FEDERAL COURT OF AUSTRALIA

Webster v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 702

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| File number: | NSD 485 of 2020 |
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| Judge: | **RARES J** |
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| Date of judgment: | 20 May 2020 |
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| Catchwords: | **CONSTITUTIONAL LAW –** *Constitution* s 51(xix) – where foreign born applicant claimed to be a non-citizen non-alien by reason of being an Aboriginal Australian within the meaning of tripartite test in *Mabo v Queensland (No 2)* 175 CLR 1 at 70 – where Minister had cancelled applicant’s visa and decided not to revoke cancellation under s 501(CA)(4) of the *Migration Act 1958* (Cth) – sufficiency of evidence necessary to establish each limb of tripartite test – whether test’s requirement of “mutual recognition” satisfied by Australian Aboriginal recognition by elders or persons enjoying traditional authority “culturally adopting” applicant into indigenous society different from that of his biological descent. |
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| Legislation: | *Constitution,* s 51(xix)*Evidence Act 1995* (Cth), s 140*Judiciary Act 1903* (Cth), 39B*Migration Act 1958* (Cth), ss 189, 476A, 501, 501CA*Native Title Act 1993* (Cth)*Racial Discrimination Act 1975* (Cth) |
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| Cases cited: | *Blatch v Archer* (1774) 1 Cowp 63*Gibbs v Capewell* (1995) 54 FCR 503*Griffiths v Northern Territory* (2007) 165 FCR 391*In the matter of The Aboriginal Lands Act 1995 and Marianne Watson (No 2)* [2001] TASSC 105*Love v The Commonwealth* (2020) 94 ALJR 198*Mabo v Queensland (No 2)* (1992) 175 CLR 1*Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422*Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285*The Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606*Warrie v Western Australia* (2017) 365 ALR 624*Western Australia v Ward* (2002) 213 CLR 1Barwick D, “Mapping the past: an atlas of Victorian clans – 1835–1904”, *Journal of* *Aboriginal History*, Vol 8 (1984) pp 100-131Clark I, *Scars in the Landscape*”, AIATSIS Report Series, 1995Courtenay A, *The Ghost & The Bounty Hunter*, ABC Books, 2020Prentis M D,“Research and friendship: John Mathew and his Aboriginal informants”, *Journal of Aboriginal History*, Vol 22 (1998) |
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| Date of hearing: | 18 May 2020 |
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| Solicitor for the Applicant: | Human Rights 4 All |
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| Counsel for the Respondents: | Mr C Lenehan SC, Mr C Tran |
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| Solicitor for the Respondents: | Australian Government Solicitor |

ORDERS

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|  | NSD 485 of 2020 |
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| BETWEEN: | JOHN WAYNE WEBSTERApplicant |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRSFirst RespondentMINISTER FOR HOME AFFAIRSSecond Respondent |

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| JUDGE: | RARES J |
| DATE OF ORDER: | 20 MAY 2020 |

THE COURT ORDERS THAT:

1. The application be dismissed.
2. The respondents pay the applicant’s costs up to and including 6 May 2020 fixed in the sum of $4000.
3. The applicant pay the respondents’ costs of the proceedings thereafter and such costs may be set off.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

RARES J:

1. John **Webster** is a citizen of New Zealand. He seeks a declaration that he is not an alien within the meaning of s 51(xix) of the *Constitution* by reason of his claim to be an Aboriginal Australian. He also seeks a writ of *habeus corpus* in order to secure his release from immigration detention where he has been held as an unlawful non-citizen since his release from prison on 28 January 2020, as a consequence of the cancellation on 16 October 2019 of his Class TY Subclass 444 Special Category (Temporary) visa under s 501(3A) of the *Migration Act 1958* (Cth). On 6 May 2020 the Minister made a decision under s 501CA(4) of the Act not to revoke the cancellation of Mr Webster’s visa.

## Background

1. The material facts on which Mr Webster relies were not in dispute, but the parties differed as to the inferences to which those facts gave rise. The Minister accepted that this Court had jurisdiction under s 39B of the *Judiciary Act 1903* (Cth) to make a declaration of the nature that Mr Webster sought. But, the Minister contended, Mr Webster was and remains detained under s 189(1) because an officer in the Minister’s Department, Jennifer **Irwin**, reasonably believed that he was an unlawful non-citizen. The Minister submitted that s 476A(1) of the Act precluded this Court granting a writ of *habeus corpus* because Ms Irwin’s decision under s 189, regardless of its validity, was a privative clause decision, for challenges to which only the High Court and Federal Circuit Court have jurisdiction.
2. Mr Webster is 67 years old. He suffers from several serious medical conditions, including being currently in remission from metastatic melanoma. He is concerned that, if he remains in immigration detention until his removal to New Zealand again becomes possible, once the current public health emergency caused by the COVID-19 pandemic eases, he will be vulnerable to infection and, because of his age and his health conditions, death as a result of contracting the virus. Hence, the need for an urgent decision.
3. Both parties accepted that Mr Webster’s claim to be an Aboriginal Australian, so that he is not an alien, should be assessed using the tripartite test that Brennan J stated in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 70 as determined in *Love v The Commonwealth* (2020) 94 ALJR 198 at 218 [81] per Bell J for herself, Nettle, Gordon and Edelman JJ. The test Brennan J stated was:

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

1. I will consider each of these limbs in turn, namely biological descent, the person’s self-identification and his or her recognition by elders or others.

## Biological descent

1. Mr Webster’s great grandfather, **Walter Richards** identified as a member of the **Wathaurong** tribe, group or people and to be from Ballarat, Victoria. Both Mr Webster and his nephew, Craig **Madgwick** rely on Walter Richards’ reputed membership of the Wathaurong people.
2. The parties tendered agreed maps depicting the areas of, among others, the traditional land and waters of the Taungurong and Wathaurong peoples and the European settlements at Ballarat, Berringa, Rokewood Junction, Geelong and Coranderrk.
3. Ballarat is about 90km northwest of Geelong. Berringa is about 27km southwest of Ballarat and Rokewood Junction is about 36km south of Ballarat. All of those locations were in the country of the Wathaurong people. The country of the Taungurong people was to the northwest of Wathaurong country. Coranderrk is well over 100km to the east of Berringa in Woiworung country, which is immediately to the south of Taungurong country.
4. Mr Webster’s indigenous grandmother, Lynda Beatrice Richards was born on 7 July 1916 at Berringa, Victoria as recorded in the Berringa birth register. She was the daughter of Walter Richards. The register stated that he was 30 years old and had been born at Rokewood Junction. The register also recorded that Lynda’s mother was Mary Beatrice Richards, formerly Boynett, who was 25 years old and had married Walter at Sebastapol, Ballarat on 24 June 1911.
5. Lenamarie **Madgwick**, a niece of Mr Webster, sent the Minister an aged photograph of Walter Richards holding the hand of a small child next to a woman. The photograph depicts him as having a darker pigmentation than the other two. The photograph could be a family portrait. Ms Madgwick said that the photograph was of her “great great grandfather from Ballarat who identifies as indigenous”. Mr Webster’s solicitor gave unchallenged evidence that Mr Webster and his sister, Raewyn Louttit refer to their grandparents interchangeably using or not using the adjective “great” before the particular grandparent to whom they are referring. I infer that Ms Louttit’s son Craig Madgwick, and also Ms Madgwick, have adopted this family habit.
6. Mr Webster sought assistance in February 2020 in tracing his genealogy from custodians of records of Wathaurong in Ballarat, Koorie Heritage in Melbourne and other Koori sources but each of those entities informed him that it was not able to assist for at least 12 months because it was occupied with stolen generation cases.
7. On 28 April 2020, Mr Webster’s solicitor, Alison **Battisson**, wrote to the Ministers’ solicitors. Ms Battisson stated that she had also sought assistance in garnering material to establish that Mr Webster’s ancestors were Aboriginal, including through enquires with the National Library of Australia, the Wathaurong Co-Operative, the Public Record Office of Victoria and Australian Institute of Aboriginal and Torres Strait Islander Studies (**AIATSIS**). She noted in her letter that:
* at the same time as Walter Richards was in and around Ballarat, an Aboriginal couple with the same surname, **Dick** and **Ellen Richards**, were also there.
* Ellen Richards was a Kulin, Wathaurong woman and had provided an anthropologist, John **Mathew** with information about Wathaurong culture and traditions.
* Dick Richards had been a signatory of a document called the “Coranderrk Petition” and his wife may have been one too.
* given the very small population of the area at that time, “it is not implausible that Ellen, Dick and Walter were related.”
1. Ms Battisson annexed to her affidavit of 13 May 2020 an extract from a book “*The Ghost & The Bounty Hunter*” by Adam Courtenay, published in 2020 and five extracts from results of internet searches that she had conducted and referred to in her letter of 28 April 2020, that contained the following information.
2. Mr Courtenay’s book said that in 1909 Ellen Richards had explained to Mr Mathew that she was a Wathaurong woman and that the land around Ballarat, from Smythesdale to Geelong, was Bunjil territory. She gave the anthropologist apparently detailed information about the laws, customs and significant sites of her people. Although Mr Courtenay described Ellen Richards as a “Wadawurrung/Djargurd Wurrung” woman, it was common ground at the hearing that she was a “Wathaurong” woman as the other historical sources consistently stated.
3. Ms Battisson extracted articles from the journal “*Aboriginal History*”, Vol 8 (1984) including “Mapping the past: an atlas of Victorian clans – 1835–1904” by Dr Diane E Barwick (pp 100–131). Dr Barwick was an anthropologist at the Australian Institute of Aboriginal Studies, and the author of a then forthcoming book “Rebellion at Coranderrk” relating to the Kulin people. In the article, Dr Barwick noted that Dick Richards (who had died in 1907) was a member of the Nira-balluk clan of the Taungerong people and his wife Ellen (who died in 1921) was a member of the Borumbeet-bulluk clan of the Wathaurong people, and that they had been some of the main Kulin informants of a late 19th century anthropologist, A W Howitt.
4. I infer that the Kulin people were a larger society of which the Wathaurong and Taungerong were subgroups.
5. Ms Battisson also extracted a passage from “*Scars in the Landscape*” that AIATSIS had published in its Report Series. The extract noted that the Wathaurong people had been displaced from their traditional lands by the gold rush and pastoralists, and that in the latter half of the 1860s many of the Wathaurong people had been encouraged to settle at Coranderrk, “in present day Healesville”. The extract also noted that in 1868 the Mayor of Geelong had arranged a tomb in readiness for the deaths of the last two Wathaurong residents in Geelong. It stated that Ellen Richards, who had died at 73 in 1921, was a member of the Wathaurong people at Lake Burrumbeet. Another article, “*Research and friendship: John Mathew and his Aboriginal informants*” by Malcolm D Prentis, noted that Mr Mathew had recorded that Ellen Richards’ origin was Ballarat.
6. Thus, Walter Richards’ birthplace, Rokewood Junction, and his daughter, Lynne’s, Berringa, were both in Wathaurong country. Therefore, it is plausible that, when Walter Richards was born in around 1886, he was a Wathaurong person. Likewise, if Ellen Richards’ birthplace was Ballarat, that was also in Wathaurong country.
7. Mr Webster also relied on a North Coast Aboriginal Corporation for Community Health card issued in his name as further evidence in support of his claim to be an Aboriginal Australian.
8. The Minister accepted in his s 501CA decision that Mr Webster “has significant social ties in Australia including to the aboriginal community”.

## Self-identification

1. The Minister accepted that Mr Webster did identify as a Wathaurong person for the purposes of the second limb of the tripartite test. However, the Minister argued that this was not sufficient to satisfy the mutuality of recognition that the second and third limbs required. That was because, as I explain next, Mr Webster relied on his being recognised as an Aboriginal Australian, not by any Wathaurong person, but through his “cultural adoption” by the “**Yunupingu** tribe” in Gove, Nhulunbuy in the Northern Territory.

## Recognition by elders or other persons enjoying traditional authority

1. Mr Webster and Mr Madgwick said that they were “culturally adopted” into the Yunupingu people by one of its senior elders, the late Mr M. Yunupingu, and through his great grandson, Chris Yunupingu. They have maintained a close connection with those people since. Chris Yunupingu visited both Mr Webster and Mr Madgwick twice yearly. Some time previously, Mr Webster and Mr Madgwick had lived at Gove, and Mr Webster trained Aboriginal Australians there for a year. Mr Webster contended that as a descendent from an elder, such as his great grandfather, Chris Yunupingu was a person whose recognition of Mr Webster would enjoy a sufficient level of traditional authority among the Yunupingu people to satisfy the third limb of the tripartite test. Mr Webster also relied on the assessment by Ms Irwin that accepted evidence of his association with Indigenous people through family or cultural links.

## The parties’ submissions

1. Mr Webster argued that it was more than a coincidence, indeed likely, that his grandfather was in the Ballarat area at the same time as Dick and Ellen Richards and that they were related given the small community and commonality in their surnames. He contended that the photograph supported his claim that Walter Richards was Aboriginal. He submitted that the academic writing showed that Ellen Richards was a knowledgeable Wathaurong woman and that, taken together, these indicia ought be sufficient to satisfy the first limb of the tripartite test. He relied on what each of Gordon J and Edelman J had said in *Love* 94 ALJR at 270 [368] and 291 [462] to suggest that allowances can possibly be made in the way in which the tripartite test can be satisfied.
2. The Minister argued that Mr Webster’s evidence of his biological descent from a Wathaurong apical ancestor was insufficient, relying on the following passage in *The Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 at [52] where Olney J said:

The applicants’ claim that the members of the group they describe as the Yorta Yorta Aboriginal community are the descendants of the indigenous inhabitants of the claim area involves two closely related issues, one genealogical, the other geographical.  To provide a genealogical connection to the original inhabitants necessarily involves establishing the identity of one or more persons who occupied the relevant area at or prior to 1788.   **Proof in relation to the half century from 1788 until the advent of European settlement may well be satisfied by inference but the mere presence of one or more persons at a particular place at a particular time in history goes nowhere to proving either the traditional rights and interests of the descendants of such person or persons in relation to land or waters, or the geographical limits of the land and waters in relation to which it is said native title rights and interests are enjoyed.**

(emphasis added)

1. The Minister contended that the evidence on which Mr Webster relied to establish his biological descent was insufficient and incapable of tracing Walter Richards’ apical ancestry to a Wathaurong, or indeed any Australian Aboriginal, person at a time before British sovereignty. He submitted that the photograph did not provide a proper basis for drawing such an inference and that, as Olney J said, mere presence at a particular place at a particular time is an unsubstantial basis for drawing an inference of this nature.
2. Mr Webster argued that the recognition required to satisfy the second and third limbs of the tripartite test need not be by, or with, the same Aboriginal society (or people) as that from which he could trace his biological descent. He contended that cases and tests under the *Native Title Act 1993* (Cth) and other statutes were not determinative of the *Constitutional* question of whether or how he was not an alien, if he could establish each limb of the test by the best evidence available to him.

## Consideration

1. In cases such as the present, a person in Mr Webster’s position cannot always be expected to be able to have available, readily or perhaps at all, the same genealogical or societal evidence as is ordinarily deployed in cases under the *Native Title Act*. Experience has shown that those cases frequently require anthropological and genealogical research that expert anthropologists and representative bodies undertake with many persons over an extended period at very considerable cost. A person in prison or immigration detention must comply with prescribed time limits under the *Migration Act* in which to provide the Minister (or a delegate) with a response to a requirement to provide information or submissions such as under s 501CA(4). Ordinarily, he or she will not have the resources to assemble material to establish his or her status as an Aboriginal Australian with the degree of substantial detail in respect of anthropological or genealogical issues that is necessary to establish a native title claim, unless those issues already have been dealt with in such a claim. As Gordon J said in *Love* 94 ALJR at 270 [368]:

As was recognised in *Mabo [No 2]* [ (1992) 175 CLR 1 at 51–52, 62, 70], biological descent, self-identification and recognition may raise contests which may have to be settled by community consensus or in some other manner prescribed by custom, **or by a court acting on evidence which lacks specificity**. And they have been [See, eg, *Yorta Yorta* (2002) 214 CLR 422; *Griffiths* (2019) 93 ALJR 327; 364 ALR 208. For difficulties with identifying members of claim groups, see, eg, *Davidson v Fesl* [2005] FCAFC 183; *Aplin on behalf of the Waanyi Peoples v Queensland* [2010] FCA 625 at [226]–[267]; *Violet Carr and Others on Behalf of the Wellington Valley Wiradjuri People v Premier of New South Wales* [2013] FCA 200; *Weribone on behalf of the Mandandanji People v Queensland* [2013] FCA 255; *Banjima People v Western Australia [No 2]* (2013) 305 ALR 1]. But the fact that such contests have arisen does not and cannot detract from the fact that the legal concept of Aboriginality, at its core, recognises that there is a unique group of Australians, Aboriginal Australians, who are descendants of the original inhabitants of this country and who identify as such and are accepted as such. It is not necessary, in this case, to chart the outer limits of the concept [*The Tasmanian Dam Case* (1983) 158 CLR 1 at 274].

(emphasis added)

1. Ellen Richards appears to have been the last known Wathaurong person at the time of her death in 1921. Thus, it would be difficult, in 2020, to assemble evidence about the Wathaurong people and any connection that Walter Richards might have had with them. That is because the last accepted knowledgeable member of that group died almost a century ago.
2. I have taken those difficulties of proof into account in evaluating the evidence in accordance with s 140 of the *Evidence Act 1995* (Cth) and having regard to Lord Mansfield CJ’s well-known dictum in *Blatch v Archer* (1774) 1 Cowp 63 at 65 [98 ER 969 at 970] that “all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted”: see too *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285 at 300 [40] per Kiefel CJ, Keane, Nettle and Edelman JJ.
3. I am of opinion that it is not reasonably open to infer that Walter Richards was related to Dick and/or Ellen Richards. *First*, there is no information about the family genealogical structures of Walter, Dick or Ellen Richards. *Secondly*, the mere contemporaneous presence, in a not unsubstantial area of Victoria, of persons with a commonly found surname, such as Richards, is not indicative, by itself, of a familial relationship between them or of their genealogical or other heritage. *Thirdly*, while possible, in the absence of other evidence, it is not easy to draw an inference of a familial relationship between Ellen and Walter Richards merely because she was a Wathaurong person, and Walter Richards also identified as one.
4. The photograph of Walter Richards appears to depict him as having a noticeably darker skin colour on both his face and hands than the much fairer colour of the little child and woman. That raises the difficultly that Cox CJ observed *In the matter of The Aboriginal Lands Act 1995 and Marianne Watson (No 2)* [2001] TASSC 105 at [13], namely, that darkness of pigmentation “is common to the descendants of many different races and, is not, on its own, indicative of Aboriginal descent”. And, as Drummond J said in *Gibbs v Capewell* (1995) 54 FCR 503 at 512A–B “a person’s external appearance may be deceptive of his or her racial origins”.
5. Mr Webster has not led any evidence of communal recognition (outside his and his sister’s families) of Walter Richards that might support an inference that he was a Wathaurong man. That is probably because Ellen Richards was the last recorded Wathaurong person and thus, subsequently, there has been no relevant Wathaurong community to recognise or reject Walter as one of its members: cf *Gibbs* 54 FCR at 512D.
6. In essence, Mr Webster’s evidence as to the biological descent of his grandfather, Walter Richards, from members of the Wathaurong people depends on his family’s assertion of that fact. His lineage cannot be connected to Dick or Ellen Richards by any direct evidence.
7. Significantly, the unchallenged fact that Mr Webster’s immediate family has a *bona fide* recollection of the family history of Walter Richards being a Wathaurong man tends to suggest that he was its original source.
8. In *Western Australia v Ward* (2002) 213 CLR 1 at 64 [14], Gleeson CJ, Gaudron, Gummow and Hayne JJ said:

As is now well recognised, the connection which Aboriginal peoples have with “country” is essentially spiritual. In *Milirrpum v Nabalco Pty Ltd* [(1971) 17 FLR 141 at 167], Blackburn J said that: “the fundamental truth about the aboriginals’ relationship to the land is that whatever else it is, **it is a religious relationship … There is 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**”. It is a relationship which sometimes is spoken of as having to care for, and being able to “speak for”, country.

(emphasis added)

1. It is unlikely that a non-Aboriginal in early 20th century Australia would assert a particular indigenous identity that the person did not believe he or she had. Moreover, given the significance of the spiritual connection of Australian Aboriginal peoples to the land and waters of their country and their awareness of the spiritual (and, in early times, physical) dangers of entering another group’s or people’s land or waters without permission, it is unlikely that Walter Richards would have made a claim to identify with country with which he did not have a genuine spiritual connection: see eg *Griffiths v Northern Territory* (2007) 165 FCR 391 at 428–429 [127] per French, Branson and Sundberg JJ.
2. The Minister accepted that Mr Webster believed that his great grandfather was who he said he was, namely, a Wathaurong man. Regardless of whether Walter was related to Ellen or Dick Richards, it is difficult to see why Walter Richards or his daughter Lynda (Mr Webster’s grandmother) could have had any interest or reason, especially after she moved to New Zealand, to fabricate his or her own family history. Moreover, that history is consistent with where Walter and Lynda were born.
3. Both Rokewood Junction (where Walter Richards were born), Berringa (where Lynda Richards was born or her birth registered) and Ballarat, were all in Wathaurong country. It is well known that as white settlement proceeded in Australia, it caused significant displacement of the indigenous populations, as the extract from “*Scars in the Landscape*” confirmed. Thus, it is reasonably possible that Walter Richards was a Wathaurong man, as his family history recounts. He and Lynda were born and lived in an area (before relocating to Coranderrk) that was Wathaurong country. Walter Richards’ assertions of his indigenous heritage were made at a time and in circumstances where there is no reason to think that they were inaccurate or uninformed by knowledge of other surviving Wathaurong people, which is the inference I draw: cf *Yorta Yorta* [1998] FCA 1606 at [52]; *Blatch* 1 Cowp at 65 and see too *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at 454 [80] per Gleeson CJ, Gummow and Hayne JJ.
4. While, at first glance it might seem unusual to make such a finding on the basis of what necessarily must be a story passed orally down in a family over 100 years, that is the very process of establishing substantive elements of a native title claim group’s traditional laws and customs. A society that has no written tradition, such as all Aboriginal Australian societies are, can only pass its essential features from generation to generation by word of mouth. Societies that do not have the written word to record their laws, customs or history, depend on traditions of orality. As Gleeson CJ, Gummow and Hayne JJ recognised in *Yorta Yorta* 214 CLR at 454 [80], the proof of traditional laws and customs in existence at a time earlier than described in the evidence is capable of being inferred from more recent evidence. Here, on the evidence before me, Walter Richards was born about 30 years after white settlement disturbed the traditional people’s way of life in Wathaurong country. His family oral history is that he identified to them as a Wathaurong man and he was born and lived in Wathaurong country for over 30 years.
5. I am satisfied that Mr Webster has biological descent from a Wathaurong man, his great grandfather, and accordingly he has met the first limb of the tripartite test.

## The second and third limbs

1. It is convenient to deal with the second and third limbs of the tripartite test together since the issue between the parties is whether the Yunupingu people’s “cultural adoption” of Mr Webster and his family’s recognition of that “adoption” can satisfy those limbs.
2. The second and third limbs of the tripartite test appear to refer to a mutuality of recognition by the person who has biological descent from a particular society (or people) and elders or others enjoying traditional authority among that particular indigenous society (or people) recognise or acknowledge that that person is a member of that society (or people). This appears to have been how the majority analysed the tripartite test in *Love* 94 ALJR 198 at 216 [70], 217–218 [78]–[79] per Bell J, 255 [278], 256 [281], 256–257 [286]–[288] per Nettle J; 270 [370]–[371], 271–272 [375]–[388] per Gordon J, 290–291 [458]–[462] per Edelman J.
3. I reject Mr Webster’s argument that, in applying (and, I emphasise, *applying*) the tripartite test, a person can be found to be an Aboriginal Australian through mutual recognition in a different society or people than the one from which he or she has descended biologically. The essence of the second and third limbs of the test is that the person must be seen as incorporated as a member into a society (or people) because he or she is descended from its common forebears. That concept derives from the legal conception of common law native title in Australia. That conception has a fundamental precept that the common law native title holders have a spiritual connection to, and relationship with, the relevant land and waters that derives from, or is reflected in, their traditional laws and customs.
4. Mr Webster referred to Gordon J’s and Edelman J’s reasons where they said, respectively, that the determinative question is *Constitutional*, so that neither of the *Native Title Act* or *Racial Discrimination Act 1975* (Cth) is of assistance, the Court can act on evidence that lacks specificity, and that the tripartite test “is not set in stone” (*Love* 94 ALJR at 264 [334], 270 [368], 290 [458]). However, their Honours expressed those reasons in the context of applying, not departing from, the tripartite test.
5. Here, Mr Webster’s biological descent from the Wathaurong people is unconnected to what he described as his “cultural adoption” by the Yunupingu people. Thus, their recognition of him is outside any application of the tripartite test.
6. The validity of the act of incorporating an outsider into an indigenous society can only be ascertained by evidence of that society’s laws and customs governing a particular occasion or event at which such an “adoption” can take place.
7. There is no evidence of the laws and customs of the Yunupingu people, including particularly in relation to the existence or process of any mechanism of “cultural adoption”. It is not possible to know, on the evidence, if or how the late Mr M. Yunupingu could perform this process or what place his great grandson had to recognise it under the laws and customs of the Yunupingu people.
8. It is not unknown for indigenous people to adopt or accept into their society persons born to one or more parents who is not one of its members. But the relevant process, under the society’s laws and customs, needs to be before the court, to some degree, in order that its significance and the adherence to its requirements can be assessed, where in a case like this, it is the only means by which Mr Webster claims to satisfy the second and third limbs of the tripartite test. His (and Mr Madgwick’s) honest belief that something happened that amounted to “cultural adoption” and, through that something, Mr Webster’s status changed to being that of an Aboriginal Australian because of the actions of the late Mr M. Yunupingu is not sufficient to satisfy me that, in fact, Mr Webster gained or has that status within the meaning of the third limb of the tripartite test.

## Other observations

1. Bell J expressed the *ratio decidendi* in *Love* 94 ALJR at 218 [81] as follows:

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*. **The difference with respect to Mr Love is a difference about proof, not principle.**

(emphasis added)

1. The Minister noted that Nettle J maintained that the indigenous society or people had to exist today for a biological descendent to be able to establish that he or she is not an alien. His Honour said (*Love* 94 ALJR at 256 [281]):

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.

(emphasis added)

1. Bell J recognised in *Love* 94 ALJR at 218 [80] that the Court was not dealing with a situation in which the tripartite test was, or could be, problematic. Where a person can prove that he or she is a biological descendant from a particular Aboriginal Australian ancestor, but the society or people to which that ancestor belonged has ceased to exist, it is difficult to understand how that person is no less what his or her birth entailed in terms of direct descent from the original inhabitants of Australia before British sovereignty.
2. It is one thing to be a member of an existing indigenous society or people and to have legal rules (such as the tripartite test) by which that membership can be assessed. It is another thing to deny that a person, who can prove that he or she is a direct biological descendant of persons who were in Australia before British sovereignty, is an Aboriginal Australian just because a consequence of that sovereignty was the destruction or disappearance of the antecedent society. I noted in *Warrie v Western Australia* (2017) 365 ALR 624 at 736 [450] the human tragedy that the historical displacement of Aboriginal Australians can create when their descendants seek to establish or ascertain, many years later, their true indigenous heritage and identity. Mr Webster may be in a similar and equally unfortunate position. However, his claim has failed because he based it on being able to satisfy the tripartite test.
3. It is not necessary to decide the issues raised by Mr Webster’s claim for a writ of *habeus corpus* because, based on my findings and the cancellation of his visa, he is an unlawful non-citizen.

## Conclusion

1. For the reasons above, the application must be dismissed.

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| I certify that the preceding fifty-four (54) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rares. |

Associate:

Dated: 28 May 2020