The Constitutional Status of Indigenous Australians

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In *Love v Commonwealth of Australia; Thoms v Commonwealth of Australia* [2020] HCA 3 the apex Australian court, the High Court, decided what intuitively seems obvious: that Aboriginal Australians, as that term is understood in Australian law, cannot be deported from Australia in the exercise of a Commonwealth constitutional power to make laws with respect to 'aliens' (sec 51(xix)).

The complexity of the case arose from the circumstances of the two plaintiffs, Daniel Love and Brendan Thoms. Both were born outside Australia, in Papua New Guinea and New Zealand respectively, and were citizens of those countries. But both had lived in Australia most of their lives, as permanent residents. Both had Indigenous descent through one parent. Both identified as a member of an Australian Indigenous group (Kamilaroi, Gunggari) and were recognised as a member by an elder of that group with traditional authority; Thoms also was a native title holder. Neither had taken steps to become Australian citizens under the *Australian Citizenship Act* 2007 (Cth) and neither were recognised automatically as citizens under that Act. Both, therefore, were literally 'non-citizens' for the purposes of the *Migration Act* 1958 (Cth) and so became liable to deportation under that Act when they committed offences that lead to a sentence of imprisonment for 12 months or more.

The case exposed several fault lines that run through Australian law.

One is familiar, although it manifests itself in different ways. The Australian Constitution was written before Australia became fully independent from Britain and it was not altered to reflect Australia's new status as independence gradually was obtained. One of the remnants of colonial status is the absence of a constitutional concept of citizenship or even of an express federal power to make laws for citizenship. Instead, the concept of belonging to which the Constitution refers, almost in passing, is 'subject of the Queen, resident in any State' (sec 117) and the Parliament is empowered to make laws with respect to 'naturalization and aliens' (sec 51 (xix)). After independence, in the absence of formal constitutional change, it fell to the High Court to interpret the Constitution in a way that adapted it to the new reality, insofar as it was feasible to do so within the limits of judicial power. To this end, it was accepted with little difficulty that the naturalisation and aliens power also supported the validity of legislation creating an Australian citizenship, when initially enacted in 1948 and in all its subsequent forms.

One difficult recurring issue, however, has been the relationship between the constitutional concept of alien and the statutory definition of citizenship, which typically flares in the context of deportation. Resolution was complicated by the gradual transition from subject to citizen as a result of which, for example, some

resident but non-citizen British subjects, who obtained the right to vote in Australia before 1984, can do so still. In a series of cases from 1982, nevertheless, the High Court rejected claims by non-citizens, including British subjects, that they could not be deported under the aliens power because of the nature of their connection with Australia. While the reasoning of the Court in the context of these cases encouraged the view that people who were not citizens were, automatically, aliens within the meaning of the constitutional power, there were caveats as well, that the meaning of 'alien' was a constitutional question, which could not finally be determined by Parliament, inconsistently with the 'ordinary understanding of the 'word' [236]. None of these cases dealt with Indigenous Australians.

In *Love, Thoms* the challenge of adapting the Constitution to independence intersected with another Australian constitutional fault-line, running deeper still: the difficulty of reconciling the official account of the nature of the initial British colonisation of Australia with the reality that Indigenous groups, with complex laws and customs of their own, have inhabited the territory that is now Australia for more than 60,000 years. Historically, Australia was treated as a settled colony and the Australian legal system, including the Constitution, rest on that foundation. There was no treaty, or other arrangement to bring a sense of closure to what might more accurately have been categorised as conquest and to clarify the future relationship between the new constitutional order and the established Indigenous Peoples. Instead, this also has been left to the courts, as aspects of the relationship were raised for legal resolution.

And so, in 1992, in *Mabo (No 2)*, in resolving a dispute over the power of the government of Queensland to grant a lease for a sardine factory in the Murray Islands, the High Court affirmed the entitlement of the Meriam People to the lands, as a form of native title that was recognised by the common law. In doing so Justice Brennan, in the lead judgement, acknowledged that Indigenous peoples had rights and interests in land according to their own laws and customs, which in at least some cases continued, and repudiated the 'fiction' by which these interests had been 'treated as non-existent'. Membership of the Indigenous peoples for this purpose involved 'biological descent…. and … mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among those people'.

The circumstances of Australian colonisation precluded constitutional acknowledgement of the distinctive status of Indigenous peoples, even to the limited extent found in the United States and Canada. When the Australian Constitution came into effect in 1901, it excluded 'the aboriginal race' from federal power to legislate with respect to 'the people of any race…for whom it is deemed necessary to make special laws' (sec 51(xxvi)) and prohibited the 'counting' of 'aboriginal natives' in 'reckoning the numbers of the people' for constitutional purposes (sec 127). The exclusionary words were removed from sec 51(xxvi) by referendum in 1967 and section 127 was repealed altogether; an achievement in one sense, but leaving Indigenous Peoples exposed to legislation as 'the people of any race'. Movements presently are underway to find a way to adequately recognise Indigenous Australians in the Constitution and to explore the possibility of latter-day treaties.

The challenge by Love and Thoms to the validity of their deportation orders required the High Court to decide whether the aliens power supported the deportation of persons who were not citizens but who met the tripartite description of membership of the Indigenous people accepted in *Mabo.* A majority held that it did not: Bell, Nettle, Gordon and Edelman JJ, Kiefel CJ and Gageler and Keane JJ dissenting. While each of the majority Justices delivered their own reasons, they authorised Justice Bell to confirm that they were in agreement that Aboriginal Australians, meeting the tripartite *Mabo* test, were 'not within the reach' of the aliens power [81].

The majority Justices rejected the automatic equation of 'alien' with 'non-citizen'. The consequential challenge for them was to determine the meaning of the term, in a Constitution for which the context had relevantly changed over time, in the light of the previous decisions of the Court. They approached the task in somewhat different ways, with different emphases.

A primary line of difference ran between the reasons of Justice Nettle and the other three majority Justices. Justice Nettle developed his reasons on this point around a concept of alienage that necessarily excluded those with a 'strong… claim to the permanent protection of…the Crown', the corollary of which was permanent allegiance to the Crown [252]. His analysis of the circumstances of British settlement and its aftermath, the implications of *Mabo (No 2)* and contemporary understanding of 'membership of an Aboriginal society', including its 'essentially spiritual connection' with 'country', led him to conclude that the Crown had a 'unique obligation of protection' to Aboriginal societies that was inconsistent with the constitutional concept of alien [276].

In various ways, the other majority Justices associated the meaning of 'alien' with 'otherness' [296]': 'belonging to another…place' [61]; an 'outsider' to Australia [296]; a 'foreigner' to the Australian political community [437]. Like Nettle J, however, all of them drew on history, the recognition of Indigenous rights and interests by the common law and the continuing 'fundamental spiritual and cultural sense of belonging to Australia' that lies at the core of Aboriginal identity [391]. Justice Gordon described the connection as one in which 'the land "owns" the people and the people are responsible for the land'[341]. It was 'sui generis' [74] or 'unique' [333]. It meant that Aboriginal Australians, understood according to the tripartite *Mabo* test, 'could not possibly answer the description of "aliens" in the ordinary understanding of the word' in the Australian constitutional context [51].

The majority analysis had one other important consequence. Aboriginal Australians fell outside the aliens power for reasons of indigeneity, not race. Their status of belonging, in the 21st century, was attributable to their long, continuous, deep, pre-settlement relationship to country, recognised by the common law. The confusion with race stemmed not so much from the decision in 1901 to exclude 'aboriginal natives' from the races power, which the reasons of Edelman J suggest confirmed Indigenous membership of the Australian political community from the outset [407], but as an unintended by-product of the inclusion of Indigenous Australians in the races power in 1967.

All cases that reach the High Court by definition are difficult in ways that sometimes are reflected by divisions within the Court. *Love, Thoms* was no exception. Each of the three minority Justices also delivered separate reasons. In general, however, their approach treated the constitutional term 'alien' as, effectively, the antonym of the statutory status of citizen, on the basis of both earlier authority and their understanding of the nature of the power. They did not accept that, as a matter of constitutional law, the history of Indigenous Australians and their continuing relationship with country placed them outside the constitutional concept of 'alien'. They characterised the argument to the contrary as one based on race, rather than, as for the majority, indigeneity.

Love, Thoms is one of those decisions that would have raised some eyebrows whatever the outcome. As so often is the case, moreover, the long and often dense reasons of the Court do not make easy reading. In legal circles, the decision was accepted with relative equanimity and no particular sense of surprise. The decision was criticised by Ministers when it was handed down, however, stating a preference for the minority view. The government is reputed to be considering the possibility of enacting amending legislation for the deportation of persons in the position of the plaintiffs, based on the immigration (sec 51 (xxvii)) or races powers (sec 51 (xxvi)), in the hope, which would not necessarily be realised, that this might survive challenge. There has been some talk about the implications of the decision for future appointments to the Court.

It is still early days to assess the significance of *Love, Thoms*. At the very least it is important because a constitutional term has been interpreted to recognise the distinctive position of Indigenous Australians. The conceptual, doctrinal and practical significance of the case should not too hastily be overstated, however. The decision offers no threat to the sovereignty of contemporary Australia, although it moves the Australian story a little closer to the reality of how sovereignty was achieved. While the legal implications of accepting the existence of persons who are neither citizens nor aliens remain to be worked out, on any view the group is small, and the emergence of another such group is not encouraged by these reasons. Insofar as having a third category represents a problem for Australian citizenship law it could be overcome by bringing statute law into line with the constitutional understanding of alien; comparative practice in other states is worth exploring, in this regard. The case adds to *Mabo (No 2)* by recognising another incident of the pre-settlement existence of Indigenous Australians. As in *Mabo*, also, however, this incident is reflected through the Australian legal system and not in opposition to it.