FEDERAL COURT OF AUSTRALIA

Helmbright v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2) [2021] FCA 647

|  |  |
| --- | --- |
| File number: |  |
|  |  |
| Judgment of: | **MORTIMER J** |
|  |  |
| Date of judgment: | 15 June 2021 |
|  |  |
| Catchwords: | **CONSTITUTIONAL LAW** – *Constitution* s 51(xix) – ratio decidendi of the decision in *Love v Commonwealth*; *Thoms v Commonwealth* [2020] HCA 3; 94 ALJR 198 – content of the tripartite test in *Mabo v Queensland (No 2)* [1992] HCA 23; 175 CLR 1 – application of the *Mabo (No 2)* test – where applicant is a non-citizen who identifies as an Aboriginal Australian |
|  |  |
| Legislation: | *Constitution*, ss 51(xix), 51(xxvi)  *Migration Act 1958* (Cth)  *Native Title Act 1993* (Cth), s 223 |
|  |  |
| Cases cited: | *ACCC v Pratt (No 3)* [2009] FCA 407; 175 FCR 558  *Agius v State of South Australia (No 6)* 2018 FCA 358.  *Attorney-General (Cth) v Queensland* [1990] FCA 358; 25 FCR 125  *Australian Broadcasting Corporation and Others v Chau Chak Wing* [2019] FCAFC 125; 271 FCR 632  *Bodney v Bennell* [2008] FCAFC 63; 167 FCR 84  *Cherokee Nation v Georgia* 30 US 1  *Chetcuti v Commonwealth* [2020] HCA 42; 95 ALJR 1  *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* [1992] HCA 64; 176 CLR 1  *Commonwealth Bank of Australia v Kojic* [2016] FCAFC 186; 249 FCR 421  *Commonwealth v Tasmania* [1983] HCA 21; 158 CLR 1  *Commonwealth v Yarmirr* [2001] HCA 56; 208 CLR 1  *Cunliffe v Commonwealth* [1994] HCA 44; 182 CLR 272  *De Rose v State of South Australia* [2003] FCAFC 286; 133 FCR 325  *Director of Public Prosecutions (Cth) v Thomas* [2016] VSCA 237; 315 FLR 31  *Eatock v Bolt* [2011] FCA 1103; 197 FCR 261  *Ex parte Walsh and Johnson; In re Yates* [1925] HCA 53; 37 CLR 36  *Fairfax Media Publications Pty Ltd v Gayle* [2019] NSWCA 172; 100 NSWLR 155  *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; 230 CLR 89  *Gibbs v Capewell* [1995] FCA 25; 54 FCR 503  *Hackett (a pseudonym) v Secretary, Department of Communities and Justice* [2020] NSWCA 83; 379 ALR 248  *Hasler v Singtel Optus Pty Ltd* [2014] NSWCA 266; 87 NSWLR 609  *Helmbright v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1872  *Hepples v The Commissioner of Taxation of the Commonwealth of Australia* [1992] HCA 3; 173 CLR 492  *Icon Co (NSW) Pty Ltd v Liberty Mutual Insurance Company Australian Branch trading as Liberty Specialty Markets* [2020] FCA 1493  *King-Ansell v Police* [1979] 2 NZLR 531  *Long v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1422  *Love v Commonwealth*; *Thoms v Commonwealth* [2020] HCA 3; 375 ALR 597  *Mabo v Queensland (No 2)* [1992] HCA 23; 175 CLR 1  *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 416  *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 223  *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58; 214 CLR 422  *Ngarluma Aboriginal Corporation v Ramirez* [2018] FCA 1900; 364 ALR 94  *Obeid v Lockley* [2018] NSWCA 71; 98 NSWLR 258  *Perara-Cathcart v The Queen* [2017] HCA 9; 260 CLR 595  *Pochi v MacPhee* [1982] HCA 60; 151 CLR 101  *Re Immigration and Multicultural Affairs, Minister for; Ex parte Te* [2002] HCA 48; 212 CLR 162  *Re Patterson; Ex parte Taylor* [2001] HCA 51; 207 CLR 391  *Re Woolley; Ex parte Applicants M276/2003* [2004] HCA 49; 225 CLR 1  *Risk (on behalf of the Larrakia People) v Northern Territory and Others (No NTD 5 of 2006)* [2007] FCAFC 46; 240 ALR 75  *Risk v Northern Territory of Australia* [2006] FCA 404  *Sampi v Western Australia* [2010] FCAFC 26; 266 ALR 537  *Sandy v Yindjibarndi Aboriginal Corporation (No 4)* [2018] WASC 124; 126 ACSR 370  *Shaw v Minister for Immigration and Multicultural Affairs* [2003] HCA 72; 218 CLR 28  *Shaw v Wolf* [1998] FCA 389; 83 FCR 113  *Tasmania v Victoria* [1935] HCA 4; 52 CLR 157  *Wagonga Local Aboriginal Land Council v Attorney General of New South Wales* [2020] FCA 1113  *Webster v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 702; 277 FCR 38 |
|  |  |
| Division: | General Division |
|  |  |
| Registry: | Tasmania |
|  |  |
| National Practice Area: | Administrative and Constitutional Law and Human Rights |
|  |  |
| Number of paragraphs: | 347 |
|  |  |
| Date of last submissions: | 3 February 2021 |
|  |  |
| Date of hearing: | 11-12 February 2021 |
|  |  |
| Counsel for the Applicant: | Mr S J Keim SC with Ms C J Klease |
|  |  |
| Solicitor for the Applicant: | Sentry Law |
|  |  |
| Counsel for the Respondent: | Mr S Lloyd SC with Mr C Tran |
|  |  |
| Solicitor for the Respondent: | Australian Government Solicitor |
|  |  |
| Counsel for the Intervener: | Ms R Webb QC with Dr R Cunningham and Mr T Goodwin |
|  |  |
| Solicitor for the Intervener: | King & Wood Mallesons |

ORDERS

|  |  |  |
| --- | --- | --- |
|  | | TAD 19 of 2020 |
|  | | |
| BETWEEN: | KENRICK HENARE HELMBRIGHT  Applicant | |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS  Respondent | |
|  | MELYTHINA TIAKANA WARRANA (HEART OF COUNTRY) ABORIGINAL CORPORATION  Intervener | |

|  |  |
| --- | --- |
| order made by: | MORTIMER J |
| DATE OF ORDER: | 15 JUNE 2021 |

THE COURT ORDERS THAT:

1. The application be dismissed.

2. On or before 4 pm on 29 June 2021 the parties file agreed orders in relation to costs.

3. In the absence of any agreement pursuant to order 2, on or before 4 pm on 6 July 2021 each party have leave to file any written submissions as to costs, limited to three pages.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

MORTIMER J:

# INTRODUCTION

1 This proceeding raises important questions arising out of the High Court’s decision in *Love v Commonwealth*; *Thoms v Commonwealth* [2020] HCA 3; 375 ALR 597 (***Love/Thoms***) and the majority finding (at [81]) 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*.

2 The applicant, Kenrick Henare Helmbright, seeks a declaration that he is not an alien for the purposes of s 51(xix) of the Constitution. He is a non-citizen. He identifies as an Aboriginal Australian and is of Tasmanian Aboriginal descent. He is recognised as an Aboriginal Australian by melythina tiakana warrana (Heart of Country) Aboriginal Corporation (**mtwAC**), an organisation that represents descendants of Aboriginal people living in north-eastern Tasmania at the time of first European settlement. The respondent, the Minister, denies that the applicant is an Aboriginal Australian for the purposes of s 51(xix) of the *Constitution*.

3 A central issue between the parties is whether Mr Helmbright must prove that he is recognised by a group of Aboriginal or Torres Strait Islander people who, as a “society”, have been continuously “united in and by [their] acknowledgment and observance of a body of law and customs” from sovereignty until the present day so that, under their laws and customs, they can also establish a continuing connection with particular land and waters, thus proving they hold native title: *Members of the* ***Yorta Yorta*** *Aboriginal Community v Victoria* [2002] HCA 58; 214 CLR 422 at [53]. In short, Mr Helmbright and the intervener, mtwAC, submit that this is not a requirement that flows from the majority reasoning in *Love/Thoms*. The Minister submits that it is.

4 The Minister submits that this Court is bound to apply the approach of Brennan J in *Mabo v Queensland (No 2)* [1992] HCA 23; 175 CLR 1 (***Mabo (No 2)***), and as a consequence of the reasoning of Nettle J in *Love/Thoms* adopting that test, is bound to find a person must be recognised as a member of a society which holds, or is entitled to be recognised as holding, native title. In these reasons I shall refer to this as a **native title approach**. Mr Helmbright submits that this Court is not bound to apply the *Mabo (No 2)* test and is free to apply a different test to the question whether he is an Aboriginal Australian and therefore not an alien – specifically, he nominates the tripartite test in Deane J’s reasons in *Commonwealth v Tasmania* [1983] HCA 21; 158 CLR 1 (the ***Tasmanian Dam Case***) at 273-274. mtwAC, which was granted leave to intervene in the proceeding, agrees that this Court should apply Deane J’s test but submits in the alternative that, if this Court is bound to apply the *Mabo (No 2)* test because of the reasoning in *Love/Thoms*, it is able to do so in a more flexible way than the Minister’s position suggests, and without requiring a person such as Mr Helmbright to be recognised as a member of a group that holds, or is proven to be entitled to hold, native title.

## Summary of my conclusions

5 For the reasons that follow, I find that the reasoning of the majority in *Love/Thoms*, reflected in the ratio decidendi of that decision, does not leave a single judge of this Court free to adopt a different test to the one set out by Brennan J in *Mabo (No 2)*, even though the majority reasoning in *Love/Thoms* expressly recognises that there may be other available approaches to the determination of whether or not a person such as Mr Helmbright is an Aboriginal Australian.

6 I find the ratio decidendi of the decision in *Love/Thoms* does not require a single judge to apply the mutual “recognition” limb of the *Mabo* *(No 2)* test by reference to any native title approach. I also conclude the reasoning of Nettle J in *Love/Thoms* on this matter does not support the Minister’s submission, both as to the interpretation of that reasoning, and whether it “controls” the approach a single judge must take.

7 I conclude that Brennan J’s approach, although expressed in the context of a decision about common law recognition of native title, is not as narrow as the Minister submits when it is applied to the question of alienage, as *Love/Thoms* requires. I conclude that, aside from descent, the *Mabo (No 2)* test looks to “mutual recognition”, that being the term used by Brennan J. The two aspects to mutual recognition are recognition by an individual that she or he is a member of the group concerned, and second, recognition by elders or others enjoying traditional authority within that group that the individual is a member. The recognition in this sense must flow both ways.

8 In Mr Helmbright’s case, I conclude that on the evidence Mr Helmbright has proven the descent limb, and the self-identification aspect of the mutual recognition limb, but has not proven the second aspect of the mutual recognition limb in *Mabo (No 2)*. He has proven that he is recognised by the community mtwAC represents, but he has not proven the recognition has been given by “elders or others enjoying traditional authority”. This conclusion means he has failed to prove on the balance of probabilities he is not an alien for the purposes of s 51(xix) of the Constitution, and for the purposes of the *Migration Act 1958* (Cth). However, I find that if Deane J’s test in the *Tasmanian Dam Case* was able to be applied to the evidence about Mr Helmbright’s circumstances, that test would be satisfied.

9 In these reasons, I have used the term “Aboriginal Australian” and “Indigenous” because they are terms used by members of the Court in *Love/Thoms*. I accept these terms may not be considered appropriate by all, especially by some people who identify as Aboriginal or Torres Strait Islander.

10 Equally importantly, it should be recognised that neither this proceeding, nor *Love/Thoms* concerns any single and all-encompassing definition of, or “test” for, who is, and who is not, an Aboriginal or Torres Strait Islander person. Identification and recognition are personal and community issues, although they may need to have a more normative function in some circumstances. How government elects to deal for legal purposes with issues of identification and recognition, may also vary. To hold that a person does not satisfy the test for non-alienage as it is currently expressed, is not to contradict or diminish how they identify and are in fact recognised by their community, as an Aboriginal or Torres Strait Islander person.

# PROCEDURAL HISTORY

11 This proceeding was commenced on 15 May 2020, by way of an originating application and concise statement seeking a declaration that Mr Helmbright is not an alien for the purposes of s 51(xix) of the Constitution.

12 Timetabling orders were made on 12 October 2020 providing for the filing of written submissions, among other matters, in November and December.

13 On 12 November 2020, mtwAC filed an interlocutory application seeking leave to intervene in the proceedings. Mr Helmbright supported mtwAC’s application. The Minister opposed it. On 24 December 2020, the Court granted mtwAC leave to intervene: see *Helmbright v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1872.

14 In advance of the Court’s determination of mtwAC’s interlocutory application, mtwAC had circulated written submissions it proposed to rely on if the Court granted it leave to intervene. On granting mtwAC leave to intervene, the Court ordered it to file and serve the submissions it had already circulated. The Court placed a condition on mtwAC’s intervention that it not be permitted to adduce evidence at trial, given the Minister’s submissions about the time, cost and resources which had by that stage been applied to the agreement of facts between the Minister and Mr Helmbright. There was no restriction on the evidence Mr Helmbright could adduce. Further, the Court also expressly allowed for a further application by mtwAC to adduce evidence at trial:

The trial has not yet occurred. No evidence has been adduced, although the statement of agreed facts has been filed, as have affidavits of the applicant, his mother and his grandmother. No other evidence is foreshadowed. It is presently unclear whether the three affidavits filed by the applicant will be read at trial, given the existence of the statement of agreed facts. Since this case has some novel aspects, it is not appropriate to pre-empt what the parties (including mtwAC) might reasonably wish to do at trial, once their arguments are more refined and have been reflected on further, as might usually occur the closer the trial approaches. The present orders do not make provision for any further evidence, however they also do not preclude an application to adduce further evidence. The Court would expect any applying party to have given reasonable and appropriate notice of such an application. The Court would then consider any such application, taking into account any contended prejudice or unfairness. The present point is that although mtwAC’s intervention is conditioned by a ruling that it cannot adduce any further evidence, if there are factual matters which it (or any other party) subsequently contends are critical to the resolution of the issues before the Court, and are absent from the statement of agreed facts and the affidavit evidence (if read at trial), then the Court will hear its argument on that matter, in the usual course. It would not be appropriate for the Court to deprive itself of the possibility of further evidence, if its admission proves fair, necessary and appropriate.

15 On 19 January 2021, the Court made orders granting leave to the Minister to file submissions in response to mtwAC’s submissions and to Mr Helmbright and mtwAC to file submissions in reply. The Court now has before it six sets of written submissions:

(a) Mr Helmbright’s submissions filed on 20 November 2020;

(b) the Minister’s submissions filed on 4 December 2020;

(c) Mr Helmbright’s submissions in reply filed on 18 December 2020;

(d) mtwAC’s submissions filed on 24 December 2020;

(e) the Minister’s submissions filed on 21 January 2021 responding to mtwAC’s submissions; and

(f) mtwAC’s submissions in reply filed on 3 February 2021.

16 The parties provided a statement of **agreed facts** filed on 5 November 2020. In addition, Mr Helmbright read and relied on his own affidavit dated 13 November 2020; an affidavit of his mother, Mrs Denise Mary Ferris, dated 12 November 2020; and an affidavit of his grandmother, Mrs Hera Makare Ferris, dated 18 November 2020. mtwAC did not seek leave to adduce any further evidence.

17 The final hearing was delayed, and was held by Microsoft Teams on 11-12 February 2021. Mr Helmbright was briefly cross-examined. Otherwise, and subject to some minor objections which were mostly dealt with by agreement, the affidavit and other evidence was not directly challenged, although submissions were made about whether various aspects of the affidavit evidence should be accepted.

# FACTUAL FINDINGS

18 The recitals to the agreed facts state (at C):

The documents annexed to this statement of agreed facts are attached in order to provide background and context for the agreed facts to which they relate, and not every statement within the documents is taken to be agreed by the parties.

19 Accordingly, where in these reasons I extract and make findings about some of the historical material in the documents annexed to the agreed facts, those findings are for the purposes of ensuring that the facts the parties have agreed not to dispute in the statement of agreed facts itself (see *ACCC v Pratt (No 3)* [2009] FCA 407; 175 FCR 558 at [83]-[84], Ryan J), are seen in their proper context. In any event, I do not consider that the findings made on the basis of the historical material are of a kind likely to be materially disputed.

## Mr Helmbright’s immigration history

20 Mr Helmbright was born in New Zealand in 1983. He is a citizen of New Zealand.

21 In 2005, Mr Helmbright moved to Western Australia, where he has lived ever since.

22 On 15 January 2011, Mr Helmbright was granted a Class TY (subclass 444) Special Category Visa (the **2011 visa**). This is what is described in s 32 of the Migration Act as a “special category visa”, and which principally applies to New Zealand citizens, being granted by operation of law when they enter Australia, rather than by some formal application process. The evidence does not explain why this visa was granted to the applicant in 2011, when he had first entered Australia in 2005, but I infer that may have been because 15 January 2011 was a date on which Mr Helmbright re-entered Australia, or because there was some applicable change to the special category visa scheme.

23 On 9 August 2017, the Minister notified Mr Helmbright that he was considering cancelling Mr Helmbright’s 2011 visa under s 501(2) of the Migration Act.

24 On 18 June 2018, a delegate of the Minister cancelled Mr Helmbright’s 2011 visa.

25 On 22 January 2019, the Administrative Appeals **Tribunal** set aside the cancellation decision and substituted a decision not to cancel Mr Helmbright’s 2011 visa.

26 On 25 August 2019, Mr Helmbright temporarily left Australia. By reason of his departure, his 2011 visa ceased.

27 On 31 August 2019, Mr Helmbright returned to Australia and was granted a new Class TY (subclass 444) Special Category Visa (the **2019 visa**).

28 On 5 February 2020, the Minister notified Mr Helmbright that he was considering cancelling the 2019 visa under s 501A(2) of the Migration Act.

29 At the time of trial, Mr Helmbright continued to hold a Class TY (subclass 444) special category visa. The following fact was agreed by the parties:

By letter dated 3 March 2020, the Respondent withdrew the 2020 Notice for reasons other than the Applicant’s claims of Aboriginality. However, the Respondent indicated that an alternative power of cancellation may be exercised in respect of the Applicant’s 2019 Visa at some time in the future.

30 It is this continuing cloud of possible cancellation of his 2019 visa which has prompted the applicant, relying on *Love/Thoms*, to bring forward a claim that if the Minister were to re-consider any visa cancellation, as the Minister has foreshadowed he might, he would not have any power to cancel the 2019 visa, nor to detain and remove Mr Helmbright from Australia. Mr Helmbright contends that is the case because he is not an alien and the Minister’s cancellation powers in the Migration Act (together with the consequential powers of detention and removal) are incapable of extending to him.

## Mr Helmbright’s ancestry

31 Mr Helmbright’s maternal grandmother five generations back was an Aboriginal woman known as Poolrerrener. She was also named in some of the writings about her variously as Bullrub, Bullroe, or Bulra. The Minister agrees this is the case.

32 Poolrerrener was born in the area of Tebrikunna or Tebrakuna (now known as Cape Portland), located in the north-east of Tasmania. Poolrerrener was born there in or before 1792, and was a member of the Pairebeene clan, which was one of a number of clans that lived in north-eastern Tasmania at the time of first European settlement. With a European man called Samuel Tomlins she had a child named Edward (Ned) Tomlins, who was born in 1813 at Cape Barren Island. Cape Barren Island is located in Bass Strait off the north-east coast of Tasmania, and is part of the Furneaux Group of islands.

33 In her text entitled “Tasmania Aborigines: A history since 1803”, parts of which are annexed to the agreed facts, the historian Dr Lyndall Ryan explains that about 6,000 years ago, Tasmanian Aboriginal people began to expand their occupation along the east coast and hinterland of Tasmania, and

also occupied new sites to exploit fat-rich foods such as seals, shellfish and mutton-birds and appear to have introduced techniques like stone traps for shallow-water fishing

and

increasing seasonal use of offshore sites like Maatsuyker Island for sealing … Their development of watercraft over the last 2,000 years, in the north-west, south-west and south-east, to exploit seals, would have aided such expansion.

34 Continuing with Dr Ryan’s descriptions as they related to sealing, she states

They were very strong swimmers and dived to prodigious depths for shellfish like abalone, mussels and crayfish, used their agility to hunt larger sea mammals such as seals and used long ropes made from tough grass to clamber up trees for possums.

35 Dr Ryan notes that in 1803 at the time of the British invasion, there may have been up to 100 clans in Tasmania, and that 48 have been identified by the physical anthropologist Mr Brian Plomley. I return to Mr Plomley’s work below, which was also in evidence. Dr Ryan also notes that archaeologist Dr Rhys Jones estimates that there were originally 70 to 85 clans in Tasmania. In turn, Dr Jones’ view is that there were a smaller number of “nations”, estimated to have been around nine.

36 In those parts of her work which are in evidence, Dr Ryan describes in detail the complex cultural and physically challenging conditions under which those clans survived and flourished prior to the arrival of Europeans, including how their living conditions, activities, laws and customs varied across Tasmania. At 32-33 of the extract of her work that is in evidence, she states:

Each clan was associated with a wider political unit, which the colonial ethnographer G.A. Robinson called a nation’, the name preferred by Tasmanian Aborigines today. Jones defines this unit as ‘that agglomeration of [clans] which lived in contiguous regions, spoke the same language or dialect, shared the same cultural traits, usually intermarried, had a similar pattern of seasonal movement, habitually met together for economic and other reasons, the pattern of whose peaceful relations were within the agglomeration and of whose enmities and military adventures were directed outside it’. Its territory consisted of all the land owned by the constituent clans so that movement outside the territory, and of alien clans inside it, was carefully sanctioned. Such movements usually had reciprocal economic advantages to clans concerned, while trespass was usually a challenge to or punishable by war. Its borders ranged from ‘a sharp well-defined line associated with a prominent geographical feature to a broad transition zone often found between two friendly’ nations.

…

each nation had its own distinctive physical, social, cultural and economic characteristics and different ways of conducting their internal and external relations.

37 One of the nations identified by Dr Ryan is the “North East nation”, in the region the parties agree is the one where the Pairebeene clan was located. Dr Ryan states there may have been at least 10 clans, with other researchers estimating the North East nation may have had a minimum total population of about 400 to 500 people. It is convenient to use the term the “North East nation” in these reasons. Dr Ryan describes part of the hunting activities of these clans:

The coastline of the North East nation and the associated lagoons and estuaries provided abundant seasonal food resources, such as mutton-birds, swans, ducks and seals. From late July to early September the egging season enticed several clans to congregate around these lagoons and estuaries to collect swan and duck eggs. In summer they hunted fur seals and in autumn mutton-birds.

38 To understand why Edward (Ned) Tomlins migrated to New Zealand, at least a smattering of an understanding about the early European sealing and whaling trades in Tasmania and New Zealand is helpful. There is evidence both in the agreed facts and in the documents annexed to those agreed facts, about those trades. European sealing operations in the islands proximate to the north-east coast of Tasmania commenced around 1798, which was some years before any European settlement in Tasmania. It is an agreed fact that the first European settlement in north-eastern Tasmania was established in 1804 on the Tamar River at Port Dalrymple (then named George Town).

39 In an article entitled “The sealers of Bass Strait and the Cape Barren Island Community”, Plomley and Ms Kristen Henley describe how European sealers took Aboriginal women as their partners, and how the Furneaux Islands, in particular Cape Barren Island were some of “several places of resort of the Australian sealers”. In their account of the European men and Aboriginal women who lived a life based around sealing at this time, Plomley and Henley describe the applicant’s maternal ancestor Poolrerrener by several names including Bullrub, Bullroe and Bulra and state:

Shortly after her arrival there her son, the half-caste sealer Edward Tomlins, left on a whaling voyage to the western coast of New Holland. She remained among the sealers in the western straits, living first with Dodson and then with Rew. On 17 August 1832, she was delivered up to Robinson by Rew and sent to the Aboriginal Settlement. She died there, probably before September 1835.

40 The brutal way of life to which women like Poolrerrener were subjected is described by Dr Nigel Prickett in a collection of essays in honour of the archaeologist Professor Atholl Anderson, entitled “Islands of Inquiry: Colonisation, seafaring and the archaeology of maritime landscapes” (ed. Geoffrey Clark, Foss Leach and Sue O’Connor), which is annexed to the agreed facts. In a chapter called “Trans-Tasman stories: Australian Aborigines in New Zealand sealing and shore whaling”, Dr Prickett writes:

Tomlins, Morrison and Harrington came from the mixed-race sealing communities of Bass Strait and Kangaroo Island. Robinson describes how sealers shot Aboriginal men as they sat around their fires, and then abducted the women (e.g. Plomley 1966:966). Or women were traded by Aborigines themselves, from their own tribes or others from which they had been abducted (Ryan 1977:30–31). At first, women were made available for the sealing season only, but as sealers began to stay on throughout the year, so too did their ‘wives’. By 1816, sealers each might have two to five women for sexual and domestic purposes. Robinson refers to them as ‘slaves’ (Plomley 1966:1008). In 1830, Tomlins’ headsman at Hunter Island, the Maori ‘John Witieye’, had two women (Plomley 1966:180). Coastal tribes were devastated, Robinson reporting just three women with 72 men in Tasmania’s northeast, also in 1830 (Plomley 1966:966).

41 Dr Prickett describes the start of the sealing trade thus:

The first sealing on Bass Strait islands took place in 1798 (Ling 1999:327). Exploitation of subantarctic islands began in 1804 at the Antipodes group (Smith 2002:12). Everywhere, big early catches soon declined. Nonetheless, seal numbers in southern New Zealand were sufficient to maintain an industry into the early 1830s (Smith 2002:12), with gangs dropped off along the coast from vessels out of Sydney, or in the 1820s by boat from Foveaux Strait. As relationships developed with Maori, especially with Maori women, many sealers stayed on to make a new life in New Zealand.

42 Dr Prickett then describes how the men turned their attention to whaling:

With Australia the source of most New Zealand shore whalers, it is not surprising that one and two generations after the First Fleet sailed into Port Jackson some were of Aboriginal descent. Their fathers were convicts or ex-convicts. Mothers came from the many tribes that lived at or near the Australian coast and were largely dispossessed and dispersed early in the process of colonisation. The best known among them was Thomas Chaseland, whose convict father arrived in New South Wales in 1792 and later settled in the Hawkesbury district near Sydney. Chaseland was sealing at Foveaux Strait from c. 1824 and later whaled at several southern stations. Notable Hawke’s Bay whalers from the mixed-race sealing communities of Bass Strait and Kangaroo Island were George Morrison, Edward Tomlins and Samuel Harrington.

43 Of Tomlins, and after having described his birth and his parentage in broadly the way I have set out above, Dr Prickett says:

In December 1830, Tomlins was one of five Hunter Island men marooned on the Clarke Island reef [also in the Furneaux Group] when their boat was lost (Figure 3). Two disappeared trying to reach safety in a makeshift craft, the others living for eight days on seal meat and blood before being rescued (Plomley 1966:295–296)

….

It is not known when Ned Tomlins arrived in Hawke’s Bay. Information on his New Zealand career comes largely from ‘An Old Colonist’, thought to be F.W.C. Sturm, writing in the Hawke’s Bay Herald in June 1868: ‘Where all were drunkards, Ned Tomlins was notorious; he was a valuable man, and an able headsman.’ In his ‘Old Wairoa’, Thomas Lambert (1925:368) describes Tomlins as ‘said to be one of the best whalers that ever stepped into a boat’ (apparently after Dunderdale), and recklessly generous, once giving away one of three sperm whales he had taken in exchange for a bucket of water. Lambert (1925:368) says he worked for Captain Mansfield and whaled out of Waikokopu and Kinikini. At Waikokopu, he probably whaled with Morrison, whom he may have known from Portland. Tomlins died there after a successful day’s whaling. More drunk than others who were playing cards, he was turned out of a house, but insisted on trying to get back in. Finally, he was hit by the station owner, a man named Perry, and thrown from the door, later to be found dead outside. Perry himself read the burial service. This happened before Perry died of ‘apoplexy’ on the beach at Mahia in 1853. Tomlins and Hipora Iwikatea of Mohaka had one son, also Edward Tomlins, who had three children, a girl Akenehi, a boy Tamati, and a second girl Hera. Hipora Iwikatea died on November 12 1900, her son Edward predeceasing her on December 15 1892 (Parsons pers comm. 2008).

44 Dr Prickett observes that:

Tasmanian Aborigines were killed or removed from their land, and women bartered, sold or stolen (Ryan 1977). Maori tribes, on the other hand, remained on their land and in many cases incorporated the newcomers into tribal society and whakapapa, especially when women were from chiefly families, as in the case of Puna (see Anderson 1991:7).

45 The common theme relevantly emerging from this material is the exploitation of both Aboriginal and Maori women by the men involved in the sealing and whaling trades, and especially in the case of Aboriginal women, their forced removal from their home clans and their country, with their descendants moving on to be absorbed into another Indigenous society, the Maori, in New Zealand.

### The connections between Mr Helmbright’s Maori and Aboriginal ancestors

46 It is appropriate to make some findings about the way the applicant’s family identifies. The purpose of doing so is to demonstrate that the evidence plainly supports the proposition that the applicant’s family, on his maternal side, has long understood there was a connection in their family to the Aboriginal people of Australia, and have in more recent years sought to incorporate their Aboriginal ancestry and cultural heritage into their lives, seeing that Aboriginal identity as part of their family, while (I find) maintaining their identity as Maori.

47 It was no express part of the Minister’s case that the applicant had somehow manufactured his identification as an Aboriginal person, nor recently invented it in order to take advantage of the *Love/Thoms* decision. Indeed, the applicant’s own evidence makes it clear he raised his Aboriginality with the Minister’s department in 2017, several years before *Love/Thoms* was decided: see [20] of his affidavit. The evidence from, and about, the applicant’s family demonstrates that it is his family as a whole, through his maternal side, who have been accepted and welcomed into the Aboriginal community of north-eastern Tasmania, and that this has been a gradual process of discovery, and reinvigoration of connection over several decades. It is a narrative familiar to many Aboriginal and Torres Strait Islander peoples.

48 The applicant’s grandmother, Mrs H Ferris is the great-great granddaughter of Edward (Ned) Tomlins. She deposed:

Our whanau (family)—the Tomlins family—always knew that we were descended from an Aboriginal from Tasmania called ‘Black’ Ned Tomlins. This was always part of our whakapapa from the time that I can first remember. Whakapapa is the Maori term for the oral history and genealogy of family passed down from generation to generation and is a very important part of Maori culture which continues to be observed to this day.

When I was young I remember my grandfather Tommy Tomlins (before he passed away on 23 April 1946) as well as my uncles and aunties talk about Black Ned, the Aboriginal Australian who came to Hawke’s Bay from Tasmania. My siblings, cousins and I were told that Ned Tomlins married Hipora Iwikatea and had a son Edward (Neri) Tomlins. We were also told that Ned Tomlins was an excellent sealer and whaler and was killed by his best friend at a pub in Mahia.

49 She further deposes that:

For all of my life it has been well known amongst the people of Pakipaki [where Mrs H Ferris lives] that our family had an Aboriginal connection. I identify as both Maori and Aboriginal.

50 She describes her family’s sadness at not knowing until the last twenty years or so any further details about Edward (Ned) Tomlins’ background:

I know that among members of the Tomlins family from my generation, we have always discussed Ned Tomlins as a part of our whakapapa. As a proud Maori family, knowing and preserving our whakapapa is very important to us because our identity comes from knowing who we are, and we believe we are who we come from. I know that members of my family from my generation have always shared a sense of sadness and loss that we could not trace our ancestors back beyond Ned Tomlins. We know our Maori ancestors back many, many generations, but do not have the same knowledge for the Tomlins’ family. For many years our whakapapa for our Tomlins family ended with ‘Black Ned’ Tomlins.

51 Mrs H Ferris then describes how her cousin, who is a professor at Massey University in New Zealand, “worked with a professor from Tasmania and they made the connection with Ned Tomlins”. Once that connection was established, Mrs H Ferris deposes:

After that we had a family reunion in Hawkes Bay, which was held to update our family’s whakapapa. Our family regularly holds reunions to update our whakapapa. At this reunion we were played a video that explained the link between Ned Tomlins and Bulra and showed us the land we came from. I know that some years later members of our family travelled to Tasmania to visit our Tasmanian Aboriginal relatives.

Our family has always been proud of our Maori heritage and also proud of our Aboriginal heritage. Our grandfather Ned being an Aboriginal is and always has been important part of our family’s whakapapa.

52 The applicant’s mother (Mrs D Ferris) deposed that she has

known since I was young that I was part Aborigine. When I was quite young, definitely under the age of nine years, my mother told me that she was part Aborigine. It came up because I couldn’t understand why my mother and my uncle had hair with tight curls – which is not normal for people of Maori descent. My mother explained to me that it was because we were part Aborigine.

53 Her evidence was that she never sat the applicant down and told him he was Aboriginal when he was a child, but the applicant’s brother had the same tights curls as her mother, and Mrs D Ferris’ own brother “had such dark skin” so that, if asked why, her family’s response was “[t]hat is the Aboriginal side”. Mrs D Ferris deposed that Mr Helmbright’s youngest son has the same dark skin and tight curls.

## The applicant’s knowledge of his Aboriginal ancestry, and his identification as Aboriginal

54 The physical features of tight curls and dark skin in his family are a matter about which Mr Helmbright himself gave evidence. His evidence is that he was conscious of these physical features in his family from childhood, because his brother had them, and was teased about it. I accept that evidence.

55 However, he deposed that he does not remember considering his Aboriginal ancestry further before about 2008 or 2009 when he was being held in remand at Hakea Prison in Perth, and had a conversation with his grandmother, whom he calls Nanny Hera, on the phone.

56 His affidavit evidence continued:

Nanny Hera was aware that I was being held in prison with a lot of Aboriginal men. Nanny Hera told me something to the effect of, ‘Make sure that you tell them that you’re one of them.’ I asked Nanny Hera what she meant and she then went on to tell me that I had an Aboriginal ancestor in my *Koro* (grandfather), Ned Tomlins.

After Nanny Hera told me that I was Aboriginal, I immediately began identifying as Aboriginal and identified myself as such to other inmates at Hakea Prison and to people in the prison generally. After I was released from remand in 2009, I believe that I continued to identify myself as Aboriginal to other people in the community, but I have no specific recollections or examples of this.

In about 2012, I had another telephone conversation with Nanny Hera where she provided specific details of my Aboriginal ancestry. During that conversation, Nanny Hera told me that there had been a family reunion with some of our Tasmanian Aboriginal family in Tasmania in 2012. I don’t remember if Nanny Hera told me which of my family members had gone to Tasmania, but I know that Nanny Hera was not one of them. She also told me that, a few years before that, there was a family reunion in Hawkes Bay, New Zealand, that was intended to update our family’s *whakapapa* (the Maori term for our family’s genealogical history and development). Nanny Hera attended that family reunion in New Zealand. Nanny Hera told me that, as a result of both of these family events, our family was able better understand our connection to Tasmania.

During my telephone discussion with Nanny Hera in 2012, she told me that our family was descended from a Tasmanian Aboriginal woman named Bulra who was Ned Tomlins’ mother. She told me that ‘Black Ned’ Tomlins had travelled to New Zealand as a sealer. Nanny Hera told me, earlier this year, that, as a child, she and her siblings knew that ‘Papa Ned’ was an Aboriginal blackfella who arrived on the sealing ships, was known as a good sealer, was particularly dark-skinned and that he was murdered by his best friend. Nanny Hera may have given me these details during our conversation in 2012, but I do not remember.

I know with certainty that, since that telephone call with Nanny Hera in 2012, I have proudly identified myself, both personally and to other people, as Aboriginal and as a Tasmanian Aboriginal (*palawa*) specifically. I also identify as a descendent of the Pairebeene clanswoman, Bulra (also known as Poolrerrener), from the North-East of Tasmania.

Since at least 2012, but possibly as early as 2008, I have identified myself as Aboriginal and Maori in the community, including with employers, with friends and with my children’s schools. Since at least 2012, when I have had to fill in a form and it has asked whether I identify as Aboriginal or Torres Strait Islander I always tick the ‘yes’ box.

I feel that it is a blessing and a privilege to be both Aboriginal and Maori and belong to two Indigenous cultures and have a deep ancestral connection to two different countries. I am very proud to identify myself as both Aboriginal and Maori.

I’ve told my boys that they are Aboriginal since they were very young. I believe I told them pretty soon after my conversation with Nanny Hera in about 2012. When they were younger, I just told them they were Aboriginal but, as they have grown older, I’ve explained our family’s *whakapapa* to them, and told them the story of *Koro* Ned, Bulra’s son, travelling from Australia to Hawkes Bay. It is important to me that my children know and understand their Aboriginal ancestry, as well as their Maori ancestry. I believe that it is important for them to know who they are, and and to do so they must know who and where they come from—that is extremely important to me both as both a Maori man and an Aboriginal man.

When I lived in Margaret River, Western Australia, between about 2012 and 2014 I used to help out with The Warden Centre, which was run by the Wardandi people near Margaret River. I used to help out with the Centre’s working bees. I remember telling an Aunty at the Centre of my Aboriginal ancestry and she was very excited, but also very sad because she knew about the history of Tasmanian Aboriginals. I remember her saying to me that I was the darkest Tasmanian Aboriginal she’d ever met because most have a fairer skin tone.

57 Mr Helmbright’s evidence is that, during a period of imprisonment in 2015-2016, he was offered a place on a rehabilitation program that only Aboriginal prisoners were eligible for, but he decided not to participate because his parole had already been approved and participating in the program would have required him to serve his full sentence of imprisonment.

58 After Mr Helmbright received the notification of an intention to cancel his 2011 visa in 2017, he wrote two letters to the (then) Department of Immigration and Border Protection, and provided several letters of support, referring to his history of identifying as an Aboriginal Australian. As I have noted, this occurred well before the High Court’s decision in *Love/Thoms*. In his first letter, dated 6 September 2017, Mr Helmbright wrote:

I needed to bring the following to your attention;

1. By descent I am an Aboriginal Australian.

2. This has already been recognized by the Department of Corrective Services as well as Department of Human Services, Australia.

My name is Kenrick Helmbright, son of Denise Ferris, daughter of Hera Ferris, daughter of Jessie, daughter of Tom Tomlins, son of Edward (Ned) Tomlins, son of Samuel Tomlins and mother of Bulra (SA aboriginality, Kangaroo Island residence…). This has been known and respected as of 2012 following a family reunion held in Hawkes Bay, New Zealand.

59 Clearly, the statement about Poolrerrener’s ancestral country was not correct, but nothing turns on this. It appears that, around this time, the Department informed Mr Helmbright that he was not an Australian citizen. Mr Helmbright addressed this in his second letter, dated 5 January 2018:

Let me firstly and most importantly speak to your confidence in telling me I am not a citizen.

Whilst I understand your available “departmental systems” must struggle to find records of what was essentially stolen generations by way of governmental genocide carried out on the First Australian Palawa people in the 1830s – my ancestors! I match your confidence in knowing who I am. I am Kenrick Helmbright and my parents and lineage is as previously provided to you. I am a direct descendant of the Palawa people. This is my country. Mannalargenna is my uncle. Bullrer(Louisa) is my aunt. Black Ned(Edward Tomlins) is my Grandfather. The fate of all my known ancestors was in the hands of the Wybaleena establishment at this time; all, except my Grandfather who was a skilled whaler & sealer who departed for Nueve Zealandia for better prospects. I as one of his many descendants claim birthright to this land and deny your insinuation that an aboriginal is not a citizen of this land now called Australia. There is deep pain caused by denying someone of their rightful home. I would hope that displacement of the original inhabitants of this land was of importance to any government department in existence today. Legal advice I have sought has assisted in clarifying the three pronged approach in law that provides definition to aboriginality;

l. I have provided my line of descent.

2. I have identified as an Aboriginal and have done so for over 5 years now.

3. I am accepted as Aboriginal by the community I live as well as the community I descend from.

As previously mentioned my aboriginality has already been accepted over the years by the Department of Justice and the Department of Human Services.

To further support this claim I herewith provide my Grandfather Tairua Hapimana as an authority on this case (*Form 956* attached herewith). Papa has been as you might call “formerly recognized” as Palawa Aboriginal and has offered his details as a point of contact to support my genuine claim. The Migration Act of 1958 pertains only to non-citizens. I am at the very least in the process of acquiring my “citizenship” as an Aboriginal. Bear in mind that this process currently has no quantifiable process to it. If you are aware of a form to prove citizenship by aboriginality please feel free to forward to me so we can stop wasting your time and mine.

60 The letters of support included the following statements:

(a) From his sister-in-law, dated 6 January 2018:

Kenrick has identified himself to me as an Aboriginal over these years.

(b) From his mother-in-law, dated 7 January 2018:

I have known Kenrick for the past 24 years, and am aware that he has proudly identified himself to myself and others as being of Tasmanian/Palawa Aboriginal descent, descending from his maternal grandmother’s line.

(c) From the principal of a school his children attended, dated 7 January 2018:

Kenrick has identified himself and his two enrolled children as Aboriginal since arriving at the school 6 years ago. The school has identified Kenrick’s two children as Aboriginal in the Federal and State Censuses each year.

(d) From a parent with children attending the same school as Mr Helmbright’s children, dated 7 January 2018:

Kenrick has identified himself to me as an Aboriginal over these years.

…

Kenrick’s deportation from Australia would be against our respect of the Indigenous communities.

We may be spread wide across the lands of the earth, but we should always be welcomed back to our homeland.

(e) From the parent of a friend of one of Mr Helmbright’s sons, dated 8 January 2018:

Kenrick has … mentioned that he has Indigenous roots through his grandmother coming from Tasmania, does this not qualify him to stay in the country?

61 Mr Helmbright’s evidence is that, after he was released from immigration detention, he attended and volunteered at “a community organisation … that runs a Stronger Fathers program for Aboriginal fathers”.

62 Mr Helmbright also gave the following evidence about his children and nephews:

My daughter, [name redacted], was born with the assistance of the Aboriginal midwifery group Moorditj Boodjarri Mia at St John of God Hospital. Our family has also attended the Moorditj Koort Aboriginal Corporation Health and Wellness Centre for medical care.

My sons identify as Aboriginal. I have seen and heard them tell other people that they are Aboriginal. My younger son, [name redacted], participates in the Aboriginal cultural learning group at his school—[name redacted]. Only Aboriginal children are eligible to participate in the group. As part of the group, they go on excursions to country, learn about Dreamtime and also learn cultural traditions like traditional dance. [My younger son] recently performed as a dancer at an Aboriginal awards night, which was a very proud moment for me as a father.

My nephew, [name redacted], participates in Aboriginal support programs offered by his high school—[name redacted]. Participation in these programs entitles him to special tutoring and study support, as well as health care services. …

My son, [name redacted], and my nephew, [name redacted], play basketball for [name redacted], an exclusively Indigenous youth basketball club in the [name redacted] area.

63 Mr Helmbright was cross-examined about how and when he first identified as Aboriginal, and whether that did not occur until the point when he spoke to his grandmother in 2008 or 2009 from prison. He confirmed that before this point what he knew “was only hearsay” and that it was only after this conversation with his grandmother that he thought of himself as being Aboriginal. He described telling one of his fellow prisoners about that fact:

And what did you tell him?---I told him that – that I just found out that my tipuna was one of his descendants – one of his tipuna that we – we – brothers.

Sorry. You used a word that I was unfamiliar with, tipuna; what does that mean?---Tipuna. That’s – in – in Maori that’s ancestors.

64 There was some further cross-examination about the second conversation with his grandmother around 2012. I find the applicant was genuinely uncertain about how much he was told during these two conversations about the details of his ancestry. That is understandable. No doubt, given the evidence of his mother and grandmother, these matters may also have been discussed when the applicant was growing up. I find the applicant was nevertheless clear in placing the start of his personal identification as Aboriginal at approximately 2008-2009.

65 Many of the matters he was thereafter cross-examined about appeared to call into question, or seek to test, the applicant’s identification as Aboriginal and how much he knew about Aboriginal culture and his particular Tasmanian Aboriginal heritage. I consider the applicant answered those questions to the best of his ability and did not seek to exaggerate his knowledge of such matters, nor to conceal the fact that he was still learning about his Tasmanian Aboriginal heritage and thus could not answer everything he was asked about that culture or heritage. Many people with various cultural, ethnic and racial heritages might be in the same position if questioned.

66 None of that cross-examination affects my view that the applicant genuinely and honestly identifies as an Aboriginal and Maori person, is proud of both his heritages and takes each of them to be a core part of his own identity, which he intends to pass on to his children.

67 In 2019, when the Tribunal found that Mr Helmbright did not pass the character test, but decided not to exercise the discretion to cancel Mr Helmbright’s visa, one of the considerations that the Tribunal considered weighed in favour of not cancelling Mr Helmbright’s visa was the strength of his ties to “the Australian community”.

68 At [147]-[148], the Tribunal stated:

The Tribunal finds that the Applicant’s ties to the Australian community are very strong. The Applicant was born in New Zealand and has Maori heritage, however, the Applicant’s evidence is that for the past five years he has primarily identified as an Aboriginal Australian after learning of his family’s ancestry through his maternal line (G10, G11). In his personal statement, the Applicant stated (Exhibit A2, page 42, paragraph [54]):

Even though I was born in New Zealand, I identify as Indigenous Australian as my mother has ancestral connections to the Indigenous people of Tasmania. My grandfather (5 generations back) [name omitted] left Tasmania for New Zealand to escape the massacre of Tasmania’s Indigenous people. My material [sic] family has always recognised its Indigenous ties to Australia and I have applied to become a member of the [name omitted] Aboriginal Corporation. Many of my maternal family members are already members of the Corporation and are recognised as being of Aboriginal descent. Both of my sons identify as Indigenous Australians as well.

The Tribunal has before it the Applicant’s application for membership to the Aboriginal Corporation, as well as a family tree which traces the Australian Aboriginal line of the Applicant’s family (Exhibit A2, page 49 and 50). The Tribunal also has before it a letter from the Aboriginal grand-uncle of the Applicant, unsigned but dated 2 January 2019, which states, “*I know he [the Applicant] is a descendant of the [name omitted] people of Tasmania through his mother’s family and that he identifies as Aboriginal*” (Exhibit A2, page 58). The tribunal also has before it a “Confirmation of Aboriginality” certificate from the relevant Aboriginal Corporation dated 14 November 2015 certifying that the Applicant’s grand-uncle is a Tasmanian Aboriginal person (Exhibit A2, page 59). As also noted above, the Principal of his children’s former school has stated that the Applicant had identified himself as Aboriginal for approximately six years and that his children had also been identified as Aboriginal in the Federal and State Census each year (G38). Additionally, another parent at the school who wrote a letter of support for the Applicant, stated that she had known the Applicant of four years and that he had “*identified himself to me as Aboriginal over these years*” (G37). Although the Applicant has not yet been formally recognised as Aboriginal by the relevant Aboriginal Corporation, **the Tribunal is of the view that there is sufficient circumstantial evidence to suggest that the Applicant is a person of Australian Aboriginal descent, and that the Tribunal accepts that the Applicant identifies as an Australian Aboriginal person**.

(Emphasis added.)

69 The Tribunal’s finding is not without significance. In a contested situation, and for the purposes of the exercise of powers under the Migration Act, one arm of the executive government of the Commonwealth has formally accepted the applicant as an Australian Aboriginal person. Of course in doing so in 2019, the Tribunal could not have appreciated the potential, additional ramifications of this finding, since *Love/Thoms* had not been decided.

## mtwAC

70 mtwAC was founded in 2008 by six people who:

(a) each self-identified as having at least one Indigenous ancestor from north-eastern Tasmania at about the time of first European settlement; and

(b) were active within the Indigenous community in Tasmania.

71 mtwAC was registered by the Office of the Registrar of Indigenous Corporations under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (the **CASTI Act**) in the year it was founded.

72 mtwAC is governed by a board of directors. It also has a “Circle of Elders” which is consulted by the board from time to time. I return to these aspects of its governance in more detail below.

73 Since 2015, mtwAC has run an annual celebration called Mannalargenna Day. This day commemorates the life of Mannalargenna, a warrior and chief from eastern Tasmania. The agreed facts state that:

Mannalargenna Day is a day that allows his descendants and wider community to learn about, and celebrate, local Aboriginal culture, their connection to country and of significant Aboriginal people in Tasmanian’s history through cultural performances and dances, workshops, food, walks, tours, storytelling and discovery sessions.

74 mtwAC is a member organisation of the Tasmanian Regional Aboriginal Communities Alliance, an organisation which recognises mtwAC as the entity representing the interests of Indigenous persons from north-eastern Tasmania. It is also recognised by the Tasmanian Office of Aboriginal Affairs as an organisation capable of recognising persons as Aboriginal for the purpose of special government programs.

75 Any member of mtwAC is eligible to be issued with a certificate of membership and what mtwAC refers to as a “Certificate of Confirmation of Aboriginality”.

76 Mr Helmbright was admitted as a member of mtwAC by the board on 15 February 2020. He has been issued with a certificate of membership and a Certificate of Confirmation of Aboriginality. Six other members of his family are members of mtwAC.

# THE PARTIES’ SUBMISSIONS IN SUMMARY

## Mr Helmbright’s submissions

77 Mr Helmbright submits that, on a proper reading of *Love/Thoms*, this Court is not bound to apply the *Mabo (No 2)* test. He submits that the majority did not decide that the *only* test for non-alienage on the basis of Aboriginality is the test from *Mabo (No 2)*.

78 Mr Helmbright submits that Bell, Gordon and Edelman JJ explicitly stated it was unnecessary to determine whether the test from *Mabo (No 2)* is the only test for non-alienage on the basis of Aboriginality (eg at [80], Bell J, at [388], Gordon J, at [462], Edelman J). He acknowledges that Nettle J appeared to be of the view that the *Mabo (No 2)* test is the *only* test for non-alienage on the basis of Aboriginality (at [278], [280]-[282]), but he submits that this is not part of the ratio decidendi of the case, and is not binding on this Court.

79 Mr Helmbright also submits that if the ratio decidendi in *Love/Thoms* is as the Minister submits, it nonetheless does not bind the Court in its fact finding in this proceeding. In oral argument senior counsel submitted:

If the court accepts the applicant’s submission that the ratio of *Love* is restricted to the way in which the parties were, in the case in *Love*, there is no binding authority on the court to determining the present matter. Indeed, just as the position of Mr Love and Thoms was sui generis, the basis of our client’s claim not to be an alien has also never been previously considered. As was said at first instance in *McHugh*, this leaves open for future argument by a non-citizen of Australia that on the basis of his or her Aboriginality he or she is not an alien, notwithstanding that he or she does not satisfy each of the elements of the *Mabo* tripartite test.

80 Assuming that this Court is not bound to apply the *Mabo (No 2)* test, Mr Helmbright makes two broad submissions as to why this Court should apply Deane J’s approach from the *Tasmanian Dam Case*.

81 *First*, referring to French J’s reasons in ***Attorney-General (Cth) v Queensland*** [1990] FCA 358; 25 FCR 125 at 148,he submits that the meaning of “Aboriginal Australian” varies depending on the context in which the term is used, and whereas the *Mabo (No 2)* test is concerned principally with questions of native title, Deane J’s test has been applied in a broader range of settings. This, it is submitted, shows that Deane J’s test is a suitable alternative to the *Mabo (No 2)* test for determining alienage.

82 *Second*, he submits that it is inappropriate to require recognition by a *Yorta Yorta* society which holds or is entitled to hold native title, and accordingly Deane J’s test is to be preferred to the *Mabo (No 2)* test. In making this second submission Mr Helmbright’s argument may assume that recognition by a *Yorta Yorta* society *is* part of the *Mabo (No 2)* test.

83 The cases referred to by Mr Helmbright in support of his submission that Deane J’s test or something like it has been applied in a range of contexts include *Gibbs v Capewell* [1995] FCA 25; 54 FCR 503 at 512, ***Shaw v Wolf*** [1998] FCA 389; 83 FCR 113 at 122 and ***Eatock*** *v Bolt* [2011] FCA 1103; 197 FCR 261 at [188]. Mr Helmbright submits that, by contrast, the *Mabo (No 2)* test should be seen in light of Brennan J’s substantive reasoning that native title exists where a traditional connection with land has been substantially maintained since sovereignty, and it should be confined to that context.

84 As to why it is *inappropriate* to require recognition by a *Yorta Yorta* society holding native title, Mr Helmbright submits:

(a) the particular purpose of s 51(xix) of the Constitution is to determine whether a person is an alien and, therefore, susceptible, *inter alia*, to permanent exclusion from Australia;

(b) the Courts have recognised that “strong, vibrant and dynamic” contemporary Aboriginal communities exist even if they cannot meet the ‘continuity’ requirements of s 223(1) of the *Native Title Act 1993* (Cth); and

(c) it is incongruous that a person descended from an Aboriginal person who, genuinely, self-identifies as Aboriginal and is recognised by a contemporary vibrant Aboriginal community could be said not to belong to Australia just because continuity is not proved.

85 Mr Helmbright refers to the dispersion and dispossession of Aboriginal Australians which has meant that many communities or societies have been *unable* to survive without disruption. He submits that to require that a person who identifies as Aboriginal be recognised by a society that has survived without disruption would “compound the sins that have been wrought upon the First Peoples of this continent and make the Constitution an ally of that dispersion and dispossession in a way eschewed in *Mabo*”. He therefore submits that the term “Aboriginal Australian” should be construed “generously” and consistently with the authorities on s 51(xxvi) (the “race power”). In oral submissions, senior counsel put the point as follows:

The loss of continuity is attributable to the forces of dispersion and possession which flowed from European settlement. It doesn’t say anything about a spiritual connection of the people who were affected by that with the Australian polity or the Australian continent. In addition, the requirement that the observance of laws and customs must have continued substantially uninterrupted is a technical requirement making the proof of native title more difficult … the circumstances that the Native Title Act only recognises rights found in the normative rules of a society that existed pre-sovereignty.

## mtwAC’s submissions

86 Like Mr Helmbright, mtwAC submits that, in deciding what test should be used to determine who is an Aboriginal Australian for the purposes of s 51(xix) of the Constitution, the Court should take account of the devastating consequences suffered by Aboriginal Australians, and Tasmanian Aboriginal people in particular, since European settlement. It submits that to require recognition by a society holding native title which meets *Yorta Yorta* requirements would be to ignore this history. It submits:

…the relevant tripartite test formulation should be applied in a contextual fashion, which would be dependent on Aboriginal historical and cultural factors specific to the particular peoples or region concerned. Regardless of which tripartite test formulation is applied, taking into account context considerations, the community recognition limb of each respective formulation must consider the unique Tasmanian Aboriginal cultural history.

87 mtwAC submits that, in the *Tasmanian Dam Case*, Deane J took a broad view of community recognition which looked to “the Australian Aboriginal people generally rather than to any particular racial sub-group”. This is said to be a more appropriate standard, at least in the present case. It is also said to be consistent with the reasoning of Bell, Gordon and Edelman JJ in *Love/Thoms* at [74], [374], and [398] respectively, and with the fundamental concept of “belonging” to Australia, which is the antithesis of alienage.

88 mtwAC submits that “to equate ‘community recognition’ with ‘continuous connection’ is to conflate an inquiry concerning citizenship/alienage with an inquiry concerning property rights/native title” and can lead to circularity because being Indigenous is a precondition to holding native title. mtwAC therefore submits that this Court can and should find that recognition by a *Yorta Yorta* society that holds, or is entitled to hold, native title is not necessary, either by applying Deane J’s test or by taking a flexible approach to the *Mabo (No 2)* test.

## The Minister’s submissions

89 The Minister submits that the only test this Court can apply to decide whether Mr Helmbright is an alien is the test in *Mabo (No 2)*. He submits the content of the test which the Court must follow must be drawn from the reasons of Nettle J in *Love/Thoms*. In particular, the Minister relies on what Nettle J said at [278], about the third limb of the *Mabo* *(No 2)* test:

So long as an Aboriginal society which enjoyed a spiritual connection to country before the Crown’s acquisition of sovereignty has, since that acquisition of sovereignty, remained continuously united in and by its acknowledgment and observance of laws and customs deriving from before the Crown’s acquisition of sovereignty over the territory, including the laws and customs which allocate authority to elders and other persons to decide questions of membership of the society, the unique obligation of protection owed by the Crown to the society and each of its members in his or her capacity as such will persist.

90 This, the Minister contends, embodies a native title approach. In support of his submission that this Court is bound to follow a native title approach, the Minister makes four points.

91 *First*, the Minister notes that Bell J stated her Honour “was authorised to say there was no disagreement as to principle” between the members of the majority. The Minister submits that the majority must therefore be taken to have agreed with the position adopted by Nettle J. The Minister also submits that Nettle J’s later reasons in ***Chetcuti*** *v Commonwealth* [2020] HCA 42; 95 ALJR 1 at [38]-[40], sitting as a single judge, are consistent with the Minister’s submissions on this point.

92 *Second*, the Minister submits that, to the extent there are differences between the reasons of the majority justices, “Nettle J’s judgment reflects the ‘minimum position’ to be distilled” and is therefore binding on this Court.

93 *Third*, the Minister submits that Nettle J’s approach accords with Brennan J’s reasons in *Mabo (No 2)*, in particular where Brennan J stated at 59-60:

Where a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connexion with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence.

94 *Fourth*, the Minister submits that, although some justices in *Love/Thoms* left open the possibility that a test other than the test in *Mabo (No 2)* might be used to determine whether a person is a non-alien Aboriginal Australian, this Court remains bound to apply the tripartite test; in other words, if the law is to be developed further, that must be done by the High Court itself.

95 The Minister submitted:

While native title is a discrete area of law (particularly following the enactment of the *Native Title Act 1993* (Cth)), if one is to accept that there is a class of Aboriginal Australian that is not able to be treated as an alien, then to proceed as if Brennan J’s test in *Mabo (No 2)* is unsuited to informing the understanding of s 51(xix) would be to ignore “the content, nature and depth of that connection” with lands and waters and thus “distort the concept of alienage”. It is the connection between Indigenous peoples and land and waters that, upon Gordon J’s explanation, establishes them as non-aliens. And it is the very same “traditional laws and customs” to which native title looks that “establish and regulate the connection between Indigenous peoples and land and waters” and thus whether a person is a non-alien on account of membership of a particular traditional society.

(Footnotes omitted.)

96 As an alternative to his submission that this Court is constrained as a matter of precedent not to apply Deane J’s test, the Minister submits that even if the Court has some choice about whether or not to apply it, this Court should not apply the *Tasmanian Dam Case* test for three reasons.

97 *First*, as the extract above indicates, at least on Gordon J’s explanation in *Love/Thoms*, the Minister submits it is the depth of connection between traditional law and custom and *particular land* that establishes certain Aboriginal Australians as non-aliens. The Minister therefore submits that a test concerned with connection to land in accordance with traditional law and custom is the appropriate test for determining whether a person is not an alien.

98 *Second*, the Minister submits that the Parliament has “significant flexibility” in defining racial categories in federal legislation – in part because race is a social construct and in part because in interpreting the *Constitution* “grants of power are to be construed with all the generality that their words permit”. By contrast, the Minister submits that “limits on power are not approached in the same fashion”. This is in part a response to Mr Helmbright’s submission that “[t]here is no textual basis in the Constitution to approach the meaning of Aboriginal Australian differently for the purpose of s 51(xix) to the manner in which it has been treated for the purpose of the race power in s 51(xxvi)”. The Minister also submits that in *Love/Thoms* each member of the majority “expressly eschewed any reliance on race in explaining the limit on s 51(xix)”.

99 *Third*, the Minister submits that the *Tasmanian Dam Case* test is not binding on this Court: first, because it was dicta; second, because his Honour was considering a different head of power; and third, because it did not command majority support. Finally, the Minister submits that the test is vague and indeterminate, as “[i]t provides no objective criteria for identifying an “Aboriginal community”.

# RESOLUTION

100 The questions which must be resolved are the following:

(a) Is the Court bound to apply the *Mabo (No 2)* test to determine if the applicant is an Aboriginal Australian and therefore not an alien for the purposes of the Migration Act?

(b) If so, what is the content of that test? In particular, does it include a requirement that a person be recognised by a group which meets the requirements of a “*Yorta Yorta* society” and holds, or is entitled to hold, native title in particular land and waters?

(c) If the *Mabo (No 2)* test is applied to the applicant’s circumstances, as they are revealed by the evidence, is the applicant an Aboriginal Australian and therefore not an alien? Depending on the answer to the second question, this third question may need to be answered by reference to what Brennan J said in *Mabo (No 2)* itself, or by reference to what the majority said in *Love/Thoms* about that test, or alternatively only by reference to what Nettle J said and what the Minister contends is a native title approach.

(d) If the Court is not bound to apply the *Mabo (No 2)* test, can and should it apply the test set out by Deane J in the *Tasmanian Dam Case*?

(e) If the *Tasmanian Dam Case* test is applied to the applicant’s circumstances, as they are revealed by the evidence, is the applicant an Aboriginal Australian and therefore not an alien?

## First question: is this Court bound to apply the *Mabo (No 2)* test?

101 I accept the submissions of the Minister that until *Love/Thoms*, there was ample authority for the proposition that it is open to the Parliament to treat a person who does not hold statutory citizenship as an “alien” within the meaning of s 51(xix) of the Constitution: see ***Shaw v Minister*** *for Immigration and Multicultural Affairs* [2003] HCA 72; 218 CLR 28 at [2], Gleeson CJ, Gummow and Hayne JJ, at [190], Heydon J; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* [1992] HCA 64; 176 CLR 1 at 25, Brennan, Deane and Dawson JJ, at 64-65, McHugh J; *Re Woolley; Ex parte Applicants M276/2003* [2004] HCA 49; 225 CLR 1 at [15], Gleeson CJ; *Cunliffe v Commonwealth* [1994] HCA 44; 182 CLR 272 at 313 Brennan J, at 374-375 Toohey J.

102 To say that much is really only to recognise that the argument made in *Love/Thoms* had not been made before.

103 The Minister’s submissions describe the outcome in *Love/Thoms* as the statement of a “narrow qualification” on the propositions in the earlier cases. There may be various descriptors available. In my opinion, it is more appropriate to describe the outcome in *Love/Thoms* as the most recent example of the proposition set out by Gibbs CJ in *Pochi v MacPhee* [1982] HCA 60; 151 CLR 101 at 109, that the word “alien” involves a constitutional concept, to be interpreted by the Court, and that Parliament cannot define “alien” in a way which could expand its legislative power to include, under cover of that head of power, persons who could not possibly answer the description of “aliens”. See Bell J’s reasons in *Love/Thoms*[50]. See also at [7], Kiefel CJ; at [87], Gageler J; at [168], Keane J; at [236], Nettle J; at [310], Gordon J; at [433], Edelman J. While accepting that proposition, of course one of the clear dividing lines between the majority and the minority was the application of this proposition in relation to non-citizens who were Aboriginal Australians.

104 *Love/Thoms* proceeded by way of two special cases stated for consideration by the High Court. The questions stated and the answers given appear at the end of the report of the case. The form of the answers given was not the form expressed by all majority justices in their reasons: see, eg Edelman J’s different formulation at [468]. Nevertheless, this is the form of the Court’s orders.

**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.

105 Common to both answers is the following proposition:

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.

106 The differences in the answers reflect different fact finding in relation to the two plaintiffs. It will be recalled that at a factual level, the difference on the agreed facts before the Court between the two plaintiffs was that Mr Thoms was recognised as a member of a group which held native title (the Gunggari People) and Mr Love was recognised as a member of a group which did not hold native title (the Kamilaroi People). After the Court’s orders, on 1 July 2020, Edelman J made orders remitting both cases to the Federal Court for “further hearing and determination in accordance with the reasons of this Court”.

107 The common part of the answers in the Court’s orders mirrors what is said by Bell J at [81] of her Honour’s reasons:

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.

108 When that common part is taken together with the statement at [81] of Bell J’s reasons, in my respectful opinion it is the proposition 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” which is the ratio decidendi of *Love/Thoms*.

109 My approach to the statement at [81] is consistent with the approach taken in *Webster v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 702; 277 FCR 38 at [49].

110 The specific incorporation of Brennan J’s approach in *Mabo (No 2)* as the way the term “Aboriginal Australian” is to be understood in that proposition, binds me as a single judge of this Court to apply Brennan J’s approach in determining whether Mr Helmbright is an “Aboriginal Australian”.

111 Of course, it is true that at [80], Bell J observed that

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.

(Footnotes omitted.)

112 I accept that another way of expressing the position might well be to state that the agreement of the majority was limited to Brennan J’s approach being “sufficient but not necessary to establish Aboriginality for s 51(xix)”. That was the applicant’s submission. The applicant relied on some passages from the trial decision of *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 416 at [196]-[197]. On appeal, in ***McHugh*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 223the Chief Justice (at [63]) noted that the

proceeding before the primary judge and the appeal were conducted on the basis that the majority of the High Court in *Love and Thoms* rested their conception of Aboriginal Australian upon the tripartite test of Brennan J in *Mabo v Queensland (No 2)* [1992] HCA 23; 175 CLR 1 at 70.

113 I said at [396]:

I respectfully agree with the Chief Justice’s reasons at [65] that the question of how the descent aspect of the tripartite test is to be determined was not the subject of detailed submissions before this Court, and is a question of some complexity. Indeed, putting to one side the prospect that the tripartite test may not be the only approach (see *Love/Thoms* at [80]), the relationship between on the one hand what has been said in *Love/Thoms* about “Aboriginality” by reference to the High Court’s decision in *Mabo (No 2)* on the common law’s recognition of native title, and on the other hand the operation of the statutory scheme of native title in the *Native Title Act 1993* (Cth), is in my respectful opinion yet to be worked through in detail.

114 Mr Helmbright’s claim does, of course, require some of that working through in detail.

115 Besanko J expressed a firmer view. His Honour said (at [103]):

I reject any suggestion that satisfaction of anything less than the tripartite test is sufficient. Not only would that be inconsistent with the way in which this case was conducted, but more importantly, it would involve a modification or variation of the tripartite test laid down by the High Court in *Love*. In my respectful opinion, any modification or variation of the tripartite test is a matter for the High Court.

116 Given the parties’ agreement in *McHugh* that Brennan J’s approach in *Mabo (No 2)* should apply, and their conduct of the proceeding in that way before the primary judge, the issue which now arises simply did not arise in *McHugh*.

117 I accept that, in point of legal principle, it may well be that an approach other than the adoption of Brennan J’s approach in *Mabo (No 2)* is available to determine whether a person is, or is not, an Aboriginal Australian and therefore not an alien within s 51(xix) of the *Constitution*. The approach of Deane J in the *Tasmanian Dam Case* has been used to determine Aboriginality in other legal contexts: see [124]-[129] below. There are other approaches. The submissions made by the applicant and mtwAC, which I have set out at [81]-[85] and [86]-[88] above respectively, are not without force. However, these are not matters for a single judge presently to embark upon.

## Second question: what is the content of that test?

118 That leaves the question of what is the content of the test set out by Brennan J in *Mabo (No 2)*? On one view, this might not appear a difficult question to answer. Yet, with respect, the divergent majority reasoning about alienage and Aboriginal Australians in *Love/Thoms* presents challenges in understanding how the *Mabo (No 2)* test is intended to be applied in the very different context of alienage.

119 The principal source of authority on the content of Brennan J’s approach is what his Honour himself said. Although not dealing with exactly the same situation, in ***Hasler*** *v Singtel Optus Pty Ltd* [2014] NSWCA 266; 87 NSWLR 609 the NSW Court of Appeal at [98], Leeming JA (with whom Gleeson JA agreed) said:

This court is bound by what the High Court said in *Farah* as to second limb *Barnes v Addy* liability. It is bound directly. Ultimately, it is bound by reason of s 73 of the Commonwealth Constitution. This court is not bound indirectly by another court’s interpretation of what the High Court said. To paraphrase the words of McHugh J in *Marshall*, the primary guide to understanding the law as stated by the High Court is the language of that court’s reasons, and a judicial decision as to what those reasons mean is at best a guide to, but cannot control, the meaning of that language.

120 That principle has been repeated on many occasions: see *Australian Broadcasting Corporation and Others v Chau Chak Wing* [2019] FCAFC 125; 271 FCR 632 at [97]; *Commonwealth Bank of Australia v Kojic* [2016] FCAFC 186; 249 FCR 421 at [149]; *Obeid v Lockley* [2018] NSWCA 71; 98 NSWLR 258 at [167]-[170], [237]-[241]; *Director of Public Prosecutions (Cth) v Thomas* [2016] VSCA 237; 315 FLR 31 at [132]-[134]; *Fairfax Media Publications Pty Ltd v Gayle* [2019] NSWCA 172; 100 NSWLR 155 at [239(3)]. The context in these authorities was the convention, or principle of comity, that one intermediate appellate Court should generally follow the decisions of another intermediate appellate Court: *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; 230 CLR 89 at [135]. However, the same approach as I take here has been taken by Lee J in *Icon Co (NSW) Pty Ltd v Liberty Mutual Insurance Company Australian Branch trading as Liberty Specialty Markets* [2020] FCA 1493 at [60], and I respectfully agree.

121 If, in *Love/Thoms* the majority had gone beyond the proposition at [81] of Bell J’s reasons, and had expressed some additional qualifications on Brennan J’s approach in *Mabo (No 2)*, or had made findings about, or modifications to, the meaning of the “tripartite test in *Mabo (No 2)*” which could be seen as binding, then the situation facing a single judge might be more complex.

122 As I seek to explain below, in the majority reasoning in *Love/Thoms* there are no modifications to Brennan J’s approach in *Mabo (No 2)*, nor any specific interpretations of that approach which bind a single judge to take a particular view of what Brennan J said. Nor does the history of how the law came to frame the task of deciding if a person could be described as “Aboriginal” for legal purposes suggest that Brennan J’s approach in *Mabo (No 2)* was in some way a substantive departure from previous approaches. As I explain below, I do not consider the majority reasoning in *Love/Thoms* as a whole requires a single judge to superimpose onto the *Mabo (No 2)* test, which was expressed by Brennan J as the method for determining membership of an Indigenous group, a requirement to prove native title in particular land and waters. Nor do I consider a native title approach is required at a more general level by the majority reasoning in *Love/Thoms*.

123 Before turning to Brennan J’s reasons, it is appropriate to consider the way Australian law had dealt with the identification of Aboriginal and Torres Strait Islander peoples in other contexts.

### The development in Australian law of a “tripartite test”

124 mtwAC submits that the approaches taken by Deane J in the *Tasmanian Dam Case* and Brennan J in *Mabo (No 2)* both involve a “tripartite” test: descent, self-identification and community recognition. Subject to my conclusions about mutual recognition below, I accept that general proposition.

125 mtwAC also submits that a “tripartite test” appears to have first been proposed officially in 1981. That submission appears to be correct. The “test” arose from dissatisfaction with an approach based solely on biological descent, especially when European attitudes to biological descent had in the past informed and supported some of the oppressive government and public policies towards Aboriginal and Torres Strait Islander people. Bromberg J traced the history of this tripartite approach in *Eatock*. At [172] his Honour said:

A move away from the use of biological descent as the exclusive determinant of Aboriginality can be traced back to the 1967 Referendum, when s 51(xxvi) of the *Constitution of the Commonwealth* (the Constitution) was amended with the effect that the Commonwealth Parliament gained the power to legislate with respect to Aboriginal people. As the ALRC report identified, the Commonwealth subsequently enacted a number of statutes for the purpose of providing rights and privileges for Indigenous Australians. In the early 1980s a new three-part definition of an Aboriginal or Torres Strait Islander was proposed by the Commonwealth Department of Aboriginal Affairs. As the ALRC report describes at [36.14], the definition was in the following terms:

An Aboriginal or Torres Strait Islander is a person of Aboriginal or Torres Strait Islander descent who identifies as an Aboriginal or Torres Strait Islander and is accepted as such by the community in which he [or she] lives.

126 The “ALRC report” to which Bromberg J is referring is the Australian Law Reform Commission’s 2003 *Report on the Protection of Human Genetic Information*, which considered whether a biological basis for the identification of race was justifiable. His Honour noted at [170] that:

Despite what is now known about the invalidity of biology as a basis for race or ethnicity, legal definitions of Aboriginality, at least until the 1980s, exclusively concentrated on biological descent.

127 His Honour continued:

Dr John Gardiner-Garden, in his report titled *Deﬁning Aboriginality in Australia* (Department of the Parliamentary Library, Current Issue Brief No.10 2002-03) noted that for Aboriginal people, loss of identity began with the dispossession of their lands. Dr Gardiner-Garden’s report summarised the legislative position on racial categorisation at p 3 as follows:

Although in the first decades of settlement Aboriginal people were grouped by reference to their place of habitation, in subsequent years, as settlement resulted in more dispossession and intermixing, a raft of other definitions came into use. The most common involved reference to “Blood-quotum”. “Blood-quotum” classification entered the legislation of New South Wales in 1839, South Australia in 1844, Victoria in 1864, Queensland in 1865, Western Australia in 1874 and Tasmania in 1912. Thereafter till the late 1950s States regularly legislated all forms of inclusion and exclusion (to and from benefits, rights, places etc.) by reference to degrees of Aboriginal blood. Such legislation produced capricious and inconsistent results based, in practice, on nothing more than an observation of skin colour.

(Footnotes omitted.)

It is a notorious and regrettable fact of Australian history that the flawed biological characterisations of many Aboriginal people was the basis for mistreatment, including for policies of assimilation involving the removal of many Aboriginal children from their families until the 1970s. It will be of no surprise that a race of people subjected to oppression by reason of oppressive racial categorisation will be sensitive to being racially categorised by others. I accept that to be the case in relation to Aboriginal Australians. At [36.7] of its report, the ALRC acknowledged that sensitivity with an extract from the final *Report of the Royal Commission into Aboriginal Deaths in Custody* in the following terms:

No area of research and commentary by non-Aboriginal people has such potential to cause offence as does that which attempts to define “Aboriginality”. This determination of non-Aboriginal people to categorise and divide Aboriginal people is resented for many reasons, but principally, I suspect, because the worst experiences of assimilation policies and the most long term emotional scars of those policies relate directly to non-Aboriginal efforts to define “Aboriginality” and to deny to those found not to fit the definition, the nurture of family, kin and culture. To Aboriginal people there appears to be a continuing aggression evident in such practices.

(Footnote omitted.)

128 As Bromberg J noted at [173], Dr Gardiner-Garden’s report and the ALRC report observe that the three-part (or “tripartite”) definition was adopted by all federal government departments as their “working definition” for determining eligibility to access certain services and benefits. It was after these developments that the High Court came to consider in 1983 the meaning of “race” in the *Tasmanian Dam* *Case*, and whether the *World Heritage Properties Conservation Act* *1983* (Cth), and its provisions protecting Aboriginal sites, was supported by the power in s 51(xxvi) because it was a law “for the people of any race for whom it is deemed necessary to make special laws”.

129 Thus, in the context of the *Tasmanian Dam Case*, a tripartite definition was used as a means of understanding what is meant by the term “race”. An approach which looked at more than biological descent in an understanding of the term “race” was also endorsed by Richardson J in *King-Ansell v Police* [1979] 2 NZLR 531 at 542, a passage to which Brennan J refers in the *Tasmanian Dam Case* at 244, and to which Bromberg J refers in *Eatock* at [175]. Richardson J said:

The real test is whether the individuals or the group regard themselves and are regarded by others in the community as having a particular historical identity in terms of their colour or their racial, national or ethnic origins.

130 In the *Tasmanian Dam Case* at 244, Brennan J went on to find that Richardson J did not intend to pronounce an exhaustive or conclusive test with what his Honour had said. Brennan J continued:

Actual proof of descent from ancestors who were acknowledged members of the race or actual proof of descent from ancestors none of whom were members of the race is admissible to prove or to contradict, as the case may be, an assertion of membership of the race. Though the biological element is, as Kerr L.J. pointed out, an essential element of membership of a race, it does not ordinarily exhaust the characteristics of a racial group. Physical similarities, and a common history, a common religion or spiritual beliefs and a common culture are factors that **tend to create a sense of identity** among members of a race and **to which others have regard in identifying people** as members of a race. **As the people of a group identify themselves** and **are identified by others** as a race by reference to their common history, religion, spiritual beliefs or culture as well as by reference to their biological origins and physical similarities, an indication is given of the scope and purpose of the power granted by par. (xxvi).

(Emphasis added.)

131 In this extract we see, in 1983, an approach by Brennan J, which has at its base the same elements as the approach taken by his Honour in 1992 in *Mabo (No 2),* with what I consider to be the important nuance of describing this as “mutual” recognition.

132 In *Eatock* from [178]-[187], Bromberg J surveyed a number of further authorities, arising in various statutory contexts, about the meaning of the term “Aboriginal” or “Aboriginal person”, and concluded at [188]-[189]:

The authorities to which I have referred, make it clear that **a person of mixed heritage but with some Aboriginal descent, who identifies as an Aboriginal person and has communal recognition as such, unquestionably satisfies what is conventionally understood to be an “Aboriginal Australian”**. For some legislative purposes and in the understanding of some people, compliance with one or two of the attributes of the three-part test may be regarded as sufficient. To some extent, including within the Aboriginal community, debate or controversy has occurred as to the necessary attributes for the recognition of the person as an Aboriginal. Those controversies have usually occurred in relation to whether a person meets the necessary criteria, rather than as to the criteria itself. Those controversies have however from time to time focused upon whether a person with no or no significant Aboriginal descent should be accepted as an Aboriginal person.

A person possessing all three attributes identified by the three-part test clearly satisfies the conventional understanding of an Aboriginal person. Consistently with the authorities to which I have referred, in the knowledge of the possession of those three attributes, such a person would be described by ordinary Australians as Aboriginal. In my view, such a person would be entitled to expect that other Australians would recognise and respect his or her identification as an Aboriginal Australian. I do not wish to suggest that a person with less than the three attributes of the three-part test should not be recognised as an Aboriginal person. That question does not arise for determination in this case.

(Emphasis added.)

133 His Honour’s survey of the cases (with which I respectfully agree) makes good the applicant’s proposition that a “tripartite” approach was not only in use before *Mabo (No 2)*, but also thereafter, in a number of different statutory contexts. However, the NSW Court of Appeal’s decision in *Hackett (a pseudonym) v Secretary, Department of Communities and Justice* [2020] NSWCA 83; 379 ALR 248 demonstrates that a particular context may well suggest a different approach. In that case, the NSW Court of Appeal held that a child fell within the meaning of the phrase “Aboriginal child” in the *Adoption Act 2000* (NSW) where evidence established that she was descended from the people who lived in Australia before British colonisation: even if the child does not satisfy the tripartite test and even if no ancestor of the child satisfied the tripartite test, at: [60], [86], [89]-[90], Leeming JA, [145], [175], Basten JA and [176], McCallum JA.

134 The point of discussing these authorities is not to “cherry pick” extracts from any of them and substitute them for the words of Brennan J in *Mabo (No 2)*, nor to substitute them for the adoption of those words by a majority of the High Court in *Love/Thoms*. Rather, it is to emphasise the general commonalities in approach which emerge from the survey of these authorities, and to dispel any impression that in *Mabo (No 2)*, Brennan J was taking an approach that was novel or unique, or not already well-understood in Australian law. Further, aside from the emphasis that comes with his Honour’s usage of the term “mutual recognition”, it was an approach his Honour had already adopted in the *Tasmanian Dam Case*. In all the circumstances discussed, for one reason or another, Australian law has required a characterisation of people to be undertaken, almost always for the purpose of deciding if the people concerned fall within or outside an identified group. In other words, all approaches are about membership of a group, or a race. Some have greater specificity than others, which is likely to be driven by the context in which they have arisen. The specificity of the mutual recognition limb in *Mabo (No 2)*, in its emphasis on traditional authority, no doubt arises because the context concerned recognition of land title. At present, because of the way the ratio is expressed in *Love/Thoms*, that need for traditional authority in my opinion binds a single judge.

### My understanding of Brennan J’s approach in its context

135 Although biological descent remains prominent in most of the tests, there is no need in the present case to explore what might be comprehended by his Honour’s phrase “biological descent **from the indigenous people**” (emphasis added), and whether this can include, for example, biological descent from a person who was adopted under traditional law and custom by a particular group or clan; *cf* my observations in *McHugh* at [396]. Nor is it necessary to explore whether the non-citizen himself or herself could rely on adoption in accordance with traditional law and custom as a legitimate surrogate for a biological connection to a group or clan.

136 The second concept in the *Mabo (No 2)* test is “mutual recognition”. Brennan J uses that term in preference to “identification”, which was a term his Honour used in the *Tasmanian Dam* *Case*, and is the term used by Deane J in the *Tasmanian Dam* *Case* for the second limb. It is clear Brennan J’s emphasis is that the recognition must flow both ways.

137 What must the mutual recognition relate to? Brennan J’s view is that it is “membership” of the “indigenous people”. In other words, in the context of *Mabo (No 2)*, membership of the group or clan said to hold native title according to traditional laws and customs of those people. In *Mabo (No 2)*, this was the Meriam people. The holding of native title was in my respectful opinion contextual but not definitional.

138 Who must engage in the mutual recognition? On the one hand, the “particular person”. On the other hand – “elders or other persons enjoying traditional authority” amongst the group or clan concerned. That term – “traditional authority” is not used elsewhere in his Honour’s reasons, or in the reasons of any other member of the Court. The adjective “traditional” is however used frequently by Brennan J in speaking about land, that is, “traditional land”, in describing usufructuary and proprietary rights: “traditional usufructuary rights”, “traditional proprietary community title”; in describing the character of law and custom: “traditional laws and custom”; and in describing native title: “traditional native title”.

139 In each case the adjective “traditional” is apt to refer to features which find their origin in circumstances prior to European settlement, even though there may have been adaptations (including significant adaptations) since that time: see *Bodney v Bennell* [2008] FCAFC 63; 167 FCR 84 at [120]; ***Risk*** *(on behalf of the Larrakia People) v Northern Territory and Others (No NTD 5 of 2006)* [2007] FCAFC 46; 240 ALR 75. In *Risk* at [88], the Full Court quoted with approval the explanation of the primary judge (Mansfield J):

[T]he references, in pars (a) and (b) of the definition of native title, to “traditional” law or custom must be understood in the light of the considerations that have been mentioned. As the claimants submitted, “traditional” is a word apt to refer to a means of transmission of law or custom. A traditional law or custom is one which has been passed from generation to generation of a society, usually by word of mouth and common practice.

140 See also *Wagonga Local Aboriginal Land Council v Attorney General of New South Wales* [2020] FCA 1113 at [386] and [391], where Jagot J ascribes the same meaning to the word “traditional”; namely something handed down through the generations. Senior counsel for mtwAC advanced the same meaning in submissions in this proceeding. I agree.

141 Therefore, when Brennan J describes mutual recognition by those with “traditional authority”, and “by elders”, his Honour is describing those people who are seen, by their own community, as having authority under the laws and customs of that community as passed down through the generations, to make decisions for and about the community (including membership of the group or clan itself). As his Honour recognised, there may have been some adaptation and change to the content of law and custom because of the impact of European settlement.

142 The Minister submits that Brennan J’s description of community recognition must be read subject to other parts of his Honour’s reasons, such as the key passage at 59-60 about the circumstances in which native title may “cease”:

Where a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connexion with the land has been substantially maintained, **the traditional community title of that clan or group can be said to remain in existence.** The common law can, by reference to the traditional laws and customs of an Indigenous people, **identify and protect the native rights and interests to which they give rise.** However, when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared. A native title which **has ceased with the abandoning of laws and customs based on tradition** cannot be revived for contemporary recognition. **Australian law can protect the interests of members of an Indigenous clan or group, whether communally or individually, only in conformity with the traditional laws and customs of the people to whom the clan or group belongs** and only where members of the clan or group **acknowledge those laws and observe those customs (so far as it is practicable to do so)**. Once **traditional native title expires, the Crown’s radical title expands to a full beneficial title**, for then there is no other proprietor than the Crown.

(Emphasis added.)

143 I understand this passage somewhat differently. The emphasised parts assist in understanding that his Honour was here explaining that the common law could not recognise and enforce title to land sourced in traditional law and custom if that law and custom was no longer observed and acknowledged by the group itself. The continuing observance of traditional law and custom, in a sufficient way, and allowing for adaption and change, was how the native title itself survived. This fundamental proposition which conceptually underpins what is now described as the “continuity” requirement in s 223 of the *Native Title Act 1993* (Cth), wholly concerns survival of native title to land (and waters). It does not at all concern, and was not in my respectful opinion intended to concern, the survival of a community of Indigenous people, as a community. Nor was it intended to suggest that, if there was no proven continued observance of traditional law and custom about rights and interests in particular land and waters, all connection, and sense of connection, to the land and waters of that community was lost, or that the community itself – as an entity to which people could belong and in which culture, language, law and custom could continue to reside – was lost. What was lost, in his Honour’s view, was native title capable of being recognised by the common law.

144 His Honour was not here explaining when a person will, or will not be an “Aboriginal” person, or a member of a particular Indigenous people, group or clan for other purposes. That is apparent from the passage at 61 of his Honour’s reasons:

But **so long as** the people remain as an identifiable community, the members of whom are identified by one another as members of that community living under its laws and customs, **the communal native title survives** to be enjoyed by the members according to the rights and interests to which they are respectively entitled under the traditionally based laws and customs, as currently acknowledged and observed.

(Emphasis added.)

145 This is a passage about survival of native title to enable common law recognition, just as in *Risk v Northern Territory of Australia* [2006] FCA 404 (see above), Mansfield J was discussing the survival of the native title of the Larrakia people.

146 From 69-70, Brennan J then embarks on a summary of his findings to that point, in nine numbered points, concerning “what I hold to be the common law of Australia with reference to land titles”. It is in this summary that the “test” applied by the majority in *Love/Thoms* appears. Thus, what is said in these nine numbered points is Brennan J’s summary of what his Honour has already found. In point six, Brennan J notes again that it is “immaterial” if the laws and customs have undergone some change since sovereignty, provided “the general nature of the connexion between the indigenous people and the land remains”. Immediately after this statement, Brennan J gives his summary of how “the indigenous people” are to be identified (at 70):

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.

147 In my respectful opinion, in this key passage, Brennan J was in substance applying the same kind of approach that his Honour had taken in the *Tasmanian Dam Case* to the question of how membership of an Indigenous group was to be assessed. Instead of considering it in the context of the “Aboriginal race” (as he was in the *Tasmanian Dam Case*), his Honour was now considering it in the context of the Meriam people, and other groups of Aboriginal and Torres Strait Islander people who sought recognition of traditional ownership of their land. His Honour emphasised that recognition must be “mutual”, and in that sense focussed on how the traditional law and custom of the group operated to permit or preclude membership. That is why his Honour focused on “elders” (a term in my opinion used to convey a sense of hierarchy in Aboriginal communities by reason of traditional law and custom) and “others” enjoying traditional authority (a term in my opinion used to capture those who may not be “elders” but have a role under traditional law and custom in deciding which people are properly considered members of a particular group).

148 In my opinion the correct understanding of the test as explained by Brennan J in *Mabo (No 2)* is that there must be:

(a) biological descent from “the indigenous people”, which is a reference to an identifiable group, clan or community; and

(b) mutual recognition of a person’s membership of that same group, clan or community by the person concerned and by elders or others enjoying traditional authority within that group, clan or community. In this context, what is required is authority to permit or preclude membership that has its source in the norms handed down from generation to generation, since prior to European settlement.

149 The remaining question is whether the application of the *Mabo (No 2)* test in *Love/Thoms* to an entirely different legal circumstance – who is and who is not an alien – requires me, sitting as a single judge, to give what Brennan J said in *Mabo (No 2)* a different meaning to the understanding I have expressed above. In particular, in light of the Minister’s submissions, must a Court at first instance give the second aspect of the mutual recognition limb a meaning which requires an individual to prove they either are already a native title holder under the Native Title Act, or are entitled to be recognised as such?

### Use of Brennan J’s approach in Love/Thoms

150 The connection of Aboriginal and Torres Strait Islander people to Australian land and waters (in a broad sense, and not just in terms of statutory native title) was discussed in the reasons of all justices in *Love/Thoms*, in both pre- and post-sovereignty terms. What divided the minority and the majority was whether that relationship had anything to say, in legal principle, about who Parliament could identify as an alien in an exercise of legislative power under s 51(xix) of the Constitution.

#### The minority approach: rejection of a race-based criterion; connection to land irrelevant

151 Although in the *Tasmanian Dam Case* both the approach of Deane J and the approach of Brennan J concerned how the “Aboriginal race” should be understood for the purposes of determining if federal legislation is supported by the race power, in *Love/Thoms* the majority did not accept an approach to the understanding of alienage could be based on race. The minority saw Brennan J’s test in *Mabo (No 2*), and other judicial statements about how persons could or could not be identified as Aboriginal or Torres Strait Islander people, as being concerned – to a greater or lesser extent – with “race”.

152 Kiefel CJ said at [43]-[44]:

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.

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.

153 Gageler J said at [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), 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)”.

(Footnote omitted.)

154 And at [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”. It is supra-constitutional innovation.

(Footnote omitted.)

155 Gageler J also noted at [134]:

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.

156 Given the way the Minister now invites the Court to apply *Love/Thoms* – drawing a line between Aboriginal and Torres Strait Islander people who are non-citizens *and* native title holders, and those Aboriginal and Torres Strait Islander people who are non-citizens but cannot prove they are native title holders – Gageler J’s observation at [134] was prescient, with respect. The latter group of non-citizens are not “Aboriginal Australians”, according to the Minister.

157 Keane J (at [147]) also saw the contended distinction to be race-based:

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.

(Emphasis added.)

158 And at [177]:

In this regard, **membership of a particular race does not afford an entitlement to membership of the Australian body politic** under the *Constitution* or any Act of Parliament. Considerations of race are irrelevant to the requirements for membership of the Australian body politic.

(Emphasis added.)

159 His Honour made several other similar observations during the course of his reasons: see especially [181].

160 In dealing with the plaintiffs’ arguments about the relationship of Aboriginal and Torres Strait Islander people to land as a basis for non-alienage, the minority justices rejected these arguments at a fundamental level.

161 Kiefel CJ noted at [22] that the

common law has never recognised, as the plaintiffs’ argument at some points suggests, that Aboriginal persons as a whole comprise a singular society or group for the purposes of native title or that the connection spoken of extends beyond the traditional lands of the groups in question.

162 Noting also the limits imposed on the recognition of native title by the *Yorta Yorta* society principles, the Chief Justice identified at [25] how, in her Honour’s opinion, the plaintiff’s arguments involved some attribution of sovereignty to Indigenous groups:

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)* – by reason of the fact of British sovereignty and the possibility that native title might be extinguished – and expressly rejected in subsequent cases.

(Footnotes omitted.)

163 From [27], while recognising and accepting the approach in *Mabo (No 2)* to the recognition of common law native title, and the subsequent development of that concept under the Native Title Act, her Honour explained at [30] that the limits inherent in both the *Mabo (No 2)* test and the definition of statutory native title concerning connection to particular land and waters (rather than to all Australian land and waters) is what precludes adoption of connection to land as a basis for non-alienage. Her Honour described this at [31] as an

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.

(Footnote omitted.)

164 At [37] the Chief Justice explains what her Honour sees as a further erroneous premise in the plaintiffs’ arguments:

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) 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.

(Footnotes omitted.)

165 Gageler J expressed similar concerns at [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.

166 At [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.

167 And at [134], after the passage I have extracted above about the absence of Indigenous viewpoints on the argument, Gageler J said:

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.

168 Keane J, having identified at [185] a wide form of a three-part test his Honour considered the plaintiffs were suggesting, described the plaintiffs’ approach (at [188]) as involving “fundamental legal errors”. One error (at [192]) was that in *Mabo (No 2)*, Brennan J was 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.

169 Yet, Keane J found, that was how the plaintiffs sought to use the *Mabo (No 2)* test in the context of s 51(xix). At [194]-[195], Keane J explained the errors in this way:

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.

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.

170 These are by no means all the key passages in the minority reasons, but they are the ones which in my respectful opinion illustrate the core differences between the members of the Court on the use of the *Mabo (No 2)* approach, or indeed any approach based on the connection of Indigenous people to land and waters, as a relevant distinction for the purposes of s 51(xix). Understanding the two core differences (race, and connection to land) assists in understanding the contrary approach in the four majority judgments.

#### The majority approach: not race, but indigeneity; connection to land and to the Australian polity

171 Despite the plaintiffs having put their case in terms of race in at least at some points (see [78], Bell J), the majority preferred to express their approach as based on “indigeneity”.

172 Having described (at [60]) the Commonwealth’s ultimate position in argument as being that there is no “defining characteristic of the status of alienage”, noting (at [61]) the etymological origin of the term “alien” as meaning “belonging to another person or place”, Bell J observed (at [63]) that:

[N]o 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.

173 From [70], where her Honour considers the parties’ respective arguments based on *Mabo (No 2)*, Bell J finds at [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.

(Emphasis added.)

174 Bell J finds the Commonwealth’s concerns to be “overstated”. Her Honour says (at [73]):

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**, 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.

(Emphasis added; footnote omitted.)

175 What emerges in the reasoning of all the majority justices is the prominence given to the connection of Aboriginal and Torres Strait Islander people with their land, long before the assertion of sovereignty by the British Crown, the core cultural and spiritual dimensions of which have continued after sovereignty. Bell J puts it this way at [74]:

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.

(Footnote omitted.)

176 Nettle J’s reasoning focused on the relationship between an Indigenous person and the Crown in right of Australia, the relationship being unique because of a person’s indigeneity. At [255]:

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

177 His Honour then rejected (at [256]) the capacity of the concept of race to have any “bearing on the capacity of a person to owe permanent allegiance to, or be owed protection by, the sovereign”. Similarly, “connections” to “Australian territory, community or polity”: at [257]-[261]. Then, from [262] onwards, in a section headed “Aboriginality”, Nettle J found that “different considerations” applied to

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

178 This proposition aligns with Brennan J’s reasons in *Mabo (No 2)* at 70, and (as Brennan J’s passage at 70 is also expressed) *without* any references to continuing rights and interests in land capable of being recognised by Australian law. At [263], what Nettle J identified as needing re-examination was

the nature of an Aboriginal person’s relationship to the Australian polity...

179 That is, in my respectful opinion, because of indigeneity, not ‘race’ in some wider sense. At [269], Nettle J suggested that “the common law’s recognition of the Aboriginal societies from which those laws and customs organically emerged” was logically *anterior* to the common law’s recognition of rights and interests in land arising from traditional law and custom, referring to a passage in *Yorta Yorta* at [49]. From this passage, his Honour derives the proposition that (at [270]):

under the common law of Australia, **an Aboriginal society** **retains an identifiable existence** so long as its members are “continuously united in their acknowledgement of laws and observance of customs” deriving from before the Crown’s acquisition of sovereignty, and such may be inferred from **“subsidiary facts” of a social, cultural**, **linguistic, political or geographical kind**.

(Emphasis added; footnote omitted.)

180 Authority for the last proposition is given as ***Sampi*** *v Western Australia* [2010] FCAFC 26; 266 ALR 537 at [77], North and Mansfield JJ. The appeal in *Sampi* concerned the findings of the trial judge about whether the Bardi and the Jawi people were, and remained, one or two societies. The primary judge had found that while in contemporary times the two peoples formed one society, that may not have been the case at sovereignty, and the Jawi had been subsumed into the Bardi society. Thus, there was no separate native title determination in favour of the Jawi people over land and waters which they said belonged only to Jawi people. At [77], North and Mansfield JJ said:

It is too narrow to exclude from consideration factors which may bear on the existence of a normative system whilst not being direct evidence of the existence of that system. Indeed in the present case the array of factors relied upon by the Bardi and Jawi people themselves to demonstrate the existence of a single society at sovereignty highlights the point. They have not restricted themselves to factors which directly prove the existence of a normative system. For instance, the proof of the existence of songs about the sea is capable of showing that there were rules about the use of the sea even though the proof of the songs themselves is not proof of the law or custom.

181 While *Sampi* concerned recognition of native title, in my respectful opinion these references to *Sampi* in the passage in Nettle J’s reasons are included to illustrate the survival of a “society” or a community, in a form which, because of the “undoubted historical connection between Aboriginal societies and the territory of Australia” that his Honour discusses at [276] justifies or explains the Crown’s “unique obligation of protection to Australiana Aboriginal societies”. Nettle J is not describing the survival of native title to particular land and waters, although that was the context of *Sampi*. The passage in *Sampi* concerns how to identify the survival of a community or society. In Nettle J’s reasons, the paragraph immediately before [270], extracting a passage from *Yorta Yorta* at [49], concerns how to define or understand what an Aboriginal “society” *is*, not what its proprietary interests are.

182 This understanding is consistent with his Honour’s use of “anterior” in that same paragraph ([269]): the society or community, with its normative traditional law, must exist and then *from this*, or *after this*, come the interests in land and waters sourced in that traditional law. While this might not be the way an Aboriginal or Torres Strait Islander person would explain connection to country, it is a European legal analysis, and it is also consistent with the way Nettle J begins the next paragraph ([271]), where the focus is on when a person can be a member of an Aboriginal society. Not, I emphasise, when a person holds native title.

183 His Honour went on to explain that authority to decide membership of an Aboriginal society, and the status of that membership itself, was critical to the relationship of an Aboriginal person with the Australian polity. At [272]:

Logically, it cannot be that the common law in force immediately before Federation acknowledged the authority of elders and other persons to determine membership of an Aboriginal society and yet at the same time subjected members of that society to a liability to deportation.

184 These passages might appear to take the approach rejected by the Chief Justice at [37] of her Honour’s reasons. They are, I emphasise, not necessarily about the survival of native title to particular land and waters, but about survival of a society or community, and the authority of that society or community to determine its membership.

185 From [274] onwards, Nettle J discusses more broadly – including by reference to comparative circumstances in other jurisdictions – the recognition of a “unique obligation of permanent protection to Indigenous peoples”.

186 It is in this part of his Honour’s reasons that the Minister submits the “continuity” requirement, explained by the High Court in *Yorta Yorta* can be found, and therefore, the Minister submits, the inherent requirement that a society or community continue to hold native title to particular land or waters. However, his Honour’s reasoning should be seen in its full context at [276]-[278], with my emphasis:

Such considerations need not be pursued further, however, because, in this matter, domestic considerations dictate the proper conclusion. Underlying the Crown’s unique obligation of protection to Australian Aboriginal societies and their members as such is the **undoubted historical connection between Aboriginal societies and the territory of Australia which they occupied at the time of the Crown’s acquisition of sovereignty.** As is now understood, central to the traditional laws and customs of Aboriginal communities was, and is, **an essentially spiritual connection with “country”, including a responsibility to live in the tracks of ancestral spirits and to care for land and waters to be handed on to future generations**. Ignorance of those connections, and of their potential significance at common law, justified the early dispossession of Aboriginal peoples in the decades after 1788. But by the mid-19th century, James Dredge, the Assistant Protector of Aborigines at Port Phillip, could acknowledge that those connections were “sacredly recognised from one generation to another” and that, within the “boundaries of their own country, as they proudly speak, they feel a degree of security and pleasure which they can find nowhere else”. And even that was a profound understatement of the position, which Michael Dodson has since explained thus:

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

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

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

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

**So long as an Aboriginal society which enjoyed a spiritual connection to country before the Crown’s acquisition of sovereignty has, since that acquisition of sovereignty, remained continuously united in and by its acknowledgment and observance of laws and customs deriving from before the Crown’s acquisition of sovereignty over the territory,** including the **laws and customs which allocate authority to elders and other persons to decide questions of membership of the society**, the unique obligation of protection owed by the Crown to the society and each of its members in his or her capacity as such will persist.

(Italics emphasis in original; bold emphasis added.)

187 This led his Honour to conclude at [279]:

[E]ach **resident member of a relevant Aboriginal society** in his or her capacity as such owes to the Crown an obligation of permanent allegiance in the sense described.

188 These passages, both expressly and implicitly, are not concerned with the survival of native title to particular areas of land and waters. They are concerned with the survival of a society or community, and with a broader ongoing and well-recognised spiritual connection to country, which his Honour finds existed at the time of the assertion of European sovereignty, and has not been extinguished even if “title” has been extinguished.

189 Read in context, I do not see these passages as supporting the Minister’s arguments, either about Nettle J’s own approach, or about the “native title” prism the Minister urges the Court to adopt on the *Mabo (No 2)* test as used in *Love/Thoms*. His Honour’s focus is certainly on an identifiable society or community, and one which has survived in the form described by his Honour. But his Honour is speaking of “social facts”, and “historical connections” to land, and not contemporary holding of native title.

190 Gordon J quotes Brennan J’s test at [291], at the start of her Honour’s reasons. Immediately in [292], her Honour applied that test to the plaintiffs, in identical language:

The plaintiffs are Aboriginal Australians by biological descent, self-identification and recognition by an elder or elders enjoying traditional authority.

191 Gordon J describes the plaintiffs as “Aboriginal Australians” again at [298]. Her Honour explains at the end of her reasons (at [388]) why she did not consider it was appropriate to treat Mr Love any differently to Mr Thoms. I infer that explains the passages to which I have just referred. Then, at [298], in explaining her overall conclusions in outline, Gordon J said:

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

(Emphasis added.)

192 In my respectful opinion, it is clear that Gordon J has sought to apply Brennan J’s test in *Mabo (No 2)* on its terms, without any added requirement that only those Aboriginal people who are non-citizens and can prove native title under the Native Title Act are not aliens. Like Bell and Nettle JJ, Gordon J looked to the ongoing spiritual and cultural connection of Aboriginal and Torres Strait Islander people to land and waters, rather than the specific requirements necessary to prove continuing and current native title. At [334], her Honour dismisses the proposition that the Native Title Act, or the *Racial Discrimination Act* *1975* (Cth), can determine the proper construction of the Constitution. At [364], Gordon J emphasised that native title is but one legal consequence flowing from

common law recognition of the connection between Aboriginal Australians and the land and waters that now make up Australia. That Aboriginal Australians are not “aliens” within the meaning of that constitutional term in s 51(xix) is another.

193 In my respectful opinion, Gordon J saw the source of alienage in the Constitution as derived from concepts of “belonging” and its antonym, in her Honour’s opinion, “otherness” which could not be applied to Indigenous people: see [302], [333], [343] and [349]. See also [373] and [374] where her Honour emphasises the connection Aboriginal Australians have with Australian land and waters under their own law and custom; these passages however are expressed at the level of more general connection, not only proven native title.

194 It is for that reason that her Honour found at [335] (in my respectful opinion summarising what her Honour then goes on to explain in more detail):

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

195 There are similar statements at [340] and [357].

196 It is true, as the Minister submitted, that at [365] after referring to the compensation provisions in the Native Title Act, her Honour says:

Similarly, “[i]t is immaterial that the laws and customs have undergone some change since the Crown acquired sovereignty provided the general nature of the connexion between the Indigenous people and the land remains” and has not been substantially interrupted.

(Footnotes omitted.)

197 The first statement has a footnote to *Mabo (No 2)* at 70, and also *Commonwealth v Yarmirr* [2001] HCA 56; 208 CLR 1 at [295] and *Yorta Yorta* at [46], [83] and [114]. The second statement has a footnote to *Yorta Yorta* at [87]. However, Gordon J does not then engage in any application of what was said at [87] in *Yorta Yorta* to the circumstances before the High Court in *Love/Thoms*. Indeed, as I have explained above, in fact her Honour does the opposite and puts to one side the fact that there was no proof Mr Love belonged to a community who are or could be recognised as the holders of native title because their connection to land and waters by traditional law and custom had not been “substantially interrupted”.

198 From [366], Gordon J turns to what her Honour describes as the “[l]egal concept of Aboriginality”. This her Honour then defines by reference to Brennan J’s test in *Mabo (No 2)*, and says at [368]:

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

(Footnotes omitted.)

199 All of the authorities to which Gordon J refers in the footnote to the statement “[a]nd they have been” are cases under the Native Title Act, and five of them concerned contested membership of a native title claim group. They are not cases about “Aboriginality” as such, but rather about who is and who is not descended from specified apical ancestors, and whether certain apical ancestors have been established to have had rights and interests in certain land at effective sovereignty under the applicable traditional law and custom. In my opinion, in this passage Gordon J is using those cases as no more than illustrations or examples of how disputes about the “mutual recognition” to which Brennan J referred may arise, and might be resolved. In my respectful opinion, her Honour was not suggesting in this passage that unless a non-citizen who identified as Aboriginal could *prove* membership of a native title holding group, they would not be within the concept of “Aboriginal Australian”, being the status Gordon J finds is incompatible with alienage.

200 At [370], Gordon J notes it is “necessary to say something further about biological descent, self-identification and recognition”. In my respectful opinion there is nothing in these next passages which suggests Gordon J is adding to the *Mabo (No 2)* test a requirement that a non-citizen prove she or he is native title holder.

201 From the outset of his reasons, Edelman J focuses on Aboriginal people’s “fundamental spiritual and cultural sense of belonging to Australia”, finding it is this identity which “constitutes them as members of the Australian political community”: at [391]. Noting (at [392]) that at Federation, “the essential meaning of an alien, as a foreigner to a political community, was understood and applied in racial terms”, his Honour adds that Aboriginal people were not considered to be aliens:

The Aboriginal inhabitants of Australia had community, societies and ties to the land, now recognised as a “connection to country”, that established them as belonging to Australia and therefore to its political community.

(Footnote omitted.)

202 This led his Honour to find (at [394]), in my respectful opinion as part of his central reasoning:

The antonym of an alien to the community of the body politic cannot be a “citizen”. It is a “belonger” to the political community.

(Footnote omitted.)

203 This is what led his Honour to find (at [398], referring to ***Nolan*** *v Minister for Immigration and Ethnic Affairs* [1988] HCA 45; 165 CLR 178 at 189), that:

Aboriginal people belong to Australia and are essential members of the “community which constitutes the body politic of the nation state”.

(Footnote omitted.)

204 After explaining his reasoning for these propositions in more detail, Edelman J turns to the question of Indigenous people from [447] onwards. His Honour begins by noting (at [448]) the legal position of “American Indians” cannot be directly compared with Aboriginal and Torres Strait Islander people, but adds, citing *Cherokee Nation v Georgia* 30 US 1 at 56 (1831):

[n]evertheless the basic difficulty involved in characterising American Indians as aliens is the same as that for Aboriginal people of Australia: “[w]e call an alien a foreigner, because he is not *of the country* in which we reside”.

205 At [451], Edelman J expressly rejected the proposition that loss of continuity of relationship with land, or “even the effluxion of particular Aboriginal societies” could

extinguish the powerful spiritual and cultural connections Aboriginal people have generally with the lands of Australia.

(Footnote omitted.)

206 From [458] onwards, Edelman J discusses Brennan J’s test in *Mabo (No 2)* in that part of his Honour’s reasons dealing specifically with Mr Love and Mr Thoms. He notes the *Mabo (No 2)* test “was neither new nor novel”, finding:

It was similar to the approach taken in s 4(1) of the *Aboriginal Land Rights Act 1983* (NSW) and the approach of Deane J in *Commonwealth v Tasmania (Tasmanian Dam Case*.

(Footnote omitted.)

207 His Honour found that although used in *Mabo (No 2)* to “identify those members of a particular sub-group of Indigenous people who enjoy continuing connection with particular land”, the test

can be usefully applied in this case. However, it is not set in stone, particularly as an approach to determining Aboriginality as the basis for those fundamental ties of political community in Australia which are not dependent upon membership of a particular sub-group.

(Footnoted omitted.)

208 At [462], Edelman J addresses the changes in the Commonwealth’s position about its approach to the agreed facts concerning Mr Love, and the absence of a “contest” in the case about:

(i) whether the tripartite test, developed in the context of native title, and involving issues of recognition by sub-groups of Aboriginal people, should be adapted in the context of application of provisions such as s 51(xix) or s 51(xxvi);

(ii) whether the limbs of the tripartite test are each part of a continuum from weakness to strength; and

(iii) whether the limbs are interrelated so that a weaker factual basis in one limb could be compensated for by a stronger factual basis in others.

(Footnote omitted.)

209 Given the Commonwealth’s ultimate position communicated to the Court after the hearing that “the Commonwealth prefers not to take a position on the state of the agreed facts”, Edelman J concluded (at [462]) that:

the assumption upon which the agreed facts proceeded, namely that Mr Love is Aboriginal, should be accepted.

210 It is apparent from the passages I have extracted above that Edelman J was prepared to countenance a number of other approaches to the determination whether a person, who is both a non-citizen and identifies as Aboriginal or Torres Strait Islander, is an alien, and expressly rejected any confinement based on continuing native title.

### Is the Mabo (No 2) test modified or differently interpreted in Love/Thoms?

211 In my respectful opinion, the analysis I have set out above of the four majority judgments in *Love/Thoms* discloses that there is no modification of the *Mabo (No 2)* test by any of the majority justices. Indeed, to have done so would, in my respectful opinion, have required some additions or modification to the statement at [81] in the reasons of Bell J.

212 It is true that each of the majority justices uses indigeneity, and connection to land, in different ways. Each does rely on the connection of Aboriginal and Torres Strait Islander people to land and waters in Australia from prior to sovereignty as part of their reasoning for rejecting the alienage of non-citizens who are Aboriginal Australians in accordance with *Mabo (No 2)*. This is a core division between the majority and the minority.

213 As I have sought to explain, Bell, Gordon and Edelman JJ clearly do not confine their legal analysis, or their fact finding, to only those non-citizens who are, or can prove they should be recognised as, native title holders under the Native Title Act. As I have also sought to explain, through the key passages of his Honour’s reasons, I do not interpret Nettle J’s reasoning as expressed or confined in that way either. Although his Honour employs references to *Yorta Yorta* in several key passages in his reasons, he does so in the context of describing survival of Aboriginal societies, whose traditional law connects them to country in the sense described by Professor Dodson in the quotation at [276] of Nettle J’s reasons: that is, a connection between community and country which is not dependent on the forensic satisfaction of the elements of s 223 of the Native Title Act. As I explain below, nor do I interpret what Nettle J said in *Chetcuti* as confirming his Honour did impose some kind of “proof of continuing native title” requirement onto the test for alienage, using *Mabo (No 2)*.

214 Accordingly, in my respectful opinion, there is no basis to find that the understanding I have of the *Mabo (No 2)* test as explained at [148] above, must be modified or changed because of the majority reasoning in *Love/Thoms*.

### Rejection of the Minister’s “native title” prism on Love/Thoms

215 While it is now well-established that for native title to be recognised under the Native Title Act, connection to land and waters of a specific and continuous character must be proven, no justice in *Love/Thoms* (majority or minority) suggested that those Aboriginal and Torres Strait Islander people who have been found unable to satisfy the legislative requirements of the Native Title Act (such as the Yorta Yorta people) do not possess a genuine, ongoing, fundamental sense of belonging and obligation to those parts of Australian land and waters that belonged to their ancestors since time immemorial. No justice in *Love/Thoms* questioned this well-recognised and fundamental feature in the identity and lives of Aboriginal and Torres Strait Islander people, citizens or non-citizens, native title holders or non-native title holders. It has never been suggested this sense of identity coalesces only with statutory citizenship, or has been held since European sovereignty only by those with statutory citizenship. In substance, the difference between the minority and the majority (which can be seen also in the Commonwealth submissions to the High Court extracted below) was whether this relationship between Indigenous peoples and their land and waters could say anything in legal principle about their relationship with the polity of the Commonwealth of Australia.

216 In its arguments to the High Court in *Love/Thoms*, the Commonwealth did not seek to confine the category of Aboriginal and Torres Strait Islander people who have connections to Australian lands and waters and continue to observe traditional law and custom, to those who hold statutory native title.

217 Indeed, in its further reply submissions to the State of **Victoria’s** submissions in the High Court, the Commonwealth recognised (at [19]):

…the fact that a deep connection of Aboriginal persons to land and waters long preceded the creation of that body politic. Indeed, such connections likewise long preceded the acquisition of British sovereignty over the continent of Australia.

218 It did so in the context of its submissions that running together a relationship to land and waters and a relationship to the body politic was the basic mistake in the submissions of the plaintiff and of Victoria. And at [22] of those submissions:

While the Commonwealth acknowledges and respects the deep and strong connection between Aboriginal persons and the lands and waters of Australia, it does not follow that a connection of that kind creates a privileged connection with the Australian body politic, such that factors that would allow Parliament to treat any other person as an alien must be disregarded where those factors pertain to an Aboriginal person.

219 It was for this reason in the same submissions that the Commonwealth contended (at [24]) the “common law principles that underpin native title do not provide any foundation for an Indigenous form of citizenship that stands outside the generally applicable statutory regime”, which was its contention about the substantive effect of the plaintiffs’ and Victoria’s arguments. However, the Commonwealth then went on to criticise the use by Victoria of the concept of “Aboriginal society”, and positively contended this concept could only be understood in the way the plurality explain the concept in *Yorta Yorta*. Citing *Yorta Yorta*, the Commonwealth submitted (at [29]):

Thus, an “Aboriginal society” is not simply a grouping of Aboriginal persons who satisfy the plaintiffs’ proposed three-part test. It is a society where it can be shown that its laws and customs have maintained “a continuous existence and vitality since sovereignty”. Victoria simply asserts that this aspect of native title law can be put to one side, and that all that is relevant is the present relationship of Aboriginal society to land and waters: VS [41]. The justification for cherry picking in that way is unexplained, and would produce profound uncertainty as to what kind of relationship to land and waters would need to be established to take members of Aboriginal society outside the reach of s 51(xix).

(Footnote omitted.)

220 The Commonwealth then cautioned (at [30]) against the “invidious consequences” of the adoption of a native title approach, through reliance on *Yorta Yorta* to define “membership of Aboriginal society … as a determinant of legal status”. It submitted:

[T]he post-sovereignty histories of Aboriginal societies are not all the same. There are parts of Australia where the effects of dispossession have been heaviest in which there may be Aboriginal persons who cannot be members of any Aboriginal “society” as that term is defined in *Yorta Yorta* because no such society exists, whether or not there are currently Aboriginal communities in those areas. Denied the possibility of membership of an Aboriginal society, Victoria’s argument would result in **two classes of Aboriginal persons, some of whom would be incapable of being aliens, and some of whom would not be**. As such, Victoria’s argument does not provide any basis for any general rule concerning the status of Aboriginal persons.

(Emphasis added; footnote omitted.)

221 Despite having advanced this submission to the High Court, the Minister now contends at trial for this very outcome in relation to Mr Helmbright, and in relation to some of the most dispossessed of all Aboriginal people, the Aboriginal people of Tasmania.

#### The Minister’s submissions

222 The Minister submits (at [17] of his principal submissions) that:

(a) Nettle J’s reasoning in *Love/Thoms* is “controlling applying orthodox techniques concerning the use of precedent”;

(b) It is Nettle J’s understanding that explains why it is that Mr Love’s case had to return to the Federal Court for further fact finding (relying on [288] of the judgment); and

(c) Nettle J’s judgment reflects “the minimum position” to be distilled from the majority judgments.

223 The Minister further contends that adopting the reasoning of Nettle J – and therefore a “native title” approach

is also consistent with the traditional approach that an appeal is determined “according to the opinion of a majority as to the order which gives effect to the legal rights of the parties irrespective of the steps by which each of the Justices in the majority reaches the conclusion”.

(Footnote omitted.)

224 The relevant footnote refers to the authority for this proposition as ***Hepples*** *v The Commissioner of Taxation of the Commonwealth of Australia* [1992] HCA 3; 173 CLR 492 at 551. The footnote records “see also” ***Perara****-Cathcart v The Queen* [2017] HCA 9; 260 CLR 595 at [41], Kiefel, Bell and Keane JJ.

#### My reasoning

225 The Minister’s submissions should be rejected firstly for the reasons I have already set out: the Minister’s position does not, in my respectful opinion, correctly reflect the position taken by Nettle J.

226 A further, albeit minor, point is that it is not possible to reach a firm conclusion whether the only reason Mr Love’s matter was remitted was to determine the application of the *Mabo (No 2)* test to his factual circumstances. Clearly this was one reason. However, Mr Thoms’ matter was also remitted.

227 Next, I do not accept the submissions that the position of Nettle J is “controlling”. It is correct, as the Minister submits, that Nettle J was the only member of the majority who expressed himself unable to answer the stated factual question in relation to Mr Love: see [288]. Bell J relied on the absence of a contrary position being taken by the Commonwealth when in her Honour’s view it would have been appropriate for it to do so if it did not accept the agreed facts would lead to a conclusion that Mr Love was not an alien: see [78]. Gordon J was content to make a finding in Mr Love’s favour in part because of the Commonwealth ultimately not taking a position on the agreed facts about Mr Love. At [390], her Honour indicates she would answer the question about whether Mr Love was an alien as “no”. Edelman J also relied on the absence of a contradictory position from the Commonwealth and at [468] also indicated he would answer the question in relation to Mr Love as “no”. It is also notable that Nettle J did not answer the stated question about Mr Love “yes”: that is, his Honour did not seek to apply any “native title” reasoning to the agreed facts so as to produce the conclusion that Mr Love *was* an alien because the agreed facts established the Kamilaroi People had not been recognised as native title holders.

228 Thus, three of the four majority justices *could and did* reach a factual conclusion about Mr Love. Yet, the Minister asks the Court to ignore the position of these three judges. The three to one position amongst the majority does not mean, in my respectful opinion, that the reasoning of the single judge who could not reach a factual conclusion (either way) assumes a position which, for the purposes of precedent, should be considered the “most narrow”. If anything, given the position taken by the other three majority justices, and the absence of a “yes” answer, his Honour’s position could equally be seen as a reluctance on the part of Nettle J to draw any inference from Commonwealth’s election not to take a position on the facts about Mr Love. As I explain below, I also do not consider it is correct to describe Nettle J’s approach as the “most narrow” of the majority justices.

229 Nor do the two cases relied on by the Minister support the position he advances.

230 *Hepples* was a case about capital gains tax, and the proper construction and operation of (then) s 160M of the *Income Tax Assessment Act 1936* (Cth). In an ongoing proceeding, the then President of the Administrative Appeals Tribunal had stated a case for the Federal Court under s 45(2) of the *Administrative Appeals Tribunal Act 1975* (Cth).

231 The stated question was:

Was there, in consequence of the facts recited herein, included in the assessable income of the Applicant for the year of income ended 30 June 1986 –

(a) an amount of $40,000; or

(b) some other amount, and if so, what amount, pursuant to sub-section 160ZO(l) of the *Income Tax Assessment Act 1936*?

232 A majority of the Full Federal Court (Lockhart and Gummow JJ, Hill J dissenting) answered the question raised by paragraph (a) “Yes”.

233 The High Court made some criticisms of the way the question had been stated. Mason CJ said (at 498) that the question had been stated in a general way, which did not really permit it being answered in a way that would give effect to the (different) conclusions of the majority in the Full Court, and that there should have been more than one question. The Chief Justice proposed relief which would remedy this (including by allowing the appeal and substituting orders), even though the Court substantively agreed with the majority in the Full Federal Court. Brennan, Dawson, Toohey, Gaudron and McHugh JJ agreed. The parties were given an opportunity to make submissions on the appropriate orders to be made in such a circumstance, and it is the second and subsequent part of the High Court’s reasons, after these further submissions were made, which is the part upon which the Minister relies. In the further submissions, the plaintiff taxpayer submitted there was no majority in the High Court in favour of assessability on either of the two sub-sections of s 160M which were in issue. The taxpayer contended (at 549) a majority cannot be found by “combining some Justices views on sub-s(6) with the views of others on sub-s(7)”. In contrast, the Commissioner contended the “ultimate issue” was whether the taxpayer had demonstrated the assessment was excessive and that had been decided in the Commissioner’s favour. Whereas, the Commissioner contended, if the Chief Justice’s proposal was adopted the Tribunal would be bound to find in favour of the taxpayer.

234 The High Court’s supplementary judgment commenced with the following question (at 550):

What order should this Court make when a majority would dismiss the appeal but for discrepant reasons and each of those reasons is rejected by a majority differently constituted?

235 It can immediately be seen from this question that there is no parallel with *Love/Thoms*, where four justices agreed on the reasoning set out in [81] of Bell J’s judgment.

236 Returning to *Hepples*, the Court pointed out it was dealing with an appeal from the determination of a question of law in pending proceedings in the Tribunal. It was not dealing with an appeal from a final judgment. The Court said (at 551):

An appeal in proceedings of that latter kind has traditionally been determined according to the opinion of a majority as to the order which gives effect to the legal rights of the parties irrespective of the steps by which each of the Justices in the majority reaches the conclusion. But when an issue of law is determined for the purposes of proceedings pending in a court or tribunal, an order on appeal must declare the majority opinion as to the issue of law, irrespective of any conclusion as to the ultimate rights of the parties to which the reasons of the respective Justices would lead.

(Footnote omitted.)

237 While *Love/Thoms* was not an appeal to the High Court from a final judgment, nor was it a proceeding of the kind in *Hepples*.

238 In *Love/Thoms*, the declaration on the “issue of law” was identical in the order on each case stated. As I have found earlier, that declaration contains the ratio decidendi of the decision. Then, in Mr Thoms’ case, there was a further answer which gave further effect to the legal rights of the parties, by declaring Mr Thoms to be an “Aboriginal Australian” and therefore declaring the answer to the question whether he is an alien to be “no”. In relation to Mr Thoms, this was done “irrespective of the steps by which each of the Justices in the majority reaches the conclusion”, to adapt the language of *Hepples*.

239 Nettle J found himself unable to answer the question whether Mr Love was an alien. That was because (see [287]):

the Commonwealth **did not concede** that he had been recognised by “elders or others having traditional authority”, that is, authority under laws and customs observed since before the Crown’s acquisition of sovereignty.

(Emphasis added.)

240 It was not because of an absence of a concession about the survival of native title. That can be seen from the way Nettle J describes the concession about Mr Thoms at [287]:

In the case of Mr Thoms, the Commonwealth did not dispute that, **because** he is a native title holder, the **Aboriginal community of which he is a member must be an Aboriginal society** whose laws and customs have relevantly maintained a continuous existence and vitality since the Crown’s acquisition of sovereignty.

(Emphasis added.)

241 In other words, the focus of Nettle J’s reasoning here is *not* on the survival of native title as such, but on the survival of the society or community and its traditional laws and customs which, as his Honour had said, is “anterior” to any rights and interests to which those traditional laws and customs might give rise. The survival of an Aboriginal society, his Honour reasons, may well be implicit or inherent in recognition under the Native Title Act. This reasoning by Nettle J is consistent with the passages concerning the applicable legal principles, which I have extracted above at [183], [186] and [187]. In my respectful opinion, his Honour’s focus is on the survival of a society or community of a particular kind, and how membership of that community is to be determined.

242 The Court’s order in respect of Mr Love made it clear the majority justices could not agree on how the agreed legal principles applied in fact to Mr Love’s circumstances. There is nothing in *Hepples* which suggests, or supports the proposition, that a subsequent Court, lower in the judicial hierarchy, must in such circumstances consider the reasoning of one of the four judges as somehow binding in subsequent and different fact finding in a different proceeding, especially where three judges of the majority did find facts supporting an outcome for Mr Love, and where the case has a clear ratio decidendi.

243 The other authority relied on by the Minister is *Perara*. That appeal from conviction concerned the admission of certain evidence, and the jury direction which related to that evidence. The Full Court of the South Australian Court of Criminal Appeal found by majority that there was an error in the jury direction but between them disagreed whether the proviso applied (that is, that no substantial miscarriage of justice had occurred). The third judge found no error in the jury direction, so did not consider the application of the proviso (relevantly contained in s 353(1) of the *Criminal Law Consolidation Act 1935* (SA)). The appeal against conviction was dismissed. In the High Court, the appellant submitted that because two judges had found error, the dismissal of his appeal could not be sustained by s 353 unless *two* judges concluded there had been no substantial miscarriage of justice. By a notice of contention, the Crown contended there was no error in the jury directions.

244 A majority of the High Court (Kiefel (as her Honour then was), Bell, Gageler, Keane and Gordon JJ) upheld the Crown’s contention. However, the majority split on the appellant’s argument. Kiefel, Bell, Keane and Nettle JJ (Nettle J otherwise being in dissent on the Crown’s contention) all held there needed to be a majority in the Full Court on two questions – whether there was error justifying setting aside the verdict and second whether the proviso applied to avoid that outcome. The majority found the appellant was correct to submit a majority of the Full Court had not determined the proviso applied, so there was no support for an order dismissing his appeal. Gageler and Gordon JJ dissented, on the basis there was a single question before the Full Court – should the appeal be allowed or dismissed – and the order dismissing the appeal was made in accordance with the opinion of the majority as to the answer to that question (ie the one judge who relied on the proviso and the one judge who found no error in the jury direction).

245 The majority on what I might call the “orders question” saw the issue as essentially one of statutory construction, on the basis that the legislature had required “more” than the single question whether an appeal should be allowed or dismissed. However, their Honours added (at [41]) that their conclusion was consistent with *Hepples*, which their Honours described as dealing with

the appropriate course when a majority of a multi-member court “would dismiss [an] appeal but for discrepant reasons and each of those reasons is rejected by a majority differently constituted.”

246 The passage at [41] is the passage relied on by the Minister. Quoting (at [42]) the passage from *Hepples* I have extracted at [236] above, their Honours appeared to consider the task under s 353(1) fell into the same category as a referral on a question of law. No further explanation was given for the posited similarity.

247 It is unclear how [41], or [42] of *Perara*, advance or support the Minister’s submissions. I do not consider they go any further than *Hepples*, and I have explained why I do not consider that is on all fours. To be clear, in *Love/Thoms* the orders made on the case stated in each proceeding, as to the applicable legal principles, were made by a four member majority, for the joint reason given at [81] of Bell J’s reasons, which in turn was expressed again in the orders. *Perara* is a quite different situation.

248 In *Perara*, the reasons of both dissenting judges are instructive on the issues of principle. Gageler J commenced with propositions (at [73]-[74]) that:

The institutional responsibility of a court is to produce an order that resolves the justiciable controversy before it. That is the court’s “unique and essential function”. In the performance of that function by a multi-member court, each member of the court has an individual duty to give effect to his or her own true view of the law and of the application of the law to the facts of the case.

The individual members of a multi-member court will sometimes disagree. Sometimes disagreements will be resolved by dialogue, one member ending up convinced by another to take a different view; sometimes not. Where disagreements are not resolved, the law supplies a decision-making rule which allows the court to produce the order that is necessary for its institutional duty to be fulfilled.

(Footnotes omitted.)

249 Explaining that this rule is different from the backward-looking task of extracting a ratio decidendi, because this rule must be applied at the time of the decision to the exercise of judicial power in making the order, Gageler J said (at [75]):

Every case must have an outcome, but not every case need have a ratio decidendi.

250 In my respectful opinion, *Love/Thoms* has both. In *Perara*, the “decision-making rule” was supplied, in Gageler J’s view, by s 23(2) of the *Judiciary Act 1903* (Cth), which is directly applicable to the High Court’s appellate jurisdiction. His Honour found the holding in *Hepples* was an application of the “same underlying decision-making rule as informs the disposition of an appeal from a final judgment which concludes the legal rights of the parties”. His Honour identified this as a “majoritarian decision-making rule” and concluded (at [79]) that:

The majoritarian rule is not applied in respect of conclusions which each member has reached on **issues arising in the process of reasoning** to that opinion. The “question”, in short, is **as to the order** not the reasons.

(Emphasis added.)

251 From [80], Gageler J then applied this approach to determine what the “question” was in s 349 of the *Criminal Law Consolidation* *Act* *1935* (SA). That analysis is not presently relevant, but his Honour concluded the “question” was the same as that in s 23(2) – namely, what order should the Full Court make. This is what his Honour described at [88] as the “end-point” of the Court’s reasoning. That is why his Honour held there was a single question – should the appeal be allowed or dismissed.

252 Gordon J’s dissent on the “order” issue commenced from the proposition that appeals (here to the South Australia Court of Criminal Appeal, but also applicable to the High Court) are brought against orders not reasons. In this way her Honour found (at [144]) that the “question” before the Full Court was whether to allow or dismiss the appeal. However at [153] her Honour did touch on a situation closer to the present one in *Love/Thoms*:

The issue concerning the appropriate orders to be made where judges are in disagreement is separate from the question of application of the proviso. In an appeal where judges’ reasons are divided, an expedient must be adopted by the court to dispose of the case and give effect to, and conclude, the parties’ legal rights.

(Footnote omitted.)

253 Aside from s 23(2) of the Judiciary Act, her Honour cites *Tasmania v Victoria* [1935] HCA 4; 52 CLR 157 at 183, where Dixon J discussed the need for an “expedient” in a situation where members of a Court are equally divided, discussed historic examples and referred to s 23(3) of the Judiciary Act as the expedient applicable in the High Court. Rich and Dixon JJ (but not a majority of the High Court) found that a decision given on equal division of opinion in the High Court is not a precedent binding on this Court in subsequent cases.

254 *Love/Thoms* is not, of course, a case where the Court was equally divided. It is a case where there was a four member majority opinion that Aboriginal Australians, understood by reference to Brennan J’s test in *Mabo (No 2)*, are not aliens for the purposes of laws made pursuant to s 51(xix). It is a case where the differing reasoning of the majority justices explains why the application of those legal principles to the facts meant the majority was “unable … to agree” on findings of fact which would determine the rights of Mr Love and the Minister. If there is any “expedient” apparent in the majority reasoning, it is the statement of Bell J on behalf of all the majority at [81]. Otherwise, the outcome of the factual disagreement was the remitter of Mr Love’s case for further fact finding. None of that affected the making of orders reflecting the legal conclusion reached by the majority. Nor does it affect the ascertainment of the ratio decidendi of the case. Nor does this circumstance suggest, or authorise, an elevation of the reasons of Nettle J to a more binding position on single judges at trial level than the reasoning of the other justices in the majority, assuming (contrary to my own conclusions) that Nettle J’s reasons should be understood as the Minister submits.

255 The Minister submitted a single judge of this Court is bound to adopt a “native title” approach because first, that is the approach of Nettle J, and second because his Honour’s reasoning is the “minimum position”:

[I]t doesn’t really matter where one plots Gordon, Bell, and Nettle JJ, because – sorry, and Edelman – because Nettle Js position is clearly the minimum position that is consistent with the orders of the court, and that is what will give rise, ultimately, to the binding authority of the decision. And that is supported by paragraph 81.

…

his Honour found that Mr Thoms had met that test, and Mr Love had not, and the all applied the same test, we would say, but three of their Honours were prepared to draw inferences that Nettle J was not prepared to draw.

256 As I explain above, the Minister’s submissions imply the only reason Nettle J did not agree was because Mr Love was not a native title holder. In fact, in my opinion, the reasons given at [287] (extracted at [239] above) are not about being a native title holder. It is about the kind of community which has provided the recognition. Without further facts being agreed in relation to the Kamilaroi People, Nettle J could not apply the concepts to which his Honour had given prominence in his reasoning, about a society united in its observance of traditional law and custom. In Mr Thoms’ case, agreement as to an existing determination of native title implicitly provided a sufficient factual basis for an inference about the society comprising the Gunggari People.

257 The principal authority relied on by the Minister for his contentions about the “minimum position” being what is binding in terms of precedent is ***Long*** *v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1422 at [35], [40], a decision of French J, as his Honour then was.

258 *Long* was itself a case about the reach of the aliens power. Mr Long was a national of the United Kingdom, but a long-term resident of Australia, who had never taken out Australian citizenship. His visa was cancelled because of the commission by him of serious criminal offences. He contended he was not an alien and so was not amenable to the visa cancellation and deportation or removal powers in the Migration Act.

259 As French J noted at [11], referring to *Ex parte Walsh and Johnson; In re Yates* [1925] HCA 53; 37 CLR 36, it was common ground that Mr Long was no longer an immigrant because he had been absorbed into the Australian community. *Long* was decided before *Shaw v Minister*, but not long after ***Re******Patterson****; Ex parte Taylor* [2001] HCA 51; 207 CLR 391. *Re Patterson* was the case which created what Gageler J described in *Love/Thoms* at [132] as a “constitutional cul-de-sac” where, for a brief period of time, the High Court declared the law to be that some British citizens who migrated to Australia during certain periods and became permanent residents but not Australian citizens were outside the reach of the aliens power. *Re Patterson* overruled *Nolan*. *Shaw v Minister* effectively re-instated *Nolan*, and held, by majority, that such people were within the reach of the aliens power.

260 Nevertheless, at the time *Long* was decided, French J had to grapple with the authority of *Re Patterson*. One difficulty for French J was that the majority in *Re Patterson* (Gaudron, McHugh, Kirby and Callinan JJ) adopted differing reasoning to support orders quashing the Minister’s decision to cancel Mr Taylor’s visa. McHugh J decided the case in Mr Taylor’s favour on administrative law rather than constitutional grounds (hence the relief by a majority of four), although McHugh J did agree, for reasons his Honour gave, that *Nolan* should be overruled. Nevertheless, this was clearly obiter in McHugh J’s reasons. This meant on the constitutional question of the reach of the aliens power to people such as Mr Taylor, the Court was evenly divided between the rest of the majority (Gaudron, Kirby and Callinan JJ) and the minority (Gleeson CJ, Gummow and Hayne JJ). What then did this mean for a single judge in the position of French J, coming to apply *Re Patterson* to a person like Mr Long, who contended he was in an analogous factual situation to Mr Taylor in *Re Patterson*?

261 In *Long* at [34], French J identified “at least two views” supporting the conclusion that Mr Taylor was not an alien – one view discernible from the reasons of Gaudron, Kirby and Callinan JJ, and a different view discernible from the reasons of McHugh J. The former view meant British subjects absorbed into the Australian community prior to May **1987** were not aliens for the purposes of s 51(xix). The latter (McHugh J) meant those British subjects born in the United Kingdom and living in Australia in **1973** became subjects of the Queen of Australia (because, McHugh J found, of the effect of the *Royal Style and Titles Act 1973*), and therefore (at least) those British subjects who arrived before 1973 were not aliens.

262 This meant, French J found at [35], there was no “clear common ratio” on when a British subject was not an alien. His Honour posed the question for himself, sitting as a single judge as (at [38]):

The decision in *Re Patterson* is not binding authority for the proposition that a British subject arriving in Australia before 1 May 1987, who had been absorbed into the community, is not an alien. It is therefore not open to this Court simply to apply the principle enunciated by Gaudron, Kirby and Callinan JJ **on the basis that it is bound to do so**. The question is whether it is **appropriate**, at first instance in this Court, to apply that principle.

(Emphasis added.)

263 At [39], French J looked to the (then) more recent High Court decision of *Re Immigration and Multicultural Affairs, Minister for; Ex parte* ***Te*** [2002] HCA 48; 212 CLR 162 to see if that assisted in understanding the High Court’s own view about whether *Re Patterson* created a binding precedent about the scope of the aliens power. French J found in substance the divergence between various justices continued and *Te* did not assist.

264 French J’s conclusion at [40] was:

In my opinion, there is no binding principle in *Re Patterson* which assists me to a decision in this case. I consider that I should not apply to this case the proposition that British subjects living in Australia were not to be regarded as aliens until after 1987. In my opinion the appropriate position to take **is the minimum position** adverted to by McHugh J (although not definitively). On that position the division of allegiances between the Queen of the United Kingdom and the Queen of Australia became clear and the status of British subjects who were not Australian citizens also became clear as aliens for the purpose of the Constitution in 1973 upon the enactment of the *Royal Style and Titles Act 1973*. This approach is **the most conservative approach to the decision in *Re Patterson*** which, having regard to its divergent reasoning, **should be seen as disturbing pre-existing law to the least extent necessary consistent with the outcome**. That position is reached by following the reasoning of McHugh J and treating it as definitive.

265 This is the passage upon which the Minister relies, but the emphasis is mine.

266 I accept that consideration of French J’s approach in *Long* is instructive. However, the situation facing his Honour in *Long*, because of *Re Patterson*, is not the same situation facing this Court because of *Love/Thoms*.

267 In my respectful opinion, if I am wrong in my interpretation of Nettle J’s reasons, and the Minister’s interpretation of his Honour’s approach is correct and it is a native title approach, then I am nevertheless not bound sitting as a single judge to adopt the reasoning of Nettle J. The approach taken by French J in *Long* arose in circumstances quite different to the present proceeding, and to the circumstances of *Love/Thoms*.

268 I reach that conclusion for the following reasons:

(a) Unlike French J in *Long*, I have concluded that there *is* a legal principle flowing from *Love/Thoms* which binds me as a single judge. It is the proposition in [81] of Bell J’s reasons, which is the same proposition as found in the Court’s orders answering the question of law found in each of the stated cases. The binding principle is:

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.

(b) The application of this binding principle to the facts of a particular case will depend on the evidence adduced. As I have explained above, it will also depend on the correct understanding of what was said by Brennan J in *Mabo (No 2)*, derived from his Honour’s own reasons, but of course read and understood in the context of its application by all members of the majority in *Love/Thoms* to findings about when a non-citizen who identifies as Aboriginal is not an alien. Just as I should take account of the findings made by Edelman J, and how his Honour applied the *Mabo (No 2)* test, so I should take account of the findings by Bell, Gordon and Nettle JJ and how each of their Honours applied *Mabo (No 2)*. Contrary to the Minister’s submissions, no one line of reasoning by any single member of the majority will “control” the findings I must make on the evidence before the Court about Mr Helmbright. Those findings are controlled only by a correct understanding of [81] of *Love/Thoms* and a correct understanding of the *Mabo (No 2)* test.

(c) Nettle J’s reasoning was founded on the proposition that the Crown has a “unique obligation of protection” to Indigenous peoples, and that this obligation of protection was inconsistent with the concept of alienage. His Honour was the only judge to develop and adopt that analysis and accepted (at [273]) that this obligation of protection “has not hitherto been seen as placing those members beyond the bounds of alienage as that term is ordinarily understood”. At [252] Nettle J went as far as to say that “it necessarily follows that *some* individuals would not be aliens even if denied Australian citizenship by statute” (original emphasis).

(d) This analysis did not create “minimum” disturbance to pre-existing law as it was an entirely new analysis. It is novel, and the first time there has been judicial recognition in the High Court of an “obligation of protection” in the Crown in right of Australia towards Australia’s Indigenous peoples. Indeed, the Commonwealth expressly contended the Court should not decide the question of any Crown obligation of protection as it had not been put forward by any party or intervener. It is difficult to apply the Minister’s adjective of “conservative” to Nettle J’s analysis. If “conservative” is no more than another description of “minimum disturbance”, I do not agree that is an accurate description of Nettle J’s approach.

(e) Unlike the situation in *Long*, there is no pre-existing law about whether non-citizens who identify as Aboriginal Australians are aliens. At [294] Gordon J said:

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

(f) See also Bell J at [63]. In contrast, the “pre-existing law” to which French J referred in *Long* concerned the position of non-citizens who were British subjects, and about which there had been specific pronouncements by the High Court about. It was to that law his Honour referred when referring to the need to create “minimum disturbance”.

(g) The *Mabo (No 2)* test is consistent with what Brennan J said in the *Tasmanian Dam Case*, and is broadly consistent with the other approaches summarised by Bromberg J in *Eatock*. It does refer to mutual recognition by those with traditional authority, which is a distinct requirement from some of the other tests. That distinct requirement does bind me as a single judge.

(h) If, contrary to my view of his Honour’s reasons, Nettle J *is* to be taken as imposing a second, native title requirement, then this is in my respectful opinion a novel proposition, and a significant rather than a minimum disturbance to previous legal approaches to Aboriginality. It is not a “narrow” approach to the previous law concerning Aboriginality. It is a novel approach. On this hypothesis, the reasoning of the three other majority justices is more consistent with previous law about Aboriginality.

269 It is necessary to say something about the forensic realities of the approach now urged upon the Court by the Minister. Unlike the situation for Mr Thoms, in this proceeding, there is no existing determination of native title in favour of the north-eastern clans of Tasmania, nor those who are represented by mtwAC (if there is a difference).

270 The Minister accepted that on a native title approach it would be up to Mr Helmbright to prove, on the balance of probabilities I infer, that as an individual he is entitled to be recognised as a native title holder under the Native Title Act. Or, to turn the proposition around, that Mr Helmbright could prove that recognition by mtwAC, on behalf of the Aboriginal peoples of the North East nation, was recognition by a society or community entitled to be recognised as common law holders of native title under the Native Title Act.

271 Thus, it appears the Minister’s approach superimposes in particular the terms of s 223 which provide:

**223 Native title**

*Common law rights and interests*

(1) The expression ***native title*** or ***native title rights and interests*** means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

(a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and

(c) the rights and interests are recognised by the common law of Australia.

*Hunting, gathering and fishing covered*

(2) Without limiting subsection (1), ***rights and interests*** in that subsection includes hunting, gathering, or fishing, rights and interests.

*Statutory rights and interests*

(3) Subject to subsections (3A) and (4), if native title rights and interests as defined by subsection (1) are, or have been at any time in the past, compulsorily converted into, or replaced by, statutory rights and interests in relation to the same land or waters that are held by or on behalf of Aboriginal peoples or Torres Strait Islanders, those statutory rights and interests are also covered by the expression ***native title*** or ***native title rights and interests***.

Note: Subsection (3) cannot have any operation resulting from a future act that purports to convert or replace native title rights and interests unless the act is a valid future act.

*Subsection (3) does not apply to statutory access rights*

(3A) Subsection (3) does not apply to rights and interests conferred by Subdivision Q of Division 3 of Part 2 of this Act (which deals with statutory access rights for native title claimants).

*Case not covered by subsection (3)*

(4) To avoid any doubt, subsection (3) does not apply to rights and interests created by a reservation or condition (and which are not native title rights and interests):

(a) in a pastoral lease granted before 1 January 1994; or

(b) in legislation made before 1 July 1993, where the reservation or condition applies because of the grant of a pastoral lease before 1 January 1994.

272 I raised some of the difficulties I perceived in this approach with senior counsel for the Minister during the hearing. Of course, the situation is relatively straightforward for a non-citizen who is recognised as a member of a group which already holds native title, for the reason identified by Nettle J in *Love/Thoms* at [287]. The difficulties arise outside that circumstance. In substance, if a party proves the matters in s 223 in relation to particular land and waters, then subject to extinguishment, the party has proven matters which would usually result in a determination of native title over that land and those waters. A non-exhaustive list of the difficulties to which this gives rise includes:

(a) How an individual can prove native title when under the Native Title Act, the only party competent to seek a determination of native title is an “applicant” authorised by a claim group to bring an application for such a determination of native title: see s 61 and s 251B of the Native Title Act.

(b) Similarly, since native title rights are rights *in rem*, what is to happen about matters such as the third party notification processes under, for example, s 66 of the Native Title Act.

(c) Whether the state or territory in which the lands and waters of the relevant group are situated should be heard on any such application and whether any other persons with proprietary interests would need to be heard.

(d) To maintain some alignment with the Native Title Act, is it this group or community which must prove it is entitled to be recognised as holding native title, rather than the non-citizen? If so, how is that to be accommodated in a proceeding about the question of the alienage of a non-citizen?

(e) How is any trial to be conducted, in terms of evidence from other individuals who are members of the group, expert anthropologists and historians, on country evidence, bearing in mind most native title trials occupy many stages over years, and are extremely costly.

(f) Whether the Commonwealth could be permitted, in pursuit of any opposition to a declaration that a non-citizen is not an alien, outside the framework of the Native Title Act, to contest a contention of native title over lands and waters – especially one to which a state government might otherwise have been prepared to agree in some form through a consent determination process? For example, see the determination of native title over the City of Adelaide: *Agius v State of South Australia (No 6)* 2018 FCA 358.

(g) If an individual like Mr Helmbright seeks to prove native title using s 223 but outside the framework of the Native Title Act, and does so, are he and the group of which he claims to be a member entitled to a determination of native title under the Native Title Act and how that is to be implemented when all the steps under the Native Title Act have not occurred?

(h) Conversely, whether a finding of failure to prove native title could result in an application by any proprietary interest holder in the relevant land and waters for a negative determination of native title under the Native Title Act.

(i) How are the boundary disputes between different Indigenous groups, which are a reality in native title litigation, to be factored into this forensic exercise in relation to alienage?

(j) If a group to which a non-citizen is said to belong has a native title application on foot, but is found not to hold native title at first instance, and that finding is reversed on appeal (or vice versa), does a person’s alienage status also change with the changing native title findings of the Court?

273 In my respectful opinion, based on the assessment of the majority reasoning I have set out, no intention can be attributed to the majority of the High Court in *Love/Thoms* that exercises of this kind need be embarked upon, or these considerable difficulties confronted. I accept that Nettle J did refer to “difficulty of proof” (at [281]), but his Honour did so in the context of observing, favourably to Mr Love and Mr Thoms, that difficulties of proof were no justification to avoid what his Honour saw as the correct conclusion that an Aboriginal Australian was not an alien. As the application of the *Mabo (No 2)* test to Mr Helmbright’s circumstances demonstrates, there are still considerable difficulties with proof.

274 At [282], Nettle J accepted that in order to avoid the “invidious consequence” of two classes of Aboriginal people, a legislative solution might be required. However, nowhere in his reasons did his Honour touch on the kinds of difficulties, at trial level, to which I have referred above. I do not consider it can be inferred his Honour intended, by his reasoning, that some kind of native title trial, outside the framework of the Native Title Act (or inside it, but not in accordance with it), would need to be undertaken.

275 There was no occasion for any of the majority justices to descend into that level of detail, given their primary focus. But this is now the reality of the approach the Minister urges at trial. In my respectful opinion, the approach for which the Minister contends is not an intended or inevitable consequence of the majority ruling in *Love/Thoms*, and would likely throw the administration of the Native Title Act into disarray. It is not required by the majority reasoning in *Love/Thoms*, and is not appropriate. Further, for the reasons I have given, if I am wrong in those conclusions, adopting the approach of Nettle J as the Minister contends it to be does not inflict “minimum disturbance” on existing law.

#### Nettle J’s reasons in Chetcuti

276 *Chetcuti* did not concern a person who identified as an Aboriginal Australian. It can be readily distinguished. It concerned an applicant attempting to extend the majority reasoning in *Love/Thoms* to a British subject, an attempt fraught with challenges given the decisions in *Nolan*, *Shaw v Minister* and *Singh v The Commonwealth* [2004] HCA 43; 222 CLR 322, and the reasoning of the majority in *Love/Thoms* relying on the connection of Indigenous people to their land. Nettle J confirmed (at [28]-[29]) his view about the correctness of these authorities.

277 Further, and more importantly, the observations of Nettle J about *Love/Thoms* are consistent with what his Honour said in *Love/Thoms*, as I have explained it above. Those observations should not be interpreted in the way the Minister submits and they do not suggest a non-citizen must prove they are, or is entitled to be recognised as, a native title holder under the Native Title Act.

278 In *Chetcuti* at [34], Nettle J again emphasised the obligation of allegiance as a “central characteristic of alienage”:

The proposition is more accurately expressed in terms that the central characteristic of alienage is a want of permanent allegiance to Australia and thus the **absence** of a **correlative obligation of permanent protection** on the part of Australia.

(Emphasis added; footnote omitted.)

279 The footnote to this passage is to his Honour’s reasons in *Love/Thoms* at [245]-[250]. These statements reaffirm, in my respectful opinion, that the allegiance/protection concepts, in their application to Indigenous people, represented his Honour’s primary analysis in *Love/Thoms*.

280 As Nettle J recognised in *Chetcuti*, it was the concept of “belonging” that the plaintiff in *Chetcuti* at [38] sought to draw on from *Love/Thoms*. His Honour described the plaintiff’s contention in *Chetcuti* thus (at [38]):

[D]ue to the plaintiff’s more or less continuous residence in Australia since his arrival here in 1948, he now so much belongs to Australia that to treat him as an alien would be to obliterate that essential, defining feature of alienage.

281 It was in response to the reliance on “belonging” that Nettle J made the remarks at [39]:

That contention, however, misconceives the substance of what the majority decided in *Love*. As has been observed, authority establishes that the central characteristic of alienage is a lack of permanent allegiance to the Crown in right of Australia (and thus a lack of a correlative obligation of permanent protection). Properly understood, *Love* decided no more than that, because the common law of Australia recognises, and is taken always to have recognised, **Aboriginal societies who have remained continuously united in their acknowledgment and observance of laws and customs deriving from before the Crown's acquisition of sovereignty over the Australian territory**, and because the common law of Australia also recognises, and is taken always to have recognised, that **membership of such a society is to be determined by the elders and other members of the society in accordance with those rules and customs**, such a society and each resident member of it attracts a Crown obligation of permanent protection and owes a correlative obligation of permanent allegiance that is the antithesis of the ordinary understanding of alienage. Nothing that any member of the majority said in *Love* called into question this Court’s established jurisprudence that, generally speaking, alienage has nothing to do with a person’s experience or perception of being connected to the Australian territory, community or polity, or with an actual or perceived absence of connection to another country.

(Footnotes omitted, emphasis added.)

282 And at [40]:

Admittedly, each member of the majority in *Love* expressed his or her reasoning to some extent differently. But common to all was the essentiality of the **common law’s recognition of the membership of an Aboriginal society continuously united in their acknowledgment of their ancient laws and customs deriving from before the Crown’s acquisition of sovereignty over the Australian territory**, and the inherent inconsistency of that fact with the permanent exclusion from Australia of a member of such an Aboriginal society. That is what some members of the majority characterised in terms of “belonging”, and that is what all members of the majority concluded put such Aboriginal persons beyond the ordinary understanding of “alien”.

(Emphasis added.)

283 These passages, and in particular the parts in bold, reinforce my view that in *Love/Thoms*, the focus of Nettle J’s reasoning was on the survival of a society or community and its continued observance of norms derived from times before European sovereignty, and handed down through the generations. His Honour used the *Yorta Yorta* passages to emphasise the need for an identifiable community, united by such traditional norms, and which in a spiritual and cultural sense retained the historical connection to country that had always existed: that was the connection with the pre-sovereignty situation that his Honour saw as critical to the determination of non-alienage.

284 *Chetcuti* does not require me to adopt the approach for which the Minister contends.

## Third question: the *Mabo (No 2)* test applied to the evidence about the applicant

285 In relation to Mr Helmbright, it is clear the fact finding challenges lie in the application of the mutual recognition limb of the *Mabo (No 2)* test.

### Finding: descent

286 There was no real debate about this limb, although senior counsel for the Minister did emphasise how far back, in an ancestral sense, the descent connection was. That may be so, but as I have described earlier in these reasons, the taking of Aboriginal women by sealers and whalers, and the way that following generations then followed these trades around the Pacific, explains how and why this occurred.

287 I find on the evidence Mr Helmbright satisfies the first limb of the *Mabo (No 2)* test, because he is a person who is biologically descended, through his great-great-great-great grandfather Edward (Ned) Tomlins, from an Aboriginal woman known as Poolrerrener, who was also named in some of the writings about her variously as Bullrub, Bullroe, or Bulra. Poolrerrener was a member of the Pairebeene clan, which was one of a number of clans of the North East nation at the time of first European settlement.

288 There is no occasion in this case to consider the position in respect of customary adoption, or other customary ways of determining membership of a group. However, on the Minister’s “native title” approach, it would seem that observations such as those in *De Rose v State of South Australia* [2003] FCAFC 286; 133 FCR 325 at [200] by the Full Court would be relevant:

There is, however, nothing in the definition of “native title” in s 223(1) of the NTA that incorporates a requirement of a biological link between the claimants and the holders of native title at sovereignty. Native title rights and interests in relation to land must be possessed under the traditional laws acknowledged and traditional customs observed by the Aboriginal peoples (s 223(1)(a)) and the Aboriginal peoples, by those laws and customs, must have a connection with the land (s 223(1)(b)). Apart from the requirement in s 223(1)(c) that the rights and interests must be capable of recognition under the common law, s 223(1) does not impose limits on the content of traditional laws and customs. In particular, it does not purport to limit native title rights and interests to those which have passed to the biological descendants of the Aboriginal people who held those rights and interests at sovereignty. Claimants may rely on other means of acquiring native title rights and interests, provided that traditional laws acknowledged and customs observed allow for those means of acquiring the rights and interests. As the appellants contended, on the assumption that traditional laws and customs continue to be acknowledged and observed, it is to those laws and customs that the inquiry must be directed to identify the current holders of native title rights and interests.

289 Nuances such as this, and the role of adoption under traditional law and custom, will remain to be worked out in subsequent cases where such issues arise. Mr Helmbright’s argument on the first limb raises no such issues.

### Finding: mutual recognition

290 The question of “mutual recognition” (being the expression used by Brennan J) is in my opinion appropriately understood as the second requirement, having two parts. In my respectful opinion this is a faithful rendition of Brennan J’s approach. An emphasis on mutual recognition explains why it is important that a person identify as a member of the same group as the group which also identifies her or him as one of its own. That is not to suggest of course, given the histories of Aboriginal and Torres Strait Islander peoples, and the realities of life for them in post-European settlement Australia, that a person will be confined to mutual recognition in relation to one group. There are many examples where mutual recognition may exist between one individual and more than one Aboriginal or Torres Strait Islander community.

291 An emphasis on *mutual* recognition is consistent with the approach taken by Rares J in *Webster*: at [43]‑[48].

292 There was some cross-examination (see [63]-[66] above) about when Mr Helmbright first identified as an Aboriginal person. I have found that he has identified as an Aboriginal person from the clans of the North East nation since around 2008 or 2009. I have found his evidence was honestly and genuinely given. The Minister did not submit these facts should lead the Court to find Mr Helmbright has never identified in that way. Nor did the Minister submit this identification was some kind of recent invention or contrivance aimed only at avoiding visa cancellation and removal. The evidence would contradict such an assertion in any event, but quite properly no such submission was made.

293 There are no agreed facts about mutual recognition, but in oral submissions senior counsel for the Minister submitted:

It may be accepted that Mr Helmbright, a descendent of one Aboriginal person seven generations earlier – each generation of which lived outside Australia can nonetheless pass Deane Js test. He has biological descent. **He apparently now identifies or self-identifies as Aboriginal.**

(Emphasis added.)

294 The “apparently” in this submission can be disregarded, because the evidence shows Mr Helmbright’s conscious identification came from a genuine source independent of his quest to retain a visa – namely, from conversations with his grandmother. I am fortified in my conclusion about the first aspect of mutual recognition by the evidence about Mr Helmbright’s wider family identification, and their connection with the North East nation of Tasmania. Again, if the correct approach is, as I have found it to be, to look for “mutual recognition”, then one aspect of the mutuality is the recognition by, and of, Mr Helmbright’s extended family, in particular his grandmother, as well as Mr Helmbright himself.

295 As to the recognition of the community represented by mtwAC, being the second limb of mutual recognition, the evidence plainly establishes the fact of recognition of Mr Helmbright by mtwAC, and the recognition of six of his other family members. Is that sufficient?

296 Although mtwAC is a corporation, it was not suggested by the Minister that this *necessarily* precludes it participating in the mutual recognition process described by Brennan J in *Mabo (No 2)*. Senior counsel submitted:

If there was a way that it could be shown that there were traditional laws and customs that were being exercised by a Tasmanian Aboriginal community and they had somehow vested it in a corporation, I don’t know that we necessarily say that it’s impossible for a corporation to do it; it seems improbable. But there’s no evidence of that in this case, in any event

…

I mean, we wouldn’t say that – for example – that a PBC would have no – would necessarily have no role, and that would be an example of, if the rules of the PBC listed traditional laws and customs in order to identify who were members.

297 In this extract, the reference to “PBC” is a reference to a prescribed body corporate, being a corporation which, after a determination of native title is made, is declared by the Federal Court under s 56(2) of the Native Title Act to hold the rights and interests comprising the native title on trust for the common law holders.

298 I have found at [146]-[148] above that when explaining what kind of mutual recognition from a group is required, Brennan J emphasised that recognition must be focussed on how the law and custom of the group operates to permit or preclude membership. As I have found earlier, that is why his Honour focused on “elders” (a term in my opinion used to convey a sense of hierarchy in Aboriginal communities by reason of traditional law and custom) and “others enjoying traditional authority” (a term in my opinion used to capture those who may not be “elders” but have a role under traditional law and custom in deciding which people are properly considered members of a particular group).

299 This aspect of mutual recognition, which is particular to the *Mabo (No 2)* test, may likely be proven by evidence about the processes by which a decision is made to permit a person to join the group, or to exclude them. And by evidence about who makes that decision.

300 The “group” for the purposes of the application of the *Mabo (No 2)* test to Mr Helmbright is those people mtwAC represents – the people of the North East nation of Tasmania. That is the relevant society or community.

301 I have noted above the submissions of the Minister concerning what kind of entity representing a group could give recognition. It is unnecessary and inappropriate to be prescriptive about this aspect: for example, Brennan J’s approach in *Mabo (No 2)* expressly acknowledges mutual recognition might be provided by elders, and that would be enough.

302 Certainly from the “native title” approach taken by the Minister in this proceeding, it could hardly then be denied that the very entity which the Native Title Act contemplates will hold native title for the common law holders is incapable of participation in the mutual recognition process under the *Mabo (No 2)* test. To say as much is, I emphasise, not to suggest that it is *only* such bodies who might participate in mutual recognition. But such entities must logically be included, if a “native title” approach is taken. If a different approach is taken, as I find the majority reasoning in *Love/Thoms* contemplates, there is also no conceptual difficulty in including such entities. The relevant society or community may have elected to determine its membership through a range of mechanisms, and in the world in which Aboriginal and Torres Strait Islander communities must operate in the 21st century, this may include corporations.

303 mtwAC is not a prescribed body corporate under the Native Title Act. It is an agreed fact that it is a corporation registered by the Office of the Registrar of Indigenous Corporations under the CASTI Act.

304 There are a number of requirements under the CATSI Act for registration, amongst them in s 29-5 what is called an “Indigeneity requirement”; namely that a specified proportion of the members of the corporation must be “Aboriginal and Torres Strait Islander persons”. That term is defined expansively in s 700-1 to include corporations in some circumstances, but as to natural persons it is defined to mean:

(a) an Aboriginal person;

(b) a Torres Strait Islander;

(c) an Aboriginal and Torres Strait Islander person; and

(d) a Torres Strait Islander and Aboriginal person.

305 In turn, and in a clear demonstration of the circularity and challenges which come with the task of requiring that human beings must be categorised by reference to inherent characteristics (even if for objectively beneficial purposes), s 700-1 defines “Aboriginal person” to mean

[a] person of the Aboriginal race of Australia.

306 “Torres Strait Islander” is given different content and is defined to mean

a descendant of an Indigenous inhabitant of the Torres Strait Islands.

307 I find that, taking into account the realities of a mutual recognition process occurring in the 21st century and not the 18th or 19th centuries, there is no rational basis to exclude a corporation established under the CATSI Act, or any similar legislation at the state or territory level, from being the vehicle through which mutual recognition by a society or community can be established. However, it is no more than a vehicle. In each case, whether the mutual recognition which has occurred satisfies the test in *Mabo (No 2)* is likely to depend on how such a corporation is constituted and the content of its rules and practices. To that extent I accept the Minister’s submissions. It is through these matters that the characteristics identified by Brennan J as necessary are either likely to be present, or absent. The membership rules and practices thus must bear some relationship to the traditional law and custom of the community, recalling the explanation of “traditional” given at [139]-[140] above.

308 I emphasise this reasoning is necessary only because I have found as a single judge I am bound to apply the *Mabo (No 2)* test.

309 Accordingly, I find mtwAC is the kind of entity *capable* of participating in a mutual recognition process for the purposes of the *Mabo (No 2)* test on behalf of the community it represents, being the Aboriginal peoples of the North East region of Tasmania or the country of *tebrakuna*, as it is described in mtwAC’s vision statement. I turn then to examine the evidence about its rules and practices in relation to membership.

310 Membership is determined by r 5.2.2 of the mtwAC Rule Book, which provides

**Who can apply to become a member (eligibility for membership)?**

A person who is eligible to apply for membership must be an individual who is (choose from the examples below):

(a) be open to individuals at least 15 years of age

must be in writing

must be nominated by at least two members of the corporation

accepted as a Tasmanian Aboriginal person

311 The final criterion – “accepted as a Tasmanian Aboriginal person” is thus a separate requirement. It is not entirely clear how this latter requirement sits with r 6.2.3 (which contemplates a member might not be an “Aboriginal or Torres Strait Islander person”), but for the moment that issue can be put to one side.

312 So far as I have been able to ascertain, there is no definition in the mtwAC Rule Book of “Tasmanian Aboriginal person” for the purposes of r 5.2.2. This gap appears to be filled by what in the agreed facts is described as the “practice” of the mtwAC Board to require, with an application for membership

A descent chart setting out the applicant’s line of biological descent from a person who is accepted by the mtwAC as being a member of a clan living in north-eastern Tasmania at about the time of first European settlement, and, if required, birth and death certificates evidencing that line of descent[.]

313 To see this practice as a core part of the membership process of mtwAC, even if not in the Rule Book, is consistent with the first part of the “Vision statement” for mtwAC, also annexed to the agreed facts. There the following statement is made:

***melythina tiakana warrana*** members are direct descendants of the Aboriginal Ancestors from the Country of ***tebrakuna***, known as the region of northeast Tasmania.

(Original emphasis.)

314 The evidence establishes a membership decision is made by the directors of mtwAC: see r 5.2.4 of the mtwAC Rule Book. The directors are required to reject a membership application unless a person “meets all the eligibility for membership requirements”: r 5.2.4(c). An available inference from the evidence (in particular the practice described at [312] above) is that r 5.2.4(c) should be understood in its proper context to require rejection of a membership application unless the membership applicant can establish the “line of biological descent” referred to in the agreed facts. I draw that inference.

315 As to the directors who make the membership decision, r 8 does not confine eligibility for directorship to persons who are “elders” of the group. Any person who is a member and is at least 18 years old is eligible to be a director: r 8.2.1. By r 8.2.2(a), a majority of the directors must be “individuals who are Aboriginal and Torres Strait Islander persons”. Those terms are defined in the Rule Book in the following way in Schedule 1:

“Aboriginal person” means a person of the Aboriginal race of Australia.

“Aboriginal and Torres Strait Islander person” means the following:

a) An Aboriginal person;

b) A Torres Strait Islander;

c) An Aboriginal and Torres Strait Islander person;

d) A Torres Strait Islander and Aboriginal person.

…

“Torres Strait Islander” means a descendant of an Indigenous inhabitant of the Torres Strait Islands.

316 On one view this would broaden out the eligibility for directorship to (for example), Torres Strait Islanders who are not descended from a North East nation person, but the cross-reference to being a member, read with the agreed “practice” to which I have referred, indicates directors are expected to have a descent connection to a clan living in north-eastern Tasmania at about the time of first European settlement, even if by reason of other ancestry they also identify as (for example) Torres Strait Islander.

317 Membership rule books of organisations like mtwAC should not be approached in such a rigid or stereotypical way as to ignore the realities of the lives and families of Aboriginal and Torres Strait Islander people, whose familial, cultural, customary and traditional associations may pull in more than one direction.

318 That intramural decisions such as who is and who is not a member of an Aboriginal or Torres Strait Islander community, even within the framework of a corporation under the CATSI Act, should be approached with some latitude and flexibility, and with an emphasis on the role of elders, was recognised by Pritchard J in *Sandy v Yindjibarndi Aboriginal Corporation (No 4)* [2018] WASC 124; 126 ACSR 370 at [635]-[638]:

The fact that the witnesses in this case expressed different views about the detail of the content of the traditional laws and customs of the Yindjibarndi people was not surprising. As French J observed in *Sampi v The State of Western Australia*:

Within a single coherent system of traditional law and custom there may be differences of interpretation and different versions of particular stories told. An apposite analogy may be seen in the differences of view among those directly involved in the administration of the Australian legal system and commentary on it in connection with matters such as the interpretation of the common law and equity and even of the Constitution and statutes. There are sometimes debates about the origins and content of particular rules of judge-made law. And outside the very small population of persons involved in the administration of the law, there is, in the wider community, a range of awareness of the law from the well-informed to the profoundly ignorant. None of that detracts from the existence and validity of the legal rules by which our society is governed. In a system of law and custom transmitted by oral tradition these general propositions have even greater force.

To similar effect, the full Federal Court in *Northern Territory v Alyawarr Kaytetye, Warumungu, Wakaya Native Title Claim Group* recognised that the membership of any indigenous society can be defined by a variety of rules, and that there may be differences of view in relation to the content or nature of those rules, or the strictness with which they should be applied. The Court observed that in the resolution of membership disputes,

it is not ... productive of any practical benefit to require that the laws and customs of indigenous society and the rights and interests arising under them be presented as some kind of organism in amber whose microanatomy is available for convenient inspection by non indigenous authorities.

The differences of view expressed by the witnesses in relation to the content of, and the importance of observing, Birdarra Law, Galharra and Nyinyadt suggest that caution should be applied in considering the evidence of the directors as to their application of the Birdarra Law criterion for membership of YAC. These are questions over which minds may (and in this case, do) differ. Consequently, it would be appropriate to grant some latitude to the directors’ views about satisfaction of this criterion, in so far as the Court concludes that this criterion was in fact applied by the directors.

These differences of view also serve to highlight the fact that determining questions such as whether a person is a Yindjibarndi person according to Yindjibarndi law and custom are questions which, preferably, should be determined by Elders within the Yindjibarndi community.

319 On the basis of this evidence, and the inferences I have drawn, I find that membership of mtwAC is determined in two ways which fall within the concept of mutual recognition of membership described by Brennan J in *Mabo (No 2)*. First, mtwAC’s requirement in practice of establishing a descent connection to a clan living in north-eastern Tasmania at about the time of first European settlement. Secondly, the requirement for a nomination from two existing mtwAC members, indicating support from within the group for that recognition.

320 There was no evidence directed specifically at establishing that the requirement for a descent connection was in accordance with traditional law and custom of the clans of north-eastern Tasmania. However, it is well-established in native title law that descent is one of the core pathways in many systems of traditional law and custom by which membership of a group is determined, and through which rights and interests are transmitted.

321 I find that in the two ways set out at [310], [312] above, mtwAC’s membership rules and practices are more likely than not to have their origins in the traditional law and customs of the clans of north-eastern Tasmania, albeit they have been substantially adapted to the 21st century requirements of membership of a corporation.

322 The difficulty in the application of the evidence to the mutual recognition limb lies in proof that recognition is given by “elders” or “those otherwise enjoying traditional authority” within the group. That requirement is particular to the *Mabo (No 2)* test. The evidence discloses, and I have found, that membership of mtwAC is determined by the directors. Those people need only be over 18 years of age, and themselves qualified as members. That would not satisfy the *Mabo (No 2)* test.

323 However, there was evidence about another body associated with mtwAC, called the “Circle of the Elders”. It is not a body recognised in mtwAC’s Rule Book. The agreed facts are that the Circle of Elders comprises members of mtwAC who are selected by mtwAC for their “knowledge and wisdom”. It is agreed a person can become a part of the Circle of Elders through a formal process via a nomination and voting process at the annual general meeting. It is agreed that in practice, since the establishment of the mtwAC, the Board consults the Circle of Elders from time to time on “matters relevant to the mtwAC”.

324 It is also an agreed fact that

Members of the Board and the Circle of Elders have knowledge about the lines of ancestry going back to the Indigenous persons living in north-eastern Tasmania at the time of first European settlement.

325 There are no agreed facts, and no other evidence about the knowledge of the members of the Circle of Elders about the traditional laws and customs of the clans of north-eastern Tasmania, nor about the application of any such traditional law and custom to the determination of membership of mtwAC or recognition of a person otherwise as a member of the country of *tebrakuna*, or any differently described community of Aboriginal people from the North East nation in Tasmania.

326 Given I have found I am bound to apply the *Mabo (No 2)* test, and given my findings adverse to the applicant about the membership process under the mtwAC rules, the only forensic route left to the applicant is to prove that the role of the Circle of Elders is capable of meeting the second aspect of the mutual recognition limb of the *Mabo (No 2)* test. I find he has not proven this to be the case for at least three reasons.

327 First, there is no evidence that the Circle of Elders decides who can and who cannot become a member of mtwAC. Indeed, if they did, this may well be contrary to mtwAC’s rules. This stands in contrast to other CATSI corporations, where a consultation requirement may be express: see for example the situation in *Ngarluma Aboriginal Corporation v Ramirez* [2018] FCA 1900; 364 ALR 94, where the rules of the corporation obliged the directors to consult with the Council of Elders on membership applications: see [150]. In the present case, the evidence is that membership is decided by the Board of Directors, and while in practice descent may be a criterion that is applied (outside the rules), there is no basis in the evidence for the Court to find the membership decision is made (and thus recognition given) by people who are “elders” or “other persons enjoying traditional authority among those people”. The highest the evidence reaches is the agreed fact that:

In assessing membership applications, the Board would always consult any member of the Circle of Elders present at the relevant Board meeting.

328 Second, even if contrary to the finding above, it is fact that the Circle of Elders can have a role in deciding membership, there is no evidence that those who comprise the Circle of Elders (or any of them) had a role in deciding Mr Helmbright’s mtwAC membership – and that is the factual question before the Court for the purpose of the application of the *Mabo (No* *2)* test. The question is whether Mr Helmbright was recognised by elders or those otherwise enjoying traditional authority within the community represented by mtwAC. The recognition and membership certificates annexed to the agreed facts record Mr Helmbright’s recognition and membership as having occurred at a directors’ meeting on 15 February 2020, but the evidence does not go beyond that.

329 Third, even if contrary to the findings above, it is fact that the Circle of Elders can have a role in deciding membership, and had such a role in deciding Mr Helmbright’s membership, there is no evidence that – whatever respect is afforded to those who comprise the Circle of Elders – the individuals who comprise the Circle of Elders are “elders” in the sense traditionally understood; or are “other persons enjoying traditional authority among” the clans of north-eastern Tasmania.

330 It is not enough that a body which sits outside the formal structure of mtwAC is *called* the Circle of Elders. The evidence does not establish the people in that group are elders in any traditional sense. There is no evidence at all about who, by the traditional laws and customs of the clans of north-eastern Tasmania, is considered an “elder”. There is no evidence about which other people, by the traditional laws and customs of the clans of north-eastern Tasmania, may be considered to enjoy authority within the group.

331 The evidence establishes individuals are nominated, and voted into the Circle of Elders by the general membership of mtwAC. While it is an agreed fact that people are “selected” (which I infer means voted in) on the basis of their “knowledge and wisdom”, the evidence gives no content to that bare proposition. Many people, including older people, might genuinely be seen as having knowledge and wisdom, but the source of that knowledge and wisdom could be any number of life experiences, or learnings. The *Mabo (No 2)* test looks specifically to the position of elders, or the equivalent of elders, under traditional law and custom. Its looks to knowledge of law and custom handed down through the generations since prior to European sovereignty.

332 I accept there is considerable evidence about the recognition and certification functions mtwAC performs for various government purposes. I do not discount that such evidence could be relevant to the question whether a non-citizen is an Aboriginal Australian if an approach other than that of Brennan J’s test in *Mabo (No 2)* were adopted. However, by its nature that evidence is unlikely to assist in the determination of mutual recognition by elders or those otherwise holding traditional authority to determine membership of a group of Aboriginal or Torres Strait Islander people.

333 These matters may highlight the increasing disconformities likely to emerge as other non-citizens who identify as Aboriginal seek judicial determinations about whether or not they are aliens, and one part of the federal government continues to contend that such evidence, accepted by other parts of government state and federal, is irrelevant.

### Conclusion

334 The applicant has not proven both aspects of the mutual recognition limb of the *Mabo (No 2)* test.

## Fourth question: Can the Court apply Deane J’s test from the *Tasmanian Dam Case*?

335 I have concluded a single judge is precluded from applying the tripartite test as expressed by Deane J in the *Tasmanian Dam Case*.

## Fifth question: Deane J’s test applied to the evidence about the applicant

336 On the assumption I am wrong to see myself sitting as a single Judge as bound by Brennan J’s test in *Mabo (No 2)*, then I make the following findings about the application of Deane J’s test in the *Tasmanian Dam Case* to the evidence about the applicant. To recap, that test is whether an individual is a person of Aboriginal descent, albeit mixed, who identifies themselves as such and who is recognised by the Aboriginal community as an Aboriginal person.

337 I adopt the findings and reasoning at [268] to [334] on the *Mabo (No 2)* test: they are equally applicable to the Deane J test in the *Tasmanian Dam Case*.

338 Plainly, there are three limbs to the *Tasmanian Dam Case* test and the third is expressed as no more than recognition “by the Aboriginal community”. There is no additional element of the recognition having to be by particular kinds of group members, who have traditional authority. There is no implication the recognition must be in accordance with traditional law and custom.

339 On this test, the applicant’s submission is that there is no barrier to the Court taking the same kind of approach as that taken by Merkel J in *Shaw v Wolf* at 122:

**Communal recognition**

Some form of communal identification or recognition will often form part of the process leading to self-identification. In determining whether there is communal identification or recognition the Court will consider the views held in a relevant Aboriginal, or even the general, community as to whether a person is regarded as an Aboriginal person. That evidence is relevant because in the modern Australian community such recognition is commonly the mode by which a person is identified as a person of the Aboriginal race of Australia. Communal identification may be based on physical, cultural, social or other attributes perceived in a particular community to exist in Aboriginal persons. Although the evidence will usually relate to views held by persons comprising the relevant community it is a communal, rather than personal, recognition that is relevant.

Community, like identity, is a social construct. A community may be a human settlement within a particular locality, a local social system - comprising a set of relationships that take place wholly or mostly within a locality, or it may embrace a type of relationship between geographically dispersed individuals having some common sense of identity. (*The MacMillan Student Encyclopedia of Sociology*, Ed M Mann (1983), p 56.)

The relevant community might be the general Aboriginal community in particular locality or a much smaller part of that community whose members reside in a specific locality or have some common historical, cultural or social characteristic. In some instances a community might consist of an extended Aboriginal family living in a particular locality. The Court, in having regard to evidence of identification or recognition by any relevant community, need not be concerned with defining the relevant community or communities other than in the most general sense. The weight to be attributed to such communal recognition as is found to exist will vary according to the facts of the particular case.

340 As Merkel J noted at 127, how a “community” is to be defined may depend very much on the evidence, and some caution must be taken in assessing that evidence:

A difficulty with the petitioners’ “community” submissions is that they assume that there is only one Aboriginal community in Tasmania and on the evidence before me this assumption cannot be accepted. I accept that as a result of its central role in Tasmania in relation to Aboriginal affairs, if an individual is recognised by the TAC as being an Aboriginal person, then, subject to descent, they are likely to be an Aboriginal person. I am not satisfied, however, that if the TAC does not recognise an individual as Aboriginal the converse is true and that they are not an Aboriginal person. There is also a difficulty in placing too much weight on the opinions of individual persons, as to whether they recognise or do not recognise particular respondents as being Aboriginal. Opinions as to an individual’s membership of the Aboriginal community will be based on highly subjective personal, social and political reasons and consequently vary from person to person. As a result of the complexity inherent in defining an Aboriginal community in Tasmania, throughout these reasons I have referred generally to community recognition, or to recognition by a section of a community, rather than to a defined community.

341 On the evidence which I have described earlier in these reasons, there is no doubt the applicant is recognised by the Aboriginal community in Tasmania as an Aboriginal person. So too are other members of his family, which accords with the communal nature of the recognition. The wider recognition role performed by mtwAC in Tasmania, for the purposes of the Tasmanian government’s certification processes for access to certain government services limited to Aboriginal and Torres Strait Islander people, also supports a finding that the applicant’s recognition by mtwAC is recognition by an Aboriginal community within the terms of Deane J’s test in the *Tasmanian Dam* *Case*.

342 This finding is also consistent with the findings of the Tribunal which I have extracted at [68] above.

343 I note that although the applicant referred in his written submissions to other approaches, such as that of French J in *Attorney-General (Cth) v Queensland* at 147 (which suggested that in some contexts descent would be sufficient), he did not submit the Court should take any other approach than that set out in the *Tasmanian Dam Case* by Deane J.

344 Therefore, if contrary to my own conclusions, I were to be at liberty to apply Deane J’s test in the *Tasmanian Dam Case*, I would have found the applicant had proven on the balance of probabilities that he meets that test. I note senior counsel for the Minister also accepted in oral argument that Mr Helmbright could meet the *Tasmanian Dam Case* test.

345 Adopting this approach may involve the additional challenge of integrating the key aspect of the majority reasoning in *Love/Thoms*: that is, an enduring spiritual and cultural connection to country. The reality which is well-established across Australia is that Aboriginal and Torres Strait Islander groups all express a connection to particular land and waters, and that may well be why, even if Deane J’s approach in the *Tasmanian Dam Case* is taken to s 51(xix), for the purposes of deciding alienage a Court may be unable to go to a wide understanding of “community” such as that expressed in *Shaw v Wolf*, which is effectively unconnected to any land and waters. Given the emphasis by the majority in *Love/Thoms* on connection to country as underpinning the belonging of Indigenous people to the Australian polity, it may be necessary to retain in any test some link to land and waters in the approach to the description of the “community” of which a person is a member. These however are not matters for this Court to decide in this proceeding.

# CONCLUSION

346 The Court’s findings on the application of the second aspect of the *Mabo (No 2)* test to the evidence before it mean that Mr Helmbright’s application must be dismissed. The Minister did not submit the Court should grant declaratory relief that Mr Helmbright *is* an alien. Even if it had been sought, my present view is that such relief would not be appropriate because many of the findings I have made which determined the second aspect of the mutual recognition test in *Mabo (No 2)* against Mr Helmbright are matters which may well be capable of proof. Further, if another approach is available to the question of how to identify a person as an Aboriginal Australian, then as I have explained, Mr Helmbright’s circumstances may well fall within such an alternative approach.

347 The parties will be given an opportunity to agree on appropriate costs orders, if any. Failing agreement the question of costs will be referred to a Registrar for determination by way of a lump sum costs order.

|  |
| --- |
| I certify that the preceding three hundred and forty-seven (347) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Mortimer. |

Associate:

Dated: 15 June 2021