IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY

NO B43 OF 2018

DANIEL ALEXANDER LOVE

Plaintiff

and

COMMONWEALTH OF AUSTRALIA

Defendant

NO B64 OF 2018

BRENDAN CRAIG THOMS

Plaintiff

and

COMMONWEALTH OF AUSTRALIA

Defendant

OUTLINE OF ORAL SUBMISSIONS OF THE COMMONWEALTH OF AUSTRALIA

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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

2. The question raised by one or more members of the Court is whether Aboriginal persons cannot be aliens because they have a unique claim to the protection of the Crown and therefore owe permanent allegiance to the Crown. The question raised by Victoria is whether the members of an Aboriginal society cannot be aliens because they have such a strong connection to the land and waters of Australia. For the reasons advanced below, the Commonwealth submits the answer to both questions is "no".

I Proposition 1 (CFS [5]): *Pochi* limit

3. This proposition is not controversial.

II Proposition 2 (CFS [6]-[11]): common law informs meaning of "alien"

4. ***First point:*** According to the common law, upon the acquisition of sovereignty, indigenous people became British subjects (*Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 34, 36-38, 182 (**Original (O) JBA, V 7, T 31**); *Campbell v Hall* (1774) ER 1045 at 1047 (**Supplementary (S) JBA, V 6, T 94**). After sovereignty, the common law rule in *Calvin's Case* applied equally to all persons, indigenous or otherwise, born within the territory of the Sovereign (Geoffrey Sawer, Opinion (**O JBA, V 10, T 53**)).

5. ***Second point***: the "ordinary understanding" of the word "alien" includes at least those who would be aliens under the common law, and at least those who are citizens or subjects of a foreign state (and not citizens of Australia). Either point is sufficient to decide these cases: *Singh v Commonwealth* (2004) 222 CLR 322 at [32], [205] (**O JBA, V 9, T 50**).

6. ***Third point***: while the common law informs the "ordinary" meaning of alien, it does not confine it: *Singh v Commonwealth* (2004) 222 CLR 322 at [30], [190], [272] (**O JBA, V 9, T 50**); *Koroitamana v Commonwealth* (2005) 227 CLR 31 at [9], [28] (**O JBA V 7, T 30**).

III Proposition 3 (CFS [12]-[18]): permanent protection/ permanent allegiance

7. ***First point*** (CFS [16]-[17]): Propositions 3, 5 and 6 read together erroneously equate the duty of protection that arises reciprocally from the duty of allegiance (i.e. protection in the international sphere) with a notion of "protection" that is used in different areas of the law (in particular, a duty to protect all persons, including aliens, within the territory): H Kelsen, *General Theory of Law and State* (Harvard University Press, 1949) pp 237-238; *Singh v Commonwealth* (2004) 222 CLR 322 at [165]-[168] (**O JBA, V 9, T 50**); *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at [125]-[133] (**O JBA, V 8, T 43**); *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 222 CLR 1 at [19], [63] (**S JBA, V 1, T 78**).

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8. No party invites this court to determine whether there is a unique fiduciary duty owed to indigenous persons. The Court should not decide that issue (Plaintiffs' Reply to Defendant's Further Submissions [26]; Victoria's Submissions (**VS**) [52]-[54]]).

9. ***Second point*** (CRS [13], [15], [18]): Victoria's attempts to stigmatise the notion of "allegiance" as "feudal" and therefore non-essential (Victoria's Submissions [8], [14], [48]) is wrong. The concept of allegiance to a political unit has always been a critical part of the concept of alienage: *Calvin's Case* (1609) 7 Co Rep 1a [77 ER 377] at 169, 170, 175, 177, 193 (**S JBA, V 6, T 93**). The importance of the relationship between members of an Aboriginal society and their land and waters in Australia does not justify treating that relationship as "equivalent" to the reciprocal relationship of "allegiance" that lies at the heart of the concept of alienage.

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IV Proposition 4 (CFS [19]-[38]; CRS [34]-[35]): Recognition of native title entails recognition of laws and customs and authority to determine membership

10. ***First point:*** Native title is a recognition of specific laws and customs for a specific purpose: *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at [37]-[38], [43]-[44] (**S JBA, V 1, T 77**). *Mabo v Queensland [No 2]* (1992) 175 CLR 1 did not hold that the common law recognises traditional laws and customs in a more general sense: *Walker v New South Wales* (1994) 182 CLR 45 at 49-50 (**S JBA, V 2, T 80**).

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11. ***Second point***: Aboriginal societies cannot, by determining their own membership, convert aliens into non-aliens: *Pochi v Macphee* (1982) 151 CLR 101 at 111 (**O JBA, V**

8, T38); *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at [26], [210] (**O JBA, V 8, T 43**).

V Proposition 5 (CFS [39]-[44]): unique obligation of protection

12. Members of Aboriginal societies were and are entitled to the "protection" of the Crown (in the relevant sense) in the same way as, and pursuant to the same law as, other persons. To the extent that the common law recognizes traditional laws and customs as a factum for the existence of native title rights and interests in land, it has never cast that recognition as involving an "obligation of protection". Native title is not a fetter on the exercise of sovereign power even to extinguish rights or interests in land: *Western Australia v Ward* (2002) 213 CLR 1 at 93 [91] (**S JBA, V 2, T 82**). It does not provide a proper foundation to limit the power conferred on Federal Parliament by the Constitution.

VI Proposition 6 (CFS [45]): unique obligation of protection gives rise to allegiance

13. Membership of Aboriginal society says nothing about permanent allegiance to the Crown, as these are entirely different subject matters. Otherwise, Aboriginal persons would be unable to sever their connection with the Australian body politic, even if they wished to do so.

VII Proposition 7 (CFS [46]-[49]): it follows that a person that an Aboriginal society has determined to be one of its members cannot be an alien

14. The legal framework that governs the plaintiffs' status is of long-standing, and the factual circumstances of these cases do not reveal any defect in that framework.

15. Statutory status as a citizen can and should be kept in alignment with constitutional status as a "non-alien" by focussing attention on the validity of any amendments to the *Australian Citizenship Act 2007* (Cth) that would treat as aliens persons who Parliament has no power to treat in that way. The Plaintiffs could not feasibly challenge the relevant provisions of the that Act in this case, and have not sought to do so: *Koroitamana v Commonwealth* (2005) 227 CLR 31 at [33] (**O JBA V 7, T 30**); *Singh v Commonwealth* (2004) 222 CLR 322 at [272] (Kirby J) (**O JBA, V 9, T 50**). The result is that both plaintiffs are aliens.

Date: 5 December 2019

Stephen Donaghue **Nick Wood** **Julia Watson**