

# 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

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

On 11 February 2020 the High Court handed down its decision in *Love v Commonwealth of Australia* [2020] HCA 3 (*Love*).<sup>1</sup> 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)*,<sup>2</sup> 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 Gunggarri People hold common law native title in respect of lands in Queensland's Maranoa region.<sup>3</sup> 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