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.

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.

---

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.

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*.

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

---

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.

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 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.

---

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.

15 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 143-144 per Brennan J.

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.

---

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.

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.

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.

---

23 *Australian Citizenship Act 2007* (Cth), s 16(2).

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].

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 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

---

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.

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.

"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.

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

---

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

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

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

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].

---

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

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 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].

443-444 [44] per Gleeson CJ, Gummow and Hayne JJ.

43 (2002) 214 CLR 422.

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.

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].

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.

---

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.

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 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

---

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.

51 See [25] above.

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

---

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

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 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

---

per Mason CJ, Toohey and Gaudron JJ.

57 (1994) 182 CLR 104 at 126.

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

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].

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.

---

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.

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*

---

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 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 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].

---

and Toohey JJ.

65 (2003) 218 CLR 28 at 35 [2].

66 (2004) 222 CLR 322 at 398 [200].

67 (2004) 222 CLR 322 at 398 [200].

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.

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

---

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].

77 (2006) 227 CLR 31.

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

---

78 (2006) 227 CLR 31 at 38-39 [14].

79 (2003) 218 CLR 28 at 35 [2].

80 (2001) 207 CLR 391.

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 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

---

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.

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.

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.

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".

---

88 Citizenship Act, s 16.

89 *Judiciary Act 1903* (Cth), s 78B.

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

---

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.

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 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.

---

96 (2002) 213 CLR 1 at 65 [14] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

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].

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].

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.

---

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.

107 (1992) 175 CLR 1 at 70.

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].

---

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)

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 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".

---

364 ALR 423 at 435-436 [50]-[51] per Allsop CJ (Markovic and Steward JJ agreeing at 436 [54], [55]).

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

---

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.

> 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 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].

---

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

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.

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 a person's status as an alien or non-alien falling to be

---

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.

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

---

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.

"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, internationally 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

---

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*.

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.

> 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 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

---

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*.

142 *Attorney-General for the Commonwealth v Ah Sheung* (1906) 4 CLR 949 at 951.

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]

---

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

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 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].

---

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).

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

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

---

[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.

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 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,

168 *Cherokee Nation v Georgia* (1831) 30 US 1 at 17.

169 *Elk v Wilkins* (1884) 112 US 94 at 99.

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).

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 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

---

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.

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.

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].

---

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.

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 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

---

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

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).

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 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

---

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].

191 (1992) 175 CLR 1 at 70.

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 other variations of the

---

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.

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.

---

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).

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 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.

---

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.

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 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

---

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.

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 ...

---

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.

rights"[206]. If the scope of one or 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.

---

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

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 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.

---

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

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].

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

---

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).

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.

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 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

---

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.

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".

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]:

---

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.

> "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'."

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].

---

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].

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 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

---

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).

235 *Pochi v Macphee* (1982) 151 CLR 101 at 109.

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

---

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].

[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.

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

---

246 (2006) 227 CLR 31 at 42 [31].

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].

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 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

---

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.

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

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.

---

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

---

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.

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.

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

---

259 (1983) 158 CLR 1 at 274.

260 (1983) 158 CLR 1 at 273.

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 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.

---

261 (1992) 175 CLR 1 at 70.

262 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 48.

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

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.

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].

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

---

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.

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.

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 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]

---

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.

276 *Walker v New South Wales* (1994) 182 CLR 45 at 50.

, 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

---

277 (2001) 208 CLR 1 at 50-51 [46]-[48], 60-61 [76], 99 [204].

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 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.

---

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

279 (1992) 175 CLR 1 at 203.

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 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*?

---

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

Answer: Yes.

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

Answer: Mr Thoms.

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

---

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

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 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.

---

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).

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.

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 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.

---

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.

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.

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

---

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

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

---

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.

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).

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], 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.

---

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.

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 as paramount lord[302]. As the common law became permeated

---

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.

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*

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

---

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

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 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

---

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.

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*,