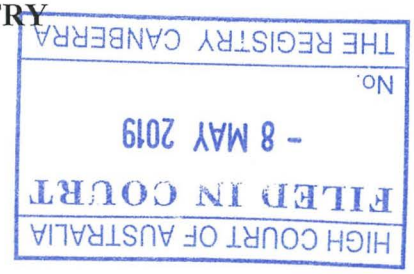
IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY **NO B43 OF 2018**



BETWEEN: **DANIEL ALEXANDER LOVE**

Plaintiff

AND: **COMMONWEALTH OF AUSTRALIA**

Defendant

NO B64 OF 2018

BETWEEN: **BRENDAN CRAIG THOMS**

Plaintiff

AND: **COMMONWEALTH OF AUSTRALIA**

Defendant

OUTLINE OF ORAL SUBMISSIONS OF THE DEFENDANT

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PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the Internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

I. Scope of the aliens power

2. Section 51(xix) (**the aliens power**) equips the Parliament with the capacity to decide, on behalf of the Australian community, who will be admitted to formal membership of that community. It reflects the right inherent in every sovereign nation to decide who shall become members of its community: *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at [21], [24], [39] (Gleeson CJ) (**JBA V8:T3**).

3. The criteria for being an 'alien' were not fixed or frozen at the time of Federation, with the result that the Constitution left it to Parliament to decide, within limits, the criteria for the legal status of alienage. As a result, the relevant question for the purposes of s 51(xix) is whether it is open to Parliament to treat a person as an alien. If it is, then a person's status depends upon how Parliament has exercised that power. For this reason, the Plaintiff's distinction between the 'statutory' and 'constitutional' definitions of aliens (Plaintiff's submissions (**PS**) [18(d)]) is apt to mislead.

4. It is not open to Parliament to treat anyone it chooses as an alien: *Pochi v MacPhee* (1982) 151 CLR 101 at 109 (**JBA V8:T38**). However, for the purposes of this case it is not necessary to attempt to define the outer boundaries of the power.

5. Subject to the limit identified in *Pochi*, the aliens power includes the power to determine to whom is attributed the status of 'alien':

   5.1. *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at [2], [32] (Gleeson CJ, Gummow and Hayne JJ, Heydon J agreeing) (**JBA V9:T49**);

   5.2. *Singh v Commonwealth* (2004) 222 CLR 322 at [4]-[5], [28], [30] (Gleeson CJ), [150], [190] (Gummow, Hayne and Heydon JJ), [250]-[252], [266] (Kirby J) (**JBA V9:T50**);

   5.3. *Koroitamana v Commonwealth* (2006) 227 CLR 31 at [9], [11], [14] (Gleeson CJ and Heydon J), [28], [30], [48] (Gummow, Hayne and Crennan JJ) (**JBA V7:T30**).

6. The above authorities establish that the Constitution leaves it to Parliament to determine who will have the legal status of alien, at least to the extent that Parliament's determination reflects, or involves some combination of, historically sanctioned criteria of place of birth, descent or allegiance to a foreign power. For the following two reasons, application of those principles is sufficient to establish that both are within the reach of laws passed pursuant to the aliens power.

II. By valid statutory definition, the Plaintiffs are non-citizens

7. This Court has repeatedly recognised that citizenship is the obverse of alienage: *Shaw* at [2] (Gleeson CJ, Gummow and Hayne JJ); *Lim v Minister for Immigration* (1992) 176 CLR 1 at 25 (Brennan, Deane and Dawson JJ) (**JBA V3:T17**). See also *Plaintiff M76/2013 v Minister for Immigration* (2013) 251 CLR 322 at 369 (**JBA V8:T36**).

8. There is no category of 'non-citizen, non-alien': *Re Woolley* (2004) 225 CLR 1 at [15] (Gleeson CJ), [38] (McHugh J) (**JBA V9:T47**); see also *Singh* at [265] (Kirby J).

9. Neither plaintiff is an Australian citizen: Love SC [24(c)]; Thoms SC [15(c)]. Parliament has therefore treated them as aliens. The plaintiffs have not challenged the laws that result in them having that status, being the *Australian Citizenship Act 1948* (Cth) ss 10B and 11(1)(b)(ii) (**JBA V1:T6, T8**): cf *Koroitamana v Commonwealth* (2006) 227 CLR 31 at [33], [50] (Gummow, Hayne and Crennan JJ). Had they attempted to challenge those laws, on the authorities identified above the fact that they were born outside Australia would, without more, have meant that such a challenge could not be sustained (**CS** [16]).

III. Parliament may treat foreign citizens as aliens

10. Further, Parliament may treat citizens of a foreign country as aliens: *Singh* [190], [195], [200], [203], [205] (Gummow, Hayne and Heydon JJ); see also at [4]-[5], [30]-[32] (Gleeson CJ); *Re Minister for Immigration; Ex parte Ame* (2005) 222 CLR 439 at [35] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ) (**JBA V8: T44**).

11. *Singh* is not distinguishable. The foreign allegiance that places a person within the reach of the aliens power arises by operation of the foreign law that confers status as a foreign citizen, and does not depend on subjective feelings of allegiance: *Re Canavan* (2017) 91 ALJR 1209 at [26] (**JBA V8:T41**); cf PS [54].

12. The Plaintiffs' belated challenge to *Singh* should be rejected. There is no basis to re-open that decision: *Attwells v Jackson Lalic Lawyers* (2016) 259 CLR 1 (**JBA V2:T13**) at [28] (French CJ, Kiefel, Bell, Gageler and Keane JJ); *Wurridjal v Commonwealth* (2009) 237 CLR 309 at [68]-[70] (French CJ) (**JBA V10:T52**). In any event, the challenge should be rejected because it: (1) puts the very arguments that were rejected in *Singh*; (2) mis-states the reasoning in *Singh* and the law concerning alienage as at 1900; (3) proceeds by reference to an undefined notion of "sufficient otherness"; and (4) incorrectly states that the Plaintiffs were "incidentally" born overseas (Plaintiff's Reply (**PR**) [6]-[13]).

IV. Scope of s 51(xix) not altered by Aboriginality/Native Title

10 13. Accepting the long connection between Australia's indigenous people and the land, the status of an Aboriginal person falls to be determined by reference to the same well-established principles that apply to all other persons.

14. Historically (including in 1900), Aboriginality was irrelevant to a person's status as a British subject: *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 38 (Brennan J) (**JBA V7:T31**); Opinion of Geoffrey Sawer, Appendix III to the Report from the Select Committee on Voting Rights of Aborigines, 1961 (**JBA V10:T53** at **3947**).

15. A person's activities subsequent to their entry into Australia cannot result in a person ceasing to be an alien, irrespective of the strength of any connections that person make
20 make to Australia: *Pochi v Macphee* at 111 (Gibbs CJ) (**JBA V8:T38**); *Re Minister for Immigration and Multicultural Affairs v Te* (2002) 212 CLR 162 at [27] (Gleeson CJ) (**JBA V8:T43**).

16. The possession by a person of native title rights and interests does not place a constitutional limitation on the ability of Parliament to treat that person as an alien under s 51(xix). Native title, being subject to legislative extinguishment, cannot provide a form of constitutional immunity.

Dated: 8 March 2019

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STEPHEN DONAGHUE **NICK WOOD** **JULIA WATSON**