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

SUBMISSIONS OF THE NATIONAL NATIVE TITLE COUNCIL SEEKING LEAVE TO INTERVENE

Part I: Publication

1 The applicant for intervention, the National Native Title Council (**NNTC**), certifies that this submission is in a form suitable for publication on the internet.

2 The following matters are canvassed in these submissions:

(a) Part II: Scope of proposed intervention;

(b) Part III: Why leave to intervene should be granted; and

(c) Part IV: A representative Aboriginal and Torres Strait Islander perspective.

Part II: Scope of proposed intervention

3 Pursuant to order 7 of the orders made on 2 December 2021 by Keane J, the NNTC seeks leave to intervene in support of the Respondent in this proceeding.

4 The Appellants in this proceeding are seeking to have overruled the decision in *Love v Commonwealth* (2020) 270 CLR 152 (***Love***), a landmark decision delivered by this Court less than two years ago. The NNTC and its members have significant concerns

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Filed on behalf of the National Native Title Council

about the immediate effect, as well as the wider implications for Aboriginal and Torres Strait Islander people that would result, if the Appellants' submissions are accepted by this Court. Those concerns form the basis of the NNTC's application to intervene and are outlined in these submissions.

5 Accordingly, the NNTC seeks leave to:

(a) make submissions (including orally at the final hearing) in support of the Respondent, in respect of the following matters:

(i) that leave to re-open Love is required and should be refused;

(ii) if *Love* is to be reopened, that it was correctly decided;

10 (iii) that it is not necessary or appropriate in this case to consider what other test or tests might be sufficient for determining who is an 'Aboriginal Australian' (to use, for convenience only, the term used in *Love*) in the context of alienage;

(iv) however, that if and when that issue arises, it must be recognised that 'Aboriginal Australian' and 'native title' are not synonymous, and must not be conflated in this context such that non-native title holding Aboriginal and Torres Strait Islander peoples are denied the protection of *Love*; and

(b) to otherwise appear and be heard at any case management conference or

20 interlocutory hearing.

Part III: Why leave to intervene should be granted

6 In support of its application for leave to intervene, the NNTC submits that who is or is not an 'Aboriginal Australian' is ultimately a matter for Aboriginal and Torres Strait Islander people and, at the very least, Aboriginal and Torres Strait Islander people should have a 'voice at the table' when these matters are deliberated. In these proceedings, the NNTC can be such a voice. Further, if the Appellants' submissions are accepted, this would remove a protection provided by this Court to the NNTC's members, such that they have a direct and substantial interest in the outcome of this proceeding. These matters are expanded upon below.

30 Beyond the unique perspective that the NNTC can bring, importantly, the NNTC it is not seeking to raise any new issues, or to repeat what has already been said by others;

its submissions will be confined in scope as outlined in paragraph 5 above. Its intervention will therefore neither delay nor 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.[1]

A matter for Aboriginal and Torres Strait Islander People

7 At the most fundamental level, the characterisation, in any context, of who is or who is not an 'Aboriginal Australian' should, in the NNTC's view, ultimately be a matter for Aboriginal and Torres Strait Islander peoples to decide, in accordance with their traditional law and custom. It is a question of self-determination, which is reflected in the United Nations Declaration on the Rights of Indigenous peoples (**Declaration**), endorsed by Australia, as entailing the right of Indigenous peoples 'to determine their own identity or membership in accordance with their customs and traditions…'.[2] The Declaration thus upholds respect for the authority of traditional laws and customs of Aboriginal and Torres Strait Islander peoples, the content of which is, of course, a matter of proof in each case.

8 This authority has not yet been fully appreciated in Australia. Rather, there are several definitions which have been developed to meet specific objectives, in specific contexts, including, following *Love*, in the context of alienage. It follows that, at the very least, the interests of Aboriginal and Torres Strait Islander groups, informed by traditional law and custom, should be at the forefront of such considerations.[3]

Aboriginal and Torres Strait Islander people should at least have a 'voice at the table'

9 If such issues are to be reopened, the NNTC submits that it is critical that there be a representative Aboriginal and Torres Strait Islander 'voice at the table', to support the Respondent in defending *Love* – something that Gageler J recognised was noticeably absent in that case. In his Honour's words (*Love* at 134):

> *The limits of judicial competence are reinforced by the limits of judicial process. The hearing of the special cases in these proceedings has been conducted at a time when a national conversation is occurring about the appropriateness of amending the Constitution to include an Aboriginal and Torres Strait Islander "Voice" to the Commonwealth Parliament.* ***Noticeably absent from the***

[1] See *Levy v State of Victoria* (1997) 189 CLR 579 (***Levy***) at 605 (Brennan CJ).
[2] United Nations Declaration on the Rights of Indigenous Peoples (UN doc A/RES/61/295, 13 September 2007) (supported by Australia, 3 April 2009), art 33(1).
[3] See for example, the concerns expressed by Merkel J in *Shaw v Wolf* (1998) 163 ALR 205, 268.

> ***viewpoints represented at the hearing has been the viewpoint of any Aboriginal or Torres Strait Islander body representing any of the more than 700,000 citizens of Australia who identify as Aboriginal or Torres Strait Islander.*** *On the basis of the case as presented,* ***I cannot presume that the political and societal ramifications of translating a communal, spiritual connection with the land and waters within the territorial limits of the Commonwealth of Australia into a legislatively ineradicable individual connection with the polity of the Commonwealth of Australia are able to be judicially appreciated.***
>
> (Emphasis added.)

10 The ongoing role of Aboriginal and Torres Strait Islander organisations in proceedings which raise issues of whether a person is an alien, or an Aboriginal Australian, has also been recognised by the courts.[4]

11 The NNTC is the national peak body for Aboriginal and Torres Strait Islander organisations operating in the native title sector and our members include Native Title Representative Bodies,[5] Native Title Service Providers,[6] Registered Native Title Bodies Corporate[7] and Traditional Owner Corporations.[8] Acting as the only national and coordinated voice for Aboriginal and Torres Strait Islander peoples' interests in the native title sector, the NNTC's purpose is to strengthen the native title system to improve the economic, social and cultural wellbeing of Aboriginal and Torres Strait Islander peoples.[9]

12 While the NNTC cannot speak for all persons who identify as Aboriginal and Torres Strait Islander (indeed no one person or body could), it can speak, through its board,[10] on behalf of its over 40 members from each mainland Australian state and territory, including the Torres Strait.[11] It can bring a unique representative Aboriginal and Torres Strait Islander peoples perspective to the issues raised by this proceeding, including on matters such as:

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[4] See *Helmbright v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 3)* [2021] FCA 955 at [34] (Mortimer J).
[5] *Native Title Act 1993* (Cth) s 203AD.
[6] *Native Title Act 1993* (Cth) s 203FE.
[7] *Native Title Act 1993* (Cth) s 55.
[8] *Victorian Traditional Owner Settlement Act 2010* (Vic).
[9] NNTC, *About the NNTC <https://nntc.com.au/about/>*.
[10] NNTC, *Our Governance* <https://nntc.com.au/about/our-governance>.
[11] NNTC, *Our Members* <https://nntc.com.au/our-members/>.

(a) the recognition of individuals within a wider traditional collective as applied under traditional law and custom, as well as through the NTA and alternative legislative and policy processes;

(b) understanding of the challenges of coming to a unified position amongst Aboriginal and Torres Strait Islander peoples on the appropriate 'test(s)' for 'Aboriginality' in various contexts, including constitutional contexts, given the plurality of groups and cultures;

(c) the impact of colonisation on Aboriginal and Torres Strait Islander peoples' connections to culture and land and the challenges presented by native title law; and

(d) the likely impacts of this proceeding on native title claims and rights holders.

The members of the NNTC have a direct and substantial interest in this proceeding

13 Currently, the NNTC's member organisations' constituents, who are recognised as native title holders, are constitutionally protected from being 'aliens' for the purpose of s 51(xix) of the Constitution, regardless of their citizenship and/or visa status. *Love* was, like *Mabo v Queensland (No 2)* (1992) 170 CLR 1 (***Mabo (No 2)***), an important step in this Country and the Court's journey of recognising the enduring connection that Aboriginal and Torres Strait Islander peoples have to this place now called Australia, and indeed towards a fuller appreciation of the enduring authority of tradition law and custom in Aboriginal societies. The Appellants' submissions, if accepted, would remove that protection, and – fundamentally – take a significant step backwards in that journey. It is on this basis that the NNTC's members have a direct and substantial interest in this proceeding.[12]

Part IV: A representative Aboriginal and Torres Strait Islander perspective

A. The decision of the Court in *Love* was correct and should not be overturned

(i) Leave to re-open is required and should be refused

14 In respect of these matters, the NNTC supports and adopts paragraphs [37] to [51] the written submissions of the Respondent dated 4 March 2022 (***RS***).

(ii) If reopened, Love *was correctly decided*

[12] *Levy* at 600-605 (Brennan CJ).

15 In circumstances where the Court either (1) grants leave to reopen *Love* or (2) determines that leave to reopen *Love* is not required, the NNTC respectfully submits that *Love* was correctly decided. In respect of this submission, the NNTC supports and adopts the RS at [52] to [82].

16 *Love* provides recognition of what Aboriginal and Torrs Strait Islander people, including those the NNTC represents, have always known, that people are part of 'an organic part of one indissoluble whole' with the land, and that this connection is of the most profound 'cultural and spiritual' significance.[13]

(iii) It is neither necessary nor appropriate in this case to consider what other test or tests might be sufficient for determining who is an 'Aboriginal Australian' for the purpose of s 51(xix) of the Constitution

17 In circumstances where the Court either (1) grants leave to reopen *Love* or (2) determines that leave to reopen *Love* is not required, the NNTC respectfully submits that this case is not the appropriate vehicle to consider the outer bounds of the test or tests for Aboriginality for the purpose of s 51(xix) of the Constitution.

18 Aboriginal and Torres Strait Islander persons must be central in any determination of identification and membership, in any context, but particularly in a constitutional context. It is a right recognised in the Declaration, and has also been expressed similarly in native title determinations.[14] Yet, in the context of alienage, aside from the individual applicants' whose liberty has been at stake, as it was in *Love*, and has largely been since,[15] left to non-Aboriginal or Torres Strait Islander lawyers to decide. This is wholly unsatisfactory.

19 Interventions by Aboriginal and Torres Strait Islander groups are important, and go some way to addressing the issue, but in these circumstances the timeframes make it difficult for representative organisations to acquire authoritative directions from their membership, given the critical importance of the issues at stake. As above, given the plurality of Aboriginal and Torres Strait Islander communities and organisations, there

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[13] *Love* at 260 [290] (Gordon J, citing *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 167), 314 [451] (Edelman J) and 276 [349] (Nettle J).

[14] For example, as a native title right, see Kirsty Gover, 'Tribal Constitutionalism and Membership Governance in Australia and New Zealand: Emerging Normative Frictions' (2009) 7(2) *New Zealand Journal of Public and International Law* 191; *Saibai People v State of Queensland* [1999] FCA 158; *Congoo v State of Queensland* [2001] FCA 868.

[15] With some exceptions, such as in *Helmbright v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2)* [2021] FCA 647 (***Helmbright (No 2)***).

is no one group that can speak for all Aboriginal and Torres Strait Islander peoples. And even for individual organisations like the NNTC, who can speak through a Board or some other governance structure, the narrow legal nature of and the timeframes imposed in this proceeding do not allow for the kind of extensive consultations with memberships that should, in the NNTCs view, be conducted in order to reach a collective view about the appropriate test to apply in factual circumstances like the ones leading to this appeal.[16] It is anticipated that similar peak and representative Aboriginal and Torres Strait Islander bodies would be required to undertake a similar process.

10 20 The National Agreement on Closing the Gap signed in July 2020 is demonstrative of the commitment of all levels of government to not only acknowledging the unique and enduring connection of Aboriginal and Torres Strait Islander peoples to this land but to no longer make decisions *for* and *about* Aboriginal and Torres Strait Islander peoples without the genuine involvement of the 'community' through representative bodies.[17] The Priority Reforms, including shared decision-making, support the recognition of the central position of First Peoples in determining matters which affect them. Consistent with this position, endorsed by all levels of Government, the NNTC submits that this Court needs to be able to hear from a broad representation of views of community as to what test is (or tests are) appropriate in this important

20 constitutional context.

B. 'Aboriginal Australians' and 'native title holders' are not synonymous, and must not be conflated in this context

(i) The essential significance of traditional authority in these matters

21 In the communities the NNTC knows and represents, traditional law and custom is determinative of belonging. Belonging is not impacted by whether the communities have claimed or hold native title. In addition, from the perspective of the NNTC, the operation of traditional law and custom is unaffected by the *Native Title Act 1993* (Cth) and its regulations. As has been recognised by Australian courts since the 1970s, traditional law and custom continues to hold many Aboriginal societies

[16] In particular because Aboriginal and Torres Strait Islander groups were not involved in the first instance proceedings and the formulation of the agreed facts in this case.
[17] Closing the Gap: In Partnership, *National Agreement on Closing the Gap* (July 2020) <https://www.closingthegap.gov.au/national-agreement/national-agreement-closing-the-gap>.

together in much the same way has it has for thousands of years. The NNTC reiterates that, for many Aboriginal Australians, this body of law and custom is well understood, and governs their day to day lives. It is nuanced and complex, and it is locally specific. In this respect, the NNTC considers that the majority judges in *Love* correctly referred to the findings of Blackburn J in *Milirpum v Nabalco*, noting that in Aboriginal societies (in this case the clans of Yirrkala):

> *... [t]here is an unquestioned scheme of things in which the spirit ancestors, the people of the clan, particular land and everything that exists on and in it, are organic parts of one indissoluble whole.*[18]

10 22 In the same case, Blackburn J also observed of the law of the Yirrkala clans:

> *The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called "a government of laws, and not of men", it is that shown in the evidence before me.*[19]

23 The law and custom governing belonging in the Aboriginal and Torres Strait Islander societies that the NNTC knows and represents, is highly adapted to Country, and is intrinsically connected to what Brennan J in *Mabo (No 2)* has called 'traditional authority' in the tripartite test. The point the NNTC makes here is that in their view,
20 only the community, exercising traditional authority in accordance with their traditional law and custom, can say who does or does not belong to that community.

24 Additionally, the NNTC notes that in *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*, Mortimer J pointed out, appropriately, that working through the implications of the *Mabo No (2)* tripartite test in *Love* requires careful thought, and that this working out is yet to be done. Her Honour said:

> *...the relationship between on the one hand what has been said in Love/Thoms about "Aboriginality" by reference to the High Court's decision in* Mabo (No

[18] Gordon J at 260 [290], 281 [365]; Edelman J 314 [451]. See also Nettle J at 349 [276,] citing Michael Dodson, 'Land Rights and Social Justice', in Yunupingu (ed), *Our Land Is Our Life: Land Rights – Past, Present and Future* (1997) 39 at 41. *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 167, quoted in *Ward* (2002) 213 CLR 1 at 64 [14], in *Griffiths* (2019) 93 ALJR 327 at 368 [153]; 364 ALR 208 at 255.
[19] *Millirpum v Nabalco* (1972) ALR 65; 17 FLR 141.

> 2) *on the common law's recognition of native title, and on the other hand the operation of the statutory scheme of native title in the* Native Title Act 1993 *(Cth), is in my respectful opinion yet to be worked through in detail.*[20]

25 In her reasons on this point her Honour referred to the case of *Northern Territory v Alyawarr*.[21] The NNTC s attention to some parts of the reasons in that case that they believe are critical. The Court observed that:

> *Recognition is not a process which has any transforming effect upon traditional laws and customs or the rights and interests to which, in their own terms, they give rise. The term 'extinguishment' merely refers to the withholding or withdrawal of recognition of native title rights and interests where the exercise of non-indigenous sovereignty is reflected in legislative or executive acts inconsistent with such recognition. Extinguishment, like recognition, is silent on the rights and interests which arise under traditional law and custom and the relationship which they may reflect between an indigenous society and its country.*[22]

26 A similar idea was expressed in *R v Toohey; Ex parte Meneling Station Pty Ltd* by Brennan J who said:

> *... the connection of the group with the land does not consist in the communal holding of rights with respect to the land, but in the group's spiritual affiliations to a site on the land and the group's spiritual responsibility for the site and for the land. Aboriginal ownership is primarily a spiritual affair rather than a bundle of rights.*[23]

27 The NNTC notes that in *Hirama v Minister for Home Affairs* the Minister for Home Affairs accepted, in the agreed facts of that case, that the applicant was a descendant of the Nyul Nyul people, in accordance with the native title determination made in *Manado (on behalf of the Bindunbur Native Title Claim Group) v State of Western Australia*,[24] and that the determination identified the Nyul Nyul people as including

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[20] *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 283 FCR 602 at 682[368]. See also Allsop CJ at 620 [64]-[65].
[21] (2005) 145 FCR 442.
[22] *Northern Territory v Alyawarr Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442 (***Northern Territory v Alyawarr***) at 448 [9] and 476-7 [114]-[116].
[23] *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327, 357.
[24] *Manado (on behalf of the Bindunbur Native Title Claim Group) v State of Western Australia* [2018] FCA 854.

persons who are descendants 'by adoption in accordance with traditional law and custom'.[25] This reflects the reality of the operation of traditional laws and customs in many of the groups the NNTC represents. It will reflect the reality of many groups who have not claimed or have not succeeded in proving, native title rights and interests. It is traditional law and custom, exercised in accordance with traditional authority, that matters, and its content will vary from group to group.

28 In sum, as Mortimer J observes in *Helmbright (No 2)*, whether or not a community holds native title does not touch on traditional authority, including law and customs governing membership and belonging.[26] The critical fact is that the relevant community is connected to Country through traditional law and custom.[27]

29 Belonging to an Aboriginal society is primarily about being included in a communal connection to land and waters, it is not primarily about a person's status or rights as an individual. When considering these foundational matters, at the very heart of what it means to be part of an Aboriginal society, the Court should bear this in mind. This foundational principle was acknowledged by the Court in *Northern Territory v Alyawarr:*[28]

> *The traditional law and custom which defines membership may allow for incorporation of persons who are recognised as members and who can therefore share in the communal ownership of the defined native title rights and interests without attracting the allocation of any particular individual rights and responsibilities with respect to land or waters. If the native title rights and interests are held communally, as in this case, they are not affected by a rule of membership which allows for recognition of particular persons according to traditional law and custom.*

30 In the same case, the Court makes the following, important observation:

> *The form of [the native determination] involves an acceptance that the community of native title holders is a living society. It is not consistent with*

[25] *Hirama v Minister for Home Affairs* [2021] FCA 648, 32-35. See also Congoo on behalf of the Bar Barrum People #9 v State of Queensland [2017] FCA 1510, Sch. 3(2). Expressed as a native title right, see Saibai People v State of Queensland [1999] FCA 158, 3(c)iii. (the Native Act defines Torres Strait Islander as 'a descendant of an indigenous inhabitant of the Torres Strait Islands.'

[26] *Helmbright (No 2)*, at [181] – [188].

[27] *Helmbright (No 2)*, at [321], [345].

[28] *Northern Territory v Alyawarr* at 475 [114].

the purposes of the NT Act, nor productive of any practical benefit to require that the laws and customs of indigenous society and the rights and interests arising under them be presented as some kind of organism in amber whose microanatomy is available for convenient inspection by non-indigenous authorities.[29]

(ii) 'Aboriginal Australians' must not be conflated with 'native title holders'

31 If *Love* is to be reconsidered, the NNTC wishes to make the following critical point: while all native title holders may be 'Aboriginal Australians', not all 'Aboriginal Australians' hold native title. So much flows from the judgments in *Love*, in recognising the existence of Aboriginal Australian identity distinct from the existence of native title rights. The NNTC acknowledges that some Aboriginal and Torres Strait Islander peoples do not know which first people they are connected to or belong to. This is a product of settler-colonialism.

32 Due to the devastating effects of colonisation on Aboriginal and Torres Strait Islander people, many of them will never attain legislative native title rights. Many people will never meet the stringent requirements for acquiring native title, because – as was the case for the *Yorta Yorta* community – aspects of their collective observance of traditional law and custom have been said to have been interrupted 'by the 'tide of history'. For many communities, any continuous observance of their traditional customs, or inhabitancy of their traditional lands, will have been precluded by the devastating impacts on their communities of displacement and dispossession effected by colonisation.[30] The inability to meet the legislative criteria required to establish their native title rights and interests clearly cannot mean that the Yorta Yorta people, do not enjoy cultural and spiritual connection to their land in accordance with traditional laws and customs. They clearly do have such a connection. The NNTC maintains this is the case for many other Aboriginal societies.

33 Earlier decisions demonstrate the error in suggesting that Aboriginal Australian identity only coalesces consequent to the existence of native title rights.[31] In these

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[29] *Northern Territory v Alywarr* at 476-7 [114] and [116]. See also *Sandy v Yindjibarndi Aboriginal Corporation (No 4)* (2018) 126 ACSR 370 at 513-4 [635]-[638]:
[30] See e.g. *Helmbright (No 2).*
[31] See *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; *Davidson v Fesl* [2005] FCAFC 183; *Violet Carr and Others on Behalf of the Wellington Valley Wiradjuri People v Premier of New South Wales* [2013] FCA 200.

decisions, no suggestion is made that the relevant parties are not Aboriginal or Torres Strait Islander people, notwithstanding the unavailability of native title rights. Nobody could rightly deny that members of the *Yorta Yorta* community are 'Aboriginal Australians'. Nobody could rightly say that their connection to Australian lands and waters has been 'washed away', or that they cease to 'belong' to this place. *Love* makes this clear.

34 This plainly highlights the dangers of conflating 'native titleholders' with 'Aboriginal Australians' in determining the appropriate test or tests in the entirely separate context of alienage. In *Helmbright (No 2)* Mortimer J set out some of the other practical challenges that would arise.[32]

35 Aboriginal and Torres Strait Islander people possess a *sui generis* cultural and spiritual connection,[33] a connection that persists, as determined by Indigenous laws and traditional customs,[34] being a 'genuine, ongoing, fundamental sense of belonging and obligation to those parts of Australian land and waters that belonged to their ancestors since time immemorial'.[35] To abrogate this connection by reference to the recognition of native title rights would be a gross mischaracterisation of a fundamental feature in the identity and lives of Aboriginal and Torres Strait Islander people.

***(iii) It is therefore not necessary for the legal tests of 'Aboriginality' for both native title and non-alienage to be aligned, and this is not what occurred in* Love**

36 Native title and non-alienage are two distinct contexts, and do not necessitate an equivalent test. As mentioned, different tests have been developed to meet different objectives, in different contexts.

37 Lower courts have also recognised that the test for who is an Aboriginal Australian for the purposes of s 51(xix) of the Constitution, does not require a person to hold, or be entitlement to hold, native title rights.[36] As canvassed in detail by Mortimer J in *Helmbright (No 2)*, none of the majority judges in *Love* (not even Nettle J) held otherwise.[37]

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[32] *Helmbright (No 2)* at [272].
[33] *Love* at 190 [73] – [74].
[34] *Love* at 260-1[290].
[35] *Helmbright (No 2)* at [215].
[36] *Helmbright (No 2)* at [213]; *Hirama v Minister for Home Affairs* [2021] FCA 648 at [11].
[37] See in particular [143] and [213].

38 The *ratio* expressed in *Love* at 192 [81] per Bell J is that:[38]

> *… 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.*

39 As explained by Mortimer J in *Helmbright (No 2),* following a meticulous consideration of each of the judgments in *Love,* the *Mabo (No 2)* test was applied in *Love* without any additional requirement that the plaintiffs hold, or be entitled to hold, native title rights.

40 Justice Bell found that the plaintiffs' arguments operated independently of native title, at 189 [71]:

> ***Their argument does not depend on the holding of native title rights and interests.*** *In many instances those rights and interests have been extinguished. The plaintiffs' and Victoria's argument depends upon the incongruity of the recognition by the common law of Australia of the unique connection between Aboriginal Australians and their traditional lands, with finding that an Aboriginal Australian can be described as an alien within the ordinary meaning of that word.*
>
> (Emphasis added.)

41 This statement recognises that a person may be an Aboriginal Australian for the purposes of s 51(xix) of the Constitution, without being a person who holds, or is entitled to hold, native title rights.

42 This is further reflected in the judgement of Nettle J at 257 [277]:

> *Being a matter of history and continuing social fact,* ***an Aboriginal society's connection to country is not dependent on the identification of any legal title in respect of particular land or waters within the territory****. The protection to*

[38] For the application of this statement as *ratio* see: *Webster v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs and Another* (2020) 277 FCR 38, 47 [49] (Rares J); *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 283 FCR 602, 630 [99] (Besanko J); *Helmbright (No 2)* at [4]-[5], [107]-[108], [122], [134]-[149], [211], [215], [235], [249]-[250], [254] (Mortimer J); *Hirama v Minister for Home Affairs* [2021] FCA 648 [31], [46] (Mortimer J); *Hopkins v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs and Another* (2020) 275 FCR 42, 53 [36] (Logan, Wigney and Gleeson JJ); *Chetcuti v Commonwealth* (2021) 392 ALR 371, 375 [14] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

> *which it gives rise cannot be cast off by an exercise of the Crown's power to extinguish native title.*
>
> (Emphasis added, footnotes omitted.)

43 This passage is not concerned with the survival of native title, and explicitly recognises that the existence of a particular Aboriginal society, and whether a person is an Aboriginal Australian, is a matter wholly separate from whether a particular Aboriginal society holds, or is entitled to hold, native title.[39]

44 Similarly, Gordon J found at 280 [362] - [363]:

> *Native title is a significant acknowledgement of the position of Indigenous peoples that took place long after Federation. Native title recognises that, according to their laws and customs, Aboriginal Australians have a connection with country and have rights and interests in land and waters.* ***But those laws and customs are not limited to rights and interests****. They entail obligations consistent with Aboriginal Australians being custodians of the land and waters.*
>
> *It is connection with land and waters that is unique to Aboriginal Australians. As history has shown, that connection is not simply a matter of what the common law would classify as property…* ***the tendency to think only in terms of native title rights and interests must be curbed.***
>
> (Emphasis added, footnotes omitted.)

45 Nothing in these passages suggest that Gordon J considered it necessary that, for a person to satisfy the description of Aboriginal Australian for the purposes of s 51(xix) of the Constitution, they be a native title holder.

46 A similar view is expressed by Edelman J, who found at [451]:

> *Native title rights and interests require a continuing connection with particular land. However, underlying that particular connection is the general spiritual and cultural connection that Aboriginal people have had with the land of Australia for tens of thousands of years...* ***Sometimes events, including the cessation of the existence of a particular Aboriginal society,***

[39] See *Helmbright (No 2)* at [188].

> ***cause the loss of native title rights to land. But the loss of those rights to, and the relationship with, particular land, or even the effluxion of particular Aboriginal societies, does not extinguish the powerful spiritual and cultural connections Aboriginal people have generally with the lands of Australia.***
>
> (Emphasis added, footnotes omitted.)

47 His Honour went on to find that the plaintiffs were Aboriginal Australians and were not aliens within the meaning of s 51(xix) of the Constitution,[40] without reference to any requirement of showing the existence of native title rights on the part of either plaintiff.

48 In *Helmbright (No 2)*, Mortimer J's view, with which the NNTC agrees, was that, correctly understood, the tripartite test articulated by Brennan J in *Mabo (No 2)* is not a test for 'native title', but rather a test for membership of an identifiable group, clan or community, being a *prerequisite* to holding native title, namely (at [148] of *Helmbright (No 2)*):

> *(a) biological descent from "the indigenous people", which is a reference to an identifiable group, clan or community; and*
> *(b) mutual recognition of a person's membership of that same group, clan or community by the person concerned and by elders or others enjoying traditional authority within that group, clan or community. In this context, what is required is authority to permit or preclude membership that has its source in the norms handed down from generation to generation, since prior to European settlement.*

49 As Mortimer J further explained, nothing in the way the majority judges applied the test in *Love* necessities any modification of Brennan J's test in the context of alienage (at 229-230 [211]-[214]):[41]

> *In my respectful opinion, the analysis I have set out above of the four majority judgments in* Love/Thoms *discloses that there is no modification of the* Mabo (No 2) *test by any of the majority justices. Indeed, to have done so would, in my respectful opinion, have required some additions or modification to the statement at [81] in the reasons of Bell J.*
>
> *It is true that each of the majority justices uses indigeneity, and connection to land, in different ways. Each does rely on the connection of Aboriginal and Torres Strait Islander people to land and waters in Australia from prior to sovereignty as part of their reasoning for rejecting the alienage of non-citizens*

[40] *Love* at 318 [462], 321 [468].
[41] For the full explanation of why, see *Helmbright (No 2)* at [150]-[241].

who are Aboriginal Australians in accordance with Mabo (No 2). *This is a core division between the majority and the minority.*

As I have sought to explain, Bell, Gordon and Edelman JJ clearly do not confine their legal analysis, or their fact finding, to only those non-citizens who are, or can prove they should be recognised as, native title holders under the Native Title Act. As I have also sought to explain, through the key passages of his Honour's reasons, I do not interpret Nettle J's reasoning as expressed or confined in that way either. Although his Honour employs references to Yorta Yorta *in several key passages in his reasons, he does so in the context of describing survival of Aboriginal societies, whose traditional law connects them to country in the sense described by Professor Dodson in the quotation at [276] of Nettle J's reasons: that is, a connection between community and country which is not dependent on the forensic satisfaction of the elements of s 223 of the Native Title Act. As I explain below, nor do I interpret what Nettle J said in* Chetcuti *as confirming his Honour did impose some kind of "proof of continuing native title" requirement onto the test for alienage, using* Mabo (No 2).

Accordingly, in my respectful opinion, there is no basis to find that the understanding I have of the Mabo (No 2) test as explained at [148] above, must be modified or changed because of the majority reasoning in Love/Thoms.

(iv) In this context, while native title is, rightly, sufficient to demonstrate 'Australian Aboriginality', it need not be necessary

Whilst the majority in *Love* adopted the *Mabo (No 2)* test in that case, the prospect of using a test other than Brennan J's tripartite test to demonstrate that an Aboriginal Australian is a non-alien was left open.[42] For the reasons already given above, the NNTC does not consider it necessary or appropriate to delve into that question on this occasion, its members' interests already being clearly protected by the current position, which by intervening it seeks to defend. But if and when that question does arise, the NNTC wishes to impress upon the Court the following critical points:

(a) native title holders represent only a portion of Aboriginal and Torres Strait Islander peoples who 'belong' to this place, are connected to Country and to Australian land and waters in accordance with traditional law and custom, and on that basis are equally deserving of *Love's* protection; and

[42] *Love* at 192 [80] (Bell J), 317 [458] (Edelman J).

(b) as acknowledged by the Appellants,[43] the tripartite test is not, and does not purport to be, a universally applicable test of 'Aboriginality';[44]

(c) given the plurality of Aboriginal and Torres Strait Islander communities and organisations and their traditions, customs and experiences, and the different contexts in which a test is currently adopted, a single legal test for determining who is an Aboriginal Australian may be inappropriate;

(d) it follows from those differences that at least some other test or standard may be sufficient to determine who is an 'Aboriginal Australian' for the purposes of s 51(xix) of the Constitution; and

10 (e) by reason of these matters being decided by this Court there is no question of sovereignty, of which the Constitution is a demonstration, being infringed.

Part V: Estimate of time for oral argument

51 The intervener estimates that 20 minutes will be required for the presentation of its oral argument.

Dated: 9 March 2022

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[43] Submissions of Appellants and Attorney-General for the Commonwealth (Intervening) dated 28 January 2022, at [51].
[44] See e.g. *Hackett (a pseudonym) v Secretary, Dept of Communities and Justice* (2020) 379 ALR 248, wherein a child was found to be an Aboriginal Australian for the purposes of the *Adoption Act 2000* (NSW), notwithstanding that she did not satisfy the tripartite test.

ANNEXURE – LEGISLATION REFERRED TO IN SUBMISSIONS

	Description of legislation	*Version*	*Reference*
1	*Native Title Act 1993* (Cth)	Current (Compilation No. 47)	[21], [24]