

Before the High Court

Aboriginal Identity and Status under the *Australian Constitution: Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery*

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Abstract

In *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery* ('*Montgomery*'), the High Court of Australia is faced with a challenge to the significant, but controversial, decision in *Love v Commonwealth*. That decision held that the aliens power under s 51(xix) of the *Australian Constitution* does not reach Aboriginal Australians. As a result, they are not vulnerable to the removal powers contained in the *Migration Act 1958* (Cth) regardless of their statutory citizenship status. In *Montgomery*, the Commonwealth seeks to reopen and overturn *Love v Commonwealth*, or to confine the category of Aboriginal Australians in a way that excludes persons like Montgomery, who have been culturally adopted into an Aboriginal society, but have not shown that they are the biological descendant of an Aboriginal or Torres Strait Islander person. *Montgomery* highlights the challenges entailed in efforts to determine the scope of the Australian Parliament's power to determine membership of the constitutional polity, and appropriately describe Aboriginal Australians in a way that respects the complexities of Aboriginal and Torres Strait Islander identity and membership.

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I Facts and Procedural History

In *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery* (*‘Montgomery’*),¹ the Commonwealth² seeks to reopen and overturn *Love v Commonwealth*, which held that the aliens power under s 51(xix) of the *Australian Constitution* does not reach Aboriginal Australians.³ Alternatively, the Commonwealth seeks to confine the category of Aboriginal Australians in a way that excludes persons like Montgomery. Shayne Paul Montgomery was born in New Zealand and is a New Zealand citizen. His mother is an Australian citizen and his father a New Zealand citizen of Māori (Ngā Puhī) descent. He moved to Australia in 1997 as a teenager and was granted a visa under s 32 of the *Migration Act 1958* (Cth) (*‘Migration Act’*). He has never been naturalised. Montgomery identifies as Aboriginal Australian and has been recognised as a culturally adopted Mununjali man by persons enjoying traditional authority in the Mununjali community, in accordance with that society’s traditional laws and customs.⁴ He was told by his paternal grandmother that his Ngā Puhī ancestors married into an Aboriginal clan, but he does not know if he is a direct descendant of Aboriginal ancestors, and he does not know if his Australian mother has Aboriginal ancestry.⁵

In 2018, Montgomery was convicted of a burglary offence and sentenced to 14 months’ imprisonment, following which a delegate of the Minister cancelled his visa. That cancellation was mandatory, as Montgomery had breached the character test because of his criminal record.⁶ At the expiration of his sentence in February

¹ *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery* (High Court of Australia, Case No S192/2021) (*‘Montgomery’*).

² We refer to ‘the Commonwealth’ as shorthand for the appellants and supporting interveners — all being emanations of the Commonwealth.

³ We use the expression ‘Aboriginal Australian’ to reflect the terminology used by the majority of the High Court of Australia in *Love v Commonwealth* (2020) 270 CLR 152, 192 [81] (Bell J) (*‘Love’*) and Federal Court of Australia decisions, otherwise ‘Aboriginal and Torres Strait Islander’ persons or people is used.

⁴ *Montgomery v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1423, [53] (*‘Montgomery (FCA)’*).

⁵ *Ibid.*

⁶ *Ibid* [2], [29]–[30]. See *Migration Act 1958* (‘Cth’) s 501(3A)(a)(i), (6)(a), (7)(c).

2019, Montgomery was taken into immigration detention.⁷ A year later, the High Court of Australia decided the case of *Love*, in which a majority of the Court held that Aboriginal Australians, even if not citizens, are not aliens for the purpose of s 51(xix) of the *Australian Constitution*.⁸

Montgomery challenged his immigration detention on a number of grounds in the Federal Court of Australia. He was successful in a habeas corpus application based on a challenge to the lawfulness of his detention under s 189 of the *Migration Act*.⁹ That challenge was premised on the finding that Montgomery's representations as to his Aboriginality were sufficient to put in issue the lawfulness of his detention,¹⁰ shifting the burden of proof to the Minister.¹¹ SC Derrington J, in the Federal Court, concluded that the detaining officer's suspicion that Montgomery was not an Aboriginal Australian was not reasonable.¹² The Minister filed a notice of appeal with respect to the habeas writ and it is that appeal which was removed into the High Court on 29 November 2021.¹³

Montgomery has sought to separate any constitutional issues from the grounds upon which the habeas writ was granted, given that the question of Montgomery's status as an Aboriginal Australian in the terms required by *Love* was not before the Federal Court. Yet the issues are not so easily separated. The constitutional issue (the effect of Aboriginality on alien status) is linked to the habeas writ's dependence on a conclusion regarding the lawfulness of Montgomery's detention. Following *Love*, there have been several Federal Court cases regarding the application of that precedent to individuals faced with immigration detention.¹⁴ The logic adopted in those cases has been that Aboriginal Australians, understood in accordance with the tripartite test used in *Love*,¹⁵ are not aliens, therefore they are not vulnerable to detention and deportation under the *Migration Act*.¹⁶ *Montgomery* is the first of the Federal Court cases on this issue to reach the High Court.

⁷ *Montgomery (FCA)* (n 4) [29].

⁸ *Love* (n 3) 192 [81] (Bell J).

⁹ *Montgomery (FCA)* (n 4).

¹⁰ *Ibid* [55].

¹¹ *Ibid* [52].

¹² *Ibid* [68].

¹³ Transcript of Proceedings, *Montgomery v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] HCATrans 201.

¹⁴ See *Helmbright v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2)* [2021] FCA 647 ('*Helmbright (No 2)*'); *Hirama v Minister for Home Affairs* [2021] FCA 648 ('*Hirama*'); *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 283 FCR 602 ('*McHugh (FCAFC)*'); *Webster v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 277 FCR 38.

¹⁵ The tripartite test, addressed below in Part VI, was that referred to by Brennan J in *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 70 ('*Mabo (No 2)*'): see below n 44 and accompanying text.

¹⁶ The extent to which non-aliens may be lawfully detained under that Act is the subject of separate proceedings flowing from the *Love* decision, see *Thoms v Commonwealth* (High Court of Australia, Case No B56/2021, commenced 11 October 2021, heard 9 March 2022 with judgment reserved).

II Overview of the Issues

The threshold question before the High Court in these proceedings is a challenge to its competency to hear an appeal from the habeas writ. Montgomery refers to a so-called ‘preclusion principle’, in which ‘no appeal lies from an order of a competent Court for the issue of a writ of habeas corpus discharging a [detained] person from custody, unless a right of appeal is specifically given by the Legislature’.¹⁷

Assuming the Court decides it is competent to hear the appeal, it will likely proceed to address the Minister’s arguments regarding the reopening of *Love*.¹⁸ The Commonwealth Attorney-General has intervened in support of the Minister, indicating the Government’s desire to see a reversal of the decision in *Love*.¹⁹ That position is no surprise given the criticism of the Court’s decision in *Love* and the public position of at least one member of the current government.²⁰ Montgomery argues *Love* should neither be reopened nor overturned, and is supported by interveners.²¹

If *Love* remains good law, the Court will provide a restatement of what that case stands for, but in order to respond to the case before them, the Court may also have to consider its application to Montgomery’s circumstances. At that point, questions of fact become particularly fraught, since the hearing in the Federal Court proceeded without comprehensive evidence on Montgomery’s status as an

¹⁷ Shayne Paul Montgomery, ‘Submissions of Respondent’, Submission in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery*, Case No S192/2021, 4 March 2022, [13] (‘Respondent’s Submissions’).

¹⁸ For other preliminary arguments of Montgomery to avoid the Court reaching the *Love* issue, see *ibid* [21]–[36].

¹⁹ Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, ‘Submissions of the Appellants and Attorney General for the Commonwealth (Intervening)’, Submission in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery*, Case No S192/2021, 28 January 2022 (‘Appellants’ Submissions’).

²⁰ Senator Amanda Stoker, currently Assistant Minister to the Attorney-General, made clear in her paper delivered to the Samuel Griffiths Society in 2020, prior to the appointments of Gleeson and Steward JJ, that ‘challenging the decision under a reconstituted Bench’ is her preferred approach for the Government in seeking to ‘remedy’ the ‘truly disturbing’ decision reached by the majority of the Court in *Love*: Amanda Stoker, ‘All’s Fair in Love and War: The High Court’s Decision in *Love & Thoms*’ (2020) (Online Speaker Series) *Samuel Griffiths Society* <<https://www.samuelgriffith.org/papers>>.

²¹ See the submissions in *Montgomery* seeking leave to intervene: National Native Title Council, ‘Submissions of the National Native Title Council Seeking Leave to Intervene’, Submission in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery*, Case No S192/2021, 9 March 2022; Northern Land Council, ‘Proposed Submissions of the Northern Land Council’, Submission in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery*, Case No S192/2021, 9 March 2022; Attorney-General (Vic), ‘Submissions of the Attorney-General for the State of Victoria (Intervening)’, Submission in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery*, Case No S192/2021, 9 March 2022 (‘Attorney-General (Vic) Intervener’s Submissions’). See also the submissions of the Australian Human Rights Commission seeking leave to appear as *amicus curiae*: Australian Human Rights Commission, ‘Submissions of the Australian Human Rights Commission Seeking Leave to Appear as *Amicus Curiae*’, Submission in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery*, Case No S192/2021, 9 March 2022.

Aboriginal Australian under the tripartite test referred to in *Love*.²² The lack of facts may affect whether or not the Court enters the fray on this point. The High Court may decide that the factual matters have to be resolved in the Federal Court, as it did in relation to Daniel Love. To the extent that the High Court entertains the definitional challenge of identifying ‘Aboriginal Australians’, the focus will turn on the meaning of ‘biological descent’ in the first limb of the tripartite *Mabo v Queensland (No 2)* test relied on in *Love*.²³

In this article, we address two issues: first, how the aliens power is to be understood; and second, the state of play regarding tests for determining whether a person is an Aboriginal Australian. We conclude that the finding in *Love* that a person’s status as an Australian Aboriginal is relevant to constitutional membership is neither illegitimate nor inconsistent with fundamental principles of Australian constitutionalism.

III *Love* and Alienage: A Clarification?

The decision in *Love* is the first time that a majority of the High Court has enunciated a specific limit to the aliens power in s 51(xix) of the *Australian Constitution*. That majority was composed of four separate judgments by Bell, Nettle, Gordon and Edelman JJ. The members of the majority agreed on a central proposition as expressed by Bell J:

I am authorised by the other members of the majority to say that although we 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*.²⁴

Whatever route the Court takes in responding to the appeal in *Montgomery*, the reasoning of *Love* will be in focus. Individual judges may decide the case on the question of whether leave is required to reopen *Love* and whether leave should be granted. Whether or not *Love* is reopened, the Court will either have to explain why the case should be overturned, or explain what the precedent means in application to *Montgomery*.

At its heart, the *Montgomery* appeal is about choosing between different approaches to understanding alienage in s 51(xix) of the *Australian Constitution* and whether (and, if so, how) a person’s status as an Aboriginal Australian is relevant. The submissions of the parties effectively repeat the key lines of disagreement seen on the High Court in *Love*, influenced by the intervening case of *Chetcuti v Commonwealth*,²⁵ decided in August 2021, and the arguments in *Alexander v*

²² Respondent’s Submissions (n 17) [12].

²³ *Mabo (No 2)* (n 15) 70. Only the first limb of the test (biological descent) is in issue in *Montgomery*. This is addressed below in Part VI.

²⁴ *Love* (n 3) 192 [81] (Bell J).

²⁵ *Chetcuti v Commonwealth* (2021) 95 ALJR 704.

Minister for Home Affairs,²⁶ heard in February 2022. Despite the disagreements, the entire Court speaks with one voice on some key elements.

One element of agreement in the High Court is that the aliens power is a key component of the Australian State's capacity to determine membership and exclusion under the *Australian Constitution*.²⁷ Another is that there is a great deal of latitude available to the Australian Parliament in how it seeks to determine membership and therefore implicitly also exclusion through statute — principally by means of citizenship legislation. This latitude is due to the lack of settled law as to alienage at Federation given statutory inroads to that status at the time, and the evolution of Australia as an independent nation. Lastly, all judges have recognised that the power of the Parliament in this field is not completely unlimited, by reference to the key statement of Gibbs CJ in *Pochi v Macphee*: 'the Parliament cannot, simply by giving its own definition of "alien", 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'.²⁸

IV Maintaining a Supervisory Function of the High Court — Limits to the Aliens Power

The Commonwealth structures their argument in a way that seeks to reduce the impact of the 'ordinary understanding' limit. They note: 'the existence of [the *Pochi*] qualification is undoubted ... [but] ... the ordinary understanding of "alien" is relevant only to the extent that the *range of possible meanings* encompassed by that understanding marks the limit on the first aspect of s 51(xix)'.²⁹ The Commonwealth argues that the majority in *Love* reasoned in error by focusing on the essential or ordinary meaning of alien and concluding that Aboriginal Australians do not fall within that meaning. That is, they say one should not *start* with a focus on that limit because it would be a 'direct application' of the ordinary meaning of alien.³⁰

This approach of the Commonwealth effectively prevents the identification of limits on the aliens power. The logic of the Commonwealth's approach is to allow the Australian Parliament to choose from among a smorgasbord of options regarding the possible bases upon which to determine citizenship and by implication non-alienage. The argument goes as follows: if it is sufficient that any one of those is a basis upon which to legislate, then no limit can be identified unless that list is itself challenged. That is, the very reference to 'ordinary meaning' simply collapses back to the bases upon which individuals have been treated as aliens in the past and each of them is available today and into the future at the choice of the Parliament, with no other factors being able to be legitimately raised to limit the Parliament's power.

²⁶ *Alexander v Minister for Home Affairs* (High Court of Australia, Case No S103/2021, commenced 23 July 2021).

²⁷ Appellants' Submissions (n 19) [23]; *Love* (n 3) 217–18 [167] (Keane J), 173 [14] (Kiefel CJ), 209 [130], 212 [138] (Gageler J), 293–4 [404] (Edelman J).

²⁸ *Pochi v Macphee* (1982) 151 CLR 101, 109.

²⁹ Appellants' Submissions (n 19) [27] (emphasis in original). See also [34].

³⁰ *Ibid* [26].

The Commonwealth's approach should be rejected, because of (among other reasons) the way in which it affects the supervisory function of the High Court in determining limits to powers conferred under the *Australian Constitution*. Deference is appropriate in the context of determining membership of the body politic through constitutional status. However, that deference should not extend to the refusal to consider limits to the power of the Australian Parliament. In the context of the *Montgomery* case, the question becomes whether Aboriginality can be understood as a limit to the aliens power. Assuming the Court takes an approach that leaves open the possibility of determining limits to the aliens power, it would then be faced with the question of whether Aboriginality is relevant to constitutional status in terms of alienage.

V Aboriginality is Relevant to Constitutional Membership

A *Sui Generis Basis of Belonging*

The reasoning of the majority in *Love* provides recognition of a *sui generis* basis of constitutional membership through non-alienage: being an Aboriginal Australian. It is significant that the basis is expressly *sui generis*, since this helps sustain the coherency of existing case law regarding alien status for non-Aboriginal persons. The High Court has not fully developed a jurisprudence regarding constitutional membership. However, one element of existing doctrine is that substantive absorption into the Australian community is not relevant to alienage.³¹ The absorption doctrine was one that applied in relation to another constitutional category — that of 'immigrant' relevant to s 51(xxvii).³² The *sui generis* nature of the reasoning in *Love* does not affect this element of the law.

Key to the majority reasoning in *Love* is the way in which the core or essential meaning of alienage was understood to be 'belonging to another place'³³ or, more fundamentally, as not belonging to Australia. From that position, the majority judges concluded that Aboriginal Australians cannot be aliens because by definition they belong to Australia, by virtue of their unique, spiritual, two-way connection to Australian land and waters. The way in which that claim of belonging occurs through a particular recognition of Aboriginal Australians and their unique connection to Country, rather than simply a generic or substantive connection to the Australian body politic, avoids any conflict with the absorption doctrine noted above.

B *Sovereignty and a Longstanding Recognition of 'Connection'*

The non-justiciability of questions pertaining to the validity of the British Crown's assertion of sovereignty over Australia is well-established in the High Court's

³¹ *Pochi* (n 28) 111 (Gibbs CJ).

³² *Re Yates; Ex parte Walsh and Johnson* (1925) 37 CLR 36; *R v Director-General of Social Services (Vic); Ex parte Henry* (1975) 133 CLR 369.

³³ *Love* (n 3) 186 [61], 190 [74] (Bell J), 240–1 [246] (Nettle J), 263 [301]–[302] (Gordon J), 292–3 [403] (Edelman J).

jurisprudence. In *Montgomery*, the Commonwealth raises the possibility that the tripartite test set out by Brennan J in *Mabo No (2)* and endorsed in *Love* amounts to an ‘implicit conferral of political sovereignty on Aboriginal societies’ at odds with the decision in *Mabo (No 2)* and subsequent cases.³⁴ *Montgomery* explains the majority’s reasoning as an exercise of the sovereignty of the Australian State, through the authority of the Court, not a challenge to it.³⁵

The task of the Court in *Montgomery* is analogous to that required of courts by a longstanding orthodoxy in native title jurisprudence. Traditional laws and customs supply the content of native title rights and interests as identified by the court, so that while the latter are recognised and protected by common law and statute, traditional laws and customs are left to continue ‘out of frame’.³⁶ So too in the constitutional law setting of *Montgomery*. The Court sets the rule regarding Aboriginal Australians being non-alien, together with a test for how to determine who is relevantly an Aboriginal Australian. We address the choice of test below.

The question for the Court in *Montgomery* directly engages the Court’s responsibility to determine and develop the law, including where it is necessary to resolve instances of ‘incongruity between legal characterisation and historical reality’,³⁷ or, in the words of Brennan J in *Mabo (No 2)*, to close the gap between ‘theory [and] our present knowledge and appreciation of the facts’.³⁸ The way in which the majority of the Court in *Love* reasoned is consistent with the understanding that some legal and social changes recognised by Australian law can, in turn, affect the meaning of the *Australian Constitution*.³⁹

The majority judges in *Love* made it clear in their reasoning that the common law recognition of ‘Aboriginal societies’⁴⁰ and their connection to Australian land and waters is longstanding, and does not, as suggested by Kiefel CJ, amount to the development of an unspecified ‘new principle’ of the common law.⁴¹ Nettle J emphasised the foundational point that the consequences of the acquisition of sovereignty in domestic law *are* justiciable⁴² and Gordon J noted that:

[n]ative title is one legal consequence flowing from common law recognition of the connection between Aboriginal Australians and the land and waters that

³⁴ Appellants’ Submissions (n 19) [45].

³⁵ Respondent’s Submissions (n 17) [66]–[67].

³⁶ See generally Robert French, ‘Simple Justice — Recognition and Sovereignty’ in Robert Pascoe (ed), *The Tuning Cymbal: Selected Papers and Speeches of the Robert French* (Federation Press, 2020), 36, 39.

³⁷ *Love* (n 3) 250 [265] (Nettle J), quoting Sharwood, ‘Aboriginal Land Rights — The Long Shadow of the Eighteenth Century’ (1981) 14 *Proceedings of the Medico-Legal Society of Victoria* 93, 93.

³⁸ *Mabo (No 2)* (n 15) 38 (Brennan J, Mason CJ and McHugh J agreeing at 15). See also *Love* (n 3) 249–50 [264]–[265] (Nettle J).

³⁹ See, for example, the reliance on a durable legislative practice leading to a baseline of a universal adult citizenship franchise in the reasoning of the Court in *Roach v Electoral Commissioner* (2007) 233 CLR 162 and the interpretation of marriage to extend to same sex marriage in *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441.

⁴⁰ *Love* (n 3) 252–3 [269] (Nettle J).

⁴¹ *Ibid* 181 [42]–[43].

⁴² *Ibid* 249–50 [264]–[265].

now make up Australia. That Aboriginal Australians are not ‘aliens’ within the meaning of that constitutional term in s 51(xix) is another.⁴³

The central proposition in *Love* that Aboriginal Australians are not aliens under the *Australian Constitution* can be understood as consistent with Australian constitutional law doctrine. It does not do damage to the standard narrative of monistic and absolute sovereignty held by the Australian State and does not conflict with other elements of existing law. However, if the Court upholds the central proposition in *Love*, it is faced with the challenging task of determining when a person fits within the settler legal construct of ‘Aboriginal Australian’.

VI Definition of ‘Australian Aboriginal’

As noted above, the majority in *Love* adopted the tripartite test set out by Brennan J in *Mabo (No 2)*:

[m]embership of the indigenous people depends on biological descent from the indigenous people and on mutual recognition of a particular person’s membership by that person and by the elders or other persons enjoying traditional authority among those people.⁴⁴

If the High Court elects to address Montgomery’s status as an ‘Aboriginal Australian’, the Court will need to consider the following question: in circumstances where a person who is not a native title holder is unaware of facts that would otherwise assist them to prove their ‘biological descent’ from an Aboriginal or Torres Strait Islander person, does that person’s self-identification as an Aboriginal Australian, coupled with recognition of their membership by others exercising traditional authority within the group, suffice to satisfy the *Mabo (No 2)* test? The answer to this question will turn on the meaning of ‘biological descent’ in the first limb of the test, and whether, as SC Derrington J asked, the tripartite test applied in *Love* ‘supplants the rights of Aboriginal people to determine by reference to Indigenous law and customs who possesses such rights’⁴⁵ or ‘foreclose[s] any other approach “to determining Aboriginality as the basis for those fundamental ties of political community in Australia”’.⁴⁶ In this section, we consider the relevance of Federal Court decisions applying *Love* as they interact with the parties’ arguments in *Montgomery*.

While the majority judges in *Love* applied the tripartite test set out by Brennan J in *Mabo (No 2)*, their Honours left open the possibility that this test may not be the only, or the most appropriate, test to identify a non-citizen as an ‘Aboriginal Australian’ for the purposes of determining whether that person is an ‘alien’. An alternative test was not in play in *Love* and the biological descent of Daniel Love and Brendan Thoms was not at issue. Edelman J noted that:

⁴³ Ibid 281 [364].

⁴⁴ *Mabo (No 2)* (n 15) 70.

⁴⁵ *Montgomery (FCA)* (n 4) [61], citing *Love* (n 3) 279 [357] (Gordon J).

⁴⁶ *Montgomery (FCA)* (n 4) [61], quoting *Love* (n 3) 317 [458] (Edelman J).

The tripartite test was applied in *Mabo [No 2]* as a means to identify those members of a particular sub-group of indigenous people who enjoy continuing connection with particular land. It can be usefully applied in this case. However, it is not set in stone, particularly as an approach to determining Aboriginality as the basis for those fundamental ties of political community in Australia which are not dependent upon membership of a particular sub-group.⁴⁷

A *Biological Descent*

The question of how to assess Montgomery's biological descent was not the subject of a full factual inquiry in the Federal Court. Montgomery's arguments accordingly emphasise the undesirability of the High Court entering into a discussion of the relationship between 'biological descent' and cultural adoption in a context where SC Derrington J, correctly in Montgomery's view, did not entertain trial on facts bearing on that question.⁴⁸

The Commonwealth argues that 'biological descent' in its ordinary sense is confined to 'genetic relationships' and to remove this 'objective criterion' from the test would make it dependent on 'the content of traditional laws and customs regarding adoption and other forms of non-biological kinship',⁴⁹ and unreasonably complicate the determination of the *Migration Act* by rendering it reliant on matters that may be 'difficult to ascertain'.⁵⁰ On this point, Montgomery observes that the Commonwealth remains free to 'set in train lawful statutory or administrative steps that they consider advisable in response to the decision in *Love*; much as did the Executive and the Parliament in response to this Court's decision in *Mabo [No 2]*'.⁵¹ Connecting *Love* and *Mabo (No 2)* in this way, and pointing to the different response of the political branches to each case, is a powerful provocation. Montgomery effectively characterises the *Love* precedent as one that, like *Mabo (No 2)*, is a signal determination of the law in response to a novel legal question.

B *The Application of Love in the Federal Court of Australia*

Cases decided at the Federal Court level give an indication of the type of considerations that the High Court may consider relevant if it embarks on an inquiry into Montgomery's status. The contentious question that may then arise is whether Montgomery's self-identification and 'recognition as a Mununjali man by persons enjoying traditional authority amongst that society'⁵² will suffice to satisfy the 'biological descent' limb of the *Mabo (No 2)* test.

⁴⁷ *Love* (n 3) 317 [458]. See also 192 [80] (Bell J).

⁴⁸ Respondent's Submissions (n 17) [25], supported by the National Native Title Council, the Northern Land Council and the Victorian Government: see, eg, Attorney-General (Vic) Intervener's Submissions (n 21) [41].

⁴⁹ Appellants' Submissions (n 19) [55].

⁵⁰ *Ibid.*

⁵¹ Respondent's Submissions (n 17) [44]. See also [50].

⁵² *Montgomery (FCA)* (n 4) [4].

On the facts considered in the Federal Court proceeding, Montgomery does not claim to be a native title holder, and his satisfaction of the third ‘mutual recognition limb’ is not in question. These differences aside, the reasoning in two applications for declaratory relief is likely to be of relevance: *Hirama v Minister for Home Affairs*,⁵³ and *Helmbright v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2)*.⁵⁴ Both cases were decided by Mortimer J in the Federal Court and her Honour’s reasoning in *Helmbright (No 2)* is applied to Hirama’s application to the extent that it is relevant.

In *Hirama*, a native title holder succeeded in his application for a declaration that he was an ‘Australian Aboriginal’ in the terms required by *Love*. It was an agreed fact between the applicant and the Minister that Hirama is an ‘Aboriginal Australian’ in accordance with the *Mabo (No 2)* test, and the applicant was prepared to agree to what Mortimer J described as ‘additional criteria’ corresponding with the Minister’s interpretation of the ratio in *Love*,⁵⁵ described by Mortimer J as the ‘native title approach’.⁵⁶ This required that the community in question held, or was entitled to hold, native title, by virtue of being a community that had ‘remained continuously united in and by its acknowledgment and observance of laws and customs deriving from before the Crown’s acquisition of sovereignty over the territory’.⁵⁷ In *Helmbright (No 2)*, Mortimer J rejected the native title approach.⁵⁸ In *Hirama*, her Honour imported her reasoning on that point, and found that the applicant satisfied the criteria set out in the agreed facts, while making the point that the Court is not bound by the parties’ agreement as to the content of the relevant law.⁵⁹

The critical feature of the *Hirama* reasoning for Montgomery is that the agreed facts in *Hirama* trace the applicant’s descent through his great grandfather, who was culturally adopted into the community.⁶⁰ The native title determination in question includes descendants ‘by adoption in accordance with the traditional laws and customs of the native title holders’.⁶¹ Both parties in *Hirama* submitted that the applicant satisfied the ‘biological descent’ limb of the *Mabo (No 2)* test on this basis, and her Honour accepted this submission,⁶² noting that ‘the Minister accepts that “descent” need not mean strict biological descent but can include adoption in accordance with the traditional law and custom of a particular group.’⁶³ To what extent could this reasoning assist Montgomery to show ‘biological descent’ by ‘cultural adoption’?

Applied to Montgomery’s circumstances, as far as we know them, if the High Court (or Federal Court on remittance) enters into an assessment of Montgomery’s

⁵³ *Hirama* (n 14).

⁵⁴ *Helmbright (No 2)* (n 14).

⁵⁵ *Hirama* (n 14) [11].

⁵⁶ *Ibid* [11]. See also [24].

⁵⁷ *Helmbright (No 2)* (n 14) [89]–[90], quoting *Love* (n 3) 258 [278] (Nettle J). See also *ibid* [11].

⁵⁸ *Helmbright (No 2)* (n 14) [5]–[6]. See also *Hirama* (n 14) [11].

⁵⁹ *Hirama* (n 14) [13], [15].

⁶⁰ *Ibid* [34].

⁶¹ *Ibid* [33].

⁶² *Ibid* [34]–[35].

⁶³ *Ibid* [35].

status as an ‘Aboriginal Australian’, *Helmbright (No 2)* and *Hirama* could support a finding that his self-identification coupled with the recognition of his membership in the Mununjali community (by persons exercising traditional authority in accordance with traditional laws and customs) could suffice to enable Montgomery to satisfy the biological descent limb of the *Mabo (No 2)* test. That may be so notwithstanding the fact that Montgomery is not (yet) aware of facts that would otherwise assist him to prove his ‘biological descent’, and, while not at issue, that the Mununjali people are not (yet) recognised as a native title-holding community.⁶⁴

This approach would be consistent with questions raised about the ‘biological descent limb’ by the judges of the Full Federal Court of Australia in the course of granting a detainee’s habeas corpus petition in *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*.⁶⁵ In that case, Allsop CJ left open the possibility that the biological descent limb of the *Mabo (No 2)* test could be proved, when required, by relevant normative standards that included adoption:

Is it genealogical or biological descent strictly by blood, or does it include other features, such as adoption, that may be encompassed within (if applicable) traditional Aboriginal law or custom? The question is to be posed and answered using the correct frame of reference or normative standard. The question is or may be more than one drawn from analytical jurisprudence or the principles of private international law as to the ascertainment of the proper law of a subject, once the subject is identified by a process of characterisation.⁶⁶

In the same case, Besanko J noted that self-identification and community recognition can be probative of descent in tests of Aboriginality other than the *Mabo (No 2)* test.⁶⁷ In making these comments, his Honour drew attention to the probative role accorded to community recognition in cases applying the ‘*Tasmanian Dam test*’,⁶⁸ referring to the cases of *Shaw v Wolf*⁶⁹ and *Gibbs v Capewell*⁷⁰ for this proposition.

There are two further areas of likely future legal development on the application of *Love* that may be touched on by the High Court if it enters into a discussion of Montgomery’s status. First, we note the possibility that an alternative test for Aboriginality, not involving an exercise of traditional authority, may be brought into play (possibly the *Tasmanian Dam test*). Second, that the relationships between traditional law and custom and the *Native Title Act 1993* (Cth) on questions of descent will require further elaboration in a relevant case.

As to the first possibility, obiter dicta in the reasoning of Besanko J in *McHugh (FCAFC)* and Mortimer J in *Helmbright (No 2)* and *Hirama* point to the

⁶⁴ A native title claim was filed on behalf of the Danggan Balun (Five Rivers) People, which may include at least some Mununjali people, over land in the Beaudesert area in 2017: *Williams on behalf of the Danggan Balun (Five Rivers) People v Queensland* (Federal Court of Australia, File No QUD331/2017, 27 June 2017).

⁶⁵ *McHugh FCAFC* (n 14).

⁶⁶ *Ibid* 620–1 [65].

⁶⁷ *Ibid* 631–2 [108], 632 [110].

⁶⁸ *Commonwealth v Tasmania* (1983) 158 CLR 1, 273–4 (‘*Tasmanian Dam*’).

⁶⁹ *Shaw v Wolf* (1998) 83 FCR 113, 120 (Merkel J).

⁷⁰ *Gibbs v Capewell* (1995) 54 FCR 503, 510 (Drummond J).

possibility that recognition of a person's Aboriginality by a 'relevant society or community',⁷¹ in the absence of traditional authority, could be probative of 'biological descent'. The test of Aboriginality referred to in those comments is the tripartite *Tasmanian Dam* test, set out in the reasons of Deane J in the *Tasmanian Dam* case in the course of determining if the relevant federal legislation was supported by the races power in s 51(xxvi) of the *Australian Constitution*. That test provides that: "'Australian Aboriginal" [means] a person of Aboriginal descent, albeit mixed, who identifies himself as such and who is recognized by the Aboriginal community as an Aboriginal.'⁷²

In *Hirama*, Mortimer J noted that in contrast to the *Mabo (No 2)* test, if applying the *Tasmanian Dam* test in the context of alienage, the traditional authority requirement may not be express or required, but the relevant community in that test (or another test) would 'probably' still be one that identifies itself as connected to particular land, given the underpinning justificatory emphasis in *Love* on Aboriginal societal connections to land and waters.⁷³ This latter point is expanded on in *Helmbright (No 2)*, in which Mortimer J observed that while she was bound to apply the *Mabo (No 2)* tripartite test as a single judge in the Federal Court, Helmbright would have qualified in accordance with the *Tasmanian Dam* test had it been possible to apply it.⁷⁴

The second area that may be touched on in any substantive analysis of Montgomery's status is the interface of the *Native Title Act 1993* (Cth) and associated regulations with traditional laws and customs and questions of alienage. In deliberations in *McHugh (FCAFC)*, Mortimer J noted that the issue is one of some considerable complexity.⁷⁵ As is evident in *Hirama*, some native title determinations refer to the possibility of descent by adoption in accordance with traditional laws and customs, and reasoning in several important native title cases emphasises that descent from native title holders is not always required for membership of a native title holding community.⁷⁶ However, the Act itself appears, on its face, to replicate definitions premised on the idea of an 'Aboriginal race'.⁷⁷ As Mortimer J explained:

the relationship between on the one hand what has been said in *Love/Thoms* about 'Aboriginality' by reference to the High Court's decision in *Mabo (No 2)* on the common law's recognition of native title, and on the other hand the operation of the statutory scheme of native title in the *Native Title Act 1993* (Cth), is in my respectful opinion yet to be worked through in detail.⁷⁸

⁷¹ *Helmbright (No 2)* (n 14) [300].

⁷² *Tasmanian Dam* (n 68) 274 (Deane J).

⁷³ *Hirama* (n 14) [36].

⁷⁴ *Helmbright (No 2)* (n 14) [5], [8], [344].

⁷⁵ *McHugh (FCAFC)* (n 14) 686 [396].

⁷⁶ *Native Title Act (1993)* (Cth). For examples of native title determinations referring to cultural adoption, see *Congoo on behalf of the Bar Barrum People #9 v Queensland* [2017] FCA 1510, sch 3(2), *Saibai People v Queensland* [1999] FCA 158, order 3(c)(iii). Notably, the latter reference is expressed as a native title right.

⁷⁷ *Native Title Act (1993)* (Cth) (n 76) s 253 (definition of 'Aboriginal peoples').

⁷⁸ *McHugh (FCAFC)* (n 14) 686 [396].

In response to the Commonwealth's concerns about the difficulty of ascertaining the content of traditional law and customs in any given context, it is a distinctive feature of Australia's legal and political history that Aboriginal societies have been characterised as racial communities, rather than as political entities. This is a mistake of fact. Requirements for biological descent as an element of a person's 'race', overlaid across the vast diversity of Aboriginal polities, can be seen as an element of this mischaracterisation. Indeed, the tripartite test itself was developed to mitigate against an overly rigid and unilateral logic of race by requiring that Aboriginal peoples be involved in identity designations made in accordance with settler law.⁷⁹

Provisions enabling the naturalisation of non-descendants in accordance with Indigenous law are not uncommon parts of the positive membership criteria used in the governing documents of Indigenous communities in Canada, Australia, New Zealand and the United States.⁸⁰ These forms of incorporation or 'cultural adoption' need not, in practice, correlate with 'descent' — biological or otherwise. Further, in Australia, as in other countries, Indigenous law on membership sometimes operates through the vehicle of rules set out in the governance documents of a formal legal representative institution, and sometimes those rules are unwritten and less accessible to outsiders. Difficulties of proof do not diminish the necessity of engaging with traditional law and authority on its own terms.⁸¹ Likewise, whether or not an Aboriginal society has sought and received recognition of their rights at common law or through legislation is not a reflection of the coherency and authority of their traditional laws and customs. When the facts are present for a properly argued case, it will be high time to reconsider the place of racial designations of Aboriginal and Torres Strait Islanders, in order to recognise the authority of traditional law and custom and to bring about further reconciliation between 'theory [and] our present knowledge and appreciation of the facts',⁸² in line with the central motivation for the High Court's decision in *Mabo (No 2)*.

VII Conclusion

The challenge in *Montgomery* to the decision in *Love* concerns the intersection of multiple fraught areas of law and policy in Australia. The concept of alienage is one that is both political and legal, determining as it does membership or exclusion from the Australian body politic. Aboriginality can be understood as a sui generis basis for constitutional belonging. A significant challenge is for the High Court to articulate how Aboriginality is to be understood and applied. In particular, what test or tests may be applied and whether self-identification and recognition by persons 'enjoying traditional authority' in accordance with traditional law and custom will suffice to satisfy any requirement of 'biological descent'. The outcome in this case

⁷⁹ See discussion in *Helmbright (No 2)* (n 14) [125]–[128].

⁸⁰ For examples, see Kirsty Gover, *Tribal Constitutionalism: States, Tribes and the Governance of Membership* (Oxford University Press, 2010).

⁸¹ *Mabo (No 2)* (n 15) 52, *Love* (n 3) 258 [281] (Nettle J). See also *Love* (n 3) 282 [368] (Gordon J).

⁸² *Mabo (No 2)* (n 15) 38 (Brennan J, Mason CJ and McHugh J agreeing at 15), quoted in *Love* (n 3) 250 [265] (Nettle J).

will depend, to a great extent, on the judicial sensibilities of each judge on the current Court and how they interpret the limits of their own role. This case will neither satisfy calls for structural constitutional reform as seen in the Uluru Statement from the Heart,⁸³ and in the progress of state and territory treaties, nor prevent such reforms from taking place. It is only one case in the ongoing negotiation between the Australian settler colonial state and the reality of First Nations and their ongoing connection to the territory of that state.

⁸³ 'Uluru Statement from the Heart' (2017) <<https://ulurustatement.org/the-statement/>>.

