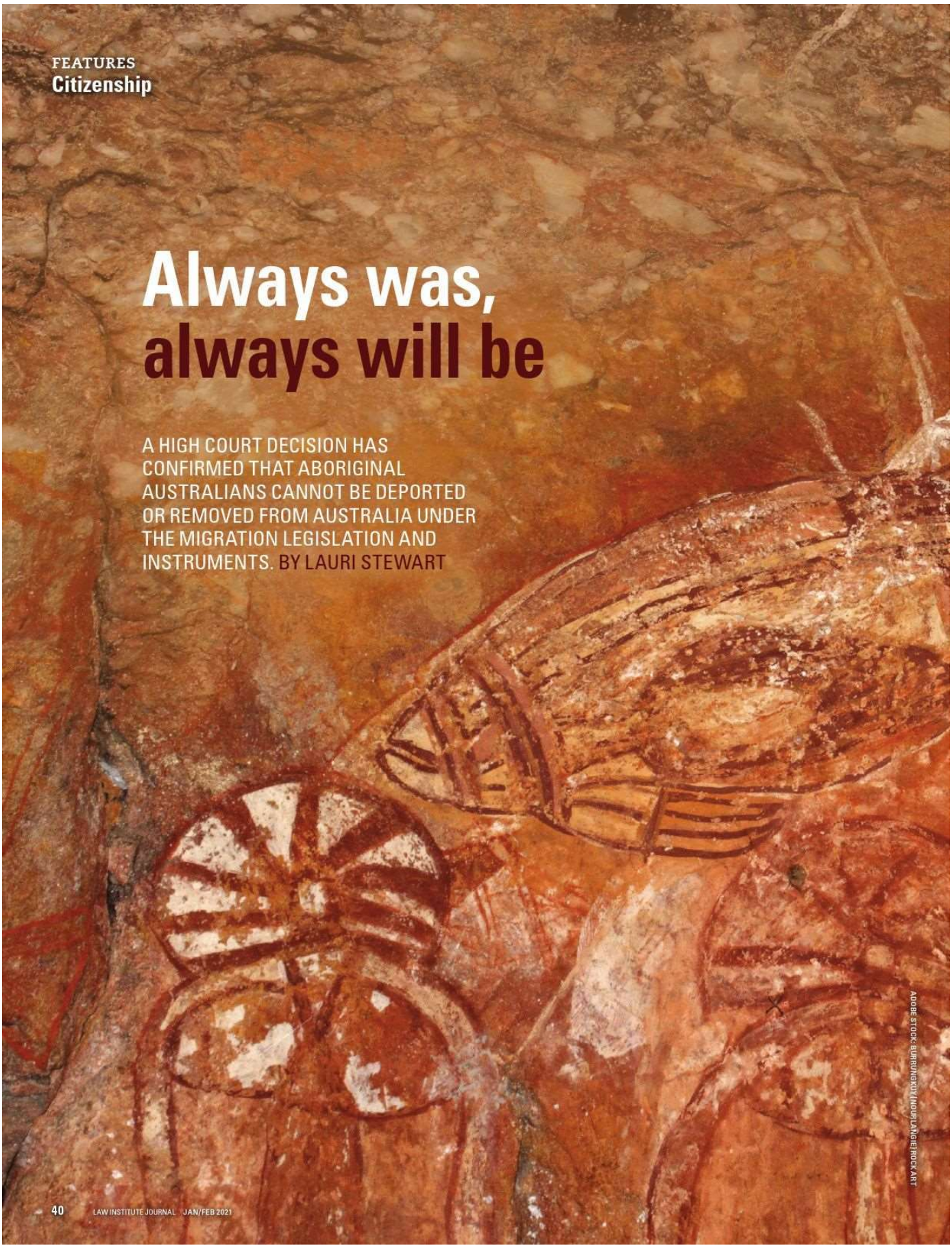
Always was, always will be

A HIGH COURT DECISION HAS CONFIRMED THAT ABORIGINAL AUSTRALIANS CANNOT BE DEPORTED OR REMOVED FROM AUSTRALIA UNDER THE MIGRATION LEGISLATION AND INSTRUMENTS. BY LAURI STEWART



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In *Love v Commonwealth of Australia; Thoms v Commonwealth of Australia*[1] the High Court of Australia held by a 4:3 majority that Aboriginal Australians are not aliens and are therefore not subject to s51(xix) of the Constitution. This decision is a declaration and application of the rights which were recognised in *Mabo v Queensland [No 2]*[2] as far as they pertain to Aboriginal Australians who are not recognised under statute as Australian citizens. It is not a declaration of Aboriginal sovereignty in Australia, but rather that there is a portion of society who are "non-citizen non-aliens" – a notion which has been disputed in previous High Court decisions.[3] This decision is the legal recognition that Aboriginal people "belong to Australia".[4] The practical application of this recognition means that Aboriginal people are beyond the scope of the aliens power.

The majority of Aboriginal Australians are Australian citizens, having their citizenship conferred or deemed under the *Australian Citizenship Act 2007* (Cth) and its predecessors. However, as there has been a global increase of people travelling to and partnering with people from other countries, there are more and more children of Aboriginal descent who do not live in Australia and are not recognised as being Australian citizens. These non-citizen Aboriginal Australians require a visa to enter Australia. Until now, their visa has been liable to cancellation under the *Migration Act 1958* (Cth) and they have been liable to deportation and exclusion from Australia. Following the decision by the full bench of the High Court of Australia in February 2020, it is now recognised that Aboriginal Australians cannot be deported from Australia even if they are not Australian citizens under statute.

SNAPSHOT

- In *Love v Commonwealth of Australia; Thoms v Commonwealth of Australia* [2020] HCA 3 the High Court decided that Aboriginal Australians are "non-citizen, non-aliens", not within s51(xix) (the alien's power) of the Constitution, and cannot be deported or excluded from Australia.
- People claiming to be Aboriginal Australians must meet the tripartite test in *Mabo [No 2] v Queensland* to be outside the scope of s51(xix).
- This does not create a new class of residents in Australia. It recognises a pre-existing state of affairs and the rights of Aboriginal Australians as confirmed in *Mabo [No 2] v Queensland*.

Has this decision created a third class of Australian residents?

Is this a return to the pre-statutory understanding of what makes someone Australian?

The short answer to these questions is no.

Under Australian law there has always been at least two clear classes of people residing in Australia – citizens and aliens. Since 1901, there have been periods where the High Court has recognised classes of persons who are neither aliens nor formally recognised citizens or British subjects; however, such recognition has been accepted and refuted over the years.[5] It was not disputed by the Court in this case that the term "alien" describes a person's lack of formal legal relationship with the country[6] or that the term "alien" refers to a legal status which is rooted in notions of sovereignty[7] or allegiance to a foreign sovereign. However, it was also undisputed that:

"Parliament cannot, simply by giving its own definition of 'alien', expand the power under s51(xix) to include persons who could not possibly answer the description of 'aliens' in the ordinary understanding of the word".[8]

It is this finding on which the majority (Bell, Nettle, Gordon and Edelman JJ) based their conclusions. In contrast, their Honours dissenting (Kiefel CJ, and Gageler and Keane JJ) all made considerable reference to two broad concepts within immigration and constitutional law: absorption into the Australian community as a means of not being considered an 'alien'; and race or ethnicity, that "race is simply irrelevant . . . to the question of continued membership of the Australian body politic".[9] Absorption into the Australian community has been a subject of jurisprudence in Australia since the early 20th century.[10] Regarding the concept of absorption, their Honours at various stages referred to *Pochi v Macphee*[11] regarding long residency and absorption into the Australian community; *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28[12] regarding connection to Australia through personal history; and *Singh v The Commonwealth*[13] and *Koroitamana v The Commonwealth*,[14] both of which concerned plaintiffs who were born in Australia. With respect to the concept of race, Keane J found:

Alienage or citizenship is a status created by law. That status is a relationship between an individual and the sovereign nation.[15] It is not a relationship between an ethnic group and the nation.[16]

Approaching this from a refugee law background, it is not incomprehensible that a group of individuals could share a characteristic which is innate, unchangeable or otherwise fundamental to their identity, thereby enabling those individuals to identify as a particular group within society (or

a "particular social group").[17] In the case of Mr Love and Mr Thoms, the shared characteristics were the tripartite test to determine Aboriginality, as set out in *Mabo v Queensland [No 2]*.[18] The fundamental premise of the decision in *Mabo v Queensland [No 2]* – "the deeper truth – is that the Indigenous peoples of Australia are the first peoples of this country, and the connection between the Indigenous peoples of Australia and the land and waters that now make up the territory of Australia was not severed or extinguished by European 'settlement'".[19] Aboriginal Australians were the first custodians of the country in which we reside. Their connection to the land and waterways goes beyond tenets of property ownership. The question is whether this connection is sufficient to render its participants the status of "non-alien".

The Court makes it very clear that the opposite of "alien" is not a statutory citizen. Such treatment of those terms is a "basic flaw".[20] The antonym of "alien" is a person who belongs to the Australian political community.[21] Because citizenship is a statutory concept,[22] and "aliens" is a constitutional term,[23] the definition of "citizenship" cannot control, restrict or provide reference to, the definition of "alien". The Court has adopted the term "non-citizen, non-alien" to describe this class of persons to whom the Crown owes protection obligations because of their status as Aboriginal Australians. It is not a new class of Australian residents and it doesn't signal a return to pre-1948 notions of Australian citizenship and membership of the Australian community – it is simply recognising that which has always been there, in the same way that the decision in *Mabo v Queensland [No 2]* recognised that which always existed. As Edelman J found, "Aboriginal people belong to Australia".[24] Edelman J explained:

"When the post-Federation application of membership of the political community moved away from issues of race, this did not strip non-citizen Aboriginal people of their status as belongers to the Australian political community by denying their identity".[25]

Although the term "belonging" has not always been used, the concept of "belonging" to Australia has been the subject of previous judicial consideration on many occasions since Federation [26]. When a person is found to belong to or be a member of the Australian community, that is their identity and it cannot be taken away. Griffith CJ, in *Potter v Minahan*, referred to "persons who are returning to an Australian home".[27] In *Re Patterson; Ex parte Taylor*, Gaudron J held that if a person was, at one point in time, not an alien in Australia, Parliament could not legislate to transform him into one.[28]

Who is an Aboriginal Australian?

The majority found that the tripartite test espoused by Brennan J in *Mabo v Queensland [No 2]* should be utilised to determine whether a person who claims to be an Aboriginal Australian is, in fact, a non-citizen non-alien, and specifically that:

"Membership 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".[29]

There are going to be difficulties for some people in establishing that they are an Aboriginal Australian, such was the case for Mr Love. The majority could not agree on whether or not he was an Aboriginal Australian, despite self-identifying as a member of the Kamilaroi people. In contrast, Mr Thoms has been recognised as the holder of common law native title rights, and was accepted as an Aboriginal Australian by the Court.[30] However, as observed by Nettle J, "difficulty of proof is not a legitimate basis to hold that a resident member of an Aboriginal society can be regarded as an alien in the ordinary sense of the term".[31]

Mabo's fundamental premise

The circumstances of this case and the consequences of this decision go not only to whether or not an Aboriginal Australian can be deported or excluded from Australia. It asserts that Aboriginal Australians hold a special place in the fabric of our society because they were the first custodians of our land, and this is the "fundamental premise from which the decision in *Mabo [No 2] v Queensland* proceeds – the deeper truth".[32] The consequence of this decision is that Aboriginal Australians cannot be removed and excluded from the country of their ancestors, their culture and their identity. As observed by Edelman J, "[t]he sense of identity that ties Aboriginal people to Australia is an underlying fundamental truth".[33] *Love v Commonwealth; Thoms v Commonwealth* is a continuation of the rights and recognitions confirmed in *Mabo [No 2] v Queensland*, and a continuation of the underlying fundamental premise: that Australia always was and always will be Aboriginal land. ■

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1. [2020] HCA 3.
2. (1992) 175 CLR 1.
3. *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 and *Re Patterson; Ex Parte Taylor* (2001) 207 CLR 391.
4. Note 1 above, at [398] per Edelman J.
5. In addition to *Nolan* and *Patterson*, see, for example, *Potter v Minahan* (1908) 7 CLR 277; *Jerger v Pearce* (1920) 27 CLR 277); *Koon Wing Lau v Calwell* (1949) 80 CLR 533; *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28; and *Minister for Immigration, Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566.
6. *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178.
7. Note 1 above, at [245], per Nettle J, citing *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 170 [21] per Gleeson CJ.
8. *Pochi v Macphee* (1982) 151 CCLR 101 at 109, per Gibbs CJ.
9. *Kartiniyeri v The Commonwealth* (1998) 195 CL 337 at 366 [40], per Gaudron J.
10. See, for example, the *Immigration Restriction Act 1901* (the "white Australia policy") and *Potter v Minahan* (1908) 7 CLR 277.
11. (1982) 15 CLR 101.
12. (2003) 218 CLR 28.
13. (2004) 222 CLR 322.
14. (2006) 227 CLR 31.
15. Citing Re: Patterson; Ex parte Taylor (2001) 207 CLR 391 at 466 [225].
16. *Love v The Commonwealth; Thoms v The Commonwealth* [2020] HCA 3 at [177].
17. Article 1(2), UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol 189, p137.
18. (1992) 175 CLR 1 at 70, per Brennan J.
19. Note 1 above, at [289] per Gordon J.
20. *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 491 [300], per Kirby J.
21. Note 1 above, at [437] per Edelman J.
22. Note 1 above, at [305] per Gordon J.
23. Note 1 above, at [300] per Gordon J.
24. Note 1 above, at [398] per Edelman J.
25. Note 1 above, at [396] per Edelman J.
26. In addition to *Nolan* and *Patterson*, see, for example, *Potter v Minahan* (1908) 7 CLR 277; *Jerger v Pearce* (1920) 27 CLR 277); *Koon Wing Lau v Calwell* (1949) 80 CLR 533; *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28; *Minister for Immigration, Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566; *SNMX v Minister for Immigration and Citizenship* [2009] AATA 539.
27. *Potter v Minahan* (1908) 7 CLR 277 at 290, per Griffith CJ.
28. *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at [46].
29. *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 70.
30. *Kearns on behalf of the Gunggari People #2 v Queensland* [2012] FCA 651; and *Foster on behalf of the Gunggari People #3 v Queensland* [2014] FCA 1318.
31. Note 1 above, at [281].
32. Note 1 above, at [289].
33. Note 1 above, at [451].