

Comment

Editor: Dan Meagher

Drawing an Implied Limitation to the Race Power

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For over a decade, Australians have debated whether and how Aboriginal and Torres Strait Islander peoples should be recognised in the *Constitution*. Characterised as “unfinished business”,¹ at its root, arguments over constitutional recognition and reform centre on the ongoing struggle to “effect a more just basic distribution of public power”² between Indigenous Australians and the State. Since the 2017 *Uluru Statement from the Heart*, that struggle and debate have centred on two key proposals. In the *Uluru Statement*, around 250 Aboriginal and Torres Strait Islander delegates called for a constitutionally enshrined First Nations Voice to advise Parliament and government on law and policy affecting Indigenous peoples, and a Makarrata Commission to supervise a process of treaty making and truth telling.³

Despite sustained community support for the First Nations Voice,⁴ the position of the federal government remains unclear. Although initially dismissing the call for an Indigenous representative body,⁵ the government subsequently launched a co-design process aimed at developing an appropriate model.⁶ Nevertheless, it continues to refuse to commit to holding a referendum to constitutionally entrench a First Nations Voice.⁷ Notwithstanding these ongoing challenges, it is clear that the *Uluru Statement from the Heart* offers the only viable way forward for formal constitutional reform.⁸ However, that fact should not close our eyes to the potential for informal complementary reform outside the amendment procedure in s 128 of the *Constitution*. One area in which this may be possible is the race power.

The race power is set out in s 51(xxvi) of the *Constitution*. It provides that:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: (xxvi) The people of any race, for whom it is deemed necessary to make special laws.

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¹ Patrick Dodson, “Beyond the Mourning Gate: Dealing with Unfinished Business” in Robert Tokinson (ed), *The Wentworth Lectures: Honouring Fifty Years of Australian Indigenous Studies* (Aboriginal Studies Press, 2015) 192.

² Dylan Lino, *Constitutional Recognition: First Peoples and the Australian Settler State* (Federation Press, 2018) 88.

³ *Uluru Statement from the Heart*, 2017.

⁴ Francis Markham and Will Sanders, “Support for a Constitutionally Enshrined First Nations Voice to Parliament: Evidence from Opinion Research Since 2017” (Centre for Aboriginal Economic Policy Research, 2020).

⁵ Prime Minister, Attorney-General, Minister for Indigenous Affairs, “Response to the Referendum Council’s Report on Constitutional Recognition” (Media release, 26 October 2017).

⁶ National Indigenous Australians Agency, *Indigenous Voice Co-Design Process: Interim Report to the Australian Government* (October 2020).

⁷ Harry Hobbs, “The Road to Uluru: Constitutional Recognition and the UN Declaration on the Rights of Indigenous Peoples” (2020) 66(4) *Australian Journal of Politics and History* 613, 631.

⁸ Michelle Grattan, *Politics with Michelle Grattan: Megan Davis on a First Nations Voice in the Constitution* (18 July 2019) NITV <<https://www.sbs.com.au/nitv/article/2019/07/18/politics-michelle-grattan-megan-davis-first-nations-voice-constitution>>.

The orthodox position is that the race power permits Parliament to enact legislation that imposes a disadvantage on Aboriginal and Torres Strait Islander peoples.⁹ In *Western Australia v Commonwealth (Native Title Act Case)*, for example, six members of the Court stated in dicta comments that the race power would support a law conferring a right as well as a law imposing a disadvantage on members of a particular race.¹⁰ Nonetheless, a majority of the High Court has never confirmed this position, and in several cases a number of Justices have questioned whether a latent limitation may exist.

The *Uluru Statement from the Heart* does not propose amending the race power in s 51(xxvi) of the *Constitution* but it is clear that restraining the scope of the race power is an important objective of many Aboriginal and Torres Strait Islander peoples. The *Final Report of the Referendum Council*, for example, reveals that a prohibition on racial discrimination was endorsed in over half of the Regional Dialogues: Hobart, Darwin, Perth, Sydney, Ross River, Brisbane and Thursday Island.¹¹ At the same time, the Report records that “amending or deleting the race power was ranked low in many Dialogues and rejected in other Dialogues”.¹² Although initially it may appear difficult to reconcile these positions, it appears that reluctance for constitutional amendment stems from the fact that many delegates were concerned that altering s 51(xxvi) could not provide an “iron clad guarantee” preventing the enactment of discriminatory legislation and that any amendment would risk the constitutional validity of existing beneficial legislation.¹³

What is desired then is informal amendment of the race power which restrains its capacity to discriminate adversely against Aboriginal and Torres Strait Islander peoples. Informal amendment may produce the preferred result without the risk that comes from a new set of words. In a previous comment, I argued that restraining the scope of the race power may not require a referendum.¹⁴ That analysis was based on the High Court of Australia’s decision in *McCloy v New South Wales*.¹⁵ No such limitation has since been found, but neither has the Court had cause to examine that specific question. In this comment, I explore whether the recent High Court decision of *Love v Commonwealth; Thoms v Commonwealth (Love; Thoms)*,¹⁶ could offer another path to the High Court uncovering an implied limitation to the race power. Of course, such a conclusion will require an appropriate vehicle.

THE DECISION IN LOVE; THOMS

In *Love; Thoms* the Court was asked whether two Aboriginal people who were not citizens of Australia could be deported under the *Migration Act 1958* (Cth) (*Migration Act*) as “aliens”. Daniel Love and Brendan Thoms were both born outside Australia and neither holds Australian citizenship. Love was born in Papua New Guinea (PNG) in 1979 to an Australian citizen father and PNG citizen mother.¹⁷ At birth, he became a citizen of PNG.¹⁸ Love identifies as and is recognised by at least one elder as a Kamilaroi man. Thoms was born in New Zealand in 1988 to an Australian citizen mother and a New Zealand citizen father. Thoms automatically became a citizen of New Zealand at birth. Thoms identifies and is recognised by other members as a member of the Gunggari people. The Federal Court has

⁹ Robert French, “The Race Power: A Constitutional Chimera” in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (CUP, 2003) 180, 206.

¹⁰ *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373, 461.

¹¹ Referendum Council, *Final Report of the Referendum Council* (Commonwealth, 2017) 15. No evidence is available in the Records of Meetings in the remaining Dialogues on this question.

¹² Referendum Council, n 11, 13.

¹³ Referendum Council, n 11.

¹⁴ Harry Hobbs, “Revisiting the Scope of the Race Power after *McCloy*” (2016) 27 PLR 249.

¹⁵ *McCloy v New South Wales* (2015) 257 CLR 178; [2015] HCA 34.

¹⁶ *Love v Commonwealth; Thoms v Commonwealth* (2020) 94 ALJR 198; [2020] HCA 3.

¹⁷ Facts drawn from Plaintiffs Submissions, ‘Special Case Submission of the Plaintiffs’, Submission in *Love v Commonwealth; Thoms v Commonwealth*, B43/2018, 2 April 2019, 2–3, [9]–[15].

¹⁸ See *Constitution of the Independent State of Papua New Guinea 1975*, s 66(1).

recognised Gunggari native title and Thoms himself is a native title holder.¹⁹ Both men were convicted of separate offences and sentenced to a period of imprisonment of 12 months or more. As a result, both men had their visas cancelled by a delegate of the Minister for Home Affairs in accordance with s 501(3A) of the *Migration Act*.

Daniel Love and Brendan Thoms were not the first Aboriginal Australians to be subject to the mandatory visa cancellation provisions in the *Migration Act*. In *Hands v Minister for Immigration and Border Protection*, for instance, the Full Court of the Federal Court upheld an appeal by an adopted Koori man against the dismissal of his application to revoke the cancellation of his visa for jurisdictional error.²⁰ However, Love and Thoms were the first to challenge the cancellation of their visas on the basis that they were not aliens for the purpose of s 51(xix) of the *Constitution* and could therefore not be deported under the Act.

A majority of the Court accepted their submission. Bell, Gordon, Nettle and Edelman JJ held that Aboriginal Australians, understood according to the three-part test in *Mabo v Queensland (No 2)* (*Mabo (No 2)*),²¹ “are not within the reach of the ‘aliens’ power conferred by s 51(xix) of the *Constitution*”.²² The majority confirmed that while the Commonwealth Parliament’s authority to legislate with respect to aliens is broad, Parliament cannot “expand the power under s 51(xix) to include persons who could not possibly answer the description of “aliens” in the ordinary understanding of the word”.²³ For three of the four justices in the majority, Aboriginal and Torres Strait Islander peoples longstanding and deep connection to country means that they cannot be said not to belong to the Australian community, even if they do not hold statutory citizenship.²⁴ Nettle J characterised this in a slightly different way. His Honour held that common law recognition of Aboriginal societies “as the source and sanctuary of traditional laws and customs” means that the Crown owes an obligation to protect those societies, who “*eo ipso* owe permanent allegiance” to the Crown in right of Australia.²⁵

Notwithstanding this central finding, however, a division within the majority over the appropriate legal test for Aboriginality resulted in different orders for each plaintiff. As a native title holder, all four judges in the majority accepted that Thoms satisfied the standard. In the case of Love, however, Nettle J could not be certain that he met the requirements in *Mabo (No 2)*.²⁶ Consequently, Love’s status was sent before a lower court for determination.²⁷

The immediate effect of the decision in *Love; Thoms* prevented the government’s intended deportation of Daniel Love and Brendan Thoms. It also precludes the government from deporting other Aboriginal non-citizens under the *Migration Act*.²⁸ Reflecting the decision’s challenge to the government’s policy

¹⁹ *Kearns on behalf of the Gunggari People #2 v State of Queensland* [2012] FCA 651; *Foster v Queensland* [2014] FCA 1318.

²⁰ *Hands v Minister for Immigration and Border Protection* (2018) 267 FCR 628; [2018] FCAFC 225. Similar cases have considered circumstances where a non-citizen in a relationship with an Aboriginal person and who has children who may identify as Aboriginal may seek judicial review of the decision to cancel their visa: See, for instance, *Umi v Minister for Home Affairs* [2019] FCA 2148; affirmed in *Umi v Minister for Home Affairs* [2020] FCAFC 101.

²¹ *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

²² *Love v Commonwealth; Thoms v Commonwealth* (2020) 94 ALJR 198, 218 [81] (Bell J); [2020] HCA 3.

²³ *Pochi v Macphree* (1982) 151 CLR 101, 109 (Gibbs CJ). Cited in *Love v Commonwealth; Thoms v Commonwealth* (2020) 94 ALJR 198, 212 [50] (Bell J), 243 [236] (Nettle J), 260–261 [310]–[311] (Gordon J), 273–274 [395] (Edelman J); [2020] HCA 3.

²⁴ *Love v Commonwealth; Thoms v Commonwealth* (2020) 94 ALJR 198, 217 [74] (Bell J), 256 [284] (Nettle J), 258 [296] (Gordon J), 274 [398] (Edelman J); [2020] HCA 3.

²⁵ *Love v Commonwealth; Thoms v Commonwealth* (2020) 94 ALJR 198, 253 [272], 255 [279] (Nettle J); [2020] HCA 3 (emphasis in original).

²⁶ *Love v Commonwealth; Thoms v Commonwealth* (2020) 94 ALJR 198, 257 [287]–[288] (Nettle J); [2020] HCA 3.

²⁷ *Love v Commonwealth; Thoms v Commonwealth* (2020) 94 ALJR 198, 209 [24] (Kiefel CJ), 229 [141] (Gageler J), 236 [187] (Keane J), 257 [287] (Nettle J); [2020] HCA 3.

²⁸ In April 2021, the Department of Home Affairs gave evidence to a Senate Committee that seven non-citizens facing deportation have been released from immigration detention because they were able to prove they met the requirements in *Mabo v Queensland (No 2)* (1992) 175 CLR 1. The Department was assessing the claims of a further 20 people in immigration detention: Nicola

of deporting non-citizens convicted of serious offences, several members of the government were “furious” with the result,²⁹ and announced plans to seek legal advice to allow them to continue to deport Aboriginal non-citizens under a different head of power.³⁰ Building on the reasoning of the majority, however, the government may find that the decision in *Love; Thoms* forecloses one of those paths.

The constitutional validity of the *Migration Act* is supported by the aliens’ power. It is not the only possible head of power under which the Parliament could enact laws facilitating the deportation of non-citizens. In *Love; Thoms*, Gageler J suggested that if the government was minded to maintain “an orderly national immigration program” under the Act, it could rely:

on the power conferred by s 51(xxvii) to make laws with respect to ‘immigration and emigration’. Alternatively, the Commonwealth Parliament might consider itself obliged to address them through racially targeted legislation enacted under s 51(xxvi) of the *Constitution*.³¹

Nettle J also observed that the federal government may be inclined to abrogate its obligation to protect Aboriginal societies by statute. To do so, would:

require unambiguously clear provision with the effect that, notwithstanding the common law of Australia, and perhaps the *Racial Discrimination Act 1975* (Cth), the Crown shall not owe the obligation of permanent protection to Aboriginal societies or their members as such.³²

His Honour cautioned, however, that it is not clear whether “the enactment of such a provision would be within the ambit of Commonwealth legislative power”.³³ Justice Gordon made a similar comment, noting that “whether the Parliament could remove or modify” Aboriginal Australians “unique connection to this country” “need not be decided”.³⁴ These cryptic remarks raise the prospect that *Love; Thoms* could lead to the High Court finding an implied limitation to the race power.

THE RACE POWER AFTER LOVE; THOMS

The scope of s 51(xxvi) has been considered most fully in two cases decided in the 1990s: the *Native Title Act Case*,³⁵ and *Kartinyeri v Commonwealth (Hindmarsh Island Bridge Case) (Kartinyeri)*.³⁶ In the *Native Title Act Case*, the Court dismissed a challenge to the Native Title Act brought by Western Australia. In reaching this decision, the Court explored the meaning of the race power. The plurality judgment of Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ explained that the word “special” qualifies “law” and does not relate to necessity. Therefore, “the special quality of a law must be ascertained by reference to its differential operation upon the people of a particular race, not by reference to the circumstances which led the Parliament to deem it necessary to enact the law.”³⁷ The plurality thus appeared to hold that “a special quality appears” when the law imposes a benefit *or disadvantage* on the people of a particular race.³⁸ Nonetheless, their Honours indicated that some limit

Berkovic, “New Law a Lifeline for Seven to Stay”, *The Australian*, 15 April 2021, 2. Michelle Foster and Kirsty Gover raise the prospect that a wider reading of the decision may protect certain non-Indigenous peoples: Michelle Foster and Kirsty Gover, “Determining Membership: Aboriginality and Alienage in the Australian High Court” (2020) 31(2) *PLR* 105, 113–114.

²⁹ See discussion in Matt Coughlan, “Dutton Furious with High Court Decision”, *Canberra Times*, 20 February 2020 <<https://www.canberratimes.com.au/story/6640195/dutton-furious-with-high-court-decision/?cs=14231>>.

³⁰ Elias Visontay, “Peter Dutton Says High Court Indigenous ‘Status’ Call May Face Legislation Fight”, *The Australian*, 13 February 2020 <<https://www.theaustralian.com.au/nation/peter-dutton-says-high-court-indigenous-status-call-may-legislation-fight/news-story/a66ec94589b45bb3a1b7e544d8c9a2de>>.

³¹ *Love v Commonwealth; Thoms v Commonwealth* (2020) 94 ALJR 198, 229 [140] (Gageler J); [2020] HCA 3.

³² *Love v Commonwealth; Thoms v Commonwealth* (2020) 94 ALJR 198, 256 [283] (Nettle J); [2020] HCA 3.

³³ *Love v Commonwealth; Thoms v Commonwealth* (2020) 94 ALJR 198; [2020] HCA 3.

³⁴ *Love v Commonwealth; Thoms v Commonwealth* (2020) 94 ALJR 198, 271 [373] (Gordon J); [2020] HCA 3.

³⁵ *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373.

³⁶ *Kartinyeri v Commonwealth (Hindmarsh Island Bridge Case)* (1998) 195 CLR 337; [1998] HCA 22.

³⁷ *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373, 460–461.

³⁸ *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373, 461 (emphasis added).

exists. While it is not appropriate to determine whether a law enacted by the Parliament could be deemed to be “necessary”, as this would require the Court to form a political judgment, the Justices did leave open the question as to whether it “retains some supervisory jurisdiction to examine the question of necessity against the possibility of a manifest abuse of the races power”.³⁹

In *Kartinyeri*, the Court considered the validity of the *Hindmarsh Island Bridge Act 1997* (Cth) (*Bridge Act*). The Act facilitated the construction of a bridge that would allegedly violate a Ngarrindjeri sacred site by excising the area from the protection of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth). The Ngarrindjeri challenged the *Bridge Act*, arguing that it discriminated against them on the basis of race and was therefore not supported by s 51(xxvi). A majority of the Court dismissed the challenge and upheld the validity of the *Bridge Act*, but no definitive position on the scope of s 51(xxvi) emerged as only four Justices found it necessary to examine the issue. Gummow and Hayne JJ held that the scope of s 51(xxvi) extends to enacting laws that disadvantage Aboriginal and Torres Strait Islander peoples,⁴⁰ while Kirby J disagreed entirely.⁴¹ Gaudron J struck a middle ground, holding that the race power can ground discriminatory legislation, but does not extend to supporting a law operating to the disadvantage of Indigenous Australians.⁴² Brennan CJ and McHugh J did not address the scope of s 51(xxvi),⁴³ and Callinan J had recused himself.

On the reasoning of Kirby J and Gaudron J, a law to deport Aboriginal Australians who are not citizens of Australia would likely be found not to be supported by the race power. This is because such a law would clearly operate to their disadvantage. Could a majority be found on this point? It is worth exploring Gummow and Hayne JJ’s judgment in more detail. Although their Honours found that the scope of s 51(xxvi) can extend to enacting laws that disadvantage Aboriginal and Torres Strait Islander peoples, their discussion is predicated on the particular issue in question. That issue is the withdrawal of a statutory benefit rather than the curtailment of “the enjoyment of any substantive common law rights”.⁴⁴ Indeed, Gummow and Hayne JJ were careful to explain that the *Bridge Act* limited the protection offered under an existing law and did not interfere with fundamental common law rights and freedoms. In doing so, their Honours expressly left open the possibility that a law which did interfere may fall outside the scope of s 51(xxvi) as a “manifest abuse” of that power.⁴⁵

The question then becomes whether a law enacted by the Commonwealth Parliament that abrogated common law recognition of Aboriginal Australians’ deep connection with country and/or the Crown’s unique obligation of protection to those societies in order to permit deportation of Aboriginal non-citizens, would constitute a manifest abuse of the race power. No express limitation on the Commonwealth’s legislative power to enact such a law exists, and principles of statutory interpretation will only assist so far; the principle of legality,⁴⁶ for example, can be rebutted with “clear words or a necessary implication to that effect”.⁴⁷ Nonetheless, comments from each judge in the majority suggest that such a law may interfere with fundamental rights recognised by the common law such that it could meet this high standard.

³⁹ *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373, 460.

⁴⁰ *Kartinyeri v Commonwealth (Hindmarsh Island Bridge Case)* (1998) 195 CLR 337, 338–379; [1998] HCA 22.

⁴¹ *Kartinyeri v Commonwealth (Hindmarsh Island Bridge Case)* (1998) 195 CLR 337, 411; [1998] HCA 22.

⁴² *Kartinyeri v Commonwealth (Hindmarsh Island Bridge Case)* (1998) 195 CLR 337, 367; [1998] HCA 22.

⁴³ *Kartinyeri v Commonwealth (Hindmarsh Island Bridge Case)* (1998) 195 CLR 337, 358; [1998] HCA 22.

⁴⁴ *Kartinyeri v Commonwealth (Hindmarsh Island Bridge Case)* (1998) 195 CLR 337, 376 [72], 379 [84] (Gummow and Hayne JJ); [1998] HCA 22.

⁴⁵ *Kartinyeri v Commonwealth (Hindmarsh Island Bridge Case)* (1998) 195 CLR 337, 378 [82], 381 [89] (Gummow and Hayne JJ); [1998] HCA 22.

⁴⁶ Brendan Lim, “The Normativity of the Principle of Legality” (2013) 37(2) *Melbourne University Law Review* 372, 373; *Potter v Minahan* (1908) 7 CLR 277, 304 (O’Connor J); *Coco v The Queen* (1994) 179 CLR 427, 437.

⁴⁷ *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 553 (Gleeson CJ, Gaudron, Gummow and Hayne JJ); [2002] HCA 49; James Spiegelman, “Principle of Legality and the Clear Statement Principle” (2005) 79(12) ALJ 769, 779.

The High Court has acknowledged the deep connection that Aboriginal Australians have to country. Underlying that connection is a “fundamental truth ... an unquestioned scheme of things in which the spirit ancestors, the people of the clan, particular land and everything that exists on and in it, are organic parts of one indissoluble whole”.⁴⁸ While the High Court has recognised that native title can be extinguished, Aboriginal Australians connection to country remains. Dispossession “does not strip [Aboriginal Australians] of their connection with land and waters”,⁴⁹ for the loss of those rights “does not extinguish the powerful spiritual and cultural connections Aboriginal people have generally with the lands of Australia”.⁵⁰

A law deporting non-citizen Aboriginal Australians is of a fundamentally different character than a law that validates historic extinguishment of native title. This is because a law facilitating deportation would encompass the permanent exclusion from country. In doing so, such a law would “tear the organic whole of the society asunder”,⁵¹ by destroying the “cultural and spiritual dimensions of the distinctive connection between indigenous peoples and their traditional lands”.⁵² Such a law would “ignore the content, nature and depth of [Aboriginal Australians’] connection”,⁵³ “would fail to recognise the first peoples of this country” and “would fly in the face of decisions of this Court that recognise that connection and give it legal consequences befitting its significance”.⁵⁴ Such a law would also strip Aboriginal Australians of their identity, which “is shaped by a fundamental spiritual and cultural sense of belonging to Australia”.⁵⁵ In perhaps the clearest suggestion that such a law would constitute a manifest abuse of the race power, Edelman J notes, “the sense of identity that ties Aboriginal people to Australia is an underlying fundamental truth that cannot be altered or deemed not to exist by legislation”.⁵⁶

It is not clear whether a future Court would find an implied limitation to the race power. Two members of the majority, Justices Nettle and Bell, retired in December 2020 and March 2021 respectively. Nonetheless, the recognition that Aboriginal and Torres Strait Islander peoples’ status as the First Peoples of the Australian polity is constitutionally significant leaves it open for the Court to find an implied limitation to the race power. Deporting Aboriginal Australians and permanently excluding them from country violates their fundamental rights recognised by the common law and imposes severe consequences on their wellbeing. A law facilitating that deportation may well be held to be a manifest abuse of the race power.

A constitutionally entrenched First Nations Voice remains critical. However, if a future Court finds an implied limitation to the scope of the race power, one key aspiration of Aboriginal and Torres Strait Islander peoples will have been met even in the absence of formal constitutional amendment.

⁴⁸ *Milirrpum v Nabalco Pty Ltd (Gove Land Rights Case)* (1971) 17 FLR 141, 167 (Blackburn J); *R v Toohy; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327, 356–357; *Northern Territory v Griffiths* (2019) 93 ALJR 327, 377 [206]; [2019] HCA 7.

⁴⁹ *Love v Commonwealth; Thoms v Commonwealth* (2020) 94 ALJR 198, 269 [365] (Gordon J); [2020] HCA 3.

⁵⁰ *Love v Commonwealth; Thoms v Commonwealth* (2020) 94 ALJR 198, 288 [451] (Edelman); [2020] HCA 3.

⁵¹ *Love v Commonwealth; Thoms v Commonwealth* (2020) 94 ALJR 198, 253 [272] (Nettle J); [2020] HCA 3.

⁵² *Love v Commonwealth; Thoms v Commonwealth* (2020) 94 ALJR 198, 217 [73] (Bell J), 257 [290] (Gordon J); [2020] HCA 3.

⁵³ *Love v Commonwealth; Thoms v Commonwealth* (2020) 94 ALJR 198, 258 [298] (Gordon J); [2020] HCA 3.

⁵⁴ *Love v Commonwealth; Thoms v Commonwealth* (2020) 94 ALJR 198, 269 [365] (Gordon J); [2020] HCA 3.

⁵⁵ *Love v Commonwealth; Thoms v Commonwealth* (2020) 94 ALJR 198, 272 [391] (Edelman J); [2020] HCA.

⁵⁶ *Love v Commonwealth; Thoms v Commonwealth* (2020) 94 ALJR 198, 288 [451] (Edelman J); [2020] HCA 3.