HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 07 Apr 2022 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S192/2021
File Title:	Minister for Immigration, Citizenship, Migrant Services and M
Registry:	Sydney
Document filed:	Form 27F - Outline of oral argument (NLC)
Filing party:	Interveners
Date filed:	07 Apr 2022

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S192 of 2021

BETWEEN:

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs

First Appellant

Minister for Home Affairs

Second Appellant

and

Shayne Paul Montgomery

Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE NORTHERN LAND COUNCIL (INTERVENING)

Part I: Certification

1. This outline of oral submissions is in a form suitable for publication on the internet.

Part II: Propositions to be advanced in oral argument

2. ***Scope of oral submissions:*** The Northern Land Council confines its oral argument to the biological descent issue (Ground 1(b)(i) **CRB 121**), if that falls for decision (as to which, see RS [26]–[36], [83]–[88]; NLC [11]–[14]; NNTC [17]–[20]; VS [41]; contra AS Reply [12]–[16]).

3. The Commonwealth case approaches the matter as if there were a (uniform) legal standard, yet *Mabo [No 2]*, as applied in *Love*, concerns matters to be determined by the laws and customs of the indigenous people concerned, which are fact-specific: see [4(1)]. What it is to be an Aboriginal Australian and the nature of one's descent that qualifies one's belonging to an Aboriginal community are questions of fact to be answered on evidence in a properly cast proceeding in which such issues are squarely confronted at the outset: NLC [13]–[14] cf AS Reply [15].

4. ***Relevant frame of reference:*** If the legal status of Aboriginal peoples is to depend upon an element of descent, that should include principles of descent encompassed within the applicable customs and traditions of the Aboriginal peoples concerned. That is the relevant frame of reference (NLC [10], [23]; *McHugh v Minister for Immigration* (2020) 283 FCR 602 at [65] (**JBA 19/107**)) and:

   (1) It does not modify *Love*. It accords with Brennan J's reasoning in *Mabo [No 2]* (1992) 175 CLR 1 (**JBA 8/50**) on the customary transmission of rights and duties – "biological descent from the indigenous people … [with] mutual recognition … by … traditional authority" – adopted in *Love* for the purposes

of s 51(xix) in identifying one's belonging to a recognised ongoing Aboriginal community (or society): *Love* (2020) 270 CLR 152 at [70]-[71], [81], [268]-[272], [277]-[278], [357], [362], [451] (**JBA 8/49**). *Mabo* does not lay down some invariable requirement of strict biological (consanguineal) descent: NLC [21], [25]–[26]; *Western Australia v Ward* (2000) 99 FCR 316 at [154], [229]–[233] (**JBA 20/124**); findings Moynihan J at 145–9; *Akiba v Queensland [No 3]* (2012) 204 FCR 1 at [196]–[201].

(2) Strict biological descent jars with the accepted position that traditional titles, the incidents of which include these normative rules on customary transmission, derive from broader principles of descent, and even if it could be confined to the limitation in s 51(xix), that would introduce legal incoherence as Aboriginal Australians necessarily include those holding titles under those principles: NLC [27]–[28], [32]; *Hirama* [2021] FCA 648 at [32]–[35] (**JBA 17/101**); RFM 46–50, 56–60, 945–6.

(3) It does not lessen the importance of descent: cf AS Reply [17]. It recognises that descent is a social construct that ultimately turns on social acceptance and that the customs and traditions that define an Aboriginal community are "socially derivative and non-autonomous". The elements of descent, self-identification and community recognition interact and are interdependent: NLC [30], [33]; *Yorta Yorta v Victoria* (2002) 214 CLR 422 at [44], [49], [52] (**JBA 9/51**); *Shaw v Wolf* (1998) 83 FCR 113 at 118-20 (**JBA 19/117**).

5. The Commonwealth parties' case fails to appreciate that customs and traditions go to define an Aboriginal community: *Yorta Yorta* (2002) 214 CLR 422 at [49] (**JBA 9/51**). They point to nothing by which it can be said that the normative standards determining community composition are confined to a European view of genealogy (pedigree): NLC [33]–[34]; cf AS Reply [18].

7 April 2022

Sturt Glacken

Sarah Zeleznikow