



HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
CANBERRA 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

**OUTLINE OF ORAL SUBMISSIONS FOR
THE NATIONAL NATIVE TITLE COUNCIL**

Part I: Certification

This outline of submissions is in a form suitable for publication on the internet.

Part II: Outline of propositions

The first issue: Factual determination of adoption (at [17] NNTC's written submissions)

- 1 To be an "Aboriginal Australian" for the purposes of s 51(xix) of the *Constitution*, according to the majority in *Love & Thoms*, sufficed to consider the tri-partite test as set out in *Mabo (No 2)*: biological descent, and on mutual recognition of a particular person's membership: by that person, and by the elders or other persons enjoying traditional authority among those people.
- 2 Nothing in *Mabo (No 2)*, nor any of the succeeding cases, addressed the factual possibility that traditional adoption, in the absence of Aboriginal or Torres Strait Islander biological descent, could replace the first limb of the tri-partite test.

- 3 The factual determination of whether such an adoption has occurred in each case will require evidence of the traditional laws and customs of the particular Aboriginal or Torres Strait Islander group who is said to have adopted the person.
 - 4 There are no facts or evidence in this case sufficient to properly determine the question of whether adoption in accordance with traditional laws and customs has occurred.
 - 5 Accordingly, the issue of whether traditional adoption by an Aboriginal or Torres Strait Islander group is sufficient to meet the first limb of the tri-partite test, cannot be determined in this case.
- 10 ***The second issue: Issues of sovereignty do not arise (at [50(e)] NNTC's written submissions)***
- 6 The minority judgments in *Love & Thoms* raise the concern that by recognising the capacity of Aboriginal or Torres Strait Islander groups to determine whether a person is a member of that group, this would concede the Commonwealth's capacity to determine whether a person is an alien for the purposes of s 51(xix). The minority were concerned that this would be inconsistent with Australian sovereignty, at [25] (per Kiefel CJ), at [137] (per Gageler J) and at [197] (per Keane J).
 - 7 The recognition provided by an Aboriginal group, under the third limb of the tri-partite test, is a factual determination operating in a sphere that has nothing to do with 20 Australian sovereignty.
 - 8 The fact of this recognition is simply a basis, when proved, for an Australian court to consider justiciable questions.
 - 9 There is no diminution in the Commonwealth's authority when the issue of the membership of a particular group depends on facts of this kind.

Dated: 6 April 2022



BRET WALKER