

Notes on the *Love;Thoms v The Commonwealth*

- Nettle J (who is part of the Majority) noted at [272], pg. 93 that;

That status [discussed in para. [271] regarding membership of an Aboriginal community in Australia] is necessarily inconsistent with alienage. Logically, it cannot be that the common law in force immediately before Federation acknowledged the authority of elders and other persons to determine membership of an Aboriginal society and yet at the same time subjected members of that society to a liability to deportation.

- Gordon J (who is part of the Majority) held at [293], pg. 102 that;

If the plaintiffs are aliens, and thus within the reach of the legislative power in s 51(xix) of the Constitution, ss 189 and 198 of the Migration Act, which provide for detention of unlawful non-citizens and their removal from Australia, are constitutionally valid in their application to them. If the plaintiffs are not aliens, then those provisions must be read down so as not to apply to them. Are the plaintiffs aliens within the meaning of s 51(xix) of the Constitution? They are not.

Gordon J then noted at [374], pg. 128 that;

It is a connection to this country that means that Aboriginal Australians are not foreigners within the constitutional concept of alien under s 51(xix). And it is a connection which means that even if an Aboriginal Australian's birth is not registered and as a result no citizenship is recorded, or an Aboriginal Australian is born overseas without obtaining Australian citizenship, they are not susceptible to legislation made pursuant to the aliens power or detention and deportation under such legislation.

- Bell J (who is part of the Majority) stated (on behalf of the Majority) at [81], pg. 26 that:

...although we [the Majority] 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.

s. 47C(1)

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