HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS

First Appellant

MINISTER FOR HOME AFFAIRS

Second Appellant

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and

SHAYNE PAUL MONTGOMERY

Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE AUSTRALIAN HUMAN RIGHTS COMMISSION (INTERVENING)

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Part I: Certification as to suitability for publication

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

Part II: Propositions to be advanced in oral argument

Adverse impact on fundamental rights is a factor militating against reopening and overruling a previous authority of this Court (AHRC [13]-[20])

2. Recognition of that factor as an important consideration in this setting:

   a. Is consistent with the non-exhaustive list of relevant matters identified in *Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49 at 56-58 (5 JBA tab 37 at pp 1644-1646).

   b. Is supported by the reasoning of Gibbs J (at 597, 599-600) and Stephen J (at 603-604) in the *Second Territory Senators Case* (1977) 139 CLR 585 (10 JBA tab 64 at pp 3894, 3896-3897, 3900-3901).

   c. Would align the Court's approach to the exercise of the discretion to reopen and overrule a previous decision with the principle of legality.

3. In this case, reopening and overruling *Love v Commonwealth* (2020) 270 CLR 152:

   a. Would render Aboriginal persons who are not Australian citizens liable to exclusion from their communities, to the deprivation of their liberty, and to the impairment of other rights (such as freedom of association, and the rights of First Nations people to self-determination).

   b. Could also make it difficult for some Aboriginal persons who *are* Australian citizens to prove they are not aliens liable to deportation and removal, given the markedly lower rate at which the births of Aboriginal persons have been registered in at least three States in recent years.

      22 JBA tab 155 at pp 8445-8446, 8507-8509 (Queensland Ombudsman, 2018)

      22 JBA tab 164 at pp 8625, 8626, 8628 (Xu et al, 2012, NSW)

      21 JBA tab 135 at p 7994 (Gibberd et al, 2016, WA)

For the purposes of determining who is an "alien", indigeneity is a relevant difference that can be recognised without offending the principle of equality before the law (AHRC [21]-[29])

4. Indigeneity is a status recognised in Australian law and in international instruments. See, eg:

   Aboriginal and Torres Strait Islander Recognition Act 2013 (Cth), preamble, s 3 (3 JBA tab 8 at pp 560-562)

   Native Title Act 1993 (Cth), preamble (3 JBA tab 16 at p 788)

   Constitution Act 1934 (SA), s 2 (3 JBA tab 22 at pp 876-877)

5. Facially neutral treatment of different groups can amount to unequal treatment if it does not account for relevant differences between those groups.

   South West Africa Cases (Second Phase) [1966] ICJR 6 at 305-306 (19 JBA tab 118 at pp 7358-7359)

   Street v Queensland Bar Association (1989) 168 CLR 461 at 571 (12 JBA tab 74 at p 4655)

6. "Alienage" has at its heart a judgment that a person does not belong to, or is foreign to, a political community. Functionally, its role as a status is to exclude persons from that political community.

7. There is an inextricable link between the proposition that a person does not belong to the *political community* and the proposition that they do not belong to the *physical territory* of that community, because exclusion from one results in exclusion from the other. The converse is also true: a sufficient relationship with *polity* grounds a sufficient relationship with *territory* and vice versa.

   Human Rights Committee, *Gillot et al v France*, Communication No 932/2000, UN Doc CCPR/C/75/D/932/2000 (21 July 2002) at [13.16] and [14.7] (21 JBA tab 138 at pp 8053 and 8054-8055)

   Human Rights Committee, *General Comment No 27: Article 12 (Freedom of Movement)*, UN Doc CCPR/C/21/Rev.1/Add.9 (1 November 1999) at [5], [19]-[20] (21 JBA tab 137 at pp 8029 and 8032-8033)

8. *Indigeneity* is a characteristic that identifies (inter alia) membership of Australia's first peoples, and the accompanying distinctive cultural and spiritual links that Indigenous Australians have had, from time immemorial, with the physical territory on which the Australian political community is located. In the context of alienage, that characteristic is a relevant difference that justifies differential treatment of Aboriginal people as compared

with other people.

If necessary to decide: "biological descent" within the tripartite test need not be confined to "a genetic relationship with any Aboriginal person" (AHRC [30]-[36])

9. Justice Brennan's statement of the tripartite test should be read contextually with the surrounding passages of his Honour's judgment, which:

    a. emphasise the need to ascertain the persons entitled to native title "according to the laws and customs of" the relevant Indigenous group (*Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 61, 70, 8 JBA tab 50 at pp 2937 and 2946); and

    b. leave open the possibility that "biological descent" could be an enquiry directed at the level of the group or community (*Western Australia v Ward* (2000) 99 FCR 316 at [230]-[232], 20 JBA tab 124 at pp 7650-7651).

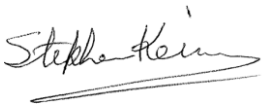
10. The proposition that traditional law and custom has a role to play in each limb of the tripartite test is consistent with:

    a. Articles 9 and 33(1) of the *United Nations Declaration on the Rights of Indigenous Peoples* (22 JBA tab 163 at pp 8616-8617, 8621).

    b. Recent case law dealing with the meaning of "descent" in Indigenous communities (see, eg, *Hackett (a pseudonym) v Secretary, Department of Communities and Justice* (2020) 379 ALR 248 at [148]-[149] (17 JBA tab 96 at pp 6423-6424).

11. There is no evidentiary support for the suggestion that "Aboriginality" can be determined through genetic testing.

7 April 2022



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Stephen Keim SC

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Celia Winnett