HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No S192 of 2021**

BETWEEN:

MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS
First Appellant

MINISTER FOR HOME AFFAIRS
Second Appellant

and

SHAYNE PAUL MONTGOMERY
Respondent

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

PART I: CERTIFICATION

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

PART II: OUTLINE

A clear *ratio decidendi* emerges from *Love* and *Thoms*

2. The *ratio decidendi* of a case is "the general rule of law that the court propounded as its reason for the decision": *Woolcock Street Investments v CDG Pty Ltd* (2004) 216 CLR 515 at [59] (McHugh J) (**JBA vol 14, tab 80)**; **VS [5]**.

3. The *ratio* of this Court's decision in *Love v Commonwealth; Thoms v Commonwealth* (2020) 270 CLR 152 (***Love* and *Thoms***) is 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*" (**VS [7]; cf AS [14]**). That principle is expressed in the statement that Bell J was "authorised" to make on behalf of each member of the majority in paragraph 81 of the judgment: *Love* and *Thoms* at [81] (**JBA vol 8, tab 49**); **VS [6]-[7]**. It is also expressly stated in the answers to the stated questions in each proceeding in *Love* and *Thoms*; see *Helmbright v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [No 2]* [2021]

FCA 647 at [105]-[108], see also [238], [241] (Mortimer J) (**JBA vol 17, tab 100**); **VS [8]**.

4. The device adopted by the majority in *Love* and *Thoms* – of having the most senior judge in the majority using their reasons to express the position of the majority judges as a whole, in a case where the majority judges have written separately – is not novel: see *Mabo v Queensland [No 2]* (1992) 170 CLR 1 at 15-16 (Mason CJ and McHugh J) (**JBA vol 8, tab 50**); *Parker v The Queen* (1963) 111 CLR 610 at 633 (Dixon CJ) (**JBA vol 10, tab 60**): **VS [6], fn 7**.

5. The fact that the majority judges "express [their] reasoning differently" does not detract from the identification of a *ratio*. There is no requirement of uniformity in the path of reasoning; what is necessary is that there be a general rule of law propounded by the majority judges that explains the decision. The members of the majority expressly agreed on that general rule of law and authorised Bell J to state it on their behalf. The Appellants therefore require leave to re-open *Love* and *Thoms*.

Leave to re-open *Love* and *Thoms* should be refused

6. A change in the composition of the bench is not a sufficient reason to overrule a previous decision of the Court: *Queensland v The Commonwealth* ('*Second Territory Senators Case*') (1977) 139 CLR 585 at 600 (Gibbs J) (**JBA vol 10, tab 64**): **VS [12]**.

7. Consideration of the factors referred to in *John v Commissioner of Taxation* (1989) 166 CLR 417 at 438 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ) (**JBA vol 7, tab 44**) does not support re-opening the decision: **VS [13]-[26]**. That the principle was not worked out in a significant succession of cases is a neutral consideration, given the question whether Aboriginal persons could be aliens had never arisen: cf **AS [21]**. *Love* and *Thoms* is nonetheless preceded by and grounded in the Court's acknowledgment of the *sui generis* status of Aboriginal persons by reason of their unique connection with the lands and waters which now make up Australia (**VS [14]-[15]**), now recognised *in the alienage context*. As for the differences in reasoning, a key plank in the reasoning of each of the majority judges was the significance of the unique position of Aboriginal peoples as *indigenous* to this country: *Love* and *Thoms* at [73] (Bell J), [256], [262], [276] (Nettle J), [289]-[290] (Gordon J), [447]-[448], [453] (Edelman J); **VS [18]**.

Love and _Thoms_ was correctly decided

8. The "aliens" power does not support laws with respect to persons "who could not possibly answer the description of 'aliens' in the ordinary understanding of the word": *Pochi v Macphee* (1982) 151 CLR 101 at 109 (Gibbs CJ) (**JBA vol 10, tab 63**) (the ***Pochi limit***).

9. The *Pochi* limit recognises in terms that there is an "ordinary understanding" of the word "alien". It is only within the limits of the ordinary understanding that Parliament is able to decide who will be treated as an alien. That is so even if Parliament has selected historically recognised criteria for alienage.

10. The Appellants take an impermissibly narrow approach to the *Pochi* limit. The relevance of the *Pochi* limit does not cease at the level of the criteria chosen by Parliament to determine the status of alienage. It can also require consideration of whether the application of those criteria results in persons "who could not possibly answer the description of "alien" in the ordinary understanding of the word" being treated as aliens.

11. The ordinary meaning of "alien" is a person who belongs to another place: **VS [30]**. Aboriginal people who satisfy the tripartite test cannot belong to another place because they are *indigenous* to Australia. What comes with the status of *indigeneity* is a distinctive connection – of a "spiritual", "religious", "cultural" or "metaphysical" nature – with the lands and waters that make up the territory of Australia (**VS [14], fn 39**). Aboriginal people form an "indissoluble whole" with those lands and waters: *Love* and *Thoms* at [365] (Gordon J), [451] (Edelman J). They *belong* to – and are a *part of* – Australia. The body politic has a "territorial dimension" (*Love* and *Thoms* at [438] (Edelman J)) and therefore cannot be divorced from the territory. As part of the "indissoluble whole" with the lands and waters of Australia, Aboriginal peoples are inseparably tied to both the territory and the political community of that territory.

Dated: 7 April 2022

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Rowena Orr	**Timothy Goodwin**	**Rohan Nanthakumar**