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

and

SHAYNE PAUL MONTGOMERY
Respondent

SUBMISSIONS OF THE AUSTRALIAN HUMAN RIGHTS COMMISSION SEEKING LEAVE TO APPEAR AS AMICUS CURIAE

PART I: CERTIFICIATION

1. These submissions are in a form suitable for publication on the internet.

PART II: BASIS OF LEAVE TO APPEAR

2. The Australian Human Rights Commission (**AHRC**) seeks leave to appear as *amicus curiae* to make submissions in support of the Respondent. The Court's power to grant leave derives from its inherent or implied jurisdiction under Ch III of the Constitution and s 30 of the *Judiciary Act 1903* (Cth).

3. The AHRC's proposed submissions do not put a position concerning the proper interpretation of s 51(xix) of the Constitution.

4. These submissions are made by the AHRC and are not made on behalf of the Commonwealth.

PART III: WHY LEAVE SHOULD BE GRANTED

5. The AHRC seeks to make submissions on three topics:

   a. *First*, the principles governing when it is appropriate for the Court to re-open and overrule one of its prior decisions. The AHRC submits that a critical factor militating against this course, which the Court should consider in assessing the consequences of reopening, is that overruling the previous authority would adversely affect the fundamental rights and interests of individuals.

   b. *Secondly*, the criticism that the majority's approach in *Love v Commonwealth* (2020) 270 CLR 152 (***Love***) is grounded in illegitimate racial distinctions. The AHRC contends that, in determining who is foreign to the Australian political community, indigeneity is a relevant difference as that concept is understood in the discrimination jurisprudence. Consistently with the principle of equality before the law, it is appropriate to recognise and respond to that difference.

   c. *Thirdly*, the "biological descent" limb of the tripartite test formulated by Brennan J in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (***Mabo (No 2)***) at 70. The AHRC suggests that it may be too narrow a reading of that limb to contend that it can be satisfied only if a person demonstrates that they have "a genetic relationship with any Aboriginal person" (Commonwealth Submissions (**CS**) [53]).

6. Leave should be granted to the AHRC for the following reasons.

7. *First*, the matters addressed by the AHRC fall within its distinctive interest and expertise, given its statutory remit. The AHRC seeks to give effect to its function of "interven[ing] in proceedings that involve human rights issues", "where the Commission considers it appropriate to do so, with the leave of the court hearing the proceedings and subject to any conditions imposed by the court": *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**), s 11(1)(o). The Court has previously been assisted by the AHRC's submissions on human rights issues arising in cases before it.[1] The AHRC's participation is particularly apt here given that the Commonwealth's foreshadowed challenge[2] to *Love*, focusing as it does on the scope of any Commonwealth "power to determine who is a

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[1] See, eg, *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1; *Maloney v The Queen* (2013) 252 CLR 168 (***Maloney***); *Comcare v Banerji* (2019) 267 CLR 373.

[2] Notice of Appeal at [1(a)], Cause Removed Book at 111.

member of the Australian body politic" (CS [23]), involves issues of public importance which may significantly affect individuals other than the Respondent.[3]

8. For the purposes of s 11(1)(o) of the AHRC Act, "human rights" includes the rights and freedoms recognised in the *International Covenant on Civil and Political Rights* (**ICCPR**).[4] The question whether some Indigenous Australians can be regarded as aliens is a question that impacts directly on their human rights. The "most important difference" between aliens and non-aliens is that the former are liable to exclusion from the community, and removal from the state, without the right to return.[5] This engages article 12(4) of the ICCPR, which provides that "no-one shall be arbitrarily deprived of the right to enter his own country". Interpretative guidance issued by the UN Human Rights Committee (which should be given considerable weight[6]) states that "own country" in this context is "not limited to nationality in a formal sense", but also embraces a person who "because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien".[7] This construction of article 12(4) has been accepted by the Federal Court.[8]

9. Further, once an Indigenous Australian is rendered susceptible to removal, many other rights under the ICCPR are brought into jeopardy. These include the right to liberty and security of person (article 9(1)); the right to protection from interference with one's privacy, family and home (article 17(1)); the right to freedom of association with others (article 22(1)); and the right to protection of one's family as the natural and fundamental group unit of society (article 23(1)).

10. Since this case has the potential to permit a larger group of Indigenous Australians to be permanently removed from Australia, the Court's decision may also impact First Nations

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3 *United States Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520 at 534 (Davies, Wilcox and Gummow JJ).

4 Opened for signature 16 December 1966, [1980] ATS 23 (entered into force generally 23 March 1976, except Article 41, which came into force generally on 28 March 1979; entered into force for Australia 13 November 1980, except Article 41, which came into force for Australia on 28 January 1993), which appears at Schedule 2 to the AHRC Act. See AHRC Act, definition of "human rights" in s 3.

5 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 29: "the power to exclude or expel even a friendly alien is recognized by international law as an incident of sovereignty over territory".

6 *CRI026 v Republic of Nauru* (2018) 92 ALJR 529 at [22] (the Court).

7 Human Rights Committee, *General Comment No 27: Article 12 (Freedom of Movement)*, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) at [20].

8 *Ratu v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 141 at [50] (Farrell, Rangiah and Anderson JJ).

Peoples' rights to self-determination (articles 1(1), (3)). That state of affairs then brings to the fore the relevance of the United Nations Declaration on the Rights of Indigenous Peoples,[9] proclaimed by the General Assembly as one means of effectuating (inter alia) the right of self-determination.[10] Relevantly, article 9 of the UNDRIP provides that indigenous peoples and individuals "have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned". Article 33(1) provides that indigenous peoples "have the right to determine their own identity or membership in accordance with their customs or traditions", although such right "does not impair the right of indigenous individuals to obtain citizenship of the States in which they live".

11. *Secondly*, the AHRC advances arguments that are not made by the parties. The Commission's submissions aim to assist the Court in a way that it may not otherwise be assisted.[11] On the topics described at [5] above, the AHRC will give the Court "the benefit of a larger view of the matter before it"[12] than the parties alone will provide.

12. *Thirdly*, if the Commission is granted leave, its intervention will not unduly prolong the proceedings, nor lead to the parties incurring additional costs in a manner that would be disproportionate to the assistance that is proffered.[13] The AHRC's proposed submissions are brief and limited in scope.

PART IV: SUBMISSIONS

Impact on fundamental rights is a relevant consideration in determining whether to overrule a previous decision

13. In assessing whether to re-open, and then overrule, one of its previous decisions, "the Court is required to make a discretionary judgment, and to do so with the caution, and the sense of responsibility, that the gravity of the matter requires".[14] It must undertake a "full

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[9] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted by the General Assembly 13 September 2007, supported by Australia 3 April 2009) (**UNDRIP**), referred to in *Love* at [73] (Bell J).

[10] See the Preamble.

[11] *Levy v Victoria* (1997) 189 CLR 579 at 604 (Brennan J).

[12] *Wurridjal v Commonwealth* (2009) 237 CLR 309 (***Wurridjal***) at 312-313 (French CJ).

[13] *Levy* at 605 (Brennan CJ).

[14] *Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49 (***HCF***) at 56 (Gibbs CJ), cited with approval in *John v FCT* (1989) 166 CLR 417 (***John***) at 438 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

consideration of what may be the consequences of"[15] the overruling, having "due regard to the need for continuity and consistency in judicial decision".[16]

14. In *John* (at 438), five Justices identified and applied the four matters that Gibbs CJ (Stephen and Aickin JJ agreeing) had held in *HCF* to justify departure from earlier decisions in all the circumstances. However, as Gibbs CJ acknowledged in *HCF*, those factors are not exhaustive.[17] Thus, in examining the consequences of the prospective overruling, the Court is not confined to asking whether the earlier decision has worked "considerable inconvenience" (an aspect of the third matter) or has been "independently acted upon" (the fourth matter).

15. In the AHRC's submission, a critical factor militating against overruling a previous authority of the Court is that doing so would adversely affect the fundamental rights and interests of individuals. *First*, that consideration can be viewed as one specific application of the more general inquiry into whether a previous decision has "achieved no useful result".[18] In our legal tradition, recognition of individual rights through the operation of law is a useful result.[19]

16. *Secondly*, it is supported by the reasoning of Stephen J in the *Second Territory Senators Case*. In deciding whether to reopen *Western Australia v Commonwealth* (1975) 134 CLR 201, his Honour noted that the people of the Territories had "attained representation in the Senate" as a consequence of that decision (at 603). Whilst it was one thing to contemplate that a loss of representation in Parliament "flow[ed] from one's perceived operation of the mandatory effect of the Constitution", his Honour stated, it was "quite another" to regard that loss "as the acceptable price of a personal decision to treat a particular precedent authority as appropriate for reconsideration" (at 604). Recognising the force of that factor,

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[15] *Queensland v Commonwealth* (1977) 139 CLR 585 (***Second Territory Senators Case***) at 602 (Stephen J), quoted with approval in *HCF* at 56 (Gibbs CJ).

[16] *Perpetual Executors and Trustees Association of Australia Ltd v FCT* (1949) 77 CLR 493 at 496 (Latham CJ, Rich, Dixon, McTiernan and Webb JJ), quoting from *The Tramways Case* (1914) 18 CLR 54 at 69 (Barton J).

[17] *HCF* at 56 (Gibbs CJ), cited with approval in *John* at 438 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ); *Second Territory Senators Case* at 630 (Aickin J); *Wurridjal* at [70]-[71] (French CJ).

[18] *John* at 438, third factor (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

[19] In the common law context, see, eg, Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, 1959) at 195. Under statute, see, eg, the principles reflected in ss 10A(1)(a) and 11(1)(g), (h) and (j) of the AHRC Act.

his Honour held himself bound to follow *Western Australia v Commonwealth* notwithstanding that he disagreed with its constitutional holdings (at 604).

17. *Thirdly*, the proposition described at [15] above would align the Court's approach to the exercise of this important judicial discretion with a foundational principle of statutory construction – namely, the principle of legality. The Court does not impute to Parliament an intention to interfere with fundamental rights in the absence of unmistakable and unambiguous language.[20] Of course, the principle of legality assists the Court in attributing meaning to laws enacted by the legislative branch. However, interpretive rules of this kind are "accepted by all arms of government in the system of representative democracy".[21] The principle is "an aspect of the rule of law",[22] and a manifestation of the broader proposition that "[t]he law of this country is very jealous of any infringement of personal liberty",[23] amongst other fundamental rights. Further, it is not novel for courts to take human rights into account when exercising broad discretionary powers. In *Schoenmakers v Director of Public Prosecutions* (1991) 30 FCR 70,[24] for example, French J considered "the value placed by Australia, as part of the international community, on the liberty of the individual and the presumption in favour of that liberty" (at 75) in determining whether "special circumstances" existed justifying a grant of bail pending the appellant's extradition.[25] Nor is it novel to treat "the traditional civil and political liberties",[26] and international standards protective of human rights, as a "legitimate and important influence on the development of the common law".[27]

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[20] See, eg, *Coco v The Queen* (1994) 179 CLR 427 at 437 (Mason CJ, Brennan, Gaudron and McHugh JJ); *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [58] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

[21] *Zheng v Cai* (2009) 239 CLR 446 at [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ).

[22] *Australian Crime Commission v Stoddart* (2011) 244 CLR 554 at [182] (Crennan, Kiefel and Bell JJ).

[23] *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 523 (Brennan J).

[24] Discussed in Williams and Hume, *Human Rights Under the Australian Constitution* (2nd ed, 2013) at [4.4]. See also *McKellar v Smith* [1982] 2 NSWLR 950 at 962F (discretion to exclude confessional evidence); *R v Togias* (2001) 127 A Crim R 23 at [85] (sentencing discretion).

[25] Although note *United Mexican States v Cabal* (2001) 209 CLR 165 at [66], [72] (Gleeson CJ, McHugh and Gummow JJ), criticising this approach in the context of the particular statutory test in issue.

[26] *Tajjour v New South Wales* (2014) 254 CLR 508 at [28] (French CJ, dissenting in the result), quoting with approval from Allan, 'The Common Law as Constitution: Fundamental Rights and First Principles' in Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 146 at 148.

[27] *Mabo (No 2)* at 42 (Brennan J).

18. If the Court were to depart from its previous decision in *Love*, this would have immediate practical effects on at least the category of persons in the circumstances of Mr Love and Mr Montgomery – individuals identifying and recognised within their communities as Aboriginal persons, but who are not Australian citizens. Those individuals without visas would newly become liable to exclusion from their communities, and to the deprivation of their liberty, for the purpose of removal from Australia under ss 189, 196 and 198 of the *Migration Act 1958* (Cth). Those individuals with visas would newly become exposed to the same consequences should they trigger a criterion that could lead to cancellation of the visa under s 501 – for example, by being sentenced to at least 12 months' imprisonment (ss 501(2), (6)(a) and (7)(c)) or by engaging in "general conduct" that might lead to a conclusion that they are "not of good character" (s 501(6)(c)(ii)). These consequences represent serious interferences with the right to personal liberty and the other rights and freedoms described at [8]-[10] above. The Court can and should take these interferences into account without needing evidence of actual individuals other than Mr Montgomery who would be adversely affected by a reopening of *Love* (cf CS [24]) – just as it acts on the principle of legality without requiring proof that particular persons would be affected by a rights-abrogating construction of a statute.

19. Moreover, departing from *Love* could expose some Aboriginal and Torres Strait Islander persons born in Australia to similar consequences. As Gordon J emphasized in *Love* (at [374]), a further result of the decision was that "even if an Aboriginal Australian's birth is not registered and as a result no citizenship is recorded … they are not susceptible to legislation made pursuant to the aliens power or detention and deportation under such legislation". Reports concerning birth registration in Queensland,[28] Western Australia[29] and

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[28] Based on data from the period 1 July 2010 to 30 June 2012, 15-18% of Indigenous births were not registered, compared to only 1.8% of non-Indigenous births, meaning approximately 1 in 6 Indigenous children born in Queensland during that period had no birth certificate: Queensland Ombudsman, 'The indigenous birth registration report: an investigation into the under-registration of Indigenous births in Queensland' (June 2018) at 10, available at https://www.ombudsman.qld.gov.au/improve-public-administration/investigative-reports-and-casebooks/investigative-reports/the-indigenous-birth-registration-report. 2018 data continued to show much lower birth registration rates for Aboriginal and Torres Strait Islander children: Queensland Government, 'Closing the Registration Gap: A Cross-Agency Strategy to Increase the Birth Registration Rate for Aboriginal and Torres Strait Islander Queenslanders' (2021) at 6, available at https://www.publications.qld.gov.au/dataset/register-your-bub-our-kids-count/resource/5b0f6507-8281-4830-a85e-7d64844eabc1.

[29] As at 2012, 18% of Aboriginal children born in Western Australia between 1980 and 2010 and aged under 16 did not have a birth registration record: Gibberd, Simpson and Eades, 'No official identity: a data linkage study of birth registration of Aboriginal children in Western Australia' (2016) 40(4) *Australian and New Zealand Journal of Public Health* 388 at 388.

New South Wales[30] indicate that Indigenous births are registered at a far lower rate than non-Indigenous births. If the Court embraced the minority's position in *Love*, an Indigenous person entitled to citizenship under s 12(1)(a) of the *Australian Citizenship Act 2007* (Cth), who cannot prove that he or she (and/or a parent) was born in Australia, would face significant practical obstacles in establishing that he or she is not an alien. This prospect may be particularly relevant to Torres Strait Islanders, given the long history of familial connections and travel between the Torres Strait and Papua New Guinea.[31]

20. In summary, reopening and overruling *Love* would have grave adverse impacts on the rights and freedoms of Mr Montgomery and other Indigenous persons described above. That provides a strong reason why the Court should not take such a course.

The decision in *Love* is not grounded in illegitimate racial distinctions

21. In *Love,* Chief Justice Kiefel considered that the principles for which the plaintiffs contended "point[ed] up an issue of race", which was not a subject "appropriate to the judicial function" (at [44]). Justice Gageler stated that each of the arguments put forward by the plaintiffs necessarily involved a "distinction that is based on 'race'" (at [126]). Justice Keane held that it was "doubtful" that it was open to the Court to adopt a race-based discrimen in the exercise of judicial power (at [210]) and that to do so was "not a course that commends itself … given that justice is to be administered equally to all" (at [181]).

22. With respect, the AHRC contends that those concerns are misplaced.

23. *First*, the majority Justices grounded their reasoning in the criterion of *indigeneity*, not "race".[32] Indigeneity is a status that is recognized in Australia's domestic legislation,[33] and in Australia's relations with other countries.[34]

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[30] Birth registration data for the period 2001-2005 showed that Indigenous births in NSW were less likely to be registered than non-indigenous births: Xu et al, 'Under-reporting of birth registrations in New South Wales, Australia' (2012) 12(1) *BMC Pregnancy and Childbirth* 147 at 5 and 7.

[31] See *Love* at [139] (Keane J).

[32] *Love* at [73], [81] (Bell J), [274] (Nettle J), [357] (Gordon J), [447] (Edelman J).

[33] For example, *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth), s 3; *Native Title Act 1993* (Cth), preamble; *Constitution Act 1902* (NSW), s 2; *Constitution of Queensland 2001*, preamble; *Constitution Act 1934* (SA), s 2; *Constitution Act 1934* (Tas), preamble; *Constitution Act 1975* (Vic), s 1A; *Constitution Act 1889* (WA), preamble; *Aboriginal Heritage Act 2006* (Vic), s 4(1), definition of "Aboriginal person", s 12; *Traditional Owner Settlement Act 2010* (Vic), s 1.

[34] UNDRIP, supported by Australia on 3 April 2009.

24. *Secondly*, the view that racial classifications are generally inappropriate stems from the concern that "racial characteristics so seldom provide a relevant basis for disparate treatment".[35] Treating groups differently in response to *relevant* differences between them is non-discriminatory, rather than a failure to administer equal justice. It is well established that the concept of discrimination involves both treating like things differently and treating different things as if they were the same. A "neutral" law that applies the same rules to everyone may result in discrimination if it results in "a failure to accord different treatment appropriate to [a relevant] difference".[36] As Judge Tanaka explained in the *South West Africa Cases (Second Phase)* [1966] ICJR 6 at 305-306, in a passage approved by this Court on several occasions:[37]

> We can say accordingly that the principle of equality before the law does not mean the absolute equality, namely equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal. …
>
> To treat unequal matters differently according to their inequality is not only permitted but required. The issue is whether the difference exists.

25. To apply those general principles concerning discrimination to one concrete example – differential treatment based on residence may be appropriate as a criterion for conferral of rights to participate in State political processes, because residence within a particular State is one matter that signifies membership of the body politic of that State.[38]

26. It was this conception of substantive, rather than formal, equality to which Gaudron J's remarks in *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at [39]-[40] were directed. In her Honour's view, to form a view that it was "necessary" to make a law providing differently for the people of a particular race, or dealing with something of special significance to the people of that race, the requirement of 'necessity' involved two things. First, there must be some relevant difference between the people of the race to whom the law is directed and the people of other races. Secondly, there must be "some matter or circumstance" upon which Parliament might reasonably form a judgment about that

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[35] *Adarand Constructors Inc v Pena*, 515 US 200 (1995) at 236 (O'Connor J for the Court).

[36] *Street v Queensland Bar Association* (1989) 168 CLR 461 at 571 (Gaudron J). See similarly, describing the "general features of a discriminatory law", *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 478 (Gaudron and McHugh JJ).

[37] *Gerhardy v Brown* (1985) 159 CLR 70 at 129 (Brennan J); *Street v Queensland Bar Association* (1989) 168 CLR 461 at 512 (Brennan J), 571 (Gaudron J); *Maloney* at [340] (Gageler J).

[38] *Street v Queensland Bar Association* (1989) 168 CLR 461 at 572 (Gaudron J).

difference. Her Honour said that there was no relevant difference between people based on race that would justify differentiating between citizens on this basis in relation to the maintenance or exercise of their citizenship rights (at [40]).

27. Importantly, Gaudron J was not denying, or even addressing, the existence of relevant differences (for example, based on indigeneity) for the purposes of identifying whether a person has alienage status.

28. Longstanding common law usage of the term 'alien' denotes a status that, at its core, signifies that an individual is foreign to the political community and belongs elsewhere.[39] It marks some people as "us" and some people as "other", and does so by reference to the nature of the relationship between an individual and the nation.[40] One important aspect of that relationship is the link between an individual and the physical territory on which the political community is situated.[41] This is because: (i) a necessary precondition for effective membership of a political community is free access to the locus of the community's civic life, and (ii) the primary significance of the distinction between alien and non-alien lies in the state's power to exclude an alien from its territory. In the Australian context, given that Australia is a federation, a relationship with and access to one part of Australian territory creates a relationship with and access to the whole territory.[42]

29. Accordingly, in determining who is foreign to the Australian political community, *indigeneity* – membership of Australia's first peoples, manifesting in distinctive cultural and spiritual connections to the land inhabited by our political community – is a *relevant difference* that justifies differential treatment of Aboriginal people vis-à-vis other persons.[43] Consistently with the principle of equality before the law, it is appropriate to recognise and respond to that difference.

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[39] See *Singh v Commonwealth* (2004) 222 CLR 322 at [190] (Gummow, Hayne and Heydon JJ); *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 183 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ); Human Rights Committee, *General Comment No 27: Article 12 (Freedom of Movement)*, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) at [20].

[40] See *Love* at [177] (Keane J).

[41] See, eg, 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].

[42] See Human Rights Committee, *General Comment No 27: Article 12 (Freedom of Movement)*, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) at [5].

[43] See Gerangelos, "Reflections upon Constitutional Interpretation and the "Aliens Power": Love v Commonwealth" (2021) 95 ALJ 109 at 113.

"Biological descent" for the purposes of the tripartite test need not be confined to "a genetic relationship with any Aboriginal person"

30. The "tripartite test" from *Mabo (No 2)* at 70, formulated by Brennan J to identify Aboriginal people in the native title context, is as follows: "Membership of the indigenous people depends on biological descent from the indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among those people".

31. As to the first requirement of "biological descent from the indigenous people", the Commonwealth contends that the limb is satisfied only if a person can show that they have "a genetic relationship with any Aboriginal person" (CS [53]). However, that interpretation may be too narrow.

32. *First*, it is significant that Brennan J's formulation followed two sentences after his Honour declared that the persons entitled to native title "are *ascertained according to the laws and customs of the indigenous people* who, by those laws and customs, have a connexion with the land" (emphasis added). This suggests that Brennan J did not intend for Aboriginality to be determined inconsistently with the laws and customs of the relevant traditional owners – for example, by a blanket requirement of genetic testing in circumstances where the traditional owners recognize adopted family members as part of the group. The Full Court of the Federal Court has observed that, when Brennan J's formulation is read in its full context, including by reference to his Honour's discussion of inheritance and transmission of native title rights at 61, it is "plain that his Honour was not intending to lay down as an invariable requirement that there be strict 'biological descent'".[44] Rather, the Court considered (at [232]), Brennan J was

> expressing a requirement that there be an identifiable community with an entitlement to the present enjoyment of native title rights in relation to land arising from the adherence to traditionally based laws and customs. A substantial degree of ancestral connection between the original native title holders and the present community would be necessary to enable a group to be identified as one acknowledging and observing the traditional laws and customs under which the native title rights were possessed at sovereignty.

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[44] *Western Australia v Ward* (2000) 99 FCR 316 (***Ward FFC***) at [230]–[232] (Beaumont and von Doussa JJ) (with whom North J agreed at [682]), overruled in *Western Australia v Ward* (2002) 213 CLR 1 but without reference to this issue. See also *De Rose v South Australia* (2003) 133 FCR 325 at [196]–[201] (Wilcox, Sackville and Merkel JJ).

33. *Secondly*, an approach that has regard to traditional law and custom in interpreting and applying each limb of the tripartite test would align with articles 9 and 33(1) of the UNDRIP (see [10] above). In a 1995 paper prepared for the UN Working Group on Indigenous Populations, which drafted the UNDRIP, the Chairperson-Rapporteur noted that[45]

> historically speaking, indigenous peoples have suffered from definitions imposed by others. For example, in the past the criterion for membership of an indigenous population in certain countries was based upon parentage or blood quotient and this is now deemed discriminatory as it denies the right of indigenous people to determine their own membership. For this and other relevant reasons the Working Group would not consider it appropriate to develop a definition of its own without full consultation with indigenous peoples themselves.

34. *Thirdly*, that approach would also be consistent with case law examining the concept of "descent" in indigenous communities, including for the purposes of native title. The meaning of "descent" was recently considered in *Hackett (a pseudonym) v Secretary, Department of Communities and Justice* (2020) 379 ALR 248 in the context of construing the phrase "Aboriginal descent" in the *Adoption Act 2000* (NSW). Basten JA said that limiting the concept of descent to "'biological descent' in the sense found in a family tree" may be "unduly restrictive", noting evidence presented to the Australian Law Reform Commission, including from the then Aboriginal and Torres Strait Islander Social Justice Commissioner, about "the role of social descent within Aboriginal communities whose traditional laws and customs might provide for adoption or other social forms of inclusion into a family or community".[46] Similar remarks have been made by Justices of the Federal Court when considering the application of the test described in *Love*.[47]

35. Evidence of traditional laws and customs providing for group membership via adoption has been accepted in several native title cases.[48] In *Western Australia v Ward*, for example, the Full Court of the Federal Court found that there was "extensive evidence … concerning the

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[45] UN Working Group on Indigenous Populations, *Note by the Chairperson-Rapporteur on criteria which might be applied when considering the concept of indigenous peoples*, 21 June 1995 (E/CN.4/Sub.2/AC.4/1995/3) p 4 at [6].

[46] *Hackett (a pseudonym) v Secretary, Department of Communities and Justice* [2020] NSWCA 83 at [148] (Basten JA), [176] (McCallum JA agreeing), referring to Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia*, ALRC Report 96 (2003) at [36.34]–[36.35].

[47] *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 283 FCR 602 at [65] (Allsop CJ); *Helmbright v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2)* [2021] FCA 647 at [288]–[289] (Mortimer J).

[48] *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442 at [113]–[116] (Wilcox, French and Weinberg JJ); *Griffiths v Northern Territory of Australia* (2007) 165 FCR 391 at [36] and [132] (French, Branson and Sundberg JJ); *Western Australia v Sebastian* (2008) 173 FCR 1 at [123]–[141] (Branson, North and Mansfield JJ).

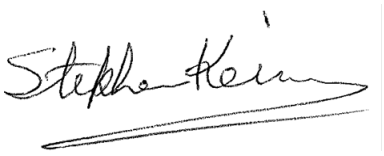
adoption (or growing up) of children by members of the Miriuwung and Gajerrong community", and considered that Brennan J's reference to "biological descent" in the first limb of the tripartite test "was not intended to exclude such people from membership of the community".[49] Further, when the test of biological descent was applied at the level of the *community*, rather than the individual, the evidence pointed to a "broad spread of links" that provided "sufficient proof of 'biological' connection between the present community and the community in occupation at the time of sovereignty".[50]

36. *Fourthly*, the implicit premise for the argument in favour of genetic connection appears to be that Aboriginality is a racial characteristic that can accurately be established through genetic testing. In the AHRC's submission, however, "there is no meaningful genetic or biological basis for the concept of 'race'".[51]

PART V: ORAL ARGUMENT

37. If the AHRC is given leave to be heard orally, it estimates it will require no more than 15 minutes to put its arguments.

Dated 9 March 2022



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[49] *Ward FFC* at [233]–[235] (Beaumont and von Doussa JJ) (with whom North J agreed at [682]).

[50] *Ward FFC* at [235] (Beaumont and von Doussa JJ) (with whom North J agreed at [682]).

[51] Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia*, ALRC Report 96 (2003) at [36.41], quoted in *Eatock v Bolt* (2011) 197 FCR 261 at [169] (Bromberg J).

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

and

SHAYNE PAUL MONTGOMERY
Respondent

ANNEXURE TO THE SUBMISSIONS OF THE AUSTRALIAN HUMAN RIGHTS COMMISSION

Pursuant to paragraph 3 of the *Practice Direction No 1 of 2019*, the Australian Human Rights Commission sets out below a list of the particular constitutional provisions and statutes referred to in its submissions.

No	Title	Provision(s)	Version
Commonwealth			
1.	*Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth)	s 3	As made No. 18, 2013
2.	*Australian Citizenship Act 2007* (Cth)	s 12	Current (Compilation No. 29)
3.	*Australian Human Rights Commission Act 1986* (Cth)	s 11	Current (Compilation No. 51)
4.	*Judiciary Act 1903* (Cth)	s 30	Current (Compilation No. 49)

5.	*Migration Act 1958* (Cth)	ss 189, 196, 198, 501	Current (Compilation No. 152)
6.	*Native Title Act 1993* (Cth)	Preamble	Current (Compilation No. 47)
New South Wales			
7.	*Constitution Act 1902* (NSW)	s 2	Current, compilation
Queensland			
8.	*Constitution of Queensland 2001*	Preamble	Current, compilation
South Australia			
9.	*Constitution Act 1934* (SA)	s 2	Current, compilation
Tasmania			
10.	*Constitution Act 1934* (Tas)	Preamble	Current, compilation
Victoria			
11.	*Aboriginal Heritage Act 2006* (Vic)	s 4(1), definition of 'Aboriginal person'	Current Authorised Version No. 025
12.	*Constitution Act 1975* (Vic)	s 1A	Current Authorised Version No. 223
13.	*Traditional Owner Settlement Act 2010* (Vic)	Preamble and s 1	Current Authorised Version No. 025
Western Australia			
14.	*Constitution Act 1889* (WA)	Preamble	Current Version 06-g0-00