HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

Matter No B43/2018

DANIEL ALEXANDER LOVE . . . . . PLAINTIFF

AND

COMMONWEALTH OF AUSTRALIA . . . . . DEFENDANT

Matter No B64/2018

BRENDAN CRAIG THOMS . . . . . PLAINTIFF

AND

COMMONWEALTH OF AUSTRALIA . . . . . DEFENDANT

Love v Commonwealth of Australia
Thoms v Commonwealth of Australia
[2020] HCA 3
Date of Hearing: 8 May 2019 & 5 December 2019
Date of Judgment: 11 February 2020
B43/2018 & B64/2018

ORDER

Matter No B43/2018

The questions stated in the special case for the opinion of the Full Court are answered as follows:

1. *Is the plaintiff an "alien" within the meaning of s 51(xix) of the* Constitution*?*

   Answer: The majority considers that 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 majority is unable, however, to agree as to whether the plaintiff is an Aboriginal Australian on the facts stated in the special case and, therefore, is unable to answer this question.*

2. *Who should pay the costs of this special case?*

   Answer: The defendant.

Matter No B64/2018

The questions stated in the special case for the opinion of the Full Court are answered as follows:

1. *Is the plaintiff an "alien" within the meaning of s 51(xix) of the* Constitution*?*

   Answer: 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".*

2. *Who should pay the costs of this special case?*

   Answer: The defendant.

Representation

S J Keim SC with K E Slack and A J Hartnett for the plaintiff in each matter (instructed by Maurice Blackburn Lawyers)

S P Donaghue QC, Solicitor-General of the Commonwealth, with N M Wood and J D Watson for the defendant in both matters (instructed by Australian Government Solicitor)

P G Willis SC with T B Goodwin for the Attorney-General for the State of Victoria, intervening in both matters (instructed by Victorian Government Solicitor) at the hearing on 5 December 2019

CATCHWORDS

Love v Commonwealth of Australia
Thoms v Commonwealth of Australia

Constitutional law (Cth) - Powers of Commonwealth Parliament - Power to make laws with respect to naturalisation and aliens - Meaning of "aliens" - Where plaintiffs foreign citizens, born outside Australia, who did not acquire Australian citizenship - Where plaintiffs biological descendants of indigenous peoples - Where plaintiffs' visas cancelled under s 501(3A) of *Migration Act 1958* (Cth) - Whether statutory citizenship and constitutional alienage co-terminous - Whether an Aboriginal Australian (defined according to tripartite test in *Mabo v Queensland [No 2]* (1992) 175 CLR 1) can be "alien" within meaning of s 51(xix) of *Constitution* - Whether s 51(xix) supports application of ss 14, 189 and 198 of *Migration Act* to plaintiffs - Whether plaintiffs satisfy tripartite test.

Words and phrases - "Aboriginal Australian", "alienage", "aliens", "allegiance", "body politic", "citizen", "connection to country", "essential meaning", "foreign citizen", "indicia of alienage", "nationality", "non-alien", "non-alienage", "non-citizen", "obligation of protection", "political community", "polity", "sovereignty", "spiritual connection", "subject", "territory", "traditional laws and customs", "tripartite test", "unlawful non-citizen".

Constitution, s 51(xix), (xxvii).
Australian Citizenship Act 2007 (Cth), ss 12, 13, 14, 15, 16.
Migration Act 1958 (Cth), ss 5, 14, 189, 196, 198, 200, 501.

Index of Headings

1 **KIEFEL CJ.** These two special cases raise questions concerning s 51(xix) of the *Constitution*, which provides that the Commonwealth Parliament has power to make laws "for the peace, order, and good government of the Commonwealth with respect to: ... naturalization and aliens". The plaintiffs argue that the power should be read so as not to apply to a person who is not a citizen of Australia, who is a citizen of a foreign country and is not naturalised as an Australian citizen, but who is an Aboriginal person. That is to say, the plaintiffs contend that s 51(xix) is subject to an unexpressed limitation or exception.

2 Each of the plaintiffs was born outside Australia - Mr Love in Papua New Guinea and Mr Thoms in New Zealand. They are citizens of those countries. They have both lived in Australia for substantial periods as holders of visas which permitted their residence but which were subject to revocation. They did not seek to become Australian citizens. Their visas were cancelled by a delegate of the Minister for Home Affairs under s 501(3A) of the *Migration Act 1958* (Cth), the relevant effect of which is to require the Minister to cancel a person's visa if the person has been convicted of an offence for which a sentence of imprisonment of 12 months or more is provided.[1] Upon cancellation of their visas the plaintiffs became unlawful non-citizens[2] and liable to be removed from Australia.

3 The *Migration Act* and the *Australian Citizenship Act 2007* (Cth) ("**the Citizenship Act**") are enacted under s 51(xix).[3] The plaintiffs do not challenge the provisions of those statutes. They do not contend that the criteria stated in the Citizenship Act for Australian citizenship and the inference to be drawn from those criteria respecting the status of alien is not within the power given by s 51(xix). They contend that they are outside the purview of those statutes and s 51(xix) because they have a special status as a "non-citizen, non-alien". They say that they have that status because although they are non-citizens they cannot be aliens because they are Aboriginal persons. Mr Thoms identifies, and is accepted by other Gunggari People, as a member of the Gunggari People. He is a common law holder of native title which has been recognised by determinations made by the Federal Court of Australia.[4] Mr Love identifies as a descendant of the Kamilaroi group and is recognised as such by one Elder of that group.

The question of law

4 The question of law stated for the opinion of this Court in these special cases is whether each of the plaintiffs is an "alien" within the meaning of s 51(xix). The question as framed is apt to mislead as to the role of this Court. It is not for this Court to determine whether persons having the characteristics of the plaintiffs are aliens. Such an approach would involve matters of values and policy. It would usurp the role of the Parliament. The question is perhaps best understood to be directed to whether it is open to the Commonwealth Parliament to treat persons having the characteristics of the plaintiffs as non-citizens for the purposes of the *Migration Act*.

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1 *Migration Act 1958* (Cth), s 501(6)(a), s 501(7)(c).

2 *Migration Act 1958* (Cth), ss 13, 14.

3 See, eg, *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 443 [156] per Gummow and Hayne JJ; *Pochi v Macphee* (1982) 151 CLR 101.

4 *Kearns on behalf of the Gunggari People #2 v Queensland* [2012] FCA 651; *Foster on behalf of the Gunggari People #3 v Queensland* [2014] FCA 1318.

Section 51(xix)

5 Section 51(xix) gives the Commonwealth Parliament power to choose the criteria for alienage.[5] It gives the Parliament the power to provide the means by which that status is altered, which is to say by naturalisation. It gives the Parliament power to determine the conditions upon which a non-citizen may become a citizen and to attribute to any person who lacks the qualifications for citizenship the status of alien.[6] It is now regarded as settled that it is for the Parliament, relying on s 51(xix), to create and define the concept of Australian citizenship and its antonym, alienage.[7]

6 At Federation it was well recognised that an attribute of an independent sovereign State was to decide who were aliens and whether they should become members of the community.[8] It was a view held by international jurists of the time and was followed by the courts of the United Kingdom.[9] At Federation there were two leading theories about the status of subject or citizen and how it was to be determined. On one view that status was acquired by descent; on the other it was acquired by reference to a person's place of birth. The latter reflected the view of the common law, earlier expressed in *Calvin's Case*,[10] but which had been modified by statute in the United Kingdom. But by s 51(xix) it was to be left to the Commonwealth Parliament to deal with the subject matter of aliens.[11]

7 Following Federation it was open to the Commonwealth Parliament to choose one or more of the common law approaches, or variations of them, so long as what was chosen could be said truly to answer the description of "alien".[12] In *Pochi v Macphee*,[13] Gibbs CJ acknowledged that, necessarily, there must be a limit to Parliament's powers to determine who comes within the definition of an "alien". The limit to which his Honour referred was that Parliament could not expand the power under s 51(xix) by defining as aliens persons who could not possibly answer the description of an "alien" in the ordinary understanding of that word. No question of that kind[14] arises in these special cases. The plaintiffs do not suggest that the criteria stated in the Citizenship Act are beyond the power of the Parliament. Rather, they argue that neither that statute nor s 51(xix) applies to a person who is a non-citizen, a citizen of a foreign country and an Aboriginal person.

8 Section 51(xix) is not expressed to be subject to any prohibition, limitation or exception respecting Aboriginal persons. The task of this Court, in interpreting a provision of the *Constitution*, is to expound its text and where necessary to ascertain what is implied in it. Needless to say, questions of constitutional interpretation cannot

5 *Koroitamana v The Commonwealth* (2006) 227 CLR 31 at 38 [11] per Gleeson CJ and Heydon J.
6 *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 35 [2] per Gleeson CJ, Gummow and Hayne JJ.
7 *Koroitamana v The Commonwealth* (2006) 227 CLR 31 at 46 [48] per Gummow, Hayne and Crennan JJ, citing *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 173 [31], 180 [58], 188-189 [90], 192 [108]-[109], 215-216 [193]-[194], 219-220 [210]-[211], 229 [229]; see also *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 35 [2] per Gleeson CJ, Gummow and Hayne JJ.
8 *Robtelmes v Brenan* (1906) 4 CLR 395 at 400-401 per Griffith CJ.
9 *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 170 [21] per Gleeson CJ.
10 (1608) 7 Co Rep 1a [77 ER 377].
11 *Singh v The Commonwealth* (2004) 222 CLR 322 at 340-341 [30] per Gleeson CJ, 413-414 [251]-[252] per Kirby J.
12 *Koroitamana v The Commonwealth* (2006) 227 CLR 31 at 49 [62] per Kirby J.
13 (1982) 151 CLR 101 at 109.
14 See *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 258 per Fullagar J.

depend on what the Court perceives to be a desirable policy[15] regarding the subject of who should be aliens or the desirability of Aboriginal non-citizens continuing to reside in Australia. The point presently to be made is that in the absence of a relevant constitutional prohibition or exception, express or implied, it is not a proper function of a court to limit the method of exercise of legislative power.[16] The question then is whether the plaintiffs can point to an implication by the accepted methods of constitutional interpretation.

The Citizenship Act and the Australian body politic

9 From the time of British settlement the legal status of Aboriginal persons in Australia - as subjects of the Crown - has not been different from other Australians. In *Mabo v Queensland [No 2]*,[17] it was explained that at settlement all persons present in Australia became subjects of the British Crown on the inception of the common law. With the enactment of the *Nationality and Citizenship Act 1948* (Cth)[18] British subjects became citizens of Australia. It has been observed[19] that another effect of Australia becoming a fully independent sovereign nation, with its own brand of citizenship, was that the word "alien" became synonymous with non-citizen.

10 Neither the Citizenship Act nor the *Migration Act* defines the term "alien". The Citizenship Act does specify the criteria for citizenship and it may be taken that Parliament attributes the status of alien to a person who does not have those characteristics. The preamble to the Citizenship Act states that "Australian citizenship represents full and formal membership of the community of the Commonwealth of Australia" and is a "common bond" involving reciprocal rights and obligations. The community there referred to may be understood to be the "people" referred to in the *Constitution*.[20]

11 Under the Citizenship Act a person is automatically an Australian citizen if born in Australia and one or both parents of the person are Australian citizens or permanent residents at that time.[21] There are other ways in which a person may acquire citizenship automatically. A person may also acquire citizenship by application to the Minister.[22] One basis for such an application is citizenship by descent, where a person is born outside Australia and one or both of the parents of the person are Australian citizens.[23] Citizenship by descent is not automatically conferred.

12 The preamble to the Citizenship Act goes on to state that the Parliament recognises that persons conferred with Australian citizenship will have the reciprocal rights and obligations as citizens after pledging loyalty to Australia and its people and after pledging to uphold and obey the laws of Australia.

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15 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 143-144 per Brennan J.
16 *Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth* (1943) 67 CLR 116 at 133-134 per Latham CJ.
17 (1992) 175 CLR 1 at 37-38 per Brennan J, with whom Mason CJ and McHugh J agreed, 80 per Deane and Gaudron JJ, 182 per Toohey J.
18 Later renamed the *Australian Citizenship Act 1948* (Cth).
19 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 25 per Brennan, Deane and Dawson JJ, referring to *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178.
20 See *Constitution*, preamble, s 24.
21 *Australian Citizenship Act 2007* (Cth), ss 2A, 4(1), 12.
22 *Australian Citizenship Act 2007* (Cth), s 16.
23 *Australian Citizenship Act 2007* (Cth), s 16(2).

13 The reciprocal obligations of loyalty or allegiance[24] on the part of a citizen and the protection given by the Crown in right of Australia to its citizens are somewhat abstract in that their content is not clear.[25] It may be expected that Australia will continue to provide protection to its citizens, or nationals, when abroad.[26] Within Australian territory all persons, citizens and non-enemy aliens alike, have the protection of the law.[27]

14 The preamble to the Citizenship Act makes plain, if it were necessary, the importance of the power given to the Commonwealth Parliament respecting citizenship, alienage and naturalisation. It is by this means that Parliament determines who is to be part of the body politic and who is not to be. It is a serious matter to deny a power which is fundamental to the structure of the *Constitution* and the governance of Australia. The basis for an implication having this effect must be pellucidly clear.

Cases concerning alienage

15 In the past four decades there have been a number of challenges to the provisions of the Citizenship Act, and its predecessors, and the *Migration Act* concerning the status of a non-citizen or alien. In each of those cases the non-citizen sought to identify a characteristic pertaining to them which placed them outside the reach of the statute. But as was said by Gummow, Hayne and Heydon JJ in *Singh v The Commonwealth*,[28] the status of alien is not defined by pointing to what is said to take a person outside the reach of Parliament's prescription, rather it depends upon what it is that gives the person that status.

16 The preamble to the Citizenship Act identifies an important feature of the relationship between citizen and State. It is the loyalty owed by a citizen to the State. The decision in *Singh* highlights the importance of loyalty, or allegiance,[29] to the question of alienage. But it has also been held to be within the power of the Parliament to treat as an alien a stateless person who owes no such allegiance to the State.[30] It may be sufficient that the person has the characteristics of being born in Australia but to foreign nationals, when the statute requires that one or both of the parents be Australian citizens or permanent residents of Australia.

17 There have been a number of cases in which it has been argued, unsuccessfully, that a person's strong connection to Australia and its community takes a non-citizen out of the operation of the statute. In *Pochi*, the plaintiff was an alien immigrant who had not been naturalised. Like the plaintiffs, he was facing deportation after being convicted of a serious offence. He argued that his long residency in Australia and absorption into the Australian community took him outside the statutory meaning of "alien". In *Shaw v Minister for Immigration and Multicultural Affairs*,[31] the plaintiff

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24 *Joyce v Director of Public Prosecutions* [1946] AC 347.

25 *Singh v The Commonwealth* (2004) 222 CLR 322 at 387-388 [165]-[166] per Gummow, Hayne and Heydon JJ.

26 *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 222 CLR 1 at 8 [19], 23-24 [63]; *Singh v The Commonwealth* (2004) 222 CLR 322 at 387-388 [166] per Gummow, Hayne and Heydon JJ.

27 *Bradley v The Commonwealth* (1973) 128 CLR 557 at 582-583 per Barwick CJ and Gibbs J; *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 197-199 [125]-[130] per Gummow J.

28 (2004) 222 CLR 322 at 398 [200].

29 See *Joyce v Director of Public Prosecutions* [1946] AC 347.

30 *Koroitamana v The Commonwealth* (2006) 227 CLR 31.

31 (2003) 218 CLR 28.

pointed to his connection with Australia gained through his personal history. In *Singh* and in *Koroitamana v The Commonwealth*,[32] the plaintiffs sought to rely on the fact that they were born in Australia. But birth in Australia will not exclude a person from the reach of statutory-mandated alienage. That status now applies even to a British subject who has not been naturalised. A long connection with Australia and its community will not deprive a person of that status.[33]

18 In *Nolan v Minister for Immigration and Ethnic Affairs*[34] it was observed that, as a matter of etymology, "alien" means belonging to another place. This is not a reference to a person's feelings of connection, however strong. It is not a reference to perceptions, to how a person might be understood by others to have a connection to a country. Rather it describes a person's lack of formal legal relationship with the community or body politic of the country with which they contend to have a connection. In the United States the meaning attributed to "alien" has been said to be "one born out of the United States, who has not since been naturalized under the constitution and laws".[35]

19 In the present case the plaintiffs were born outside Australia, are citizens of foreign sovereign countries and have not been naturalised under the Citizenship Act or its predecessor. They are not part of the community of the Commonwealth of Australia and do not have the relationship with the Crown in right of Australia that a member of that community has. In *Re Minister for Immigration and Multicultural Affairs; Ex parte Te*,[36] Gleeson CJ said "there are many people who entered Australia as aliens, who have lived here for long periods and have become absorbed into the community ... Whether by design, or simply as the result of neglect, they remain aliens." Subject to consideration of the plaintiffs' argument as to the relevance of their aboriginality to s 51(xix), on the current state of authority it must be held to be within the power of the Commonwealth Parliament to treat them as aliens.

The plaintiffs' essential contention

20 The plaintiffs do not challenge these decisions. They seek to distinguish their circumstances from the plaintiffs in those cases by reference to the special connection which they, as Aboriginal persons, have to Australia.

21 The plaintiffs' submissions have been subject to extensive elaboration. Their essential contention is that it may be seen by reference to *Mabo [No 2]* and following cases that the common law of Australia recognises the unique connection which Aboriginal people have with land and waters in Australia. The plaintiffs contend that that connection is so strong that the common law must be taken to have recognised that Aboriginal persons "belong" to the land. This recognition is inconsistent with the treatment of Aboriginal persons as strangers or foreigners to Australia. The status of alien provided for in s 51(xix) therefore cannot be applied to them, it is submitted.

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32 (2006) 227 CLR 31.

33 *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162; *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 43 [31] per Gleeson CJ, Gummow and Hayne JJ, 87 [190] per Heydon J.

34 (1988) 165 CLR 178 at 183.

35 *Milne v Huber* (1843) 17 Fed Cas 403 at 406.

36 (2002) 212 CLR 162 at 172 [27].

Aboriginal persons

22 The cases relied on by the plaintiffs refer to the connection to particular land by distinct groups of Aboriginal persons by reference to their laws and customs respecting that land.[37] The common law has never recognised, as the plaintiffs' argument at some points suggests, that Aboriginal persons as a whole comprise a singular society or group for the purposes of native title or that the connection spoken of extends beyond the traditional lands of the groups in question.

23 The plaintiffs' submissions do accept that in order to determine whether a person comes within the special category of "non-citizen, non-alien", on account of the person's aboriginality, some test would be necessary. The plaintiffs initially adopted the three-part test propounded by Brennan J in *Mabo [No 2]*,[38] which accords with definitions earlier proposed by Commonwealth departments,[39] and later sought to adopt a test which they described as "analogous" to the three-part test. Under that test, aboriginality depends upon biological descent and upon recognition of the person's membership of the group with which the person identifies. In that latter regard, Brennan J said that membership of the group depends upon recognition by the Elders or other persons having traditional authority amongst those people.[40]

24 It is not to be assumed that all persons of Aboriginal descent will be in a position to prove recognition by the group in question. Some native title cases bear this out. The evidence relating to Mr Love points to this difficulty. The agreed facts of the special case concerning Mr Love do not go so far as to establish that acceptance by one Elder of the Kamilaroi group is sufficient according to the laws of that group. No concession has been made by the Commonwealth in this regard.

25 Matters of proof may be put to one side. There is a more fundamental difficulty which arises from the plaintiffs' argument. It is that the legal status of a person as a "non-citizen, non-alien" would follow from a determination by the Elders, or other persons having traditional authority amongst a particular group, that the person was a member of that group. To accept this effect would be to attribute to the group the kind of sovereignty which was implicitly rejected by *Mabo [No 2]*[41] - by reason of the fact of British sovereignty and the possibility that native title might be extinguished - and expressly rejected in subsequent cases.[42]

26 Nor is it to be assumed that all Aboriginal persons will be able to establish the requisite existing connection to particular land and waters as the common law requires. *Yorta Yorta Aboriginal Community v Victoria*[43] is a case in point. To meet these difficulties the plaintiffs contended, and Victoria intervening in support of the plaintiffs agreed, that it may be sufficient for the purposes of the test that an Aboriginal person be descended from a person who was accepted as a member of an Aboriginal group at

37 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 70 per Brennan J, with whom Mason CJ and McHugh J agreed.
38 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 70.
39 Gardiner-Garden, *Defining Aboriginality in Australia* (2003) at 4; see also *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 274 per Deane J.
40 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 70.
41 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 57-60, 63 per Brennan J, with whom Mason CJ and McHugh J agreed.
42 *Coe v The Commonwealth* (1993) 68 ALJR 110 at 115 per Mason CJ; 118 ALR 193 at 200; *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at 443-444 [44] per Gleeson CJ, Gummow and Hayne JJ.
43 (2002) 214 CLR 422.

the time of acquisition of sovereignty by the British Crown. This contention marks a significant divergence from the common law recognition of native title upon which the plaintiffs rely.

Connection at common law

27 *Mabo [No 2]* held that the common law recognises a form of native title to land and waters which has survived the acquisition of sovereignty by the British Crown. At the inception of the common law its protection was extended to the holders of a common law native title, which was a burden on the Crown's radical title.[44]

28 Native title is liable to extinguishment, but when it is not extinguished it, and the persons who are entitled to it, is ascertained by reference to the traditional laws and customs respecting that land. It is by this means that it may be said that members of an Aboriginal group have a connection to the land and waters which supports the existence of native title. The incidents of native title, which is to say that which may be enjoyed by those persons with respect to the land, are also ascertained by reference to those laws and customs.[45] The nature of the connection to land and waters ascertained by reference to traditional laws and customs has been further explained in cases subsequent to *Mabo [No 2]*. It has been described as being not only material or physical, but also spiritual and cultural.[46]

29 It may be accepted that the connection spoken of in these cases is special, unique even. Its importance at a personal and community level to the members of an Aboriginal group cannot be denied. And it is an essential requirement of proof of native title. But it also has its limits, both geographical and as to the area of the law to which it is relevant. Neither its unique nature nor its importance can alter or extend the concept of connection so as to apply beyond those limits.

30 In a geographical sense the connection which is the concern of the common law of native title is limited to the particular land and waters which are the subject of traditional laws and customs of the Aboriginal group in question. Brennan J made this plain in *Mabo [No 2]*.[47] The connection spoken of cannot be to the territory of the whole of Australia. A connection with any lands beyond those to which a group's traditional laws and customs relate is inconsistent with the concept of native title.

31 Closer to the heart of the plaintiffs' case is the erroneous assumption that the connection to land necessary for recognition by the common law of native title may be used in an entirely different area of the law, to answer questions of a constitutional kind about the relationship between an Aboriginal group and its members and the Australian body politic. Its use for such a purpose is wrong as a matter of law and of logic. The error is compounded by the fact that race is irrelevant to the questions of citizenship and membership of the Australian body politic.[48]

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44 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 57-58 per Brennan J, with whom Mason CJ and McHugh J agreed.

45 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 70 per Brennan J, with whom Mason CJ and McHugh J agreed.

46 *Yanner v Eaton* (1999) 201 CLR 351 at 373 [38] per Gleeson CJ, Gaudron, Kirby and Hayne JJ; *Western Australia v Ward* (2002) 213 CLR 1 at 64-65 [14] per Gleeson CJ, Gaudron, Gummow and Hayne JJ; *Northern Territory v Griffiths* (2019) 93 ALJR 327 at 341 [23] per Kiefel CJ, Bell, Keane, Nettle and Gordon JJ; 364 ALR 208 at 219.

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

48 *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 366 [40] per Gaudron J.

32 Because the cases accept that the connection spoken of is spiritual and cultural, it may be said that the common law accepts that members of an Aboriginal group may feel a sense of "belonging" to the land in question and that others may perceive them to "belong" to the land. But that is not the "belonging" spoken of in the constitutional sense. In the constitutional context it refers to a characteristic which a citizen has with respect to the sovereign State of which they are a citizen and which an alien does not. A citizen may be said to belong to their country. A non-citizen or alien does not belong. An alien belongs to the sovereign State of which they are a citizen.

33 In the constitutional context "belonging" refers to the formal legal relationship between a person and the community or body politic in question. In Australia it is apt to describe the connection between a citizen and the body politic. It reflects a conclusion reached about that relationship rather than a premise upon which the relationship may be founded.

Aboriginal laws and customs

34 Native title is not regarded as a creation of the common law, although *Mabo [No 2]* might be seen as correcting the prior refusal of the common law to recognise it. It was observed in *Fejo v Northern Territory*[49] that native title is not an institution of the common law. It has its origins in the traditional laws and customs of indigenous peoples. The common law takes those traditional laws and customs to evidence the connection to land and waters which is necessary for the existence and recognition of native title.

35 The plaintiffs' submissions treat the common law as going further. They contend that, by accepting traditional laws and customs as the foundation for native title, the common law must be taken to accept that a decision made pursuant to them as to membership of the group has some recognised legal effect, including with respect to questions of alienage.

36 The other aspect of the plaintiffs' argument which relies upon the common law's acceptance or recognition of traditional laws and customs points to a characteristic of alienage. An alien, it is said, is a person to whom the Crown does not owe permanent protection. The common law, by its recognition of traditional laws and customs, must be taken to accept an obligation of protection of the persons subject to, and who create and maintain, them. The argument then follows that a member of an Aboriginal group cannot be an alien.

37 These arguments are based upon a wrong premise. It is not the traditional laws and customs which are recognised by the common law. It is native title (namely, the interests and rights possessed under the traditional laws and customs[50]) which is the subject of recognition by the common law, and to which the common law will give effect. The common law cannot be said by extension to accept or recognise traditional laws and customs as having force or effect in Australia. They are not part of the domestic law. To suggest that traditional laws may be determinative of the legal status of a person in relation to the Australian polity is to attribute sovereignty

49 (1998) 195 CLR 96 at 128 [46] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.
50 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 57 per Brennan J, with whom Mason CJ and McHugh J agreed.

to Aboriginal groups contrary to *Mabo [No 2]* and later cases, as has earlier been explained.[51]

38 The common law's protection is not given to the traditional laws and customs upon which native title is based. It is extended to native title and the holders of native title.[52] The common law's concern with respect to traditional laws and customs is as to the evidence they may furnish of the requisite connection to land and waters and no more.

A constitutional implication?

39 This is not the first occasion on which a non-citizen has argued for the acceptance of a special constitutional category of non-citizen, non-alien. The category was for a short time accepted by this Court, in *Re Patterson; Ex parte Taylor*.[53] That decision was disapproved in *Shaw*. It must be said that in neither case were arguments of the kind here advanced presented.

40 If there is to be understood to be a special constitutional category of persons to whom s 51(xix) does not apply, it must be by way of exception to that provision. The plaintiffs do not point to anything in the text or context of s 51(xix) or any other provision to found an implication of this kind. As Brennan CJ explained in *McGinty v Western Australia*:[54]

> "Implications are not devised by the judiciary; they exist in the text and structure of the Constitution and are revealed or uncovered by judicial exegesis. No implication can be drawn from the Constitution which is not based on the actual terms of the Constitution, or on its structure."

41 If the implication for which the plaintiffs must contend is said to rest upon existing common law principle it would be necessary to consider whether, as the plaintiffs' argument implies, the common law trumps or controls the *Constitution*. It would require consideration of the relationship between the common law and the *Constitution* of which Sir Owen Dixon spoke[55] when he said that constitutional questions "should be considered and resolved in the context of the whole law, of which the common law ... forms not the least essential part". It would be necessary to consider whether his Honour intended to convey more than the proposition that the common law provides the context by reference to which a constitutional question is to be decided but that the question is not determined only by reference to the common law.[56] Regard might also be had to the view expressed by Mason CJ, Toohey and Gaudron JJ in *Theophanous v Herald & Weekly Times Ltd*[57] when, after referring to the statement of Sir Owen Dixon, their Honours said that it may be understood that the common law "set[s] the scene in which the Constitution operates", but that if a doctrine of the common law is at variance with the *Constitution*, the common

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51 See [25] above.

52 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 57-58 per Brennan J, with whom Mason CJ and McHugh J agreed.

53 (2001) 207 CLR 391 at 413 [52] per Gaudron J, 437 [136] per McHugh J, 493-494 [308] per Kirby J, 518 [377] per Callinan J.

54 (1996) 186 CLR 140 at 168 (footnotes omitted), quoted in *Kruger v The Commonwealth* (1997) 190 CLR 1 at 152 per Gummow J.

55 Dixon, "The Common Law as an Ultimate Constitutional Foundation" (1957) 31 *Australian Law Journal* 240 at 245.

56 See *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 126-127 per Mason CJ, Toohey and Gaudron JJ.

57 (1994) 182 CLR 104 at 126.

law must yield. These views point up the difficulty for the plaintiffs in reading s 51(xix) by reference to what is said to be common law principle.

42 In reality the plaintiffs' arguments do not rest upon existing common law principle. They are far removed from what was said in *Mabo [No 2]* and later native title cases. The plaintiffs must contend for the application of a new principle. This new principle cannot be said to be a development of the common law. If it were, the plaintiffs would have to explain how it could be applied in the face of the terms of s 51(xix), given that the common law cannot be developed inconsistently with the *Constitution*.[58]

43 The new principle or rule for which the plaintiffs contend is not articulated by them but may be expressed as: that persons of Australian Aboriginal descent who have, or whose ancestors had, some connection with land in Australia are to be permitted to be physically present and not be subject to removal from Australia. So understood, the rule is of the nature of a right which would inhere in the person regardless of the person's status as a non-citizen and as a citizen of a foreign sovereign State and regardless of their lack of relationship with the body politic of the Commonwealth of Australia. It is this principle or rule which would found the necessary implication in s 51(xix) which excludes persons such as the plaintiffs from its operation.

44 If it was not already obvious from the arguments put for the plaintiffs, the identification of a rule of this kind points up an issue of race. The plaintiffs do not refer to s 51(xxvi) of the *Constitution*, by which the Commonwealth Parliament is expressly conferred power with respect to the people of any race for whom it is deemed necessary to make special laws. The *Constitution* makes no other relevant provision on the topic, which may be thought to render an implication involving race in s 51(xix) problematic. Moreover the express conferral of this power on the Parliament does not suggest that its subject is appropriate to the judicial function.

45 The plaintiffs' argument in connection to this rule cannot be said to be supported by assumptions about some underlying, but unexpressed, view upon which *Mabo [No 2]* and following cases proceeded concerning Aboriginal persons and the protection which the common law shall afford them. These cases were not concerned with any such question. *Mabo [No 2]* may have been a landmark decision but it did not provide a philosophical basis by which such questions might be answered. It and the cases which follow explain what is native title. They hold that it will be recognised when the necessary facts are present. But they do not speak more broadly.

46 What is the source of this proposed new principle if it is not the common law of native title? Clearly enough it is of such a nature that it may not be altered either by statute or by the *Constitution*. Because it is immutable it might be understood to bear the characteristics of a higher principle of which natural law might conceive.[59] But such conceptions are generally not regarded as consistent with constitutional theory.[60] And they are regarded by some as antithetical to the judicial function since they involve an appeal to the personal philosophy or preferences of judges.[61]

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58 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 566 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ.

59 See *Singh v The Commonwealth* (2004) 222 CLR 322 at 388-389 [170], 390 [174] per Gummow, Hayne and Heydon JJ.

60 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 73 per Dawson J; *Building Construction Employees & Builders' Labourers Federation (NSW) v Minister for Industrial Relations* (1986) 7 NSWLR 372 at 403-405 per Kirby P.

61 Zines, "A Judicially Created Bill of Rights?" (1994) 16 *Sydney Law Review* 166 at 183, 184.

Answers

47 In each of the proceedings I would answer Question 1 as follows: the plaintiff does not have the status of an Australian citizen according to legislation validly enacted under s 51(xix) of the *Constitution*. Accordingly each plaintiff is an alien within the meaning of s 51(xix).

48 So far as concerns Question 2, in each case the plaintiff should pay the costs of the special case.

49 **BELL J.** The question of law, the facts and the applicable legislation in each special case are set out in the reasons of other members of the Court and need not be repeated, save to the extent that it is necessary to explain my reasons. In the Commonwealth's submission, whether the plaintiffs are Aboriginal Australians is irrelevant to the determination of whether they are persons within the reach of the "aliens" power under s 51(xix) of the *Constitution*. In the event the Commonwealth is wrong in this respect, it makes no submission on whether either plaintiff is an Aboriginal Australian. For the reasons to be given, I answer the question of law upon acceptance that the plaintiff in each case is an Aboriginal Australian who was born overseas and is not an Australian citizen.

50 Section 51(xix) of the *Constitution* confers power on the Commonwealth Parliament to make laws with respect to "naturalization and aliens". The question of law in each special case turns on the meaning of "aliens" in this provision. In *Pochi v Macphee* Gibbs CJ stated:[62]

> "[T]he 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."

51 The issue in these special cases is whether, as the plaintiffs assert, Aboriginal Australians are persons who cannot possibly answer the description of "aliens" in the ordinary understanding of the word.

52 The plaintiffs and the Commonwealth are at one in acknowledging that at Federation Aboriginal Australians were not aliens. The Commonwealth submits that this is because in 1901 Aboriginal Australians were persons who were born in Australia and by virtue of that circumstance were subjects of the Queen. The plaintiffs do not contest that this is one reason why, at Federation, Aboriginal Australians were not aliens. A more fundamental reason, in their submission, is the unique connection that Aboriginal Australians have to the land and waters of Australia; a connection which at least since *Mabo v Queensland [No 2]*[63] has been recognised by the Australian body politic.

53 The Commonwealth relies on a line of unchallenged authority, commencing with *Nolan v Minister for Immigration and Ethnic Affairs*, holding that since Australia's emergence as a fully independent sovereign nation with its own distinct citizenship, alien in s 51(xix) has come to be synonymous with "non-citizen".[64] As subsequently explained in *Shaw v Minister for Immigration and Multicultural Affairs*, the power conferred by s 51(xix) supports legislation determining those to whom the status of alien is to be attributed.[65] The legislation that presently performs this function is the *Australian Citizenship Act 2007* (Cth) ("**the Citizenship Act**"), which exhaustively provides the circumstances in which a person has the status of an Australian citizen. Neither plaintiff acquired that status at the time of his birth because each was born outside Australia. It follows, in the Commonwealth's submission, that absent challenge to the Citizenship Act, the plaintiffs' case must fail.

54 The Commonwealth advanced an alternative argument, based on the analysis in the joint reasons of Gummow, Hayne and Heydon JJ in *Singh v The Commonwealth*, that the defining characteristic of alienage is the owing of allegiance to a foreign power.[66] Whether a

62 (1982) 151 CLR 101 at 109 (Mason J agreeing at 112, Wilson J agreeing at 116).
63 (1992) 175 CLR 1.
64 (1988) 165 CLR 178 at 183-184 per Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ.
65 (2003) 218 CLR 28 at 35 [2].
66 (2004) 222 CLR 322 at 398 [200].

person possesses some other characteristic, such as having been born to an Australian parent, or having other deep ties to Australia, is, on this analysis, immaterial. That is because, as the joint reasons put it:[67]

> "The central characteristic of that status is, and always has been, owing obligations (allegiance) to a sovereign power other than the sovereign power in question (here Australia). That definition of the status of alienage focuses on what it is that gives a person the status: owing obligations to another sovereign power. It does not seek to define the status, as the plaintiff sought to submit, by pointing to what is said to take a person *outside* its reach."

55 Mr Love was born in Papua New Guinea and is a citizen of that country and Mr Thoms was born in New Zealand and is a citizen of that country. The Commonwealth submitted that absent a challenge to *Singh*, the plaintiffs' case must also fail.

56 The plaintiff in *Singh* was born in Australia and had remained in Australia continuously since her birth. Her parents were citizens of India. She challenged the validity of s 10 of the *Australian Citizenship Act 1948* (Cth), the predecessor to the Citizenship Act, insofar as it purported to deny Australian citizenship to any person born in Australia who had not attained the age of ten years. Her case was conducted on the footing that an essential characteristic of a constitutional alien is that he or she was born outside Australia,[68] because a person born within Australia would not have been an alien at Federation, under the common law.[69]

57 Building on the analyses in *Nolan*[70] and *Shaw*,[71] the joint reasons rejected Tania Singh's "one-sided understanding of the [aliens] power",[72] because it failed to accommodate the change in Australia's relationship to the United Kingdom since Federation. In this context, their Honours said that the "central characteristic" of the status of alien is owing obligations to a sovereign power other than Australia.[73] Tania Singh had acquired Indian citizenship at birth and thus she owed allegiance to a foreign sovereign power. The possession of this characteristic sufficed to resolve the case stated in *Singh*.[74] As the joint reasons in *Singh* made clear, their Honours were not seeking to describe the metes and bounds of the constitutional expression "aliens"; they were determining whether the circumstances presented by Tania Singh were such that s 51(xix) did, or did not, have the consequence for which she contended.[75]

58 The joint reasons of Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* approved the statement in *Singh* that the defining characteristic of alienage is the owing of allegiance to a foreign sovereign power.[76] By reason of the changes brought about by the *Papua New Guinea Independence Act 1975* (Cth) and the *Constitution of the Independent State of Papua New Guinea*, Amos Ame was a person who owed allegiance to Papua New Guinea, and was no longer a citizen of Australia. These circumstances were determinative of Mr Ame's status as an alien.

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67 (2004) 222 CLR 322 at 398 [200].
68 (2004) 222 CLR 322 at 332 [11] per Gleeson CJ.
69 (2004) 222 CLR 322 at 398 [199] per Gummow, Hayne and Heydon JJ.
70 (1988) 165 CLR 178.
71 (2003) 218 CLR 28.
72 (2004) 222 CLR 322 at 398 [198] per Gummow, Hayne and Heydon JJ.
73 (2004) 222 CLR 322 at 398 [200] per Gummow, Hayne and Heydon JJ.
74 (2004) 222 CLR 322 at 383 [154] per Gummow, Hayne and Heydon JJ.
75 (2004) 222 CLR 322 at 383 [152] per Gummow, Hayne and Heydon JJ.
76 (2005) 222 CLR 439 at 458 [35].

59 Nonetheless, as *Koroitamana v The Commonwealth*[77] makes plain, none of the Justices in the majority in *Singh* are to be understood as holding that allegiance to a foreign power is the determinative characteristic of the status of alienage. Neither of the appellants in *Koroitamana* owed allegiance to a foreign sovereign power. Each appellant was born in Australia and had remained in Australia continuously from birth. The appellants' parents were citizens of a foreign country. As Gleeson CJ and Heydon J explained the position in their joint reasons:[78]

> "Once one rejects the notion that birth in Australia ... necessarily results in membership of the Australian community, then it is a short step to the conclusion that it is open to Parliament to decide that a child born in Australia of parents who are foreign nationals is not automatically entitled to such membership. *It cannot be said of such a person that he or she could not possibly answer the description of alien*." (emphasis added)

60 On the hearing, the Commonwealth acknowledged the tension between reading statements in *Singh* and *Ame* as holding that there is a defining characteristic of the status of alienage, and the line of authority commencing with *Nolan* holding that it is open to Parliament to determine the characteristics of that status. The Commonwealth submitted that the joint reasons in *Singh* and *Ame* are to be understood as responding to the argument that the plaintiff in each special case was a person outside the reach of the aliens power. The Commonwealth's ultimate position was that there is no defining characteristic of alienage, rather there are "available characteristics for the Parliament to choose and some unavailable characteristics". The Commonwealth's case is encapsulated in the joint reasons of Gleeson CJ, Gummow and Hayne JJ in *Shaw*:[79]

> "The power conferred by s 51(xix) supports legislation determining those to whom is attributed the status of alien; the Parliament may make laws which impose upon those having this status burdens, obligations and disqualifications which the Parliament could not impose upon other persons. On the other hand, by a law with respect to naturalisation, the Parliament may remove that status, absolutely or upon conditions. In this way, citizenship may be seen as the obverse of the status of alienage." (footnote omitted)

61 *Nolan* rejected the notion that a person may have the status of "non-alien" and "non-citizen", and although temporarily in disfavour following *Re Patterson; Ex parte Taylor*,[80] its authority was restored by the majority in *Shaw. Nolan*, *Shaw* and the decisions following them were made in the course of the working out of the reach of the aliens power in light of Australia's changed relationship with the United Kingdom. While at Federation there could have been no doubt that a British subject was not an alien,[81] *Nolan* held that the application of the constitutional term "aliens" had changed, reflecting Australia's emergence as an independent nation.[82] It was a change that required recognition of the divisibility of the Crown such that Therrance Nolan, a citizen of the United Kingdom and subject of the Queen who had lived in Australia continuously between 1967 and 1985, was within the scope of the aliens power.[83] The joint reasons noted that etymologically the

77 (2006) 227 CLR 31.
78 (2006) 227 CLR 31 at 38-39 [14].
79 (2003) 218 CLR 28 at 35 [2].
80 (2001) 207 CLR 391.
81 *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 183 per Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ.
82 (1988) 165 CLR 178 at 184 per Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ.
83 (1988) 165 CLR 178 at 184 per Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ.

term "alien" is traced through old French to the Latin "alienus", and has the meaning of "belonging to another person or place".[84]

62 Gleeson CJ observed, in *Re Minister for Immigration and Multicultural Affairs; Ex parte Te*, that it is through the power conferred by s 51(xix) that the Parliament decides who will be admitted to membership of the Australian body politic.[85] His Honour noted that the power is not unqualified, but found that it extended to denying membership to the prosecutors in *Te*, who were born in Cambodia and Vietnam respectively, entered Australia as aliens and had not become Australian citizens.[86]

63 However, no decision of this Court has addressed the question of whether the aliens power extends to the exclusion of an Aboriginal Australian from the Australian body politic.

64 Acceptance that the aliens power supports legislation defining the circumstances in which a person will be treated as an alien is subject to the qualification that Parliament cannot by defining "alien" or "citizen" expand the power conferred by s 51(xix).[87] Recognition that, in some circumstances, an attempt by the Parliament to ascribe the status of alien to a person would be beyond power allows of the possibility that a person may not hold Australian citizenship and yet not be an alien. In the course of argument, when pressed, the Commonwealth submitted that a person born in Australia to two Australian parents who has not renounced his or her citizenship of Australia might be outside the reach of the power.

65 In the Commonwealth's submission, acknowledgement of the limit on legislative power is not to the point: the Parliament cannot be said to have come near the outer boundaries of the power in choosing to treat persons who are born outside Australia, and who have not been granted Australian citizenship, as aliens. The Commonwealth submits that the vice in the plaintiffs' invocation of their Aboriginality to take them outside the aliens power is that it places a race-based limitation on legislative power. Correctly understood, it is said, the plaintiffs are within the reach of the aliens power because each was born outside Australia; they stand in no different position to any person born to an Australian parent outside Australia. The Commonwealth points out that at all times it has been open to the plaintiffs to apply to the Minister to become Australian citizens,[88] and that neither has done so.

66 It may be, as the Commonwealth submits, that recognition of dual citizenship is largely reflective of the legislative choice to treat foreign citizens as capable of being Australian citizens. It does not follow that possession of foreign citizenship necessarily brings a person within the scope of the aliens power. Whether it is open to Parliament to treat as an alien a person born in Australia to Australian parents, by reason that the law of a foreign country confers citizenship on the person by descent, is a large question. The language of s 51(xix) is to be distinguished in this respect from that of s 44(i) of the *Constitution*. The circumstance that each plaintiff, an Aboriginal Australian, is a citizen of the country of his birth cannot be determinative of his status as a constitutional alien.

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84 (1988) 165 CLR 178 at 183 per Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ; see also at 189 per Gaudron J.

85 (2002) 212 CLR 162 at 175 [39].

86 (2002) 212 CLR 162 at 170 [18].

87 *Pochi v Macphee* (1982) 151 CLR 101 at 109 per Gibbs CJ (Mason J agreeing at 112, Wilson J agreeing at 116); *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 172 [26] per Gleeson CJ; *Singh v The Commonwealth* (2004) 222 CLR 322 at 329 [4] per Gleeson CJ, 375 [124] per McHugh J, 382-383 [151] per Gummow, Hayne and Heydon JJ.

88 Citizenship Act, s 16.

67 Following the hearing of the special cases, the Court wrote to the parties inviting submissions on whether members of an Aboriginal society have such a strong claim to the protection of the Crown that they may be said to owe permanent allegiance to the Crown. In response to the invitation, the Commonwealth filed a s 78B Notice in each special case.[89] Following receipt of those Notices, the Attorney-General for the State of Victoria ("**Victoria**") intervened in support of the plaintiffs. In Victoria's submission, Aboriginal persons who are members of an Aboriginal society are not within the reach of the "aliens" power in s 51(xix) by reason of the "recognised mutual and unique relationship between members of Aboriginal societies and the land and waters of Australia".

68 The Commonwealth submits that Victoria's contention involves a radical reconceptualisation of "the law of alien status", in that it postulates that non-alien status may arise from a connection between persons and land. Such a postulate is said to be inconsistent with "the fundamental basis of the law of alien status", which basis is the connection between persons and the sovereign or body politic.

69 The importance of *Singh* to the plaintiffs' and Victoria's argument is the holding that at Federation the constitutional term "aliens" did not possess a fixed, immutable meaning ascertained by reference to the common law.[90] The joint reasons explained that any understanding of the term "aliens" at Federation must take account of the existence of different and competing views as to how aliens were to be identified.[91] The analysis was developed in *Ame* in the joint reasons of Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ. Their Honours said that changes in the national and international context in which s 51(xix) is to be applied may have an important bearing upon its practical operation.[92] The decisions in *Sue v Hill* and *Shaw* and *Singh* were each instanced as illustrative of the ways in which those changes in national and international circumstances may affect the application of terms such as "foreign" and "alien".[93]

70 The plaintiffs' and Victoria's argument relies on *Mabo [No 2]*, not because it acknowledged a change in national circumstances, but rather because it recognised that at the time of European settlement there existed antecedent rights and interests in the land and waters of Australia possessed by the indigenous inhabitants sourced in traditional law and customs and alienable only by that body of law and custom.[94] The recognition, as subsequent decisions have explained, was of a connection that Aboriginal Australians have with "country" that is essentially spiritual.[95] As the plurality observed in *Western Australia v Ward*, there are difficulties in describing the connection between a community of Aboriginal Australians and their traditional land in terms of the language of "rights and interests" familiar to the common lawyer.[96]

71 To observe that the capacity of an alien to hold proprietary interests in land has no bearing on his or her status as an alien fails to address the core of the plaintiffs' argument. Their argument does not depend on the holding of native title rights and interests. In many

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89 *Judiciary Act 1903* (Cth), s 78B.
90 (2004) 222 CLR 322 at 384 [157] per Gummow, Hayne and Heydon JJ.
91 (2004) 222 CLR 322 at 393 [183] per Gummow, Hayne and Heydon JJ.
92 (2005) 222 CLR 439 at 458-459 [35].
93 (2005) 222 CLR 439 at 459 [35], citing *Sue v Hill* (1999) 199 CLR 462, *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 and *Singh v The Commonwealth* (2004) 222 CLR 322.
94 (1992) 175 CLR 1 at 57-59 per Brennan J (Mason CJ and McHugh J agreeing at 15).
95 *Western Australia v Ward* (2002) 213 CLR 1 at 64 [14] per Gleeson CJ, Gaudron, Gummow and Hayne JJ; *Northern Territory v Griffiths* (2019) 93 ALJR 327 at 341 [23] per Kiefel CJ, Bell, Keane, Nettle and Gordon JJ; 364 ALR 208 at 219.
96 (2002) 213 CLR 1 at 65 [14] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

instances those rights and interests have been extinguished. The plaintiffs' and Victoria's argument depends upon the incongruity of the recognition by the common law of Australia of the unique connection between Aboriginal Australians and their traditional lands, with finding that an Aboriginal Australian can be described as an alien within the ordinary meaning of that word.

72 Other common law nations that have indigenous populations do not appear to have been confronted with the issue here raised. Amongst other things, this may reflect differences in the relations between the sovereign power and the indigenous population.[97] The affirmation of existing Aboriginal rights under the Canadian Constitution[98] was described as "limit[ing] the exercise of governmental powers which may be inherent as a sovereign state",[99] in a case bearing some semblance to the present one. Canada's choice to fetter the power to control which non-citizens may remain in Canada foreclosed consideration, in that case, of whether the power conferred on the Parliament of Canada with respect to "naturalization and aliens"[100] supports the exclusion of an Aboriginal Canadian from the community.

73 The Commonwealth's concern, that to hold that its legislative power does not extend to treating an Aboriginal Australian as an alien is to identify a race-based limitation on power, is overstated. It is not offensive, in the context of contemporary international understanding, to recognise the cultural and spiritual dimensions of the distinctive connection between indigenous peoples and their traditional lands,[101] and in light of that recognition to hold that the exercise of the sovereign power of this nation does not extend to the exclusion of the indigenous inhabitants from the Australian community.

74 The conclusion is not to deny that an attribute of every sovereign state is the power to decide whether an alien is admitted to membership of the community and to expel an alien whom it chooses not to suffer to remain.[102] As Gleeson CJ observed in *Te*, the exercise of the power is vital to the welfare, security and integrity of the nation.[103] The position of Aboriginal Australians, however, is sui generis. Notwithstanding the amplitude of the power conferred by s 51(xix) it does not extend to treating an Aboriginal Australian as an alien because, despite the circumstance of birth in another country, an Aboriginal Australian cannot be said to belong to another place.[104]

75 Whether a person is an Aboriginal Australian is a question of fact. In the *Tasmanian Dam Case*, Deane J proposed the meaning of the term "Australian Aboriginal" as "a person of Aboriginal descent, albeit mixed, who identifies himself as such and who is recognized by the Aboriginal community as an Aboriginal".[105] This was in the context of s 8(2)(b) of the *World Heritage Properties Conservation Act 1983* (Cth), which referred to Aboriginal sites having particular significance to "the people of the Aboriginal race". His Honour inclined to the view that the reference was to the Australian Aboriginal people generally rather than to any particular racial sub-group.[106]

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97 *Elk v Wilkins* (1884) 112 US 94.
98 *Constitution Act 1982* (Can), s 35(1).
99 *Watt v Liebelt* [1999] 2 FC 455 at 457 [3].
100 *Constitution Act 1867* (Can), s 91(25).
101 United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007); see also *R v Van der Peet* [1996] 2 SCR 507 at 534 [17]-[19], 538 [30].
102 *Robtelmes v Brenan* (1906) 4 CLR 395 at 400 per Griffith CJ.
103 (2002) 212 CLR 162 at 171 [24].
104 cf *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 183.
105 *The Commonwealth v Tasmania* (1983) 158 CLR 1 at 274.
106 (1983) 158 CLR 1 at 274.

76 In their written submissions, the plaintiffs relied on Brennan J's formulation in *Mabo [No 2]* for the meaning of "Aboriginal" Australian: "[m]embership of the indigenous people depends on biological descent from the indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among those people".[107]

77 On the hearing, the Solicitor-General was asked if the Commonwealth accepted that each plaintiff met the tripartite test in *Mabo [No 2]*. The Solicitor-General responded that the Commonwealth did not "affirmatively advance a submission against that proposition". In response to the Court's invitation to clarify its position on the question of whether both plaintiffs meet the tripartite test formulated by Brennan J in *Mabo [No 2]*, the Commonwealth maintained its preference not to take a position on the state of the agreed facts.

78 In each case, the plaintiff claims entitlement to the relief sought in his writ of summons by reason of the fact that he is an Aboriginal person. The parties agreed to state a single question of law for the opinion of the Full Court in each case, namely, "[i]s the Plaintiff an 'alien' within the meaning of s 51(xix) of the Constitution?" If the Commonwealth did not accept that Mr Love is an Aboriginal person there was no utility in agreeing to state a question for the opinion of the Full Court which assumes that he is such a person. If the Commonwealth did not accept Mr Love's pleaded case, that he is a member of the Aboriginal race of Australia, the appropriate course was for the proceeding to have been remitted to the Federal Court of Australia for the facts to be found.

79 The agreed facts are that Mr Love's paternal great-grandfather, Frank Wetherall, was born in Queensland and was descended in significant part from people who inhabited Australia immediately prior to European settlement, as was his paternal great-grandmother, Maggie Alford. Mr Love identifies as a descendant of the Kamilaroi tribe and is recognised as such a descendant by Janice Margaret Weatherall, an elder of the Kamilaroi tribe. In light of the agreed facts and the Commonwealth's position respecting the conduct of the litigation, the question of law reserved in Mr Love's special case is answered upon acceptance that Mr Love is an Aboriginal Australian within the tripartite *Mabo [No 2]* test.

80 That test was framed with respect to native title to land. Deane J's test expressed his Honour's understanding of the conventional meaning of the term "Australian Aboriginal".[108] That understanding appears to accord with the Commonwealth's working definition applied in connection with the provision of special benefits to Aboriginal persons and with respect to the enactment of special laws affecting Aboriginal persons.[109] The special cases do not raise consideration of the circumstances, if any, in which a person who is not within the *Mabo [No 2]* test may nonetheless establish that he or she is an Aboriginal Australian.[110]

81 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 tripartite test in *Mabo [No 2]*) are not within the reach of the "aliens" power conferred by

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107 (1992) 175 CLR 1 at 70.

108 *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 274.

109 See Constitutional Section, Department of Aboriginal Affairs, *Report on a Review of the Administration of the Working Definition of Aboriginal and Torres Strait Islander* (1981) at 9; Gardiner-Garden, *Defining Aboriginality in Australia*, Department of the Parliamentary Library, Current Issues Brief No 10 2002-03 (2003).

110 See *Attorney-General (Cth) v Queensland* (1990) 25 FCR 125 at 126-127 per Jenkinson J, 132 per Spender J, 147-148 per French J; *Gibbs v Capewell* (1995) 54 FCR 503 at 506, 511-512 per Drummond J; *Re Watson [No 2]* [2001] TASSC 105 at [7] per Cox CJ; *Eatock v Bolt* (2011) 197 FCR 261 at 304-305 [188]-[189] per Bromberg J; *Hands v Minister for Immigration and Border Protection* (2018) 364 ALR 423 at 435-436 [50]-[51] per Allsop CJ (Markovic and Steward JJ agreeing at 436 [54], [55]).

s 51(xix) of the *Constitution*. The difference with respect to Mr Love is a difference about proof, not principle.

82 For these reasons, I answer question 1 in each special case "no" and question 2 in each special case "the defendant".

GAGELER J.

Nature of the aliens power

83 The subject-matter of the legislative power with respect to "naturalization and aliens" conferred on the Parliament of the Commonwealth by s 51(xix) of the *Constitution* is framed in terms that are identical to the subject-matter of a legislative power declared to be exclusive to the Parliament of Canada by s 91(25) of the *British North America Act 1867* (Imp) (30 & 31 Vict c 3). The subject-matter comprises persons of a legal status - "aliens" - together with the process by which that legal status can be changed - "naturalisation".

84 The Privy Council recognised in 1902 that the legislative power of the Parliament of Canada under s 91(25) of the *British North America Act* is a power to "determine what shall constitute either the one or the other".[111] The High Court ultimately recognised in 2002 that s 51(xix) of the *Constitution* encompasses legislative power of the same nature: to determine who is and who is not to have the legal status of alienage.[112] The Court then also recognised that the legislative power goes further than its Canadian counterpart in that the power permits as well specification of the legal consequences of that legal status.[113]

85 What is meant by a legal status in this or any other context is clear:[114]

> "A person may be said to have a status in law when he belongs to a class of persons who, by reason only of their membership of that class, have rights or duties, capacities or incapacities, specified by law which do not exist in the case of persons not included in the class and which, in most cases at least, could not be created by any agreement of such persons. An alien, for example, as distinct from a subject of the Crown, a married person as distinct from an unmarried person, a bankrupt as distinct from other persons generally, are all persons who have a particular status. The mere fact that an alien is an alien means that he is subject to certain disabilities and disqualifications in law. A husband because he is a husband owes special duties to his wife which he owes to no other person and cannot owe, merely as a matter of law, to any other person. A bankrupt, simply because he is a bankrupt, cannot deal with his property in the same manner as other persons. These consequences follow as a matter of law from the fact of membership of a particular class of persons."

86 To the extent that s 51(xix) of the *Constitution* confers legislative power to determine the existence and consequences of a legal status, it resembles the legislative powers conferred by s 51(xvii) (with respect to "bankruptcy"), s 51(xviii) (with respect to "copyrights, patents ... and trade marks") and s 51(xxi) (with respect to "marriage"). Unlike the power conferred by s 51(vii) (with respect to "lighthouses"), the example of which is often seized upon for the purpose of expounding constitutional principle,[115] the subject-matter of none of those

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111 *Cunningham v Tomey Homma* [1903] AC 151 at 156. See also *Morgan v Attorney-General for Prince Edward Island* (1975) 55 DLR (3d) 527 at 531-532.

112 *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 170-172 [21]-[26], 219-220 [209]-[210]. See also *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 35 [2], 87 [190].

113 *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 185 [80], 194 [114]; *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 35 [2], 87 [190]. See also *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 56-57.

114 *Ford v Ford* (1947) 73 CLR 524 at 529.

115 eg, *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 258.

powers is a thing the existence of which falls to be ascertained as a constitutional fact independently of the application of positive law. Each refers instead to a "recognized topic of juristic classification".[116] The topic of juristic classification to which each refers has an ineluctable fluidity in that the law on that topic was in a process of legislative development before and after 1900 and in that each is itself a source of legislative authority to modify or replace the pre-existing law on that topic.[117] The subject-matter of none is expressed in terms that can be said to have an "established and immutable legal meaning".[118] The scope of none can be "ascertained by merely analytical and *a priori* reasoning from the abstract meaning of words".[119] Each takes its place within "an instrument of government meant to endure and conferring powers expressed in general propositions wide enough to be capable of flexible application to changing circumstances".[120]

87 References in the context of s 51(xix) of the *Constitution* to the principle in *Australian Communist Party v The Commonwealth* ("**the *Communist Party Case***"),[121] and to the inability of the Parliament "simply by giving its own definition" of "alien" to "expand the power ... to include persons who could not possibly answer the description of 'aliens' ",[122] must be understood in that light. Expressed at the appropriate level of generality, the applicable principle is that courts do, and legislatures do not, exercise the constitutional function of finally determining whether or not legislation is within power.[123] Application of that principle requires that "[w]hen any enactment is challenged on the ground that it is outside the power over a particular subject, a decision whether or not that is so must ultimately depend upon what exactly is the effect of the enactment upon that subject".[124] Applied to the subject-matter of s 51(xix), what that means is that the content of the power to determine alienage and the existence or non-existence of a connection between the power and a particular law purporting to lay down criteria for determining who has the status of an alien or a non-alien must and can only be determined judicially. That is all it means.

88 No room is left by s 51(xix) for application of the more specific principle, on which the outcome in the *Communist Party Case* turned, that it is the duty of a court in a constitutional case "to be satisfied of every fact the existence of which is necessary in law to provide a constitutional basis for the legislation".[125] That more specific principle has no application because the nature of the legislative power to determine who has and who does not have the legal status of alienage 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. The status of a person as an alien or non-alien can (and where put in issue in appropriately constituted legal proceedings must) be judicially ascertained. But that status can be judicially ascertained only through the application of positive law, enactment of which inheres in the legislative power itself.

89 Failure to recognise that the nature of the power conferred by s 51(xix) is inconsistent with

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116 *Attorney-General (Vict) v The Commonwealth* ("**the *Marriage Act Case***") (1962) 107 CLR 529 at 578; *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 at 455 [14].

117 *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 500-501 [40]-[41]; *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 at 458-459 [21].

118 *Koroitamana v The Commonwealth* (2006) 227 CLR 31 at 37 [9].

119 *Marriage Act Case* (1962) 107 CLR 529 at 576; *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 at 455 [15].

120 *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29 at 81.

121 (1951) 83 CLR 1.

122 *Pochi v Macphee* (1982) 151 CLR 101 at 109; *Singh v The Commonwealth* (2004) 222 CLR 322 at 329 [4], 383 [151]; *Koroitamana v The Commonwealth* (2006) 227 CLR 31 at 38 [12], 54-55 [81].

123 *Communist Party Case* (1951) 83 CLR 1 at 262-263, citing *Marbury v Madison* (1803) 5 US 137.

124 *Marriage Act Case* (1962) 107 CLR 529 at 578.

125 (1951) 83 CLR 1 at 222.

a person's status as an alien or non-alien falling to be determined as a question of constitutional fact was a problem which attended the notion, taken up for a time in the case law,[126] only to be implicitly discarded,[127] that an "essential characteristic" of the legal status of alienage was to be found in the owing of "allegiance" to a foreign sovereign. That was not the only problem. Quite apart from being in tension with the nature of the legislative power with respect to aliens being to determine who has and who does not have the legal status of alienage, the notion was in tension with the power being a "plenary legislative power" conferred on an "autonomous government".[128] The tension arose from the circumstance that owing allegiance to a foreign sovereign turns at least primarily on the content of foreign law.[129] Those problems aside, the notion was stripped of utility as a criterion of constitutional demarcation once the postulated essential characteristic of the legal status of alienage was accepted to extend beyond owing allegiance to a foreign sovereign to include in the alternative owing no allegiance at all. The additional problem exposed by that development was one of logic. For so long as the status of alienage is conceived of as importing an absence of allegiance to the sovereign (about which I will have more to say), the essential characteristic of alienage as so extended became so broad that anyone determined to be an alien through the application of any criterion would fall within one category or the other simply by reason of being an alien. The legal consequence of being an alien no matter what criterion is used to distinguish an alien from a non-alien cannot without circularity supply the criterion for distinguishing an alien from a non-alien.

Scope of the aliens power

90 How then is the scope of the legislative power conferred by s 51(xix) to determine the legal status of alienage to be determined?

91 The requisite frame of reference is the body politic of the Commonwealth of Australia, which is described in the preamble to the *Commonwealth of Australia Constitution Act 1900* (Imp) as having been created through the agreement of "the people" of the former Australian colonies "to unite in one indissoluble Federal Commonwealth under the Crown", the Parliament of which is required by the *Constitution* to consist of the Queen and of a Senate and a House of Representatives respectively comprised of senators and members "directly chosen by the people"[130] in the exercise of a common franchise determined by the Parliament itself,[131] and the Executive Government of which is required by the *Constitution* to be responsible to the Parliament.[132] Whilst the Commonwealth of Australia was at the time of its creation yet another colony within an Empire, the grant to its Parliament of legislative power to determine the legal status of alienage, no less than the grant to its Parliament of legislative power with respect to external affairs,[133] "was a clear recognition, not merely that, by uniting, the people of Australia were moving towards nationhood, but that it was the Commonwealth which would in due course become the nation state, in-

126 *Singh v The Commonwealth* (2004) 222 CLR 322 at 383 [154], 395 [190], 398 [200]; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439 at 458-459 [35].
127 *Koroitamana v The Commonwealth* (2006) 227 CLR 31 at 38 [11], 46 [48]-[49].
128 *Polites v The Commonwealth* (1945) 70 CLR 60 at 78; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 384-385 [98].
129 *Sykes v Cleary* (1992) 176 CLR 77 at 105-107, 109, 135.
130 Sections 1, 7 and 24 of the *Constitution*.
131 Sections 8, 30 and 51(xxxvi) of the *Constitution*.
132 Sections 61 and 64 of the *Constitution*.
133 Section 51(xxix) of the *Constitution*.

ternationally recognized as such and independent".[134]

92 The usage and practice of independent nation states had been from at least the middle of the nineteenth century,[135] and remains to the present, each to draw a distinction under its municipal law between those persons who are formally admitted to membership of the community that constitutes the body politic of the nation state and those persons who are not. The former category of persons, as recognised in the terminology of s 44(i) of the *Constitution*, has long been referred to from the perspective of the nation state as either "subjects" or "citizens", or more generically as "nationals". It is persons within the latter category who have long been referred to from the same perspective as "aliens".[136]

93 The usage and practice is reflected in the following explanation of the legal status of alienage, given by Gaudron J in the context of expounding the meaning of "alien" in s 51(xix), which I am content to adopt:[137]

> "An alien (from the Latin alienus - belonging to another) is, in essence, a person who is not a member of the community which constitutes the body politic of the nation state from whose perspective the question of alien status is to be determined. For most purposes it is convenient to identify an alien by reference to the want or absence of the criterion which determines membership of that community. Thus, where membership of a community depends on citizenship, alien status corresponds with non-citizenship; in the case of a community whose membership is conditional upon allegiance to a monarch, the status of alien corresponds with the absence of that allegiance."

94 The power conferred on the Parliament of the Commonwealth by s 51(xix) to determine the legal status of alienage was a power which from the outset enabled the Parliament to bring a measure of precision to the identification of those to whom the *Constitution* refers as "the people", by laying down criteria for determining with specificity which persons were and which persons were not to have the legal status of members of the body politic of the Commonwealth of Australia.[138]

95 Upon the basis of that membership, certain common law rights and duties would automatically become applicable (most fundamentally, the right to enter and remain in Australia[139]), as would the constitutional right not to be subjected to discrimination under the law of any State on the basis of residence in any other State.[140] And upon the basis of that membership, other civil and political rights and duties were capable of being conferred - most fundamentally, the right and duty to vote at elections of senators and members of the House of Representatives and at referenda for the alteration of the *Constitution*.[141]

96 The capacity of the Commonwealth Parliament to exercise the legislative power conferred by s 51(xix) was initially constrained by the continuing application to Australia of Imperial

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134 *New South Wales v The Commonwealth* ("**the *Seas and Submerged Lands Case***") (1975) 135 CLR 337 at 373.

135 See *Minor v Happersett* (1874) 88 US 162 at 165-166.

136 See, generally, Koessler, "'Subject,' 'Citizen,' 'National,' and 'Permanent Allegiance'" (1946) 56 *Yale Law Journal* 58.

137 *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 189.

138 cf *Hwang v The Commonwealth* (2005) 80 ALJR 125 at 128 [10]; 222 ALR 83 at 86-87.

139 See *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462 at 469; cf *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 25-26. See also *Potter v Minahan* (1908) 7 CLR 277 at 304-305; *Musgrove v Chun Teeong Toy* [1891] AC 272 at 282-283.

140 Section 117 of the *Constitution*. See also *Street v Queensland Bar Association* (1989) 168 CLR 461 at 525, 541, 554.

141 Sections 8, 30, 51(xxxvi) and 128 of the *Constitution*.

legislation operating by paramount force and by the political reality of Empire reflected in the prevailing doctrine of the unity of the Imperial Crown. Indeed, for some time, it was inaccurate to speak of an "Australian nationality" as distinct from a "British nationality",[142] which equated to the status of a "British subject". The status of a British subject for some time fell to be ascertained by reference to the common law as modified by Imperial legislation[143] and as supplemented by local legislation providing for local naturalisation.[144]

97 With the retreat of Empire, the emergence of Australia as an independent nation in world affairs and the unshackling of Commonwealth legislative competence from Imperial oversight through the enactment of the *Statute of Westminster Adoption Act 1942* (Cth), s 51(xix) provided ample power for Australia to respond to the invitation contained in the resolution of the Imperial Conference of 1937 that, together with other former British colonies which had by then become recognised as "autonomous Communities"[145] within what had by then become known as the Commonwealth of Nations, it determine "which persons have with it that definite connexion ... which would enable it to recognize them as members of its community".[146] The resolution's reference to "members of its community" was intended to have the "rather technical meaning" of denoting a person that a former colony had "decided to regard as 'belonging' to it, for the purposes of civil and political rights and duties, immigration, deportation, diplomatic representation, or the exercise of extra-territorial jurisdiction".[147] In the same year, 1937, Australia ratified the Convention on Certain Questions Relating to the Conflict of Nationality Laws,[148] Art 1 of which recognised that "[i]t is for each State to determine under its own law who are its nationals".

98 By 1937, the common law status of a British subject had already been replaced in Australia with the statutory status of a British subject.[149] The sequence of legislative development afterwards saw the supplementation in 1949[150] and ultimate displacement in 1987[151] of the statutory status of a British subject with the statutory status of an Australian citizen.[152] The result was that it could be said to have been recognised by 1988 "that the effect of Australia's emergence as a fully independent sovereign nation with its own distinctive citizenship was that the word 'alien' in s 51(xix) of the Constitution had become synonymous with 'non-citizen' ".[153]

99 Reflecting the contemporary significance of the status of an Australian citizen, legislation providing for the determination of the status of an Australian citizen enacted under s 51(xix) recites,[154] and since 1994 has similarly recited,[155] that Australian citizenship "represents full and formal membership of the community of the Commonwealth of Australia" and "is a common bond, involving reciprocal rights and obligations, uniting all

142 *Attorney-General for the Commonwealth v Ah Sheung* (1906) 4 CLR 949 at 951.
143 *The Naturalization Act 1870* (Imp) (33 & 34 Vict c 14).
144 *Naturalization Act 1903* (Cth).
145 Great Britain, *Imperial Conference 1926: Summary of Proceedings*, Cmd 2768 at 10 (emphasis omitted). See *Kirmani v Captain Cook Cruises Pty Ltd [No 1]* (1985) 159 CLR 351 at 363, 373-374, 398-399, 422.
146 Great Britain, *Imperial Conference 1937: Summary of Proceedings*, Cmd 5482 at 16.
147 Great Britain, *Imperial Conference 1937: Summary of Proceedings*, Cmd 5482 at 16.
148 [1930] 179 LNTS 89.
149 Sections 5 and 6 of the *Nationality Act 1920* (Cth), which implemented the "common code" of the *British Nationality and Status of Aliens Act 1914* (UK).
150 Part III of the *Nationality and Citizenship Act 1948* (Cth), which commenced on 26 January 1949.
151 *Australian Citizenship Amendment Act 1984* (Cth), which relevantly commenced on 1 May 1987.
152 See Brazil, "Australian Nationality and Immigration", in Ryan (ed), *International Law in Australia*, 2nd ed (1984) 210 at 210-223.
153 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 25, referring to *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178.
154 Preamble to the *Australian Citizenship Act 2007* (Cth).
155 Section 3 of the *Australian Citizenship Amendment Act 1993* (Cth).

Australians, while respecting their diversity". A person on whom the status of an Australian citizen is conferred by a process of naturalisation pledges "loyalty to Australia and its people".[156]

100 As to the constitutionally permitted scope of the legislative choice conferred on the Commonwealth Parliament by s 51(xix) to prescribe criteria for the determination of who is to have from birth the status of an Australian citizen as distinct from non-citizen or alien, it must now be taken as settled that the Parliament is entitled at least to choose between the principal options recognised as having vied for acceptance as indicia of nationality in the second half of the nineteenth century, being the place of birth (*jus soli*) or the nationality of one or more parents (*jus sanguinis*),[157] or to choose some combination of the two.[158]

101 That does not mean that the Parliament's choice within those parameters is entirely unconstrained. Having regard to the role of Australian citizenship as determining membership of the body politic of the Commonwealth of Australia, it is at least arguable that any exclusion from citizenship of a person who is or would be qualified to be an Australian citizen by reference to criteria of general application would need to be supported by "substantial reasons".[159] And having regard to the specific and qualified nature of the power[160] conferred by s 51(xxvi) as amended since 1967[161] to make laws with respect to "the people of any race for whom it is deemed necessary to make special laws", it is at least arguable that an exclusion based on race would be impermissible.[162] There is no need for present purposes to explore those potential limitations.

Indigeneity and alienage

102 Australian courts before[163] and after[164] *Mabo v Queensland [No 2]* ("***Mabo***"),[165] as well as in the reasoning in *Mabo* itself,[166] have consistently rejected the existence of Aboriginal or Torres Strait Islander sovereignty. That rejection has meant that, unlike the "Indian Tribes" recognised in the *Constitution of the United States*,[167] Aboriginal and Torres Strait Islander societies have never been treated constitutionally as "distinct political societies" or as "domestic dependent nations"[168] the members of which have owed "immediate allegiance to their several tribes".[169]

103 The consequence has been that members of Aboriginal and Torres Strait Islander societies have never been understood to fall outside the standard common law or statutory rules that have from time to time governed the distinction between a British subject or

156 Sections 26 and 27 of and Sch 1 to the *Australian Citizenship Act 2007* (Cth).
157 See Great Britain, *Report of the Royal Commissioners for Inquiring into the Laws of Naturalization and Allegiance* (1869) at viii.
158 *Singh v The Commonwealth* (2004) 222 CLR 322 at 340-341 [30], 395 [190], 414 [252]; *Koroitamana v The Commonwealth* (2006) 227 CLR 31 at 37 [9], 49 [62].
159 cf *McGinty v Western Australia* (1996) 186 CLR 140 at 166-167, 170; *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 174 [7], 176-177 [12], 182 [23], 198-200 [83]-[86]; *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 19-21 [23]-[26], 56-62 [150]-[168], 118-121 [372]-[385].
160 cf *Bourke v State Bank of New South Wales* (1990) 170 CLR 276 at 289.
161 *Constitution Alteration (Aboriginals) 1967* (Cth).
162 *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 365-366 [40].
163 *R v Murrell* (1836) 1 Legge 72 at 73; *R v Wedge* [1976] 1 NSWLR 581; *Coe v The Commonwealth* (1979) 53 ALJR 403 at 408, 409-410, 412; 24 ALR 118 at 128-129, 132-133, 137-138.
164 *Coe v The Commonwealth* (1993) 68 ALJR 110 at 114-115; 118 ALR 193 at 199-200; *Walker v New South Wales* (1994) 182 CLR 45 at 48-49.
165 (1992) 175 CLR 1.
166 (1992) 175 CLR 1 at 15, 31-32, 69, 78-79, 122, 179-180.
167 Article I, s 8.
168 *Cherokee Nation v Georgia* (1831) 30 US 1 at 17.
169 *Elk v Wilkins* (1884) 112 US 94 at 99.

Australian citizen, on the one hand, and an alien, on the other hand. Against that background, it has never been thought necessary to enact legislation along the lines of the *Indian Citizenship Act 1924* (US), specifically conferring the status of subjects or citizens on members of indigenous societies. Nor has it been thought necessary to enact declaratory legislation along the lines of the *Native Rights Act 1865* (NZ),[170] deeming indigenous persons born or to be born within Australia to have such a status.

104 Until the displacement of the common law by statute early in the twentieth century, two distinct rules of the common law operated in temporal sequence to confer the status of a British subject on the indigenous inhabitants of Australia. The first, applicable at the time of acquisition of sovereignty over territory, was that by which every inhabitant of that territory alive at that time immediately became a British subject.[171] The second, applicable from the time of acquisition of sovereignty over territory, was that by which every person born within that territory became a British subject from birth simply by reason of their place of birth.[172] Each common law rule was subject to exceptions, but neither drew any distinction based on race or indigeneity.

105 Application of the second of those common law rules produced the result, in the language used by Sir Kenneth Bailey as Solicitor-General of the Commonwealth in an opinion provided to the House of Representatives Select Committee on Voting Rights of Aborigines in 1961, that "antecedently to the establishment of the Commonwealth aboriginal natives of Australia, like other persons born within Her Majesty's dominions and allegiance were ... natural-born subjects of Her Majesty".[173] Taking account of statutory developments to that date, the Solicitor-General went on to advise that "aboriginal natives of Australia, like other persons born in Australia" after 1949 had the statutory status of Australian citizens and, "by virtue of that citizenship", also had the statutory status of British subjects. Professor Geoffrey Sawer advised to the same effect in an opinion provided to the same Committee in the same year that "every aboriginal native of Australia born in Australia after 1829 (by which date the whole of the continent was part of the dominions of the Crown) became a British subject by birth; his race was irrelevant, and there were no other circumstances capable of qualifying the allegiance".[174] Sir Garfield Barwick, when Attorney-General of the Commonwealth, had advised to materially identical effect in 1959.[175] Illustrating the perceived irrelevance of race to the loss as well as the acquisition of the status of British subject, Sir Robert Garran as Solicitor-General of the Commonwealth had advised in 1925 that it was perfectly possible for an Aboriginal woman to become an alien by reason of marriage.[176]

106 Before and after federation, in the vestigial language of feudalism taken to be descriptive of the formal legal relationship between a British subject and the "Crown",[177] Aboriginal

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170 Section 2.

171 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 38, 182; *Campbell v Hall* (1774) 1 Cowp 204 at 208 [98 ER 1045 at 1047].

172 *Singh v The Commonwealth* (2004) 222 CLR 322 at 389 [172].

173 Australia, House of Representatives, *Report from the Select Committee on Voting Rights of Aborigines* (1961) at 48 [16] (Appendix VIII).

174 "National Status of Aborigines in Western Australia", in Australia, House of Representatives, *Report from the Select Committee on Voting Rights of Aborigines* (1961) 37 at 37 (Appendix III).

175 Letter from Attorney-General Sir Garfield Barwick to Paul Hasluck, Minister for Territories, 16 July 1959, in Chesterman and Galligan (eds), *Defining Australian Citizenship: Selected Documents* (1999) 35 at 35-36.

176 See Chesterman and Galligan, *Citizens Without Rights* (1997) at 109.

177 *Calvin's Case* (1608) 7 Co Rep 1a at 5a-5b [77 ER 377 at 382-383]; Blackstone, *Commentaries on the Laws of England* (1765), bk 1, ch 10 at 357-358; Salmond, "Citizenship and Allegiance" (1902) 18 *Law Quarterly Review* 49.

and Torres Strait Islander Australians were accordingly understood to have owed "allegiance" to the Crown and to have been entitled, at least in theory, to the "protection" of the Crown in exactly the same way and to exactly the same extent that other Australians were understood to have owed allegiance to the Crown and to have been entitled to the protection of the Crown.

107 By federation, the Crown to which such allegiance was owed was understood to be the monarch "in his politic, and not in his personal capacity" and the full feudal dimensions of what might once have been meant by the "protection" of the Crown had been lost in the mists of time.[178] To the extent that the "protection" of the Crown might have been thought to involve a positive duty on the part of the Crown to exercise prerogative power physically to protect a British subject, any such duty of the Crown to provide that protection to a British subject was understood to be one of "imperfect obligation".[179]

108 To the extent that the "protection" of the Crown involved recognition of an entitlement to the equal protection of the law as administered by courts, however, there was no doubt that the protection of the common law and of applicable statute law was the entitlement of every British subject. But it was equally the entitlement of every "friendly alien" (being an alien other than an "enemy alien" possessing a nationality of a foreign state at war with the Crown who entered any part of the dominions of the Crown so as thereby to owe "temporary allegiance" to the Crown).[180] "Under the common law of Australia and subject to qualification in the case of an enemy alien in time of war, an alien who is within this country, whether lawfully or unlawfully, is not an outlaw."[181] Hence, it could be said in the High Court in 1973 to have been "clear" that "an alien, other than an enemy alien, is, while resident in this country, entitled to the protection which the law affords to British subjects".[182]

109 Perhaps debatable is whether the terminology of "allegiance" and reciprocal "protection" remains appropriate to describe the bond between an Australian citizen and the Commonwealth of Australia that is inherent in the legal status of Australian citizenship. Quite apart from the obscurity of the content of "allegiance" and "protection",[183] the description is problematic to the extent that reciprocity might imply conditionality. The reality is that "in modern states the obligations of the national to the nation are unconditional, rather than contingent upon the state's compliance with corresponding duties".[184]

110 For the sake of the historical record, it is as well to affirm that Aboriginal and Torres Strait Islander Australians and non-Aboriginal or Torres Strait Islander Australians alike became at federation members of the body politic of the Commonwealth of Australia. They did so by virtue of their common status as British subjects born within the territorial limits of the Australian colonies, each of which was then a dominion of the Crown. Although s 127 of the *Constitution*, until its repeal in 1967,[185] required that "aboriginal natives" not be

178 *In re Stepney Election Petition; Isaacson v Durant* (1886) 17 QBD 54 at 65-66. See Williams, "The Correlation of Allegiance and Protection" (1948) 10 *Cambridge Law Journal* 54 at 58-73.

179 *Attorney-General v Tomline* (1880) 14 Ch D 58 at 66.

180 *Singh v The Commonwealth* (2004) 222 CLR 322 at 388 [168]. See also *Bradley v The Commonwealth* (1973) 128 CLR 557 at 582; *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 521. See Salmond, "Citizenship and Allegiance" (1902) 18 *Law Quarterly Review* 49 at 50; Finnis, "Nationality, Alienage and Constitutional Principle" (2007) 123 *Law Quarterly Review* 417 at 418-419.

181 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 19 (footnotes omitted).

182 *Bradley v The Commonwealth* (1973) 128 CLR 557 at 582.

183 cf *Singh v The Commonwealth* (2004) 222 CLR 322 at 387 [165]-[166]. See also Parry et al (eds), *Encyclopaedic Dictionary of International Law* (1986) at 16-17, "allegiance".

184 Koessler, " 'Subject,' 'Citizen,' 'National,' and 'Permanent Allegiance' " (1946) 56 *Yale Law Journal* 58 at 68.

185 Section 3 of the *Constitution Alteration (Aboriginals) 1967* (Cth).

counted in "reckoning the numbers of the people" of the Commonwealth, the better view of that section is that it governed nothing more than the working out of numbers.[186] Exclusion from the franchise of "aboriginal native[s] of Australia" (other than those who were by virtue of s 41 of the *Constitution* entitled to vote) in 1902[187] was appropriately described by Senator R E O'Connor in the legislative process by which it occurred as a "monstrous thing".[188] Until that exclusion was removed in 1962,[189] its existence was a gross legislative denial of political rights to persons who, before, after and throughout their period of exclusion from the franchise, formed part of "the people" of the Commonwealth.

Articulation of the plaintiffs' argument

111 The plaintiffs do not complain that any criterion laid down by the Parliament for the determination of Australian citizenship operates invalidly to exclude them from membership of the body politic of the Commonwealth of Australia. They disclaim an attack on the validity of the *Australian Citizenship Act 2007* (Cth) and do not seek to argue that they are citizens. Citizenship is said by them to be no more than a statutory status, directed to the conferral of certain rights and duties associated with being Australian, which status cannot bear upon the antecedent constitutional question of whether they are or are not aliens.

112 Their argument is that, as persons of Aboriginal or Torres Strait Islander descent who identify with and are acknowledged as members of Aboriginal or Torres Strait Islander communities, they fall within the unique constitutional category of "non-citizen non-aliens". Recognition of that constitutional category would have the effect of placing beyond legislative power the enactment of criteria directed to the question of their alienage or non-alienage, regardless of whether the status of non-alienage is citizenship or any another nomenclature Parliament might choose to adopt.

113 The plaintiffs acknowledge that their argument is novel. They say that its novelty is part of its strength. In all of the legal analysis that has until now been undertaken of indigeneity and alienage, and in all of the cases on s 51(xix) of the *Constitution*, the argument has never been considered and therefore it has never been rejected.

114 How then do the plaintiffs put their argument? Their argument as ultimately articulated with the support of the Attorney-General for Victoria seems to have three main variations. All have a common starting point.

115 The common starting point is the belated recognition by the common law of Australia in *Mabo* of the existence, at the time of the acquisition of Imperial sovereignty over the land and waters of Australia, of Aboriginal and Torres Strait Islander societies which observed long-standing traditional laws and customs by which those societies both maintained a spiritual and cultural connection with land and determined their own membership.

116 The first variation of the argument relies on what has since *Mabo* been described as the "necessary pre-requisite"[190] to its recognition of native title at common law. The necessary pre-requisite is the continuation in contemporary Australia of the observance by

186 Sawer, "Grant of Franchise to Aborigines by the Commonwealth", in Australia, House of Representatives, *Report from the Select Committee on Voting Rights of Aborigines* (1961) 38 at 38-39 (Appendix IV). cf *Hwang v The Commonwealth* (2005) 80 ALJR 125 at 129-130 [16]-[17]; 222 ALR 83 at 88-89.

187 Section 4 of the *Commonwealth Franchise Act 1902* (Cth).

188 Australia, Senate, *Parliamentary Debates* (Hansard), 10 April 1902 at 11584.

189 *Commonwealth Electoral Act 1962* (Cth).

190 *Fejo v Northern Territory* (1998) 195 CLR 96 at 128 [46] (emphasis omitted); *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 37 [10].

Aboriginal and Torres Strait Islander societies of their traditional laws and customs. The plaintiffs point to *Mabo*'s recognition of those continuing traditional laws and customs as means through which those societies continue to maintain a spiritual and cultural connection with land and continue to determine their own membership. They emphasise *Mabo*'s acknowledgement of "[m]embership of the indigenous people" depending "on biological descent from the indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among those people".[191]

117 The plaintiffs argue that the common law's recognition of the continuing existence of self-determining indigenous societies maintaining a spiritual and cultural connection with land within Australia through observance of traditional laws and customs is inconsistent with the treatment of members of those societies as strangers to that land or as foreigners to Australia. That is because the common law has now recognised that members of self-determining indigenous societies maintaining a spiritual and cultural connection with land in a very real sense "belong" to that land. Their belonging is so deep and so enduring that it has transcended the acquisition of Imperial sovereignty and has transcended the establishment by the *Constitution* of the nation state of the Commonwealth of Australia. The coming into being in comparatively recent time of the nation state of the Commonwealth of Australia has meant that "a proper understanding of the juridical relationship between land, commonwealth and humans who live on the land ... ('aboriginal' asserting priority in relationship to land) is a question of constitutional law: a primary question of citizenship in the Australian Commonwealth".[192]

118 Acknowledging the common law to be a source of "juristic authority" for the *Constitution*,[193] and taking into account the inherent connection that must exist between the territory of any nation state and the people of that nation state[194] as reflected in the *Constitution*'s use of the word "Commonwealth" to describe both the political community of the nation state which it constitutes and the territory occupied by that community, members of self-determining indigenous societies now recognised by the common law to "belong" to land within what is now the territory of the Commonwealth of Australia must in turn be recognised by the *Constitution* to "belong" to the political community of the nation state of the Commonwealth of Australia within which their land is situated. Contemporary application of the understanding that the constitutional reference to "aliens" is to persons who are not members of the political community that constitutes the body politic of the nation state of the Commonwealth of Australia must adjust to that ancient but only newly appreciated reality.

119 The foregoing exposition might not reflect in every particular the way the plaintiffs put the first version of their argument. To the extent that it does not, I proffer it as my understanding of the strongest way that version of the argument can be put.

120 Faced with the example of the Yorta Yorta Aboriginal community having been found not to constitute a continuation from the acquisition of Imperial sovereignty of a society observing traditional laws and customs,[195] and mindful of the position of Mr Love, in respect of whom the special case provides no basis for inferring anything about observance of traditional laws and customs by the community with which he identifies, the plaintiffs proffer

191 (1992) 175 CLR 1 at 70.
192 Detmold, *The Australian Commonwealth: A Fundamental Analysis of its Constitution* (1985) at 48.
193 Dixon, "The Common Law as an Ultimate Constitutional Foundation", in Crennan and Gummow (eds), *Jesting Pilate*, 3rd ed (2019) at 203.
194 cf Art 1 of the Montevideo Convention on the Rights and Duties of States.
195 *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

other variations of the argument. Neither of the other variations relies on the continuing existence of indigenous societies observing traditional laws and customs.

121 Formulation and presentation of those other versions of the plaintiffs' argument is made necessary by the historical fact acknowledged in *Mabo* that indigenous persons "were dispossessed of their land parcel by parcel" in a process of dispossession which "underwrote the development of the nation".[196] That dispossession produced spiritual and cultural losses to indigenous persons which have been "permanent and intergenerational".[197] The consequence of the losses wrought by dispossession remaining unaddressed is that "Aboriginal peoples and Torres Strait Islanders have become, as a group, the most disadvantaged in Australian society".[198] The body politic of the Commonwealth of Australia is uniquely responsible for that consequence, and it is uniquely placed to redress that consequence.

122 The second variation postulates as sufficient for a person to "belong" to the land, and hence to be one of or to be uniquely connected with "the people" of Australia, that the person identifies with and is acknowledged to be a member of an existing community that is comprised of descendants of persons who were members of indigenous societies at the time of the acquisition of Imperial sovereignty. The third variation postulates the sufficiency merely of the person being descended from a person who was a member of an indigenous society at the time of the acquisition of Imperial sovereignty.

123 On either of these latter variations of the plaintiffs' argument, proof, through the continual practice of traditional laws and customs, of current spiritual and cultural connection with land is unnecessary. Indigeneity without more entails a connection with land within Australia which is indelible for so long as indigeneity is not renounced. The intergenerational legacy of dispossession sustains a connection with the body politic of the Commonwealth of Australia that is sufficient to demand membership of the body politic. If not sufficient to demand its membership, then the responsibility of the body politic for the intergenerational legacy of dispossession is at least sufficient to preclude it from disowning those whom it has dispossessed.

124 Here again I am conscious that my exposition of the alternative versions of the argument might not reflect the detail of how the plaintiffs chose to couch it. Here again I proffer the exposition as my understanding of the strongest way the argument can be put.

125 Insofar as the plaintiffs treat membership of an indigenous society as exhaustive of the question of whether they are non-aliens, the first two variations of the argument come perilously close to an assertion of Aboriginal and Torres Strait Islander sovereignty, albeit that the argument is deployed to assert not independence from, but an indelible connection with, the polity of the Commonwealth of Australia. The third variation of the argument would constitutionalise a form of nationality by descent (*jus sanguinis*), which was unknown to the common law though it may have parallels in some other legal systems.

126 Understandably, the plaintiffs eschew encapsulation of their argument in racial terminology. Yet it is apparent that each version of their argument seeks to introduce into s 51(xix) of the *Constitution* a distinction that is based on "race" as that term appears in s 51(xxvi),[199] on which the Commonwealth Parliament has relied since its amendment in

196 (1992) 175 CLR 1 at 69.
197 *Northern Territory v Griffiths* (2019) 93 ALJR 327 at 380 [230]; 364 ALR 208 at 272.
198 Preamble to the *Native Title Act 1993* (Cth).
199 *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 461-462, quoting *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 273-274.

1967 to enact a range of legislation for the benefit of Aboriginal or Torres Strait Islander people including the *Native Title Act 1993* (Cth). One way or another, what the plaintiffs seek to achieve through a process of constitutional interpretation or constitutional implication is the functional equivalent of an exclusion from s 51(xix) comparable to the express parenthetical exclusion from s 51(xxvi) which was deleted by constitutional amendment in 1967. They seek, in effect, to read s 51(xix) as if it concluded, after the word "aliens", with the parenthetical exclusion "(other than [members of] the aboriginal race)".

Rejection of the plaintiffs' argument

127 Though I recognise the magnitude of the change wrought by the holding in *Mabo* to the common law of Australia, to Australian legal thinking more generally, and to Australian national sentiment, and though I am not unmoved by growing appreciation of the depth of cultural connection to country and of the extent of historical dispossession of Aboriginal and Torres Strait Islander peoples, I am unable to accept the plaintiffs' argument in any of its variations.

128 Morally and emotionally engaging as the plaintiffs' argument is, the argument is not legally sustainable. The common law antecedents of the *Constitution* provide no basis for extrapolating from common law recognition of a cultural or spiritual connection with land and waters within the territory of the Commonwealth to arrive at constitutionally mandated membership of or connection with the political community of the Commonwealth. The considerations which informed the common law development in *Mabo* cannot be transformed by any conventional process of constitutional interpretation or implication into a constitutional limitation on legislative power.

129 The *Constitution* uses the word "Commonwealth" to describe both the "territorial community" of the Commonwealth of Australia and the "territory occupied by that community". The *Constitution* does so using the same word in these two quite distinct "senses" that are "close[]" but "several", making it "peculiarly important to distinguish them".[200]

130 Membership of or exclusion from the political community of the Commonwealth of Australia is a topic of vital national importance, which the Commonwealth Parliament has since 1901 had specific power to address under s 51(xix) of the *Constitution*. Recognition and protection of the connection of Aboriginal and Torres Strait Islander peoples with land and waters within the territory of the Commonwealth of Australia is another topic of vital national importance, which the Commonwealth Parliament has since 1967 had specific power to address under s 51(xxvi) of the *Constitution*. Each topic raises issues which, within our current constitutional structure, and subject to the constraints which that constitutional structure currently imposes, fall to be resolved by the Commonwealth Parliament in the outworking of the political processes for which the *Constitution* makes elaborate provision. To the extent those issues might intersect, the existence and consequences of the intersection fall to be addressed by the Commonwealth Parliament in the outworking of those political processes. Judicial intervention on the basis for which the plaintiffs contend is not constitutionally justified.

131 Section 51(xix) of the *Constitution* is to be construed "with all the generality which the words used admit"[201] to confer power on the Commonwealth Parliament to create and

[200] *R v Sharkey* (1949) 79 CLR 121 at 153, quoting Moore, *The Constitution of The Commonwealth of Australia*, 2nd ed (1910) at 73.

[201] *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225-226.

maintain a clear-cut dichotomy between those who are by force of statute aliens and those who are by force of statute non-aliens because they are citizens. Section 51(xix) is not to be read as admitting of the existence of a further category of non-aliens who are non-aliens by force of the *Constitution* itself, whose status is for that reason and to that extent off-limits to the Parliament, and who are consigned to inhabit a constitutional netherworld in which they are neither citizens, who are full and formal members of the body politic of the Commonwealth of Australia, nor aliens, who are not full and formal members of the body politic of the Commonwealth of Australia.

132 For reasons I have sought to make clear in explaining the nature of the power conferred by s 51(xix) of the *Constitution* as a power to determine who has and who does not have the legal status of alienage, I cannot countenance the existence of a constitutional category of "non-citizen non-aliens" any more than I could countenance the existence of a category of "constitutional citizens". That is so irrespective of the basis on which persons within such a category might be determined. Not to be forgotten is that we have been down a similar path before: between 2001[202] and 2003,[203] when the notion was entertained that British citizens who migrated to Australia between 1948 and either 1986 or 1987 and who settled here as permanent residents without becoming Australian citizens were somehow not "aliens". It was a constitutional cul-de-sac.

133 Nor can I be party to a process of constitutional interpretation or constitutional implication which would result in the inference of a race-based constitutional limitation on legislative power. My objection is one of principle to the judicial creation of any race-based constitutional distinction irrespective of how benign the particular distinction contended for might seem. Creativity of that nature and in that degree is not within the scope of the acknowledged judicial function of ensuring that the structure of government, democratically endorsed through the adoption and amendment of the *Constitution*, is accommodated to the "changeful necessities and circumstances of generation after generation" as "the nation lives, grows, and expands".[204] It is supra-constitutional innovation.

134 The limits of judicial competence are reinforced by the limits of judicial process. The hearing of the special cases in these proceedings has been conducted at a time when a national conversation is occurring about the appropriateness of amending the *Constitution* to include an Aboriginal and Torres Strait Islander "Voice" to the Commonwealth Parliament. Noticeably absent from the viewpoints represented at the hearing has been the viewpoint of any Aboriginal or Torres Strait Islander body representing any of the more than 700,000 citizens of Australia who identify as Aboriginal or Torres Strait Islander. On the basis of the case as presented, I cannot presume that the political and societal ramifications of translating a communal, spiritual connection with the land and waters within the territorial limits of the Commonwealth of Australia into a legislatively ineradicable individual connection with the polity of the Commonwealth of Australia are able to be judicially appreciated.

135 Unlike, for example, the legislative powers of the Parliament of Canada,[205] the legislative powers of the Parliament of the Commonwealth have not to date been constrained by the insertion of a constitutional guarantee of "aboriginal ... rights".[206] If the scope of one or

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202 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 408-409 [35]-[39], 411-412 [48]-[50], 444-445 [159]-[160].

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

204 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 18 March 1902 at 10967.

205 cf *Watt v Liebelt* [1999] 2 FC 455.

206 See s 35 of the *Constitution Act 1982* (Can).

more of those legislative powers is now to be limited so as to result in constitutionally mandated differential treatment of some or all Aboriginal and Torres Strait Islander people, then the *Constitution* should be amended to produce that result by referendum, just as the *Constitution* was amended in 1967 to increase the scope of the legislative power of the Parliament of the Commonwealth to enact such special laws as the Parliament might deem necessary with respect to Aboriginal and Torres Strait Islander people.

136 Important to be remembered in the interpretation and application of the *Constitution* is that it was framed as a practical instrument of government. Consequences for practical governance cannot be ignored.

137 To concede capacity to decide who is and who is not an alien from the perspective of the body politic of the Commonwealth of Australia to a traditional Aboriginal or Torres Strait Islander society or to a contemporary Aboriginal or Torres Strait Islander community, or to any other discrete segment of the people of Australia, would be to concede to a non-constitutional non-representative non-legally-accountable sub-national group a constitutional capacity greater than that conferred on any State Parliament. Yet that would be the practical effect of acceptance of either of the first and second variations of the plaintiffs' argument.

138 Acceptance of any variation of the plaintiffs' argument would have the practical effect of depriving the Commonwealth Parliament of an aspect of its power to enact legislation under s 51(xix) of the *Constitution* which has effect for purposes both of national law and of international law. It would inject an element of indeterminacy into the administration of the legal status of alienage in respect of which Australia's interests as a nation state, domestically and internationally, demand that the legal criteria for determining the legal status be clearly identified, publicly proclaimed and officially and consistently administered, and that the legal status of individuals be unambiguous at and from the time of birth.

139 The potential impact on maintenance of an orderly national immigration program cannot be predicted on the basis of the material contained in the special cases but should not be underestimated. The *Migration Act 1958* (Cth) has since 1984 relied on s 51(xix) of the *Constitution*. As amended since 1994, it has required all persons who are not Australian citizens to hold valid visas in order to enter and remain in Australia. Immunisation from its operation of an indeterminate number of persons who are not Australian citizens but who have familial connections with indigenous societies or communities within the mainland of Australia or on the islands of the Torres Strait would not be trivial. Findings made by Finn J in 2010 in the course of determining native title in the Torres Strait as to "numerous interactions over generations between Islanders and coastal Papuans"[207] are sufficient to indicate that such trans-national family connections are not the product only of recent social mobility.

140 The complications and uncertainties which acceptance of the plaintiffs' argument would create for the maintenance of an orderly national immigration program under the *Migration Act* might perhaps be addressed by the Commonwealth Parliament reverting to the approach of relying on the power conferred by s 51(xxvii) to make laws with respect to "immigration and emigration". Alternatively, the Commonwealth Parliament might consider itself obliged to address them through racially targeted legislation enacted under s 51(xxvi) of the *Constitution*. On a correct understanding of the scope of the power

[207] *Akiba v Queensland [No 3]* (2010) 204 FCR 1 at 243 [999].

conferred by s 51(xix), neither is a course which the Commonwealth Parliament ought to be driven to take.

Disposition

141 I would answer the principal question for determination in each special case to the following effect: by reason of not having the status of an Australian citizen according to criteria of general application prescribed by legislation validly enacted under s 51(xix) of the *Constitution*, the plaintiff is an alien within the meaning of that provision.

142 **KEANE J.** Mr Daniel Love is the plaintiff in Matter No B43 of 2018 ("**the Love proceeding**"); Mr Brendan Thoms is the plaintiff in Matter No B64 of 2018 ("**the Thoms proceeding**"). Neither of the plaintiffs is an Australian citizen; and neither holds a current visa.

143 Sections 189 and 198 of the *Migration Act 1958* (Cth) provide that a person who is not an Australian citizen and who does not hold a visa is required to be detained and then removed from Australia.

144 Section 51(xix) of the *Constitution* empowers the Commonwealth Parliament to make laws with respect to "naturalization and aliens".

145 All parties are agreed that the plaintiffs are not subject to ss 189 and 198 of the *Migration Act* if they are outside the scope of the naturalisation and aliens power in s 51(xix) of the *Constitution*, pursuant to which, ss 189 and 198 of the *Migration Act* were enacted. On that basis, the question of law stated for the opinion of the Full Court in these special cases is whether each of the plaintiffs is an "alien" within the meaning of s 51(xix).

146 The plaintiffs argue that because each of them is of Aboriginal descent, and each identifies as a member of a particular Aboriginal group, and is said to be recognised as such by one or more elders of that group, he cannot be an "alien" within the naturalisation and aliens power. The plaintiffs' argument should be rejected, and the question of law in the special cases should be answered: Yes.

147 Neither plaintiff was born in Australia. Each plaintiff is a citizen of a foreign country. Neither plaintiff has been naturalised as an Australian citizen, although that course was open to him. By reason of these circumstances, each plaintiff is within s 51(xix). The circumstance that each plaintiff is of Aboriginal descent does not take him outside the scope of s 51(xix). Section 51(xix) cannot be read as if it distinguished between persons of Aboriginal descent on the one hand and persons descended from other races on the other, so that the former are excluded from its scope. Each plaintiff is within the scope of s 51(xix) no less than any other child who is born abroad of an Australian parent and does not apply for Australian citizenship.

148 In order to explain my reasons for these conclusions, I propose first to summarise the facts that gave rise to these cases and then to discuss the arguments agitated on behalf of the plaintiffs.

The facts

149 The relevant facts may be stated shortly.

Mr Love

150 Mr Love was born on 25 June 1979 in the Independent State of Papua New Guinea ("**PNG**") and acquired the status of a PNG citizen at that time.[208] His father was an Australian citizen by birth and his mother was a citizen of PNG. Mr Love's father was born in Port Moresby but was an Australian citizen by reason that, at the time of his birth, "Australia" was defined to include the Territory of Papua.[209]

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[208] *Constitution of the Independent State of Papua New Guinea*, s 66(1).

[209] *Nationality and Citizenship Act 1948* (Cth), ss 5(1), 10(1). This Act was subsequently renamed the *Australian Citizenship Act 1948* (Cth).

151 Mr Love was not entitled to Australian citizenship by descent. That was because at the time of his birth, a person born outside of Australia and out of wedlock could acquire such citizenship only if the person's mother was either an Australian citizen or a British subject ordinarily resident in Australia or New Guinea.[210]

152 Mr Love travelled back and forth between Australia and PNG in the period November 1981 to October 1985; he was granted a permanent residency visa for Australia in December 1984, at the age of five. He has resided in Australia continuously since October 1985. He has held visas, including the permanent residency visa, which entitled him to reside in Australia but which were liable to cancellation. Unlike his sibling, Mr Love did not seek and did not acquire the status of an Australian citizen.

153 On 25 May 2018, Mr Love was convicted of an offence of assault occasioning bodily harm contrary to s 339 of the *Criminal Code* (Qld) and was sentenced to 12 months' imprisonment. His visa was subsequently cancelled by a delegate of the Minister for Home Affairs ("**the Minister**") under s 501(3A) of the *Migration Act*, which requires the Minister to cancel a visa which has been granted to a person if satisfied that the person does not pass the character test. A person cannot pass that test if the person has a substantial criminal record,[211] which is defined to include a sentence of 12 months' imprisonment or more.[212]

154 Mr Love was taken into immigration detention on suspicion of being an unlawful non-citizen.[213] An unlawful non-citizen is required to be removed from Australia as soon as reasonably practicable.[214] An unlawful non-citizen is a non-citizen who is in Australia who does not hold a visa that is in effect.[215] The cancellation of Mr Love's visa was subsequently revoked and he was released from immigration detention. The Commonwealth nevertheless contends that he has the legal status of an alien who is liable to be removed from Australia.

155 Mr Love is descended from persons who inhabited Australia prior to European settlement. He identifies as a member of the Kamilaroi group and is recognised as such by one elder of that group.

Mr Thoms

156 Mr Thoms was born on 16 October 1988 in New Zealand and acquired the status of a New Zealand citizen at birth.[216] His father was at this time a New Zealand citizen. Mr Thoms' mother is an Australian citizen by birth, which entitled Mr Thoms to acquire Australian citizenship.[217] He has never sought to acquire that status.

157 Mr Thoms first came to Australia in December 1988. He has resided permanently in Australia since November 1994, when he was granted a Special Category Visa. He travelled from Australia to New Zealand on a temporary basis in 1997-1998 and 2002-2003. He has not departed Australia since January 2003.

158 Mr Thoms identifies as a member of the Gunggari People and is accepted as such by other members of the Gunggari People. He is a common law holder of native title which

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210 *Australian Citizenship Act 1948*, s 11(1)(b).
211 *Migration Act*, s 501(6)(a).
212 *Migration Act*, s 501(7)(c).
213 *Migration Act*, s 189.
214 *Migration Act*, s 198.
215 *Migration Act*, ss 13, 14.
216 *Citizenship Act 1977* (NZ), s 6(1).
217 *Australian Citizenship Act 1948*, s 10B.

has been recognised by determinations of native title made by the Federal Court of Australia.[218]

159 On 17 September 2018, Mr Thoms was convicted of an offence of assault occasioning bodily harm - domestic violence offence, contrary to s 339(1) of the *Criminal Code* (Qld),[219] and was sentenced to 18 months' imprisonment. He commenced court-ordered parole on 28 September 2018; but he was taken into immigration detention on the same day, where he remains, as his visa was cancelled by a delegate of the Minister under s 501(3A) of the *Migration Act*.

From subjects to citizens

160 At Federation, no subject of the British Crown was an alien within any part of the British Empire.[220] Aboriginal persons, like all other British subjects then living in Australia, were not aliens: they had become subjects of the Crown upon the reception of English common law at the first British settlement.[221]

161 Aboriginal persons living in Australia at or after British settlement were, like others present or born here, subject to English law as the law of the land. In *Mabo v Queensland [No 2]*, Brennan J, with whom Mason CJ and McHugh J agreed, said that "the law of England was not merely the personal law of the English colonists; it became the law of the land, protecting and binding colonists and indigenous inhabitants alike and equally".[222]

162 To say that Aboriginal persons, or persons identifying as such, were not "aliens" for the purposes of the naturalisation and aliens power at Federation because they were British subjects is not relevantly to differentiate them or their descendants from other British subjects living in Australia at that time or their individual descendants. Aboriginal persons in Australia were not subjects of the Crown with a special claim to the protection of the Crown that differentiated them from other inhabitants of the continent; nor were they subject to some special obligation to the Crown as a reciprocal of such "special protection". Aboriginal inhabitants of the Australian continent became subjects of the British Crown by reason of the fact of settlement; they did not become subjects of the British Crown because they were indigenous to the continent. They became subject to English law because they were, like European and other settlers, inhabitants of the continent of which English law was the law of the land.

163 Australians are no longer British subjects. After World War II, the *Nationality and Citizenship Act 1948* (Cth) established a separate Australian citizenship. Thereafter:[223]

> "The fact that a person who was born neither in Australia nor of Australian parents and who had not become a citizen of this country was a British subject or a subject of the Queen by reason of his birth in another country could no longer be seen as having the effect, so far as this country is concerned, of precluding his classification as an 'alien'."

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218 *Kearns on behalf of the Gunggari People #2 v Queensland* [2012] FCA 651; *Foster on behalf of the Gunggari People #3 v Queensland* [2014] FCA 1318.

219 Section 47(9) of the *Justices Act 1886* (Qld) provides that "[a] complaint for an offence may state the offence is also a domestic violence offence".

220 *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 183.

221 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 37-38, 80, 182. See, also, *In re Ho* (1975) 10 SASR 250 at 253.

222 (1992) 175 CLR 1 at 37. See, also, at 34, 36, 38, 182; *Coe v The Commonwealth* (1979) 53 ALJR 403 at 408; 24 ALR 118 at 129; *Campbell v Hall* (1774) 1 Cowp 204 at 208 per Lord Mansfield, delivering the reasons of the Court [98 ER 1045 at 1047].

223 *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 184.

164 Since Australia's emergence as an independent sovereign nation with its own distinct citizenship, the word "alien" has, speaking generally, become synonymous with "non-citizen".[224] That is so even though it has been said that the concepts are not perfectly overlapping.[225] So in contemporary parlance, it is natural to speak of members of the Australian body politic as "citizens"; similarly, it is an ordinary and natural use of language to speak of a person who is not an Australian citizen, but is a citizen of another country, as an "alien".

165 The naturalisation and aliens power extends to the making of laws that determine who is to be treated as a citizen of the Commonwealth of Australia, who will be treated as having the status of alienage, and "what the status of alienage, or non-citizenship, will entail".[226] The requirements of citizenship are currently found in the *Australian Citizenship Act 2007* (Cth). The plaintiffs do not challenge the validity of that Act or the proposition that they have not been naturalised as citizens under that Act.

Aliens and citizens

166 Section 51(xix) of the *Constitution* empowers the Commonwealth Parliament to "create and define the concept of Australian citizenship",[227] to select or adopt the criteria for citizenship or alienage,[228] and to attribute to any person who lacks the qualifications for citizenship "the status of alien".[229]

167 At Federation, the major legal systems of the world applied different approaches to the concept of alienage and the correlative concept of citizenship. The two principal theories were citizenship acquired by descent or by place of birth. The latter reflected the common law view earlier expressed in *Calvin's Case*,[230] but it had been modified by statute. An understanding of what "alien" meant at Federation must therefore take account of these different views and the legislative responses to these views that occurred during the nineteenth century across the major legal systems of the world.[231] What was clear at Federation was that it was an attribute of the sovereignty of an independent State to decide who were aliens and whether they should or should not become members of the community.[232] Given this background, it is not difficult to accept that alienage was a matter seen as appropriate to be dealt with by Parliament.[233] As Kirby J explained in *Koroitamana v The Commonwealth*:[234]

> "The reasons for the rejection of the constitutional idea of nationality as a birthright were differently expressed in the several reasons in *Singh*. However, basically, they reflected the recognition by all members of the

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224 *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 183-184; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 25; *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 61 [95]; *Singh v The Commonwealth* (2004) 222 CLR 322 at 329 [4], 374 [122], 400 [205].

225 cf *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 412 [50]-[51], 421 [91], 437 [136], 493-494 [308], 496 [313], 518 [376]-[378]. But see *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 45 [39], 87 [190].

226 *Koroitamana v The Commonwealth* (2006) 227 CLR 31 at 38 [11].

227 *Koroitamana v The Commonwealth* (2006) 227 CLR 31 at 46 [48].

228 *Koroitamana v The Commonwealth* (2006) 227 CLR 31 at 37 [9], 46 [50], 49 [62].

229 *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 35 [2].

230 (1608) 7 Co Rep 1a [77 ER 377].

231 *Singh v The Commonwealth* (2004) 222 CLR 322 at 340-341 [30], 384 [157], 391 [177], 392 [179], 393 [183], 394 [184], 395 [190].

232 *Robtelmes v Brenan* (1906) 4 CLR 395 at 400, 404, cited in *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 170 [21].

233 *Singh v The Commonwealth* (2004) 222 CLR 322 at 341 [30], 414 [251]-[252].

234 (2006) 227 CLR 31 at 49 [62] (footnote omitted).

> majority, that, at the time the *Constitution* was written and thereafter, two criteria for nationality by birth existed in the world - ius soli and ius sanguinis. In that circumstance, consistent with the accepted norms for the construction of the *Australian Constitution*, notions of alienage and of nationality could adapt, as Parliament provided, by reference to one, both or a mixture of these competing approaches, so long as the persons designated as 'aliens' truly answered that description in accordance with the judgment of this Court."

168 Of course, as was noted by Kirby J, the power given by s 51(xix) has limits in that the Commonwealth Parliament cannot, simply by inventing its own peculiar 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.[235] But the existence of outer limits does not deny that the power conferred on Parliament is "wide",[236] and that it must be construed "with all the generality which the words used admit".[237]

169 In *Singh v The Commonwealth*, Gummow, Hayne and Heydon JJ held that "a central characteristic of the status of 'alien' is, and always has been, owing obligations to a sovereign power other than the sovereign power in question".[238] Their Honours explained that "owing obligations to a sovereign power other than Australia is the central characteristic of what is meant by 'aliens' ".[239] This explanation was confirmed by six members of the Court in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame*.[240] In *Singh*, Gummow, Hayne and Heydon JJ concluded:[241]

> "the meaning of 'aliens' was conveniently described in the joint reasons of six members of the Court in *Nolan v Minister for Immigration and Ethnic Affairs*[242] where it was said that 'alien' '[u]sed as a descriptive word to describe a person's lack of relationship with a country ... means, as a matter of ordinary language, "nothing more than a citizen or subject of a foreign state"'[243]."

170 These statements of Gummow, Hayne and Heydon JJ in *Singh* were not doubted in *Koroitamana*;[244] as Gleeson CJ and Heydon J pointed out in the latter case, "foreign allegiance [is] the clearest example" of the characteristic that brings a person within "the ordinary understanding of the word 'alien' ".[245] It was accepted in that case that statelessness is also "a relevant characteristic rendering [persons] objects of the exercise of the aliens power".[246] The statements of Gummow, Hayne and Heydon JJ in *Singh* are reconcilable with the decision in *Koroitamana* on the basis that, in each case, it was open to the Parliament to treat as an alien a person who holds an allegiance to a foreign power inconsistent with the grounds of allegiance prescribed by Australian law or who holds no allegiance to Australia under those grounds.

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235 *Pochi v Macphee* (1982) 151 CLR 101 at 109.
236 *Hwang v The Commonwealth* (2005) 80 ALJR 125 at 130 [18]; 222 ALR 83 at 89; *Koroitamana v The Commonwealth* (2006) 227 CLR 31 at 38 [11].
237 *Singh v The Commonwealth* (2004) 222 CLR 322 at 384 [155], citing *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225.
238 (2004) 222 CLR 322 at 383 [154]. See, also, at 398 [200].
239 (2004) 222 CLR 322 at 399 [201].
240 (2005) 222 CLR 439 at 458 [35].
241 (2004) 222 CLR 322 at 400 [205].
242 (1988) 165 CLR 178 at 183.
243 *Milne v Huber* (1843) 17 Fed Cas 403 at 406.
244 (2006) 227 CLR 31 at 37 [9], 41 [28].
245 (2006) 227 CLR 31 at 38 [13].
246 (2006) 227 CLR 31 at 42 [31].

Alienage and foreign allegiance

171 In *Sykes v Cleary*, Brennan J explained that issues of foreign citizenship are "ordinarily determined by reference to the municipal law of the foreign power",[247] but that law cannot deny the power of the Parliament to provide differently. Accordingly, the Parliament may provide for dual citizenship where it thinks fit to do so.

172 The legal status of an alien in Australian law is now derived from the statutory description of citizenship. It reflects the ordinary meaning of "alien" as a person who is not a citizen of Australia but is a citizen of a foreign State. It is for Parliament, relying on s 51(xix), to create and define the concept of Australian citizenship and its antonym alienage.[248] So understood, the fact that a person who is not a citizen of Australia also has some other characteristic (such as having been born to an Australian parent, or having deep personal ties or a strong emotional attachment to Australia) cannot alter that status created by law.[249]

173 Each of the plaintiffs is a citizen of a foreign country. It was submitted on their behalf that neither of them owes, and has ever owed, allegiance to a foreign power. In this regard, it was said that each of them departed his country of birth as a young child and has permanently resided in Australia since he was an infant. It was said that neither of them had, as children, the capacity to form an allegiance to a foreign sovereign power. Furthermore, it was said that each plaintiff's permanent presence in Australia, close relationships with other Australians (including becoming the parent of Australian citizens), and identification as an Aboriginal person, all indicate that his allegiance is to the Australian body politic.

174 This submission is untenable. Whether a person owes allegiance to a foreign country does not depend on his or her mental state or capacity to choose allegiance. "Allegiance" to a foreign country is a legal duty that arises by reason of an individual's legal status as a "subject" or "citizen" under foreign law[250] - that status may arise independently of the choice of the individual.

175 The plaintiffs' submission is directly contrary to the decision in *Singh*, where this Court was concerned with a six-year-old girl who was a citizen of India but was born in Australia of Indian parents. In rejecting the claim that the child was not an Indian citizen, the Court attributed no significance to her status as a minor and lack of capacity to make her own choices about her allegiance. It is an agreed fact that each plaintiff is a citizen of a foreign country; accordingly, the plaintiffs' submission can succeed only if *Singh* were to be overruled. The plaintiffs did not invite the Court to take that course.

Section 51(xix) and Aboriginality

176 Events that, under Australian law, may affect the relationship between an individual and the Australian body politic may equally affect the relationship between a member of an

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247 (1992) 176 CLR 77 at 112, citing *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 649.

248 *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 172 [26]; *Koroitamana v The Commonwealth* (2006) 227 CLR 31 at 46 [48].

249 *Singh v The Commonwealth* (2004) 222 CLR 322 at 398 [200]; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439 at 458 [35].

250 See, eg, *Sykes v Cleary* (1992) 176 CLR 77 at 109-110; *Re Canavan* (2017) 91 ALJR 1209 at 1216 [26]; 349 ALR 534 at 541.

Aboriginal group and the Australian body politic. An individual who identifies as a member of an Aboriginal group and is recognised as such by other members of that group, but who was born overseas and is a citizen of a foreign country, falls, like any other person who is a citizen of a foreign power, within the scope of the naturalisation and aliens power. That each plaintiff was born overseas and is a citizen of a foreign country who has not been naturalised as a citizen of Australia is itself sufficient to bring him within the power of the Commonwealth Parliament to treat him as an alien; just as it is open to the Parliament to treat any other person possessing these characteristics as an alien.

177 Alienage or citizenship is a status created by law. That status is a relationship between an individual and the sovereign nation.[251] It is not a relationship between an ethnic group and the nation. Nor is it a relationship between an individual and an ethnic group. Australian law does not recognise an entitlement to membership of the Australian body politic independently of the satisfaction of the ordinary legal requirements and qualifications for Australian citizenship.[252] In this regard, membership of a particular race does not afford an entitlement to membership of the Australian body politic under the *Constitution* or any Act of Parliament. Considerations of race are irrelevant to the requirements for membership of the Australian body politic. As Gaudron J said in *Kartinyeri v The Commonwealth*: "[R]ace is simply irrelevant ... to the question of continued membership of the Australian body politic."[253]

178 There is no support in the text or structure of the *Constitution* for the contention that there is a special class within the people of the Commonwealth who, by virtue of their biological descent and self-identification as members of a particular racial group, enjoy a constitutionally privileged political relationship with the Australian body politic. A strong moral case can be made for special recognition of Aboriginal people in the *Constitution* because of their special place as the first inhabitants of the continent and the historical injustices suffered by them. Indeed, the case for special recognition is the subject of public debate at the present time.[254] The point is that the debate about constitutional recognition is necessary precisely because the *Constitution*, in its current terms, does not have that effect.

179 It may be noted that the *Constitution* originally provided by s 127 that:

> "In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted."

180 Section 127 was repealed by the *Constitution Alteration (Aboriginals) 1967* (Cth). This Act also removed from s 51(xxvi) of the *Constitution* the words "other than the aboriginal race in any State".[255] The removal of these discriminations against people of the Aboriginal race brought about a state of affairs in which Aboriginal people were no longer singled out by the *Constitution* itself as persons who stand separately and apart from the other people of the Commonwealth.

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251 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 466 [225].

252 *Pochi v Macphee* (1982) 151 CLR 101 at 111; *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 179-180 [56]-[58], 194-195 [116]-[117], 219-220 [210].

253 (1998) 195 CLR 337 at 366 [40].

254 Gleeson, "Recognition in Keeping with the Constitution" (2019) 93 *Australian Law Journal* 929.

255 Section 51(xxvi) now provides that "[t]he Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to ... the people of any race for whom it is deemed necessary to make special laws".

181 One cannot read s 51(xix) of the *Constitution* as if it provided that the Commonwealth Parliament may make laws with respect to "naturalization and aliens, save in respect of members of the Aboriginal race". Such a reading is not required to make sense of the constitutional text; indeed, it does no little violence to that text. And to adopt race as a basis for differentiating between members of the people of the Commonwealth in terms of the application of laws is not a course that commends itself in terms of the exercise of judicial power given that justice is to be administered equally to all.[256]

182 In *The Commonwealth v Tasmania (The Tasmanian Dam Case)*, Deane J adopted the observation by Professor Sawer[257] that "the architects of the Constitution paid no attention at all to the position of the Aboriginal people of Australia".[258] While the truth of that observation is lamentable and a remedy for that neglect long overdue, it is distinctly unconvincing, and bitterly ironic in the light of Professor Sawer's observation, to attribute to the *Constitution*, and s 51(xix) in particular, an intention to accord persons of Aboriginal descent a special position of privilege over other persons in a similar position. True it is that s 51(xxvi) of the *Constitution* contemplates that the Commonwealth Parliament may make special laws for the people of a particular race, but the express conferral of that power on Parliament tends, if anything, to confirm that the *Constitution* itself does not create or recognise persons of Aboriginal descent as a special privileged group among those who constitute the people of the Commonwealth.

Aboriginal connection with lands and waters in Australia

183 The plaintiffs submitted that persons of Aboriginal descent who identify, and are recognised, as members of an Aboriginal group are not capable of being treated as aliens by the Commonwealth Parliament wherever they happen to have been born, and whether or not they are citizens of a foreign country, because of their special connection to Australia.

184 The plaintiffs argued that Aboriginal persons do not meet the description of aliens because they are a permanent part of the Australian community, having inhabited Australia for some 50,000 years prior to European settlement. The plaintiffs said that a construction of the naturalisation and aliens power that includes Aboriginal persons does not cohere with the unique historical status of Aboriginal persons as the first inhabitants of Australia. It was said that an Aboriginal person's descent, self-identification, and community acceptance, are so closely connected with being "Australian" as to take him or her beyond the reach of the naturalisation and aliens power.

185 The plaintiffs relied upon a three-part test for determining whether a person meets the description of "Aboriginal person", under which a person is an Aboriginal person if:

(i) the person is a member of the Aboriginal race;

(ii) the person identifies as an Aboriginal person; and

(iii) the person is accepted by other members of the Aboriginal community as an Aboriginal person.

186 It was said that both Mr Love and Mr Thoms meet the requirements of this three-part test.

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256 *Tuckiar v The King* (1934) 52 CLR 335.

257 Sawer, "The Australian Constitution and the Australian Aborigine" (1966) 2 *Federal Law Review* 17 at 17.

258 (1983) 158 CLR 1 at 272.

187 It may be noted that there is reason to doubt that the last requirement is met in the case of Mr Love. The agreed facts disclose that whilst Mr Thoms is recognised by the Gunggari People, Mr Love is recognised by only one identified elder of the Kamilaroi group, and it is not apparent that such recognition conformed to the traditional customs and laws of that group.

188 In any event, the plaintiffs' argument cannot be accepted. It involves fundamental legal errors.

189 In *The Tasmanian Dam Case*, Deane J, speaking of provisions of the *World Heritage Properties Conservation Act 1983* (Cth) ("**the World Heritage Act**") which were said to be supported by s 51(xxvi) of the *Constitution* as special laws for the people of the Aboriginal race, said:[259]

> "By 'Australian Aboriginal' I mean, in accordance with what I understand to be the conventional meaning of that term, a person of Aboriginal descent, albeit mixed, who identifies himself as such and who is recognized by the Aboriginal community as an Aboriginal."

190 The provisions of the World Heritage Act with which Deane J was concerned related to the protection and conservation of identified property "of particular significance to the people of the Aboriginal race".[260] The description by Deane J of "Australian Aboriginal" was put forward to give context to the operation of the World Heritage Act. It is important to appreciate that it was not propounded as a test of membership of the body politic of the Commonwealth of Australia.

191 The plaintiffs' submission relies upon the reasons of Brennan J (with whom Mason CJ and McHugh J agreed) in *Mabo [No 2]*, where, in discussion of the qualifications necessary for membership of an indigenous people, his Honour said:[261]

> "Native title to particular land (whether classified by the common law as proprietary, usufructuary or otherwise), its incidents and the persons entitled thereto are ascertained according to the laws and customs of the indigenous people who, by those laws and customs, have a connexion with the land. It is immaterial that the laws and customs have undergone some change since the Crown acquired sovereignty provided the general nature of the connexion between the indigenous people and the land remains. Membership of the indigenous people depends on biological descent from the indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among those people."

192 In this passage, Brennan J was concerned to explain the basis on which an individual indigenous person may come to share in the communal rights of a particular indigenous group to a particular territory. Brennan J was plainly not seeking to describe the political relationship between an individual indigenous person and the body politic, being the Commonwealth of Australia, much less the relationship between all indigenous people collectively and the body politic.

193 It is true, of course, that a polity has a territorial dimension;[262] but that dimension does not determine the character of the polity or the legal basis of the relationship between

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259 (1983) 158 CLR 1 at 274.
260 (1983) 158 CLR 1 at 273.
261 (1992) 175 CLR 1 at 70.
262 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 48.

the polity and its people. These matters are determined by the laws of the State, not some supra-national or natural law. So, for example, between June 1789 and the present day the territory of France has been affected by the annexation by Germany of Alsace and Lorraine on two occasions, by German occupation during World War II, and by the post-War loss of Algeria as part of Metropolitan France. In that time, the French State was constituted as two monarchies, two empires, five republics and the Vichy regime during World War II. The people of France were, during this time, variously subjects and citizens; and whether they were one or the other depended on the legal regime established by the State. The point is that the basis of the relationship between a sovereign State and its people is a function of political and legal considerations.

194 The relationship between the individual and the polity that confers the status of membership of the polity is created by the law of the sovereign nation. It is marked with formalities that make manifest its attainment and loss. The relationship described by Brennan J in *Mabo [No 2]* is between a particular indigenous community and particular traditional lands and waters. That relationship is not one of formal legal status between an individual and a sovereign power; it is a spiritual and cultural connection that is focused upon particular lands and waters. This connection does not extend to all the lands and waters under Australian sovereignty. In particular, it does not confer rights to enter upon or reside in the traditional lands of other indigenous groups; much less does it confer rights to enter and reside in any part of the territory of the Commonwealth of Australia.

195 The plaintiffs' argument confuses the body politic that was brought into existence at Federation with lands and waters, parts of which were occupied by particular Aboriginal groups long before that body politic came into being. The plaintiffs' argument also confuses the spiritual connection of an indigenous person to particular lands and waters with a connection to the body politic that is inconsistent with alienage. In this regard, the plaintiffs' submission is fatally imprecise. If, as is the case here, one is speaking of the body politic being the Commonwealth of Australia, the "Australian community" is not 50,000 years old: the Australian community, the Commonwealth of Australia, was established only at Federation.

196 The adoption of the three-part test proposed by the plaintiffs as a basis for negativing the status of alienage would mean that whether Parliament could treat an individual as an "alien" would necessarily depend on the choices or views of the individuals concerned. These choices and views might vary over time, and whether a person could be said to be immune from the status of alienage would be left in a state of uncertainty because individuals might bring themselves in and out of the scope of the power upon a change in their self-identification or in the attitude towards them of other members of their group, or in the membership of those entitled to speak for the group. Informality and uncertainty of this kind generate conceptual and practical difficulties.

197 At the conceptual level, these difficulties are inconsistent with the understanding that alienage and its opposites are necessarily matters of status established formally and objectively by law. More importantly, to suggest that members of Aboriginal groups have authority to make choices that bind the Commonwealth of Australia is to attribute to those persons a measure of political sovereignty. To assert that the ordinary application of laws made pursuant to s 51(xix) of the *Constitution* to foreign citizens born outside Australia such as the plaintiffs is displaced as a result of recognition by members of the Aboriginal group from which they claim descent, is to assert an exercise of political sovereignty by those persons. It will be necessary to say something more about this.

198 At the practical level, adoption of the plaintiffs' argument would replace the easy formality of a passport with a complex inquiry in every case where a person of Aboriginal descent who is a non-citizen seeks to enter or leave Australia.

Native title and political sovereignty

199 Political sovereignty is not an incident of native title. Indeed, the recognition of native title in *Mabo [No 2]* proceeded squarely on the footing that sovereignty reposes elsewhere than in the holders of native title, and that native title remains vulnerable to the exercise of sovereign power.[263]

200 The assertion of a claim to sovereignty has been rejected on the few occasions on which it has been articulated. Thus, in *Coe v The Commonwealth*, Mason CJ said:[264]

> "*Mabo [No 2]* is entirely at odds with the notion that sovereignty adverse to the Crown resides in the Aboriginal people of Australia. The decision is equally at odds with the notion that there resides in the Aboriginal people a limited kind of sovereignty embraced in the notion that they are 'a domestic dependent nation'."

201 Similarly, in *Yorta Yorta Aboriginal Community v Victoria*,[265] Gleeson CJ, Gummow and Hayne JJ said:

> "[W]hat the assertion of sovereignty by the British Crown necessarily entailed was that there could thereafter be no parallel law-making system in the territory over which it asserted sovereignty. To hold otherwise would be to deny the acquisition of sovereignty and ... that is not permissible."

202 In *Mabo [No 2]*,[266] Brennan J expressly acknowledged "the Crown's acquisition of sovereignty", and that the dispossession of indigenous groups from their traditional lands and the extinction of native title were attributable to the exercise of the "paramount power" of the sovereign. Native title operates through recognition by the common law or by statute: it does not operate by the force of an Aboriginal group's laws and customs. The common law's recognition of customary native title does not entail the recognition of an Aboriginal community's laws. Drawing upon the reasons of Brennan J in *Mabo [No 2]*,[267] Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ in *Fejo v Northern Territory*[268] and Gleeson CJ, Gaudron, Gummow and Hayne JJ in *The Commonwealth v Yarmirr*[269] said: "The underlying existence of the traditional laws and customs is a *necessary* pre-requisite for native title but their existence is not a *sufficient* basis for recognising native title" (emphasis in original).

203 This is because, as Brennan J said in *Mabo [No 2]*, upon the Crown acquiring sovereignty over the territory of Australia, Aboriginal persons were thereafter "entitled to such rights and privileges and subject to such liabilities as the common law and applicable statutes provided".[270]

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263 (1992) 175 CLR 1 at 43-45, 58-60, 63.
264 (1993) 68 ALJR 110 at 115; 118 ALR 193 at 200. See, also, *Walker v New South Wales* (1994) 182 CLR 45 at 50.
265 (2002) 214 CLR 422 at 443-444 [44].
266 (1992) 175 CLR 1 at 57-58.
267 (1992) 175 CLR 1 at 58.
268 (1998) 195 CLR 96 at 128 [46].
269 (2001) 208 CLR 1 at 37 [10].
270 (1992) 175 CLR 1 at 38.

204 To the same effect, in *Wik Peoples v Queensland*, Kirby J said:[271]

> "The theory accepted by this Court in *Mabo [No 2]* was not that the native title of indigenous Australians was enforceable of its own power or by legal techniques akin to the recognition of foreign law. It was that such title was enforceable in Australian courts because the common law in Australia said so.[272]"

205 It is important to be clear that in *Mabo [No 2]* it was recognised that under the common law of Australia, absent the inconsistent exercise of sovereign power, the radical title of the Crown to land was subject to the customary rights and interests of Aboriginal groups.[273] It was not suggested in *Mabo [No 2]*, and has not been held since, that laws and customs of Aboriginal groups are recognised as part of the law of the realm, much less as altering the operation of that law.

A new basis for native title?

206 In the course of argument it was suggested that the three-part test for native title was but a particular expression of a more general underlying conception of Aboriginality. Under that more general conception, it was suggested, was a concept of one group of indigenous inhabitants of the continent at the time of British settlement comprising various sub-groups of indigenous inhabitants whose laws and customs provide the foundation for native title claims by those sub-groups. This more general conception has not been articulated, much less upheld, in any of the cases concerned with native title, whether in *Mabo [No 2]* or since.

207 The native title cases after *Mabo [No 2]* were concerned with claims by particular Aboriginal groups whose claims depended upon their particular connection with particular areas of lands and waters.[274] In cases involving a claim to exclusive possession by an Aboriginal group of particular lands and waters, a successful claim by one group of native title claimants involves the exclusion of all others, including other Aboriginal persons, from the claimed lands and waters. Members of all other Aboriginal groups would be excluded from the lands and waters of the successful group of claimants. That circumstance is difficult to square with the underlying unity of common customary connection with the continental land mass asserted in argument. It is also difficult to square the new theory of a general underlying basis for native title with the decision of this Court in *Yorta Yorta*,[275] where the inability of the claimants to establish their particular ongoing connection with the claimed land in accordance with the laws and customs of their group was fatal to their claim for native title, even though a general connection based on biological descent was readily apparent.

208 There is no suggestion in the decided cases that an Aboriginal group has claimed authority under traditional laws and customs to speak in respect of lands and waters other than those to which the group is traditionally connected. Nor is there any suggestion in these special cases that such a claim is made or that such a claim accords with the laws and customs of any Aboriginal group, much less of all Aboriginal groups. Nor is there any

271 (1996) 187 CLR 1 at 237-238.
272 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 59, 61.
273 *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 439, citing *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 64, 110-111.
274 Compare *The Commonwealth v Yarmirr* (2001) 208 CLR 1; *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; *Akiba v The Commonwealth* (2013) 250 CLR 209.
275 (2002) 214 CLR 422.

suggestion in the decided cases or in the agreed facts in the special cases that members of any Aboriginal groups inhabiting Australia at British settlement claimed an overarching right under traditional laws and customs over all the lands of the continent.

209 If such a right had been claimed as a matter of Aboriginal customary law, it is difficult to see how it would not have been extinguished by the passage of laws of general application.[276] So, for example, in *The Commonwealth v Yarmirr*,[277] this Court held that customary laws conferring rights of exclusive possession of particular areas of sea and seabed could not be given legal effect because they were inconsistent with common law public rights of fishing and navigation. It has already been noted that traditional Aboriginal laws and customs did not survive settlement as "a parallel law-making system" in any of the territory over which British sovereignty was asserted. A fortiori, Aboriginal laws and customs do not operate to displace, impair or alter the ordinary operation of the laws made by the Parliament.

210 Finally, to the extent that it is said that a general connection of all persons of Aboriginal descent to all parts of the continent underlies the basis on which native title has been recognised to this point, it must be accepted that this broader connection is one based squarely on biological membership of the Aboriginal race. It is open to the Parliament to adopt that criterion as the basis for laws made under s 51(xxvi) of the *Constitution*, but it is, to say the least, doubtful whether the adoption of such a discrimen is open to the Court as a matter of the exercise of judicial power.

Mr Thoms

211 In the Thoms proceeding, specific reliance was placed on the circumstance that Mr Thoms is a holder of common law native title rights. It was submitted that the exercise of those rights necessarily requires permission to be present on the relevant lands and waters. It was said that a determination that a person is an "alien" has the effect of rendering that person's right to continued presence in Australia subject to withdrawal by the executive. It was said that the capacity of the executive to exercise that power, in respect of an Aboriginal person who is the holder of native title rights, is unsatisfactory and wholly inconsistent with that person's ability to enjoy or exercise those rights. Accordingly, so it was said, the Court should prefer a construction of "alien" that does not include an Aboriginal person with a judicially recognised common law native title claim over particular lands and waters.

212 This contention cannot be accepted: it confuses rights of property with rights of citizenship. An alien may own land in Australia, if the law permits it, but it does not follow that the alien is relieved of the need for a visa to enter Australia because entry into Australia is necessary to facilitate enjoyment of his or her property. A French citizen who owns land in Australia is not immune against the operation of ss 189 and 198 of the *Migration Act* because entry into Australia is necessary to enable her to enjoy her property here. To say this is in no way to disparage the significance of the spiritual connection of Aboriginal persons with their traditional lands and waters. It is simply to make the point that the political connection with the Australian polity in respect of which the Parliament may provide under s 51(xix) of the *Constitution* is radically different from the spiritual connection of native title holders with their traditional lands and waters. A native title holder who is also a citizen of a foreign country may continue to enjoy rights as a native title

276 *Walker v New South Wales* (1994) 182 CLR 45 at 50.
277 (2001) 208 CLR 1 at 50-51 [46]-[48], 60-61 [76], 99 [204].

holder even though he or she may require a visa to enter Australia in order to enjoy those rights.

213 Once again, the argument for the plaintiffs confuses the physical and spiritual connection of Aboriginal persons with particular lands and waters within the territory of Australia with the political and legal connection to the polity, being the Commonwealth of Australia, involved in Australian citizenship, or, previously, allegiance as a British subject. The spiritual and cultural connection that particular groups of Aboriginal persons have to particular lands and waters within the territory of the Commonwealth of Australia cannot be equated with the political and legal connection with the sovereign nation that is the antonym of alienage. The right of a member of a particular Aboriginal group to enjoy his or her rights in respect of particular lands and waters cannot be equated with, and is not even remotely analogous to, the right of every individual who is a member of the Australian body politic to enter and reside in *any part* of the territory of the Commonwealth of Australia.

Permanent allegiance?

214 The plaintiffs adopted an argument to the effect that persons of the Aboriginal race owe a permanent allegiance to the Crown as the reciprocal of an obligation of special protection owed by the Crown to the indigenous people of the continent.

215 This argument has no support in authority. The notion that there is a special duty on the part of the Crown to protect Aboriginal persons bears some similarity to the suggestion advanced in *Mabo [No 2]* that the Crown owes a fiduciary obligation to Aboriginal people. Of the Justices who decided *Mabo [No 2]*, only Toohey J accepted that suggestion.[278] But Toohey J considered that the fiduciary duty arose "out of the *power* of the Crown to extinguish traditional title"[279] (emphasis in original). None of the judgments in *Mabo [No 2]* affords support for the kind of reciprocal relationship urged by the plaintiffs.

216 To argue that persons of Aboriginal descent owe permanent allegiance to the Crown could be said necessarily to imply that they cannot make a legally effective choice to forgo their allegiance to the Crown in right of the Commonwealth. The plaintiffs' counsel were disposed to argue that persons of Aboriginal descent may repudiate their permanent allegiance to the Crown, but it was not explained how this repudiation might lawfully be effected.

217 If one takes seriously the notion of "permanent allegiance", it is difficult to see how persons of Aboriginal descent can unilaterally free themselves from that allegiance. One can readily understand that the plaintiffs would grasp at any straw that may save them from what they might understandably perceive as a harsh overreaction by the executive government to their circumstances; but the absence of a cogent explanation as to how permanent allegiance may lawfully be repudiated invites the query whether other persons of Aboriginal descent not confronted with the same immediate difficulties would so blithely embrace the rank paternalism that suffuses this argument. In this regard, the special privilege offered to persons of Aboriginal descent by the reciprocal arrangement urged by the plaintiffs does not come without cost. To accept the argument would be to accept limitations on the freedom of persons of Aboriginal descent to pursue their destiny as individuals. The autonomy of such persons would be constrained in a way that does not

278 (1992) 175 CLR 1 at 200-205.
279 (1992) 175 CLR 1 at 203.

affect people who are not of Aboriginal descent. That the autonomy of persons of Aboriginal descent should be limited in this way is not consistent with fundamental notions of equality before the law.

218 In addition, the argument based on permanent allegiance advanced by the plaintiffs lacks coherence. For the plaintiffs, it was argued that they might lawfully abandon their allegiance to the Crown in right of the Commonwealth of Australia, but the polity could not sever its relationship with them. As was said in *Singh*[280] by Gummow, Hayne and Heydon JJ, "[t]hat one-sided understanding of the power [in s 51(xix)] sits uncomfortably with any notion of allegiance that is bilateral".

Conclusion and orders

219 In the Love proceeding, the questions posed for determination by the Full Court should be answered as follows:

(a) Is Mr Love an "alien" within the meaning of s 51(xix) of the *Constitution*?

Answer: Yes.

(b) Who should pay the costs of the special case?

Answer: Mr Love.

220 In the Thoms proceeding, the questions posed for determination by the Full Court should be answered as follows:

(a) Is Mr Thoms an "alien" within the meaning of s 51(xix) of the *Constitution*?

Answer: Yes.

(b) Who should pay the costs of the special case?

Answer: Mr Thoms.

[280] (2004) 222 CLR 322 at 398 [198].

221 **NETTLE J.** The questions presented for determination by these two special cases are: (1) whether either of the plaintiffs is an "alien" within the meaning of s 51(xix) of the *Constitution*; and (2) who should pay the costs of the special cases. For the reasons which follow, the questions should be answered: (1) in the case of the plaintiff Mr Love: unable to determine; and, in the case of the plaintiff Mr Thoms: no; and (2) the respondent.

The facts

Mr Love

222 The plaintiff Daniel Alexander Love was born on 25 June 1979 in the Independent State of Papua New Guinea ("**PNG**") and became a PNG citizen by birth under s 66(1) of the *Constitution of the Independent State of Papua New Guinea* ("**the PNG Constitution**"). He is not an Australian citizen under the *Australian Citizenship Act 2007* (Cth), but he identifies as a descendant of the Kamilaroi tribe of Aboriginal people, and he is recognised as such by an elder of that tribe. Between 9 November 1981 and October 1985, Mr Love travelled with his parents back and forth between PNG and Australia, and, on 25 December 1984, at the age of five years, he took up permanent residence in Australia with his parents pursuant to a permanent residency visa which, since 1 September 1994, has taken effect as a class BF transitional (permanent) visa.[281] Following a visit to PNG between 8 February and 18 October 1985, he has resided continuously in Australia.

223 Mr Love has family connections to Australia and PNG. His paternal great-grandfather was descended in significant part from Aboriginal inhabitants of Australia before European settlement, was born in Queensland in 1902, and died and was buried in Queensland in 1973. Mr Love's paternal great-grandmother was also descended in significant part from Aboriginal inhabitants of Australia before European settlement, was born in Queensland during the last decade of the nineteenth century, and died and was buried in Queensland in 1970.

224 Mr Love's paternal grandfather was born in Queensland in 1922 and, in 1940, enlisted for service with the Australian Military Forces. He served during, and immediately after, World War II in the Middle East, the Territory of New Guinea, and the Territory of Papua. Following his discharge from service in 1946, he remained in the Territory of Papua, where, in 1948, he married Mr Love's paternal grandmother. She had been born in 1922 in the Territory of Papua, then under the authority of the Commonwealth.[282] Together, they had seven children. In 1961, Mr Love's paternal grandmother was certified as an Australian citizen pursuant to ss 5(1), 10(1) and 25(1)(a) of the *Nationality and Citizenship Act 1948* (Cth), later known as the *Citizenship Act 1948* (Cth)[283] and then as the *Australian Citizenship Act 1948* (Cth),[284] and, in 1965, she was authorised to enter Australia for permanent residence with six of her children. Between 1966 and 1980, she visited Australia intermittently. In April

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281 See *Migration Act 1958* (Cth), s 31(1); *Migration Reform (Transitional Provisions) Regulations* (Cth) (SR 1994 No 261); *Migration Regulations 1994* (Cth), regs 1.06(b)(i), 2.01(1)(b)(i).

282 *Papua Act 1905* (Cth), s 5. See *Strachan v The Commonwealth* (1906) 4 CLR 455 at 461-463 per Griffith CJ, 464-465 per O'Connor J; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439 at 446-447 [5] per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ.

283 *Citizenship Act 1969* (Cth), s 1(3).

284 *Australian Citizenship Act 1973* (Cth), s 1(3).

1980, she and Mr Love's paternal grandfather entered Australia, and thereafter she resided here permanently until her death in 2012, after the death of Mr Love's paternal grandfather in Queensland in 1990.

225 Mr Love's father was born in 1954 in the Territory of Papua and became an Australian citizen at birth, pursuant to ss 5(1) and 10(1) of the *Nationality and Citizenship Act 1948*. In 1964, he came to Australia, where he attended primary school in Brisbane and later, for two years, high school in Sydney. In 1970, he returned to the Territory of Papua where he completed grade 10. In 1984, he married Mr Love's mother, who was born in 1952 in Rabaul in the Territory of New Guinea, which was then being governed in an administrative union with the Territory of Papua.[285] Together, they had two children: Mr Love and his sister. At the time of Mr Love's birth, his mother was a citizen of PNG. On 25 December 1984, Mr Love's father and mother entered Australia with their two children. They returned to PNG on 8 February 1985, but, on 18 October 1985, they came back to Australia and thereafter remained here. In 2008, Mr Love's father sought and received a certificate of Australian citizenship.

226 Mr Love's sister was born in PNG in 1976 and became a PNG citizen at birth pursuant to s 66(1) of the PNG Constitution. On 25 December 1984, she was granted an Australian permanent residency visa, and, in 2009, she became an Australian citizen by application pursuant to s 16 of the *Australian Citizenship Act 2007*.

227 Mr Love's former wife, who is the mother of Mr Love's five children, is an Australian citizen who was born in Brisbane in 1982; and each of Mr Love's five children is an Australian citizen.

228 On 25 May 2018, Mr Love was sentenced for an offence against s 339 of the *Criminal Code* (Qld) - assault occasioning bodily harm - to 12 months' imprisonment. As a result, on 6 August 2018, a delegate of the Minister for Home Affairs ("**the Minister**") cancelled Mr Love's visa pursuant to s 501(3A) of the *Migration Act 1958* (Cth), and, on 10 August 2018, Mr Love was taken into immigration detention. On 27 September 2018, a delegate of the Minister revoked the decision to cancel Mr Love's visa, pursuant s 501CA(4) of the *Migration Act*, and Mr Love was released from immigration detention.

Mr Thoms

229 The plaintiff Brendan Craig Thoms was born in New Zealand on 16 October 1988 and became a New Zealand citizen by birth. At the time of his birth, Mr Thoms was entitled to acquire Australian citizenship under s 10B of the *Australian Citizenship Act 1948* but did not do so. He first came to Australia on 19 December 1988 on a special category visa, and, since 23 November 1994, he has resided permanently in Australia. He travelled between Australia and New Zealand between 1997 and 1998 and again between 2002 and 2003, but he has not departed from Australia since 8 January 2003. Although not an Australian citizen, Mr Thoms identifies, and is accepted by members of the Gunggari People, as a member of the Gunggari People. He is also a common law holder of native title in respect of land and waters the subject of

[285] *Papua and New Guinea Act 1949* (Cth), ss 8, 9. See *Fishwick v Cleland* (1960) 106 CLR 186 at 194-198 per Dixon CJ, McTiernan, Fullagar, Kitto, Menzies and Windeyer JJ; *Ame* (2005) 222 CLR 439 at 447 [5] per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ.

Gunggari People claims that were recognised by the Federal Court of Australia in 2012 and 2014[286] ("**the native title determinations**").

230 Mr Thoms has family connections to Australia and New Zealand. His maternal great-great-grandmother was born between 1872 and 1885 in Queensland. Through her mother, who was described in 1938 as an "FB [presumably, full-blood] Kunggari" woman, she was descended in significant part from Aboriginal inhabitants of Australia before European settlement. Mr Thoms' maternal great-grandmother was born in 1905 or 1906 in Queensland. In 1926, she married Mr Thoms' maternal great-grandfather, and together they had ten children. They both died in Queensland: he in 1964, and she in 1983.

231 Mr Thoms' maternal grandmother was born at Toowoomba in 1937. In 1957, she married Mr Thoms' maternal grandfather, and together they had eight children. She has resided permanently in Australia for the whole of her life, and she identifies, and is accepted by members of the Gunggari People, as a member of the Gunggari People. She is also a common law holder of native title recognised by the native title determinations. Mr Thoms' maternal grandfather was born in Queensland in 1933, and he resided permanently in Australia until his death in 2017.

232 Mr Thoms' mother was born in Queensland in 1962. In 1986, she travelled to New Zealand, where she appears to have met Mr Thoms' father. He had been born in New Zealand in 1959 and become a New Zealand citizen at birth pursuant to s 6 of the *British Nationality and New Zealand Citizenship Act 1948* (NZ). In 1988, they travelled to Queensland, where they were married, and then returned to New Zealand in 1989. Thereafter, until 1994, they lived primarily in New Zealand, albeit travelling from time to time between New Zealand and Australia. They had three children: Mr Thoms, his brother, and his sister. On 23 November 1994, Mr Thoms' mother sent Mr Thoms to live with his father, who had relocated to Queensland, and, in December 1994, she travelled with Mr Thoms' brother to join them in Queensland. Since then, she has resided permanently in Australia. She identifies, and is accepted by members of the Gunggari People, as a member of the Gunggari People, and she, too, is a common law holder of native title recognised by the native title determinations. Mr Thoms' father has resided permanently in Australia since September 1994 and became an Australian citizen in 2009.

233 Mr Thoms' brother was born in New Zealand in 1991 and became a New Zealand citizen at birth pursuant to s 6(1)(a) of the *Citizenship Act 1977* (NZ). He has permanently resided in Australia since 1994, and he, too, is a common law holder of native title recognised by the native title determinations. Mr Thoms' sister was born in Queensland in 1995 and is an Australian citizen. She also identifies, and is accepted by members of the Gunggari People, as a member of the Gunggari People and is a common law holder of native title recognised by the native title determinations.

234 Mr Thoms' former partner, who is the mother of his son and only child, was born in Queensland and is an Australian citizen. Mr Thoms' son was born in Queensland in 2013 and is an Australian citizen. He, too, is a common law holder of native title recognised by the native title determinations.

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[286] *Kearns on behalf of the Gunggari People #2 v Queensland* [2012] FCA 651; *Foster on behalf of the Gunggari People #3 v Queensland* [2014] FCA 1318.

235 On 17 September 2018, Mr Thoms was sentenced for an offence against s 339(1) of the *Criminal Code* (Qld) - assault occasioning bodily harm (domestic violence)[287] - to 18 months' imprisonment. He commenced court-ordered parole on 28 September 2018. On 27 September 2018, the Minister cancelled his visa pursuant to s 501(3A) of the *Migration Act*, and, the next day, he was taken into immigration detention, where, so far as appears from the agreed facts, he remains.

Relevant statutory provisions

236 Section 51(xix) of the *Constitution* empowers the Commonwealth Parliament to make laws with respect to "naturalization and aliens". The word "aliens" is not, however, defined in the *Constitution*. Rather, the wide power conferred by s 51(xix),[288] construed with all the generality that its terms permit,[289] has been held to include the power to determine who shall be treated as an alien.[290] That power may be exercised by creating and defining a concept of Australian citizenship[291] and attaching incidents of alienage to persons who are not "Australian citizens".[292] But it is subject to the limitation recognised in *Pochi v Macphee*:[293] that the Parliament may not determine to treat as an alien a person who could not possibly answer the description of "alien" according to the ordinary understanding of the word.

237 Pursuant to s 51(xix) and (xxvii) of the *Constitution*, the Parliament has enacted the *Australian Citizenship Act 2007* and the *Migration Act*. Relevantly, the former prescribes those persons who are automatically Australian citizens and the several ways in which a person who is not an Australian citizen may become one. Subject to exceptions that are not presently to the point, the persons who are automatically Australian citizens include anyone born in Australia to a parent who is an Australian citizen or permanent resident at the time of the birth (s 12(1)(a)); anyone who is born in Australia and remains permanently resident in Australia for the next ten years (s 12(1)(b)); anyone adopted under the law of an Australian State or Territory by a person who at the time of the adoption is an Australian citizen, if the person adopted is present in Australia as a permanent resident at that time (s 13); a child found abandoned in Australia, until and unless the contrary is proved (s 14); and anyone in a class of persons determined to be Australian citizens upon a territory becoming part of Australia (s 15).

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287 See *Justices Act 1886* (Qld), s 47(9).

288 *Koroitamana v The Commonwealth* (2006) 227 CLR 31 at 38 [11] per Gleeson CJ and Heydon J.

289 *Singh v The Commonwealth* (2004) 222 CLR 322 at 384 [155] per Gummow, Hayne and Heydon JJ, quoting *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225 per Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ.

290 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 400-401 [7] per Gleeson CJ; *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 171 [24], 173 [31] per Gleeson CJ, 180 [58] per Gaudron J, 188 [89] per McHugh J, 192 [109]-[110] per Gummow J, 220 [210] per Hayne J, 228 [227] per Callinan J; *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 35 [2] per Gleeson CJ, Gummow and Hayne JJ; *Singh* (2004) 222 CLR 322 at 329 [4] per Gleeson CJ, 396-397 [193], 397-398 [197] per Gummow, Hayne and Heydon JJ; *Koroitamana* (2006) 227 CLR 31 at 37 [9] per Gleeson CJ and Heydon J, 46 [48] per Gummow, Hayne and Crennan JJ.

291 *Te* (2002) 212 CLR 162 at 171 [24], 173 [31] per Gleeson CJ; *Singh* (2004) 222 CLR 322 at 329 [4] per Gleeson CJ. See also *Pochi v Macphee* (1982) 151 CLR 101 at 108-109 per Gibbs CJ (Mason and Wilson JJ agreeing at 112, 116); *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 184-186 per Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ, 189-190 per Gaudron J; *Shaw* (2003) 218 CLR 28 at 35 [3], 38 [16]-[17], 40 [21]-[22] per Gleeson CJ, Gummow and Hayne JJ.

292 See *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 29-32 per Brennan, Deane and Dawson JJ.

293 (1982) 151 CLR 101 at 109 per Gibbs CJ (Mason and Wilson JJ agreeing at 112, 116). See *Singh* (2004) 222 CLR 322 at 329 [4] per Gleeson CJ, 382-383 [151]-[152] per Gummow, Hayne and Heydon JJ.

238 The persons who are not automatically Australian citizens but who may apply to become Australian citizens relevantly include anyone born outside Australia on or after 26 January 1949 who has at least one parent who was an Australian citizen by birth at the time of the person's birth, and, in the case of foreign nationals and stateless persons, if the Minister is satisfied that the person is of good character at the time the Minister decides the application (s 16(2)). If a person is eligible to become an Australian citizen, the Minister must approve the application unless the Minister is not satisfied of the identity of the person or a national security exception applies (s 17).

239 Under the *Migration Act*, a person who is not an Australian citizen is a "non-citizen" (s 5(1)), and a non-citizen whose visa is cancelled while in the migration zone (in effect, Australian territory and resource and sea installations) becomes an "unlawful non-citizen" unless immediately after the cancellation the person holds another visa that is in effect (s 14(1)). If an "officer" (which includes duly authorised Department officers and police) knows or suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person (s 189(1)). And an unlawful non-citizen so detained must be kept in detention until one of a number of possible things occur (s 196(1)). One possibility is that the person will be removed from Australia (s 198) or deported (s 200).

240 Under the *Migration Act*, the Minister may cancel a visa granted to a person, and thus render the person an unlawful non-citizen, if the Minister reasonably suspects that the person does not pass the "character test" and the person does not satisfy the Minister that he or she passes the character test (s 501(2)). For this purpose, a person does not pass the character test if, relevantly, "the person has a substantial criminal record" (s 501(6)(a)), which is the case if, relevantly, "the person has been sentenced to a term of imprisonment of 12 months or more" (s 501(7)(c)). It is not disputed that, by reason of the sentences of imprisonment imposed on each of the plaintiffs, each plaintiff does not pass the character test.

The question restated

241 In light of those facts and the relevant statutory provisions that have been set out, the principal question for decision may now more conveniently and more precisely be restated as being whether it is within the legislative competence of the Parliament under s 51(xix) of the *Constitution* to treat either plaintiff as an "unlawful non-citizen" (within the meaning of s 14(1) of the *Migration Act*), and thus to detain and possibly to deport him under ss 189, 196 and 200 of the *Migration Act*.

The plaintiffs' contentions

242 Each plaintiff contended that it is not within the legislative competence of the Parliament to do so. Referring to the fact that Aboriginal people first inhabited Australia at least 40,000 years before Australia was settled by Great Britain,[294] that Aboriginal people have lived in Australia continuously ever since, and that Aboriginal people have a consequent, unique spiritual connection to land and waters in Australia,[295]

[294] See *Gerhardy v Brown* (1985) 159 CLR 70 at 149 per Deane J. See also Clarkson et al, "Human Occupation of Northern Australia by 65,000 Years Ago" (2017) 547 *Nature* 306.

[295] See *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 167 per Blackburn J.

each plaintiff argued that a person of Australian Aboriginal descent who identifies as a member of an Australian Aboriginal community, and is accepted as such by one or more members of an Australian Aboriginal community, is so essentially "Australian" (as that concept is ordinarily understood) that such a person cannot possibly answer the description of "alien" in the ordinary sense of that word, and therefore cannot be treated as an unlawful non-citizen liable to deportation on that basis.

243 In the case of Mr Thoms, it was further contended that such a liability to deportation would be inconsistent with his ability to enjoy and exercise his rights as a common law native title holder, which requires that he have access to the land and waters the subject of title, and that this Court should prefer a construction of s 51(xix) which denies the Parliament legislative power so to provide. Counsel for the plaintiffs emphasised, however, that proof of native title was not essential to the conclusion that the Parliament cannot treat persons of Aboriginal descent who identify and are accepted as members of Aboriginal communities as "aliens" under s 51(xix). In support of that submission, counsel contended that, even where native title has been extinguished, the ancestral tie between the land and Aboriginal persons remains.

Alienage

244 As has been observed,[296] s 51(xix) of the *Constitution* is to be construed with all the generality that its terms allow, and thus Parliament's power to legislate with respect to "aliens" is necessarily wide. According to the established authority of this Court, the Parliament, acting within power, may create and define the status of Australian citizenship, and subject persons who are not Australian citizens to liabilities of alienage, such as deportation. But the Parliament may not thereby treat as an alien a person who could not possibly answer the description of "alien" in the ordinary understanding of the word. Accordingly, as Gummow, Hayne and Heydon JJ indicated in *Singh v The Commonwealth*,[297] the fact that Parliament may have classified a person as an unlawful non-citizen liable to deportation, and so, in effect, as an alien, "presents the constitutional question" of whether, in so providing, the Parliament has acted within power; "it does not provide an answer".

245 The term "alien" refers to a status in the eye of the law that is rooted in notions of sovereignty.[298] The ordinary understanding of the term is thus informed by centuries of legal history and political theory.[299] In *Singh*, Gummow, Hayne and Heydon JJ stated,[300] by reference to these sources, that the "central characteristic" of the status of alienage "is, and always has been, owing obligations (allegiance) to a sovereign power other than the sovereign power in question (here Australia)". That requires some explanation.

246 In common law systems, alienage was and remains about the want of a permanent allegiance to the sovereign in question.[301] Under feudal law after the Conquest, such allegiance was founded upon an express oath of liege fealty by a tenant to the King

296 See [236] above.
297 (2004) 222 CLR 322 at 383 [153].
298 *Te* (2002) 212 CLR 162 at 170 [21] per Gleeson CJ, 192 [109], 196 [122] per Gummow J.
299 *Shaw* (2003) 218 CLR 28 at 36-37 [10]-[12] per Gleeson CJ, Gummow and Hayne JJ.
300 (2004) 222 CLR 322 at 398 [200].
301 *Calvin's Case* (1608) 7 Co Rep 1a at 4b-5b [77 ER 377 at 382-383]. See Salmond, "Citizenship and Allegiance" (1902) 18 *Law Quarterly Review* 49 at 50-51.

as paramount lord.[302] As the common law became permeated with "the idea of land as the sign and sacrament of all relations between ruler and subject",[303] allegiance to the King of England came to be implied from the mere fact of birth on English soil (except to parents who were foreign diplomats or during hostile occupation).[304] In *Calvin's Case*, the Justices of the King's Bench and Common Pleas, Lord Chancellor and Barons of the Exchequer concluded,[305] by reference to the law of nature, that this right of the soil (*jus soli*) extended to those born in a territory after it was acquired personally by the King (*postnati*). Thus, it transpired that anyone born in the King's dominions archetypically owed permanent allegiance to, and was therefore a subject of, His Majesty. By contrast, anyone born abroad archetypically did not owe such allegiance, and - because variants of the *jus soli* were recognised in continental Europe before the *Code Napoléon* recognised citizenship by blood (*jus sanguinis*)[306] - he or she could be regarded as belonging to another (*alienus*).[307]

247 Neither foreign birth, however, nor foreign allegiance was a universal criterion of the absence of permanent allegiance which constituted the legal status of alienage.[308] At the dawn of the fourteenth century, with the growth of navigation for commerce and war, Parliament declared that a person born overseas to natural-born subjects could inherit. In turn, that was taken to imply subjecthood.[309] With the emergence of the British Empire, that status of subjecthood was extended at common law to anyone resident in a territory at the time of its acquisition by conquest or cession (*antenati*) (at least absent contrary election).[310] Later, statutes prompted by other changes in national sentiment attached significance to a person's protestant faith,[311] birth to a natural-born father (unless attainted of treason or in the actual service of a foreign sovereign),[312] and marriage to a natural-born subject.[313] Still later, although the common law had long tolerated subjects owing allegiance to foreign sovereigns on the basis that allegiance to the King of England was paramount,[314] the *Naturalization Act 1870* (UK) provided for deemed renunciation of allegiance by

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302 *Leges Henrici Primi*, Downer ed (1972), c 43 at 153 pl 6; *Bracton on the Laws and Customs of England*, Woodbine ed, Thorne tr (1968), vol 2 at 230, 232; *Britton*, Nichols tr (1901), bk 1, ch 30 at 152 pl 11. See Pollock and Maitland, *The History of English Law Before the Time of Edward I*, 2nd ed (1898), vol 1 at 298-301.

303 O'Rahilly, "Allegiance and the Crown" (1922) 11 *Studies: An Irish Quarterly Review* 169 at 171, citing Blackstone, *Commentaries on the Laws of England* (1765), bk 1, ch 10 at 355.

304 *Calvin's Case* (1608) 7 Co Rep 1a at 10a, 18a-18b [77 ER 377 at 389, 399]. See Cockburn, *Nationality: Or the Law Relating to Subjects and Aliens* (1869) at 7; Dunham, "Doctrines of Allegiance in Late Medieval English Law" (1951) 26 *New York University Law Review* 41 at 43.

305 (1608) 7 Co Rep 1a at 14a-14b [77 ER 377 at 394]. See Parry, *Nationality and Citizenship Laws of The Commonwealth and of The Republic of Ireland* (1957) at 40-43; Price, "Natural Law and Birthright Citizenship in *Calvin's Case* (1608)" (1997) 9 *Yale Journal of Law and the Humanities* 73 at 105-106.

306 See Sahlins, *Unnaturally French: Foreign Citizens in the Old Regime and After* (2004) at 58-59.

307 *Calvin's Case* (1608) 7 Co Rep 1a at 16a-16b [77 ER 377 at 396].

308 See Ross, "English Nationality Law: *Soli* or *Sanguinis*?" [1972] *Grotian Society Papers* 1.

309 *Statute De Natis Ultra Mare 1350* (25 Edw III Stat 1). See Pollock and Maitland, *The History of English Law Before the Time of Edward I*, 2nd ed (1898), vol 1 at 459; Dunham, "Doctrines of Allegiance in Late Medieval English Law" (1951) 26 *New York University Law Review* 41 at 45-46, 50; Kim, *Aliens in Medieval Law: The Origins of Modern Citizenship* (2000) at 151-163.

310 See fnn 381-384 below. See also Jones, *British Nationality Law and Practice* (1947) at 40-56; Black, "The Constitution of Empire: The Case for the Colonists" (1976) 124 *University of Pennsylvania Law Review* 1157 at 1204-1206.

311 *Foreign Protestants Naturalization Act 1708* (7 Ann c 5), repealed by 10 Ann c 9. See also 4 & 5 Ann c 16.

312 *British Nationality Act 1730* (4 Geo II c 21); *British Nationality Act 1772* (13 Geo III c 21).

313 *Aliens Act 1844* (UK) (7 & 8 Vict c 66), s 16.

314 *Bracton on the Laws and Customs of England*, Woodbine ed, Thorne tr (1968), vol 4 at 329. See Salmond, "Citizenship and Allegiance" (1902) 18 *Law Quarterly Review* 49 at 56; Dunham, "Doctrines of Allegiance in Late Medieval English Law" (1951) 26 *New York University Law Review* 41 at 63-71; Spiro, "Dual Nationality and the Meaning of Citizenship" (1997) 46 *Emory Law Journal* 1411 at 1419-1424.

naturalisation in a foreign state.[315]

248 In the decades leading up to Federation, judicial statements in England,[316] the United States,[317] Canada[318] and the Australian colonies[319] confirmed that the essence of alienage was the want of permanent allegiance to the sovereign, albeit as a political institution rather than a natural person. Unlike a subject of the Crown or citizen of a republic, who owed permanent allegiance to that sovereign, an alien from a friendly state owed only a local allegiance while resident in the sovereign's territories.[320] The recognised incidents of the allegiance, whether permanent or local, included prescriptive jurisdiction in international law[321] and liability for treason in domestic law.[322] Correlative to that allegiance was the protection owed by the sovereign, also either permanently or locally: "*protectio trahit subjectionem, et subjectio protectionem*".[323] The incidents of that permanent protection included the right of the state to take diplomatic action in international law on behalf of the subject or citizen wherever resident[324] and the denial of the "act of state" defence to actions in tort in domestic law.[325]

249 At Federation, "the people" of the several colonies "agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution".[326] Consistently with the history described above, the ordinary understanding of alienage - and thus the connotation of the word "aliens" in s 51(xix) of that *Constitution*[327] - then depended on the want of a permanent allegiance to and protection by the sovereign of that Commonwealth, formerly regarded as an undivided Crown but now identified as the Crown in right

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315 33 & 34 Vict c 14, s 6.

316 *Udny v Udny* (1869) LR 1 Sc & Div 441 at 457 per Lord Westbury; *In re Stepney Election Petition; Isaacson v Durant* (1886) 17 QBD 54 at 59 per Lord Coleridge CJ for the Court. See also Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws* (1896) at 173, 175, 196.

317 *Carlisle v United States* (1872) 83 US 147 at 154 per Field J for the Court; *United States v Wong Kim Ark* (1898) 169 US 649 at 663 per Gray J for the Court. See also Bigelow (ed), *Story's Commentaries on the Constitution of the United States*, 5th ed (1891), vol 2 at 499-500 §1700.

318 *R v McMahon* (1866) 26 UCR 195 at 201 per Draper CJ for the Court; *In re Criminal Code Sections Relating to Bigamy* (1897) 27 SCR 461 at 474-475 per Strong CJ, 489 per Girouard J. See also Howell, *Naturalization and Nationality in Canada; Expatriation and Repatriation of British Subjects* (1884) at 5-7.

319 *Holt v Abbott* (1851) 1 Legge 695 at 697 per Stephen CJ for the Court; *R v Ross* (1854) 2 Legge 857 at 862, 864 per Stephen CJ for the Court; *Ex parte Lo Pak* (1888) 9 LR (NSW) L 221 at 246-247 per Windeyer J; *Toy v Musgrove* (1888) 14 VLR 349 at 371 per Higinbotham CJ, 399 per Kerferd J, 436 per Wrenfordsley J. See also Piggott, *Nationality: Including Naturalization and English Law on the High Seas and Beyond the Realm* (1907) at 219.

320 See, eg, *R v Francis; Ex parte Markwald* [1918] 1 KB 617 at 624 per A T Lawrence J; *Markwald v Attorney-General* [1920] 1 Ch 348 at 363-364 per Lord Sterndale MR.

321 See Bennett (ed), *Story's Commentaries on the Conflict of Laws*, 7th ed (1872) at 21-23 §§21-22; *The Case of the SS "Lotus"* (1927) PCIJ Ser A No 10 at 92-93 per Judge Moore.

322 *McMahon* (1866) 26 UCR 195 at 200-201 per Draper CJ for the Court; cf *De Jager v Attorney-General of Natal* [1907] AC 326 at 328 per Lord Loreburn LC for the Board; *Carlisle* (1872) 83 US 147 at 154-155 per Field J for the Court. See also *Joyce v Director of Public Prosecutions* [1946] AC 347 at 365 per Lord Jowitt LC (Lord Macmillan, Lord Wright and Lord Simonds agreeing at 373, 374).

323 *Calvin's Case* (1608) 7 Co Rep 1a at 5a [77 ER 377 at 382]. See Lauterpacht, "Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens" (1947) 9 *Cambridge Law Journal* 330; Glanville Williams, "The Correlation of Allegiance and Protection" (1948) 10 *Cambridge Law Journal* 54.

324 See Hurst, "Nationality of Claims" (1926) 7 *British Year Book of International Law* 163; Sinclair, "Nationality of Claims: British Practice" (1950) 27 *British Year Book of International Law* 125.

325 *Walker v Baird* [1892] AC 491 at 497 per Lord Herschell for the Board; cf *Johnstone v Pedlar* [1921] 2 AC 262 at 272-273 per Viscount Finlay, 276 per Viscount Cave, 284 per Lord Atkinson, 290-291 per Lord Sumner, 296 per Lord Phillimore. See also *Zachariassen v The Commonwealth* (1917) 24 CLR 166 at 183 per Barton, Isaacs and Rich JJ; E C S Wade, "Act of State in English Law: Its Relations with International Law" (1934) 15 *British Year Book of International Law* 98.

326 *Constitution*, preamble. See *Victoria v The Commonwealth* (1971) 122 CLR 353 at 370 per Barwick CJ; *Sue v Hill* (1999) 199 CLR 462 at 497 [81], 502 [93] per Gleeson CJ, Gummow and Hayne JJ.

327 See *Ex parte Professional Engineers' Association* (1959) 107 CLR 208 at 267 per Windeyer J.

of Australia.[328] As should be apparent, to speak of "permanent" allegiance to and protection by the sovereign is not to suggest that those relations are incapable of being dissolved, but only to recognise their special scope and content relative to the "local" relations between sovereign and resident alien.

250 Contrary to the Commonwealth's submissions, this Court did not hold in *Singh* that the correlative obligations of permanent protection and allegiance have ceased to define the constitutional connotation of alienage. Rather, on this point, the plurality in *Singh* merely recognised[329] that the content of those obligations must be "spelled out", because the mere duty to obey, and right to claim under, Australian law are inherent in the local allegiance and protection owed by and to an alien for so long as he or she is within Australia.

251 Certainly, the indicia of permanent allegiance and protection have always been inherently contestable.[330] Thus, as Gleeson CJ observed in *Singh*,[331] "questions of nationality, allegiance and alienage were matters on which there were changing and developing policies" at the time of Federation. It was for that reason that Parliament was given power to select the relevant indicia and determine their priority. That power has been exercised, since 1948, by defining the statutory concept of Australian citizenship and, since 1984, by attaching liabilities of alienage to unlawful non-citizens. "In this way", as Gleeson CJ, Gummow and Hayne JJ observed in *Shaw v Minister for Immigration and Multicultural Affairs*,[332] "citizenship may be seen as the obverse of the status of alienage".

252 But once it is accepted, as it must be, that the aliens power is not entirely untrammelled, it necessarily follows that *some* individuals would not be aliens even if denied Australian citizenship by statute. Given the conception explained above, that must be because they have so strong a claim to the permanent protection of - and thus so plainly owe permanent allegiance to - the Crown in right of Australia that their classification as aliens lies beyond the ambit of the ordinary understanding of the word. And that remains so notwithstanding statements like that quoted above from *Shaw*,[333] drawing a dichotomy between "citizen" and "alien" for the purpose of demonstrating the contemporary insignificance of permanent allegiance to the Crown in right of the United Kingdom. Nothing in those statements suggests that the limit on the aliens power recognised in *Pochi* no longer applies.

253 As to the application of that limit, history teaches that what lies beyond the ambit of the ordinary understanding of the word "aliens" cannot be determined by mechanical identification of necessary and sufficient conditions from pre-Federation decisions and statutes. So to reason would impermissibly fix the denotation of a word which, to adopt and adapt the statement of Frankfurter J in *Baumgartner v United States*,[334] connotes "nothing less than the bonds that tie [Australians] together in

328 See *Pochi* (1982) 151 CLR 101 at 109-111 per Gibbs CJ (Mason J and Wilson J agreeing at 112, 116); *Nolan* (1988) 165 CLR 178 at 183-184 per Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ, 191 per Gaudron J; *Sue v Hill* (1999) 199 CLR 462 at 503 [96] per Gleeson CJ, Gummow and Hayne JJ; *Shaw* (2003) 218 CLR 28 at 39-42 [20]-[27] per Gleeson CJ, Gummow and Hayne JJ.

329 (2004) 222 CLR 322 at 387 [165]-[166] per Gummow, Hayne and Heydon JJ. See also *Te* (2002) 212 CLR 162 at 198 [126], 198-199 [129] per Gummow J.

330 See Koessler, " 'Subject', 'Citizen', 'National', and 'Permanent Allegiance' " (1946) 56 *Yale Law Journal* 58.

331 (2004) 222 CLR 322 at 341 [30].

332 (2003) 218 CLR 28 at 35 [2].

333 See also *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 11-12 [15] per Gleeson CJ; *Koroitamana* (2006) 227 CLR 31 at 38 [11] per Gleeson CJ and Heydon J.

334 (1944) 322 US 665 at 673.

devotion to a common fealty". Rather, as the plurality in *Singh* concluded,[335] the determination requires analysis of the circumstances presented by a live controversy in light of historical developments, including in customary international law.

254 *Singh* established[336] that birth in Australia was not of itself sufficient to exclude a person from the class of aliens even by 1900. English developments culminating in the *Naturalization Act 1870* had foreclosed an argument based on English law as stated in *Calvin's Case*; and, if the significance of birthplace to status had become "a matter appropriate to be dealt with by legislation",[337] the significance of parentage had always been so. Hence, 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 - even if one of his or her parents is an Australian citizen. Generally speaking, Parliament has power under s 51(xix) of the *Constitution* to provide, as it has done, that such a person is and will remain a non-citizen, and so liable to treatment as an alien, unless and until that person is granted Australian citizenship under s 16 of the *Australian Citizenship Act 2007*.

255 The question remains, however, whether Aboriginal descent, self-identification as a member of an Aboriginal community and acceptance by such a community as one of its members constitute such a relationship with the Crown in right of Australia as to put a person beyond the reach of that legislative power.

Race

256 By and large, the Parliament's power under s 51(xix) of the *Constitution* cannot be limited, or required to be exercised, by reference to racial characteristics. At the level of principle, race has no bearing on the capacity of a person to owe permanent allegiance to, or be owed protection by, the sovereign. As Gaudron J observed in *Kartinyeri v The Commonwealth*:[338]

> "race is simply irrelevant to the existence or exercise of rights associated with citizenship. So, too, it is irrelevant to the question of continued membership of the Australian body politic."

And in terms of history and precedent, the familiar indicia of alienage are oblivious of race as that concept is now understood. Racial politics may have informed support amongst some present at the Convention Debates for the insertion of s 51(xix), (xxvi) and (xxvii) of the *Constitution*. But as Gleeson CJ noted in *Singh*,[339] "what the record shows about the subjective beliefs or intentions of some [such] people may be interesting but, of itself, is not a relevant fact" in the construction of s 51(xix). That Parliament has power under s 51(xxvi) to make laws with respect to "the people of any race for whom it is deemed necessary to make special laws" - which, as a result of the 1967 amendment, extends to peoples of the Aboriginal race[340] - and power under s 51(xxvii) with respect to "immigration and emigration", says nothing as to the ordinary understanding of the word "aliens" in 1901 or at present. Nor can

335 (2004) 222 CLR 322 at 383 [152], 393 [183] per Gummow, Hayne and Heydon JJ.
336 (2004) 222 CLR 322 at 341 [30] per Gleeson CJ, 395 [190] per Gummow, Hayne and Heydon JJ.
337 *Singh* (2004) 222 CLR 322 at 341 [30] per Gleeson CJ.
338 (1998) 195 CLR 337 at 366 [40].
339 (2004) 222 CLR 322 at 337 [21].
340 See *Kartinyeri* (1998) 195 CLR 337 at 362-363 [31]-[32] per Gaudron J, 381-383 [90]-[94] per Gummow and Hayne JJ.

it justify reading down or requiring the exercise of the distinct power with respect to "aliens" conferred by s 51(xix).[341]

Connections

257 Generally speaking, too, alienage also has nothing to do with a person's experience or perception of being connected to the Australian territory, community or polity. As Gleeson CJ stated in *Re Minister for Immigration and Multicultural Affairs; Ex parte Te*:[342]

> "there are many people who entered Australia as aliens, who have lived here for long periods and have become absorbed into the community, whose activity of immigration has long since ceased, but who have never sought formal membership of the community. ... Whether by design, or simply as the result of neglect, they remain aliens."

258 Nor does it have anything to do with an actual or perceived absence of connection to another country. As Hayne J held in *Te*:[343]

> "The status of alien is not lost or altered by the fact that the person in question may have lived in Australia for a long time, or may have cut all the ties which once existed with the body politic of the place where that person was born or with the country of which he or she was formerly a subject or citizen."

259 The reasons underlying these conclusions were explained by Gummow J in the same case,[344] by reference to the following statement of Sir Hersch Lauterpacht:[345]

> "The alien resident in a foreign country continues to owe allegiance to the sovereign of his own State. That allegiance expresses itself in his continued subjection to the laws of his own country - though, more often than not, the home State considers it convenient to limit its claims to jurisdiction with regard to the acts of its nationals when abroad. But, while continuing to be bound by allegiance to his own State, the alien becomes subject to another allegiance - that concomitant with the protection of the law which shelters him. There is nothing technical or mercenary about that reciprocity of allegiance and protection. *That reciprocity is a formal relation only in the sense that it is of no legal relevance whether there is at any given moment an equivalence of duty and benefit, of allegiance and protection, of an actual disposition to fidelity and actual capacity to afford protection*."

260 As that passage makes plain, questions of alienage cannot depend on a person's actual or anticipated allegiance to or protection by the sovereign[346] - not least because the application of any such criterion to every individual would be wholly impracticable. Whether a person's classification as an alien lies beyond the ambit of the ordinary understanding of

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341 See *New South Wales v The Commonwealth (Work Choices Case)* (2006) 229 CLR 1 at 127 [219]-[220] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.

342 (2002) 212 CLR 162 at 172 [27].

343 (2002) 212 CLR 162 at 219 [210].

344 *Te* (2002) 212 CLR 162 at 198-199 [129].

345 Lauterpacht, "Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens" (1947) 9 *Cambridge Law Journal* 330 at 335 (emphasis added), referring to *Joyce* [1946] AC 347.

346 cf *Joyce* [1946] AC 347 at 365-366 per Lord Jowitt LC (Lord Macmillan, Lord Wright and Lord Simonds agreeing at 373, 374).

that word has to depend on the person's possession of characteristics which so connect him or her to the sovereign as necessarily to give rise to reciprocal obligations of protection and allegiance.[347]

261 The point is illustrated by this Court's recent decision in *Falzon v Minister for Immigration and Border Protection*.[348] The man in question - a non-citizen of Maltese extraction - had come to Australia when only three years of age and thereafter remained here for more than 60 years before the Minister determined to revoke his visa. All of his kin had either been born here or come here years before and remained here ever since. As a result of living almost all of his life in Australia, and of all of his kin being here, the man was deeply connected to the Australian community and without any sense of connection to any other country. On any view, Mr Falzon had been "absorbed" into the community and might thus have felt permanent allegiance to, and expected permanent protection from, the Crown in right of Australia. Nevertheless, consistently with this Court's previous determinations that absorption is not a characteristic which denies the status of alienage,[349] it was accepted[350] that he was an alien and held[351] that he was liable to be removed from Australia on that basis.

Aboriginality

262 Different considerations apply, however, to the status of a person of Aboriginal descent who identifies as a member of an Aboriginal society and is accepted as such by the elders or other persons enjoying traditional authority among those people under laws and customs deriving from before the Crown acquired sovereignty over the territory of Australia.

263 True it is, as the Commonwealth contended, that cases such as *Singh* appear to imply that such a person could be classified as an alien where he or she was born abroad or is a foreign citizen. But, intuitively, that conclusion appears at odds with the growing recognition of Aboriginal peoples as "the original inhabitants of Australia"[352] and the ubiquity of Australian dual citizens. It is therefore necessary "to stop to inquire"[353] and, applying the "received technique", to re-examine the essentials of alienage and the nature of an Aboriginal person's relationship to the Australian polity, to ascertain "whether in truth, upon a correct analysis of the situation",[354] the objectionable conclusion inevitably follows from a logical application of the principle to the circumstances. And, for the reasons to be explained, upon re-examination of the elements of alienage and Aboriginality, it can be seen that it does not so follow.

264 Under English constitutional law, the Crown has long enjoyed prerogative power to extend its sovereignty to territories not previously claimed.[355] As Gibbs J recognised in *New*

347 See and compare *Nottebohm Case (Second Phase)* [1955] ICJR 4 at 23.
348 (2018) 262 CLR 333.
349 See especially *Pochi* (1982) 151 CLR 101 at 111 per Gibbs CJ (Mason J and Wilson J agreeing at 112, 116).
350 *Falzon* (2018) 262 CLR 333 at 335 per Lloyd SC (*arguendo*).
351 *Falzon* (2018) 262 CLR 333 at 345-346 [37]-[40] per Kiefel CJ, Bell, Keane and Edelman JJ, 355-356 [82] per Gageler and Gordon JJ, 358 [92] per Nettle J.
352 *Bropho v Western Australia* (1990) 171 CLR 1 at 12 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ; *Northern Territory v Griffiths* (2019) 93 ALJR 327 at 346 [62] per Kiefel CJ, Bell, Keane, Nettle and Gordon JJ; 364 ALR 208 at 226.
353 Dixon, "Jesting Pilate", in Crennan and Gummow (eds), *Jesting Pilate, And Other Papers and Addresses*, 3rd ed (2019) 74 at 77.
354 Dixon, "Concerning Judicial Method", in Crennan and Gummow (eds), *Jesting Pilate, And Other Papers and Addresses*, 3rd ed (2019) 112 at 119, 123.
355 *Post Office v Estuary Radio Ltd* [1968] 2 QB 740 at 753 per Diplock LJ. See Hale, *The Prerogatives of the King*, Yale ed (1976) at 129.

South Wales v The Commonwealth ("**the *Seas and Submerged Lands Case***"),[356] such an "acquisition of territory by a sovereign state for the first time is an act of state which cannot be challenged, controlled or interfered with by the courts of that state". And, as Brennan J later explained in *Mabo v Queensland [No 2]*,[357] this basal doctrine of Anglo-Australian constitutional law operates to "preclude[] any contest between the executive and the judicial branches of government as to whether a territory is or is not within the Crown's Dominions". Relevantly, that entails that the Crown's acquisition of sovereignty over the territory of Australia from 1788[358] cannot be called into question in this or any other Australian municipal court.[359] But, by contrast, the consequences of the acquisition of sovereignty in and for municipal law *are* justiciable, and are to be determined by common law doctrines earlier grounded in the law of nature[360] and now developed in step with customary international law.[361]

265 According to one such doctrine, as espoused in Blackstone's day, territories governed by a sovereign could be acquired only by conquest or cession, and thereafter remained subject to the body of law earlier in force until alteration by the acquiring sovereign.[362] On the other hand, territories which were not governed by a sovereign before the Crown acquired sovereignty could be acquired by settlement and thereupon receive English law, both statutory and unenacted,[363] so far as applicable to the situation of the settlers and condition of the infant colony.[364] But the application of that doctrine to the territory of the Australian colonies has given rise to "some difficulties",[365] which have been attributed to an "incongruity between legal characterisation and historical reality",[366] or between "theory [and] our present knowledge and appreciation of the facts".[367]

266 At, and in the century after, the acquisition of sovereignty, imperial legislation,[368] judicial decisions,[369] colonial instruments[370] and professional opinion[371] proceeded on the basis that the territory of the Australian colonies was not acquired from an existing sovereign

356 (1975) 135 CLR 337 at 388. See also *Wacando v The Commonwealth* (1981) 148 CLR 1 at 11 per Gibbs CJ, 21 per Mason J.

357 (1992) 175 CLR 1 at 31 (Mason CJ and McHugh J agreeing at 15).

358 See Evatt, "The Acquisition of Territory in Australia and New Zealand" [1968] *Grotian Society Papers* 16 at 26-36.

359 See also *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at 441 [37] per Gleeson CJ, Gummow and Hayne JJ.

360 *Calvin's Case* (1608) 7 Co Rep 1a at 17b [77 ER 377 at 397-398].

361 *Mabo [No 2]* (1992) 175 CLR 1 at 32, 41-42 per Brennan J (Mason CJ and McHugh J agreeing at 15).

362 See *Calvin's Case* (1608) 7 Co Rep 1a at 17b-18a [77 ER 377 at 397-398]. But see *Campbell v Hall* (1774) Lofft 655 at 741 per Lord Mansfield [98 ER 848 at 896], rejecting the "absurd exception" for territories under "infidel" laws.

363 But see McPherson, "How Equity Reached the Colonies" (2005) 5 *Queensland University of Technology Law and Justice Journal* 102.

364 *Blankard v Galdy* (1693) 2 Salk 411 at 411 per Holt CJ for the Court [91 ER 356 at 357]; *Anonymous* (1722) 2 P Wms 73 per Jekyll MR for the Privy Council [24 ER 646]. See West, "Opinion on the Admiralty Jurisdiction, in the Plantations" (1720) in Chalmers, *Opinions of Eminent Lawyers, on Various Points of English Jurisprudence, Chiefly Concerning the Colonies, Fisheries, and Commerce, of Great Britain* (1814), vol 2, 200 at 209; Blackstone, *Commentaries on the Laws of England* (1765), bk 1 at 104-105, 1766 supp at ii.

365 *Mabo [No 2]* (1992) 175 CLR 1 at 33 per Brennan J (Mason CJ and McHugh J agreeing at 15).

366 Sharwood, "Aboriginal Land Rights - The Long Shadow of the Eighteenth Century" (1981) 14 *Proceedings of the Medico-Legal Society of Victoria* 93 at 93.

367 *Mabo [No 2]* (1992) 175 CLR 1 at 38 per Brennan J (Mason CJ and McHugh J agreeing at 15).

368 *New South Wales Act 1787* (27 Geo III c 2), s 1; *New South Wales Act 1823* (4 Geo IV c 96), ss 2, 3, 4, 6; *Australian Courts Act 1828* (9 Geo IV c 83), s 24.

369 *Macdonald v Levy* (1833) 1 Legge 39 at 44-45 per Burton J, 52-53 per Forbes CJ, 61-62 per Dowling J; *Fenton v Hampton* (1858) 11 Moo PC 347 at 393 per Pollock LCB for the Privy Council [14 ER 727 at 744]; *Cooper v Stuart* (1889) 14 App Cas 286 at 291 per Lord Watson for the Privy Council.

370 *Ordinance No 2 of 1843* (SA), s 1.

371 "Messrs Shepherd and Gifford to Earl Bathurst" (1819) in *Historical Records of Australia* ("**HRA**") (1922), ser 4, vol 1, 330 at 330; J Stephen, "Validity of Statute, 20 George II, c 19 in the Colony" (1822) in HRA (1922), ser 4, vol 1, 412 at 414.

by conquest or cession but rather was settled and thus received English law (even if not immediately[372]). In the result, it is not now open to this Court to doubt that conclusion.[373]

267 Yet, although English law was conceived of as having been carried by the settlers with them as their "birthright", that "invisible and inescapable cargo … fell from their shoulders and attached itself to the soil on which they stood",[374] and it became, at least in theory, "the law of the land, protecting and binding colonists and indigenous inhabitants alike and equally".[375] Thus, the early Governors of New South Wales were instructed to punish crimes against Aboriginal people,[376] and Governor Hunter reported, with reference to the trial of five settlers for the murder of Aboriginal persons before the Court of Criminal Jurisdiction in 1799, that "the natives of this country were to be held as a people now under the protection of His Majesty's Government".[377] The same Court also tried Aboriginal persons charged with crimes against settlers,[378] and, after initial doubts,[379] its successor, the Supreme Court of New South Wales, exercised jurisdiction over crimes committed *between* Aboriginal persons; significantly on the basis that this was necessary to provide "*sanctuary* to them".[380] Furthermore, as Brennan J noticed in *Mabo [No 2]*,[381] if "the subjects of a conquered territory[382] and of a ceded territory[383] became British subjects,[384] *a fortiori* the subjects of a settled territory must have acquired that status", since, *ex hypothesi*, they could not have owed allegiance to any other sovereign. Accordingly, as this Court has confirmed on several occasions,[385] Aboriginal persons undoubtedly remain subject to, and protected by, the system of law in Australia.

268 In *Mabo [No 2]*, this Court determined[386] that the common law in Australia recognises, and in truth has always recognised,[387] rights and interests in land and waters possessed under

372 See and compare Evatt, "The Legal Foundations of New South Wales" (1938) 11 *Australian Law Journal* 409 at 415, 420-421; Castles, "The Reception and Status of English Law in Australia" (1963) 2 *Adelaide Law Review* 1 at 2-5; McPherson, *The Reception of English Law Abroad* (2007) at 18-20, 115-116.

373 *Coe v The Commonwealth* (1979) 53 ALJR 403 at 408 per Gibbs J (Aickin J agreeing at 412); 24 ALR 118 at 129, 138; *Mabo [No 2]* (1992) 175 CLR 1 at 26, 36 per Brennan J (Mason CJ and McHugh J agreeing at 15), 78-79 per Deane and Gaudron JJ.

374 R T E Latham, "The Law and the Commonwealth", in Hancock, *Survey of British Commonwealth Affairs: Volume I, Problems of Nationality 1918-1936* (1937) 510 at 517.

375 *Mabo [No 2]* (1992) 175 CLR 1 at 37 per Brennan J (Mason CJ and McHugh J agreeing at 15). See Waugh, "Settlement", in Saunders and Stone (eds), *The Oxford Handbook of the Australian Constitution* (2018) 56 at 64-73.

376 "Governor Phillip's Instructions" (1787) in HRA (1914), ser 1, vol 1, 9 at 13-14; "Governor Hunter's Instructions" (1794) in HRA (1914), ser 1, vol 1, 520 at 522; "Governor King's Instructions" (1802) in HRA (1915), ser 1, vol 3, 391 at 393; "Instructions to Governor Bligh" (1805) in HRA (1916), ser 1, vol 6, 8 at 10; "Governor Macquarie's Instructions" (1809) in HRA (1916), ser 1, vol 7, 190 at 192; "Instructions to Sir Thomas Brisbane" (1821) in HRA (1917), ser 1, vol 10, 596 at 598.

377 "Governor Hunter to The Duke of Portland" (1800) in HRA (1914), ser 1, vol 2, 401 at 402. But see "Governor King to Lord Hobart" (1802) in HRA (1915), ser 1, vol 3, 581 at 592. See also *R v Lowe* [1827] NSWKR 4.

378 *R v Mow-watty* [1816] NSWKR 2; *R v Hatherly and Jackie* [1822] NSWKR 10.

379 *R v Ballard or Barrett* (1829) NSW Sel Cas (Dowling) 2 at 4 per Dowling J.

380 *R v Murrell* (1836) 1 Legge 72 at 73 per Burton J (emphasis added). See Kercher, "R v Ballard, R v Murrell and R v Bonjon" (1998) 3 *Australian Indigenous Law Reporter* 410.

381 (1992) 175 CLR 1 at 38 fn 93 (emphasis added).

382 *Calvin's Case* (1608) 7 Co Rep 1a at 6a [77 ER 377 at 384]; *Campbell v Hall* (1774) Lofft 655 at 741 per Lord Mansfield [98 ER 848 at 895].

383 *Donegani v Donegani* (1835) 3 Kn 63 at 85 per Shadwell V-C for the Privy Council [12 ER 571 at 580].

384 *Lyons Corporation v East India Co* (1836) 1 Moo PC 175 at 286-287 per Lord Brougham for the Privy Council [12 ER 782 at 823]; 1 Moo Ind App 175 at 286-287 [18 ER 66 at 108-109].

385 *Coe* (1979) 53 ALJR 403 at 408 per Gibbs J; 24 ALR 118 at 129; *Coe v The Commonwealth* (1993) 68 ALJR 110 at 115 per Mason CJ; 118 ALR 193 at 200; *Walker v New South Wales* (1994) 182 CLR 45 at 48-50 per Mason CJ. See also *R v Wedge* [1976] 1 NSWLR 581 at 585 per Rath J.

386 (1992) 175 CLR 1 at 15 per Mason CJ and McHugh J, 57, 69-70 per Brennan J, 109-110 per Deane and Gaudron JJ, 187 per Toohey J. See also *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 452-453 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

387 *Yorta Yorta* (2002) 214 CLR 422 at 453-454 [77] per Gleeson CJ, Gummow and Hayne JJ, 490 [180] per Callinan J. See *Giannarelli v Wraith* (1988) 165 CLR 543 at 584-586 per Brennan J. See also *Kleinwort*

laws acknowledged, and customs observed, by Aboriginal peoples since before the Crown's acquisition of sovereignty. The common law of real property received upon the Crown's acquisition of sovereignty in Australia accommodated these traditional laws and customs, subject to extinguishment by inconsistent grant, by employing the concept of radical title: that native title was held of the Crown, which retained a power of extinguishment.[388]

269 Logically anterior to, however, and more fundamental than the common law's recognition of rights and interests arising under traditional laws and customs is the common law's recognition of the Aboriginal societies from which those laws and customs organically emerged. As Gleeson CJ, Gummow and Hayne JJ explained in *Yorta Yorta Aboriginal Community v Victoria*:[389]

> "Laws and customs do not exist in a vacuum. They are, in Professor Julius Stone's words, 'socially derivative and non-autonomous'.[390] As Professor Honoré has pointed out,[391] it is axiomatic that 'all laws are laws of a society or group'. Or as was said earlier, in Paton's Jurisprudence,[392] 'law is but a result of all the forces that go to make society'. Law and custom arise out of and, in important respects, go to define a particular society. In this context, 'society' is to be understood as a body of persons united in and by its acknowledgment and observance of a body of law and customs".

270 Hence, as that passage conveys, under the common law of Australia, an Aboriginal society retains an identifiable existence so long as its members are "continuously united in their acknowledgement of laws and observance of customs" deriving from before the Crown's acquisition of sovereignty, and such may be inferred from "subsidiary facts" of a social, cultural, linguistic, political or geographical kind.[393]

271 Axiomatically, a person cannot be a member of an Aboriginal society continuously united in the acknowledgment of its laws and customs unless he or she is resident in Australia. Nor can a person be a member of such an Aboriginal society unless he or she is accepted as such by other members of the society according to the traditional laws and customs of the society deriving from before the Crown's acquisition of sovereignty over the Australian territory. Thus, for present purposes, the most significant of the traditional laws and customs of an Aboriginal society are those which allocate authority to elders and other persons to decide questions of membership. Acceptance by persons having that authority, together with descent (an objective criterion long familiar to the common law of status) and self-identification (a protection of individual autonomy), constitutes membership of an Aboriginal society:[394] a status recognised at the "intersection of traditional laws and customs with the common law".[395]

Benson Ltd v Lincoln City Council [1999] 2 AC 349 at 358-359 per Lord Browne-Wilkinson, 377-379 per Lord Goff of Chieveley.

388 See *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 51 [47]-[49] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

389 (2002) 214 CLR 422 at 445 [49].

390 Stone, *The Province and Function of Law* (1946) at 649.

391 Honoré, "Groups, Laws, and Obedience", in Simpson (ed), *Oxford Essays in Jurisprudence (Second Series)* (1973) 1 at 2.

392 Paton, *A Text-book of Jurisprudence* (1946) at 34.

393 *Sampi v Western Australia* (2010) 266 ALR 537 at 560 [77] per North and Mansfield JJ. See Bartlett, *Native Title in Australia*, 3rd ed (2015) at 913 [32.11].

394 *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 274 per Deane J; *Mabo [No 2]* (1992) 175 CLR 1 at 61, 70 per Brennan J (Mason CJ and McHugh J agreeing at 15); *Yorta Yorta* (2002) 214 CLR 422 at 442 [40], 445 [49] fn 94. See *Sampi* (2010) 266 ALR 537 at 552 [45] per North and Mansfield JJ.

395 *Fejo v Northern Territory* (1998) 195 CLR 96 at 128 [46] per Gleeson CJ, Gaudron, McHugh, Gummow,

272 That status is necessarily inconsistent with alienage. Logically, it cannot be that the common law in force immediately before Federation acknowledged the authority of elders and other persons to determine membership of an Aboriginal society and yet at the same time subjected members of that society to a liability to deportation. Permanent exclusion from the territory of Australia would have abrogated the common law's acknowledgment of traditional laws and prevented the observance of traditional laws and customs by persons excluded (and, depending on their positions in society, also by others). To classify any member of such an Aboriginal society as an alien would have been to recognise that the Crown had power to tear the organic whole of the society asunder, which would have been the very antithesis of the common law's recognition of that society's laws and customs as a foundation for rights and interests enforced under Australian law. Consistently, therefore, with its recognition of Aboriginal societies as the source and sanctuary of traditional laws and customs, the common law must be taken always to have comprehended the unique obligation of protection owed by the Crown to those societies and to each member in his or her capacity as such.

273 True it is, as the Commonwealth contended, that the Crown's unique obligation of protection to those societies and to each member in his or her capacity as such has not hitherto been seen as placing those members beyond the bounds of alienage as that term is ordinarily understood. But that is to say no more than that the question has not previously arisen for determination. True it is, too, as the Commonwealth submitted, that "often" the "main" differences between the permanent protection owed to a citizen and the local protection owed to a resident alien arise while each is overseas, where only the former enjoys what Kelsen termed[396] a "more concrete right", "to diplomatic protection by the organs of his own State against foreign States". As that submission - and the plurality in *Singh*[397] - acknowledged, however, the indicia and consequences of permanent protection are not confined to the realm of international law. For, whereas an Australian citizen's right "to enter the country is not qualified by any law imposing a need to obtain a licence or 'clearance' from the Executive",[398] "the vulnerability of the alien to exclusion or deportation" itself "flows from both the common law and the provisions of the Constitution".[399] And as has been indicated,[400] this domestic liability of aliens to deportation may, in turn, properly inform the ambit of the ordinary understanding of alienage.

274 In any event, reference to sources of international law does not gainsay the recognition of a unique obligation of permanent protection to indigenous peoples.[401] Since at least[402] the writings of the sixteenth century "Spanish school" - whose critiques of the *Conquista* have been identified as the *fons et origo* of international law[403] - jurists have asserted natural rights of indigenous peoples "wisely ordered by excellent laws, religion, and custom" as against European colonisers.[404] Although such ideas had fallen out of favour by 1901,

Hayne and Callinan JJ; *Yorta Yorta* (2002) 214 CLR 422 at 439-440 [31] per Gleeson CJ, Gummow and Hayne JJ.

396 Kelsen, *General Theory of Law and State*, Wedberg tr (1945) at 237. But see *Singh* (2004) 222 CLR 322 at 387 [166] per Gummow, Hayne and Heydon JJ; cf [248] above.

397 (2004) 222 CLR 322 at 387-388 [166] per Gummow, Hayne and Heydon JJ.

398 *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462 at 469 per Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ.

399 *Chu Kheng Lim* (1992) 176 CLR 1 at 29 per Brennan, Deane and Dawson JJ.

400 See [248]-[253], [271]-[272] above.

401 See *Mabo [No 2]* (1992) 175 CLR 1 at 83-84 per Deane and Gaudron JJ.

402 But see Pope Paul III, *Sublimis Deus* (1537).

403 See Scott, *The Spanish Origin of International Law* (1934), ch 14; Stone, *Human Law and Human Justice* (1965) at 61.

404 Las Casas, *In Defense of the Indians*, Poole ed (1992) at 42-43; cf Vitoria, *De Indis et de Jure Belli Relectiones*, Nys ed, Bate tr (1917) at 127-129. See also Grotius, *The Rights of War and Peace, in Three Books*,

positivist rationales for colonisation were also founded upon obligations to indigenous peoples,[405] such as that undertaken by the signatories of the General Act of the Berlin Conference (1885) "to watch over the preservation of the native tribes, and to care for the improvement of the conditions of their moral and material well-being".[406] And, although more recently formulated in terms of self-determination,[407] the capacity to represent and obligations to protect indigenous peoples continue to be proclaimed in and by international instruments.[408]

275 To acknowledge such post-Federation developments does not require acceptance of a view that the connotation of constitutional terms may evolve by reference to international laws emerging since Federation: a notion which has, in the past, been repudiated as amounting in effect to the rewriting of the *Constitution*.[409] It goes no further than this Court did in recognising that at least since 1948 "subjects" and "aliens" in the *Constitution* have denoted persons with a status in relation to the Crown in right of Australia, rather than the United Kingdom.[410] But it may be observed that, not long ago, in a matter also affected by profound socio-political imperatives not conceived of at the time of Federation, this Court did not hesitate to observe that "terms like 'originalism' or 'original intent' ... obscure much more than they illuminate", and to recognise that the breadth of a "topic of juristic classification" may be informed by consideration of "comparative law".[411]

276 Such considerations need not be pursued further, however, because, in this matter, domestic considerations dictate the proper conclusion. Underlying the Crown's unique obligation of protection to Australian Aboriginal societies and their members as such is the undoubted historical connection between Aboriginal societies and the territory of Australia which they occupied at the time of the Crown's acquisition of sovereignty. As is now understood, central to the traditional laws and customs of Aboriginal communities was, and is, an essentially spiritual connection with "country", including a responsibility to live in the tracks of ancestral spirits and to care for land and waters to be handed on to future generations.[412] Ignorance of those connections, and of their potential significance at common law, justified the early dispossession of Aboriginal peoples in the decades after 1788.[413] But by the mid-nineteenth century, James Dredge, the Assistant Protector

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Morrice tr (1738), bk 2, ch 22, §§9-10 at 478; Vattel, *The Law of Nations; or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, Chitty ed (1834), bk 2, ch 7, §97 at 171. See generally Marks, "Indigenous Peoples in International Law: The Significance of Francisco de Vitoria and Bartolome de las Casas" (1991) 13 *Australian Year Book of International Law* 1; Cavallar, "Vitoria, Grotius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitans?" (2008) 10 *Journal of the History of International Law* 181.

405 See especially Westlake, *Chapters on the Principles of International Law* (1894) at 141-143.

406 Art 6. See Lindley, *The Acquisition and Government of Backward Territory in International Law* (1926) at 324-326; cf *South West Africa Cases (Second Phase)* [1966] ICJR 6 at 34-35 [51]-[54].

407 See *Western Sahara* (*Advisory Opinion*) [1975] ICJR 12 at 31-35 [54]-[64]; Brownlie, "The Rights of Peoples in Modern International Law", in Crawford (ed), *The Rights of Peoples* (1988) 1; Anaya, *Indigenous Peoples in International Law*, 2nd ed (2004), pt 2.

408 See, eg, Declaration on the Granting of Independence to Colonial Countries and Peoples (adopted by GA Res 1514 (XV) of 14 December 1960); United Nations Declaration on the Rights of Indigenous Peoples (adopted by GA Res 61/295 of 13 September 2007).

409 See the authorities collected in *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 225 [181] fn 181 per Heydon J.

410 See [249] above.

411 *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 at 455 [14], 459 [22] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ, quoting *Attorney-General (Vict) v The Commonwealth* ("**the *Marriage Act Case***") (1962) 107 CLR 529 at 578 per Windeyer J.

412 See *Milirrpum* (1971) 17 FLR 141 at 167 per Blackburn J; *Western Australia v Ward* (2002) 213 CLR 1 at 64-65 [14] per Gleeson CJ, Gaudron, Gummow and Hayne JJ; *Griffiths* (2019) 93 ALJR 327 at 375 [198], 377 [206], 379 [223] per Kiefel CJ, Bell, Keane, Nettle and Gordon JJ; 364 ALR 208 at 265-266, 267-268, 271.

413 *Mabo [No 2]* (1992) 175 CLR 1 at 106-107 per Deane and Gaudron JJ.

of Aborigines at Port Phillip, could acknowledge[414] that those connections were "sacredly recognised from one generation to another" and that, within the "boundaries of their *own country*, as they proudly speak, they feel a degree of security and pleasure which they can find nowhere else". And even that was a profound understatement of the position, which Michael Dodson has since explained[415] thus:

> "Everything about Aboriginal society is inextricably interwoven with, and connected to, the land. Culture is the land, the land and spirituality of Aboriginal people, our cultural beliefs or reason for existence is the land. You take that away and you take away our reason for existence. ... Removed from our lands, we are literally removed from ourselves."

A connection of that kind runs deeper than the accident of birth in the territory or immediate parentage.

277 Being a matter of history and continuing social fact, an Aboriginal society's connection to country is not dependent on the identification of any legal title in respect of particular land or waters within the territory.[416] The protection to which it gives rise cannot be cast off by an exercise of the Crown's power to extinguish native title.[417] So much was acknowledged as early as 1837, when Lord Glenelg, the Secretary of State for War and the Colonies, instructed[418] Sir Richard Bourke, the Governor of New South Wales, as follows:

> "all the natives inhabiting those Territories must be considered as Subjects of the Queen, and as within HM's Allegiance. To regard them as Aliens with whom a War can exist, and against whom HM's Troops may exercise belligerent right, is to deny *that protection to which they derive the highest possible claim from the Sovereignty which has been assumed over the whole of their Ancient Possessions*."

278 So long as an Aboriginal society which enjoyed a spiritual connection to country before the Crown's acquisition of sovereignty has, since that acquisition of sovereignty, 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, the unique obligation of protection owed by the Crown to the society and each of its members in his or her capacity as such will persist.

279 Equally, for the reasons earlier stated, it is implicit in the common law's recognition of the status of membership of such an Aboriginal society, and the obligation of permanent protection owed by the Crown in right of Australia that it entails, that those who are recognised as having the status of membership of an Aboriginal society *eo ipso* owe permanent allegiance of which the recognised incidents include prescriptive jurisdiction in international law and liability for treason in domestic law. Otherwise, they would not be within the Crown's protection. Subject, therefore, to questions of renunciation, which do

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414 R Dredge, " 'An Awful Silence Reigns': James Dredge at the Goulburn River" (1998) 61 *La Trobe Journal* 17 at 25 (emphasis in original).

415 Dodson, "Land Rights and Social Justice", in Yunupingu (ed), *Our Land Is Our Life: Land Rights - Past, Present and Future* (1997) 39 at 41.

416 See and compare *Yanner v Eaton* (1999) 201 CLR 351 at 373 [38] per Gleeson CJ, Gaudron, Kirby and Hayne JJ.

417 See and compare *Ward* (2002) 213 CLR 1 at 67 [21] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

418 "Lord Glenelg to Sir Richard Bourke" (1837) in HRA (1923), ser 1, vol 19, 47 at 48 (emphasis added).

not arise here, and so for present purposes need not be considered, each resident member of a relevant Aboriginal society in his or her capacity as such owes to the Crown an obligation of permanent allegiance in the sense described.

280 So to conclude does not mean that a resident non-citizen member of such an Aboriginal society is to be accounted an Australian citizen or other than a "non-citizen" as that term is defined.[419] Citizenship is a statutory concept which it is within the legislative competence of Parliament to prescribe.[420] Furthermore, it may be that, where a resident non-citizen member of an Aboriginal society has given up residence in Australia, and thus severed his or her relationship with that society, he or she thereafter has no more right to return to this country than any other non-citizen. That, too, is a question which, for present purposes, need not be decided. It is sufficient for the disposition of this matter that the Crown in right of Australia owes an obligation of permanent protection to a resident non-citizen of Aboriginal descent who identifies as a member of an Aboriginal society and is recognised as such according to laws and customs continuously observed since before the Crown's acquisition of sovereignty, and that the obligation of permanent protection extends to not casting that person out of Australia as if he or she were an alien.

281 It was contended by the Commonwealth that it might often prove difficult to establish that an Aboriginal society has maintained continuity in the observance of its traditional laws and customs since the Crown's acquisition of sovereignty over the Australian territory. No doubt, that is so. But difficulty of proof is not a legitimate basis to hold that a resident member of an Aboriginal society can be regarded as an alien in the ordinary sense of the term. It means only that some persons asserting that status may fail to establish their claims. There is nothing new about disputed questions of fact in claims made by non-citizens that they have an entitlement to remain in this country.

282 It was also contended by the Commonwealth that to recognise that a resident member of an Aboriginal society is not an alien would be productive of "invidious consequences" because there would be two classes of resident non-citizen persons of Aboriginal descent: those identifying and accepted as members of an Aboriginal society according to traditional laws and customs continuously observed since before the Crown's acquisition of sovereignty; and those who are not. That is unfortunate, but equally no basis to deny the Crown's obligation of permanent protection to resident members of Aboriginal societies. If Parliament regards it as "invidious" that a federal law differentiates between those two classes of Aboriginal Australians, it is well within the competence of the Parliament to ensure that the latter class is treated like the former.

283 Finally, it is to be observed that, as the obligation of protection of Aboriginal societies is a product of the common law, it is conceivable that it could be abrogated by statute. If that were to occur, it may be, although for the present it need not be decided, that there would no longer be an adequate basis to regard resident non-citizen members of Aboriginal societies differently from other non-citizens. But, as has been seen,[421] abrogation of native title would not be sufficient to have that effect. It would at least require unambiguously clear provision with the effect that, notwithstanding the common law of Australia, and perhaps the *Racial Discrimination Act 1975* (Cth), the Crown shall not owe the obligation of permanent protection to Aboriginal societies or their members as such. That is not necessarily to say, however, that the enactment of such a provision would be within the ambit of Commonwealth legislative power.

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419 See [239] above.
420 See [244] above.
421 See [268], [277] above.

284 It follows from what has been said that to classify a resident non-citizen of Aboriginal descent who identifies and is accepted as a member of an Aboriginal society according to traditional laws and customs continuously observed since before the Crown's acquisition of sovereignty as an alien is to treat as an "alien" a person who is incapable of answering that description in the ordinary sense of the word; and, therefore, that to impose the liabilities of alienage on a member of such an Aboriginal society is beyond the legislative competence of the Parliament under s 51(xix) of the *Constitution*.

285 It follows in turn that, since the *Migration Act* imposes the liabilities of an alien on unlawful non-citizens, it is beyond the legislative competence of the Parliament under s 51(xix) of the *Constitution* to treat a member of such an Aboriginal society as an unlawful non-citizen, and that s 14(1) of the *Migration Act* must be read down accordingly under s 15A of the *Acts Interpretation Act 1901* (Cth).

Conclusion

286 As was stated at the outset of these reasons, although each of the plaintiffs was born abroad and is a non-citizen, each has long resided in Australia, each is of Aboriginal descent, each identifies as a member of an Aboriginal community, and each has been recognised as a member of an Aboriginal community.

287 In the case of Mr Thoms, the Commonwealth did not dispute that, because he is a native title holder, the Aboriginal community of which he is a member must be an Aboriginal society whose laws and customs have relevantly maintained a continuous existence and vitality since the Crown's acquisition of sovereignty. In the case of Mr Love, however, although it was agreed that an elder of the Kamilaroi tribe had recognised him as a descendant of that tribe, the Commonwealth did not concede that he had been recognised by "elders or others having traditional authority", that is, authority under laws and customs observed since before the Crown's acquisition of sovereignty.

288 On those facts, Mr Thoms is incapable of answering the description of "alien" in the ordinary sense of that word, and, therefore, cannot be treated as an unlawful non-citizen within the meaning of s 14(1) of the *Migration Act*. In the case of Mr Love, it will be necessary for the Federal Court of Australia to find the relevant facts and, on that basis, to determine the matter according to law.

289 **GORDON J.** The fundamental premise from which the decision in *Mabo v Queensland [No 2]*[422] proceeds - the deeper truth - is that the Indigenous peoples of Australia are the first peoples of this country, and the connection between the Indigenous peoples of Australia and the land and waters that now make up the territory of Australia was *not* severed or extinguished by European "settlement".[423]

290 That connection is spiritual or metaphysical:[424] "[t]here is an unquestioned scheme of things in which the spirit ancestors, the people of the clan, particular land and everything that exists on and in it, are organic parts of one indissoluble whole".[425] And the connection that persisted, and continues to persist, is a connection determined according to Indigenous laws acknowledged, and the traditional customs observed, by the Indigenous peoples.[426]

291 As Brennan J said in *Mabo [No 2]*, membership of an Indigenous people of Australia depends on "biological descent from the indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among those people".[427]

292 The plaintiffs are Aboriginal Australians by biological descent, self-identification and recognition by an elder or elders enjoying traditional authority. Each was born outside Australia. Neither has the statutory status of citizenship. Under the law of the place where each was born, each owes obligations to a sovereign power other than Australia. The plaintiffs had their visas cancelled under s 501(3A) of the *Migration Act 1958* (Cth) because they were each convicted of a criminal offence and sentenced to a term of imprisonment of 12 months or more.[428]

293 If the plaintiffs are aliens, and thus within the reach of the legislative power in s 51(xix) of the *Constitution*, ss 189 and 198 of the *Migration Act*, which provide for detention of unlawful non-citizens and their removal from Australia, are constitutionally valid in their application to them. If the plaintiffs are not aliens, then those provisions must be read down so as not to apply to them. Are the plaintiffs aliens within the meaning of s 51(xix) of the *Constitution*? They are not.

294 The specific question before the Court - whether Aboriginal Australians, born overseas, without the statutory status of Australian citizenship and owing foreign allegiance, are aliens within the meaning of s 51(xix) - has not arisen before. No previous Australian court has considered that question. There is no binding authority.

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422 (1992) 175 CLR 1.

423 *Mabo [No 2]* (1992) 175 CLR 1 at 15, 51-52, 57-58, 61, 68-70, 100, 184; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 180, 206-207; *Fejo v Northern Territory* (1998) 195 CLR 96 at 128 [46]; *Yanner v Eaton* (1999) 201 CLR 351 at 373 [38]; *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 37 [10]; *Western Australia v Ward* (2002) 213 CLR 1 at 64-65 [14], 85-86 [64]; *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at 439-440 [31], 441 [38], 445 [49]; *Northern Territory v Griffiths* (2019) 93 ALJR 327 at 341 [23], 351 [84], 355 [98], 368 [153], 369-370 [165], 370-373 [168]-[184], 373 [187], 376 [204], 377 [206], 378 [217], 379 [223], 380 [230], 382 [240]; 364 ALR 208 at 219, 233, 238, 255, 257, 258-262, 263, 267, 267-268, 269-270, 271, 272, 274.

424 *Griffiths* (2019) 93 ALJR 327 at 375 [199]; 364 ALR 208 at 266.

425 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 167, quoted in *Ward* (2002) 213 CLR 1 at 64 [14], in turn quoted in *Griffiths* (2019) 93 ALJR 327 at 368 [153]; 364 ALR 208 at 255. See also *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 358.

426 *Yorta Yorta* (2002) 214 CLR 422 at 441 [37]-[38]; *Ward* (2002) 213 CLR 1 at 64-65 [14]; *Griffiths* (2019) 93 ALJR 327 at 340-341 [22]-[23]; 364 ALR 208 at 218-219.

427 (1992) 175 CLR 1 at 70.

428 The decision to cancel Mr Love's visa was subsequently revoked and he was released from immigration detention. Mr Thoms remains in immigration detention.

295 Whether either plaintiff is an alien is a constitutional question, not a statutory question. As was pointed out in *Singh v The Commonwealth*,[429] it is important not to distract attention from the constitutional term "aliens" by using statutory or other expressions like "Australian citizens", "nationals" or "subjects" as if those words are antonyms for the constitutional term. They are not. Likewise, it is not right to use constitutional phrases like "people of the Commonwealth" or "a subject of the Queen" as antonyms, or the text of s 44(i) of the *Constitution* as a synonym, for the constitutional term.[430] It is, therefore, best to refer to a person who is not an alien as a "non-alien".[431]

296 The constitutional term "aliens" conveys otherness, being an "outsider", foreignness. The constitutional term "aliens" does not apply to Aboriginal Australians, the original inhabitants of the country. An Aboriginal Australian is not an "outsider" to Australia.

297 European settlement did not abolish traditional laws and customs, which establish and regulate the connection between Indigenous peoples and land and waters. Assertion of sovereignty did not sever that connection. Nor did Federation, or any event after Federation, render Aboriginal Australians aliens. As later events confirmed, at Federation many Indigenous peoples retained their connection with land and waters; they retained rights in respect of the land and waters and they remained subject to obligations under traditional laws and customs with respect to the land and waters.

298 Failure to recognise that Aboriginal Australians retain their connection with land and waters would distort the concept of alienage by ignoring the content, nature and depth of that connection.[432] It would fail to recognise the first peoples of this country. It would fly in the face of decisions of this Court that recognise that connection and give it legal consequences befitting its significance. And yet that is what is sought to be done here to Mr Love and Mr Thoms, two Aboriginal Australians: to ignore their Aboriginality because they were born overseas, do not have Australian citizenship and owe foreign allegiance.

299 These reasons will consider the meaning of "aliens" under s 51(xix) of the *Constitution* and whether, as the Commonwealth submitted, that meaning is determined by the statutory concept of citizenship, birthplace or the owing of allegiance to a foreign power. These reasons will then address the position of Aboriginal Australians as uniquely connected with this country, and not falling within the concept of alien at any time since settlement. Finally, these reasons consider whether each plaintiff is an alien.

Section 51(xix)

300 "Aliens" is a constitutional term. The question in these cases is one of Commonwealth legislative power. And for present purposes, only the head of power with respect to the subject of "aliens" under s 51(xix) is of relevance, not that with respect to "naturalization", also under s 51(xix).[433] "Non-citizen" is not a synonym for alien. Foreign allegiance is not

429 (2004) 222 CLR 322 at 382 [149]-[150].

430 *Singh* (2004) 222 CLR 322 at 382 [149].

431 See *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 189, 191-193, 195; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 295, 374; *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 36 [8], 56 [78], 57 [79], 58 [83], 63 [99], 65 [103], 68 [114], 79 [157]; *Singh* (2004) 222 CLR 322 at 380 [139], 382 [149], 387 [165]-[166], 397 [195], 408 [234], 410 [238], 417 [265], 432 [315]; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439 at 454 [22], 458 [34], 482 [114], 483 [119].

432 *Griffiths* (2019) 93 ALJR 327 at 335 [2], 351 [84], 355 [98], 369-370 [165], 373 [187], 376 [204], 377 [206], 378 [217], 379 [223]; 364 ALR 208 at 212, 233, 238, 257, 263, 267, 267-268, 269-270, 271.

433 "[N]aturalization" in s 51(xix) refers to a process (naturalisation and denaturalisation); "aliens" refers to a legal status (alienage): *Singh* (2004) 222 CLR 322 at 376 [128].

synonymous with alienage. The question is *not* only whether a person has a characteristic like non-citizenship or foreign citizenship. Nor is birthplace alone necessarily determinative of alienage.

301 As was said in *Singh*,[434] the word "aliens" did not have a fixed legal meaning at the time of Federation - in particular, legislative changes had removed it from the meaning that it held at common law at the time of *Calvin's Case*.[435] But the meaning that it did have was, and remains, anchored in the concept of "belong[ing] to another".[436]

302 The word "alien" is derived from the Latin "alienus", whose definitions include "[o]f, belonging to, or affecting others", "[u]nconnected" and "[o]f another country, foreign".[437] It describes a person's "*lack* of relationship with a country"[438] (emphasis added). These concepts were, and remain, intrinsic to the constitutional word "aliens".[439]

303 With this understanding of the meaning of "aliens", it is necessary to address the relationship between it and other concepts that have *relevance* to alienage while not being *determinative* of it - citizenship, birthplace and foreign allegiance - before turning to consider alienage and the exercise of Commonwealth legislative power.

Alienage and citizenship

304 Non-citizenship does not equate, in all cases, with alienage. It may be that, in *most* cases, someone who does not hold Australian citizenship is within the reach of the aliens power in s 51(xix) of the *Constitution*. It is settled that merely living in Australia for a long period does not convert someone from an alien to a non-alien, if they have not taken the step of acquiring citizenship.[440] But the synonymy of the concepts of alien and non-citizen in *most* cases should not distract attention from the fact that the overlap is less than complete.

305 Indeed, it cannot be complete. Despite the discussions at the Convention Debates, the *Constitution* ultimately did not include a concept of "citizen".[441] Citizenship is a purely statutory concept. As has been observed, statutory concepts cannot control constitutional concepts. The Court, therefore, does not defer to Parliament's opinion to determine the scope of a constitutional concept like "aliens".[442] Put in different terms, a statutory concept cannot, in *all cases*, be the obverse of a constitutional concept. As Gaudron J stated in *Chu Kheng Lim v Minister for Immigration*,[443] Australian citizenship is:

> "not a concept which is constitutionally necessary, which is immutable or which has some immutable core element ensuring its lasting relevance for constitutional purposes.

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434 (2004) 222 CLR 322 at 395 [190].
435 (1608) 7 Co Rep 1a [77 ER 377].
436 *Singh* (2004) 222 CLR 322 at 395 [190].
437 *Oxford Latin Dictionary* (1982) at 97, meanings 1a, 3a and 4a.
438 *Nolan* (1988) 165 CLR 178 at 183, quoted in *Singh* (2004) 222 CLR 322 at 400 [205].
439 *Singh* (2004) 222 CLR 322 at 395 [190].
440 See *Shaw* (2003) 218 CLR 28.
441 See generally *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 2 March 1898. As Mr Edmund Barton (as he then was) put it, " '[c]itizens' is an undefined term, and is not known to the Constitution": *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 3 March 1898 at 1786.
442 See *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 258. See also *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 179 [53]; *Shaw* (2003) 218 CLR 28 at 61 [94].
443 (1992) 176 CLR 1 at 54 (footnote omitted).

> Because citizenship is a concept of the kind indicated, it cannot control the meaning of 'alien' in s 51(xix) of the Constitution."

306 There was no statutory concept of Australian "citizenship" before its introduction in 1948.[444] Any equating of the concepts of non-citizen and alien would thus fail to account for the period from Federation to the passing of the *Nationality and Citizenship Act 1948* (Cth). Although the case law may reflect a dispute as to when British subjects became aliens - 1949 or 1986 - there was a period of at least 48 years[445] in which there was no statutory concept of Australian citizenship. Yet during that same period, the aliens power in s 51(xix) of the *Constitution* had meaning.[446]

307 In fact, the *Nationality and Citizenship Act* cannot itself be seen as some transformative event. As enacted, that Act did not, even on its own terms, equate alienage and non-citizenship. It defined an "alien"[447] as "a person who is not a British subject, an Irish citizen or a protected person". Alienage was not anchored to, or determined by, the concept of citizenship. Indeed, the status of a British subject continued. A person who was an Australian citizen was a "British subject".[448] Conversely, citizens of other countries, specifically the United Kingdom and its colonies, Canada, New Zealand, the Union of South Africa, Newfoundland, India, Pakistan, Southern Rhodesia and Ceylon, had the option of citizenship in Australia by registration, rather than naturalisation.[449]

308 Citizenship did not then determine who was an alien and who was not an alien. Although the *Nationality and Citizenship Act* was an important event in lessening Australia's ties with the United Kingdom, and thus with other British subjects,[450] it was not an event that had any bearing on the ties between Aboriginal Australians and the country. That Act said, and says, nothing about Aboriginal Australians. The statutory question of citizenship does not, in itself, decide whether the plaintiffs, as Aboriginal Australians, are aliens within the meaning of the constitutional term.

309 The fact that citizenship does not, in all circumstances, determine alienage is reflected, in two respects, in *Pochi v Macphee*[451] in the judgment of Gibbs CJ, with whom Mason and Wilson JJ agreed. First, his Honour said that Parliament can "treat as an alien any person who was born outside Australia, whose parents were not Australians, and who has not been naturalized as an Australian"[452] - a less than complete alignment of the concepts of citizenship and alienage. That passage was quoted with approval in *Nolan v Minister for Immigration and Ethnic Affairs*.[453] It was on the basis of *Nolan* that later cases have emphasised the importance of citizenship in determining whether someone is an alien,[454] yet it is clear that the underlying dicta never completely equated the two.

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444 See *Nationality and Citizenship Act 1948* (Cth), which commenced in 1949, later renamed the *Australian Citizenship Act 1948* (Cth).

445 In *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, it was held by a 4-3 majority that a British citizen who came to Australia in 1966 was not subject to the aliens power. In *Shaw* (2003) 218 CLR 28, a differently composed 4-3 majority held that a British citizen who came to Australia in 1974 was so subject. The minority held that only British citizens arriving after 3 March 1986, being the date of coming into force of the *Australia Act 1986* (Cth) and the *Australia Act 1986* (UK), were aliens: *Shaw* (2003) 218 CLR 28 at 48 [51], 66-67 [109]-[111], 84-85 [177].

446 See, eg, *Robtelmes v Brenan* (1906) 4 CLR 395.

447 *Nationality and Citizenship Act* (as enacted), s 5(1).

448 *Nationality and Citizenship Act* (as enacted), s 7(1).

449 *Nationality and Citizenship Act* (as enacted), ss 7(2) and 12(2).

450 See *Nolan* (1988) 165 CLR 178 at 185-186.

451 (1982) 151 CLR 101.

452 *Pochi* (1982) 151 CLR 101 at 109-110.

453 (1988) 165 CLR 178 at 185.

454 See, eg, *Lim* (1992) 176 CLR 1 at 25; *Shaw* (2003) 218 CLR 28 at 35 [2], 46-47 [47], 53 [69]-[71].

310 Second, Gibbs CJ in *Pochi* also identified the limits of any reliance on a statutory concept in determining alienage[455] - in a way that was echoed years later in *Singh*[456] - by observing that "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". What was said in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame*[457] does not detract from this point. That case concerned a Territory that was becoming an independent State. What had been given by statute under the Territories power in s 122 of the *Constitution* could be taken away by statute.

311 Thus, statements about the importance of citizenship are to be understood as laying down a guiding principle, not an absolute rule. As Toohey J explained in *Cunliffe v The Commonwealth*,[458] referring to *Nolan*, "an alien can *generally* be defined as a person born out of Australia of parents who were not Australian citizens and who has not been naturalized under Australian law or a person who has ceased to be a citizen by an act or process of denaturalization" (emphasis added). Or, as Gleeson CJ and Heydon J explained in *Koroitamana v The Commonwealth*,[459] "*[w]ithin the limits of the concept of 'alien' in s 51(xix)*, it is for Parliament to decide who will be treated as having the status of alienage, who will be treated as citizens, and what the status of alienage, or non-citizenship, will entail" (emphasis added). Indeed, any general proposition about the constitutional importance of the statutory concept of citizenship is qualified by the very limits that Gibbs CJ identified in *Pochi*.[460]

312 None of this is to accept the submission of Victoria, intervening, that Aboriginality is *equivalent* to citizenship.

Alienage and birthplace

313 It is several centuries too late to treat birthplace as determinative of alienage. Although historically birthplace determined alienage at common law,[461] that position had been modified by statute well before Federation,[462] including in the eighteenth century.[463] As *Singh* makes plain, birthplace is not the controlling consideration; a person born in Australia can nonetheless be an alien.[464]

314 The significance of birthplace, in the case of Aboriginal Australians, is also doubtful as a matter of history. Aboriginal Australians were regarded as British subjects following settlement.[465] And those Aboriginal Australians who were considered subjects of the Crown were not limited to those who were born in the territory after its acquisition. Status as a British subject extended to all inhabitants. As Governor Hindmarsh proclaimed in South Australia in 1836, the Crown had extended "the same protection to the native population as to the rest of His Majesty's subjects",[466] not merely those born at a particular time. That

455 (1982) 151 CLR 101 at 109.
456 (2004) 222 CLR 322 at 382-383 [151]-[153].
457 (2005) 222 CLR 439 at 458-459 [34]-[35].
458 (1994) 182 CLR 272 at 374-375.
459 (2006) 227 CLR 31 at 38 [11].
460 (1982) 151 CLR 101 at 109. See also *Singh* (2004) 222 CLR 322 at 329 [4].
461 See *Calvin's Case* (1608) 7 Co Rep 1a [77 ER 377].
462 *Singh* (2004) 222 CLR 322 at 395 [190].
463 See, eg, *British Nationality Act 1730* (4 Geo 2 c 21); *British Nationality Act 1772* (13 Geo 3 c 21).
464 (2004) 222 CLR 322.
465 *Mabo [No 2]* (1992) 175 CLR 1 at 38.
466 Quoted in Bennett and Castles (eds), *A Source Book of Australian Legal History: Source Materials from the Eighteenth to the Twentieth Centuries* (1979) at 258.

was in accordance with established principle.[467]

315 The same was true of later territorial acquisitions. Indigenous communities in the Torres Strait and elsewhere were not isolated from other communities living closer to and under the control of what, at Federation, was British New Guinea. British New Guinea was not accepted by the Commonwealth as a Territory until the enactment of the *Papua Act 1905* (Cth).[468] The Murray Islands were not annexed by Queensland until 1879.[469] Before annexation, the Murray Islands were not part of Her Majesty's dominions.[470] It cannot be concluded that some of the persons associated with these islands, but not others, were non-aliens at Federation.

Alienage and foreign allegiance

316 Foreign allegiance or citizenship may be an important factor relevant to alienage in many cases.[471] But it, too, cannot be determinative of the scope of the power in s 51(xix). If the position were otherwise, stateless people would be outside the power and this Court has held that not to be the case.[472] Any attempt to delineate alienage exclusively by reference to foreign allegiance or citizenship therefore falls at the first hurdle it encounters.

317 No less importantly, it is not the case, contrary to the Commonwealth's submissions, that foreign citizenship, even if held alongside Australian citizenship, is sufficient in itself to bring a person within the scope of the aliens power. Whether an individual has the rights, privileges and obligations of a subject or citizen of a foreign power is a matter that will be determined according to the law of that foreign power. If a foreign power's conferral of such rights and privileges or imposition of obligations on a person were enough to bring the person within the aliens power, dual citizens would, for that fact alone, be within that power.

318 Observing that a "non-alien" can be a "dual citizen" who has dual rights, privileges and obligations is not inconsistent. A person can be a subject or citizen of a foreign power, or be entitled to the rights and privileges of a subject or citizen of a foreign power, and not be an alien.[473] Were it otherwise, a potentially very large portion of Australian citizens would be subject to the aliens power.

319 Indeed, had the framers of the *Constitution* intended to make "aliens" in s 51(xix) a test of foreign allegiance, they could have used the language employed in s 44(i), which identifies any person who "is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power". But they did not do so.[474]

320 Moreover, it would be problematic for a constitutional head of power to turn exclusively on foreign law, or for the scope of a constitutional head of power to be determined by application of foreign law. Determining the scope of a constitutional head of power exclusively on the basis of foreign law is no less problematic than allowing citizenship, as an

467 See *Campbell v Hall* (1774) 1 Cowp 204 [98 ER 1045].
468 See *Papua Act*, s 5. The United Kingdom had previously annexed British New Guinea in 1884: Griffin, Nelson and Firth, *Papua New Guinea: A Political History* (1979) at 8-9.
469 *Mabo [No 2]* (1992) 175 CLR 1 at 20-21.
470 *Mabo [No 2]* (1992) 175 CLR 1 at 19.
471 See *Singh* (2004) 222 CLR 322 at 398 [200], 400 [205].
472 *Singh* (2004) 222 CLR 322 at 395 [190]. See *Koroitamana* (2006) 227 CLR 31.
473 cf *Singh* (2004) 222 CLR 322 at 400 [205].
474 See *Official Record of the Debates of the Australasian Federal Convention* (Sydney), 21 September 1897 at 1012-1013.

Australian statutory concept, to define the parameters of a constitutional head of power. In contrast, s 44(i) of the *Constitution*, which expressly invokes the concept of foreign allegiance, is not a head of legislative power.

321 Contrary to the submissions of the Commonwealth, *Singh* is not authority for the proposition that holding foreign citizenship, without more, is sufficient to bring a person within the scope of the aliens power. *Singh* decided that a non-citizen (who was not an Aboriginal Australian) born in Australia who held foreign citizenship was an alien. As a matter of precedent, *Singh* says nothing about whether an Australian citizen who also holds foreign citizenship (a dual citizen) is an alien or whether a non-citizen who is an Aboriginal Australian is an alien.

322 It is true that Gummow, Hayne and Heydon JJ referred in *Singh* to foreign allegiance as the "central characteristic" of alienage,[475] a description which was later invoked, in slightly different wording, in *Ame*.[476] But to say that foreign allegiance is the "central characteristic" of alienage, or even its "defining characteristic", is only to identify the importance of such allegiance, which may have been particularly evident on the facts of *Singh*. It is not the same as what the Commonwealth asserts: that foreign allegiance is *in every case determinative*, such that a vast portion of the Australian population are able to be treated by the Parliament as "aliens" within s 51(xix), irrespective of whether they also hold Australian citizenship or, as in this case, whether they are Aboriginal Australians. And that submission should not be accepted. It is contrary to authority and principle and it is impractical.

Alienage and Commonwealth power

323 The Commonwealth Parliament has not purported to define alienage for constitutional purposes. The parties and the intervener did not submit that it had legislated to the effect that particular classes of persons were aliens. In particular, it has not legislated to the effect that persons in the position of the plaintiffs, Aboriginal Australians born overseas and without Australian citizenship, are aliens. It has not addressed itself to the unique position of Aboriginal Australians.

324 Thus, the question of whether, or to what extent, the Parliament has power to make a law that persons who are non-aliens shall be aliens need not be decided here because the Parliament has made no law with respect to the alien or non-alien status of Aboriginal Australians. Neither the *Australian Citizenship Act 2007* (Cth) or its predecessor, nor the *Migration Act*, is to be read as having that operation or effect and no party or the intervener in this case suggested to the contrary.

325 But it is also unclear whether, as a constitutional matter, the Parliament *could* enact such a definition.[477] That is unsurprising. As was said above, the scope of the word "aliens" under s 51(xix) of the *Constitution* is a question of Commonwealth legislative power. It determines those to whom the constitutional power extends. One aspect of the "aliens" power, or perhaps more accurately the "naturalization" power also contained in s 51(xix),

475 (2004) 222 CLR 322 at 398 [200].
476 (2005) 222 CLR 439 at 458 [35].
477 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 512-513 [101]-[103]; Crawford, "The Entrenched Minimum Provision of Judicial Review and the Limits of 'Law'" (2017) 45 *Federal Law Review* 569.

as well as of the immigration power in s 51(xxvii), is the power to define a concept of citizenship. As Gleeson CJ wrote in *Singh*:[478]

> "Parliament, under paras (xix) and (xxvii) of s 51, has the power to determine the legal basis by reference to which Australia deals with matters of nationality and immigration, to create and define the concept of Australian citizenship, to prescribe the conditions on which such citizenship may be acquired and lost, and to link citizenship with the right of abode."

326 But, although important, this power to define, for some purposes, who are members of the Australian community does not constitute a power to define the scope of the aliens power under s 51(xix). Indeed, Gleeson CJ went on to expound the limits of the passage just quoted:[479]

> "The qualification is that 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 *Constitution*. Within the class of persons who could answer that description, Parliament can determine to whom it will be applied, and with what consequences. Alienage is a status, and, subject to the qualification just mentioned, Parliament can decide who will be treated as having that status for the purposes of Australian law and, subject to any other relevant constitutional constraints, what that status will entail.
>
> Everyone agrees that the term 'aliens' does not mean whatever Parliament wants it to mean. Equally clearly, it does not mean whatever a court, or a judge, wants it to mean."

327 This qualification is important: Parliament cannot determine the breadth of its own power. And, as a matter of power, enactments pursuant to the aliens power, including those that purport to define its scope, cannot apply to someone who is not, constitutionally speaking, an alien. To suggest that Parliament has the power, *under* the aliens power, to define alienage status, risks circularity - it presupposes, as the basis for validity of the law, that the people to whom the law applies are aliens within the constitutional meaning.

328 It remains the task of this Court to assess the validity of any exercise of legislative power under the *Constitution*, including under the aliens power in s 51(xix). There is no constitutional head of power that relinquishes to Parliament the responsibility of determining the scope of that power. As Marshall CJ said in *Marbury v Madison*[480] - in words that have been described as "axiomatic" in Australian law[481] - "[i]t is emphatically the province and duty of the judicial department to say what the law is".

329 Fullagar J explained this principle in *Australian Communist Party v The Commonwealth*:[482]

> "The validity of a law or of an administrative act done under a law cannot be made to depend on the opinion of the law-maker, or the person who

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478 (2004) 222 CLR 322 at 329 [4] (footnote omitted), citing *Te* (2002) 212 CLR 162 at 173 [31]. See also *Hwang v The Commonwealth* (2005) 80 ALJR 125 at 128 [10]; 222 ALR 83 at 86-87.

479 *Singh* (2004) 222 CLR 322 at 329 [4]-[5] (footnote omitted).

480 (1803) 5 US 137 at 177.

481 *Australian Communist Party* (1951) 83 CLR 1 at 262-263; *Harris v Caladine* (1991) 172 CLR 84 at 134-135; *The Commonwealth v Mewett* (1997) 191 CLR 471 at 547; *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at 570 [66]; *Singh* (2004) 222 CLR 322 at 330 [7]; *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1 at 48 [101].

482 (1951) 83 CLR 1 at 258.

> is to do the act, that the law or the consequence of the act is within the constitutional power upon which the law in question itself depends for its validity. A power to make laws with respect to lighthouses does not authorize the making of a law with respect to anything which is, in the opinion of the law-maker, a lighthouse."

330 Thus, as was said in *Singh* by Gummow, Hayne and Heydon JJ, in relation to Fullagar J's dictum:[483]

> "a power to make laws with respect to aliens does not authorise the making of a law with respect to any person who, in the opinion of the Parliament, is an alien. That Parliament has made a law which a party or intervener asserts to be a law with respect to aliens presents the *constitutional question* for resolution; it does not provide an answer." (emphasis added)

It is the Court's role to resolve that constitutional question - the constitutional validity of legislation. The task is substantive, not merely formal. The Court does not defer to Parliament's understanding of the meaning of a constitutional term. Just as Parliament cannot call anything it likes a lighthouse, a trade mark[484] or a marriage,[485] it cannot call any person it likes an alien.

331 Assessing the position of Aboriginal Australians under the aliens power should not, in this context, be viewed as creating an "exception" or a limiting "implication". The question remains the scope or extent of the aliens power in s 51(xix) of the *Constitution*, and whether it supports the exercise of legislative power in particular circumstances - namely, the circumstances of Aboriginal Australians in the position of the plaintiffs.

Conclusion

332 Contrary to the assumption that ran throughout the argument of the Commonwealth, whether either or both of the plaintiffs can lawfully be removed from Australia does not turn only on the operation of the *Australian Citizenship Act* or the *Migration Act*. Nor does it turn only on the vagaries of foreign citizenship laws. The determinative point in these cases is constitutional rather than statutory.

333 Whether either plaintiff is an alien or a non-alien is fundamentally a question of otherness. As Gummow, Hayne and Heydon JJ said in *Singh*,[486] that more fundamental question is not answered by deciding whether either plaintiff meets the statutory description of "Australian citizen". As will be shown, Aboriginal Australians occupy a unique or *sui generis* position in this country, such that they are not aliens.

334 And, because the determinative question is constitutional, not statutory, no assistance can be drawn from the *Racial Discrimination Act 1975* (Cth) as it can and must be understood in connection with the application of the *Native Title Act 1993* (Cth).[487] Neither of those Acts (nor any other Act of the Parliament) determines the proper construction of the *Constitution*.

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483 (2004) 222 CLR 322 at 383 [153].
484 *Attorney-General for NSW v Brewery Employes Union of NSW* (1908) 6 CLR 469 at 518, 530, 540-541.
485 *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 at 461 [33].
486 (2004) 222 CLR 322 at 382-383 [150]-[153].
487 See *Ward* (2002) 213 CLR 1 at 96-112 [98]-[140].

Aboriginal Australians

335 Aboriginal Australians are not outsiders or foreigners - they are the descendants of the first peoples of this country, the original inhabitants, and they are recognised as such. None of the events of settlement, Federation or the advent of citizenship in the period since Federation have displaced the unique position of Aboriginal Australians.

European settlement

336 Aboriginal Australians have a long history in and with "country". Deane J estimated the period of Indigenous settlement as "at least" 40 millennia before the arrival of the British settlers.[488] However, the period of Indigenous settlement is likely to be tens of thousands of years longer.[489]

337 From the time of European settlement, the Crown has progressively asserted sovereignty over the land and waters that together now make up the territory of Australia. As Brennan J observed in *Mabo [No 2]*, "Aboriginal peoples have been substantially dispossessed of their traditional lands"[490] by the Crown. It was the dispossession of Aboriginal Australians, starting in 1788 and expanding "parcel by parcel", that underwrote the development of this nation.[491] Whether there has been an acquisition of territory by the Crown is not justiciable, but the consequences of acquisition are justiciable.[492] Specifically, the connection of Aboriginal Australians with country was not severed by European settlement in the late eighteenth and early nineteenth centuries. The assertion of sovereignty by the British Crown over the land left Aboriginal Australians' connection with the land and waters intact.[493]

338 This connection with land and waters survived settlement. Settlement and Crown radical title did not extinguish that connection, one legal consequence of the connection being recognised by native title.[494]

339 What we call "native title" takes its content from the traditional laws acknowledged, and the traditional customs observed, by the Indigenous inhabitants.[495] Native title is both more than, and different from, what common lawyers identify as property rights. And 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.[496] That is not a new problem.[497]

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488 *Gerhardy v Brown* (1985) 159 CLR 70 at 149.
489 See Turney et al, "Early Human Occupation at Devil's Lair, Southwestern Australia 50,000 Years Ago" (2001) 55 *Quaternary Research* 3; Clarkson et al, "Human occupation of northern Australia by 65,000 years ago" (2017) 547 *Nature* 306; Griffiths, *Deep Time Dreaming: Uncovering Ancient Australia* (2018), ch 5.
490 (1992) 175 CLR 1 at 68.
491 *Mabo [No 2]* (1992) 175 CLR 1 at 69.
492 *Mabo [No 2]* (1992) 175 CLR 1 at 32.
493 See fn 423 above.
494 *Mabo [No 2]* (1992) 175 CLR 1 at 51-52.
495 *Mabo [No 2]* (1992) 175 CLR 1 at 58.
496 *Fejo* (1998) 195 CLR 96 at 128 [46]; *Yarmirr* (2001) 208 CLR 1 at 37 [9], 51 [48]-[49]; *Ward* (2002) 213 CLR 1 at 102 [113], quoting *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 437; *Yorta Yorta* (2002) 214 CLR 422 at 441-447 [37]-[56].
497 cf *Mabo [No 2]* (1992) 175 CLR 1; *Yorta Yorta* (2002) 214 CLR 422.

340 *Mabo [No 2]* recognised the continued subsistence of native title rights and interests after European settlement. It acknowledged the fragility of those rights and interests and their susceptibility to extinguishment. The subsequent enactment of the *Native Title Act* and the many cases that have been brought about the nature and extent of native title rights and interests in respect of particular parts of this country should not obscure, as was stated earlier, the deeper truth recognised by *Mabo [No 2]*: that the Indigenous peoples of Australia are the first peoples of this country, and that the connection between the Indigenous peoples of Australia and the land and waters that now make up the territory of Australia was *not* severed or extinguished by European settlement.[498]

341 That connection is not a species of what European law understands as ownership or possession.[499] It is a connection with land where the land "owns" the people and the people are responsible for the land;[500] a two-way connection rather than the one-way connection common lawyers identify as rights *with respect to* or *over* an article of property. It is that two-way connectedness that the law has tried to capture by speaking of spiritual connection.[501] It is wrong to see the connection to land and waters through the eyes of the common lawyer as a *one-way* connection.

Federation

342 The connection of Aboriginal Australians with land and waters was not severed by Federation and the formation of the Commonwealth. Nothing in the *Constitution* purports to sever Aboriginal Australians' connection with the land or waters. And nothing in the Convention Debates purported to treat Aboriginal Australians as aliens or within the reach of the aliens power.

343 Otherness, or being from *outside*, was the focus in the Convention Debates when discussing the aliens power. As Mr O'Connor said:[502]

> "It appears to me quite clear, as regards the right of any person from the outside to become a member of the Commonwealth, that the power to regulate immigration and emigration, and *the power to deal with aliens*, give the right to define who shall be citizens, *as coming from the outside world*. Now, in regard to the citizens of the states - that is, *those who are here already*, apart from these laws - every citizen of a state having certain political rights is entitled to all the rights of citizenship in the Commonwealth, necessarily without a definition at all." (emphasis added)

344 Indeed, discussions of "aliens" in the Convention Debates were generally directed at supposedly "foreign" peoples, such as those originating from East Asia and India.[503] Nothing

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498 See fn 423 above. See also Hill, "Blackfellas and Whitefellas: Aboriginal Land Rights, The *Mabo* Decision, and the Meaning of Land" (1995) 17 *Human Rights Quarterly* 303; Russell, *Recognizing Aboriginal Title: The Mabo Case and Indigenous Resistance to English-Settler Colonialism* (2005), ch 8; Perry and Lloyd (eds), *Australian Native Title Law*, 2nd ed (2018) at [ch1.40]-[ch1.70].

499 *Yarmirr* (2001) 208 CLR 1 at 37-39 [11]-[16]; *Ward* (2002) 213 CLR 1 at 64-65 [14], 93 [88], [90]; *Griffiths* (2019) 93 ALJR 327 at 368 [153]; 364 ALR 208 at 255.

500 Behrendt and Kelly, *Resolving Indigenous Disputes* (2008) at 89; Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (2015) at 31.

501 *Yanner* (1999) 201 CLR 351 at 373 [38]; *Ward* (2002) 213 CLR 1 at 64-65 [14]; *Griffiths* (2019) 93 ALJR 327 at 341 [23]; 364 ALR 208 at 219.

502 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 2 March 1898 at 1754; see also at 1756.

503 See, eg, *Official Report of the National Australasian Convention Debates* (Sydney), 3 April 1891 at 689,

in the Debates contemplated that Aboriginal Australians - peoples who came from the land and waters that now make up Australia - would be within that power.

345 At Federation, many, perhaps most, Indigenous people in Australia would have been born in Australia. And many would have traced their ancestry through Indigenous ancestors. But those Indigenous people who, at Federation, were non-aliens were not limited to persons having both characteristics of being born in Australia and having only Indigenous ancestors.

346 As the events of the Stolen Generations would later show, Indigenous societies in Australia have long included, and accommodated as members of their community, persons who were not born of parents who each traced their ancestry entirely through Indigenous ancestors. Indeed, the whole premise for the programs that created the Stolen Generations (so flawed as they were) was to remove children who would otherwise have taken their place in the Indigenous communities from which they were taken.[504]

Sovereignty and territory

347 The sovereignty of the Commonwealth is asserted over territory, territory to which the common law recognises that Aboriginal Australians have a unique connection.[505] And what the common law then acknowledged about Aboriginal Australians is relevant to interpreting the scope of s 51(xix) because the common law may inform the understanding of constitutional concepts.[506] The issue is what follows from the continued two-way connection of Aboriginal Australians with land and waters that *Mabo [No 2]* held could and did survive the assertion of sovereignty.

348 To speak of a polity or body politic, which in the case of Australia is a nation-state, or the sovereignty exercised by that polity, without considering its territorial dimension is to overlook one of the essential requirements of a polity and of sovereignty.[507] The Commonwealth of Australia is a "territorial community".[508] Although forms of extraterritorial authority are possible,[509] Australian sovereignty is tied essentially to the territory of Australia. As Brennan J said in *Mabo [No 2]*, "a sovereign enjoys supreme legal authority *in and over a territory*"[510] (emphasis added). Sovereignty entails, as Jacobs J said in *New South Wales v The Commonwealth* ("**the *Seas and Submerged Lands Case***"), "a power and right, recognized or effectively asserted *in respect of a defined part of the globe*, to govern in respect of that part to the exclusion of nations or states or peoples occupying other parts of the globe"[511] (emphasis added). It cannot be divorced from that territory.

702-703; *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 27 January 1898 at 228-230, 234-235, 242; *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 28 January 1898 at 248, 252; *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 2 March 1898 at 1763; *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 3 March 1898 at 1782, 1791-1792.

504 See generally Human Rights and Equal Opportunity Commission, *Bringing them home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997).

505 See fn 423 above.

506 *In re Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508 at 521; *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 457.

507 Montevideo Convention on the Rights and Duties of States (1933), Art 1(b); Crawford, *Brownlie's Principles of Public International Law*, 9th ed (2019) at 118-119.

508 *R v Sharkey* (1949) 79 CLR 121 at 153.

509 *XYZ v The Commonwealth* (2006) 227 CLR 532 at 536 [5].

510 (1992) 175 CLR 1 at 48.

511 (1975) 135 CLR 337 at 479.

349 The connection recognised by Australian law between Aboriginal Australians and the land and waters of this country therefore cannot be dismissed as irrelevant to membership of the present polity of the Commonwealth of Australia, a polity established on the same land and waters. To assert sovereignty over land or waters where the connection of Aboriginal Australians has not been severed[512] requires that those connected to the land or waters in that way are not classified as aliens, or as "other" or foreign to the land or waters of the polity. Recognition of that connection in the further context of s 51(xix) of the *Constitution* does not "fracture a skeletal principle of our legal system".[513] On the contrary, to ignore or refuse that recognition would render the determination of the constitutional question incomplete.

350 Federation created the Commonwealth of Australia, a polity that "sprang from the brain of its begetters armed and of full stature".[514] But that polity was asserted and established territorially - on the same territory, with the same people, that existed prior to the formation of the Commonwealth. It was not formed out of nothing. And it did not wipe the slate clean of tens of thousands of years of history.

351 It is necessary to say something further about the foundations of Australian sovereignty. Until Federation, "sovereignty" in the (expanding) Australian colonies was the sovereignty of the British Crown. The adoption of the federal compact by referendum and the passing of the *Commonwealth of Australia Constitution Act 1900* (Imp) at Federation made it sensible to speak of *legal* sovereignty resting with the Parliament at Westminster, or the British Crown, but *popular* sovereignty resting with the people of Australia.[515] And so much was inferentially recognised by Quick and Garran when they dedicated their work on the *Constitution* "To the People of Australia".[516]

352 The continued application of the *Colonial Laws Validity Act 1865* (Imp) (28 & 29 Vict c 63) may have permitted a conclusion that the colonies (and later, the States, as distinct from the Commonwealth) were to some extent subject to the continued possibility of the exercise of power by the Parliament at Westminster. The *Statute of Westminster 1931* (UK), adopted by the Commonwealth Parliament in 1942,[517] probably marked the end of that possibility.[518] To that (limited) extent, there may have been continuing utility in distinguishing between *legal* and *political* sovereignty in Australia up to (and perhaps for some years after) 1942. But no matter whether that is so, at least since the *Australia Acts*[519] (and almost certainly for some time before that) it has been recognised that sovereign power resides in the people in the sense that the powers of government belong to and are derived from the people.[520]

353 The roots of Federation in popular sovereignty (and the dominant force of that idea today as the legitimating force of the *Constitution*) are consistent with the conclusion that the "people of Australia" *necessarily* includes Indigenous peoples.

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512 See fn 423 above.
513 *Mabo [No 2]* (1992) 175 CLR 1 at 43.
514 *Uther* (1947) 74 CLR 508 at 530.
515 See Finn, "A Sovereign People, A Public Trust", in Finn (ed), *Essays on Law and Government - Volume 1: Principles and Values* (1995) 1 at 2-3.
516 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at v.
517 *Statute of Westminster Adoption Act 1942* (Cth).
518 *Sharkey* (1949) 79 CLR 121 at 149 per Dixon J; cf at 136 per Latham CJ.
519 *Australia Act 1986* (Cth); *Australia Act 1986* (UK).
520 *University of Wollongong v Metwally* (1984) 158 CLR 447 at 476-477; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 72; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 137.

354 That few Indigenous people were eligible to vote, or in fact voted, in the Federation referenda is irrelevant. The franchise was then limited. The Australian Electoral Commission records that:[521]

> "Only South Australian and Western Australian women voted in the referendums. Indigenous Australians, Asians, Africans and Pacific Islanders were not allowed to vote in Queensland or Western Australia unless they owned property. In several colonies poor people in receipt of public assistance could not vote and Tasmania required certain property qualifications."

Exclusion of some Indigenous people from the vote was no more (or less) significant than the exclusion of many women. Voting in the referenda was not compulsory. A majority of voters voted in favour of Federation but they did not constitute a majority of the population.

355 The referendum results underpinned the union of the people of Australia in the Federation. Those who were united necessarily included those whom the *Constitution*, until 1967,[522] referred to as "[t]he people of ... the aboriginal race in any State"[523] or "aboriginal natives".[524] They were part of the people of the five colonies referred to in the preamble to the *Commonwealth of Australia Constitution Act 1900* (Imp); they were part of the people of the six colonies referred to in s 3 of that Act which, by proclamation, were "united in a Federal Commonwealth under the name of the Commonwealth of Australia".[525] They were, and they are, part of the "people of Australia".

356 Recognition of Indigenous peoples as a part of the "people of Australia" is directly contrary to accepting any notion of Indigenous sovereignty persisting after the assertion of sovereignty by the British Crown. Recognition of Indigenous peoples as part of the "people of Australia" denies that Indigenous peoples retained, or can now maintain, a sovereignty that is distinct or separate from any other part of the "people".[526]

357 One of the central pillars of *Mabo [No 2]* is that the assertion of sovereignty brought with it the common law and that, consistent with the legally unchallengeable fact of sovereignty, the common law can *and does* recognise that Indigenous peoples can and do possess certain rights and duties that are not possessed by, and *cannot be possessed by*, the non-Indigenous peoples of Australia. Those who have these rights and duties are determined by Indigenous laws and customs. They include rights and duties with respect to land and waters within the territory of Australia. Those to whom Indigenous laws and customs give those rights and duties with respect to land and waters within the territory of Australia are, and must be recognised as being, part of the "people of Australia" and not aliens.

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521 Australian Electoral Commission, *Federation and the People's Vote 1897-1903 Fact Sheet 1*, available at <https://www.aec.gov.au/about_aec/Publications/Fact_Sheets/fact_sheets/fact1.pdf>.

522 *Constitution Alteration (Aboriginals) 1967* (Cth). See generally Attwood and Markus, *The 1967 Referendum: Race, Power and the Australian Constitution*, 2nd ed (2007).

523 *Constitution*, s 51(xxvi) (as enacted).

524 *Constitution*, s 127 (as enacted).

525 See also *Commonwealth of Australia Constitution Act 1900* (Imp), s 6.

526 Finn, "A Sovereign People, A Public Trust", in Finn (ed), *Essays on Law and Government - Volume 1: Principles and Values* (1995) 1 at 5. See also *Coe v The Commonwealth* (1993) 68 ALJR 110; 118 ALR 193.

Since Federation

358 Nothing since Federation has turned Aboriginal Australians into aliens. The *Nationality and Citizenship Act* did not do so; it did not address Aboriginal Australians.[527]

359 Similarly, the commencement of the *Australia Acts* said nothing about, and certainly did not diminish, the connection of Aboriginal Australians with Australia. On the minority approach in *Shaw v Minister for Immigration and Multicultural Affairs*, the *Australia Acts* severed the connection between the United Kingdom and Australia such that citizens of the United Kingdom who thereafter migrated to Australia did so as aliens.[528] The passage of those Acts relevantly did no more than confirm Australia's independence from the United Kingdom.

360 In the nearly 120 years since Federation, awareness, understanding and acknowledgement of the connection between Aboriginal Australians and this country have increased. By contrast, the significance of the notion of "British subject" in Australia has diminished.[529] Over the same period, the franchise was extended to Aboriginal Australians;[530] a referendum on 27 May 1967 amended the *Constitution* to remove discriminatory references to Aboriginal Australians;[531] and the law recognised that, according to their laws and customs, Aboriginal Australians have a connection with country and that connection gave rise to rights and interests in land and waters through native title, first judicially, then statutorily.[532] These developments are not consistent with Aboriginal Australians becoming aliens in that period.

361 Before dealing further with the legal concept of Aboriginality, it is desirable to draw together some important elements of what has been said.

362 Native title is a significant acknowledgement of the position of Indigenous peoples that took place long after Federation. Native title recognises that, according to their laws and customs, Aboriginal Australians have a connection with country and have rights and interests in land and waters.[533] But those laws and customs are not limited to rights and interests. They entail obligations consistent with Aboriginal Australians being custodians of the land and waters.[534]

363 It is connection with land and waters that is unique to Aboriginal Australians. As history has shown, that connection is not simply a matter of what the common law would classify as property.[535] It is a connection which existed and persisted before and beyond settlement, before and beyond the assertion of sovereignty and before and beyond Federation. It is older and deeper than the *Constitution*. And the connection with land and waters that is unique to Aboriginal Australians does not exist

527 See [306]-[308] above.
528 (2003) 218 CLR 28 at 48 [51], 66-67 [109]-[110], 84-85 [177].
529 cf *Re Patterson* (2001) 207 CLR 391; *Shaw* (2003) 218 CLR 28; *Nationality and Citizenship Act* (as enacted); *Australia Act 1986* (Cth).
530 At the federal level, see *Commonwealth Electoral Act 1962* (Cth). The last State to extend the franchise to Aboriginal Australians was Queensland, in 1965: *Elections Acts Amendment Act of 1965* (Qld).
531 See *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 272-273; *Constitution Alteration (Aboriginals) 1967* (Cth).
532 *Mabo [No 2]* (1992) 175 CLR 1; *Native Title Act*, ss 3, 4(1), 10, 223.
533 *Yorta Yorta* (2002) 214 CLR 422 at 440-441 [33]-[35].
534 See *Mabo [No 2]* (1992) 175 CLR 1 at 99; *Ward* (2002) 213 CLR 1 at 64-65 [14], 93 [88], [90]; *Griffiths* (2019) 93 ALJR 327 at 368 [153]; 364 ALR 208 at 255.
535 See [341] above.

in a vacuum.[536] It was not and is not uniform.[537] It was not and is not static; cultures change and evolve.[538] And because the spiritual or religious is translated into the legal,[539] the integrated view of the connection of Aboriginal Australians to land and waters is fragmented. But the tendency to think only in terms of native title rights and interests must be curbed.

364 Native title is one legal consequence flowing from common law recognition of the connection between Aboriginal Australians and the land and waters that now make up Australia. That Aboriginal Australians are not "aliens" within the meaning of that constitutional term in s 51(xix) is another.

365 Just as dispossession of traditional land and waters does not strip Aboriginal Australians of their rights and interests,[540] it does not strip them of their connection with land and waters. Indeed, the *Native Title Act* provides that extinguishment of native title rights and interests does not strip Aboriginal Australians of their connection with land and waters and provides, so far as possible, compensation for loss where "the consequences of acts can be incremental and cumulative", recognising that "the people, the ancestral spirits, the land and everything on it are 'organic parts of one indissoluble whole' ".[541] Similarly, "[i]t is immaterial that the laws and customs have undergone some change since the Crown acquired sovereignty provided the general nature of the connexion between the indigenous people and the land remains"[542] and has not been substantially interrupted.[543]

Legal concept of Aboriginality

366 As was said at the outset of these reasons, membership of an Indigenous people was explained, in *Mabo [No 2]*,[544] by reference to biological descent, self-identification and recognition by an elder or elders enjoying traditional authority:

> "Membership of [an] indigenous people depends on biological descent from the indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among those people."

367 Although social concepts of Aboriginality may differ or be broader, the issue here is the legal concept.[545] Each part of the legal concept is significant *and* necessary - biological descent, self-identification and recognition by an elder or elders enjoying traditional authority.

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536 *Yorta Yorta* (2002) 214 CLR 422 at 445-446 [49]-[50].
537 *Mabo [No 2]* (1992) 175 CLR 1 at 58; *Ward* (2002) 213 CLR 1 at 95 [95]; *Yorta Yorta* (2002) 214 CLR 422 at 444 [46], 455 [83], 456-457 [89]-[90].
538 *Mabo [No 2]* (1992) 175 CLR 1 at 61, 70, 110, 192; *Yarmirr* (2001) 208 CLR 1 at 132 [295]; *Yorta Yorta* (2002) 214 CLR 422 at 444 [46], 455 [83], 463-464 [114]. See also Macdonald and Bauman, "Concepts, hegemony, and analysis: Unsettling native title anthropology", in Bauman and Macdonald (eds), *Unsettling Anthropology: The Demands of Native Title on Worn Concepts and Changing Lives* (2011) 1 at 2; Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)*, Report No 126 (2015), ch 5; Perry and Lloyd (eds), *Australian Native Title Law*, 2nd ed (2018) at [ch1.190].
539 *Ward* (2002) 213 CLR 1 at 65 [14]. See also *Yarmirr* (2001) 208 CLR 1 at 37-38 [11].
540 *Griffiths* (2019) 93 ALJR 327 at 377 [206], 379 [223]; 364 ALR 208 at 267, 271.
541 *Griffiths* (2019) 93 ALJR 327 at 377 [206]; 364 ALR 208 at 267.
542 *Mabo [No 2]* (1992) 175 CLR 1 at 70. See also *Yarmirr* (2001) 208 CLR 1 at 132 [295]; *Yorta Yorta* (2002) 214 CLR 422 at 444 [46], 455 [83], 463-464 [114].
543 *Yorta Yorta* (2002) 214 CLR 422 at 456 [87].
544 (1992) 175 CLR 1 at 70.
545 cf *Eatock v Bolt* (2011) 197 FCR 261 at 304-305 [188]-[189].

368 As was recognised in *Mabo [No 2]*,[546] biological descent, self-identification and recognition may raise contests which may have to be settled by community consensus or in some other manner prescribed by custom, or by a court acting on evidence which lacks specificity. And they have been.[547] But the fact that such contests have arisen does not and cannot detract from the fact that the legal concept of Aboriginality, at its core, recognises that there is a unique group of Australians, Aboriginal Australians, who are descendants of the original inhabitants of this country and who identify as such and are accepted as such. It is not necessary, in this case, to chart the outer limits of the concept.[548]

369 Nor is the aliens power rendered too uncertain, or unworkable, by this recognition. The power with respect to immigration and emigration under s 51(xxvii) of the *Constitution* operates in the same way: it is a power that cannot apply to those who are absorbed into the Australian community, because they are no longer immigrants.[549] The validity of an exercise of power under s 51(xxvii) depends on the circumstances of those in respect of whom it is exercised, yet there is no suggestion that s 51(xxvii) is thereby uncertain or unworkable.

370 It is necessary to say something further about biological descent, self-identification and recognition. The inquiry is not *just* a question of descent. That is, it is not simply a question of what the *Constitution* calls "race". But to the extent that race is relevant as an aspect of Aboriginality, it is not a concept unknown to the *Constitution.* Indeed, "race" is itself a constitutional term because of the head of power in s 51(xxvi) of the *Constitution*, as amended following the 1967 referendum, which provides for Parliament to make laws with respect to "the people of any race for whom it is deemed necessary to make special laws". The *Constitution* does not prohibit special treatment of a race - something that might be conceivable in response to, for example, historical considerations or current disadvantage. To the contrary, the power in s 51(xxvi) expressly contemplates special laws for particular races. That power has been exercised in ways intended to benefit Aboriginal and other Indigenous people.[550] As a former Chief Justice of this Court has explained in an extrajudicial context:[551]

> "Under the *Constitution*, the Parliament may make special laws concerning the people of any race which, in practice, means Indigenous people ... [T]he *Constitution* empowers the Federal Parliament to make special laws about Indigenous people. That is an important power that has been exercised on several occasions; sometimes controversially. ...
>
> It has been suggested that it is divisive to treat Indigenous people in a special way. The division between Indigenous people and others in this land was made in 1788. It was not made by the Indigenous people. The

546 (1992) 175 CLR 1 at 51-52, 62, 70.

547 See, eg, *Yorta Yorta* (2002) 214 CLR 422; *Griffiths* (2019) 93 ALJR 327; 364 ALR 208. For difficulties with identifying members of claim groups, see, eg, *Davidson v Fesl* [2005] FCAFC 183; *Aplin on behalf of the Waanyi Peoples v Queensland* [2010] FCA 625 at [226]-[267]; *Violet Carr and Others on Behalf of the Wellington Valley Wiradjuri People v Premier of New South Wales* [2013] FCA 200; *Weribone on behalf of the Mandandanji People v Queensland* [2013] FCA 255; *Banjima People v Western Australia [No 2]* (2013) 305 ALR 1.

548 *The Tasmanian Dam Case* (1983) 158 CLR 1 at 274.

549 *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 62-65; *O'Keefe v Calwell* (1949) 77 CLR 261 at 277; *R v Forbes; Ex parte Kwok Kwan Lee* (1971) 124 CLR 168 at 172-173; *R v Director-General of Social Welfare (Vict); Ex parte Henry* (1975) 133 CLR 369 at 373-374, 382.

550 cf Gleeson, "Recognition in Keeping with the Constitution" (2019) 93 *Australian Law Journal* 929 at 935. See, eg, *Native Title Act Case* (1995) 183 CLR 373.

551 Gleeson, "Recognition in Keeping with the Constitution" (2019) 93 *Australian Law Journal* 929 at 936.

> race power in the *Constitution* is now used in practice to make special laws for them."

371 Nor is determining who is an Aboriginal Australian *just* a question of self-identification - do I feel like or identify as an Aboriginal Australian[552]? There is a third and necessary limb - recognition by an Indigenous community. That third limb entails not just community acceptance, but recognition by the elders or other persons enjoying traditional authority.

372 That does not mean, of course, that it is not possible for an Aboriginal Australian to renounce their connection with Australia. Each case will, like every other case concerning renunciation, be assessed on its facts consistent with established principle. That possibility of renunciation is a complete answer to the Commonwealth's contention that, if Aboriginal Australians born overseas who do not hold Australian citizenship and, by birth overseas, owe obligations to a foreign power are not aliens under Australian constitutional law, then Aboriginality might constitute a disability under foreign law.

Conclusion

373 Aboriginal Australians have a unique connection to this country; it is not just ancestry or place of birth or even both. It is a connection with the land or waters under Indigenous laws and customs which is recognised under Australian law. The *Australian Citizenship Act* has not removed or modified that connection. Nor has the Parliament removed or modified that connection by other legislation. Whether the Parliament could remove or modify that connection need not be decided.

374 It is a connection to this country that means that Aboriginal Australians are not foreigners within the constitutional concept of alien under s 51(xix). And it is a connection which means that even if an Aboriginal Australian's birth is not registered and as a result no citizenship is recorded, or an Aboriginal Australian is born overseas without obtaining Australian citizenship, they are not susceptible to legislation made pursuant to the aliens power or detention and deportation under such legislation.

The plaintiffs are not aliens

Mr Thoms

375 Mr Thoms was born on 16 October 1988 in New Zealand. He became a New Zealand citizen upon birth.

376 At the time of his birth, he was entitled to acquire Australian citizenship under s 10B of the *Australian Citizenship Act 1948* (Cth) (as it then stood) because he was a person born outside Australia and his mother was an Australian citizen who had been born in Australia.

377 Mr Thoms first arrived in Australia on 19 December 1988, aged two months. He has resided in Australia since 23 November 1994, when he was granted a Special Category visa. He is not an Australian citizen. He temporarily travelled between Australia and New Zealand on 25 December 1997, 19 January 1998, 23 December 2002 and 8 January 2003. He has not departed Australia since 8 January 2003.

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552 cf *Re Roberts* (2017) 91 ALJR 1018 at 1032-1033 [110]; 347 ALR 600 at 619.

378 Mr Thoms was convicted of an offence against s 339(1)[553] of the *Criminal Code* (Qld) and, on 17 September 2018, was sentenced to 18 months' imprisonment. On 27 September 2018, his visa was cancelled by a delegate of the Minister for Home Affairs under s 501(3A) of the *Migration Act*. On 28 September 2018, he commenced parole but, on that day, he was taken into immigration detention, where he remains.

379 His maternal great-great-grandmother is recorded in the 1938 field notes of anthropologist Norman Tindale as being "Sarah Brennan on Moonie River", a child of Mick Brennan and a "Kunggari" (or Gunggari) woman. Mr Thoms' maternal great-great-grandmother was, through her mother, descended in significant part from people who inhabited Australia immediately prior to European settlement.

380 Mr Thoms identifies, and is accepted by other Gunggari People, as a member of the Gunggari People and is a common law holder of native title recognised by the determinations of native title made by the Federal Court of Australia on 22 June 2012[554] and 5 December 2014.[555] The same is true for his maternal grandmother and mother.

Mr Love

381 Mr Love was born on 25 June 1979 in Papua New Guinea ("**PNG**") and, at the time of his birth, became a citizen of PNG. He is not an Australian citizen. His paternal great-grandparents were descended in significant part from people who inhabited Australia immediately prior to European settlement.

382 His paternal grandfather, Douglas Francis Love, was born in Queensland, enlisted for the Australian Military Forces in 1940 and served on continuous Full Time War Service from 15 May 1940 to 4 February 1946, including 660 days of active service in Australia and 1,145 days of active service overseas including in the Middle East and in what were then the Territories of New Guinea and of Papua. After discharge from the Australian Military Forces, he remained in what was then known as the Territory of Papua.

383 Mr Love's father was born in the Territory of Papua and, upon birth, became an Australian citizen by reason of s 10(1) of the *Nationality and Citizenship Act* (as it then stood), having been born in "Australia", as defined in s 5(1) of that Act to include the Territory of Papua. Mr Love's mother was, at the time of Mr Love's birth, a citizen of PNG.

384 Mr Love moved permanently to Australia on 25 December 1984, at age five, and has held a permanent residency visa since then; since 1 September 1994 this has been in the form of a BF Transitional (Permanent) visa. He has only departed Australia once, in 1985, to visit PNG.

385 Mr Love was convicted of an offence against s 339 of the *Criminal Code* (Qld) and, on 25 May 2018, was sentenced to 12 months' imprisonment. A delegate of the Minister for Home Affairs cancelled Mr Love's visa under s 501(3A) of the *Migration Act*. On 10 August 2018, he was taken into immigration detention. On 27 September 2018, the decision to cancel his visa was revoked under s 501CA(4) of the *Migration Act* by a delegate of the Minister and he was released from immigration detention.

386 Mr Love identifies as a descendant of the Kamilaroi tribe and is recognised as a descendant of the Kamilaroi tribe by Janice Margaret Weatherall, an elder of the Kamilaroi tribe.

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553 While the special case also refers to s 47(9) of the *Criminal Code* (Qld), the correct reference is s 47(9) of the *Justices Act 1886* (Qld).

554 *Kearns on behalf of the Gunggari People #2 v Queensland* [2012] FCA 651.

555 *Foster on behalf of the Gunggari People #3 v Queensland* [2014] FCA 1318.

Conclusion on the status of the plaintiffs

387 Mr Thoms is an Aboriginal Australian who has taken no step to renounce his connection with Australia. Mr Thoms identifies, and is accepted by other Gunggari People, as a member of the Gunggari People and is a common law holder of native title recognised by determinations of native title made by the Federal Court.[556]

388 The position of Mr Love is more complex. The Commonwealth did not seek to challenge the status of Mr Love as an Aboriginal Australian. As a result, it is not necessary to determine whether the fact that Mr Love identifies as a descendant of the Kamilaroi tribe and is recognised as a descendant of the Kamilaroi tribe by an elder of that tribe[557] is sufficient. The matter having been argued as it was, it is not appropriate to treat the cases differently.

389 Children take the consequences of the actions of their parents. But the fact that both Mr Love and Mr Thoms can be said to suffer the consequence of a parent failing to take a step to obtain a *statutory* status - or, for that matter, their failure to take that step themselves - is not determinative of their alienage in the *constitutional* sense.[558] That is because, in this case, each plaintiff is an Aboriginal Australian, not an alien.

Conclusion

390 For those reasons, neither plaintiff is within the reach of the legislative power in s 51(xix) of the *Constitution*. Accordingly, ss 189 and 198 of the *Migration Act* must be read down so as not to apply to the plaintiffs. In each special case, the answer to question 1 should be "No" and the answer to question 2 should be "The defendant".

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556 See [380] above.
557 See [386] above.
558 See *Singh* (2004) 222 CLR 322 at 382 [150].

EDELMAN J.

Introduction

391 The central question in each of these special cases is whether an Aboriginal person, identifying and accepted by their community as such, with a genealogy tied to the Australian land for tens of thousands of years, is an "alien" in Australia within the application of s 51(xix) of the *Constitution*. The "most important difference"[559] between aliens and non-aliens is the liability of aliens to exclusion from the Australian community and deportation from Australia without the ability to return. Throughout history, the lives of dispossessed and exiled persons and their descendants have been sustained, and their identities shaped, by the hope of returning to their places of belonging. The identity of Aboriginal people, whether citizens or non-citizens, is shaped by a fundamental spiritual and cultural sense of belonging to Australia. It is that identity which constitutes them as members of the Australian political community. At Federation that identity limited the reach of the aliens power in s 51(xix) of the *Constitution*, preventing the fragmentation of the political community and the stripping of that Aboriginal identity. It would be bizarre if the evolved application of the aliens power could do so today.

392 At Federation, the essential meaning of an alien, as a foreigner to a political community, was understood and applied in racial terms. Persons who were described as members of the Asiatic or Indian races were considered to be aliens on arrival in Australia, even if they were also British citizens. Yet Aboriginal people were not considered to be aliens. The Aboriginal inhabitants of Australia had community, societies and ties to the land, now recognised as a "connection to country",[560] that established them as belonging to Australia and therefore to its political community. Whatever the other manners in which they were treated, as Willis J said in a different context in 1841 Aboriginal people were not "considered as Foreigners in a Kingdom which is their own".[561] To adapt the remarks of Lord Brougham, delivering the advice of the Privy Council in 1837,[562] to have concluded at Federation that an Aboriginal person was an alien would be "almost as inconsistent with common sense as it would have been to hold the English inhabitants aliens under James I".

393 The application of the essential meaning of an alien as a foreigner to the Australian political community evolved in the post-Federation jurisprudence of this Court away from an application which focused heavily upon conceptions of race, as then understood. However, unlike the approach to the immigration power, it was not sufficient to give rise to non-alienage under the evolved application for a person to have been integrated into the community, although it has been suggested that in a modern nation state defined by territory this might have been a "satisfying rationale".[563] Instead, since citizenship is a clear marker of membership of the Australian political community, the evolved application generally asked whether the person was a citizen of the polity. On this evolved application, the Commonwealth Parliament has great latitude to shape the constituent mem-

559 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 29.

560 *Northern Territory v Griffiths* (2019) 93 ALJR 327 at 371 [176]; 364 ALR 208 at 260. See also *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 357-358; *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 70; *Western Australia v Ward* (2002) 213 CLR 1 at 64 [14], 247 [580].

561 *R v Bonjon* [1841] NSWSupC 92. See Kercher, "R v Ballard, R v Murrell and R v Bonjon" (1998) 3 *Australian Indigenous Law Reporter* 410 at 425.

562 *Mayor of Lyons v East India Co* (1837) 1 Moo PC 175 at 287 [12 ER 782 at 823]. See also the discussion in Parry, *Nationality and Citizenship Laws of The Commonwealth and of The Republic of Ireland* (1957) at 72-73.

563 Wishart, "Allegiance and Citizenship as Concepts in Constitutional Law" (1986) 15 *Melbourne University Law Review* 662 at 706.

bership of, and alienage from, what is now the Australian political community. It does so by defining who is a citizen.

394 However, the essential meaning of a constitutional term should not be confused with its common application. It is an error of principle to define "alien" not as a foreigner to the Australian political community but instead, at a level of greater specificity, as depending upon the requirements that exist from time to time for statutory citizenship. A definition at that level of greater specificity would give "alien" an essential meaning that fluctuated, evolving with changes to citizenship laws enacted by the British Parliament around the time of Federation and which would have been expected to evolve further. To tie the essential meaning of "alien" to the transient concept of whatever the Commonwealth Parliament chooses it to be would also contradict the repeated denials by this Court that the Commonwealth Parliament has power to deem people to be aliens if they could not possibly answer the description of "aliens" in the ordinary understanding of the word. The antonym of an alien to the community of the body politic cannot be a "citizen". It is a "belonger"[564] to the political community.

395 The Solicitor-General of the Commonwealth accepted at the first hearing of these special cases that the purported denial by Parliament of statutory citizenship to a child born in Australia to two parents who were citizens of Australia could not make the child an alien, even if the child (and presumably also a parent) were a foreign citizen although only due to a foreign law that conferred "foreign citizenship across generations for people who were not continuing to reside in or be born in the foreign country". The essence of this submission was repeated by the Solicitor-General of the Commonwealth at the second hearing of this matter. No party, or the intervener, disputed it. No member of this Court questioned it. The submission is entirely correct. It recognises that the Commonwealth Parliament does not have an unlimited ability to recite itself into a constitutional head of power ("**aliens**") by legislation with respect to a closely related but distinct subject matter ("**citizens**"). The submission does not confuse the essential meaning of alien with the common application of the concept to statutory citizens. And it is consistent with the application of the essential meaning of an alien as a person who does not belong to the Australian political community since the child is, without more, tied to the Australian political community by bonds of birth and parentage that the Commonwealth Parliament cannot legislate to sever by a denial of citizenship. The child is beyond the scope of the aliens power in s 51(xix) of the *Constitution*.

396 No Australian court has ever considered whether Aboriginal people or, by parity of reasoning although not the focus of these cases, Torres Strait Islanders are also beyond the scope of the aliens power. Since settlement, 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. When the post-Federation application of membership of the political community moved away from issues of race, this did not strip non-citizen Aboriginal people of their status as belongers to the Australian political community by denying their identity and thus permitting an approach that would treat them as doomed "to an institutional status of permanent inferiority".[565] Instead, legal

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564 See, for example, *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067 at 1099 [43]. See also Jones, "Colonial to Postcolonial Ethics: Indian Ocean 'Belongers', 1668-2008" (2009) 11 *Interventions: International Journal of Postcolonial Studies* 212 at 220-221, referring to *Magna Carta*, ch 29.

565 Goldsmith, *Allegiance* (1971) at 24.

events following Federation reduced the scope for discrimination without destruction of the one thing that is essential to real community: difference. The legal recognition of the powerful ties between Aboriginal people and Australian land would not have been possible if the membership of a political community involved a lockstep of such stifling homogeneity as could make Aboriginal people aliens within the meaning of s 51(xix) of the *Constitution*.

397 The issue in these special cases arises because Mr Love and Mr Thoms are non-citizens. Following the sentencing of Mr Love and Mr Thoms in 2018 for offences against the *Criminal Code* (Qld), a delegate of the Minister for Home Affairs cancelled their visas.[566] Each plaintiff was taken into immigration detention, purportedly under s 189 of the *Migration Act 1958* (Cth), on suspicion of being an unlawful non-citizen[567] with the potential consequence of removal from Australia.[568] Mr Thoms remains in immigration detention. Mr Love was subsequently released from immigration detention and the decision to cancel his visa was revoked. However, the validity of the initial decision to cancel Mr Love's visa is a relevant issue in proceedings brought by Mr Love that allege false imprisonment by the Commonwealth.

398 The Commonwealth relies upon the aliens power in s 51(xix) of the *Constitution* to support the validity of the *Migration Act* in its application to Mr Love and to Mr Thoms. But an Aboriginal person cannot be an alien to Australia. Aboriginal people belong to Australia and are essential members of the "community which constitutes the body politic of the nation state".[569] Insofar as the *Migration Act* purports to apply to Aboriginal people of Australia, such as Mr Love and Mr Thoms, as aliens, it must be disapplied.[570]

The essential meaning of alien at the time of Federation

The essential meaning of alien

399 To accept that the application of "alien" can change over time does not mean that the word has no essential meaning. The *Constitution* is not merely a jumble of letters capable of being given entirely new essential content at different times like alphabet soup. The essential meaning, or "prime essential", is the "limit ... fixed beyond legislative control".[571] Putting to one side the effect of precedent, the essential meaning of the words of the *Constitution*, which instantiates their purpose, cannot change. However, although the *Constitution* was intended to be enduring it was also intended to be flexible. The essential meaning is usually intended to apply to new circumstances and in different ways as time passes. The scope for that application will depend upon the level of generality at which essential meaning is intended to be characterised. It is therefore vital that essential meaning be characterised at the proper level of generality.

400 The identification of the essential meaning of a constitutional term at the proper level of generality can sometimes be a difficult exercise. The generality of the words themselves might afford some indication of the level of abstraction that was intended. As Dixon CJ observed, "the fewer the words in which the subject matter of a constitutional power is

566 *Migration Act 1958* (Cth), s 501(3A).
567 *Migration Act 1958* (Cth), s 14.
568 *Migration Act 1958* (Cth), ss 196, 198(2B).
569 *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 189.
570 *Acts Interpretation Act 1901* (Cth), s 15A. See *Pochi v Macphee* (1982) 151 CLR 101 at 110, 113; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 494 [310].
571 *Australian Boot Trade Employes' Federation v Whybrow & Co* (1910) 11 CLR 311 at 335; see also at 339-340.

expressed the more extensive sometimes may be the field laid open to a generous interpretation".[572] However, the abstract meaning of words is only one indicator of the level of generality of essential meaning. In the context of the head of power in s 51(xxi) of the *Constitution*, concerning the "recognized topic of juristic classification" of "marriage",[573] Windeyer J said in *Attorney-General (Vict) v The Commonwealth*[574] that the scope of constitutional powers is "not to be ascertained by merely analytical and *a priori* reasoning from the abstract meaning of words". His Honour continued, saying that the interpretation is also "affected by established usages of legal language". To this can be added that interpretation is controlled by the established purpose of the provision; and it is affected by the established context in which the words appeared, particularly where established uses of legal language were in flux at Federation.

401 In *The Commonwealth v Australian Capital Territory*,[575] this Court approved the approach of Windeyer J but expressly recognised the danger of relying too heavily upon established uses of legal language at Federation where that usage was in flux. This Court rejected the characterisation of "marriage" advanced by Quick and Garran at a level of specificity, based on established usages of legal language in 1900, that included within the "essence"[576] of its meaning a union between a man and a woman. After referring to the "long and tangled development" of the social institution of marriage, including substantial changes in the latter half of the nineteenth century before Federation,[577] this Court held that "marriage" in s 51(xxi) had an essential meaning at a higher level of abstraction as a "consensual union formed between natural persons in accordance with legally prescribed requirements", an essential meaning that recognised a union that the law "intended to endure and be terminable only in accordance with law" as well as "a union to which the law accords a status affecting and defining mutual rights and obligations".[578] Although "marriage" in s 51(xxi) was characterised at a higher level of generality than the prevailing legal usage, this Court was not suggesting that its essential meaning included anything that Parliament declares to be a marriage. It would not extend, for example, to a union of corporations. "Marriage", as a topic of juristic classification, states a "subject[] for legislation, not [a peg] on which the Federal Parliament may hang legislation".[579] So too with "aliens" in s 51(xix).[580] "Aliens" is not a peg on which the Commonwealth Parliament may hang any legislation concerning citizens according to its own definition.

402 If the essential meaning of alien were to be characterised at a low level of generality, such as by reference to established common law rules underlying the recognition of citizenship and allegiance, then it would have fixed in place norms that were continually evolving, particularly around the time of Federation. Those norms had a long history of evolution at common law and by statute, particularly from the start of the seventeenth century in *Calvin's Case*.[581] That common law history was discussed in detail by McHugh J in *Singh v*

572 *Attorney-General (Vict) v The Commonwealth* (1962) 107 CLR 529 at 539-540.
573 *Attorney-General (Vict) v The Commonwealth* (1962) 107 CLR 529 at 578.
574 (1962) 107 CLR 529 at 576.
575 (2013) 250 CLR 441.
576 *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 at 454-455 [12]. See Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 608-609.
577 *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 at 456-457 [17]-[18].
578 *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 at 461 [33].
579 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 415, quoted in *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 117. See also *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 212-213; *Attorney-General (Vict) v The Commonwealth* (1962) 107 CLR 529 at 549, 578.
580 *Singh v The Commonwealth* (2004) 222 CLR 322 at 383 [153]. See also at 343 [37] and *Pochi v Macphee* (1982) 151 CLR 101 at 109.
581 (1608) 7 Co Rep 1a [77 ER 377].

The Commonwealth[582] from feudalism through the restatement in *Calvin's Case*, the union of the thrones of England and Scotland, the loss of the United States colonies, the development of international law in the nineteenth century, and the Royal Commission into naturalisation and allegiance established in 1868. In *Singh v The Commonwealth*,[583] McHugh J relied upon that history to characterise the essential meaning of an alien in s 51(xix) of the *Constitution* at a low level of generality as a person who did not owe permanent allegiance to the Crown, such allegiance arising by the location of birth subject to three exceptions. That was a minority view.

403 In *Singh v The Commonwealth*, a majority of this Court characterised the essential meaning of an alien at a higher level of generality. As Gleeson CJ observed, the difficulty with characterising the meaning of alien at a low level of generality in an instrument of government that was intended to endure was that "questions of nationality, allegiance and alienage were matters on which there were changing and developing policies".[584] In a joint judgment, Gummow, Hayne and Heydon JJ also referred to the numerous legislative interventions on the subject of aliens which had left "one feature about the use of the word that was constant".[585] That feature, at Federation as it is now, is "wholly unambiguous and clearly understood by all, lawyers and laymen alike".[586] The feature, which has been repeatedly reiterated in this Court,[587] is that "alien" in its commonly understood etymology, from "Latin alienus through Old French", means "belonging to another person or place". With this "broad"[588] characterisation of the essential meaning of "alien", the majority held that Ms Singh was an alien within the meaning of s 51(xix) of the *Constitution*. She was not an Australian citizen. And although she had been born in Australia, her parents were both of Indian nationality and she had taken Indian citizenship at birth. Gleeson CJ, expressing agreement with Gummow, Hayne and Heydon JJ, said that despite Ms Singh's birth in Australia, "there was in 1900 no established legal requirement that she be excluded from the class of aliens".[589]

The application of the essential meaning of alien at Federation

404 The most basic power over an alien is the power of exclusion and expulsion: "[t]he right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, [is] an inherent and inalienable right of every sovereign and independent nation".[590] In the period leading up to Federation the essential meaning of "alien", a foreigner to a political community, was thought to apply in racial terms, driven by a concern for a power to expel. Section 15(i) of the *Federal Council of Australasia Act 1885* (Imp)[591] gave legislative authority to the Federal Council of Australasia in relation to various matters including the "naturalisation of aliens", a conferral of power that presaged s 51(xix) of the *Constitution*. After reference from the legislatures of the colonies

582 (2004) 222 CLR 322 at 351-366 [59]-[100].
583 (2004) 222 CLR 322 at 343 [38].
584 *Singh v The Commonwealth* (2004) 222 CLR 322 at 341 [30].
585 *Singh v The Commonwealth* (2004) 222 CLR 322 at 395 [190].
586 *Taylor v United States* (1907) 152 Fed Rep 1 at 4.
587 *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 183, 189; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 428 [114]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 185 [81], 205 [159]; *Singh v The Commonwealth* (2004) 222 CLR 322 at 351 [59], 395 [190].
588 *Taylor v United States* (1907) 152 Fed Rep 1 at 4.
589 *Singh v The Commonwealth* (2004) 222 CLR 322 at 341 [30].
590 *Fong Yue Ting v United States* (1893) 149 US 698 at 711, quoted in *Robtelmes v Brenan* (1906) 4 CLR 395 at 413. See also *Ah Yin v Christie* (1907) 4 CLR 1428 at 1431, 1433; *Ferrando v Pearce* (1918) 25 CLR 241 at 270; *Pochi v Macphee* (1982) 151 CLR 101 at 106.
591 48 & 49 Vict c 60.

of Victoria and Queensland, the Federal Council of Australasia passed *The Australasian Naturalisation Act 1897*,[592] concerning the "naturalisation of aliens of European descent". Section 3 of that Act defined a person of European descent as "any person who by lineage belongs exclusively to any of the European races".

405 The slight change to the wording chosen for the aliens power in the *Constitution*, "naturalization *and* aliens", was important for the recognition of a general power with respect to aliens that was not limited to naturalisation.[593] However, this did not affect the racial lens through which the meaning of the word "alien" was thought to apply. As Dr Prince explains, in an apparently unpublished doctoral thesis from the Australian National University,[594] at the Constitutional Conventions the debate over the aliens power in s 51(xix) was closely associated with issues concerning the race power in s 51(xxvi) of the *Constitution*. In discussion of the race power, the delegates to the 1898 Convention also spoke interchangeably of "foreign races",[595] "alien races",[596] "Asiatic alien"[597] and "aliens".[598]

406 The application of the aliens power and the race power was generally understood to be complementary. The aliens power and the immigration power in s 51(xxvii) included a concern with the conditions of admission to Australia of those who were considered as members of foreign races. The race power was concerned with the treatment of the people considered to be members of those foreign races "who are in the Commonwealth [of Australia]"[599] even if they were granted citizenship. Mr Symon spoke of the admission of "the coloured races - those whom we describe as aliens - to the full advantage of the citizenship of Australia".[600] Sir Samuel Griffith said of the race power that "[t]he intention of the clause is that if any state by any means gets a number of an alien race into its population, the matter shall not be dealt with by the state, but the commonwealth will take the matter into its own hands".[601]

407 The generally understood application of the aliens power as concerned with those people considered to be from foreign races, rather than foreign citizens, was also apparent from the view that 150 million British citizens living in India were considered to be aliens.[602] Although, in *Potter v Minahan*,[603] Isaacs J referred to "the right unrestricted at common law of all British subjects wherever born outside Australia to enter the Commonwealth", the application of the aliens power was seen as a means of applying a disability to those

592 60 Vict No 1.

593 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 222; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 64. See also *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 460; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 378 [81]; *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 130 [259].

594 Prince, *Aliens in their Own Land* (2015).

595 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 27 January 1898 at 229; 2 March 1898 at 1752.

596 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 27 January 1898 at 231; 28 January 1898 at 246; 2 March 1898 at 1758; 3 March 1898 at 1791; 17 March 1898 at 2506.

597 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 3 March 1898 at 1782.

598 See *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 27 January 1898; 2 March 1898; 3 March 1898.

599 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 27 January 1898 at 228-229.

600 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 28 January 1898 at 249.

601 *Official Report of the National Australasian Convention Debates* (Sydney), 3 April 1891 at 702.

602 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 3 March 1898 at 1791, speaking of "people of alien races" as "in India some 150,000,000 British subjects". See also *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 27 January 1898 at 237, speaking of the "alien population" of "British subjects coming from Hindostan"; United Kingdom, *Report of the Royal Commission on Alien Immigration* (1903) [Cd 1741] at 35-36 [227].

603 (1908) 7 CLR 277 at 310.

considered to be members of foreign races holding British citizenship. In the context of debate about a proposed citizenship power, which was ultimately rejected, Mr Kingston said:[604]

> "It would be simply monstrous that those who are born in England should in any way be subjected to the slightest disabilities ... but, on the other hand, we must not forget that there are other native-born British subjects whom we are far from desiring to see come here in any considerable numbers. For instance, I may refer to Hong Kong Chinamen."

408 Similar statements were made in relation to the provision that became s 117 of the *Constitution*, where references were made to "alien races"[605] and to the "power of excluding Chinese, Lascars, or Hindoos who happened to be British subjects",[606] and concerns were expressed that "simply because a man was born under British rule in India, China, or elsewhere, therefore, of necessity, on arriving in one of these colonies, he could claim citizenship of the Commonwealth".[607]

409 Consistently with the application of the meaning of "alien" in the Convention debates based on what was then understood as "racial" distinctions, the race power, s 51(xxvi), also applied the meaning of "the people of any race" to people of any "alien race", namely "races" outside the Australian political community. Those "alien races" might have been British citizens of India or Hong Kong. They need not have been migrants and "they could well be born in Australia".[608]

Even with racial application, alien was not applied to persons described as members of the Aboriginal race

410 In its literal terms, the race power could have applied to *all* "races" since, as Professor Sawer observed, there is difficulty in seeing why the race power should not be "applicable to the *majority* 'race' - every person, say, of 'Caucasian origin' ".[609] It was effectively the concept of political community, which included Aboriginal people, that limited the application of the race power to "alien races". Hence, even without an express exclusion from the meaning, Aboriginal people would probably not have been within the application of the race power. The express exclusion of them from the meaning of s 51(xxvi) was thus, unsurprisingly, not the subject of debate: "it was simply taken for granted that they should be excluded".[610] There was, however, no need, even for clarity, for the same exclusion from the meaning of s 51(xix), which did not mention race. Aboriginal people simply did not fall within the application of "alien", a foreigner to the political community.

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604 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 2 March 1898 at 1760.

605 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 3 March 1898 at 1791. See also *Official Record of the Debates of the Australasian Federal Convention* (Sydney), 13 September 1897 at 453.

606 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 3 March 1898 at 1788.

607 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 3 March 1898 at 1790.

608 Sawer, "The Australian Constitution and the Australian Aborigine" (1966) 2 *Federal Law Review* 17 at 23.

609 Sawer, "The Australian Constitution and the Australian Aborigine" (1966) 2 *Federal Law Review* 17 at 23 (emphasis in original).

610 Sawer, "The Australian Constitution and the Australian Aborigine" (1966) 2 *Federal Law Review* 17 at 18.

411 Upon settlement of Australia all Aboriginal people became British subjects.[611] From that time, as Professor Sawer said, "every aboriginal native of Australia born in Australia ... became a British subject by birth; his race was irrelevant, and there were no other circumstances capable of qualifying the allegiance".[612] But, as I have explained, merely having British citizenship would not have prevented Aboriginal people of Australia from being characterised as aliens on the race-based application of "alienage" at the time of Federation. Nor, according to the decision of the majority in *Singh v The Commonwealth*,[613] would birth in Australia have been sufficient to prevent an Aboriginal person from being characterised as an alien. Instead, the reason Aboriginal people were not aliens was that they were members of the political community.

412 In 1903, the Commonwealth Parliament enacted the *Naturalization Act 1903* (Cth), which provided, in s 5, for the power of a Commonwealth resident, not being a British subject, to apply for a certificate of naturalisation. However, a person who was "an aboriginal native of Asia, Africa, or the Islands of the Pacific" was expressly excluded from the class of persons permitted to apply for a certificate.[614] No such exception was provided in relation to the Aboriginal people of Australia. There was no exception because they were members of the political community, albeit with fewer rights than others in the community.

413 In 1901, s 127 of the *Constitution* provided that "[i]n reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted". Mr Barton said that the reason for this clause was that in counting the whole population of a State "it would not be considered fair to include the aborigines".[615] The fairness to which he referred may have been a reference to the unreliable counts of the Aboriginal population and gross underestimates of their probable numbers then available.[616] In contrast with this treatment of Aboriginal people, the Convention rejected a proposed amendment by the Legislative Councils of New South Wales and Tasmania to exclude also from the count "aliens not naturalized".[617] The premise of the inclusion of aliens but the exclusion of Aboriginal people is another indication that Aboriginal people were not considered aliens despite the racial terms for application of the meaning of "alien".[618]

414 The different treatment of Aboriginal people within the political community was generally thought to be a matter for local laws. In contrast with Canada, where, separately from the power over "Naturalization and aliens" in s 91(25) of the *British North America Act 1867* (Imp),[619] there existed in s 91(24) a power over "Indians, and lands reserved for the Indians", the treatment of Aboriginal people in other colonies was not considered to be

611 Salmond, "Citizenship and Allegiance" (1902) 18 *Law Quarterly Review* 49 at 55, citing *Campbell v Hall* (1774) 1 Cowp 204 at 208 [98 ER 1045 at 1047]; Jones, *British Nationality Law and Practice* (1947) at 40-41, 41 fn 1.

612 Sawer, "National Status of Aborigines in Western Australia", in Australia, House of Representatives, *Report from the Select Committee on Voting Rights of Aborigines* (1961), Pt 1 at 37.

613 (2004) 222 CLR 322.

614 *Naturalization Act 1903* (Cth), s 5.

615 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 8 February 1898 at 713.

616 Sawer, "The Australian Constitution and the Australian Aborigine" (1966) 2 *Federal Law Review* 17 at 18, citing Australia, Royal Commission on the Constitution of the Commonwealth, *Minutes of Evidence* (1929), Pt 3 at 488.

617 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 8 February 1898 at 713.

618 See also *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 8 February 1898 at 713-714, Messrs Barton and Isaacs referring to the provision that became s 25 of the *Constitution*.

619 30 & 31 Vict c 3. Now entitled *Constitution Act 1867* (Can), see *Constitution Act 1982* (Can), s 53 read with Sch item 1.

a matter for the central authority. Following conflict between Aboriginal people and settlers, in 1837 in Great Britain the Parliamentary Select Committee on Aborigines expressed a strong view that powers concerning Aboriginal people be vested in the executive rather than the legislature. The Committee reported that:[620]

> "The protection of the Aborigines should be considered as a duty peculiarly belonging and appropriate to the executive government, as administered either in this country or by the governors of the respective colonies. ... In the formation of any new colonial constitution, or in the amendment of any which now exist, we think that the initiative of all enactments affecting the Aborigines should be vested in the officer administering the government; that no such law should take effect until it had been expressly sanctioned by the Queen, except in cases of evident and extreme emergency".

In 1929, a majority of the Royal Commission recommended against amending s 51(xxvi) of the *Constitution* on the basis that the States were still better placed than the Commonwealth to legislate in relation to Aboriginal people.[621]

The evolved application of the essential meaning of alien

415 Although the application of membership of a political community was seen by the founding fathers through a racial lens, after Federation it was not always applied in that way, although it has been persuasively argued by Dr Prince that some early cases implicitly applied criteria based upon racial perceptions.[622] The removal of the racial lens for application of the essential meaning of alien as a foreigner to the political community avoids the problematic characterisations of "race" in s 51(xix) that still permeate s 51(xxvi). However, no single test has been accepted for the application of alienage under s 51(xix). Importantly, neither of two possible tests of application has been accepted as conclusive of non-alienage: (i) absorption into the Australian community; or (ii) statutory citizenship and the associated allegiance to the sovereign of Australia. The first has not been held to be sufficient. The second is not necessary.

Absorption into the political community is not sufficient

416 One approach to membership of the Australian political community might have been to treat the aliens power in the same way that the immigration power in s 51(xxvii) of the *Constitution* had come to be treated. In *Potter v Minahan*,[623] Isaacs J, in dissent on this point, adopted a test for the immigration power which considered:

> "[t]he ultimate fact to be reached as a test whether a given person is an immigrant or not is whether he is or is not at that time a constituent part of the community known as the Australian people.
>
> Nationality and domicil are not the tests; they are evidentiary facts of more or less weight in the circumstances, but they are not the ultimate

620 Great Britain, House of Commons, *Report of the Parliamentary Select Committee on Aboriginal Tribes, (British Settlements)* (1837) at 117.
621 Australia, *Report of the Royal Commission on the Constitution* (1929) at 270.
622 Prince, *Aliens in their Own Land* (2015) at 199-208, referring particularly to *Robtelmes v Brenan* (1906) 4 CLR 395.
623 (1908) 7 CLR 277 at 308.

or decisive considerations."

417 That approach was later adopted[624] and applied to determine that people could not be deported from Australia under this power if, having entered Australia with the intention to settle, they "have become members of the Australian community".[625] Since "[t]he right to deport is the complement of the right to exclude",[626] an approach to the aliens power which focused upon whether a person had become integrated into the Australian political community might have had the merit of this symmetrical treatment of the immigration and aliens powers. In relation to British subjects who migrated to Australia prior to 1987, Kirby J said of the absorption rule that he could "see no reason of principle why a less protective rule should be applied".[627]

418 Such an approach, as a conclusive test of alienage, was rejected by this Court in *Pochi v Macphee*.[628] Gibbs CJ, with whom Mason and Wilson JJ agreed, thought that the argument was "impossible to maintain". The integration approach was rejected because, as Gibbs CJ considered, it would amount to an impermissible conferral of citizenship by naturalisation without an Act of Parliament.[629] However, it does not appear to have been argued in *Pochi v Macphee* that a constitutional non-alien is a different concept from a naturalised citizen or that constitutional concepts operate upon a different plane from legislative ones. The description of a person as a constitutional non-alien means only that the person is beyond the reach of the Commonwealth power over aliens. It does not mean that the person has become naturalised and entitled to all the privileges that citizenship brings.

419 A different reason for rejecting the absorption approach was given by Gummow and Hayne JJ, in dissent on this point, in *Re Patterson; Ex parte Taylor*:[630] the concept of integration is not easy to apply and would turn details of the lives of individuals into "constitutional facts". However, the immigration power has been applied for many decades in this manner without great difficulty and it may be that legislation could create a workable general test that could operate as an easy discrimen in most cases. In any event, as Gleeson CJ, Gummow and Hayne JJ, with whom Heydon J agreed, said in *Shaw v Minister for Immigration and Multicultural Affairs*,[631] the ordinary understanding of the term "alien" is one that "must have regard to the circumstances and conditions applicable to the individual in question".

420 A further explanation given by Gleeson CJ and McHugh J in separate judgments in *Re Minister for Immigration and Multicultural Affairs; Ex parte Te*[632] was that, unlike a person's status as an immigrant, once a person is determined to be an alien then the loss of that status is a matter for the Commonwealth Parliament. But, with respect, that explanation depends upon the reason that the person is an alien in the first place. If, as Gaudron J thought in the same case, the reason is a criterion of birth outside of Australia then there

624 *O'Keefe v Calwell* (1949) 77 CLR 261 at 277; *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 561; *R v Director-General of Social Welfare (Vict); Ex parte Henry* (1975) 133 CLR 369 at 372, 373-374, 376-377, 379-381, 385, 388.
625 *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 65; see also at 117, 137.
626 *Robtelmes v Brenan* (1906) 4 CLR 395 at 415.
627 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 492 [303].
628 (1982) 151 CLR 101 at 111. See also *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 295.
629 *Pochi v Macphee* (1982) 151 CLR 101 at 111.
630 (2001) 207 CLR 391 at 473 [247].
631 (2003) 218 CLR 28 at 36 [9]; see also at 87 [190].
632 (2002) 212 CLR 162 at 172 [26], 188 [90].

would be substantial differences from the immigration power.[633] But birth outside Australia was rejected as the test for alienage in *Singh v The Commonwealth*.[634] In contrast, if the criterion for being an alien were a lack of membership of the Australian political community then absorption into the community might indeed change that status.

421 It is not necessary to consider further whether a single test for non-alienage could be developed based upon absorption into the political community. That would be a large step for this Court to take. The plaintiffs did not seek leave to reopen *Pochi v Macphee*.[635] Their submissions were more cautious. The plaintiffs, with the support of submissions from the State of Victoria intervening, relied upon the facts of the absorption into the Australian community of Mr Love and Mr Thoms merely as matters to be considered alongside the plaintiffs' identity as Aboriginal people of Australia rather than as a single determinative test. That approach is consistent with the approach of Kirby and Callinan JJ in *Re Minister for Immigration and Multicultural Affairs; Ex parte Te*,[636] who, in separate judgments, whilst not adopting an absorption test as a conclusive criterion for loss of alien status, expressed doubts whether the aliens power would necessarily extend to non-citizens who were "very long term residents of Australia".

Statutory citizenship is not the exclusive test for membership of the political community

422 The application of statutory citizenship as the exclusive test for the essential meaning of an alien as a member of the political community involves errors in both fundamental dimensions of constitutional law: authority and principle.

Authority has not applied statutory citizenship as a test for non-alienage

423 In *Nolan v Minister for Immigration and Ethnic Affairs*,[637] a majority of six members of this Court held that a citizen of the United Kingdom who came to Australia in 1967, but who was not naturalised, was an alien. The majority upheld the validity and application of s 12 of the *Migration Act*, which permitted the deportation of Mr Nolan. The majority was careful to note that the definition of "alien" in the *Australian Citizenship Act 1948* (Cth) did not confine either "the meaning or [the] denotation of the word in s 51(xix) of the Constitution".[638]

424 In dissent in the result in *Nolan v Minister for Immigration and Ethnic Affairs*, but not inconsistently with the general approach of the majority on this point, Gaudron J also spoke of citizenship only as a criterion of application "for most purposes" of determining the membership of a political community. Her Honour said:[639]

> "An alien (from the Latin alienus - belonging to another) is, in essence, a person who is not a member of the community which constitutes the body politic of the nation state from whose perspective the question of alien status is to be determined. For most purposes it is convenient

633 *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 179 [54]-[55], 182-183 [69].
634 (2004) 222 CLR 322 at 341 [30], 399 [203].
635 (1982) 151 CLR 101.
636 (2002) 212 CLR 162 at 229 [229]; see also at 217-218 [200]-[201].
637 (1988) 165 CLR 178.
638 *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 186.
639 *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 189.

> to identify an alien by reference to the want or absence of the criterion which determines membership of that community. Thus, where membership of a community depends on citizenship, alien status corresponds with non-citizenship; in the case of a community whose membership is conditional upon allegiance to a monarch, the status of alien corresponds with the absence of that allegiance. At least this is so where the criterion for membership of the community remains constant."

425 In *Re Patterson; Ex parte Taylor*,[640] a majority of this Court overruled *Nolan v Minister for Immigration and Ethnic Affairs*. Mr Taylor, a citizen of the United Kingdom who had been "completely absorbed into the Australian community",[641] was held not to be an alien within the aliens power. The majority comprised Gaudron J, who had dissented in *Nolan v Minister for Immigration and Ethnic Affairs*, as well as McHugh, Kirby and Callinan JJ. Gaudron J reiterated that the application of alienage does not merely require an absence of citizenship or foreign citizenship, stating that a person who would have been disqualified from election under s 44(i) of the *Constitution* "is not necessarily excluded from membership of the Australian community by reason of his or her being a citizen of a foreign power".[642] Kirby J also described as a "basic flaw"[643] the treatment of alien and non-citizen as synonymous.

426 In *Shaw v Minister for Immigration and Multicultural Affairs*,[644] a majority of this Court departed from the different strands of reasoning of each of the judges in the majority in *Re Patterson; Ex parte Taylor* concerning United Kingdom citizens. The approach of the majority in *Nolan v Minister for Immigration and Ethnic Affairs* was reinstated. It was held that a citizen of the United Kingdom who arrived in Australia in 1974 was an alien. Again, however, the majority was careful not to conflate the concepts of non-citizen and alien. Gleeson CJ, Gummow and Hayne JJ said that the ordinary understanding of the term "alien" is one that in its application "must have regard to the circumstances and conditions applicable to the individual in question".[645] The fourth member of the majority, Heydon J, questioned the assumption that from 1 January 1901 all British citizens were not aliens.[646]

427 There are, however, statements of some members of this Court in *Shaw v Minister for Immigration and Multicultural Affairs* and later cases that "citizenship may be seen as the obverse of the status of alienage"[647] or that alien "means, as a matter of ordinary language, 'nothing more than a citizen or subject of a foreign state' "[648] or that Parliament can treat as an alien "a person born in Australia with a foreign citizenship derived from that of the parents of that person".[649] Three points should be made about these statements. First, these passages, whilst appearing to be absolute statements, must be understood against the background of the authority described above. Secondly, the statements must be understood against the undisputed authority, discussed below, that the Commonwealth Parliament cannot treat as alien, by excluding from citizenship, those persons who could not

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640 (2001) 207 CLR 391.
641 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 407 [31].
642 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 407 [34].
643 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 491 [300]. See also *Singh v The Commonwealth* (2004) 222 CLR 322 at 382 [149]-[150].
644 (2003) 218 CLR 28.
645 *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 36 [9].
646 *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 87 [190].
647 *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 35 [2].
648 *Singh v The Commonwealth* (2004) 222 CLR 322 at 400 [205], quoting *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 183.
649 *Koroitamana v The Commonwealth* (2006) 227 CLR 31 at 41 [28].

possibly answer the description of "aliens" in the ordinary understanding of the word. In other words, the application of the essential meaning of a constitutional word must remain consistent with that essential meaning. Thirdly, and in any event, it is plain beyond peradventure that their Honours were not, in any of those passages, seeking to answer the question whether Aboriginal non-citizens could be aliens.

Authority has not applied allegiance as a test for non-alienage

428 As Quick and Garran observe, in the middle ages allegiance and subjection were "then the test of membership of a political community".[650] An allegiance is "the obligation of fidelity and obedience which the individual owes to the government under which he lives, or to his sovereign in return for the protection he receives".[651] The difference between citizenship and allegiance is "largely, but not entirely, a terminological one":[652] all citizens owe allegiance but a non-citizen, such as resident aliens or temporary visa holders, might also owe a temporary or local allegiance.[653]

429 There may be difficulty with the use of allegiance or the lack of it even as one factor in a test for non-alienage. Allegiance is a consequence of an event such as citizenship rather than a test for membership of a political community. Allegiance, etymologically from *ligare* (to tie), is the consequence of an event that leads to "as it were a tying together of minds, just as a ligament is a connection of limbs and joints".[654] As Wishart has observed, the existence of allegiance "does not answer the questions of when is a person a member and why does that person owe political obligations".[655] This reasoning is not inconsistent with the description of allegiance in the joint judgment in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame*[656] as a "defining characteristic" of alienage or the description of allegiance by Gummow, Hayne and Heydon JJ in *Singh v The Commonwealth* as a "central characteristic"[657] of alienage. The use of "characteristic" as a descriptor is telling. A central characteristic of an elephant might be its tusks, but the presence or absence of tusks is not a conclusive basis for classification by any competent naturalist.

430 Allegiance to the local sovereign cannot be a test for membership of a political community because even resident aliens can owe local allegiance; indeed the obligation of allegiance can sometimes even persist after deportation.[658] As Gleeson CJ, Gummow and Hayne JJ said in *Shaw v Minister for Immigration and Multicultural Affairs*:[659] "[a]llegiance and alienage are not mutually exclusive". Indeed, it has been said that the concept of allegiance was, by the enactment of the *Nationality and Citizenship Act 1948* (Cth), "altogether swept away, together with all other rules of the common law respecting nationality".[660] More-

650 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 955.
651 *Carlisle v United States* (1872) 83 US 147 at 154, quoted in *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 196 [123].
652 Jones, *British Nationality Law and Practice* (1947) at 3.
653 *Johnstone v Pedlar* [1921] 2 AC 262 at 297. See also Jones, *British Nationality Law and Practice* (1947) at 3.
654 Sheppard (ed), *The Selected Writings and Speeches of Sir Edward Coke* (2003), vol 1 at 175, fn 29.
655 Wishart, "Allegiance and Citizenship as Concepts in Constitutional Law" (1986) 15 *Melbourne University Law Review* 662 at 706.
656 (2005) 222 CLR 439 at 458 [35].
657 *Singh v The Commonwealth* (2004) 222 CLR 322 at 383 [154], 398 [200], 399 [201].
658 *Joyce v Director of Public Prosecutions* [1946] AC 347 at 366-368.
659 (2003) 218 CLR 28 at 42-43 [29], citing *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 173 [29]. See also *Joyce v Director of Public Prosecutions* [1946] AC 347.
660 Parry, *Nationality and Citizenship Laws of The Commonwealth and of The Republic of Ireland* (1957) at 92. See *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 441-442 [151].

over, owing a foreign allegiance is not sufficient for alienage because an Australian citizen who becomes a dual citizen is not an alien, at least while the person remains an Australian citizen. Although, in *Singh v The Commonwealth*,[661] Gummow, Hayne and Heydon JJ said that " 'aliens' included those who owed allegiance to another sovereign power", their Honours could not have meant that every person who owes allegiance to another sovereign power is, without more, an alien within s 51(xix).

431 A lack of foreign allegiance is also not sufficient for a person to be characterised as a non-alien. A characteristic of an alien includes those "who, having no nationality, owed no allegiance to any sovereign power".[662] In *Koroitamana v The Commonwealth*,[663] two children who were born in Australia were held to be aliens within the meaning of s 51(xix) even though they had not been registered as Fijian citizens and therefore owed no foreign allegiance. In that case, Gummow, Hayne and Crennan JJ spoke of the Fijian nationality of the children's parents as a "relevant characteristic".[664]

Statutory citizenship is not the test for non-alienage as a matter of principle

432 Although a statutory citizen will be a member of the political community, and will therefore not be an alien, there are four reasons of principle why statutory citizenship cannot be the test for non-alienage.

433 First, in a passage later described as plainly correct,[665] Gibbs CJ, with whom Mason and Wilson JJ agreed, said in *Pochi v Macphee*[666] that "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". This proposition has been repeatedly iterated in this Court.[667] The proposition means that the power of the Commonwealth Parliament to confer or deny citizenship is not co-extensive with a power to confer or deny non-alienage. Parliament "cannot enlarge its powers by calling a matter with which it is not competent to deal by the name of something else which is within its competence".[668] Indeed, the power to make laws in relation to citizens derives, at least in part,[669] from the aliens power.[670] The scope of the aliens power could not itself be conclusively determined by those citizenship laws that it empowers the Parliament to make. The class of "alien" must be determined "not by a boundary line without, but by a central point within".[671]

434 Secondly, treating citizen as the antonym of alien introduces further uncertainty due to the lack of a clear meaning of "citizen". A constitutional alien is a binary concept: a person is either an alien or not. But citizenship might involve a spectrum of rights.

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661 (2004) 222 CLR 322 at 395 [190].
662 *Singh v The Commonwealth* (2004) 222 CLR 322 at 395 [190].
663 (2006) 227 CLR 31.
664 *Koroitamana v The Commonwealth* (2006) 227 CLR 31 at 46 [50].
665 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 469-470 [238].
666 (1982) 151 CLR 101 at 109.
667 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 435-436 [132], 469-470 [238], 490 [297], 492 [303]; *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 36 [9]; *Singh v The Commonwealth* (2004) 222 CLR 322 at 329 [4]-[5], 382-383 [151]; *Koroitamana v The Commonwealth* (2006) 227 CLR 31 at 54-55 [81].
668 *Attorney-General for NSW v Brewery Employes Union of NSW* (1908) 6 CLR 469 at 501.
669 *Hwang v The Commonwealth* (2005) 80 ALJR 125 at 128 [10]; 222 ALR 83 at 86-87. See also *Singh v The Commonwealth* (2004) 222 CLR 322 at 374-375 [124].
670 *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 40 [22].
671 *Attorney-General for NSW v Brewery Employes Union of NSW* (1908) 6 CLR 469 at 611.

Professor Rubenstein has treated citizenship as "the collection of rights, duties and opportunities for participation that define the *extent* of socio-political membership within a community".[672] Indeed, at the Constitutional Convention in 1898, the delegates rejected cl 110, as it had been proposed to be amended by Dr Quick, which concerned the rights and privileges of citizenship.[673] A primary reason for the rejection may have been racist concerns.[674] But another was uncertainty about the concept of Commonwealth citizenship.[675] As Mr Kingston said, there was a need for citizenship to be "defined in the Constitution, or else we ought to give power to the Federal Parliament to define it".[676] Mr O'Connor later said that Dr Quick had not explained what would be meant by citizenship:[677]

> "Does he mean only the political rights which you give to every inhabitant of a state who is qualified to vote, or does he go beyond that … and describe every person who is under the protection of your laws as a citizen? The citizens, the persons under the protection of your laws, are not the only persons who are entitled to take part in your elections or in your government, but every person who resides in your community has a right to the protection of your laws and to the protection of the laws of all the states, and has the right of access to your courts."

435 Thirdly, the ordinary concepts of citizenship and consequential allegiance are not antonyms of alien. Although Dicey treated the categories of citizen and alien as exhaustive,[678] this feat could only be accomplished by forcing square pegs into round holes. For example, a denizen is not an alien.[679] A denizen is neither a citizen nor an alien. Denizenship, created by letters patent, is "in a kind of middle state between a natural-born subject and an alien, and partakes of both of them".[680] The same might be true of the inhabitants of some British mandated territories, trust territories, protected states and Special Administrative Regions.[681]

436 Fourthly, there is grave danger in what Professor Bickel described as the "symmetrical thinking" of treating citizenship as the exclusive tie between the government and the governed in a political community, and hence treating citizenship as the sole test for non-alienage.[682] The *Constitution* did not create a concept of local citizenship. It refers instead in s 24 to the "people of the Commonwealth"[683] and, in the preamble, to the "people"

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672 Rubenstein, *Australian Citizenship Law in Context* (2002) at 4 (emphasis added and footnote omitted).

673 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 3 March 1898 at 1788, 1797.

674 See Williams, "Race, Citizenship and the Formation of the Australian Constitution: Andrew Inglis Clark and the '14th Amendment' " (1996) 42 *Australian Journal of Politics and History* 10.

675 Compare *Constitution*, s 44(i).

676 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 8 February 1898 at 677. See also Dr Quick on 2 March 1898 at 1751.

677 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 2 March 1898 at 1761.

678 Dicey, *A Digest of the Law of England with reference to the Conflict of Laws* (1896) at 174.

679 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 472 [243], citing *Halsbury's Laws of England*, 1st ed, vol 1, paras 686-687.

680 Henriques, *The Law of Aliens and Naturalization* (1906) at 17. See also Blackstone, *Commentaries on the Laws of England* (1765), bk 1, ch 10 at 362.

681 *In re Ho* (1975) 10 SASR 250 at 252-253, referring to *British Nationality Act 1948* (UK), s 32 and *Australian Citizenship Act 1948* (Cth), ss 5(1), 5(3A). See also *R v The Earl of Crewe*; *Ex parte Sekgome* [1910] 2 KB 576 at 620. Compare Grossman, "Nationality and the Unrecognised State" (2001) 50 *International and Comparative Law Quarterly* 849 at 858, fn 59; Jones, *British Nationality Law and Practice* (1947) at 45.

682 Bickel, *The Morality of Consent* (1975) at 53.

683 See *Hwang v The Commonwealth* (2005) 80 ALJR 125 at 128-129 [11]; 222 ALR 83 at 87. See also *Singh v The Commonwealth* (2004) 222 CLR 322 at 382 [149].

who ultimately did "unite in one indissoluble Federal Commonwealth".[684] The danger of shifting from the language of the "people of the Commonwealth" to the language of the "citizens of the Commonwealth" is that, as Professor Bickel observed, it "has always been easier, it always will be easier, to think of someone as a noncitizen than to decide that he is a non-person, which is the point of the *Dredd Scott* case".[685] Whatever might have been the reasons for the treatment of Aboriginal people as non-persons for the purposes of s 127 of the *Constitution*, the effect of that repealed provision should not be generalised by using the less overt language of statutory citizenship to treat Aboriginal non-citizens as though they were non-persons, cast out from the political community of the "people of the Commonwealth" to which they had belonged since its establishment at Federation.

437 The constitutional meaning of an alien, as a "foreigner" to the Australian political community, was, and therefore remains, the essential meaning of alien in s 51(xix) of the *Constitution*. The antonym of an alien in s 51(xix) is not a statutory citizen. It is a person who is a belonger to the Australian political community. Nevertheless, as explained below, a person who is a statutory citizen will belong to the Australian political community. This is because that community is powerfully shaped by citizenship laws.

Citizenship laws and the political community

438 A political community is not a thing that exists in space. It is a metaphysical construct that describes a group of people who belong to a defined place or territory, here the land of the Australian state, and who are to be regulated as such belongers. A political community of an independent body politic therefore includes the intertwined dimensions of territory, permanent population, and government.[686]

439 Since legislation is one of the defining formal acts of a political community,[687] it is natural that legislation should shape the membership of the political community. It does so by establishing norms from which a person's membership of the Australian political community can be determined. Thus, although it cannot directly control the constitutional meaning of an alien, Commonwealth legislation is a central, but not exclusive, source of the norm from which a political community is determined. The same is true of judicially created norms, which can be closely related to statutory developments,[688] including by interpretation of statutory provisions or by influence of common law norms, such as *ius soli* or *ius sanguinis*, on the development of legislation. In instances of both judicial and statutory norms, the legal and political considerations of political community have always been heavily influenced by metaphysical ties to physical territory. For instance, the common law and legislative concept of *ius soli* is concerned with citizenship based upon birth in a physical territory.

440 The most significant legislative power to shape the membership of the political community is the power to determine the citizenship of the polity. In *Potter v Minahan*,[689] Griffith CJ said that "every human being (unless outlawed) is a member of some community, and is entitled to regard the part of the earth occupied by that community as a place to which he may resort when he thinks fit". Laws that determine the conditions of citizenship affect the membership of the community because they involve an explicit statement

684 See *Constitution*, preamble.
685 Bickel, *The Morality of Consent* (1975) at 53.
686 See Montevideo Convention on the Rights and Duties of States (1933), Art 1.
687 Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (2000) at 228.
688 *Vella v Commissioner of Police (NSW)* (2019) 93 ALJR 1236 at 1259 [86].
689 (1908) 7 CLR 277 at 289.

of an "absolute and unqualified right" that "a citizen cannot be either deported or denied reentry".[690] By shaping the content of the political community in this way, citizenship legislation is therefore a cogent source from which outsiders or foreigners to the political community can be identified.

441 Over the decades, the fluctuating definition of a citizen has also caused fluctuating norms that govern the application of the power in s 51(xix) of the *Constitution* to make laws with respect to aliens. Putting to one side citizenship by naturalisation or registration, which might also be seen as shaping norms concerning integration into the Australian community, the *Nationality and Citizenship Act* provided that Australian citizenship was acquired: (i) by birth in Australia ("**citizenship by birth**");[691] (ii) upon the registration of their birth, by a person whose father was an Australian citizen or, if the person was born out of wedlock, a person whose mother was an Australian citizen or British subject ordinarily resident in Australia or New Guinea ("**citizenship by descent**");[692] or (iii) upon declaration by the Governor-General, by the people in a territory that is incorporated within Australia, "by reason of their connexion with that territory"[693] ("**citizenship by incorporation of territory**").

442 Over the next 36 years, the *Nationality and Citizenship Act* was amended to provide, among other things: (i) that citizenship by descent could be acquired through married parents if either the mother or father was an Australian citizen;[694] (ii) for the presumed citizenship of children found abandoned in Australia unless and until the contrary was proved;[695] (iii) for the avoidance of statelessness, that a person born in Australia who had never been a citizen of any country could apply for and was to be granted citizenship;[696] (iv) for citizenship to be acquired by a person adopted by an Australian citizen, provided that person was, at the time of adoption, a permanent resident;[697] (v) for the removal of distinctions between people born within or outside of marriage for the purpose of citizenship by descent;[698] (vi) for citizenship by descent, a requirement that, if the relevant parent is themselves a citizen by descent, they had been lawfully present in Australia for at least two years at any time prior to seeking to register the child as a citizen;[699] and (vii) for the conferral of citizenship by descent on the children of women who met the requirements of the transitional provisions in s 25(1)(a)-(c) of the *Nationality and Citizenship Act*.[700] In 2007, the *Australian Citizenship Act 1948* (Cth), as the *Nationality and Citizenship Act* had by then become, was repealed.[701] The *Australian Citizenship Act 2007* (Cth), which was passed in its place, retains the core concepts of citizenship by birth,[702] by adoption,[703] by abandonment in Australia,[704] by incorporation of territory,[705] and by descent,[706] as well as secondary concepts like the power to grant citizenship to prevent statelessness,[707] among

690 *United States v Valentine* (1968) 288 F Supp 957 at 980.
691 *Nationality and Citizenship Act 1948* (Cth) (as made), s 10(1); see also s 25(1)(a).
692 *Nationality and Citizenship Act 1948* (Cth) (as made), s 11(1); see also s 25(3), (5).
693 *Nationality and Citizenship Act 1948* (Cth) (as made), s 33.
694 *Citizenship Act 1969* (Cth), s 7.
695 *Citizenship Act 1969* (Cth), s 5(d).
696 *Australian Citizenship Act 1973* (Cth), s 12.
697 *Australian Citizenship Amendment Act 1984* (Cth), s 10.
698 *Australian Citizenship Amendment Act 1984* (Cth), s 10.
699 *Australian Citizenship Amendment Act 1984* (Cth), s 10.
700 See *Nationality and Citizenship Act 1948* (Cth) (as made), s 25(3).
701 *Australian Citizenship (Transitionals and Consequentials) Act 2007* (Cth), Sch 1 item 42.
702 *Australian Citizenship Act 2007* (Cth), s 12.
703 *Australian Citizenship Act 2007* (Cth), ss 13, 19C.
704 *Australian Citizenship Act 2007* (Cth), s 14.
705 *Australian Citizenship Act 2007* (Cth), s 15.
706 *Australian Citizenship Act 2007* (Cth), s 16.
707 *Australian Citizenship Act 2007* (Cth), s 21(8).

others.

443 Despite the fluctuation, two central matters that have remained among the norms of political community have been the traditional factors of place of birth (*ius soli*) and citizenship of a parent or parents (*ius sanguinis*). At Federation, English and United States common law placed most emphasis on the place of birth.[708] But many nations of Continental Europe, including France and Prussia, focused more heavily upon descent.[709] In 1862, Dr von Bar argued that "by the laws of all nations", nationality was "closely dependent on descent".[710] This rule was, Dr von Bar said, the "correct canon, since nationality is in its essence dependent on descent".[711]

444 As explained in the introduction to these reasons, the Solicitor-General of the Commonwealth submitted that one limit to legislative power to alter the content of political community lay in the combination of the central norms of birth and descent. Apparently drawing upon, and making more extreme, an example from Gaudron J,[712] the Solicitor-General of the Commonwealth accepted that a person could never be an alien if the person satisfied the tests of *ius soli* and *ius sanguinis* by birth in Australia to two parents who were solely Australian citizens and the person had not renounced their allegiance. No explanation was given for why the combination of birth and descent was, or should be, the only indelible example of membership of the political community that is beyond legislative power with respect to aliens.

445 The reason that the combination of birth and descent is a norm of political community that is indelible subject only to renunciation is that these factors evince fundamental norms of attachment to country. Of the two factors, the common law placed great emphasis upon the birth of a child in the country as establishing the necessary attachment to country. But the emphasis of the common law upon birth rather than parentage was sometimes doubted. In 1869, the Lord Chief Justice of England wrote extra-judicially that, "in the vast majority of instances", a child left to their own choice between nationality based on parentage or place of birth would choose the former. He continued:[713]

> "And the reason is obvious. Personal attachments are stronger than local ones. The place of birth is an accident; the associations connected with it are fleeting and uncertain; while the domestic ties and the relations of family and kindred are powerful and enduring. ... The impression thus produced in early youth remains, and strengthening with advancing years develops itself into the national attachment which we designate by the term of patriotism.
>
> Descent, therefore, affords the true rule for determining nationality."

446 The Lord Chief Justice acknowledged, however, that there was "general agreement" as to two related exceptions to nationality based on parentage which also illustrate the cen-

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708 *Calvin's Case* (1608) 7 Co Rep 1a at 18a [77 ER 377 at 398-399]; Blackstone, *Commentaries on the Laws of England* (1765), bk 1, ch 10 at 361-362. See also Parry, *Nationality and Citizenship Laws of The Commonwealth and of The Republic of Ireland* (1957) at 34.

709 Great Britain, *Report of the Royal Commissioners for Inquiring into the Laws of Naturalization and Allegiance* (1869) at viii; Cockburn, *Nationality: or the Law Relating to Subjects and Aliens* (1869) at 187.

710 von Bar, *Das Internationale Privat- und Strafrecht* (1862) at 92 §31. See von Bar, *International Law: Private and Criminal*, tr Gillespie (1883) at 99 §31.

711 von Bar, *Das Internationale Privat- und Strafrecht* (1862) at 92 §31. See von Bar, *International Law: Private and Criminal*, tr Gillespie (1883) at 99-100 §31.

712 *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 179 [54], requiring birth in Australia and the Australian citizenship of one parent.

713 Cockburn, *Nationality: or the Law Relating to Subjects and Aliens* (1869) at 187-188.

trality of attachment to country: (i) where the child was raised in a country in which their parents had become domiciled but which was different from the country of the parents' nationality; and (ii) where for two generations the ancestors of a person have been domiciled in a foreign country.[714]

Indigenous persons and the Australian political community

447 Indigenous non-citizens, with their powerful personal attachment to land, fall within the same intermediate region of "non-citizen, non-alien" as denizens and other protected persons. As Professor Volpp observed of the members of the "Indian Tribes", described in Art I, s 8, cl 3 of the United States Constitution, "key concepts" such as "citizen" and "alien" cannot "address the actual relationship between the nation-state and indigenous peoples. [American] Indians have been considered citizen and alien, as well as neither citizen nor alien".[715]

448 The legal position of American Indians cannot be directly compared with Aboriginal and Torres Strait Islander people of Australia. Even before the uniform grant of their United States citizenship in 1924,[716] American Indians were expressly given legal recognition as "distinct, independent, political communities, retaining their original natural rights, as the undisputed possessors of the soil"[717] when they "live together as a distinct community, under their own laws, usages and customs".[718] Nevertheless, the basic difficulty involved in characterising American Indians as aliens is the same as that for Aboriginal people of Australia: "[w]e call an alien a foreigner, because he is not *of the country* in which we reside".[719]

449 Professor McHugh has observed that in Australia, unlike New Zealand and North America, "both law and practice revealed scant, indeed a virtually non-existent, recognition of the reality of Aboriginal political organization, so blind were the settlers to it".[720] Yet, despite the limited understanding and recognition of Aboriginal society at Federation, the Aboriginal people in Australia were not regarded as aliens to the political community. It would be an astonishing result if, on the one hand, Aboriginal people were a necessary part of the "people of Australia" and the Australian political community in 1901 despite the exclusionary nineteenth century racial application of the aliens power and despite the scant recognition of the reality of Aboriginal community ties to Australia, and yet, on the other hand, Aboriginal people were to fall outside the same political community upon a more sophisticated, inclusive concept of community that has been shaped by legislative and judicial developments following the recognition of the realities of Aboriginal society and the effect upon it of the acts of Parliament and the executive.

450 Significant legislative and judicial developments since Federation have been premised upon recognition of Aboriginal community in Australia. As Brennan J said in *Mabo v Queensland [No 2]*,[721] "it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination". There, the law developed to recognise the reality that the indigenous inhabitants of Australia lived in societies in

714 Cockburn, *Nationality: or the Law Relating to Subjects and Aliens* (1869) at 188-189.
715 Volpp, "The Indigenous as Alien" (2015) 5 *UC Irvine Law Review* 289 at 293.
716 *Indian Citizenship Act*, c 233, 43 Stat 253 (1924).
717 *Worcester v Georgia* (1832) 31 US 515 at 559.
718 *Cherokee Nation v Georgia* (1831) 30 US 1 at 60. See also *Worcester v Georgia* (1832) 31 US 515.
719 *Cherokee Nation v Georgia* (1831) 30 US 1 at 56 (emphasis added).
720 McHugh, *Aboriginal Societies and the Common Law* (2004) at 191.
721 (1992) 175 CLR 1 at 41-42.

accordance with laws and customs that required the recognition of their entitlements to land. The powerful spiritual and cultural connection that Aboriginal people have with the land - the "religious relationship"[722] - is, by definition, a powerful spiritual and cultural connection with the defined territory of Australia. Just as the attachment to country that arises from citizenship of parents and birth in the defined territory can be an underlying basis for membership of political community independent of citizenship legislation, so too are the powerful spiritual and cultural connections between Aboriginal people and the defined territory of Australia.

451 Native title rights and interests require a continuing connection with particular land.[723] However, underlying that particular connection is the general spiritual and cultural connection that Aboriginal people have had with the land of Australia for tens of thousands of years.[724] In other words, underlying a connection to any particular land is a general, "fundamental truth ... an unquestioned scheme of things in which the spirit ancestors, the people of the clan, particular land and everything that exists on and in it, are organic parts of one indissoluble whole".[725] Sometimes events, including the cessation of the existence of a particular Aboriginal society, cause the loss of native title rights to land.[726] But the loss of those rights to, and the relationship with, particular land, or even the efflux-ion of particular Aboriginal societies, does not extinguish the powerful spiritual and cultural connections Aboriginal people have generally with the lands of Australia.[727] Those connections are inextricably part of Aboriginal identity as members of the broader community of the first people of the Australian land generally. The very words "Aboriginal" and "indigenous", *ab origine* or "from the beginning", enunciate a historical, and original, connection with the land of Australia generally. The sense of identity that ties Aboriginal people to Australia is an underlying fundamental truth that cannot be altered or deemed not to exist by legislation in the same way that changing legislative definitions of citizenship cannot alter the fundamental truth underlying identity that is shaped by the core combined norms that metaphorically tie a child to Australia by birth and parentage.

452 Legislative developments since Federation have expanded the rights and treatment of Aboriginal people towards equality with other members of the Australian political community, including by the enactment of the *Racial Discrimination Act 1975* (Cth). The same expansion occurred in relation to the federal franchise. Shortly after Federation, s 4 of the *Commonwealth Franchise Act 1902* (Cth) excluded Aboriginal people of Australia and various other nations from the federal franchise, unless entitled to vote under State laws as preserved by s 41 of the *Constitution*.[728] Further exceptions to the exclusion were introduced, including for Aboriginal people of Australia who were entitled to vote under State laws, without resort to s 41 of the *Constitution*, or who were or had been members of the Defence Force.[729] In 1962, s 2 of the *Commonwealth Electoral Act 1962* (Cth) gave all Aboriginal people the right to enrol and, by removal of an exemption,[730] in 1984 they had the duty to enrol.[731]

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722 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 167.
723 *Western Australia v Ward* (2002) 213 CLR 1 at 72 [32], 85 [64]; *Native Title Act 1993* (Cth), s 223(1).
724 *Gerhardy v Brown* (1985) 159 CLR 70 at 149.
725 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 167. See also *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 356-357; *Western Australia v Ward* (2002) 213 CLR 1 at 64 [14]; *Northern Territory v Griffiths* (2019) 93 ALJR 327 at 368 [153]; 364 ALR 208 at 255.
726 *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at 446 [53].
727 *Northern Territory v Griffiths* (2019) 93 ALJR 327 at 377 [206], 379 [223]; 364 ALR 208 at 267-268, 271.
728 See also *Commonwealth Electoral Act 1918* (Cth), s 39(5); *Commonwealth Electoral Act 1925* (Cth), s 2.
729 *Commonwealth Electoral Act 1949* (Cth), s 3(b); *Commonwealth Electoral Act 1961* (Cth), s 4.
730 *Commonwealth Electoral Act 1962* (Cth), s 3.
731 *Commonwealth Electoral Legislation Amendment Act 1983* (Cth), s 28(j).

453 The Commonwealth effectively submitted that this movement towards equality before the law requires Aboriginal non-citizens to be stripped of their membership of the Australian political community in order to ensure that they are treated equally with other, non-Aboriginal non-citizens. In other words, the expansion of Aboriginal rights has assimilated Aboriginal people within a unitary, homogenous political community that is defined almost entirely by legislative norms of citizenship. This view reflects a human inclination toward homogeneity which Hume described as the "narrowness of soul" which makes people prefer that which is more proximate over that which is more remote.[732] It also misunderstands the concept of equality before the law. To treat differences as though they were alike is not equality. It is a denial of community. Any tolerant view of community must recognise that community is based upon difference. As Professor Detmold has written:[733]

> "Suppose I see only green and you see only red. Do we have community in this simple matter of our example? No, because I live in a green world and you live in a red one - two worlds, not a common (communal) world. But when we recognise each other's difference then and only then is there a common world as the foundation of a community between us ... For one of us to impose their view on the other (in our example, one of us insisting that it is the other who is colour-blind) is a denial of respect for the other, and therefore a denial of our community."

454 In any event, the expansion of Aboriginal rights by Commonwealth legislation does not require an identical treatment of Aboriginal and non-Aboriginal people in the shaping of the political community. In the *Native Title Act 1993* (Cth), the Commonwealth Parliament recited that "[t]he people whose descendants are now known as Aboriginal peoples and Torres Strait Islanders were the inhabitants of Australia before European settlement. They have been progressively dispossessed of their lands."[734] Our legal system would involve a hopeless and incoherent contradiction if it were simultaneously: (i) to recognise and implement this recitation; and (ii) to conclude that those same descendants, identifying and recognised as such, have now become foreigners to the Australian political community.

Absurd consequences?

455 The Solicitor-General of the Commonwealth submitted that a consequence of treating Aboriginal persons as beyond the reach of the aliens power was that a 60 year old foreign citizen who had lived overseas all of their life could move to Australia and, by being accepted into an Aboriginal community, lose their status as an alien. It might be doubted that there are significant numbers of foreign sexagenarians awaiting their acceptance as indigenous by Aboriginal communities in Australia. This is the type of "exercise in imagination",[735] "extreme example",[736] "absurd possibility"[737] or "distorting possibility"[738] about

732 Hume, *A Treatise of Human Nature*, ed Selby-Bigge (1896), bk 3 at 537.
733 Detmold, "Law and Difference: Reflections on Mabo's Case", in *Essays on the Mabo Decision* (1993) 39 at 39.
734 *Native Title Act 1993* (Cth), preamble.
735 *Western Australia v The Commonwealth* (1975) 134 CLR 201 at 271.
736 *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 380 [87]; *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 43 [32].
737 *Western Australia v The Commonwealth* (1975) 134 CLR 201 at 275.
738 *Western Australia v The Commonwealth* (1975) 134 CLR 201 at 275; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 381 [88]; *Egan v Willis* (1998) 195 CLR 424 at 505 [160]; *Singh v The Commonwealth* (2004) 222 CLR 322 at 384 [155]; *XYZ v The Commonwealth* (2006) 227 CLR 532 at 549 [39].

which this Court has repeatedly warned in constitutional interpretation,[739] including in relation to the aliens power.[740]

456 The interpretation of s 51(xix) of the *Constitution* is also not assisted by the submission that Aboriginal people who moved overseas and whose families lived overseas for multiple generations might claim to be non-aliens. Again, it might be seriously doubted whether there are significant numbers of Aboriginal people who have lived overseas for generations, maintaining mutual recognition and Aboriginal identity.

457 A final submission by the Commonwealth was that the consequence of treating Aboriginality as a status of non-alienage is that the power of the Commonwealth Parliament to legislate would depend upon the "choices or views of individuals". The immediate answer to this submission is that a determination of the application of the concept of "alien" remains a matter for the courts even if one factor to be taken into account is the views of individuals. The same point can be made about s 51(xxvi) of the *Constitution*. It might be doubted whether the application today of the difficult concept of "race" could be confined to matters of physical characteristics or genetics without any role for the views of individuals. In any event, there is no basis for the underlying assumption that the application of constitutional concepts is fixed in time so that Aboriginal identity in the *Constitution*, whether for the purposes of s 51(xix) or s 51(xxvi), could only be determined by physical characteristics or genetics. Further, unless "alien" means whatever the Commonwealth Parliament says that it means, the power of the Commonwealth Parliament to legislate will always depend upon exogenous matters such as the choices or views of individuals. A child born in Australia to parents who are solely Australian citizens is only outside the scope of s 51(xix) due to the choices of the child's parents, including their choices to apply for and obtain Australian citizenship before the birth of their child, in some cases, and to give birth in Australia.

Mr Love and Mr Thoms

458 In *Mabo v Queensland [No 2]*,[741] Brennan J said that "[m]embership of the indigenous people depends on biological descent from the indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among those people". This tripartite test was neither new nor novel. It was similar to the approach taken in s 4(1) of the *Aboriginal Land Rights Act 1983* (NSW) and the approach of Deane J in *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*).[742] The tripartite test was applied in *Mabo [No 2]* as a means to identify those members of a particular sub-group of indigenous people who enjoy continuing connection with particular land. It can be usefully applied in this case. However, it is not set in stone, particularly as an approach to determining Aboriginality as the basis for those fundamental ties of political community in Australia which are not dependent upon membership of a particular sub-group.[743]

459 Although Mr Love is a citizen of Papua New Guinea, having been born there in 1979 after independence of that country from Australia in 1975, his identity as an Aboriginal man is based upon: (i) his paternal great-grandparents, who were descended "in significant part

739 See *Wainohu v New South Wales* (2011) 243 CLR 181 at 240 [151].
740 *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 43 [32].
741 (1992) 175 CLR 1 at 70.
742 (1983) 158 CLR 1 at 274.
743 See *The Tasmanian Dam Case* (1983) 158 CLR 1 at 274.

from people who inhabited Australia immediately prior to European settlement"; (ii) his self-identification as a descendant of the Kamilaroi tribe; and (iii) his recognition as such a descendant by an elder of that tribe.

460 Although Mr Thoms is a citizen of New Zealand, having been born there in 1988, the parties agree that he is an Aboriginal man. He identifies, and is accepted by other Gunggari People, as a member of the Gunggari People. As a Gunggari man he is a holder of native title. The native title determinations that recognised the rights of the Gunggari People quoted from a report that said:[744]

> "Despite the odds, determined efforts on the part of the Gunggari to maintain knowledge of country, of kin and countrymen, and of Gunggari law and custom - both on country and at a remove - ensured the survival of Gunggari society. Present Gunggari society may be seen as substantially continuous with that existing at presovereignty."

461 As to whether Mr Love and Mr Thoms meet the tripartite test for recognition as members of an Aboriginal community, it is unnecessary to descend to the detail of any inferences that can be drawn from the agreed facts. At one point in oral submissions, the Solicitor-General of the Commonwealth accepted that Mr Love and Mr Thoms were Aboriginal, properly adding that the Commonwealth was "conscious of the historical difficulties that have attended questions of definition in relation to Aboriginal persons" and saying that the case had therefore been approached at a higher level of principle. The Commonwealth's position was clarified in a written response to the Senior Registrar of this Court after the first hearing in which it was explained that "the Commonwealth prefers not to take a position on the state of the agreed facts". In short, the Commonwealth has never disputed that the agreed facts might be sufficient for the plaintiffs' asserted conclusion that both men are Aboriginal.

462 The process of agreeing the facts of a special case to be presented to this Court takes place against the background of the issues understood to be in dispute. A plaintiff needs to introduce sufficient facts to satisfy the Court, but that sufficiency can be shaped by the matters in dispute. The position in relation to Mr Thoms is plain. It is an agreed fact that Mr Thoms is an Aboriginal man. As for Mr Love, the lack of any dispute about the sufficiency of recognition of him as a member of an Aboriginal community means that there has been no contest against which to consider issues that might surround the application of the tripartite test, including: (i) whether the tripartite test, developed in the context of native title, and involving issues of recognition by sub-groups of Aboriginal people, should be adapted in the context of application of provisions such as s 51(xix) or s 51(xxvi); (ii) whether the limbs of the tripartite test are each part of a continuum from weakness to strength; and (iii) whether the limbs are interrelated so that a weaker factual basis in one limb could be compensated for by a stronger factual basis in others.[745] In the absence of any contest on this point, and in circumstances in which there is force in each of the three propositions above and in which it is plainly open to treat Mr Love as Aboriginal, the assumption upon which the agreed facts proceeded, namely that Mr Love is Aboriginal, should be accepted.

463 As mentioned earlier in these reasons, each plaintiff also relied upon numerous facts whose relevance was to show the integration of each plaintiff into the Australian com-

744 *Kearns on behalf of the Gunggari People #2 v Queensland* [2012] FCA 651 at [22]; *Foster on behalf of the Gunggari People #4 v Queensland* [2019] FCA 1402 at [20]. See also *Foster on behalf of the Gunggari People #3 v Queensland* [2014] FCA 1318 at [23].

745 See, for instance, *Gibbs v Capewell* (1995) 54 FCR 503 at 512; *Shaw v Wolf* (1998) 83 FCR 113 at 119.

munity. For instance, in relation to Mr Love these facts include: his paternal grandfather served with Australian military forces; his father was born an Australian citizen in the Territory of Papua; his mother lived in Australia for 19 years until she died; he arrived in Australia 34 years ago with his parents and has lived in Australia continuously since then on either a permanent residency visa or a BF transitional (permanent) visa; he was married to an Australian citizen; and he has five children, who are Australian citizens. In relation to Mr Thoms the facts include: his maternal great-grandparents and grandparents were born in Australia and lived their lives in Australia (his grandmother continues to live in Australia); his mother was born in Australia, married his father, a New Zealand national, and has resided permanently in Australia with his father since 1994; his father became an Australian citizen in 2009; and Mr Thoms himself has resided in Australia since 1994, as, it seems, has his brother, and, since their respective dates of birth, his sister (an Australian citizen) and his child (also an Australian citizen).

464 Ultimately, it is unnecessary to consider the effect of the absorption of Mr Love and Mr Thoms into the Australian community upon the application of norms of political community. As I have explained, although absorption into the community might be a relevant factor, the course of authority in this Court denies that it is sufficient. The sufficiency of the plaintiffs' identity as Aboriginal people makes it unnecessary to explore this issue further.

465 It is also unnecessary to consider the circumstances in which an Aboriginal person might become an alien. It is possible for a person who is a non-alien to become an alien. In relation to non-Aboriginal people, one obvious manner in which this can occur is by renunciation of citizenship. So too, the renunciation of Aboriginal identity by a non-citizen might transform the status of that person from non-alien to alien. Other circumstances need not be considered because they do not arise here. The Commonwealth did not suggest that Mr Love or Mr Thoms had engaged in any conduct, or was the subject of any circumstance including de-identification or non-recognition from his Aboriginal community, that could alter his status from non-alien to alien.

Conclusion

466 A premise of the submissions of all parties and the intervener to these special cases, consistently with the same premise in previous cases in this Court,[746] solidly based upon repeated statements in this Court,[747] is that the constitutional concept of an alien is not co-terminous with any persons whom the Commonwealth Parliament chooses to make statutory citizens. That long-standing assumption is correct. Political community is not a concept that is wholly a creature of legislation. For example, a child born in Australia to two parents who have only Australian citizenship is not an alien. The metaphysical ties between that child and the Australian polity, by birth on Australian land and parentage, are such that the child is a non-alien, whether or not they are a statutory citizen. The same must also be true of an Aboriginal child whose genealogy and identity includes a spiritual connection forged over tens of thousands of years between person and Australian land, or "mother nature".[748]

746 See also *Singh v The Commonwealth* (2004) 222 CLR 322 at 327.

747 *Pochi v Macphee* (1982) 151 CLR 101 at 109; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 435-436 [132], 469-470 [238], 490 [297], 491-492 [303]; *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 36 [9]; *Singh v The Commonwealth* (2004) 222 CLR 322 at 329 [4]-[5], 382-383 [151]; *Koroitamana v The Commonwealth* (2006) 227 CLR 31 at 54-55 [81].

748 *Western Sahara (Advisory Opinion)* [1975] ICJR 12 at 85. See also *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 41.

467 This conclusion could only be avoided by denying its premise, so that the children in both scenarios are capable of being aliens according to the definition of citizen chosen by the Commonwealth Parliament. That approach would be contrary to the essential meaning of s 51(xix), which is not tied to the state of legislation. It would deny the long-standing existence of a category of persons who are non-citizens and non-aliens. It would effectively allow the Commonwealth Parliament to recite itself into power. To the extent that such an approach might be said to be based upon a concern for equality within the political community, it would involve a misunderstanding of both equality and community. And, by denying the unquestioned premise and authority upon which every party and the intervener proceeded in these special cases, it would deny Aboriginal people the essence of their identity without giving any party or the intervener, or any of the population of more than half a million Aboriginal or Torres Strait Islander people or their representative bodies, the opportunity to be heard on the point.

468 I would answer the questions in each special case as follows:

Question: Is the plaintiff an "alien" within the meaning of s 51(xix) of the *Constitution*?

Answer: No.

Question: Who should pay the costs of the special case?

Answer: The defendant.