Reflections on *Love and Thoms v The Commonwealth*

Notes prepared for a talk to a national seminar organised by the Australian Association for Constitutional Law and the Law School of Monash University held on 3 June 2020

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Overview

(1) On 11 February 2020, the seven justices of the High Court handed down their decision on each of two special cases in actions brought by Daniel Love and Brendan Thoms to prevent their deportation from Australia. The decisions may be conveniently referred to as *Love and Thoms v The Commonwealth* ("Love and Thoms").[1]

(2) In each of the actions, the special case questions was phrased as: "Is the plaintiff an 'alien' within the meaning of s 51(xix) of the Constitution?

(3) The answer in Mr Love's special case was: "Aboriginal Australians (understood according to the tripartite test in Mabo v Queensland [no 2] (1992) 175 CLR 1 at 70) are not within the 'aliens' power conferred by s 51(xix) of the Constitution. The majority is unable, however, to agree as to whether the plaintiff is an Aboriginal Australian on the facts stated in the special case and, therefore, is unable to answer the question".

(4) The Commonwealth was, despite the equivocal nature of the answer, ordered to pay the costs of the special case in Mr Love's action.

(5) The answer in Mr Thoms' special case was: "Aboriginal Australians (understood according to the tripartite test in Mabo v Queensland [no 2] (1992) 175 CLR 1 at 70) are not within the 'aliens' power conferred by s 51(xix) of the Constitution. The plaintiff is an Aboriginal Australian and, therefore, the answer is 'No'". And the Commonwealth was ordered to pay the costs of Mr Thoms' special case, as well.

(6) The special cases were determined by a majority of 4-3. In the majority were Bell, Gordon, Nettle and Edelman JJ. The minority was comprised Kiefel C.J. and Gageler and Keane JJ.

(7) Both Mr Love and Mr Thoms were born overseas, Mr Love in Papua New Guinea and Mr Thoms in New Zealand. Both men had an Indigenous parent. Mr Love's father had an Australian Indigenous heritage as did Mr Thoms' mother. By being born overseas, both men became, by birth, a citizen of the country in which they were born. However, by having an Australian citizen parent, each man had a pathway to Australian citizenship under the *Citizenship Act 1948* (referred to, collectively, with its successors as "the Citizenship Act"). However, as often happens with children born overseas, neither their parents, when the men were children nor the plaintiffs, themselves, as adults, had exercised these rights under the Citizenship Act. Each man was the holder of a long term residence visa issued when the respective families moved to Australia.

[1] [2020] HCA 3

(8) Each of the plaintiffs committed offences which carried sentences of 12 months or more with some actual imprisonment. As a result, the character provisions in s 501 *Migration Act 1958* ("the Migration Act") triggered a mandatory cancellation of their visas with a mandatory deportation order subject to discretionary revocation of the deportation order.[2] The cancellation of the visas also triggered the obligation, pursuant to s 189 of the Migration Act, for each plaintiff to be detained for the purposes of removal pursuant to s 198 of the Migration Act. Mr Love's deportation order was revoked and he was released from detention but his action remained on foot as an action for damages for unlawful detention. Mr Thoms' application for revocation of his deportation order had not been decided at the time of the High Court's decision and the immediate result of the decision was that Mr Thoms was released from detention.

(9) Sections 189 and 198 of the Migration Act are expressed in terms of unlawful non-citizens. However, as Keane J. stated, the power pursuant to which ss 189 and 198 were enacted is the aliens power and, if Mr Love and Mr Thoms are not aliens, then ss 189 and 198 have no application to them.[3]

The Reasoning in Singh was Unnecessary: the Other Argument in Love and Thoms

(10) The plaintiffs' argument had two distinct and independent strands. The second, and more creative, strand was that which was ultimately successful, namely, that Indigenous Australians, because they are ab origene, from the very beginning, could not be alien to the Australian political community. The other strand was, in jurisprudential terms, much more incremental.

(11) The doctrine underpinning Australia's citizenship laws, at the moment, appears to be most immediately based on reasoning articulated in a decision called *Singh v The Commonwealth*[4] ("Singh"). Ms Singh's parents were from India and were seeking asylum when she was born. Ms Singh argued that, having been born in Australia, pursuant to the common law doctrine of jus soli, she could not be an alien. The High Court held otherwise and made various observations about the meaning of "aliens" in s 51(xix) of the Constitution.

(12) The particular reasoning from Singh which the plaintiffs challenged, in Love and Thoms, had been articulated by the plurality of Gummow, Hayne and Heydon JJ. and accepted by Gleeson CJ.[5] It was that "alien" used as a descriptive word to describe a person's lack of relationship with a country means a citizen of another country who, thereby, owes allegiance to a foreign sovereign. And, since, by Indian law, Ms Singh, as the child of Indian parents, was a citizen of and owed allegiance to India when she was born, ipso fact, she was an alien under s 51(xix) of the Australian Constitution.[6]

(13) The plaintiffs in Love and Thoms argued that, although the result in Singh was not challenged, this particular aspect of the reasoning ("the Singh doctrine") was wrong; was unnecessary for the decision; and produced illogical results. The plaintiffs pointed to the

[2] The particular element of the character test is in s 501(7)(c) of the Migration Act. Its particular application in different forensic circumstances is dealt with in ss 501(7A)-(12). Semble, a wholly suspended sentence would not trigger the character test.
[3] [2020] HCA 3 at [145]
[4] (2004) 222 CLR 322
[5] (2004) 222 CLR 322 at 341 [30]
[6] (2004) 222 CLR 322 at 398 [200] and 400 [205]

concept of dual citizenship (which seemed inconsistent with foreign allegiance being necessarily a sign of alienage) and to the various politicians who, despite being Australian citizens were found to be breaching s 44(i) of the Constitution for owing allegiance to a foreign power.[7]

(14) The plaintiffs were unsuccessful on this argument. Each member of the minority must be taken to have rejected the plaintiffs' argument aimed at the Singh doctrine.[8] Of the majority, Bell J. confined the Singh doctrine to the facts of that case[9] while Nettle J. appeared to agree with the plurality in Singh but on the basis of a broader analysis.[10] Gordon[11] and Edelman[12] JJ. both reject the Singh doctrine. On this incremental argument, the plaintiffs appear to have lost 3-4 with Nettle J. playing the role of the swing Justice. However, Keane J. appears to base his position at least partially on the plaintiffs' failure formally to seek to overrule Singh.[13]

(15) These numbers on the Plaintiffs' Singh argument are important because, if such an argument were successful, it would affect many more persons subject to deportation than did the decision in Love and Thoms. Many non-Indigenous Australians have been born overseas to at least one Australian citizen parent and come to live in Australia at a young age but have, for a plethora of reasons, not become Australian citizens. When their lives become messy and they are sentenced to a year or more of imprisonment, they face deportation to a country they may never have known other than as a very young child.

(16) It would appear likely that some litigant will test the doctrine in Singh at some time in the not too distant future. The indications from Love and Thoms are that the result of that case may also be a close run event. And it may be that some Justices who applied the Singh doctrine in Love and Thoms will take another view if the correctness of Singh is formally put in issue.

The "Indigenous Australians Cannot be Aliens" Argument

(17) The argument challenging the Singh doctrine was the plaintiffs' black letter argument in the special cases. There was plenty of case law on the aliens power. There had been strong minority reasons in a number of the leading cases. However strong or weak the argument at the end of the day, there was plenty to work with.

(18) The argument that Mr Love and Mr Thoms could not be aliens because they were the descendants of peoples who had occupied and cared for this country for 80,000 years was not a black letter argument. The argument could draw upon the ground breaking jurisprudence of Mabo [no 2][14] but it involved a further leap forward in developing new doctrine.

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[7] See *Re Canavan* (2017) 263 CLR 284
[8] [2020] HCA 3 at [16] (Kiefel C.J.); [88] (Gageler J.) and [147], and [169]-[175] (Keane J.)
[9] [2020] HCA 3 at [57] and [66]
[10] [2020] HCA 3 at [254] and [273]
[11] [2020] HCA 3 at [300]-[322]
[12] [2020] HCA 3 at [429]
[13] [2020] HCA 3 at [175]
[14] (1992) 175 CLR 1

(19) The argument had an abrupt logic and that 80,000 year history going for it but, once the proposition had been stated in one short sentence, there was little more or different that could be said to advance the argument.

(20) Faced with that proposition, four justices of the Court developed that new jurisprudence. It is to that that I now turn.

Justice Bell

(21) Justice Bell's reasoning is probably the most simply expressed of the majority. Her Honour observed that Mabo [no 2] is significant because it recognised that, at the time of European settlement, there existed antecedent rights and interests in the land and waters of Australia possessed by the indigenous inhabitants sourced in traditional law and customs and alienable only by that body of law and custom. Justice Bell stressed the recognition that has been given to the spiritual nature of the relationship that Aboriginal Australians have with country. Her Honour also adverted to the difference between that spiritual relationship and the concepts of rights and interests traditionally developed by the common law.[15]

(22) Justice Bell observed that the argument that the capacity to hold land has nothing to do with a person's status as an alien misses the point. The real issue, Her Honour observed, was the incongruity between the recognition by the common law of the unique connection between Aboriginal Australians and their traditional lands and a finding that an Aboriginal Australian can be described as an alien within the ordinary meaning of that word.[16]

(23) Justice Bell dismissed the Commonwealth's framing of the question as an argument for a race based limitation on the "aliens" power. Her Honour observed that it is not offensive to recognise the cultural and spiritual dimensions of the distinctive connection between indigenous peoples and their traditional lands or to hold that the exercise of the sovereign power of Australia does not extend to the exclusion of the indigenous inhabitants from the Australian community.[17] Her Honour said that, despite the circumstance of an Aboriginal Australian being born overseas, that person cannot be said to belong to another place.[18]

(24) Importantly, for another aspect of future litigation, Justice Bell did not regard the special cases as raising the question as to whether a person who does not satisfy the Mabo [no 2] tripartite test can, nonetheless, establish that he or she is an Aboriginal Australian.[19]

Nettle J.

(25) Nettle J.'s reasons, inter alia, draw on Dixonian logic; draw a fundamental lesson from Mabo[no 2]; draw on the instructions of a colonial secretary;[20] and find a link between the

[15] [2020] HCA 3 at [70]
[16] [2020] HCA 3 at [71]
[17] [2020] HCA 3 at [73]
[18] [2020] HCA 3 at [74]
[19] [2020] HCA 3 at [80]. This has been noted in a subsequent case of *McHugh v Minister for Immigration, Migrant Services and Multicultural Affairs* [2020] FCA 416 at [196]-[199].
[20] [2020] HCA 3 at [277] citing Lord Glenelg to Sir Richard Bourke (1837) in *Historical Records of Australia* (1923), ser 1, vol 19, 47 at 48

16th Century Spanish school of international law and the Declaration on the Rights of Indigenous Peoples ("the DRIP").[21]

(26) Nettle J. concedes that the case law including Singh appear to imply that a person born abroad or who is a foreign citizen could be classified as alien. But, His Honour says, intuitively, that proposition appears at odds with the growing recognition of Aboriginal peoples as the original inhabitants of Australia and the ubiquity of Australian dual citizens. So His Honour calls on Sir Owen Dixon who, famously, said in a speech called *On Judicial Method*[22] that, in such circumstances, it is necessary to stop to inquire and, applying the received technique, to re-examine the essentials of the received doctrine, in this case, the essentials of alienage and the nature of an Aboriginal person's relationship to the Australian polity, to ascertain whether in truth, upon a correct analysis of the situation, the objectionable conclusion, inevitably, follows from a logical application of the principle to the circumstances.[23]

(27) One of the results of this re-examination is that, logically anterior to the common law's recognition of rights and interests arising under traditional laws and customs is the common law's recognition of the Aboriginal societies from which those laws and customs organically emerged. Citing *Yorta Yorta Aboriginal Community v Victoria*,[24] His Honour observed that law is but a result of all the forces that go to make a society; law and custom arise out of and, in important respects, go to define a particular society such that society is to be understood as a body of persons united in and by its acknowledgement and observance of a body of laws and customs.[25]

(28) Nettle J. observed that, logically, the common law could not, at the same time, acknowledge the authority of elders to determine the membership of an Aboriginal society (for native title purposes) and, at the same time, subject members of that society to a liability to deportation. To permit the permanent exclusion from the territory of Australia of a member of an Aboriginal society would be to give to the Crown the power to tear the organic whole of the society asunder which would be the very antithesis of recognising the society's laws and customs as a foundation for rights and interests enforced under Australian law. It follows that the common law must be taken to have always comprehended the unique obligation of protection owed by the Crown to Aboriginal societies and every member thereof.[26]

(29) Nettle J. did advert to the possibility that some Indigenous Australians would be unable, perhaps through dispossession and dispersion, to establish that they identify, and are accepted, as members of an Aboriginal society according to laws and customs continuously observed since the Crown's acquisition of sovereignty. His Honour's comments pointed a path to the future observing that, if the Parliament regarded it as invidious that a federal law

[21] [2020] HCA 3 at [274] citing, inter alia, Scott, *The Spanish Origin of International Law* (1934), and Stone, *Human Law and Human Justice* (1965) at 61
[22] Sir Owen Dixon, *Jesting Pilate*, in Crennan and Gummow (eds), *Jesting Pilate and Other Papers and Addresses*, 3rd ed (2019)
[23] [2020] HCA 3 at [263]
[24] (2002) 214 CLR 422 at 453-454 [77]
[25] [2020] HCA 3 at [269]
[26] [2020] HCA 3 at [272]

differentiates between two classes of Aboriginal Australians, it is well within the competence of the Parliament to ensure that both classes are treated alike.[27]

Gordon J.

(30) Gordon J. draws on a number of different conceptual bases to conclude that Aboriginal Australians, whether born in Australia or overseas, are not aliens under the Constitution. These bases include the common law implications of Mabo, the ordinary meaning of "aliens"; and the absence of any event from before European sovereignty to sever the link between the Australian land mass and the Indigenous inhabitants.

(31) Her Honour commences her reasons for judgment with the statement that the deeper truth of Mabo [no 2][28] is that the Indigenous peoples of Australia are the first peoples of the country and the connection between them and the land and waters that make the territory of Australia was not severed by European "settlement".[29]

(32) Gordon J. states that "aliens" in 51(xix) conveys otherness in the sense of an outsider or foreignness. The term does not apply to Aboriginal Australians because an Aboriginal Australian is not an outsider to Australia.[30]

(33) Her Honour goes on to say that European settlement did not abolish traditional laws and customs which establish and regulate the connection between Indigenous peoples and land and waters. Assertion of sovereignty did not sever the connection. Nor did Federation nor any event after Federation render Aboriginal Australians alien to Australia. Her Honour points out that, in the wake of Mabo [no 2],[31] it is now clear that, at the date of Federation, many Aboriginal Australians were connected to land and waters and held rights in respect of such land and waters and were subject to obligations under traditional laws and customs concerning those land and waters.[32]

(34) Gordon J. observes that native title is not a species of what European law understands as ownership or possession but a connection with land where the land owns the people and the people are responsible for the land. Her Honour refers to this two-way connectedness as what the law has tried to capture by speaking of a spiritual connection.[33]

(35) Her Honour observes that Indigenous people who, at Federation, were non-aliens were not limited to persons having both characteristics of being born in Australia and having only Indigenous ancestors.[34]

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[27] [2020] HCA 3 at [282]
[28] (1992) 175 CLR 1
[29] [2020] HCA 3 at [289] citing, extensively, a series of native title and Indigenous rights cases from Mabo [no 2] (1992) 175 CLR 1 to *Northern Territory v Griffiths* (2019) 93 ALJR 327.it is noticeable that, in the text of the reasons up until that point, "settlement" had occurred 17 times, often accompanied by "European" or "British". It is only on the eighteenth use, in the first paragraph of Gordon J.'s reasons, that the word appears inside quotation marks.
[30] [2020] HCA 3 at [296]. Her Honour further develops this concept at [301]-[303] drawing upon Singh (2004) 222 CLR 322 at 395 [190]. See, also, [335].
[31] (1992) 175 CLR 1
[32] [2020] HCA 3 at [297]
[33] [2020] HCA 3 at [341]
[34] [2020] HCA 3 at [345]

(36) Gordon J. also observes that the sovereignty of the Commonwealth is asserted over territory to which the common law recognises that Aboriginal Australians have a unique connection.[35] This is important because Australia is a territorial community.[36] Her Honour states that the connection recognised by Australian law between Aboriginal Australians and the land and waters of the country cannot be dismissed as irrelevant to membership of the present polity of the Commonwealth of Australia, a polity established on the same land or waters. To assert sovereignty over land or waters where the connection of Aboriginal Australians has not been severed requires that those connected to the land or waters in that way are not classified as aliens or as other or foreign to the land or waters of the polity. To ignore or refuse the recognition of that connection would render the constitutional question incomplete.[37]

(37) Gordon J. observes that recognition of Indigenous peoples as part of the "people of Australia" denies that Indigenous peoples retained or can now retain a sovereignty that is distinct or separate from any other part of the people.[38] Her Honour notes that one of the central pillars of Mabo [no 2][39] is that the common law recognises that the Indigenous peoples of Australia possess rights that cannot be possessed by the non-Indigenous people of Australia. Those to whom Indigenous laws and customs gave such rights and duties with respect to land and waters within the territory of Australia are and must be recognised as being part of the people of Australia and not aliens.[40]

(38) Perhaps the heart of Gordon J.'s reasoning is in Her Honour' statement that native title is one legal consequence flowing from common law recognition of the connection between Aboriginal Australians and the land and waters that now make up Australia. That Aboriginal Australians are not aliens under the Constitution is another.

(39) Gordon J. adopted the tripartite test from Mabo [no 2].[41] Her Honour went on to say, however, that the legal concept of Aboriginality, at its core, recognises that there is a unique group of Australians, Aboriginal Australians, who are descendants of the original inhabitants of this country and who identify as such and are accepted as such. It is not necessary, in this case, to chart the outer limits of the concept.[42] Like Bell J., Gordon J. seems to be leaving open the possibility that future cases may allow Aboriginality to be established in circumstances where, for one reason or another, the tripartite test from Mabo [no 2] is unable to be met.

[35] [2020] HCA 3 at [347]
[36] [2020] HCA 3 at [348]
[37] [2020] HCA 3 at [349]
[38] [2020] HCA 3 at [356]
[39] (1992) 175 CLR 1
[40] [2020] HCA 3 at [357]
[41] [2020] HCA 3 at [366]-[368]
[42] [2020] HCA 3 at [368]

Edelman J.

(40) Edelman J. observes that, although considerations of race were front of mind in drafting the Constitution, Aboriginal Australians did not fall within the concept of "aliens" at Federation.[43] This was because they were members of the Australian political community.[44]

(41) Edelman J.'s underlying juristic point is that the constitutional meaning of an alien as a foreigner to the Australian political community represents the essential meaning of alien in s 51(xix) of the Constitution. The antonym of an alien is, therefore, someone who belongs to the Australian political community. This is the case even though a statutory citizen does, ipso facto, belong to the Australian community. This is, states His Honour, because that community is powerfully shaped by citizenship laws.[45] His Honour might also have observed that statutory citizenship is the chosen means by which persons who are aliens are naturalised, exercising the other element of power bestowed by s 51(xix).

(42) Edelman J. tends to deny those much discussed criteria of birth in a country and birth to the citizens of a country as covering the field of markers of what it means to belong to a political community.[46] This leads to his determination that the powerful attachment to land of Indigenous non-citizens precludes them from being aliens.[47]

(43) His Honour cited Brennan J in Mabo [no 2)[48] to the effect that it is imperative in today's world that the common law should neither be, nor be seen to be, frozen in an age of racial discrimination. His Honour goes on to say that the powerful spiritual and cultural connection, described in the case law as a religious relationship, is, by definition, a powerful spiritual and cultural connection with the defined territory of the Australian polity. This connection provides an analogous attachment to country to that provided by being born in Australia or born of Australian parents. These connections are independent of citizenship legislation.[49]

(44) Edelman J. states that underlying the connection with particular land that underpins native title rights and interests is a fundamental truth that ties Aboriginal people with Australia and is inextricably part of Aboriginal identity as members of the broader community of the first people of Australia. His Honour states that this sense of identity is a fundamental truth that ties Aboriginal people to Australia and cannot be deemed not to exist by citizenship legislation.[50]

(45) Edelman J. also eschewed that the tripartite test from Mabo [no 2] was the last word on who was an Aboriginal person for constitutional purposes. His Honour stated that the test is not set in stone, particularly, as an approach to determining Aboriginality as the basis for

[43] [2020] HCA 3 at [410]
[44] [2020] HCA 3 at [411]
[45] [2020] HCA 3 at [437]
[46] [2020] HCA 3 at [444]
[47] [2020] HCA 3 at [447] drawing on scholarship concerning the jurisprudential status of American Indians collected in Volpp, *The Indigenous as Alien*, (20150 *5 UC Irvine Law Review 289 at 293*
[48] (1992) 175 CLR 1 at 41-42
[49] [2020] HCA 3 at [450]
[50] [2020] HCA 3 at [451

those fundamental ties of political community in Australia which are not dependent upon membership of a particular sub-group.[51]

Conclusion

(46) The most important task in the wake of the decision on the special cases is to get every person who satisfies the tripartite test out of immigration detention. This requires grants of legal aid so that people without resources and who may have been dislocated in recent years from immediate contact with the elders of their community can establish the facts of their membership of their descent group. This may take considerable resources in some cases and the Commonwealth needs to make sure that those resources are available.

(47) There also needs to be a proper pathway established for Indigenous Australians who have been unconstitutionally removed to return to Australia. Those people also may need legal assistance to establish their membership of their Indigenous society.

(48) Nettle J.'s observations about the possible need for legislation to provide a pathway to citizenship for all Indigenous Australians are also apposite.[52] Indigenous Australians who do satisfy the tripartite test should be able to apply for and be given citizenship as of right. However, the history of dispossession and disturbance that marks our society with the mark of Cain will have meant that continuity of the laws and customs of some Indigenous societies will have been broken and there must be an as of right legislative pathway for Indigenous Australians who do not satisfy the tripartite test but are, nonetheless, Aboriginal Australians or Torres Strait Islanders.

(49) The decision in Love and Thoms has been the subject of much derision by certain parties in the media and in politics. As a result, it has been the subject of much misunderstanding by members of the community. Hopefully, seminars such as tonight's can spread the word as to the important jurisprudence that emerges from the majority judgments on the special case.

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21 May 2020

[51] [2020] HCA 3 at [458]. Edelman J. referenced the discussion in *Tasmania v Commonwealth (Tasmanian Dams Case)* (1983) 158 CLR 1 at 274 per Deane J.
[52] [2020] HCA 3 at [282]