genetic engineering of "absorption" based on descent characterisations (such as "half-caste", "quadroon" and "octoroon") in Western Australia and the Northern Territory respectively.

of Aboriginal persons — in the sense of genes "handed down" from an Aboriginal ancestor — for the purpose of determining non-alienage, should not be endorsed by this Court.[99]

PART V: ESTIMATE OF TIME

49. The Attorney-General for Victoria estimates that she will require approximately 45 minutes for the presentation of her oral submissions.

Dated: 9 March 2022

.....
ROWENA ORR
Solicitor-General for Victoria
T: (03) 9225 7798
E: rowena_orr@vicbar.com.au

.....
TIMOTHY GOODWIN
Aickin Chambers
T: (03) 9225 6323
E: tim.goodwin@vicbar.com.au

.....
ROHAN NANTHAKUMAR
Counsel Assisting the Solicitor-General for Victoria
T: (03) 9225 7204
E: sg.counselassisting@vicbar.com.au

10

[99] The question whether such an approach is apt in a native title context, where descent from the particular group claiming native title rights and interests over particular land is required (reflecting the fact that defining membership of the native title group is critical), does not arise for consideration in this case. No judge in the majority in *Love* and *Thoms* suggested that the tripartite test, when applied in the constitutional context, requires an Aboriginal person, or the community that recognises them, to hold or be capable of holding native title rights and interests: (2020) 270 CLR 152 at [70]-[71] (Bell J), [277] (Nettle J), [340], [365] (Gordon J), [451] (Edelman J); see also *Helmbright (No 2)* [2021] FCA 647 at [215] (Mortimer J). Therefore, the premise of the appellants' reference in the sentence in fn 101 of the **AS** to the position of members of the Yorta Yorta Aboriginal community — that they cannot satisfy the third limb — is not accurate as a general proposition.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S 192 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

ANNEXURE TO SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)

Pursuant to Practice Direction No. 1 of 2019, Victoria sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No.	Description	Version	Provisions
	Constitutional provisions		
50.	*Commonwealth Constitution*		ss 51(xix), 51(xxi), 51(xxvii)
	Statutes		
51.	*Aboriginal Heritage Act 2006 (Vic)*	Current (Compilation No 25, in force 1 July 2021)	ss 1 and 3
52.	*Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic)	Current (Compilation No 1, in force 1 August 2018)	Preamble
53.	*Charter of Human Rights and Responsibilities Act 2006* (Vic)	Current (Compilation No 14, in force 6 April 2020)	s 19(2)
54.	*Constitution Act 1975* (Vic)	Current (Compilation No 223, in force 17 March 2021)	s 1A(2)

55.	*Judiciary Act 1903* (Cth)	Current (Compilation No 49, in force 18 February 2022)	s 78A
56.	*Marriage Act 1961* (Cth)	As at 12 December 2013 (Compilation No 12, in force 1 May 2013 to 24 June 2014)	
57.	*Migration Act 1958* (Cth)	Current (Compilation No 152, in force 1 September 2021)	ss 5F(1), 5F(2), 5J, 116(1)(e)(i)
58.	*Migration Regulations 1994* (Cth)	Current (Compilation No 268, in force 18 February 2022)	rr 1.15A(3), sch 2 cll 500.212, 162.213, 858.212(2)(c) and (f)
59.	*Native Title Act 1993* (Cth)	Current (Compilation No 110, in force 25 September 2021)	
60.	*Royal Style and Titles Act 1973* (Cth)	As passed (Compilation No 1, in force 19 October 1973)	
61.	*Traditional Owner Settlement Act 2010 (Vic)*	Current (Compilation No 25, in force 1 December 2020)	Preamble
62.	*Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic)	Current (Compilation No 8, in force 24 February 2022)	Preamble