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Précis Paper

Aboriginal people cannot be 'aliens'

Abstract – In *Love v Commonwealth of Australia; Thoms v Commonwealth of Australia*, the High Court in February 2020 held by a majority of 4-3 that Aboriginal people had an inalienable connection to Australia and could not be deported as aliens under s 51 of the Constitution.

Discussion Includes

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Aboriginal people cannot be 'aliens'

1. In this edition of BenchTV, Stephen Keim SC of Higgins Chambers, lead counsel in the special case of *Love and Thoms v Commonwealth of Australia,* and junior counsel Kate Slack, Higgins Chambers and Arron Hartnett, John Jerrard Chambers, discuss the case and the reasoning of the majority judges who held Aboriginal people could not be considered as 'aliens'.
2. Indigenous Australians have a special cultural, historical and spiritual connection with the territory of Australia. This is inconsistent with holding an Indigenous Australian is an alien within the meaning of s 51 (19) of the Constitution.

Naturalisation and aliens

3. Section 51 (19) and s 51 (27) of the Constitution empowers the Commonwealth Parliament to enact laws about naturalisation and aliens. Through s 51 (19) and s 51 (27), Parliament enacted the M*igration Act 1958* (Cth) and the A*ustralian Citizenship Act 2007* (Cth).
4. Section 5 of the *Migration Act 1958* defines a non-citizen. A non-citizen whose visa is cancelled while they are in the migration zone becomes an unlawful non-citizen, unless immediately after their visa is cancelled they hold another type of visa that is in effect.
5. An unlawful non-citizen in this situation must be detained and may be removed from Australia or deported from Australia.

Indigenous Australians cannot be considered aliens

6. Each of the plaintiffs had one parent who was an Indigenous Australian. Mr Love's grandfather actually fought in the Australian Forces in PNG in the Second World War. Both plaintiffs arrived in Australia about the age of six.
7. At the time you could travel on your mother's passport if you were a child, so needed no paperwork.
8. They got into some trouble. They were sentenced to terms of imprisonment of 12 months or more, a term of imprisonment 'for a serious offence' which means their visas could be cancelled.
9. Their visas were cancelled.
10. Part of the argument was that as Indigenous Australians they could not be described as an alien within the ordinary meaning of that term because for descendants of Australia's first people to be alien is antithetical to their Indigeneity.

Tripartite test

11. Aboriginal Australians understood according to the tripartite test in *Mabo v Queensland (No. 2)* cannot be considered an alien within the meaning of s 51 (19) of the Constitution.
12. Mr Thoms was able to demonstrate he was a native title holder and satisfied the tripartite test. Not all the majority judges agreed that Mr Love satisfied all elements of the test.
13. There are three elements to the tripartite test — a person traces their ancestry to the people in Australia prior to European settlement, self-identifies as a member of that group and the traditional elders of the group also recognise them as forming a member of that Indigenous community.
14. Future cases may consider factual scenarios with a broader tripartite test.

What is an 'alien'?

15. How do you give meaning to a word that is used in a document drawn up in 1899 or 1900 that changes as conditions change? That word is 'aliens'. Sometimes people have gained citizenship according to where they were born. Other people were recognised as nationals because their father, or parents, or grandparents were a citizen — nationality by descent.
16. What is the inherent aspect of alienship is still open for argument.

Two factors for success of the case

17. The perception of the judges about what the ordinary meaning of aliens is.
18. The spiritual relationship of Indigenous Australians to the Australian land mass.

Justice Bell's decision

19. Justice Bell's decision is the most concise. She addressed head on the race-based argument — that it's not about race, ' … it's not offensive to recognise the cultural and spiritual dimension'.

Justice Nettle's decision

21. Justice Nettle sets up the case and defines the problem in a comprehensive and accessible way. Para 263 justifies when you're faced with the problem that *Singh* gives rise to — for constitutional students that's an important paragraph to have regard to.
22. Some of the judgment is strongly worded emotionally as well as rooted in legal history.

23. He recognises the impact of dispossession. It is within the power of the Commonwealth to grant people citizenship or immunise them from the potential consequences of not having a visa.
24. If you make a pathway to citizenship by establishing in fact you are an Aboriginal Australian is an important lesson to take from the case.

Justice Gordon's decision

25. Justice Gordon's reasons are easy to read. She explains quite clearly and emotively why Indigenous people feel the way they do.
26. Para 330 accurately represents the proper approach to constitutional interpretation in Australia.
27. One of the points is about connection with a particular part of the continent compared to the whole continent. Justice Gordon addresses this, seeing that connection with the continent 'was not severed by European settlement'. 'A deeper truth' is a beautiful phrase.
28. There is the spiritual connection with land, and also the difference between the rights that go to make up native title and the rights that traditionally go with land. Native title is just one manifestation of that special connection.

Justice Edelman's decision

29. The judgment denies that these much-discussed criteria of birth and country cover the field of who belongs to a political community. Just because these are things that have been given weight in the past doesn't mean that something that is just as important, in this case Indigenous connection to the land, doesn't define who belongs to a particular community.
30. In the legal profession, precedent is put forward as a doctrine that can't be questioned in any way. But nothing is fixed in constitutional law because constitutions leave so much unsaid, they are tiny documents for the task they have to do over generations and new social conditions are going to require that they have to be applied in different ways. And this is an important lesson.
31. A number of the judges comment on the uniqueness of the plaintiffs' cases. Other nations with Indigenous populations also do not appear to have faced this. After 120 years of constitutional litigation this is the first time the High Court has had to look at the question.

BIOGRAPHY

Stephen Keim SC

Senior Counsel, Higgins Chambers, Brisbane

Stephen was called to the Bar in 1985 and took silk in 2004. He holds a Bachelor of Laws (Hons) and Bachelor of Arts from the University of Queensland. He was a founding member of Higgins Chambers and is currently head of chambers. Stephen also practises from Salamanca Chambers, Hobart.

Stephen has a broad practice and has worked in most areas of law. He has appeared in a broad range of courts and tribunals including the High Court. Stephen specialises in administrative law, criminal law, planning and environmental law and appeals.

Kate Slack

Barrister, Higgins Chambers, Brisbane

Kate has a public, civil and regulatory practice, with expertise in administrative law, appellate law, Commonwealth workers', veterans' and seafarers' compensation/personal injuries law, financial services regulation, corporations law and industrial law.

Kate has appeared led and unled in federal and state jurisdictions at trial and appellate level. She practices nationally in the Administrative Appeals Tribunal, Federal Circuit Court and Federal Court of Australia.

In 2019, Kate was briefed to appear, led by Stephen Keim SC, in *Love and Thoms v Commonwealth of Australia* [2020] HCA 3.

Arron Hartnett

Barrister, John Jerrard Chambers, Brisbane

Arron was called to the Queensland Bar in 2018, having been admitted as a lawyer in 2012. He has a broad civil practice, primarily in the areas of general civil litigation, administrative law (merits review and judicial review), regulatory proceedings, family law and appellate law.

Arron appears in both state and federal courts at the trial and appellate level. In 2018, Arron was briefed to appear, along with Kate Slack, in *Love and Thoms v Commonwealth of Australia* [2020] HCA 3, led by Stephen Keim SC.

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Judgment Link

http://eresources.hcourt.gov.au/showCase/2020/HCA/3

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