IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B43 of 2018
No. B64 of 2018

BETWEEN

DANIEL ALEXANDER LOVE
Plaintiff

AND

BRENDAN CRAIG THOMS
Plaintiff

and

COMMONWEALTH OF AUSTRALIA
Defendant

OUTLINE OF ORAL ARGUMENT OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)

Part I: PUBLICATION

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

Part II: OUTLINE OF ORAL ARGUMENT

2 In response to the supplementary question, Victoria seeks to reconceptualise the meaning of 'aliens'. The status of non-citizens who are Aboriginal has not been addressed previously by the Court (Victoria's Submissions (**VS**) [**11**]).

3 The point of contest between Victoria and the Commonwealth is whether the meaning of 'aliens' is bounded by the distinction between 'citizen' and 'non-citizen', or whether it rests on deeper underlying principles.

4 This deeper perspective applies to the meaning of 'aliens' the insights into the relationship with the land and waters of Australia held by Aboriginal peoples, which the Court has recognised in cases from *Meneling Station* to *Mabo No 2,* to *Griffiths.* For the purposes of 'alienage', that relationship should be treated as equivalent in permanence, depth and reciprocity to citizenship.

5 Going to the root of the matter, as a matter both of etymology (**VS** [**13**]) and of ordinary understanding in contemporary Australia, it is unthinkable that Aboriginals,

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as descendants of the original societies of Australia, could be deported as aliens, as people who do not belong to Australia.

6 Accordingly, Victoria seeks to develop the meaning of the constitutional term 'aliens' on an orthodox, principled and reasoned basis, faithful to:

a. the historical heritage of 'alienage', derived from the mediaeval[1] English common law, expressed in abstractions of 'allegiance' and 'protection'. Importantly, those are labels for formal relations that do not require any actual disposition to fidelity or actual capacity to afford protection (**VS [14]**);

b. that 'alien' has no fixed or immutable meaning;[2] and

c. the understanding of the nature of the unique Aboriginal spiritual and cultural relationship with the land, expressed in the Court's landmark cases on customary native title[3], under statutory systems in the Aboriginal Land Rights Act[4]; in State land rights legislation;[5] in the Native Title Act;[6] under the Aboriginal Heritage Protection Acts of the Commonwealth and States; in traditional owner settlement and human rights legislation; and in cases on standing.[7] The relevantly common element of all such expressions of our law is the acknowledgement of the unique spiritual and cultural relationship to the land of Aboriginal persons (**VS [42] – [43], Attachment**).

7 There exists a unique relationship between members of Aboriginal societies and the land and waters of Australia to which each Aboriginal society and, by extension, its members, belong. (**VS [16]**). That relationship is inherent in being a member of Aboriginal society (**VS [18] – [19]**). In this case, while denying its relevance as a

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1 Contrary to the Commonwealth's reply [DR [12]], the description 'mediaeval' or 'feudal' is the Court's, not Victoria's: footnote 36 of IS – *Pochi* at 111 (Joint Book Authorities vol **8: 2975**); *Shaw* (2003) 218 CLR 28, 37 [11] (**9:3498**); *Singh* (2004) 222 CLR 322, 386-388 [164]-[166] (**9:3611 – 3612**). The interesting work of Kim, now cited by the Commonwealth, may reposition it as 'early modern, transitioning from medieval', but the content and concepts remain deep in history.

2 Neither in 1901: *Singh*, at 381 [145], 384 [157]—[158] and 395 [190] (**9:3606, 3609, 3620**), nor, by parity of reasoning, since.

3 *Milirrpum v Nabalco* (1972) 17 FLR 141, 166-167 (**7:2654 – 2655**); *Mabo v Queensland No 2* (1992) 175 CLR 1 (**7: 2403**).

4 *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327, 356-358 (**9:3360-3362**).

5 See SA legislation in *Gerhardy v Brown* (1985) 159 CLR 70, 89 (**5:2020**).

6 *Western Australia v Ward* (2002) 213 CLR 1, 64-65 [14], 85-86 [62]-[64] (**II: 5116-5117; 5137-5138**); *Yanner v Eaton* (1999) 201 CLR 351, 372-373 [37]. (**III:5739**).

7 *Onus v Alcoa of Australia Ltd* (1982) 149 CLR 27, 32, 36 (Gibbs CJ), 43 (Mason J), 45 (Murphy J), 62 (Wilson J) (**II:4882**).

criterion, "the Commonwealth acknowledges and accepts the deep and strong connection between Aboriginal person and the lands and waters of Australia" (DR [22]). It should indeed be taken as given: as a matter, so frequently proved that it is a notorious fact of which the Court can take judicial notice (see *Milirrpum v Nabalco* (1972) 17 FLR 141 at 158-159; *Angu v Alta* (PC, 1916) (**7:2646-2647**)).

8 Membership of an Aboriginal society thus entails a unique, permanent and reciprocal relationship with the land and waters of Australia and this relationship has a quality which is equivalent, as a mark of belonging, to the formal relationship with the nation, expressed in citizenship: equivalent in permanence, depth and reciprocity (**VS** [**17**], [**22**], [**33**], [**35**], [**38**], [**45**], [**49**]).

9 That does not require a member of an Aboriginal society to establish a relationship with a particular area or through a native title claim, because it is an inherent feature of membership of the society itself — consequently Victoria's reconceptualisation embraces as non-alien all members of an Aboriginal society, not just native title holders or claimants. (**VS** [**38**] – [**42**]). This includes the plaintiffs, recognized as members of an Aboriginal society by members of their community ("society" and "community" being equated) (contra DR [9], [28]-[29]).

10 Victoria's argument does not require proof of native title; nor does it change the nature or basis of native title –native title can be lost through extinguishment or loss of continuity (as per *Yorta Yorta*) but such an event does not destroy or diminish what is relevant here: the on-going spiritual and cultural relationship inherent in Aboriginality: **VS** [**39**]-[**40**]; *Griffiths* (2019) 93 ALJR 327 at 373 [187] (**V:6840**).

11 Contrary to the Commonwealth's submission (DR [19]), there is no "category error" in comparing a citizen's formal bonds of allegiance to the polity of Australia with the spiritual and cultural relationship between Aboriginal persons and the lands and waters of Australia: it is a comparison of different quantities, having the same quality – of belonging. The unique and distinctive relationship to the land and waters of Australia of members of Aboriginal societies equates to the bonds of citizenship.

12 Finally, Victoria will address remaining points raised by the Commonwealth.

Dated: 5 December 2019

Peter Willis

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