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 IN REPLY OF THE APPELLANTS

Filed on behalf of the Appellants

PART I PUBLICATION

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

PART II REPLY

Overruling *Love*

Leave to reopen is not required

2. The Appellants' submission that *Love* lacks a ratio does not overlook *Love* at [81]: cf Respondent's Submissions (**RS**) [37], [39]. While the majority agreed on a form of words at [81] in an understandable attempt to provide guidance to lower courts, Nettle J's judgment demonstrates that his understanding of the meaning of the agreed form of words differed from that of the other members of the majority, with a resultant difference in the class of "non-aliens": CS [16]. The different meaning is not denied by the fact that the majority either accepted or assumed (eg *Love* at [462]) that Mr Thoms (but not Mr Love) satisfied the tripartite test: cf Submissions of Attorney-General for Victoria (**VS**) at [8.1]-[9]. That Mr Thoms satisfied both tests does not show that the tests were the same.

To the extent necessary, leave should be granted

3. RS [43]-[51] ignore the criteria in *John*,[1] and in doing so overstate the height of the bar. While previous decisions are not lightly overruled, the criteria in *John* are directed to identifying the circumstances in which it may be appropriate to take that step.

4. It is no answer to the difficulties and uncertainties arising from *Love* to say that they can be "worked out over time": cf RS [50]; VS [20]. It is true that subsequent proceedings may bring clarity to certain questions of principle: including whether the first limb of the tripartite test requires a genetic link to the inhabitants of Australia prior to the acquisition of sovereignty; and whether the third limb is to be applied in accordance with Nettle J's understanding, or the wider view of the other members of the majority. But that will not cure the difficulty that confronts officers seeking to mould their conduct within the limits of Commonwealth power, for *Love* creates a limit on their statutory duty to detain the content of which turns on complex inquiries as to the content of particular traditional laws and customs (which, as the National Native Title Council (**NNTC**) submits at [27], will "vary from group to group"). This is not an "extreme example" (cf VS [19]), nor does it

[1] *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 (***John***) at 438-439.

require supporting affidavit evidence:[2] it is an obvious consequence that necessarily flows from the terms of the tripartite test. The difficulties are exacerbated by the judgment under appeal, as it creates a need to engage in such inquiries even with respect to non-citizens who make no claim to have indigenous ancestors (let alone ancestors from the traditional society of which they claim membership). The difficulty in applying the tripartite test in the context of s 189 is more acute than other contexts (cf RS [50]; VS [21], [24]), because officers must decide whether the clear statutory command to detain a person is actually beyond Parliament's power, in circumstances where a wrong answer results either in unlawful deprivation of liberty or failure to perform a statutory duty.

5. The number of people released as a result of *Love* is not a factor that weighs against reopening: cf RS [51]; VS [26]. When *John* refers to a decision being "independently acted upon", it is referring to third parties "ordering their affairs" in reliance on a decision;[3] not to the executive acting in accordance with the law. Nor does the claim that overruling *Love* would adversely affect the rights and interests of individuals advance matters,[4] given that the question is whether those rights were correctly held to exist.

Love was wrongly decided

6. In this appeal the Respondent directly challenges the "settled understanding" of s 51(xix) identified by Kiefel CJ, Gageler, Keane and Gleeson JJ in *Chetcuti* that "the aliens power encompasses both power to determine who is and who is not to have the legal status of an alien [the first aspect] and power to attach consequences to that status [the second aspect]".[5] That is clear from RS [60]-[64] and [70], where it is said to be "contrary to basic constitutional principle" (RS [70]) for Parliament to have power to determine who is and is not an alien (even subject to the *Pochi* limit). Indeed, the Respondent adopts the extreme position of treating statutory citizenship as irrelevant to status as an alien, stating that the significance of citizenship is "no more than" that a person who is not a citizen "is

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2 See, eg, *Commonwealth v Hospital Contribution Fund of Australia* (1982) 150 CLR 49 at 56-57 (Gibbs CJ).

3 See *John* (1989) 166 CLR 417 at 439, referring to *Queensland v Commonwealth* (1977) 139 CLR 585 (*Second Territory Senators Case*), where the previous decision had been acted upon in the sense that senators had been elected under the legislation held to be valid. In *John* itself, a factor against reopening was that the decision "has been acted upon by taxpayers as a basis for ordering their affairs".

4 Cf RS at [51]; Australian Human Rights Commission (**AHRC**) Submissions at [15].

5 *Chetcuti v Commonwealth* (2021) 95 ALJR 704 at [12] (emphasis added). The settled understanding is supported by authorities including *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at [2], [190]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at [21]-[31], [80], [114], [209]-[210]; *Love* (2020) 270 CLR 152 at [5], [84], [165]. The first aspect of the power is subject to the limitation in *Pochi v Macphee* (1982) 151 CLR 101 at 109.

not entitled to the benefits and burdens which under the law of the land attach to the statutory status of citizen" (RS [71]). Thus, he asserts, "[a]bsence of statutory citizenship is not a declaration by Parliament that the person is a constitutional alien" (RS [71]). But that is exactly what it is.[6] Citizenship is the legal status by which Parliament identifies the persons who are admitted as full members of the Australian body politic. An alien is any person who has not been admitted to such membership according to the test prescribed by law (whether statute or, where it applies, the common law).

7. In place of the "settled understanding" of 51(xix), the Respondent urges the Court to apply the "essential meaning" of the word alien, which he asserts can be done despite his acknowledgment that that word did not have a "fixed or immutable meaning" at the time of Federation: RS [65]-[66]. However, the proposition that the Court can itself identify aliens independently of Parliament's choice, by asking whether a person is "a stranger or other, who did not belong here" (RS [66]), is the very proposition that the "settled understanding" rejects. It does so because it recognises that, contrary to RS [61] and VS [37], the word "alien", like other topics of juristic classification,[7] has a range or "circumference" [8] of available meanings. Provided Parliament selects criteria that fall within that range, those criteria are determinative of status as an alien.

8. The Respondent attacks the "settled understanding" of s 51(xix) because he recognises that the decision of the majority in *Love* cannot be reconciled with that understanding. That follows because the majority's reasoning in *Love* requires the Court to decide that persons who satisfy the tripartite test "cannot possibly be aliens on the ordinary understanding of the word", despite the fact that Parliament has treated some of them as aliens by applying longstanding criteria directed to that very status. There being no plausible basis to impugn Parliament's criteria for citizenship, *Love* can be correct only if Parliament's criteria can be put to one side, contrary to the "settled understanding".

9. The Respondent attempts to derive some textual basis for the holding in *Love* from the 1967 amendments repealing s 127 of the *Constitution* and amending s 51(xxvi): RS [59]. In fact, the amendment to s 51(xxvi) points against the correctness of *Love*, for the reasons given at CS [38]. As to s 127, the better view is that it governed nothing more than the

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6 *Love* (2020) 270 CLR 152 at [10] (Kiefel CJ), [92] (Gageler J), [166] (Keane J).

7 See *Love* (2020) 270 CLR 152 at [86]-[88] (Gageler J). In addition to the examples cited there, see also *Watson v Lee* (1979) 144 CLR 374 at 398 (Stephen J, concerning "legal tender").

8 *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 at 458 [20] (the Court).

working out of numbers.[9] In any case, accepting that Aboriginal people who were British subjects were part of "the people of the Commonwealth"[10] provides no foundation for the assertion that those who were not British subjects nevertheless had that status.

10. The Respondent asserts that the majority in *Love* re-stated the common law concerning status, holding that Aboriginal people became British subjects under the common law by reason of being inhabitants of the lands and waters of Australia: RS [53(a)], [54]-[55]. *Love* did no such thing. No re-statement or development of the common law with respect to status was required, because from the moment the Crown acquired sovereignty the indigenous inhabitants of Australia became British subjects by reason of existing common law rules applicable to everyone: CS [44], fn 78-79.[11] The Respondent's reliance on *Mabo (No 2)* to submit otherwise is misplaced, for it was expressly recognised in that case that the status of Aboriginal persons as British subjects was a precursor to, not a consequence of, the common law's recognition of their rights or interests in land or waters existing under the traditional laws and customs of each Aboriginal society.[12]

11. The Respondent borrows from native title law where it suits him, but he ignores it where it would stand in his way. For example, he asserts that a "relationship to the land and waters of Australia exists as a result of membership of an Aboriginal society itself", whether or not a connection has been maintained with the land or waters under traditional laws and customs observed by that Aboriginal society: RS [78]. That amounts to saying that for the purposes of determining the status of Aboriginal persons they must be taken to have a connection to relevant land and waters, whereas in the context of native title such a connection must be proved.[13] If it is the existence of a traditional connection with land and waters within Australia that provides the rationale for treating people who satisfy the tripartite test as non-aliens, as a matter of principle that connection must be proved.

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9 *Love* (2020) 270 CLR 152 at [110] (Gageler J), citing Sawer, "Grant of Franchise to Aborigines by the Commonwealth", in House of Representatives, *Report from the Select Committee on Voting Rights of Aborigines* (1961) at 38-39 (Appendix IV). Sawer observed that "the Founders … thought a count of aborigines would be difficult to achieve accurately, and might give an unfair advantage to particular States": at 39.

10 Cf *Hwang v Commonwealth* (2005) 80 ALJR 125 at [16]-[17] (McHugh J).

11 See *Love* (2020) 270 CLR 152 at [9], (Kiefel CJ), [104], [110] (Gageler J), [160]-[162] (Keane J). It follows that the status of 'subjects' was attained by the indigenous peoples well before the passage of the *Australian Courts Act 1828*: cf RS [55].

12 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (***Mabo (No 2)***) at 38 (fn 93) (Brennan J), 182 (Toohey J). To similar effect see Deane and Gaudron JJ at 80 ("Thereafter [ie after 7 February 1788], within the Colony, both the Crown and its subjects, *old and new*, were bound by that common law" (emphasis added)).

13 See, eg, *Western Australia v Ward* (2002) 213 CLR 1 at [18]; *Native Title Act 1993* (Cth) s 223.

Biological descent

The Court can and should determine the scope of the first limb

12. The lawfulness of the Respondent's detention did not depend upon whether he is in fact an Aboriginal person in accordance with the tripartite test. It depended upon whether his detention was authorised and required by s 189(1) of the *Migration Act 1958* (Cth). In circumstances where it is "uncontroversial" that the Respondent is an unlawful non-citizen (Cause Removed Book (**CRB**) 21 [48]), in its terms s 189(1) authorised and required his detention unless – in its application to the Respondent – s 189(1) would exceed the legislative power of the Commonwealth under s 51(xix) of the Constitution, such that it must be partially disapplied pursuant to s 3A of the Act or s 15A of the *Acts Interpretation Act 1901* (Cth).

13. The legislative power of the Commonwealth under s 51(xix) is not confined to making laws that are binding upon people who actually are aliens.[14] It supports laws "with respect to" aliens, meaning laws that have a "sufficient connection"[15] to aliens. Such a connection exists where a person is reasonably suspected of being an alien (which is why s 189(1) authorises the detention of Australian citizens, if it is objectively reasonable to suspect them of being aliens).[16] Accordingly, the partial disapplication of s 189(1) is required only if it is not objectively reasonable to suspect that the Respondent is an alien. As that question involves determining the limits of Commonwealth legislative power, it is a question for a court (although officers may attempt to mould their behaviour in accordance with their assessment of how a court will answer the question[17]). Given the above, the lawfulness of the Respondent's detention depended on whether it was objectively reasonable to suspect that the Respondent did not satisfy the tripartite test. If it was, then in its application to the Respondent s 189(1) had a sufficient connection to s 51(xix), and there was no basis to partially disapply it: see CS [57].

14. On the facts, the detaining officer suspected that the Respondent did not satisfy the first limb of the tripartite test because a person "must show biological descent and therefore

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[14] See, eg, *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 295 (Mason CJ), 317-318 (Brennan J), 334-335 (Deane J), 358-359 (Dawson J), 374-375 (Toohey J), 387 (Gaudron J), 394 (McHugh J).

[15] Eg *Spence v Queensland* (2019) 268 CLR 355 at [57]-[60] (Kiefel CJ, Bell, Gageler and Keane JJ).

[16] See, eg, *Milicevic v Campbell* (1975) 132 CLR 307 at 319-320 (Mason J), 321 (Jacobs J); *Ruddock v Taylor* (2005) 222 CLR 612 at [27]-[28], [31]-[36] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

[17] See, by way of analogy, *Re Adams and the Tax Agents' Board* (1976) 12 ALR 239 at 245 (Brennan J).

adoption is not sufficient to satisfy the first limb" (CRB 28 [59(2)]).[18] SC Derrington J concluded that that suspicion was not objectively reasonable (CRB 31 [68]). In order to determine this appeal, this Court must decide whether that conclusion was correct. The assertion that the Court should not entertain the arguments in CS [51]-[56] about whether biological descent is required is untenable, for that would require the Court to determine the appeal with its eyes closed to the very basis upon which the detaining officer suspected that the Respondent is an alien: cf RS [83]; VS [41]; NLC [13].

15. Further, the first limb of the tripartite test was expressed by Brennan J in *Mabo (No 2)* as requiring "biological descent". The majority in *Love* endorsed that limb in terms that the Respondent and all interveners say is part of the *ratio*. If it is, then "biological descent" must have a legal meaning that lower courts are bound to apply. Indeed, one of Mr Montgomery's submissions before SC Derrington J was that the legal meaning of the first limb includes a person who has been adopted pursuant to traditional law and custom.[19] The legal meaning of that limb was therefore squarely in issue. In those circumstances, the Appellants do not require any "indulgence" or exercise of discretion to permit them to argue that s 189 required the Respondent's detention because he is not biologically descended from an indigenous person: cf RS [88] fn 153; NLC [14].

16. The suggestion that this appeal may have unwarranted implications for native title law or in other contexts should be rejected: cf RS [84], [87].[20] A level of precision is required in identifying a limit on constitutional power that may not be appropriate in determining eligibility for social security benefits or for native title purposes. The Commonwealth parties do not propose a universal test for "Aboriginality": CS [51]-[52].

The first limb is limited to biological descent

17. The Respondent submits that the majority's endorsement in *Love* of the "biological descent" limb of the tripartite test as formulated by Brennan J in *Mabo (No 2)* at 70,[21] should be understood as including "*sub silentio* persons who form part of an Aboriginal society by adoption in accordance with the traditional laws and customs of that society":

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[18] Appellants' Book of Further Materials, 8-9 (McBroom affidavit [13.1]).

[19] Appellants' Book of Further Materials, 22-23, 26-27 (Respondent's submissions at [12]-[13], [27], [28(b)], and especially [29]); 41-43 (Appellants' submissions at [48], [49], [50]); 48-55 (Transcript of oral hearing pp 15-18, 37-40]).

[20] See also NNTC at [4]; NLC at [6].

[21] The majority endorsed the formulation at 70, not the observations made earlier at 61: cf NLC at [25]; AHRC at [32]. Nor, given its adoption in *Love*, can the requirement of "biological descent" be dismissed as "dicta": cf NLC at [22].

RS [91]. That submission would subsume the first limb of the tripartite test into the third limb. It would also ignore the ordinary meaning of the word "biological": CS [53]. The submission therefore amounts to the contention that the "biological descent" limb of the tripartite test should be abandoned. If the Respondent wishes to advance that argument, he must support the application to re-open *Love*.

18. A requirement for biological descent does not create an impossible standard requiring scientific proof of genetic ancestry over many generations.[22] To the contrary, Australian courts have long viewed some degree of biological descent as a necessary, and sometimes as a sufficient, indicia of aboriginality: CS [54]; NLC [17]. Proof of descent can be established by evidence such as birth certificates and other written historical evidence, and by oral histories (including as represented in genealogies compiled by anthropologists in the past). The absence of evidence of a "genetic test" is irrelevant: cf RS [86].

19. If the first limb were to be extended to encompass customary adoption, there would be even stronger grounds for concluding that *Love* implicitly concedes sovereignty to Aboriginal societies: CS [45]. That is so despite the fact that the Court is the ultimate arbiter of whether a person meets the tripartite test: RS [79]; VS [39]. That follows because, if cultural adoption were sufficient, status as a "non-alien" would depend solely on mutual recognition between the person and an Aboriginal society. That is highlighted by the proposed interveners' submissions, who emphasise that the question of who is "Aboriginal" should be a decision for Aboriginal persons alone.[23] While that is entirely appropriate in many contexts and for many purposes, in the context of a limitation on constitutional power it amounts to saying that the decisions of Aboriginal societies alone may place people within or outside the scope of s 51(xix). When that submission is considered together with RS [94], which asserts that the judgment as to membership is to be made "by reference to current norms and customs of the Aboriginal community concerned" (ie without any requirement that those norms and customs be able to be traced substantially uninterrupted to a time before sovereignty[24]), the extent of the limit on the power of the Australian Parliament to determine who will be admitted to membership of the Australian body politic is manifest.

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22 Cf VS at [45].

23 NNTC at [21], [23]; NLC at [10]; AHRC at [33].

24 Cf *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at [78]-[89] (Gleeson CJ, Gummow and Hayne JJ).

Notice of Contention

20. The Respondent's Notice of Contention will only be reached if the Court concludes that *Love* was correctly decided, but the Appellants succeed in persuading the Court that the primary judge erred in holding that the detaining officer's suspicion was unreasonable. In that scenario, Dr Powell's report was irrelevant, for it was not directed to proving that the Respondent was biologically descended from Aboriginal persons. As Dr Powell stated: "I have no information about the identity of the Applicant's [ie Respondent's] biological father's antecedents, and for that reason I am unable to give opinion on this matter".[25] To the extent Dr Powell's report provided any information relevant to that issue, it was based on the evidence of the Respondent and his mother which Ms McBroom had already considered.[26] The fact Dr Powell referred to an Elder's statement that the Respondent's "bloodline" is Munanjali is immaterial, for read in context the Elder plainly did not use that word to assert "biological descent": cf RS [34].

Competency of the appeal

21. It is well established that an appeal lies to this Court under s 73 of Constitution from the issue of habeas corpus.[27] That constitutional context is critical to the interpretation of s 24(1)(a) of the *Federal Court of Australia Act 1976* (Cth) (the **Federal Court Act**), for two reasons. *First*, it means that the question of construction ultimately concerns the identification of the court to which an appeal lies, rather than whether an appeal should exist at all. There is therefore no question of the protection of liberty: cf RS [13]-[15].

22. *Second*, if s 24(1) does not confer a right of appeal from a single justice to the Full Federal Court against the grant of habeas, the effect is to exclude this Court's appellate jurisdiction pursuant to s 73 of the Constitution. That follows because s 33(2) of the Federal Court Act prevents an appeal to this Court from a single judge of the Federal Court exercising original jurisdiction. As a result, important questions of constitutional law, such as those that recently arose in *AJL20*, would be excluded from appellate review. It is most unlikely that Parliament intended to limit this Court's jurisdiction under s 73 of the Constitution in that way, particularly as sub-ss 33(4A) and (4B) of the Federal Court Act expressly create exceptions for the purposes of s 73. That powerfully indicates that,

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25 CRB 30 [66], quoting Dr Powell's report at RBM 49 [17].

26 CRB 28 [59(3)].

27 *Attorney-General (Cth) v Ah Sheung* (1906) 4 CLR 949 at 951 (Griffith CJ, Barton and O'Connor JJ); *Lloyd v Wallach* (1915) 20 CLR 299 at 306-307 (Isaacs J); *R v Snow* (1915) 20 CLR 315 at 338 (Isaacs J), 354-355 (Higgins J). See also *Ex parte Walsh & Johnson; In re Yates* (1925) 37 CLR 36 at 78 (Isaacs J).

as a matter of construction, s 24(1) does confer a right of appeal against the grant of habeas.

23. The general language of s 24 (particularly when read with the wide definition of the term "judgment" in s 4) comfortably accommodates that conclusion.[28] It receives further contextual support from s 24(1C)(a), which confirms there is a right to appeal from an interlocutory judgment "affecting the liberty of an individual", thereby necessarily implying that the Full Federal Court has jurisdiction with respect to such an appeal. Finally, it is a conclusion that coheres with the recent confirmation that s 23 of the Federal Court Act is the source of the power both to issue a writ of habeas corpus and to make an order in the nature of habeas corpus.[29] That being so, it is natural that an appeal against the grant of habeas would be subject to the same principles that govern appeals against other orders made pursuant to s 23 of the Federal Court Act.

24. The constitutional framework outlined above means that the Respondent's reliance on decisions made in England and Wales in the late 19th and early 20th centuries is misplaced: RS [14]-[19]. In light of this Court's early recognition of appeals against habeas under s 73,[30] by the time the Federal Court Act was enacted the premise for the English cases no longer held, because it was not a "fundamental principle" or "systemic feature" of the Australian legal system that there could be no appeal from the grant of habeas.[31] To the contrary, there are numerous examples of such appeals.[32]

25. In light of the above, the Respondent's submission that *Ruddock v Vadarlis*[33] and *Commonwealth v AJL20*[34] were decided per incuriam should be rejected: cf RS [20]. The

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28 *Lloyd v Wallach* (1915) 20 CLR 299 at 306-307 (Isaacs J) distinguishing *Cox v Hakes* (1890) 15 AC 506.

29 *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 283 FCR 602 at [20]-[23] (Allsop CJ), [187], [199]-[201], [211]-[214] (Mortimer J), Besanko J agreeing at [75].

30 *Attorney-General (Cth) v Ah Sheung* (1906) 4 CLR 949 at 951 (Griffith CJ, Barton and O'Connor JJ); *Lloyd v Wallach* (1915) 20 CLR 299 at 306-307 (Isaacs J).

31 See, eg, *Ex Parte Sampson; Re Governor of Her Majesty's Penitentiary at Malabar* (1966) 66 SR (NSW) 501 at 505-507 (Wallace P and Holmes JA) applying s 254 of the *Common Law Procedure Act 1889-1962* (NSW). Indeed, by then appeals from the refusal of habeas corpus were also permitted in England and Wales, following the introduction of s 15 of the *Administration of Justice Act 1960* (UK): see Farbrey and Sharpe, *The Law of Habeas Corpus* (3rd ed, 2010) at 234.

32 See, eg, *Commonwealth v AJL20* (2021) 95 ALJR 567; *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 219 CLR 664; *Ruddock v Vadarlis* (2001) 110 FCR 491; *Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri* (2003) 126 FCR 54; *Members of the Sentence Administration Board of the Australian Capital Territory v Gomez* [2002] FCAFC 261; *Minister for Immigration and Multicultural and Indigenous Affairs v Cisinski* (2004) 140 FCR 239.

33 (2001) 110 FCR 491.

34 (2021) 95 ALJR 567. To the extent RS [20] seeks to distinguish *AJL20* and *Vadarlis* because of the way the order was framed, the point goes nowhere as SC Derrington J made orders in the same form: CRB 56.

leading texts concerning habeas make express reference to the cases on which the Respondent now relies.[35] The point being easy to identify, it is most unlikely that the lawyers and judges involved in arguing and deciding those hotly contested cases (and the others cited above) overlooked the point. The more likely explanation for no issue of competency being raised is that it was recognised that the point lacks merit. There is no basis to treat those important cases as having been decided without jurisdiction.

Leave to appeal is not required

26. Orders for release from detention may be interlocutory or final in character depending on the circumstances.[36] Here, even if SC Derrington J's orders are interlocutory orders, leave to appeal is not required because they are orders "affecting the liberty of an individual" within s 24(1C)(a) of the Federal Court Act. That provision applies equally to orders which grant or withhold liberty.[37]

27. In any case, if leave to appeal is necessary, it should be granted. The decision of the primary judge is attended with sufficient doubt to warrant its reconsideration on appeal; this is not a matter of mere practice and procedure, rather it raises significant issues of wider importance; and "substantial injustice" would result if leave was refused.[38]

Costs

28. The Respondent seeks an order that his costs be paid regardless of the outcome of the appeal: RS [97]. Neither justice nor fairness requires such an order to be made. The Commonwealth does not seek its costs against the Respondent. Further, the Respondent is represented by a large team who agreed to act "pro bono" (RS [97]). Accordingly, if the appeal is allowed then there should be no order as to costs.

Dated: 25 March 2022

.....	.....	.....	.....
Stephen Donaghue	**Craig Lenehan**	**Patrick Knowles**	**Zelie Heger**
Solicitor-General of the Commonwealth	Fifth Floor St James' Hall	Tenth Floor Chambers	Eleven Wentworth
T: (02) 6141 4139	T: (02) 8257 2500	T: (02) 9232 5609	T: (02) 9101 2307

[35] David Clark and Gerard McCoy, *Habeas Corpus: Australia, New Zealand and the South Pacific* (2nd ed, 2018) at 268-270; R J Sharpe, *The Law of Habeas Corpus* (2nd ed, 1989) at 212.

[36] *Al-Kateb v Godwin* (2004) 219 CLR 562 at [24]-[26] (Gleeson CJ).

[37] *Ryan v Attorney-General* [1998] 3 VR 670 at 681 (line 20-21) (Phillips JA) (concerning s 17A(4)(b) of the *Supreme Court Act 1986* (Vic), which is relevantly identical to s 24(1C)(a)); see also Ormiston JA at 673.

[38] *Decor Corp Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397 at 399-400 (Sheppard, Burchett and Heerey JJ).