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Subject: Aboriginal Australians are not within the reach of the 'aliens' power [SEC=UNCLASSIFIED]
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Aboriginal Australians are not within the reach of the 'aliens' power conferred by s 51(xix) of the Constitution: *Love v Commonwealth; Thoms v Commonwealth* [2020] HCA

The High Court has held by a majority of 4:3, in 7 separate judgments, that Aboriginal Australians (understood according to the tripartite test in *Mabo v Queensland [No 2]* [1992] HCA 23; (1992) 175 CLR 1 at 70) are not within the reach of the 'aliens' power conferred by s 51(xix) of the Constitution.

Background

The 2 plaintiffs, Mr Love and Mr Thoms, were each born outside Australia and are citizens of other countries and not of Australia – Mr Love, Papua New Guinea and Mr Thoms, New Zealand. They were each, while residing in Australia, convicted of an offence and sentenced to a term of imprisonment of 12 months or more. The plaintiffs' visas were therefore cancelled by a delegate of the Minister for Home Affairs under s 501(3A) of the *Migration Act 1958* (Cth). Upon cancellation of their visas the plaintiffs became unlawful non-citizens under the *Migration Act* and liable to be removed from Australia.

Mr Thoms identifies, and is accepted by other Gunggari People, as a member of the Gunggari People. He is a common law holder of native title, recognised by determinations made by the Federal Court of Australia. Mr Love identifies as a descendant of the Kamilaroi group and is recognised as such by one Elder of that group.

The plaintiffs commenced action in the High Court contending that they are Aboriginal Australians and therefore not within the meaning of 'aliens' within s 51(xix) of the Constitution. Accordingly, the plaintiffs argued, they are outside the purview of the *Migration Act*.

Reasoning of the High Court

The majority of the High Court (Bell, Gordon, Edelman and Nettle JJ) in separate judgments held that Aboriginal Australians do not fall within the 'aliens' power in s 51(xix). The minority (Kiefel CJ, Gageler and Keane JJ) disagreed, and in separate judgments, held that Aboriginality is not a characteristic relevant to the scope of the 'aliens' power.

In similar judgments Bell, Gordon and Edelman JJ of the majority found that Aboriginal Australians have a unique connection to the land of Australia such that it cannot be said that they 'belong to another place' or are 'outsiders' or are not 'belongers to the Australian political community'. They are therefore not 'aliens' in the relevant constitutional sense

([71], [74] Bell J; [335], [347] Gordon J; [396], [438] Edelman J).

Justice Nettle of the majority held that the common law recognised Aboriginal societies 'as the source and sanctuary of traditional laws and customs' and so must be taken to have imposed on the Crown an 'obligation of protection' in respect of those societies ([272]). This gave rise to a reciprocal duty of allegiance to the Crown on the part of members of Aboriginal societies. Duties of 'protection' and 'allegiance' being indicators of not being an alien, it followed that members of Aboriginal societies that adhere to traditional laws and customs cannot be classified as aliens ([260], [272]).

The majority held that status as an Aboriginal Australian may be determined by the tripartite test in *Mabo v Queensland [No 2]* [1992] HCA 23; (1992) 175 CLR 1 at 70 (at [81], [262], [271], [366], [458]). Under the tripartite test membership of the Indigenous people depends on (a) biological descent from the Indigenous people and on mutual recognition of a particular person's membership by (b) that person and (c) by the elders or other persons enjoying traditional authority among those people. However Bell and Edelman JJ appeared open to the possibility that persons could satisfy the Court that they are Aboriginal Australian without fulfilling this test ([80] Bell J; [458] Edelman J).

The majority held that Mr Thoms is an Aboriginal Australian and therefore cannot be subject to the provisions applying to unlawful non-citizens within the meaning of the Migration Act, but Nettle J was not prepared to find that Mr Love fulfilled the tripartite test, holding it necessary for the Federal Court of Australia to find the relevant facts and, on that basis, to determine the matter according to law ([287]-[288]).

The minority of the High Court (Kiefel CJ, Gageler and Keane JJ) in separate judgments held that it is for Parliament to create and define the concept of Australian citizenship and its antonym, alienage ([5] Kiefel CJ; [100] Gageler J; [166], [172] Keane J). Although Parliament could not, simply by giving its own definition of alien, expand its power to include persons who could not possibly answer the description of aliens ([7] Kiefel CJ; [87] Gageler J; [168] Keane J), in their Honour's opinion this case did not engage the outer limits of the aliens power. Belonging to land is not belonging to the body politic ([32]-[33] Kiefel CJ; [128]-[129] Gageler J; [193]-[195] Keane J).

For Kiefel CJ and Keane J, given that the plaintiffs were born outside Australia, are citizens of foreign sovereign countries and have not been naturalised under the *Australian Citizenship Act 1948* (Cth) or its predecessor, the plaintiffs were aliens within the meaning of s 51(xix) ([18]-[19] Kiefel CJ; [172] Keane J).

Justice Gageler was unable to accept any of the plaintiff's arguments in any of its variations ([127]). His Honour said ([130]-[131]):

[the issues raised by this case] fall to be resolved by the Commonwealth Parliament in the outworking of the political processes for which the Constitution makes elaborate provision ... Section 51(xix) is not to be read as admitting of the existence of a further category of non-aliens who are non-aliens by force of the Constitution itself, whose status is for that reason and to that extent off-limits to the Parliament, and who are consigned to inhabit a constitutional netherworld in which they are neither citizens, who are full and formal members of the body politic of the Commonwealth of Australia, nor aliens, who are not full and formal members of the body politic of the Commonwealth of Australia.

Implications

The case has immediate consequences for the scope of the aliens power and the application of the Migration Act to Aboriginal Australians meeting the tripartite test.

With 7 different judgments it will likely take some time for any broader implications of the case to become apparent.

Text of the decision is available at: <http://eresources.hcourt.gov.au/showCase/2020/HCA/3>

For further information on the application of this decision:

Genevieve Ebbeck
Senior General Counsel
T 02 6253 7080
genevieve.ebbeck@ags.gov.au

Dale Watson
Special Counsel
T 02 9581 7660
dale.watson@ags.gov.au

For further information on the conduct of this litigation, please contact:

Gavin Loughton
Senior Executive Lawyer
T 02 6253 7203
gavin.loughton@ags.gov.au

Danielle Gatehouse
Senior Lawyer
T 02 6253 7327
danielle.gatehouse@ags.gov.au

Baden Powell
Senior Lawyer
T 07 3360 5766
baden.powell@ags.gov.au

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