Choice of Australian Aboriginal Customary Law

The relationship between the conflict of laws and constitutional law is close in many legal systems, and Australia is no exception. Leading Australian conflict of laws cases, including, for example, *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, which adopted a *lex loci delicti* rule for intra-Australian torts, are premised on public law concepts essential to our federation. These cases illustrate how the conflict of laws bleeds into other disciplines.

Love v Commonwealth [2020] HCA 3 is a recent decision of the High Court of Australia that highlights the breadth and blurry edges of our discipline. Most legal commentators would characterise the case in terms of constitutional law and migration law. The Court considered a strange question: can an Aboriginal Australian be an 'alien'?

Policy background

Australia's disposition to migration is controversial to say the least. Our government's migration policies, which often enjoy bi-partisan support, are a source of embarrassment for many Australians. One controversial migration policy involves New Zealanders. Australia and New Zealand enjoy a very close relationship on several fronts, including with respect to private international law: see the *Trans-Tasman Proceedings Act 2010* (Cth). New Zealanders often enjoy privileges in Australia that are not afforded to persons of other nationality.

Yet recently, Australia began to deport New Zealanders who had committed crimes in Australia no matter how long they had lived in Australia. In February, New Zealand Prime Minister Jacinda Ardern said that the policy was 'testing' our countries' friendship. Australian Prime Minister Scott Morrison replied, '[w]e deport non-citizens who have committed crimes in Australia against our community'. Sections of the Australian community are seeking to change Australia's policy on point, which is effected by the *Migration Act 1958* (Cth).

Facts and issues

The Court heard two special cases together. As Kiefel CJ explained: '[e]ach of the plaintiffs was born outside Australia – Mr Love in Papua New Guinea and Mr Thoms in New Zealand. They are citizens of those countries. They have both lived in Australia for substantial periods as holders of visas which permitted their residence but which were subject to revocation. They did not seek to become Australian citizens'.

Section 501(3A) of the *Migration Act* requires the Minister for Home Affairs to a cancel a person's visa if they have been convicted of an offence for which a sentence of imprisonment of 12 months or more is provided. Each of the plaintiffs committed crimes and had their visas cancelled. The effect of which was that they became 'unlawful non-citizens' who could be removed from Australia.

The plaintiffs' cases turned on s 51(xix) of the *Commonwealth Constitution*, which provides:

> *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… naturalization and aliens…*

The plaintiffs contended that they were outside the purview of the *Migration Act*, the *Australian Citizenship Act 2007* (Cth) and s 51(xix) because they each had a special status as a 'non-citizen, non-alien'. 'They say that they have that status because although they are non-citizens they cannot be aliens because they are Aboriginal persons': [3]. Each plaintiff arguably satisfied the tripartite test for Aboriginality recognised at common law and considered below. Thoms was even a native title holder.

The High Court was asked to consider whether each plaintiff was an 'alien' within the meaning of s 51(xix) of the *Constitution*. Kiefel CJ clarified that the question is better understood as follows: 'whether it is open to the Commonwealth Parliament to treat persons having the characteristics of the plaintiffs as non?citizens for the purposes of the *Migration Act*': [4].

The High Court split

The High Court's seven justices departed from usual practice and each offered their own reasons. The majority of four (Bell, Nettle, Gordon and Edelman JJ) answered as follows:

> *The majority considers that Aboriginal Australians (understood according to the tripartite test in Mabo v Queensland [No 2] (1992) 175 CLR 1 at 70) are not within the reach of the "aliens" power conferred by s 51(xix) of the Constitution. The majority is unable, however, to agree as to whether the plaintiff is an Aboriginal Australian on the facts stated in the special case and, therefore, is unable to answer this question.*

Arcioni and Thwaites explain: 'The majority rested their reasoning on the connection of Aboriginal Australians with Australian land and waters. Aboriginal Australians were a unique, sui generis case, such that Aboriginality may generate a class of constitutional members (non-aliens) who are statutory non-citizens'. The minority of Kiefel CJ, Gageler and Keane JJ dissented for different reasons. A common theme of those reasons was that 'alien' is the antonym of 'citizen'.

Is this a choice of law case?

The case is about constitutional law. It is also about status. 'Alienage or citizenship is a status created by law': [177] per Keane J. One understanding of the difference between the majority and minority is a difference in opinion as to the applicable law to determine status as 'alien' in this context.

According to Nettle J, 'status [as a member of an Australian Aboriginal society] is inconsistent with alienage': [272]. 'Aboriginal Australians are not outsiders or foreigners – they are the descendants of the first peoples of this country, the original inhabitants, and they are recognised as such': [335] per Gordon J. The majority appealed to the common law's recognition of native title rights underpinned by traditional laws and customs in support of their analyses (see, eg, [339]).

The minority denied that status as Aboriginal could determine whether a person has the status of an 'alien' within the meaning of the *Constitution*.

Recognition of non-state law?

Nettle J quoted (at [269]) the following passage from the native title case *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 445 [49] (Gleeson CJ, Gummow and Hayne JJ):

> *Laws and customs do not exist in a vacuum. They are, in Professor Julius Stone's words, 'socially derivative and non-autonomous'. As Professor Honoré has pointed out, it is axiomatic that 'all laws are laws of a society or group'. Or as was said earlier, in Paton's Jurisprudence, 'law is but a result of all the forces that go to make society'. Law and custom arise out of and, in important respects, go to define a particular society. In this context, 'society' is to be understood as a body of persons united in and by its acknowledgment and observance of a body of law and customs.*

The status of the laws and customs of Australia's Aboriginal peoples has been the subject of case consideration for decades. In *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 267, for example, Blackburn J said:

> *The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called "a government of laws, and not of men", it is that shown in the evidence before me.*

Later, in *Mabo (No 2)*, the High Court finally recognised the significance of those laws to recognition of native title. In that case, the Court articulated a tripartite test for whether a person is an Aboriginal Australian: biological descent, self-identification, and recognition by the relevant Aboriginal community (see [291] per Gordon J). As explained further below, satisfaction of this test depends on application of traditional laws and customs. Arguably, satisfaction of the test requires recognition of the positive force of that non-state law.

Against that, Keane J held, '[t]he common law's recognition of customary native title does not entail the recognition of an Aboriginal community's laws': [202]. Rather, it goes the other way: Aboriginal laws are necessary for recognition of native title. Kiefel J also explicitly rejected recognition of Aboriginal customary

law: '[i]t is not the traditional laws and customs which are recognised by the common law. It is native title … which is the subject of recognition by the common law, and to which the common law will give effect. The common law cannot be said by extension to accept or recognise traditional laws and customs as having force or effect in Australia': [37]. Arguably, this means that there is no choice of law at play in this case: there is just one law at issue, being the law of Australia.

Yet even in transnational cases within the traditional domain of the conflict of laws, Australian courts will only apply foreign laws via application of the *lex fori*: *Pfeiffer*, [40]–[41]; *Nygh's Conflict of Laws in Australia*, ch 12. For practical purposes, the majority approach does recognise Aboriginal non-state law as capable of application to resolve certain issues of (non-Aboriginal) Australian law.

A choice of law rule?

Nettle J came close to articulation of a new intra-Australian choice of law rule at [271]:

> *for present purposes, the most significant of the traditional laws and customs of an Aboriginal society are those which allocate authority to elders and other persons to decide questions of membership. Acceptance by persons having that authority, together with descent (an objective criterion long familiar to the common law of status) and self-identification (a protection of individual autonomy), constitutes membership of an Aboriginal society: a status recognised at the "intersection of traditional laws and customs with the common law".*

If there is a choice of law rule in there, its significance might be expressed through this syllogism:

- P1. Whether a person is capable of being deported after committing a serious crime depends on whether they are an 'alien'.
- P2. Whether a person is an 'alien' depends on whether they are 'Aboriginal'.
- P3. Whether a person is 'Aboriginal' depends on whether they satisfy the tripartite test in Mabo [No 2] with respect to a particular Aboriginal

society.
- P4. Whether a person satisfies the tripartite test turns on the customary law of the relevant Aboriginal society.

Like questions of foreign law, '[w]hether a person is an Aboriginal Australian is a question of fact': [75] per Bell J. How does one prove the content of the relevant Aboriginal law? Proof of traditional laws and customs often occurs in native title cases. It was considered at [281] per Nettle J:

> *It was contended by the Commonwealth that it might often prove difficult to establish that an Aboriginal society has maintained continuity in the observance of its traditional laws and customs since the Crown's acquisition of sovereignty over the Australian territory. No doubt, that is so. But 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. It means only that some persons asserting that status may fail to establish their claims. There is nothing new about disputed questions of fact in claims made by non-citizens that they have an entitlement to remain in this country.*

Minority critique of the choice of law approach

As a dissentient in the minority, Gageler J offered a compelling critique of what I construe to be the choice of law approach of the majority (at [137]):

> *To concede capacity to decide who is and who is not an alien from the perspective of the body politic of the Commonwealth of Australia to a traditional Aboriginal or Torres Strait Islander society or to a contemporary Aboriginal or Torres Strait Islander community, or to any other discrete segment of the people of Australia, would be to concede to a non?constitutional non?representative non?legally?accountable sub?national group a constitutional capacity greater than that conferred on any State Parliament. Yet that would be the practical effect of acceptance of either of the first and second variations of the plaintiffs' argument.*

The choice of non-state law is arguably made more controversial by the character

of those laws' content. Nettle J explained at [276]: 'As is now understood, central to the traditional laws and customs of Aboriginal communities was, and is, an essentially spiritual connection with "country", including a responsibility to live in the tracks of ancestral spirits and to care for land and waters to be handed on to future generations'. Gordon J held at [290], '[t]hat connection is spiritual or metaphysical'. Tacit in the majority's mode of analysis, then, is that a person's spiritual or religious views can have an impact on their status as an 'alien', or otherwise, within the *Commonwealth Constitution*. (A once-Aboriginal non-citizen who lacks those spiritual views and renounces their membership of their Aboriginal society may still be an 'alien' following this case: see [279], [372].) From a secular perspective within an increasingly secular nation, that is a striking proposition.

Conclusion

This is not the first time that the relationship between the conflict of laws and issues affecting indigenous peoples has been considered. More generally, whether non-state law may be the subject of choice of law is a topic that has been considered many times before. One of the factors that makes *Love v Commonwealth* unique, from an Australian legal perspective, is the majority's effective choice of Aboriginal customary law to determine an important issue of status without really disturbing the common law proposition that Aboriginal groups lack political sovereignty within the Australian federation (see [37], [102], [199]). COVID-19 may have stalled sought after changes to the Australian *Constitution* with respect to recognition of indigenous peoples (see (2019) 93 *Australian Law Journal* 929), yet it remains on the national agenda. In any event, Australia's very white judiciary may not be the best forum for recognition of the sovereignty of Australian Aboriginal and Torres Strait Islander peoples.