Reflections on the recent High Court decision in *Love v Commonwealth of Australia* [2020] HCA 3

The *Constitution*, Indigenous rights and immigration law

Kate Slack & Arron Hartnett, Counsel, Queensland Bar

On 11 February 2020 the High Court handed down its decision in *Love v Commonwealth of Australia* [2020] HCA 3 (*'Love'*).[1] The decision, by a majority of four judges to three, determined that Aboriginal Australians, according to the 'tripartite test' for Aboriginality described by Brennan J in *Mabo v Queensland (No. 2)* (*'Mabo'*),[2] were not within the reach of the Commonwealth Parliament's so-called 'aliens power' in section 51(xix) of the *Constitution*.

This article briefly examines the factual background of both plaintiffs in *Love*, the constitutional and legislative issues raised by the case, the High Court's decision and reasoning, and some observations about potential, future implications that the judgment might have (particularly for Aboriginal and Torres Strait Islander people in Australia).

Background

Love involved two plaintiffs, Mr Love and Mr Thoms, each of whom were born overseas. Neither Mr Love nor Mr Thoms are Australian citizens. Mr Love was born on 25 June 1979 in Papua New Guinea ('PNG') and is a PNG citizen by birth. Since 18 October 1985, he has resided continuously in Australia and has not departed. Mr Love identifies as a descendant of the Kamilaroi tribe. He is recognised as a descendant by at least one elder of the Kamilaroi tribe. His paternal great-grandfather was descended, in significant part, from Aboriginal inhabitants of Australia who lived in Australia prior to European settlement.

Mr Thoms was born on 16 October 1988 in New Zealand. He is a New Zealand citizen by birth. Since 23 November 1994, Mr Thoms has permanently resided in Australia. He identifies as a member of the Gunggari People and is accepted by other Gunggari people as such. The Gungarri People hold common law native title in respect of lands in Queensland's Maranoa region.[3] The Gunggari People's land claims were recognised in two separate Federal Court proceedings in 2012 and 2014.

Because neither of the men were citizens of Australia, their lawful presence in Australia depended upon their each holding a valid visa. Both Mr Love and Mr Thoms had types of permanent residence visas which permitted them to indefinitely remain in Australia. Their status as non-citizens, however, made their lawful right to remain in Australia conditional upon the continued validity of each of their permanent residence visas. Each of the men were convicted in Queensland of criminal offences. On 25 May 2018, Mr Love was sentenced for an offence against the *Criminal Code 1899* (Qld) (Code) section 339(1) (assault occasioning bodily harm). He was sentenced to a term of imprisonment of 12 months. On 17 September 2018, Mr Thoms was sentenced for an offence against the same provision of the Code (in a domestic violence context). He was

[1] The case was two consolidated special cases (*Love v Commonwealth* and *Thoms v Commonwealth*) which were referred to the Full Court to be argued together

[2] (1992) 175 CLR 1.

[3] http://www.gunggaripbc.com.au/gunggari-country/

sentenced to a term of imprisonment period of 18 months.

Because Mr Love and Mr Thoms were sentenced to periods of imprisonment of 12 months or more, each of their permanent residence visas was mandatorily cancelled.[4] This cancellation revoked their right to remain in Australia as lawful non-citizens and both were taken into immigration detention. Both men requested that the mandatory cancellation be revoked. On 27 September 2018, a delegate of the Minister revoked the mandatory cancellation of Mr Love's visa and he was released from detention. Mr Thoms' revocation request was refused and he remained in immigration detention throughout the High Court proceedings.

Constitutional and legislative issues

Litigants challenging the cancellation of their visas generally have very limited rights of review. The *Migration Act 1958* (Cth) ('Migration Act') purports to oust the jurisdiction of courts to review migration decisions of the Minister (or delegate) through a privative clause.[5] The plaintiffs avoided the operation of the privative clause by commencing proceedings in the High Court's original jurisdiction under section 75(iii) of the *Constitution* seeking damages for false imprisonment for the period of their detention. A key hurdle for the plaintiffs was that their detention appeared to be authorised by section 189 of the Migration Act. That section, broadly, requires officers of the Department of Immigration and Border Protection to detain persons that they reasonably suspect are unlawful non-citizens until they are removed from Australia under section 198.[6] Because it was not in dispute that the plaintiffs were not Australian citizens, the plaintiffs had to show that section 189 could not have valid application to them.

The primary way that the Commonwealth Parliament regulates the detention and deportation of unlawful non-citizens in Australia through the Migration Act is by using the 'aliens power' in section 51(xix).[7] If the plaintiffs were incapable of falling within the meaning of the term 'alien' for section 51(xix), then section 189 could not be valid in its application to either plaintiff.[8] The plaintiffs argued that they could not possibly fall within the ordinary understanding of the word 'alien' in section 51(xix) because, despite their lack of Australian citizenship, they were Aboriginal Australians.

The decision

The High Court, by majority,[9] decided that Aboriginal Australians, understood according to the tripartite test in *Mabo*,[10] are not within the reach of the 'aliens' power in section 51(xix) of the *Constitution*. The tripartite test involves a person self-identifying as an Aboriginal person, showing descent from Aboriginal ancestors and demonstrating that people enjoying traditional authority in that person's Aboriginal community recognise the person as a member of the community. Each member of the majority authored a separate judgment. Three members of the Court dissented, and each dissenting member of the Court similarly authored a separate judgment.

The majority all accepted that, while the power of the Commonwealth Parliament to legislate with respect to aliens is a broad power, including a general power to determine who

[4] Visas are mandatorily cancelled if a person is sentenced to a period of imprisonment of 12 months or more: *Migration Act 1958* (Cth) section 501(3A). The person is then required to show reasons why that mandatory cancellation should be revoked, if the person chooses to do so: *Migration Act 1958* (Cth) section 501CA.

[5] *Migration Act 1958* (Cth) section 474. Although, as explained in *Plaintiff S157 v Commonwealth* (2003) 211 CLR 476, the Commonwealth Parliament cannot oust the jurisdiction of the High Court to issue the remedies listed in section 75(v) of the *Constitution* which are aimed at challenging decisions on the basis that they are affected by jurisdictional error.

[6] An unlawful non-citizen is a non-citizen who does not have a visa and is present in the migration zone: *Migration Act 1958* (Cth) s 14(1).

[7] *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 26 (Brennan Deane and Dawson JJ).

[8] This was most clearly expressed by Nettle J: *Love* at [285]. See also, *Acts Interpretation Act 1901* (Cth) section 15A.

[9] Bell, Gordon, Nettle and Edelman JJ; Kiefel CJ, Gageler and Keane JJ dissenting.

[10] (1992) 175 CLR 1 at 70 (Brennan J).

an alien is,[11] the term 'alien' does not mean whatever the Parliament says that it means.[12] In *Pochi v Macphee*,[13] Gibbs CJ explained that 'the Parliament cannot, simply by giving its own definition of "alien", expand the power under s. 51 (xix) to include persons who could not possibly answer the description of "aliens" in the ordinary understanding of the word'. In *Nolan v Minister for Immigration and Ethnic Affairs*, the High Court observed that, as a matter of etymology, 'alien' means 'belonging to another place'.[14]

The plaintiffs' submission was that the mere fact of their being citizens of a foreign country was not enough to make them 'aliens'. They submitted that Aboriginal Australians, understood according to the 'tripartite test' in *Mabo*, fell within a group of persons who could not possibly answer the description of an 'alien' within the ordinary understanding of that word. The majority accepted both of those propositions. The divergence of the reasoning of the Court (both the majority and the minority judges) does not permit an expansive exegesis of all of the reasoning in the judgments in an article of this length. But, in essence, the majority considered the unique position that Aboriginal Australians have in Australia, both in relation to its lands and waters, and also the Australian polity. Bell J noted that:

> [t]he position of Aboriginal Australians, however, is *sui generis*. Notwithstanding the amplitude of the power conferred by s 51(xix) it does not extend to treating an Aboriginal Australian as an alien because, despite the circumstance of birth in another country, an Aboriginal Australian cannot be said to belong to another place.[15]

In relation to Australian lands and waters, the majority made significant reference to *Mabo*, in which the High Court first decided that Indigenous Australians' rights and interests in land survived the Crown's acquisition of sovereignty over Australia. The plaintiffs submitted that it was significant that Aboriginal Australians were the only persons capable of holding common law native title. However, the plaintiffs argued that even if native title had been extinguished, that did not mean that Aboriginal Australians do not continue to have a unique connection with Australia.[16] Gordon J wrote 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'.[17] Her Honour said that Aboriginal Australians not being aliens for section 51(xix) is simply another consequence of the recognition of that connection that the common law has always known.

In relation to the connection between Aboriginal Australians and the Australian polity, Edelman J pointed out that metaphysical ties of a non-Indigenous Australian's birth on Australian soil to an Australian citizen parent was sufficient to establish that a person was not an alien. His Honour concluded that '[t]he same must also be true of an Aboriginal child whose genealogy and identity includes a spiritual connection forged over tens of thousands of years between person and Australian land, or "mother nature"'.[18] Nettle J saw the connection between Aboriginal Australians and the polity as one involving reciprocal and permanent obligations of protection (by the Crown) and allegiance (by Aboriginal people to the Crown). The content of the obligation of protection, his Honour said, necessarily 'extends to not casting [an Aboriginal person] out of Australia as if he or she were an alien'.[19]

The minority judges expressed concern that the judgment gives rise to issues of 'competing sovereignty'.[20] Kiefel CJ and Keane J both

[11] The most obvious example of how this is exercised is the conferring or granting of Australian citizenship under the *Australian Citizenship Act 2007* (Cth).

[12] *Love* at [50] (Bell J); at [236] (Nettle J); at [311] (Gordon J); and at [395] (Edelman J).

[13] (1982) 151 CLR 101.

[14] (1988) 165 CLR 178 at 183.

[15] *Love* at [74] (Bell J) (footnotes omitted). Gordon J (at [333]) also expressed that Aboriginal Australians occupy a unique or 'sui generis' position in Australia.

[16] Written submissions of the plaintiffs filed 2 April 2019 at [44] <https://cdn.hcourt.gov.au/assets/cases/02-Brisbane/b43-2018/Love_v_Cth_B43-2018-Thoms_v_Cth_B64-2018_-_Joint_Pltfs_subs.pdf>.

[17] *Love* at [364].

[18] *Love* at [466].

[19] *Love* at [280].

[20] *Love* at [25] (Kiefel CJ), and at [197] (Keane J).

expressed concern, particularly with the aspect of the *Mabo* test that gives authority to the elders of an Aboriginal community to (in part) determine Aboriginality (thereby preventing the Commonwealth Parliament from designating such people aliens). Kiefel CJ called this a 'kind of sovereignty which was implicitly rejected by *Mabo (No 2)*'.[21] Keane J said that a determination by Aboriginal elders that a person is an Aboriginal person and thus beyond the reach of the aliens power amounts to 'an exercise of political sovereignty by those persons'.[22]

Implications

Immediate implications

At a narrow level, the case provides a functional limit on the Commonwealth Parliament's power to treat Aboriginal Australians as aliens (even if they are non-citizens). Effectively, this immunises Aboriginal Australians from deportation under section 198 of the Migration Act, and any detention anterior to deportation under section 189. In that sense, the practical impact of the narrow ratio in *Love*,[23] is likely to be minimal. Most Aboriginal Australians *are* Australian citizens because they are born in Australia to Australian citizen parents.[24] Australian citizens, regardless of their race, are not liable to detention in, or expulsion from, the Commonwealth because they are categorically not 'aliens'.

Because a person's Aboriginality is a question of fact,[25] it remains to be seen whether other federal courts will, for the purposes of section 51(xix), consider the tripartite test in *Mabo* as an exclusive and exhaustive test for how a person must prove that they are an Aboriginal Australian. Anderson J of the Federal Court, in obiter comments, has doubted that that is so, suggesting that it is 'for future argument by a non-citizen of Australia that, on the basis of his or her Aboriginality, he or she is not an alien notwithstanding that he or she does not satisfy *each* of the three elements of the tripartite test'.[26] It was not necessary to consider other modes of prove in *Love*. The plaintiffs had framed their case as one in which they were Aboriginal Australians according to the test in *Mabo (No 2)*.[27] Certainly, the *Mabo* test does not at some broader level dictate what it means to be 'Aboriginal' in a factual sense for every legal purpose, as recent New South Wales Court of Appeal authority makes clear.[28]

Broader implications

At a broader level, the case shows that a majority of the High Court consider Aboriginal Australians' relationship with both the lands and waters of Australia, and the Australian polity, as unique. Because a case of this nature has never been decided, its impact on other legal and constitutional issues remain to be seen.

Nettle J explained that the common law of Australia must have been taken to have always 'comprehended the unique obligation of protection owed by the Crown to [Aboriginal] societies and to each member in his or her capacity as such'.[29] His Honour also observed that the protection cannot be cast off by the exercise of the Crown's power to extinguish native title.[30] Predicting whether such statements have application beyond aliens power jurisprudence is difficult, but these

[21] *Love* at [25] (Kiefel CJ).
[22] Keane J at [197].
[23] The ratio in *Love* is probably best expressed by Bell J at [81] '*I am authorised by the other members of the majority to say that although we express our reasoning differently, we agree 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*'.
[24] Australian citizenship is automatically conferred on a child of an Australian citizen or Australian permanent resident: *Australian Citizenship Act 2007* (Cth) section 12.
[25] *Love* at [75] (Bell J).
[26] *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 416 at [197] (noting comments of Bell J in *Love* at [80]).
[27] Nettle J, however, could not be satisfied on the facts that Mr Love met the tripartite test (at [287]-[288]).
[28] *Hackett (a pseudonym) v Secretary, Department of Communities and Justice* [2020] NSWCA 83 at [153] (Basten JA) (regarding the meaning of 'Aboriginal child' for the purposes of the *Adoption Act 2000* (NSW)).
[29] *Love* at [272]
[30] *Love* at [277].

sentiments are reminiscent of the type of fiduciary obligation, recognised in Canada, that the Crown owes its Indigenous people.[31] Toohey J in *Mabo* referred to a 'trust-like' or 'fiduciary' relationship between he Crown and Indigenous people in terms of native title,[32] but the existence of such a relationship has never been formally decided.

Concerns about the fracturing of sovereignty were directly addressed by the majority judges. The decision does not call into question the principle, settled in *Mabo*, that the sovereignty of the Crown cannot be challenged in an Australian municipal court.[33] Gordon J, who wrote extensively about sovereignty in her reasons, explained that '[r]ecognition of Indigenous people as part of the "people of Australia" denies that Indigenous people retained, or can now maintain, a sovereignty that is distinct or separate from any other part of the "people"'.[34] The judgment does not, as some have asserted, created a separate category of persons. The binary distinction between 'alien' and 'non-alien' is, and has always been, the law in Australia. The difficult interpretative issues that the aliens power has thrown up have largely been a by-product of Australia's protracted journey to emerge as a fully independent nation with its own concept of an 'Australian community'. Aboriginal people form an indelible part of that community.

The majority judgments are important for another reason. Despite the extensive reference to Aboriginal Australians' unique relationship with Australia, there is no mention of them in the *Constitution*.[35] The case should not be seen as going as far as amounting to 'judicial recognition', in a broad sense, of Aboriginal Australians in the *Constitution*. *Love* explores, and shows, that the common law recognises a unique relationship that Aboriginal Australians have with Australia. Because the *Constitution* was drafted against the backdrop of the common law, that unique relationship will sometimes have occasion for constitutional significance. But *Love* cannot be seen, nor should it be seen, as a substitute for the constitutional recognition for which Indigenous Australians have long fought.[36] Instead, the case is one strand in the tapestry of significant and thoughtful work that should form part of the much broader conversation about constitutional recognition for Indigenous Australians.

The authors of this article, Kate Slack and Arron Hartnett appeared, led by Stephen Keim SC, for the plaintiffs in Love.

This article was published in the Law Society NT journal, "Balance", Vol 2, 2020 on 4 June 2020, https://issuu.com/lawsocietynt/docs/balance_2020-02_-_v1

---

[31] There is a line of authority to this effect in Canada, starting with *Guerin v The Queen* (1984) 2 SCR 335.

[32] *Mabo* (1992) 175 CLR 1 at 96-97.

[33] *Mabo* (1992) 175 CLR 1 at 31. (See also, *Love* at [356] (Gordon J)).

[34] *Love* at [356].

[35] Since the adoption of the *Constitutional Alteration (Aboriginals) 1967* the only two references to Aboriginal people in the constitution were (properly, in the context of those sections) repealed.

[36] See for example, Final Report of the Referendum Council, 30 June 2017, *Uhm, Statement from the Heart,* at p i. <https://www.referendumcouncil.org.au/sites/default/files/report_attachments/Referendum_Council_Final_Report.pdf> accessed 19 May 2020.