Court of Appeal
Supreme Court

New South Wales

Case Name:	Hackett (a pseudonym) v Secretary, Department of Communities and Justice
Medium Neutral Citation:	[2020] NSWCA 83
Hearing Date(s):	6 April 2020; 9, 22 April (written submissions)
Decision Date:	6 May 2020
Before:	Basten JA at [138]; Leeming JA at [1]; McCallum JA at [176].
Decision:	1. Grant leave to appeal confined to proposed ground 1A. 2. Direct the appellant to file a notice of appeal which conforms with proposed ground 2 of the draft notice of appeal, and otherwise dispense with the requirements as to service. 3. Direct the Secretary to apply to the Equity Division within 28 days of today to review orders 3 and 4 made on 16 July 2019 and the adoption plans the subject of those orders. 4. Otherwise dismiss the appeal.
Catchwords:	ADOPTION – “Aboriginal child” - whether necessary to identify ancestor who was a member of Aboriginal race, identified as Aboriginal and was recognised by Aboriginal community - consideration of text, context and purpose of s 4 of Adoption Act 2000 (NSW) - sufficient to show child was descended from people who lived in Australia before British colonisation - Fischer v Thompson (Anonymised) [2019] NSWSC 773 disapproved APPEAL - leave - procedural fairness - applicant alleged submissions supplied after hearing not

	considered by primary judge - significance of failure to apply to primary judge and delay - whether proper outcome could be reached without a rehearing - leave refused
Legislation Cited:	Aboriginal Land Rights Act 1983 (NSW), s 4 Aboriginal Land Rights Amendment Act 2001 (NSW), Sch 2, cll 2.1, 2.2 Aborigines Act 1969 (NSW), s 2 Aborigines Protection Act 1909 (NSW), s 3 Aborigines Protection (Amendment) Act 1918 (NSW), s 2 Aborigines Protection (Amendment) Act 1936 (NSW), s 2 Adoption Act 2000 (NSW), ss 4, 8, 32, 34, 35, 46, 52, 54, 90, 92, 101, 118, 126 Children and Young Persons (Care and Protection) Act 1998 (NSW), s 5 Children and Young Persons (Care and Protection) Miscellaneous Amendments Act 2000 (NSW) Children (Care and Protection) Act 1987 (NSW), ss 3, 87 Constitution, s 51(xix) Evidence Act 1995 (NSW) Indian Child Welfare Act 25 USC, §§1902, 1915(a) Interpretation Act 1987 (NSW), s 7 Uniform Civil Procedure Rules 2005 (NSW), rr 36.16, 56.13 Vagrancy Act 1902 (NSW)
Cases Cited:	Attorney-General of the Commonwealth v Queensland (1990) 25 FCR 125 Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd (2006) 229 CLR 577; [2006] HCA 55 DFaCS and Boyd [2013] NSWChC 9 Donnell v Dovey (2010) 237 FLR 53; [2010] FamCAFC 15 Ealing London Borough Council v Race Relations Board [1972] AC 342 Fischer v Thompson (Anonymised) [2019] NSWSC 773 Gail and Grace [2013] NSWChC 4 Gibbs v Capewell (1995) 54 FCR 503 Love v Commonwealth; Thoms v Commonwealth [2020] HCA 3

Re Refugee Tribunal; Ex parte Aala (2000) 204 CLR 82; [2000] HCA 57
Shaw v Wolf (1998) 83 FCR 113; (1999) 163 ALR 205
Suttor v Gundowda Pty Ltd (1950) 81 CLR 418; [1950] HCA 35
The Commonwealth v Tasmania (The Tasmanian Dam Case) (1983) 158 CLR 1; [1983] HCA 21
Twist v Council of the Municipality of Randwick (1976) 136 CLR 106
Williams v Central Bank of Nigeria [2014] AC 1189; [2014] UKSC 10

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	Whittaker A, “White Law, Blak Arbiters, Grey Legal Subjects: Deep Colonisation’s Role and Impact Defining Aboriginality at Law” (2017) 20 Aust Indigenous L Rev 4
Category:	Principal judgment
Parties:	Hackett (a pseudonym) (Applicant) Secretary, Department Communities and Justice (Respondent)
Representation:	Counsel: P Herzfeld (Applicant) M England, T Epstein (Respondent) Solicitors: Legal Aid NSW (Applicant) Crown Solicitor’s Office (Respondent)
File Number(s):	2019/332364
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Supreme Court of New South Wales
Jurisdiction:	Equity
Citation:	[2019] NSWSC 908
Date of Decision:	16 July 2019
Before:	Stevenson J
File Number(s):	A136/2019

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the decision]

The respondent commenced proceedings in 2018 seeking an order for the adoption of a teenaged child. That order was made in July 2019. The adoptive mother had cared for the child for most of her life. The applicant, who was the child's biological father, opposed the adoption order.

The *Adoption Act 2000* (NSW) requires the Supreme Court to apply certain "Aboriginal child placement principles" in making an adoption order if the child the subject of the order is an "Aboriginal child". The *Adoption Act* defines "Aboriginal child" as meaning "a child descended from an Aboriginal" and as including a child determined by the Court to be an Aboriginal if the Court is satisfied that the child "is of Aboriginal descent". At the hearing, it was common ground that the child was an "Aboriginal child" for the purposes of the *Adoption Act*. However, it was also common knowledge that on the day after the hearing, another decision would be delivered which might alter the parties' understanding of who is an "Aboriginal child" for the purposes of the *Adoption Act*. The effect of that decision was that a child would only be an "Aboriginal child" if it was possible to identify an ancestor who met the definition of "Aboriginal" under the Act by satisfying the three-limb test of being a member of the Aboriginal race of Australia, identifying as an Aboriginal, and being accepted by the Aboriginal community as an Aboriginal.

The parties and the primary judge proceeded on the basis that this interpretation of "Aboriginal child" was correct, and the primary judge invited the parties to provide further written submissions on whether, applying this interpretation, the child was an "Aboriginal child". The respondent provided submissions contending that the child was not an "Aboriginal child". The applicant provided submissions slightly late, and after the primary judge had notified the parties that judgment was due to be delivered. The primary judge did not refer to the applicant's submissions in his decision. In the result, the primary judge was not satisfied on the evidence that the child was an "Aboriginal child".

The applicant sought leave to appeal to the Court of Appeal and the application was heard concurrently with the argument on the appeal.

The issues in the application were:

i) Whether the child was an “Aboriginal child” for the purposes of the *Adoption Act*.

ii) Whether the applicant had been denied procedural fairness.

The Court held, granting leave to appeal in part:

As to issue (i), per Leeming JA (Basten JA agreeing in part at [145], McCallum JA agreeing at [176]):

1. The child was an “Aboriginal child” for the purposes of the *Adoption Act* in circumstances where evidence established that she was descended from the people who lived in Australia before British colonisation: at [89]-[90]. This conclusion followed from analysis of extrinsic materials prior to the *Adoption Act*’s enactment, which pointed to a broad purpose of including a descent-based extension to the definition in order that more children would answer the description, from the additional, extending language of the definition’s second limb in the text of s 4 of the Act, and from the pre-existing law at the time of the *Adoption Act*’s enactment, which defined “Aboriginal child” by reference to descent and from which the *Adoption Act* was not intended to depart: at [79], [83]-[88].

2. The second limb of the definition of “Aboriginal child” in s 4 of the *Adoption Act* empowers the Court to determine that a child who qualifies as being “of Aboriginal descent” is an “Aboriginal child”, even if the child does not satisfy the three-limb test and even if no ancestor of the child satisfies the three-limb test: at [57], [60], [86]. The Court has discretion whether or not to exercise that power; accordingly, children of Aboriginal descent, however remote, are not automatically “Aboriginal children” by reason of s 4(2) of the *Adoption Act*: at [82].

Fischer v Thompson (Anonymised) [2019] NSWSC 773 disapproved. *Gibbs v Capewell* (1995) 54 FCR 503 referred to.

As to issue (i), per Basten JA (McCallum JA agreeing at [176]):

3. The reference in s 4 of the *Adoption Act* to a child of “Aboriginal descent” is not the same as a child “descended from an Aboriginal”. Unlike the latter, the former expression does not require that the forebear be an “Aboriginal person”

as defined by the three-limb test: at [153]-[154]. The structure of s 4 of the *Adoption Act* suggests that a degree of flexibility was intended to be built into s 4(2), and in making a determination under that subsection, the Court is empowered to consider a broad range of material, including matter which would not be admissible under the *Evidence Act 1995* (NSW): at [173]-[174].

4. The evidence before the primary judge bearing upon the child's Aboriginality could not properly have been assessed without reference to the kind of circumstances in which, in the past, it was commonplace to deny Aboriginality: at [165]. The objective evidence of Belinda's Aboriginal ancestry should have been sufficient to conclude that Belinda was an Aboriginal child: at [167].

As to issue (ii), per Basten JA (McCallum JA agreeing at [176]):

5. The applicant should have explained why the opportunity to put in further submissions was not availed of in time, and could have sought to vary the primary judge's orders when the apparent procedural unfairness was identified. However, it could be inferred that the applicant's late submissions were the product of an expectation that the parties' common ground at the hearing would be maintained, and it was not clear whether, and if so when, the applicant understood that his submissions had been disregarded: at [140]-[143]. Although a party should not lightly be precluded from agitating a complaint of procedural unfairness, in the present proceeding the proper outcome could be obtained without the need for a further hearing: at [144].

As to issue (ii), per Leeming JA:

6. The applicant had not shown that this was a case where he should be granted leave to appeal complaining that he had been treated unfairly in circumstances where he had the chance to ask for his submissions to be taken into account before the primary judge, where there had not been full disclosure of the circumstances in which the alleged denial of procedural fairness occurred, and where there had already been substantial delay: at [28], [128]-[133].

JUDGMENT

1 **LEEMING JA:** The most important person in this appeal is a young teenaged girl. Because she was assumed into care when she was about six months old, I may not name her or anything that identifies her. “Belinda” is not her real name, but it seems better than calling her “the child” or by a letter. She is a real person who has been the subject of litigation for much of her life, including these proceedings for the past two years. Belinda may attempt to read these reasons, now or in the future. They explain why I have concluded that the adoption order made on 16 July 2019 and the order changing her name should remain in place.

2 Belinda’s biological father has argued that those orders should be set aside, but I have not accepted most of his arguments. The arguments and the law are technical and lengthy, and are not readily comprehensible by someone who is not a lawyer. However, if there is one thing I would wish Belinda to understand in addition to the outcome of the appeal, it is that her biological father should not be criticised for making the arguments he has made. He was entitled as a matter of law to do so, he made it plain that he accepted that the adoptive mother had “done a good job in raising [his daughter]”, and did not seek any order that would result in her ceasing to reside with her. I do not doubt the conclusion reached by the judge who made the adoption order last year, which was that the father was trying to re-establish a relationship with his daughter.

Overview

3 Belinda’s adoptive mother is the woman who has cared for her continuously, as a daughter, since she was around seven months old. She has not seen her biological mother or her biological father for more than seven years. It is not necessary to describe the circumstances which led to Belinda being assumed into care. Her adoption was proposed by the Secretary, supported by the adoptive mother and by Belinda herself after she turned 12. It was opposed by Belinda’s biological father, who also cannot be named (“Hackett” was the next on a list of some 5,000 pseudonyms prepared years ago in my chambers).

4 Certain exceptions aside, a child who is less than 12 years old cannot be adopted without the biological father’s consent. The consent of the biological

father is not required if a child is 12 or more years of age and of sufficient maturity to understand the effect of giving consent, so long as the child has been cared for by the proposed adoptive parent for at least two years. However, in such a case, which was Belinda's position, the biological father is entitled to be joined as a party and to be heard: see *Adoption Act 2000* (NSW), ss 52(a), 54(1)(c) and (2) and 118.

5 Belinda's biological father relied on s 90(3) of the *Adoption Act* which provides:

> "The Court may not make an adoption order unless it considers that the making of the order would be clearly preferable in the best interests of the child than any other action that could be taken by law in relation to the care of the child."

6 Instead of an adoption order, Belinda's biological father contended for an order giving parental responsibility for Belinda to the adoptive mother, as authorised by s 92 of the *Adoption Act*, because it had not been shown that an adoption order was clearly preferable in Belinda's best interests.

7 The primary judge was sensitive to what was driving the dispute, the differences between the two orders which were being argued, and the test of "clearly preferable in the best interests of the child" to be applied. After reproducing some unchallenged and upsetting evidence as to the circumstances in which contact between father and daughter came to an end, his Honour said the following:

> "I accept that [the father] is sincerely trying to re-establish a relationship with [Belinda]. He is having supervised contact with [Belinda's] younger sister, ... But [Belinda] is adamant, at the moment, that she does not wish to see [the father]. With some encouragement from [the adoptive mother], that may change over time. Hopefully [the father] can find within himself the patience and perseverance to persist with his efforts to establish contact, even if there is no positive response from [Belinda] to those efforts in the short term. Time will tell.
>
> What I think is clear is that the making of an adoption order now will not, itself, affect [the father's] prospects of resuming contact with [Belinda] at some point in the future.
>
> On the other hand, there are many factors pointing, quite decisively in my opinion, to the conclusion that it is clearly preferable that, rather than an order allocating parental responsibility to [the adoptive mother] under s 92, an order be made for adoption.
>
> [The adoptive mother's] evidence emphasised the security that an adoption order would bring to [Belinda's] life.

> To adopt the words of Brereton J in *Adoption of NG (No 2)* [2014] NSWSC 680 at [77] to [78] (with adjustments to reflect the circumstances here), in addition to providing certainty and permanence for [Belinda], an adoption order will have the result that:
>
> > (a) [Belinda] will be raised in a legally recognised family, rather than remaining a State ward for the duration of her childhood. She will no longer be in 'out of home care', but 'in home care'. The need for departmental intervention in her care and departmental approval for significant decisions will be removed as will the stigma potentially associated with being a State ward;
> >
> > (b) [Belinda's] legal status will be brought into conformity with reality. Psychologically and residentially, she is a member of [her adoptive mother's] family. An adoption order would bring the legal position into line with this. Her membership of the family that she regards as her own would be perfected, providing her with a sense of security and permanent belonging in that family. [Belinda] will be a member of that family, not only during her childhood but for life; and
> >
> > (c) [Belinda's] legal name will correspond with that of the family which she lives and identifies. She will be enabled to choose for herself whom she tells of this status, without it being self-evident from her name."

8 When an adoption order is made, an "adoption plan" may (and in some cases must) also be made. The primary judge ordered that the adoption plans which were in evidence before him be registered. I shall return to this later in this judgment.

9 The *Adoption Act* does not treat all children alike. The different treatment of children by the *Adoption Act* is what underlies the entirety of the appeal to this Court.

The significance of being an "Aboriginal child"

10 For most purposes of the Act, a "child" is anyone who is less than 18 years of age; in this respect it contrasts with the *Children and Young Persons (Care and Protection) Act 1998* (NSW), which bears many similarities with the relevant parts of the *Adoption Act*.

11 For the purposes of the *Adoption Act*, either a child is, or is not, an "Aboriginal child" or a "Torres Strait Islander child". Similarly, for the purposes of the *Children and Young Persons (Care and Protection) Act*, a child or young person is, or is not, an "Aboriginal child or young person" or a "Torres Strait Islander child or young person".

12 In the case of a child who is an "Aboriginal child", in addition to having regard to the best interests of the child, the *Adoption Act* requires the Supreme Court to apply the "Aboriginal child placement principles". (Likewise, in the case of a "Torres Strait Islander child", the Court is required to apply the "Torres Strait Islander child placement principles". There is nothing to suggest that the latter have any application to these proceedings, and I shall say nothing more of them.)

13 Broadly speaking, the effect of the Aboriginal child placement principles is for first preference to be given for the placement of an Aboriginal child with parents from an Aboriginal community to which one or both of the child's birth parents belong, or if that is not practicable or not in the child's best interests, for the child to be placed with adoptive parents from another Aboriginal community. If that is not practicable or not in the child's best interests, and the child is to be placed with non-Aboriginal prospective adoptive parents, then s 35(3) applies:

> "(3) **Placement of child with person who is not Aboriginal** An Aboriginal child is not to be placed with a non-Aboriginal prospective adoptive parent unless the Court is satisfied that the prospective adoptive parent:
>
> (a) has the capacity to assist the child to develop a healthy and positive cultural identity, and
>
> (b) has knowledge of or is willing to learn about, and teach the child about, the child's Aboriginal heritage and to foster links with that heritage in the child's upbringing, and
>
> (c) has the capacity to help the child if the child encounters racism or discrimination in the wider community,
>
> and that the Aboriginal child placement principles have been properly applied."

14 Special provision is made in s 35(4) for children with one Aboriginal parent and one non-Aboriginal parent. In that case, the child "may be placed with the person with whom the best interests of the child will be served having regard to the objects of this Act". Although not developed when the appeal was heard, and arguably outside the grant of leave, the Secretary submitted in supplementary written submissions that s 35(4) operated "as a carveout to the general order for placement specified in s 35(2)", and was applicable on the basis that there was "no dispute in the present case that, if the child is an Aboriginal child, she has one Aboriginal and one non-Aboriginal parent" (written submissions filed 22 April 2020, para 23). Neither proposition strikes

me as self-evidently correct. It is not necessary for me to engage with s 35(4), and to do so would not merely be to venture outside the issues argued in this Court, but it would also be to disregard the way the hearing was conducted before the primary judge. There, the Secretary expressly assumed the burden of establishing that s 35(3) was satisfied ("[i]t is submitted that s 35(2)(c) and (3) apply and that the proposed adoptive parent (a) has the capacity to assist [Belinda] to develop a healthy and positive cultural identity ...") and further, so far as I can see, no reliance was placed on s 35(4). Further, in oral submissions on appeal, the Secretary positively submitted that the Aboriginal child placement principles were satisfied (transcript 6 April 2020, p 56).

15 Other provisions in the *Adoption Act* regulate the adoption of children who are Aboriginal children, and children who are not. The detail is not important just now. What matters is that the provisions differ.

16 That said, the differences in the way the *Adoption Act* treats the adoption of an "Aboriginal child" and the adoption of a child who is not an "Aboriginal child" should not be overstated. The primary consideration in every case is the best interests of the child, and where that clashes with the Aboriginal child placement principles, the best interests of the child have priority. There is overlap between s 35(3), which applies to Aboriginal children, and the provisions which apply to children who are not Aboriginal children. Thus s 32(1), which applies to "placing a child (other than an Aboriginal or Torres Strait Islander child) for adoption", requires the Supreme Court to have regard to the culture, any disability, language and religion of the child, and "the principle that the child's given name, identity, language and cultural and religious ties should, as far as possible, be preserved". Section 32(2) requires account to be taken of

> "whether a prospective adoptive parent of a different cultural heritage to that of the child has demonstrated the following—
>
> > (a) the capacity to assist the child to develop a healthy and positive cultural identity,
> >
> > (b) knowledge of or a willingness to learn about, and teach the child about, the child's cultural heritage,
> >
> > (c) a willingness to foster links with that heritage in the child's upbringing,

> (d) the capacity to help the child if the child encounters racism or discrimination in school or the wider community."

17 The similarities between s 35(3) and s 32(2) are obvious. It does not matter whether a child is or is not an Aboriginal child – in either case the Supreme Court is required to consider the cultural heritage of the prospective adoptive parent and whether he or she will assist in the preservation of the cultural heritage of the child.

18 But nonetheless where the Aboriginal child placement principles apply, those principles give a measure of primacy to the preservation of Aboriginal cultural heritage, in particular by requiring the adoptive parent to be from an Aboriginal community if that is possible. They are a law which responds to the loss of cultural heritage which occurred when many children were taken into households and other environments which did not share that heritage. As I shall explain below, in the case of "Aboriginal children" this mostly occurred by placing children in care, rather than adoption, and in fact the Aboriginal child placement principles were first developed and formulated in connection with placement in care rather than adoption.

Three important points

19 Three matters should be clarified immediately. First, Belinda's adoptive mother is not Aboriginal. However, as will be seen below, it was common ground at the hearing that Belinda was an Aboriginal child. Thus evidence was led as to the support the adoptive mother would give to Belinda's Aboriginal heritage, in order to satisfy the requirements of s 35(3).

20 Secondly, if Belinda is an Aboriginal child, it is by reason of her biological mother, not her biological father. Belinda's biological father is not Aboriginal. That does not of course prevent Belinda's biological father from arguing that the orders should be set aside because they disregarded that Belinda was an Aboriginal child.

21 Thirdly, there was and is no suggestion that the Aboriginal child placement principles would lead to Belinda being adopted by parents belonging to any Aboriginal community. That is probably obvious, given where Belinda has lived

for all save the first 7 months of her life, but it is decisive on the view I take for the outcome of this appeal.

The tests for determining who is an Aboriginal child

22 Unfortunately, the legal test for who is or is not an "Aboriginal child" was uncertain during the hearing of this matter. In part that is a consequence of the drafting, which is far from clear. In part it is a consequence of the happenstance that the hearing was conducted with the knowledge that another decision would be delivered the following day which might, and in fact did, alter the parties' understanding of the test. In *Fischer v Thompson (Anonymised)* [2019] NSWSC 773, it was said that in order for a child to be an "Aboriginal child", it was necessary to identify an ancestor of the child who was "a member of the Aboriginal race of Australia, and identified as an Aboriginal person, and was accepted by the Aboriginal community as an Aboriginal person." However, one consequence of the common position at the hearing that Belinda was an "Aboriginal child" was that evidence had been adduced directed to establishing compliance with s 35(3). I shall return to this below.

23 Following delivery of *Fischer v Thompson,* the parties were content to proceed on the basis that the test identified in that case was correct, even though it was different from what they had previously agreed. The primary judge gave the parties an opportunity to be heard further about the evidence and the new test that he was proposing to apply. The Secretary submitted that under the new test, Belinda had not been shown to be an "Aboriginal child". The judge accepted that submission, and decided that he was not satisfied by the evidence that Belinda had an ancestor who satisfied that test, and therefore he did not have to apply the Aboriginal child placement principles. The judge made it clear that he was not finding that Belinda was *not* an Aboriginal child, but that on the evidence before the Court, he was not satisfied that she was. There was no complaint, until the afternoon of the hearing in this Court, that the primary judge had applied the wrong test.

24 The primary judge made two orders formally confirming the paternity of Belinda's biological father (he had not been named on the birth certificate). Those orders are not challenged. The judge made four other orders. They were

orders (a) adopting Belinda as the daughter of the woman in whose household she has lived for almost all of her life, (b) giving Belinda that woman's surname, and (c) two orders giving effect to two adoption plans concerning what would happen in the future until Belinda turns 18. Belinda's biological father seeks leave to appeal from those four orders. His appeal was heard concurrently with the application for leave. None of the counsel who appeared in this Court had appeared at first instance.

The appeal and my conclusions

25 The first proposed ground of appeal was a denial of procedural fairness, principally on the basis of the judge's failure to consider written submissions supplied on the Monday afternoon before judgment was handed down the following Tuesday, rather than by the previous Friday afternoon. The second proposed ground challenges the approach to "Aboriginal child" in *Fischer v Thompson*. This ground was first raised at the conclusion of Belinda's biological father's submissions in this Court, responding to questions raised by members of this Court concerning the reasoning in *Fischer v Thompson.* The respondent did not oppose the ground being raised, and advised in supplementary written submissions that "[t]he Respondent does not take a position" on whether the construction of s 4(2) in *Fischer v Thompson* was right or wrong. The respondent went on to identify "a basis upon which the Court could accept that the construction proffered in *Fischer v Thompson* as to s 4(2) is correct".

26 Belinda's biological father asks this Court to determine the second point first, for the good reason that that was a question of law of general importance, warranting a grant of leave. I think he is right about that. The respondent made no submission to the contrary, consistent with his not taking a position on the correct construction. I also think that the decision handed down the day after the hearing of Belinda's case was wrong insofar as it applied a narrower test of "Aboriginal child". On the correct test, I think that Belinda is an "Aboriginal child" for the purposes of the *Adoption Act*, and the parties had been right insofar as that was their common position at the hearing before the primary judge.

27 So far I agree with Belinda's biological father's submissions. However, I do not think that he has shown that the judge was wrong to have made an adoption order, or an order giving Belinda a new surname. There are some problems with the adoption plans. Belinda's adoption plans are important, but the problems can be fixed and that should occur soon.

28 I also do not think that Belinda's biological father has shown that this is a case where he should be granted leave to bring an appeal complaining that he was treated unfairly. That is partly because of the way his claim has been presented in this Court, and partly because he had the chance, many months ago, to go back to the Supreme Court judge and ask for his submissions to be taken into account. It is also partly because the main point Belinda's biological father wanted to make was to apply to put on further evidence establishing that Belinda was an "Aboriginal child", and there is no reason now for that to occur, because Belinda is in fact an "Aboriginal child" for the purposes of the *Adoption Act.*

29 I explain below why I have reached those conclusions.

The test for "Aboriginal child"

30 Section 4(1) of the *Adoption Act* contains definitions of "Aboriginal" and "Aboriginal child":

> "***Aboriginal*** has the same meaning as Aboriginal person has in the *Aboriginal Land Rights Act 1983*.
>
> ***Aboriginal child*** means a child descended from an Aboriginal and includes a child who is the subject of a determination under subsection (2).

31 Subsection 4(2) provides:

> "Despite the definition of ***Aboriginal*** in subsection (1), the Court may determine that a child is an Aboriginal for the purposes of this Act if the Court is satisfied that the child is of Aboriginal descent."

32 The definition of "Aboriginal person in the *Aboriginal Land Rights Act 1983* (NSW) is:

> "***Aboriginal person*** means a person who—
>
> (a) is a member of the Aboriginal race of Australia, and
>
> (b) identifies as an Aboriginal person, and
>
> (c) is accepted by the Aboriginal community as an Aboriginal person."

That was referred to in the submissions as the "three-limb" test. "Aboriginal race" and "Aboriginal community" are not defined. "Race" is an imprecise and much-criticised term, as has long been noted: see for example *Ealing London Borough Council v Race Relations Board* [1972] AC 342 at 362, cited by Brennan J in *The Tasmanian Dam* case (1983) 158 CLR 1 at 243; [1983] HCA 21.

33 The main difficulties of construction which arise in this appeal may be summarised by the following:

(1) How is the definition of "Aboriginal person" in the *Aboriginal Land Rights Act* applied when it is incorporated by reference as the definition of "Aboriginal" in the *Adoption Act*?

(2) What significance, if any, flows from the references to "descended from an Aboriginal" and "Aboriginal descent" in s 4(1) and (2), bearing in mind the definition of Aboriginal picks up a definition which is based on membership of the "Aboriginal race of Australia"?

(3) What extra work, if any, is to be given to the words "and includes a child who is the subject of a determination under subsection (2)" in s 4(1) and the whole of s 4(2), over and above what is achieved by "Aboriginal child" meaning "a child descended from an Aboriginal"?

34 In *Fischer v Thompson,* it was held that under those provisions it is necessary to show that a child has an ancestor who satisfies the three-limb test of race, identification and acceptance in the *Aboriginal Land Rights Act*. Sackar J's conclusion was expressed as follows:

> "[207] It is clear that by reason of s 4(1) and s 4(2), descent is sufficient, for a child to be an Aboriginal child for the purposes of the Act. Further support for this position can be taken [from] the New South Wales Law Reform Commission Report No 81, which was used as a basis to reform the adoptions in NSW. It is clear that there was concern that a three limbed test would be far too onerous for children to meet, for example, it is clear that very young children cannot reasonably be said to 'identify' with any particular cultural background.
>
> [208] I am satisfied that as I have said whilst descent is sufficient under s 4(1) and s 4(2) to making a finding that a particular child is an Aboriginal child for the purposes of the Act, the child must still be descended from an Aboriginal, meaning an Aboriginal as defined, which brings into stark relief the tripartite requirement.
>
> ...
>
> [210] There was significant discussion as to the true meaning of s 4(2). As I have noted above, it appears to me from reading the whole of s 4, that descent is sufficient under ss 4(1) and 4(2). The Secretary emphasised as I understand it the term 'may' and stated that this allowed *discretion* on the part of the Court

> to make a determination of Aboriginality, if I understood the argument correctly. There was some concern, that the Court should maintain this discretion, because of the significant obligations placed on the Secretary and the likely large number of children potentially captured by this definition. I do not agree with this proposition. What s 4(2) does, is to permit the Court to determine a child is Aboriginal on the basis of descent alone, but as I have said, the child must still be a descendant of an Aboriginal who meets the test. It is not a question of discretion, it simply gives the Court jurisdiction where relevant, to determine a child is Aboriginal, not having satisfied the definition of Aboriginal as otherwise defined."

35 While the construction of "the Court may determine" in s 4(2) as conferring a power is correct, I respectfully think that the more limited test is incorrect. I have four main reasons for this.

(1) The first is textual: the construction gives no work to the second limb of the definition of "Aboriginal child" or to s 4(2).

(2) The second is contextual. It pays no regard to the extensive work which was done in the three years between the Law Reform Commission Report to which his Honour referred, and the enactment of the *Adoption Act.* That work discloses the source of the words which the construction above leaves with no work to do.

(3) The third is purposive. The purpose of the additional words in s 4(1), and of s 4(2), was to expand the class of children who would be "Aboriginal children". A construction which promotes that purpose should be preferred.

(4) The fourth turns on the pre-existing law. When s 4(2) is considered carefully, it may be seen to have a distinct role, preserving a descent-based limb of the definition, which had been applied to the adoption of Aboriginal children for many years prior to 2000.

36 I should say immediately that it appears that Sackar J was not assisted by submissions from any of the parties on many of the matters I have relied upon.

Statutory text

37 The starting point is the enacted text. This is more complicated than it may at first seem. It is helpful at the outset to expose that complexity.

38 First, the definition of "Aboriginal child" refers to "descended from an Aboriginal" and s 4(2) refers to the child being "of Aboriginal descent". The words "descended" and "descent" would seem to have nothing to do with identification or acceptance. That recalls the biological aspect of the first limb of the three-limb test which is expressed in terms of race. Yet a different term has

been used, and very often when a statute uses a different term, there is a different legal meaning.

39 Secondly, the term “Aboriginal” which is picked up by the definition of “Aboriginal child” is itself defined, but by reference to a *different* defined term, namely, “Aboriginal person”, in a different statute.

40 Thirdly, the word “Aboriginal” is used in different ways in the *Adoption Act*. The word is a defined term, and the definition presupposes that it is a noun.

41 However, the word “Aboriginal” in the *Aboriginal Land Rights Act* is an adjective. That appears not just in the definition of “Aboriginal person” in s 4 reproduced above, and in the terms it contains (“Aboriginal race” and “Aboriginal community”), but also in other definitions in that section such as “Aboriginal owners”, “adult Aboriginal person” and indeed in the title of the Act.

42 This distinction between noun and adjective has been recognised by the Legislature. The definition of “Aboriginal” in the *Adoption Act* has altered. When originally enacted in 2000, s 4(1) provided:

> “**Aboriginal** has the same meaning as in the *Aboriginal Land Rights Act 1983*.”

43 The additional words “Aboriginal person has” were added by the *Aboriginal Land Rights Amendment Act 2001* (NSW), Schedule 2, cl 2.1, so as to produce the current definition:

> “**Aboriginal** has the same meaning as Aboriginal person has in the *Aboriginal Land Rights Act 1983*.”

44 That recognised the distinction, perhaps originally overlooked, between the use of “Aboriginal” as an adjective in the 1983 Act and as a noun in the *Adoption Act.* The same change was made to the identical definition of “Aboriginal” in s 5 of the *Children and Young Persons (Care and Protection) Act 1998*: see cl 2.2 of the same Schedule. It suggests that the Legislature was sensitive to the differences between noun and adjective – between “an Aboriginal” and “an Aboriginal person”. This is why “Aboriginal child” is defined to mean a child descended from *an* Aboriginal and includes a child whom the Court determines is *an* Aboriginal.

45 Exceptionally, s 8(1)(f) requires regard to be had to the Aboriginal child placement principles "if the child is Aboriginal". Mr Herzfeld submitted that this was an oversight, and that it should have read "if the child is an Aboriginal child". The respondent did not disagree. I think he is right. My conclusion is strengthened by s 90(1), which closely corresponds with s 8(1), and in particular s 90(1)(e), which asks "if the child is an Aboriginal child".

46 Section 8(1) of the *Adoption Act* relevantly provides:

> (1) In making a decision about the adoption of a child, a decision maker is to have regard (as far as is practicable or appropriate) to the following principles—
>
> > (a) the best interests of the child, both in childhood and in later life, must be the paramount consideration,
> >
> > ...
> >
> > (f) if the child is Aboriginal—the Aboriginal child placement principles are to be applied ..."

47 Section 90(1), which governs the making of an adoption order, relevantly provides:

> "(1) The Court must not make an adoption order in relation to a child unless the Court is satisfied—
>
> > (a) that the best interests of the child will be promoted by the adoption, and
> >
> > ...
> >
> > (e) if the child is an Aboriginal child—that the Aboriginal child placement principles have been properly applied ..."

48 The textual and structural similarities between these two subsections are obvious.

49 It is necessary to give meaning to the definition of "Aboriginal" in the *Adoption Act*, which refers to the definition of a *different* term in another Act. Ordinarily, in cases where there is a "referential definition" (the term used by Francis Bennion – see now D Bailey and L Norbury, *Bennion on Statutory Interpretation* (7th ed, 2018, LexisNexis Butterworths), p 477), one simply applies the legal meaning in the earlier statute to the use of that term in the later statute: *Williams v Central Bank of Nigeria* [2014] AC 1189; [2014] UKSC 10 at [50]. But bearing in mind that the defined term is "Aboriginal" but the definition which is used is of "Aboriginal person", the *Adoption Act* is to be

approached as if it contained the following definition (which is that taken from the *Aboriginal Land Rights Act* but replacing references to "Aboriginal person" by "Aboriginal"):

> "***Aboriginal*** means a person who—
>
> (a) is a member of the Aboriginal race of Australia, and
>
> (b) identifies as an Aboriginal, and
>
> (c) is accepted by the Aboriginal community as an Aboriginal."

50 The discussion of nouns and adjectives above may seem very artificial. But it is necessary, in my view, in order to understand the definition of "Aboriginal child", and the nuances in the parties' submissions.

51 The first difficulty is that the defined term "Aboriginal child" itself uses the word "Aboriginal" as an adjective. That is capable of giving rise to a question as to the relationship with the different definition of "Aboriginal" which immediately precedes it. That is potentially significant, because one explanation for the problematic s 4(2) is that it is enacted merely for an abundance of caution, to ward off a submission that an Aboriginal child had to satisfy the three-limb test from the *Aboriginal Land Rights Act.*

52 Most importantly, the definition of "Aboriginal child" in s 4(1) contains two limbs. It takes the form of a "means and includes" definition, of which form the High Court has said that:

> "As a general proposition, the adoption of the definitional structure 'means and includes' indicates an exhaustive explanation of the content of the term which is the subject of the definition, and conveys the idea both of enlargement and exclusion. In doing so, the definition also may make it plain that otherwise doubtful cases do fall within its scope": *BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2008) 236 CLR 145; [2008] HCA 45 at [32] (citations omitted).

53 I think one thing is clear. There is no requirement in order for a child to be an Aboriginal child for the child to have a specified proportion of genetic inheritance. If for example seven great grandparents of a child were Europeans or Chinese, and the eighth was an Aboriginal as that term is defined, then the child is an "Aboriginal child" as that term is defined. It is also clear that that will be so even if none of the child's parents or grandparents identified as, or was recognised as, Aboriginal.

54 The respondent submitted, as part of his basis for accepting the construction in *Fischer v Thompson* that this result tended against Belinda's biological father's construction. It was said:

> "The consequence of the Applicant's proposed construction of s 4(2) would be that the Aboriginal child placement principles in s 35 would apply to the adoption of any child where one distant ancestor was identified as an Aboriginal person, despite subsequent generations not self-identifying, not being accepted by the Aboriginal community as an Aboriginal person, or both."

55 I disagree. The Secretary's submission is directed to s 4(2) and the inclusive limb of the definition of "Aboriginal child". But the first limb of that definition, namely, "means a child descended from an Aboriginal", has the consequence that a child who for generations has no ancestors who identify as Aboriginal or have been accepted by any Aboriginal community is nonetheless an "Aboriginal child". I do not see how the child in the example I have given above, with a single Aboriginal great grandparent, is not "a child descended from an Aboriginal". If this be a consequence which (as the Secretary's submissions imply) this Court should strain to avoid, then it is not a consequence of s 4(2). It is a consequence of the straightforward language of the first limb of the definition of "Aboriginal child".

56 However, another thing is much less clear. Although anyone who is "a child descended from an Aboriginal" is undoubtedly an "Aboriginal child" because he or she falls within the first limb of the definition, the definition also contains a second, inclusive, limb. Subsection 4(2) empowers the Court to determine that a child "is an Aboriginal for the purposes of this Act if the Court is satisfied that the child is of Aboriginal descent". What does s 4(2) achieve? What is the legal meaning of "Aboriginal descent"?

57 Those questions are quite hard to answer, in part because of the word "Aboriginal". It is used three times in the same sentence in s 4(2), in very different ways.

(1) The first is in the opening words "Despite the definition of Aboriginal in subsection (1)". That requires the Court to disregard the definition of that term, where it is defined as a noun.

(2) The second confers power on the Court to "determine that a child is an Aboriginal". The indefinite article "an" makes it clear that the word "Aboriginal" is once again used as a noun. It is clear that this is a power

to determine that a child who is outside the three-limb definition is nonetheless an "Aboriginal child".

(3) The third asks whether the Court is satisfied that "the child is of Aboriginal descent". There, "Aboriginal" is used as an adjective.

58 There is a further complicating factor. Where a term has been defined, and a different cognate term is used elsewhere in the Act, there is a presumption that the cognate term bears a corresponding meaning: *Interpretation Act 1987* (NSW), s 7. Ordinarily, if the noun "Aboriginal" is defined, one might expect "Aboriginal descent" to bear a corresponding meaning. However, the rule in s 7 will be displaced where the statute evinces a contrary intent, and the words "Despite the definition of Aboriginal in subsection (1)" are a very clear manifestation of contrary intent.

Summary of what emerges from the text

59 Viewed in isolation, there is some attraction to the conclusion reached in *Fischer v Thompson,* that "of Aboriginal descent" means nothing more than that the child has an ancestor who is an "Aboriginal" as defined, and thus the ancestor was himself or herself of Aboriginal descent, identified as an Aboriginal and was recognised as such. But that would mean that the second limb of the definition of "Aboriginal child" and the whole of subsection (2) have almost no work to do at all, because such a child is a child descended from an Aboriginal, and therefore within the definition automatically, without any determination by a court. It also disregards the displacement of the definition of "Aboriginal" in s 4(2) by that subsection's opening words.

60 Even so, one possibility is that the second limb and s 4(2) are merely for the avoidance of doubt, and confirm that children who are too young themselves to identify as Aboriginal are nonetheless "Aboriginal children". One could no doubt also consider cases where, say, a 16-year-old child positively identified as *not* Aboriginal, despite his or her descent. This approach to construction wards off a submission based on the defined term "Aboriginal child", where "Aboriginal" is used as an adjective, that imputes to the term the need to satisfy the definition of "Aboriginal" in the *Aboriginal Land Rights Act*, so as to disqualify a child who is too young to identify as Aboriginal, or who positively rejects such identification. Such children are unquestionably "Aboriginal children". This

approach was favoured by the Secretary ("The opening words to subsection (2) ... merely indicate that the child themselves [sic] need not meet the tripartite definition of Aboriginality").

61 Another approach leads to the conclusion that "Aboriginal descent" has a broader legal meaning, different from "descended from an Aboriginal". There is reason to think that in the phrase "the child is of Aboriginal descent", the word "Aboriginal" does *not* bear its defined meaning. That is because the opening words of the subsection require the definition to be disregarded, and also because the word is used as an adjective, while the defined term insists that it is a noun. Mr Herzfeld said that the use of the word "descent" meant that:

> "In the context of the opening words of s 4(2), the obvious different meaning is that the child's descent is permitted to be traced from someone who does not meet the three-limb test. Rather, it may be traced from someone who meets only the first limb, ie they are a 'member of the Aboriginal race of Australia'."

Legislative history and extrinsic materials

62 Very commonly, litigants resort to legislative history and the extrinsic materials in order to support a construction of a statute favourable to them, and very commonly the legislative history is not especially informative. This litigation is an exception to the rule. The legislative history is illuminating, although it is also quite complex.

63 The definition of "Aboriginal child" has not altered since the *Adoption Act* was enacted. However, over the previous century there has been a rich history of legislative and policy material which ultimately sheds real light on the question of construction posed by this ground. I have obtained very considerable assistance from a publication of a report prepared by J Lock for the New South Wales Law Reform Commission in 1997, *The Aboriginal Child Placement Principle* (NSWLRC Research Report 7). This research report is especially helpful because it captures the position just before the enactment of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) and the *Adoption Act 2000* (NSW).

64 I have also found helpful a report prepared by Dr John Gardiner-Garden in the Social Policy Group within the Commonwealth Parliamentary Library, *Defining Aboriginality in Australia* (Current Issues Brief no. 10 2002-03). It post-dates

the *Adoption Act*, but only by a couple of years, and speaks to the circumstances in the 1990s.

Early twentieth century definitions

65 In order to understand what was being effected by the definition in the *Adoption Act 2000*, it is necessary to have regard to the very different definitions which had been used in earlier legislation. Prior to the 1970s, legislation was addressed in terms of "natives" and bloodlines. The *Vagrancy Act 1902* (NSW) defined "Aboriginal" to mean "an aboriginal native of New South Wales". That definition was repealed in 1909 by the *Aborigines Protection Act 1909* (NSW), s 3, which provided that "Aborigine" meant "any full-blooded aboriginal native of Australia, and any person apparently having an admixture of aboriginal blood who applies for or is in receipt of rations or aid from the board or is residing on a reserve". This in turn was replaced in 1918 by a new definition: "'Aborigine' means any full-blooded or half-caste aboriginal who is a native of New South Wales": *Aborigines Protection (Amendment) Act 1918* (NSW), s 2. A minor change was made in 1936 to extend the definition to "any full-blooded or half-caste aboriginal who is a native of Australia and who is temporarily or permanently resident in New South Wales": *Aborigines Protection (Amendment) Act 1936* (NSW), s 2. Finally, and, most significantly for present purposes, because it applied to adoptions immediately prior to 2000, in 1969, s 2(1) of the *Aborigines Act 1969* (NSW) provided that "'Aboriginal' means a person who is a descendant of an aboriginal native of Australia; and 'Aborigines' has a corresponding meaning".

66 These definitions are awkward at best, and many would regard the language as offensive. They have long been criticised. So too has the term "race" which is found in the Constitution, as well as in the *Aboriginal Land Rights Act.* The position in the 1970s was summarised by Dr Gardiner-Garden:

> "Throughout the 1970s a lot of legislation defined an 'Aboriginal' as 'a person who is a member of the Aboriginal race of Australia.' Though possibly an improvement on 'blood-quotum' definitions, the utility of this 'Aboriginal race' definition can still be questioned, not least of all on the grounds that there is no such thing as an Aboriginal race. Most scientists long ago stopped using the word 'race'. Darwin wanted to replace typological thinking with the concept of populations and in the *Descent of Man* (1874) devoted several chapters to refuting the notion that races were separate species. For the modern anthropologist a 'human tree' can do no more than show the frequency (not

exclusiveness) of genetic traits in sample populations and more meaningful divisions of humankind are suggested by region, culture, religion and kinship."

67 In the 1980s, definitions based on race tended to be replaced by the three-limbed definition in the *Aboriginal Land Rights Act* or definitions similar to it. Dr Gardiner-Garden's report contains the following passage:

> "**The 1990s and Problems for the Three-part Definition.**
>
> The three-part definition was soon facing bigger problems tha[n] that posed by competition from either the blood-quotum definitions or the tautological race definition. In the 1990s the three-part definition continued to be used administratively and continued to be used by the courts to give meaning to the legislative expression 'person of the Aboriginal race' e.g. Justice Brennan's 1992 *Mabo (No 2)* judgement:
>
> > 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.
>
> It was soon apparent, however, that the three-part definition was itself open to different interpretation. When it came to the test, which of the three criteria was the most important? Which criteria, if satisfied, could carry an identification in the event that meeting the others proved problematic?
>
> In the course of the 1990s there were cases when people identifying strongly as Aboriginal would claim that the sources were simply not available to prove their Aboriginal descent but that this should not mean their Aboriginality could not be recognised. On the other hand there were people who argued that Aboriginality should only be recognised with evidence of descent."

First 1997 report: NSWLRC 81

68 One influence upon the *Adoption Act 2000* was the 1997 Law Reform Commission report reviewing the *Adoption Act 1965*: *Review of the Adoption of Children Act 1965* (NSW) (NSWLRC 81). That report was summarised extensively in *Fischer v Thompson*. Relevantly for present purposes, Sackar J reproduced the following paragraphs dealing with the definition of Aboriginal Children at [65]-[68]:

> "Section 9 of the Report specifically dealt with Aboriginal and Torres Strait Islander children. The Report considered in particular the definition of an Aboriginal child. It was recognised that there were particular problems in using the definition of Aboriginal from the Aboriginal Land Rights Act for children for numerous reasons:
>
> > **Identification as an Aborigine**
> >
> > 9.19 First of all, a baby or very young child is not yet able to identify as an Aborigine. The Working Party of the Standing Committee of Social Welfare Administrators recommended that in such a case identification by either parent is to be substituted for self-identity[.] This does not

overcome the situations where a birth parent, either Aboriginal or non-Aboriginal, does not declare his or her child's Aboriginality either intentionally or because he or she does not know the child is Aboriginal.

9.20 An older child who may be capable of identifying as an Aborigine may yet not do so. Older children who are wards of the State and who are subsequently adopted may be unaware of their Aboriginality. If the child has been in non-Aboriginal foster care, and removed from the Aboriginal culture for a long period, the child is unlikely to assert an Aboriginal identity. In some instances, received negative messages may discourage the child from identifying as an Aborigine. As well, children are still forming their identities and may be influenced by the question itself as to their identification as an Aborigine.

Acceptance by community

9.21 Where a birth parent is considering relinquishing his or her child for adoption, it would not be uncommon, in those circumstances, for the birth parent's community to be unaware, and not made aware by the birth parent, of the child's birth. This may be because the birth parent has lost contact with his or her community or has deliberately concealed the fact of the birth from the community. Privacy issues may arise which prevent others, such as DOCS or a private adoption agency, making the Aboriginal community so aware. Obviously, if the relevant Aboriginal community is unaware of the child's birth there can be no acceptance of the child as an Aborigine by that community.

9.22 In that case, a definition of Aboriginality which relies in part on acceptance by the relevant Aboriginal community can operate against the best interests of a child. The child may be of Aboriginal descent and may be identified as Aboriginal by the consenting parent. But if the consenting parent does not, for personal reasons, want to seek the community's acceptance of the child, one of the essential components of the three-pronged definition is not satisfied. The child is not then defined as an Aborigine.

The Report then considered whether a definition based on 'race' may be appropriate for Aboriginal children. The Commission referred to the case of *Gibbs v Capewell* (1995) 54 FCR 503; (1995) 128 ALR 577 where Drummond J found (at 584):

> Although an opportunistic claim by a person to identification as an Aboriginal would not, I think, be regarded by ordinary Australians as sufficient to attract to that person the status of 'Aboriginal' even if he could prove he possessed a small quantum of Aboriginal genes, in my opinion a person of limited Aboriginal heritage who nevertheless genuinely identified himself or herself a[s] Aboriginal would be likely to be described by ordinary Australians as an Aboriginal, even without Aboriginal communal recognition as such ...
>
> In my opinion, in order for someone to be described as an 'Aboriginal person' within the meaning of that term in the Act, some degree of Aboriginal descent is essential, although by itself a small degree of descent of such descent is not sufficient. A substantial degree of Aboriginal descent may, by itself, be enough to require a person to be regarded as an 'Aboriginal person'.

The Report then followed:

> 9.25 Definitions resting on 'race' comprise descent as the essential factor but further involve an examination of the degree of descent. If the degree of descent is whole or substantial nothing more is required. If the degree of descent is small, cultural considerations determine whether or not the person is Aboriginal. In contrast, definitions resting on 'descent' do not depend on degrees of descent and determine Aboriginality wholly in relation to physical factors. Cultural considerations are not relevant.
>
> 9.26 Would a definition which rests on 'descent' be too far out of step with the legislative direction taken in three significant pieces of legislation, each of which defines Aboriginality in terms of "race"? It would not for the following reasons:
>
> By relying on factors of 'race' in defining Aboriginality, Parliament has already demonstrated that they are prepared to diverge from a three-pronged definition, that is, a definition requiring descent, self-identification and community acceptance. A definition which depends on the single criteria of descent is by no means extreme.
>
> *Gibbs v Capewell* considered the meaning of 'Aboriginal person' in the context of legislation affecting adults. Had the subject matter been legislation affecting the welfare of children, the outcome may have been different.
>
> The points made above in relation to the difficulties of requiring self-identification and community acceptance in the context of the adoption of children continue to be relevant here.
>
> Given the constraints on babies and children identifying themselves as Aboriginal, it could be argued that the meaning which the expression 'Aboriginal child' has 'in ordinary speech' is a 'child of Aboriginal descent'.
>
> 9.27 The undesirability, from an Aboriginal viewpoint, of analysing degrees of descent for the purposes of defining who is an Aboriginal person is discussed below.
>
> **Support for a 'descent' definition**
>
> 9.28 It may be considered by some (non-Aborigines) a difficult question as to whether the offspring of one Aboriginal parent and one non-Aboriginal parent is an Aborigine or non-Aborigine. People who have difficulty with this question may consider that the solution is to have a definition which includes criteria of self-identification and community acceptance. However, a widely held Aboriginal opinion on this issue is clear and is explained by Sommerlad as follows:
>
> The nature of Aboriginal identity is misunderstood by most whites. They fail to understand why a child of mixed parentage should identify as an Aboriginal rather than a white. Social workers are reluctant to place an Aboriginal child who is indistinguishable by his physical appearance with an Aboriginal family since they consider this situation will create identity problems for the child. The major point that whites fail to grasp is that in a racist society an individual is either white or black. One cannot be part black, part white. An Aboriginal child will soon learn from white classmates that he is not one of them, that he is

> different, and that he belongs to the black community. Even if he looks white. The position taken by Aborigines on this issue is therefore that any child of Aboriginal parentage, no matter what his physical appearance or his degree of Aboriginality is an Aborigine.
>
> 9.29 The Aboriginal Children's Service is one significant Aboriginal body which has expressed the firm view to the Commission in consultation that an Aborigine is, quite simply, a person of Aboriginal descent.

The Report concluded:

> 9.34 Defining an Aboriginal child as one of Aboriginal descent eliminates the problems discussed above. Furthermore, it accords with the views of many Aboriginal people, as outlined by Sommerlad, and with the views expressed by a number of Aboriginal organisations. In light of the past treatment of Aboriginal families, and in the interests of reconciliation, it is justified to respect those views. It is appropriate in the context of adoption to define an Aboriginal child as one of Aboriginal descent.
>
> Recommendation 70
>
> The legislation should define an Aboriginal child as one of Aboriginal descent."

69 The draft bill attached to that report contained the following:

> "***Aboriginal*** means a person who:
>
> (a) is a member of the Aboriginal race of Australia; and
>
> (b) identifies as an Aboriginal, and
>
> (c) is accepted by the Aboriginal community as an Aboriginal.
>
> ...
>
> ***Aboriginal child*** means a child who is descended from an Aboriginal."

70 It will be seen that that proposed definition corresponds to the legal meaning upheld in *Fischer v Thompson.* However, as will be seen below, that report is *not* the source of the definition enacted as s 4 of the *Adoption Act 2000* (NSW).

Second 1997 report – NSWLRC Research Report 7 (Lock)

71 In March 1997, the New South Wales Law Reform Commission published the research report prepared by Ms Lock on Aboriginal child placement principles. Ms Lock traced the concept to the *Indian Child Welfare Act* 25 USC §§1902, 1915(a), a statute which commenced in 1978, and said that the principles were first proposed in Australia at a conference of the Council of Social Welfare Ministers in 1979 (see pp 58-59). They were first recognised in legislation in

New South Wales in 1987 as s 87 of the *Children (Care and Protection) Act 1987* (NSW).

72 In 1997, adoption and fostering of Aboriginal children were governed by different definitions. Fostering was *far* more common than adoption. Where a child was to be placed in foster-care, the definition in s 3(1) of the *Children (Care and Protection) Act 1987*, applied, and that in turn picked up the three-limbed definition in the *Aboriginal Land Rights Act.* There were a handful of children recorded as Aboriginal children adopted at the time. Page 112 of Dr Lock's report records that in the five preceding years for which data were available, there had been 35 adoptions of Aboriginal children, compared with 644 adoptions of Australian-born children in total in the same period (it is of course quite possible that the statistics understate the true number of Aboriginal children). Section 4.2 of the report states:

> "The Department of Community Services ('DOCS') as a matter of policy, applies two different definitions of 'Aborigine' in relation to fostering and adoption of Aboriginal children. A definition of 'self-identification' is applied to Aboriginal children in relation to fostering, whereas a definition of 'descent' is applied to Aboriginal children in relation to adoption."

73 The paper provides a footnote:

> "NSW – Department of Community Services *Draft Policy Statement: Placement of Aboriginal Children for Adoption* (8 May 1987) defines an Aboriginal child as 'a child at least one of whose parents is Aboriginal as defined by the *Aborigines Act* of 1969'. An Aboriginal is 'a person who is a descendant of an aboriginal native of Australia": *Aborigines Act 1969* (NSW) s 2(1). Note that this Act was repealed by the *Aboriginal Land Rights Act 1983* (NSW) on 10 June 1983."

74 The Draft Policy Statement is reproduced as Appendix B of the report and the definition is at p 246. Although titled "draft", it appears to have been the then-current formulation of policy concerning the adoption of Aboriginal children. It is treated as such in other formal reports on the topic. One example may be seen in para 9.37 of NSWLRC 81. Another may be seen in chapter 22 of the April 1997 report of the Human Rights and Equal Opportunity Commission, *Bringing them Home*, which refers to the document and states that:

> the "practical problems [in other jurisdictions] are not entirely overcome by the alternative approach taken in NSW and the NT. There, self-identification and identification by the relinquishing parent are not aspects of the definition of Aboriginality. Instead a child is Indigenous if descended from an Indigenous person."

75 Nor is it especially surprising that much greater and earlier attention was addressed to the provisions governing the placement of Aboriginal children in care, as opposed to the provisions governing the adoption of Aboriginal children, which applied to a very small number of children.

76 The Lock report identifies in chapter 7 as the first problem in applying the principle in New South Wales the problem of identifying Aboriginal children. Paragraphs 7.21-7.32 warrant reproduction in their entirety; the references to "the Principle" are to the Aboriginal child placement principle.

> **Identifying Aboriginal children**
>
> 7.21 If a child is not identified as Aboriginal then the Principle is not even brought into operation. Identification usually depends on the parent indicating the cultural background of the child when dealing with the NSW Department of Community Services ('DOCS') or the non-government organisations 'NGOs'). Inadequate investigation into the child's cultural background means the Aboriginal origins of the child will remain unknown, the child will be placed without regard to this important factor and will not appear in any statistics regarding the placement of Aboriginal children.
>
> 7.22 The problem appears to be not uncommon in NSW. Both non-Aboriginal NGOs and DOCS in NSW have reported cases in which the Aboriginal heritage of a child is not discovered until late in the adoption process or after the child has been placed. Identification of children is also recognised as an important issue by Aboriginal workers within DOCS.
>
> 7.23 There is a clear obligation on DOCS to make all reasonable enquiries necessary to determine the cultural heritage of any child. Privacy issues may, in some instances, limit the extent to which DOCS can enquire about the child's Aboriginality, especially in adoption where the birth mother may want to keep the matter confidential. The involvement of Aboriginal workers, either from the department or Aboriginal organisations, who are mindful of issues of confidentiality, may overcome the reluctance of families to reveal the child's cultural heritage.
>
> 24. Problems in *identifying* Aboriginal children will exist regardless of the definition used to describe 'Aboriginal child'. The Commission recommends in the *Review of the Adoption of Children Act 1965 (NSW)* that a clear obligation be expressed in legislation that any adoption agency or government department must establish to the best of its ability the cultural heritage of a child. The involvement of Aboriginal workers in the department, or close liaison with Aboriginal organisations may assist DOCS in fulfilling this obligation.
>
> **Definitions of 'Aboriginal child'**
>
> 7.25 Difficulties inherent in the definition of 'Aboriginal child' may prevent the effective operation of the Principle.
>
> ***'Self-identification'***
>
> 7.26 Currently the 'self-identification' definition outlined in Chapter 5 is used widely in relation to the Principle. Problems arise when this definition is applied to children for the following reasons:

A baby or very young child is not yet able to identify as an Aborigine.

An older child who may be capable of identifying as an Aborigine may not do so if he or she has been removed from Aboriginal culture for a long period, for example, in non-Aboriginal foster care.

Privacy issues surrounding the adoption of Aboriginal children may mean that the relevant Aboriginal community is unaware of the birth of the child, and therefore unable to accept the child as an Aborigine.

7.27 In SA and Queensland the difficulty of identifying a baby or young child as Aboriginal is overcome by requiring that at least one parent identifies the child as such. Legislation in the ACT overcomes this difficulty by defining an 'Aboriginal child' as a child who has at least one parent who is Aboriginal. However, these options do not overcome situations where birth parents, either Aboriginal or non-Aboriginal, do not declare the child's or their own Aboriginal identity either intentionally or because they do not know.

'A member of the Aboriginal race of Australia'

7.28 This definition has been considered by Drummond J in *Gibbs v Capewell* to involve more than merely a question of descent. If the degree of descent is small, then Aboriginality would depend on a person's self-identification and community recognition. This is effectively a mixture of the two definitions of 'descent' and 'self-identification'. Such a definition may therefore be inappropriate for Aboriginal children for the same reasons as a 'self-identification' definition is inappropriate.

'Descent'

7.29 The Commission recommends in Report 81 that where it is found that a child is of Aboriginal descent, then the child should be identified as such and the Principle should apply accordingly.

This approach is broader than the 'self-identification' definition and more children would fall within its terms.

7.30 *Advantage of a 'descent' definition.* Applying a 'descent' definition to the Principle does not mean that all children of Aboriginal descent will be placed automatically with Aboriginal families. However, it does mean that the issue of the child's Aboriginal heritage will be explored where previously it may have been overlooked. This is important so that the child is not denied at least the chance of discovering and developing an Aboriginal identity.

7.31 There is also a persuasive argument that socially, a person with Aboriginal blood will be regarded as Aboriginal both by the Aboriginal community and the non-Aboriginal community alike. A definition based on descent also avoids the inappropriate, older definitions based on 'degrees of Aboriginality'.

7.32 *Disadvantage of a 'descent' definition.* A consequence of applying a 'descent' definition is that the Principle may apply to children of Aboriginal descent who have not had any previous experience with Aboriginal culture, and young people of Aboriginal descent who are old enough to form their own cultural identity and do not identify as Aboriginal. These children may have grown up with prejudices against Aboriginal people and the Principle should be applied with sensitivity to their situation. In such cases a placement with a non-Aboriginal family which has the capacity to encourage the child to develop a healthy and positive cultural identity may be appropriate." (footnotes omitted)

Third 1997 report – Legislation Review Unit (Parkinson)

77 There was a third report in 1997. The Legislation Review Unit of the Department of Community Services published the *Review of the Children (Care and Protection) Act 1987*. This was prepared by Professor Parkinson. As previously noted, s 87 of the *Children (Care and Protection) Act 1987* contained a predecessor of the Aboriginal child placement principles, and accordingly contained a definition of "Aboriginal", in s 3(1), which provided that it had "the same meaning as it has in the *Aboriginal Land Rights Act 1983*". The review addressed the issues arising as follows at p 125:

> "Recommendation 6.2
>
> The current definition of Aboriginal in the *Children (Care and Protection) Act* 1987 should be retained. However, the Children's Court should also have a discretion to make a finding that a child is Aboriginal where the Court is satisfied that a child is of Aboriginal descent, even if the current definition is not satisfied.
>
> Comment: Section 3(1) of the *Children (Care and Protection) Act* 1987 states that 'Aboriginal' has the same meaning as it has in the *Aboriginal Land Rights Act 1983* (NSW). The *Aboriginal Land Rights Act* 1983 (NSW) defines Aboriginal as a person who:
>
> (a) is a member of the Aboriginal race of Australia
>
> (b) identifies as Aboriginal
>
> (c) is accepted by the Aboriginal community as an Aboriginal.
>
> Consultations and submissions revealed the following problems with this definition:
>
> • Children and young people may be too young to self identify as required by the current definition of Aboriginal.
>
> • The impact of past discrimination and policies means that some Aboriginal people do not openly identify as Aboriginal and may not be known to their Aboriginal community. These people are unable to meet the requirement to identify or be accepted by the community.
>
> Despite these difficulties, the Aboriginal Land Rights Act definition has wide acceptance throughout NSW and should be retained. The problems with the definition could be addressed by providing a discretion for the Children's Court, so that where there is sufficient evidence to satisfy the Court that a child is of Aboriginal descent, the Court could proceed on the basis that the child is Aboriginal. The discretion may also be exercised by the Court to determine that a child or young person is not an Aboriginal child or young person within the meaning of this Act."

78 Professor Parkinson's report did not include draft legislation. However, it seems fairly clear that the new *Children and Young Persons (Care and*

Protection) Act 1998 reflected part of that recommendation. It contained the following definitions:

> "**5 Meaning of 'Aboriginal' and 'Aboriginal and Torres Strait Islander'**
>
> (1) In this Act:
>
> ***Aboriginal*** has the same meaning as in the *Aboriginal Land Rights Act 1983* and includes a child or young person who is the subject of a determination under subsection (2).
>
> ***Aboriginal and Torres Strait Islander*** means people indigenous to Australia and the Torres Strait Islands.
>
> (2) Despite the definition of ***Aboriginal*** in the *Aboriginal Land Rights Act 1983*, the Children's Court may determine that a child or young person is an Aboriginal for the purposes of this Act if the Children's Court is satisfied that the child or young person is of Aboriginal descent."

79 Thus it may be seen that:

(1) The source of what has become s 4(2), which qualifies the definition "despite the definition of Aboriginal", is s 5(2) of the *Children and Young Persons (Care and Protection) Act 1998*, itself reflecting a concern from the review by the Legislation Review Unit;

(2) The suggestion that the discretionary power be available to determine that a child was *not* an Aboriginal child or young person was not adopted;

(3) Evidently the purpose of the additional words which were enacted was to expand the class of children who were "Aboriginal children".

80 In 2000, as part of the same package of legislation introduced by the same Minister, the *Adoption Act 2000* and the *Children and Young Persons (Care and Protection) Miscellaneous Amendments Act 2000* (NSW) were introduced. Both contained identical definitions of "Aboriginal" and "Aboriginal child", save that in the latter, the definition was of "Aboriginal child or young person".

81 There is nothing so far as I am aware in the legislative history which reveals why the Law Reform Commission proposal was superseded by the definitions emerging from the Legislative Review Unit.

82 A final point should be made on s 4(2). The Secretary made submissions under the heading "Is s 4(2) discretionary or empowering?", favouring a construction whereby a child who was of Aboriginal descent within the meaning of s 4(2) was not automatically an "Aboriginal child", but was so only if the Court so determined. This aspect of the provision is not complex. The section authorises

the Court to make a determination, if it is satisfied that the child is of Aboriginal descent. The second, inclusive limb of the definition only applies if such a determination is made. There is no obligation to make such a determination, and such a determination will only be made if the Court reaches the specified state of satisfaction. I referred to the provision as a "discretionary power" above because that is an accurate statement of the provision: the Court is empowered to make a determination in certain circumstances, which will have consequences for the status of the child, but also has a discretion whether or not to exercise that power. Contrary to the question framed by the Secretary's written submissions, the distinction whether the provision is discretionary or empowering is unhelpful. It is both. However, children of Aboriginal descent, however remote, are not automatically "Aboriginal children" by reason of s 4(2).

Conclusions on the second ground

83 There is an important question of construction of the definition of "Aboriginal child". It was not raised before the primary judge, but it is a pure question of law, which is capable and appropriate of determination on appeal: *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418; [1950] HCA 35. For the reasons which follow, I have concluded that the definition of "Aboriginal child" in *Fischer* is too narrow, and that there should be a grant of leave to appeal.

84 First, the reasoning in *Fischer* does not refer to the Lock report, the review of the Legislation Review Unit under Parkinson, and the enactment of the *Children and Young Persons (Care and Protection) Act 1998*. All these point to a broad inclusive purpose, of including a descent-based extension to the definition, in order that more children would answer the description of "Aboriginal children". The latter two reports are the source of the problematic second limb of the definition in s 4(1) and of s 4(2).

85 Secondly, the reasoning in *Fischer* gives no practical work for s 4(2) to do. According to *Fischer*, a child will be an "Aboriginal child" only if an ancestor can be found who satisfied the three-limb test of Aboriginal person in the *Aboriginal Land Rights Act*. That is precisely what follows from the opening words of the definition of "Aboriginal child" – "means a child descended from an Aboriginal". But on settled principles of statutory construction, not lightly would the

additional, extending language of “includes a person who is the subject of a determination under subsection (2)” be given no work to do. (The same reasoning extends to the materially identical provisions in the *Children and Young Persons (Care and Protection) Act*.)

86 Thirdly, there is a sensible meaning to be ascribed to those words, which is clearer when regard is had to the earlier definition, based on “descent”, which continued to apply to adoptions immediately prior to the enactment of the *Adoption Act*. Descent is different from race, as Drummond J observed in *Gibbs v Capewell*. The work achieved by s 4(2) was to permit a Court to determine that a child who would qualify under the descent definition was an Aboriginal child, even if no ancestor satisfied the three-limb definition in the *Aboriginal Land Rights Act*.

87 Fourthly, that meaning is further supported by the fact that until 2000, adoptions of “Aboriginal children” had proceeded on the basis that an “Aboriginal child” was defined by reference to the descent-based definition in the *Aborigines Act 1969*. There is nothing in the extrinsic materials to suggest that the *Adoption Act* was intended to cease to apply to children who formerly had been treated as “Aboriginal children”. There is every reason for the same Aboriginal child placement principles to apply to the same class of “Aboriginal children” in respect of placement into care as well as adoption.

88 Accordingly, the primary judge was wrong to apply the test in *Fischer v Thompson.* I should make it clear that his Honour was following the approach of another judge in the Equity Division, to which all parties acceded, and it would have been wrong for him to have taken any other course without at least notifying the parties and being persuaded that *Fischer v Thompson* was clearly wrong.

89 It also follows that the Secretary’s submission that Belinda had not been shown to be an Aboriginal child should have been rejected, and the parties had been correct when they made common ground at the hearing that she was an Aboriginal child.

90 The precise basis on which that common ground was reached is not completely clear (because the parties were in agreement, so far as I can see

neither articulated the basis on which that agreement had been reached). However, the evidence available to this Court comfortably establishes that a man established to have been one of Belinda's great-great-great-grandfathers, who was born around 1895, had been supplied rations at a reserve by a contractor retained by the Aborigines Protection Board in February and March 1919 and is recorded in a local newspaper dated 26 November 1915 as having pleaded guilty to a charge of disorderly conduct at the same reserve in 1915. The evidence to which Basten JA refers at [163]-[167] is confirmatory of the position. I am satisfied that Belinda is of Aboriginal descent, meaning that she is descended from the people who lived in this country before British colonisation.

Consequences of the success on the second ground

91 Appeals lie from orders, not reasons. The question is whether, if his Honour had proceeded on the legally correct basis that Belinda was an Aboriginal child for the purposes of the *Adoption Act*, the same order would have been made?

92 It will be recalled that the primary judge made six orders. Belinda's biological father concedes that the first two orders made by the primary judge (which relate to his status as Belinda's father) should stand.

93 The remaining orders are (a) an adoption order (order 5), (b) an order "approving" Belinda's surname and given names (order 6), and (c) order 3 and 4 requiring certain adoption plans to be registered. I have listed those orders in what I regard as a more logical order.

The adoption order

94 The most important order is the adoption order, order 5. In order to make that order, it would have been necessary since Belinda is an Aboriginal child to be satisfied that the Aboriginal placement principles had been properly applied: s 90(1)(e). It is clear to my mind that they have been.

95 It is to be borne firmly in mind that the paramount consideration is the best interests of the child. The Aboriginal child placement principles give preference to an adoption by parents who are members of an Aboriginal community, but that preference is subject to what is practicable and the child's best interests. It is plain that Belinda's best interests would not be served by removing her from

the care of the woman who has cared for her, continuously and in a stable environment, since she was an infant.

96 The Aboriginal child placement principles also require, in the case of an adoption to a parent who is not a member of an Aboriginal community, satisfaction of s 35(3). No such finding was made. However, this Court on appeal is empowered to make findings of fact, and in my opinion it can and should find that the evidence established something which was treated as uncontroversial by parties who were represented and conscious of this as an issue when the hearing was run on the basis that Belinda was an Aboriginal child.

97 That is to say, it was and is accepted that if s 35 applied to Belinda's adoption, it was either not practicable or not in her best interests for her to be adopted by parents from an Aboriginal community. Rather, the Secretary approached the hearing expressly on the basis that s 35(2)(c) and (3) applied, and that the proposed adoptive mother satisfied those provisions (written submissions dated 20 June 2019, para 10(m)). Belinda's father's written submissions stated that it appeared to be "common ground that [Belinda] is to be treated as an Aboriginal child for the purposes of the *Adoption Act*" (written submissions dated 24 June 2019, para 10). Counsel for the Secretary stated at the hearing that "it is certainly in this case the position of the plaintiff and the Secretary that [the child] is an Aboriginal child".

98 The primary judge addressed the evidence directed to s 35(3) at [86]-[87]:

> "[The adoptive mother] is however actively supporting [Belinda's] understanding of her possible Aboriginal heritage as is revealed by this evidence in [the mother's] affidavit:
>
> > 'I am supporting [Belinda] to maintain connections with her cultural background in the following ways:
> >
> > a) Hiking in our local area with a view to respecting the flora and fauna and discussing how Aboriginal people lived on the land and respected their surroundings. I get information from the NSW National Parks and Wildlife Service regarding whose traditional land the hike is on.
> >
> > b) I visit the local library to further research Aboriginal culture.
> >
> > c) I read [Belinda] DreamTime stories (of her choosing) from local and school library. We then discuss themes, ideas, and morals and why these stories were told and the significance of storytelling in her culture.

d) [Belinda] and I attend local tours by Aboriginal Elders, such as the Star Night led by Len Waters (a local Aboriginal Elder) on 19 April 2018. These opportunities are always put forward as a choice to [Belinda], and where ever possible, I left her make the decision about which events she would like to attend.

e) In July 2017, [Belinda] and I participated in a Women's Weaving Workshop with local Gomeroi woman Amy Hammond. This was an occasion in which [Belinda] declined by initial invitation, but I decided that we would attend, even just for the opening, to see what it was all about. We ended up staying for the whole day and had a wonderful time learning about the tradition of weaving.'

[The adoptive mother] also gave this evidence in answer to my questions:

'A. Can I just on that issue, am, let you know that [Belinda] does not identify as Aboriginal. We have got again all of that information we have been given, and it's fantastic information - I wish I had it for myself - but again I have left that decision to her and she chooses entirely, am, and at the moment she doesn't identify but we have had some fantastic experiences in the Northern Territory and what have you, looking at culture and spending time with indigenous women and painting and going on walks and

Q. Do you speak to her about her Aboriginal heritage?

A. Yes, absolutely, and I've stated as a fact 'you do have Aboriginal heritage' but as to whether she identifies as Aboriginal that is entirely her decision. I think that that's something that she would need to, am, she can't dispute that she has Aboriginal heritage.

Q. What is your sense of what she feels about her Aboriginal heritage?

A. Am, I think she finds it all a little bit too confronting. Again it's something that's emotive and that's something that [Belinda] struggles with and on a day to day basis it really doesn't factor into her life.

…

A. …it's just something that I gently -- when things come up I say. She now knows where to find her mob on the indigenous map of all the countries and what have you. She --

Q. Who were her people?

A. Yes.

Q. What are her people?

A. Kamilaroi. So she knows where to find that, and it was quite exciting actually, probably only two weeks ago that she found it on the map and she said 'that's me' and I said 'yes, it is, that's you'; and she said 'we're here and this is these people'. 'Yep'. 'And we've been here and that's these people', and so she's joining the dots. But she is not a child that comes to anything quickly. She likes to take her time to process.

Q. You've been travelling through the Northern Territory?

A. Yes.

> Q. Have you discussed with her there the various First People's Nations that you are travelling through?
>
> A. Oh absolutely, constantly."

99 Belinda's biological father required the adoptive mother to attend for cross-examination. None of his counsel's cross-examination was directed to this aspect of her evidence.

100 In order to make an adoption order, the Court must also be satisfied that "the making of the order would be clearly preferable in the best interests of the child than any other action that could be taken by law in relation to the care of the child": s 90(3). The primary judge was of that view. His reasons have been reproduced above. He considered that adoption was "quite decisively" preferable to a parental responsibility order. His Honour's reasons are independent of and unaffected by the question whether Belinda is or is not an Aboriginal child.

101 Section 34 provides:

> "(1) The Secretary or appropriate principal officer is to make reasonable inquiries as to whether a child to be placed for adoption is an Aboriginal child.
>
> (2) The Aboriginal child placement principles are to be applied in placing a child that the Secretary or principal officer is satisfied is an Aboriginal child for adoption."

102 Counsel who had appeared for Belinda's biological father at trial made a submission in writing that the inquiries which had been made were not sufficient to comply with s 34, such that the Court lacked power to make an adoption order. I could see the force of this if the Court were asked to exercise power on the basis that a child is *not* an Aboriginal child. It is obviously important, in order to make the Aboriginal child placement principles effective, for there to be an obligation to make sufficient inquiries to reach an informed view as to whether a child is an Aboriginal child.

103 However, Belinda is an Aboriginal child, and is not to be adopted unless the Aboriginal child placement principles are satisfied. There is no further obligation under s 34 which impacts upon the exercise of the power to issue an adoption order.

Belinda's name

104 Section 101(1)(b) provides:

> (1) On the making of an adoption order—
>
> ...
>
> (b) an adopted child who is less than 18 years of age is to have as his or her surname and given name or names such name or names as the Court, in the adoption order, approves on the application of the adoptive parent or parents."

105 It follows that when an adoption order is made in respect of a child who is less than 18 years of age, then it is appropriate for an order under s 101(1)(b) to be made.

106 The order made by the primary judge gave Belinda the surname of her adoptive parent, and preserved her first given name. Belinda's birth certificate did not contain a second given name, and it thus seems likely that the court's order is the legal basis for her middle name. But this is unaffected by whether or not Belinda was an Aboriginal child.

The adoption plans

107 Section 46(4) provides that adoption plans for Aboriginal children must make provision of the kind referred to in s 46(2)(a). Section 46(2)(a) refers to "the ways in which the child is to be assisted to develop a healthy and positive cultural identity and for links with that heritage to be fostered."

108 There may be some problems with the adoption plans. The appeal books contained a "Paternal Adoption Plan", which was amended in light of discussions at the hearing, and a "Maternal Adoption Plan" executed the previous year. The Court was told the plans had not been registered. The Court's orders required both to be registered. The Court was also told that the registration had been effected by the plan being annexed to the Court's orders. If that is so, then it is not apparent from anything I have located in the appeal books or the file, and it is difficult to reconcile with r 56.13 of the Uniform Civil Procedure Rules 2005 (NSW). Quite possibly nothing turns on this, but the position should be regularised; at the moment there is a seeming non-compliance with the orders.

109 Turning to the substance of both adoption plans, a further curiosity is that although the primary judge did *not* find that Belinda was an Aboriginal child, parts of both plans proceed on the basis that she is an Aboriginal child:

> "IDENTITY AND CULTURAL HERITAGE:
>
> [Belinda] is aware she is Aboriginal, and she is aware she has a rich history which has been gathered by [the adoptive mother], with the assistance of several Aboriginal organisations. [Belinda] is aware she is part of the Kamilaroi/Gomeroi tribe one of the four largest indigenous nations in Australia. [Belinda] is aware of some of her tribe's totems including Dilby the Crow and Kapthin the eagle and is supported by [her adoptive mother] to continue to grow her knowledge of this rich heritage. She has had the opportunity to attend cultural groups and activities in the community and at school and has made some Aboriginal connections with some of her peers at school as well."

110 The Paternal (but not the Maternal) Adoption Plan states that "[Belinda's] cultural plan is attached and will be registered with this adoption plan". But no cultural plan was attached to the document which was reproduced in the Appeal books, or which appears in the Court's file.

111 Thus, inconsistently with the judge's findings, but consistently with what his Honour should have found had the correct test been applied, both adoption plans proceed on the basis that Belinda is an Aboriginal child, and are not silent on Belinda's cultural identity and links with her Aboriginal heritage.

112 These inconsistencies should be remedied. But they need not trouble this Court, and are best addressed by the Equity Division. In addition to the power under the slip rule, an adoption plan may be reviewed by the Court on application by one of more of the parties to it. I propose that the Secretary be directed to apply to the Court to review the Belinda's adoption plans, in order that provision may be made to secure the objects in s 46(2)(a).

Ground 1

113 Until the conclusion of the hearing, there was only a single ground of appeal:

> "His Honour failed to address the Appellant's Application to reopen to adduce evidence concerning whether [Belinda] was Aboriginal, thereby denying the Applicant an opportunity to be heard on this issue".

114 The focus, accordingly, was the process by which the adoption order came to be made.

115 The Secretary had commenced proceedings seeking an order for the adoption of the child in 2018. The matter was listed for hearing on Wednesday 26 June 2019. The only parties were the Secretary and the father, both represented by counsel. The father supplied short written submissions, dated 24 June 2019, which drew attention to the common ground that the child's mother was Aboriginal, and that it appeared to be common ground that the child was to be treated as an "Aboriginal child" for the purposes of the Act. The submission then stated:

> "This Thursday 27 June 2019 Justice [Sackar] will deliver judgment in an adoption application where one of the child's parents was Aboriginal and one was not and it was only in recent times that the question of aboriginality arose. His Honour was concerned that Section 4(2) of the Act although it uses the expression that the Court 'may' determine a child to be Aboriginal if it is satisfied that the child is of Aboriginal descent, the Section should be interpreted as the Court 'shall' determine the child is Aboriginal if descent is proved."

116 The submission added:

> "The Father seeks that Your Honour allow the parties to consider His Honour's judgment to determine if it has any implication in this case."

117 The transcript of 26 June 2019 confirms the point being raised at the outset:

> "MOORE: Could I just raise this issue of Aboriginality. In the outline of submissions I referred your Honour to the fact that Sackar J is going to deliver a judgment tomorrow.
>
> HIS HONOUR: Yes, I know.
>
> MOORE: And from my point of view it was a submission that your Honour would allow us to have the opportunity to consider what Sackar J says about Aboriginality.
>
> HIS HONOUR: We will get everything done today that we can get done. You both want me to reserve so that you can both make such submissions as are appropriate in regard to whatever Sackar J says tomorrow. We may have to come back briefly to tidy that up.
>
> MOORE: That's right. We either give your Honour a joint note to say that we have read the judgment and this is what we think—
>
> HIS HONOUR: You were the independent child's representative in that case?
>
> MOORE: Yes, I was, your Honour.
>
> HIS HONOUR: And you expect that his Honour will make a decision about section 4(2); is that what was argued?
>
> MOORE: Yes.
>
> HIS HONOUR: And whether 'may' means 'must'?

MOORE: And whether 'may' should mean 'shall'."

118 As anticipated, judgment was delivered the following day in *Fischer v Thompson*. His Honour's reasons have been reproduced above. It had been plain at the hearing that the parties would seek to be heard as to the effect of Sackar J's decision when delivered. By email dated 1 July 2019, the primary judge's Associate advised counsel appearing, copying in their instructing solicitors, that "his Honour would appreciate receiving any further written submissions from the publication of Sackar J's judgment by 5 pm on Friday 5 July 2019".

119 Four days later, on the afternoon of Thursday 4 July 2019, a further email was sent to the same parties by his Honour's Associate. This email was more elaborate, and warrants reproduction in full:

> "His Honour will be assisted if the parties' further submissions address the following matters:
>
> 1. As to whether [the child] is an Aboriginal child, is the following a complete summary of the evidence:
>
> a. on 13 February 2008, when [the child] was 11 months old, the Department of Family and Community Services lodged a 'Care Plan' under s 78 of the Care Act with the Children's Court recording that [the child] was not an Aboriginal; there is no evidence as to what basis that conclusion was reached;
>
> b. at some point during the proceedings in the Children's Court, which proceedings were finalised in October 2008, [the mother] stated that she identified as being Aboriginal;
>
> c. on the other hand, 21 June 2008 [the child]'s maternal grandmother, ..., is reported to have said that 'there is no Aboriginal heritage in the family';
>
> d. on 1 August 2008 an officer of the Department of Family and Community Services wrote to [the mother]'s then solicitor 'I note your client claims Aboriginality. Please request your client to provide a Certificate of Aboriginality'; there is no evidence that there was any reply to that letter nor that the Department followed the matter up by, for example, making an inquiry of [the mother] of the kind that was eventually made on 19 October 2015 (see (f) below);
>
> e. on 19 October 2015 [the child]'s mother, [the mother], told a caseworker that she, [the mother], identified as Aboriginal, that her paternal grandfather ... was Aboriginal from the Kamilaroi clan and that [Belinda] was therefore an Aboriginal child;
>
> f. on the same day, [the mother]'s father, also named Mr ..., and the son the .... referred to in (e), told a caseworker that he was Aboriginal and identified as such;
>
> g. On 26 November 2015, Ms Val Hill, an Adoptions Assessor consulted an Aboriginal Elder from Moree, Ms Noelene Briggs-Smith who, Ms Hill reported

‘provided me with a lot of information about the family of ... who is said to be [the child]’s great grandmother ... Ms Hill continued ‘Noelene said the family did not like to be recognised as Aboriginal in those days, which fits [the younger [the mother]’s father] and [the mother]’s understanding of this’

h. on 15 January 2016 2016 an organisation called ‘Native Title Service Provider’ reported that [the child]'s great great great grandparents] were ‘in our records’; inferentially because those persons were in that organisation's records as members of the Aboriginal race;

i. but on 4 October 2016 [the mother]’s father, ..., is recorded as saying after his mother/s death the previous year that there had been ‘further conversations and diggings in relation to the family tree’ and that ‘there is no Aboriginal connection through his family line’ and that his grandmother ... was Maori, rather than Aboriginal, and that her husband was Chinese; and

j. two weeks later on 19 October 2016 an organisation called ‘Pius X Aboriginal Corporation’ issued a ‘Confirmation of Aboriginality’ certifying that by resolution of the Management Committee of that organisation that [the child] (who was then 10) was of Aboriginal descent, identified as an Aboriginal and was recognised as an Aboriginal; there being no evidence as to upon what basis that resolution was passed although, possibly, based on information such as that provided to Ms Hill as set out a(g) above.

2. If not, his Honour would be grateful to be directed to any further material.

3. Does that evidence warrant a conclusion that [the child] is an Aboriginal child?

4. Was [the child]’s proposed adoption recorded in the Adoption Register per reg 65 of the Adoption Regulations 2015? if so, when did this occur?

5. Assuming that ‘reasonable inquiries’ under s 34 must be made prior to the date when [the child] was ‘placed for adoption’, and assuming that that date was October 2013, were the inquiries by then made ‘reasonable’?

6. What is the consequence in this case, and generally, so far as concerns the requirement under s 90(1)(e) that the Court be satisfied that the Aboriginal child placement principles have been ‘properly applied’, if reasonable inquiries are not made prior to a child being place for adoption?

7. What difference does it make if:

a. reasonable inquiries were subsequently made, that is after the child was placed for adoption? And/or;

b. the Court can be satisfied, despite the absence of reasonable inquiries prior to placement for adoption, that the child is an Aboriginal child?

8. Does ‘proper application’ of the Aboriginal child placement principles, for the purpose of s 90(1)(e), require timely compliance with s 34; bearing in mind its heading: s 35 of the *Interpretation Act 1987* (NSW).

9. What power does the Court have to make an adoption order if it is:

a. satisfied that the making of an adoption order is ‘clearly preferable’ for the purposes of s 90(3);

b. satisfied that the child is an Aboriginal child; but

> c. not satisfied that the Aboriginal placement principles have been properly applied?
>
> Depending on the parties' written submissions, his Honour may restore the matter to the list for further oral submissions, as the implications of these matters may be wider than the circumstances of this case.
>
> Given the above, his Honour would appreciate receiving submissions by 5pm on 12 July 2019 (not tomorrow)." (emphasis original)

120 It is impossible to read that email as indicating anything other than a statement that what had been common ground at the hearing, according to the more easily satisfied test of an "Aboriginal child", might no longer be common ground, and that the primary judge, in applying the test formulated by Sackar J, was actively considering the evidence which addressed the Aboriginality of the child's ancestors and whether it warranted a conclusion that the child was an Aboriginal child.

121 Two unfortunate things happened thereafter. The first was that a solicitor acting for the Secretary supplied, by email sent at 2:28 pm on Friday 12 July 2019 to the Associate, the Secretary's further submissions in respect of the proceeding. They should have been copied to the lawyers acting for Belinda's biological father. This did not occur until later that evening.

122 Those submissions addressed the detailed facts in the Associate's email and in particular stated, after referring to the evidence, that:

> "Thus, in answer to his Honour's third question it is conceded that the Court would not find that [Belinda] is an Aboriginal child as defined by the Act".

123 By email sent at 6:12 pm on Friday 12 July 2019, another solicitor acting for the Secretary emailed a copy of the submissions to the solicitor employed by Legal Aid NSW, stating "Apologies, you were inadvertently omitted from the email below". How that email came about was unexplained, and in particular whether there had been a telephone communication between the lawyers was unclear. Further, when counsel briefed by Legal Aid first learned that submissions had been supplied to the judge is unclear.

124 On the following Monday afternoon, 15 July 2019, by email dated 2:05 pm, the Associate wrote to counsel and their instructors advising that his Honour would be handing down judgment at 9:30 am the following day.

125 A little more than an hour later, counsel then appearing for Belinda's biological father replied to the Associate as follows:

> "I attached the defendant's additional submissions which were to be filed last Friday.
>
> I apologise that they were not.
>
> I will forward a copy of these submissions to the representatives of the Secretary".

126 Those written submissions accepted that the matters identified in para 1 were a complete summary of the evidence save for the "coloured" genogram tendered during the hearing. They accepted that whether the child was an Aboriginal child was a matter for the Court and maintained that having regard to s 126 of the Act, a conclusion that the child was Aboriginal was open. The submissions then continued:

> "20. If Your Honour has some unease in finding that [Belinda] is Aboriginal, then the Defendant should be given an opportunity to call further evidence to attempt to overcome any shortcomings in the evidence. For example, the Defendant could approach representatives of Pius X Aboriginal Corporation and Link Up to set out how the information in their documents were obtained.
>
> 21. This would require the Defendant making an application for leave to reopen his case and the matter being further adjourned.
>
> 22. The consequences for [Belinda] are too important for this issue not to be explored.
>
> 23. The Defendant accepts an application to reopen would have to be argued before Your Honour".

127 The submission then addressed the remaining paragraphs of the email and concluded that "the Court does not have power to make an adoption order".

128 It was accepted at the bar table that those were the entirety of the documents between the parties or the Court. I proceed on that basis. Even so, there are demonstrably large gaps in the evidence disclosing this phase of the litigation, including the following:

(1) When did Belinda's biological father's lawyers first learn that it was no longer common ground that Belinda was an Aboriginal child? Was there communication between counsel shortly after the Associate's email of 4 July 2019? In the ordinary course, it would be usual and appropriate for counsel to liaise with each other to see what each client's attitude would be to the new issue raised by that email. The Court has no way of determining whether that occurred.

(2) Nor is it even known when counsel, as opposed to the Legal Aid solicitor, received the Secretary's supplementary submissions. Perhaps a draft was supplied at counsel level in advance of the final copy being served (the email which attached the Secretary's supplementary submissions dated 12 July 2019 labels them "supplementary submissions – [child] (adoption) 11.7.2019.pdf", suggesting that submissions had been drafted no later than the previous day).

(3) Why did counsel for Belinda's biological father fail to comply with the timetable? The entirety of this proposed ground of appeal is that the judge failed to have regard to submissions which were supplied late. There is no explanation for the delay. And there is no explanation for the lack of an explanation of an aspect which goes to the heart of the complaint.

(4) I would regard it as unlikely in the extreme that his submissions were supplied without first obtaining the approval of his instructor. It is possible that the solicitor would have sought and obtained instructions from the client. It is quite possible that submissions were drafted well in advance of the deadline, and delays in obtaining instructions resulted in the non-compliance. Another alternative is that the fault was entirely attributable to the legal practitioners, as opposed to the client.

(5) It must have been obvious when judgment was delivered and orders were made at 9:30 am on Tuesday 16 July 2019 that Belinda's biological father's submissions had been ignored or rejected, and it must have been obvious as soon as reasons were read, that the primary judge had proceeded on the basis that the evidence did not establish that the child was an Aboriginal child. That was precisely the circumstance in which an application to reopen and adduce further evidence had been flagged. Why was no such application made, either on the Tuesday morning, or later that day, or at some stage in the next 14 days, or indeed at any stage thereafter?

(6) It is, to my mind, difficult to be unduly critical of the absence of any application then and there. It is possible that counsel formed the view, in light of the solemnity of the occasion from the perspective of Belinda, that nothing should at that stage be said. It is also possible that counsel lacked instructions (which may have been because they had been sought and not provided, or because they had not been sought).

(7) But why was no application made thereafter? If consideration was given to making such an application, there is no evidence of it before this Court. If no consideration was given to making such an application, then once again there is no evidence of that before this Court. It is unknown whether the father was told that he had a choice, to make an application to the primary judge, or to seek leave to appeal, and if so what his instructions were.

(8) All that is known is that some four weeks later, on essentially the last day provided by the rules, a notice of intention to appeal was filed. That gave a total period of three months for an appeal to be brought. A few

days before the end of that extended three month period, a notice of appeal challenging the adoption order was filed.

129 What follows should in no way be understood as an implicit criticism of counsel now appearing for the father. Yet the serious allegation was made that the primary judge made a decision contrary to natural justice. If that occurred, it was in part a consequence of the father's non-compliance with the Court's directions, and the matter has been determined on appeal, rather than much more expeditiously before the primary judge, for reasons which are entirely unknown.

130 It must be the case that more information is available within the father's camp than has been made available to this Court. That information may have supported the application, or hindered it. In the ordinary course, I would expect a candid explanation of the reasons for non-compliance with a direction where that non-compliance is central to an issue sought to be raised in this Court.

131 The reasons range from the wholly excusable (illness or unforeseen unavailability) to the merely unfortunate (omitting to recall a deadline) to a calculated attempt to delay for as long as possible the making of orders opposed by the father. Time matters in all civil litigation. Time is of heightened significance in adoption. A court making a decision about the adoption of a child is required to have regard to the principle that "undue delay in making a decision in relation to the adoption of a child is likely to prejudice the child's welfare": s 8(1)(e1). That applies to this Court which is asked to set aside an adoption order, just as it applied to the primary judge. It makes the unexplained delay on the part of the father a powerful factor telling against the grant of leave.

132 Belinda's biological father's appeal does not lie as of right, but by way of leave, and the explanation of the matters referred to above is, at least to my mind, central to the decision whether there should be a grant of leave.

133 There is presently some debate as to the role of materiality when there has been a denial of procedural fairness. But it is not necessary to engage in that debate in order to resolve this appeal. In circumstances where substantially the same orders would be made irrespective of whether Belinda is or is not an

Aboriginal child, where there has not been a full disclosure of the circumstances in which the alleged denial of procedural fairness occurred, and where there has already been a delay of almost a year and a retrial would delay certainty to Belinda for many more months, I would not grant leave.

134 In order to establish that the denial of procedural fairness was material, Belinda's biological father adduced further evidence supplementing what had been before the Court, directed to identifying an ancestor who satisfied the three-limb test of Aboriginal person in the *Aboriginal Land Rights Act*. The tender was opposed, and the matter was argued at a time when ground 1 was the only ground of appeal. I have drawn upon the documentary aspects of that evidence above, to explain why I am satisfied that Belinda was an "Aboriginal child" on the correct test. To that extent, the additional evidence is appropriately before this Court. Otherwise, it is not necessary to address the contested portions of the affidavit which will have no bearing upon the outcome of this appeal.

Orders

135 For those reasons, I propose that there be a grant of leave confined to proposed ground 1A, that the Secretary be directed to apply to the primary judge, within 28 days of today, to review the adoption plans, but that the appeal otherwise be dismissed. The purpose of reviewing the adoption plans will be (a) to regularise the fact that no adoption plan appears to have been filed, despite the Court's orders, (b) to attach the cultural plan which appears not to have been attached, and (c) to ensure that the plans make appropriate provision concerning Belinda's Aboriginal heritage, in accordance with s 46(2)(a).

136 The applicant has had some success on a point not argued at trial, and not opposed by the respondent, but has failed to set aside the adoption order. In circumstances where the Secretary did not seek an order for costs, there should be no order as to costs.

137 I propose these orders:

1. Grant leave to appeal confined to proposed ground 1A.

2. Direct the appellant to file a notice of appeal which conforms with proposed ground 2 of the draft notice of appeal, and otherwise dispense with the requirements as to service.

3. Direct the Secretary to apply to the Equity Division within 28 days of today to review orders 3 and 4 made on 16 July 2019 and the adoption plans the subject of those orders.

4. Otherwise dismiss the appeal.

138 **BASTEN JA**: I agree with the orders proposed by Leeming JA and with his reasons in respect of ground 1A of the proposed appeal. Because it was important that the opening paragraphs of his reasons should commence the judgment of this Court, his reasons are published first. (That is not to say that, as occurs in the United Kingdom Supreme Court, the lead judgment should not usually go first.)

Ground 1: procedural unfairness

139 I am content to refuse leave to appeal with respect to the claim of procedural unfairness (ground 1), but for different reasons. These may be outlined as follows. First, there is a question as to whether procedural unfairness, like bias,[1] should not be considered first. Arguably that course should be taken because, if made out, the unfairness will vitiate the exercise of judicial power in the court below. However, such a conclusion need not necessarily be accepted on an appeal by way of rehearing. At least that is so where the procedural unfairness can, as in this case, be rectified on appeal.[2]

140 Secondly, I agree that the applicant should have explained to the primary judge why the opportunity to put in further submissions was not availed of within time. That explanation, not having been provided to the primary judge, should have been provided to this Court. On the other hand, the Secretary, who sought to preserve the orders made, did not file evidence that the father had been advised of the Secretary's change in position before the submissions were served on the evening of Friday, 12 July, on the solicitor for the father. Up until

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[1] Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd (2006) 229 CLR 577; [2006] HCA 55 at [2]-[3] (Gummow ACJ), [117] (Kirby and Crennan JJ), [172] (Callinan J).

[2] Compare, with respect to an administrative decision which would otherwise be invalid, Twist v Council of the Municipality of Randwick (1976) 136 CLR 106 at 116 (Mason J), 119 (Jacobs J).

that point, the father (and his lawyers) may have assumed that no further submission would be necessary because they would rely upon the submissions of the Secretary. In these circumstances, I would infer that the father's belated submissions were the product of an expectation that the common approach would be maintained, that assumption being based on what had been common ground until Friday evening, namely that Belinda was of Aboriginal descent.

141 The submissions were filed the next working day. The judgment delivered the day after that did not refer to them, nor to the suggestion that there should be an opportunity for further material to be presented to the Court, if it was inclined not to accept Belinda's Aboriginal descent. Whilst there was a breach of the Court's direction, it was not egregious; it was not the filing of extra material after judgment is reserved without leave to take any such step. If the submissions had included an explanation as to why they were late, perhaps on the basis set out above, together with the need to obtain further instructions, it would have been procedurally unfair for the judge to disregard them. On the other hand, if the judge did not see the submissions before delivering judgment, the circumstances would be analogous to those which arose in *Re Refugee Tribunal; Ex parte Aala*,[3] a case in which the Tribunal, mistakenly thinking that it had a particular document, confirmed to the applicant that it had it, when it did not.

142 The next issue concerns the failure of the father to seek to vary the orders when the apparent unfairness was identified. As the content of the adoption plan depended upon a finding that Belinda was of Aboriginal descent, it might have been open to the father to seek to have the orders varied on the basis of a different factual finding. It is true that the Uniform Civil Procedure Rules 2005 (NSW) provide that an application to vary a judgment or order can be made within 14 days of the orders being entered: r 36.16. However, it appears that the relevant adoption plan has never been entered, as contemplated by the judge's orders. It is not even clear that its content has been settled. This aspect of the case should have been sorted out in the Equity Division, as must now occur. But the Secretary, who was the moving party in the Court below and is

[3] (2000) 204 CLR 82; [2000] HCA 57.

the authority responsible for dealing with adoption applications, took no steps to regularise the record.

143 The question of reopening therefore turns on whether that was the appropriate course to deal with the failure of the judge to advert to the father's submissions. It is not clear whether the father understood that the submissions had been disregarded or had been rejected, and, if so, when the relevant understanding arose, if it did. Unless the failure to seek reopening can be seen to involve acquiescence in the course taken by the trial judge, it is not a factor of great weight in considering whether leave should be granted for an appeal.

144 There is no doubt that the delay in resolving this matter caused by the appeal is most unfortunate. Adoption proceedings should always be determined as expeditiously as possible, in the interests of the child and the proposed adoptive parent or parents, as well as other involved parties. Nevertheless, a party should not lightly be precluded from agitating a complaint of procedural unfairness, if there is a reasonably arguable case that that has occurred. As it happens, the proper outcome can be obtained in the present proceeding without the need for a further hearing. On that basis leave to appeal may properly be refused with respect to ground 1.

Ground 1A: "Aboriginal descent"

145 I agree with Leeming JA as to the scope and operation of s 4(1) and (2) of the *Adoption Act 2000* (NSW). I would add the following observations.

146 When not applying the statutory language, reference will be made to Indigenous persons,[4] rather than using "Aboriginals" as a noun. It is surprising that only 20 years ago legislation used this identifier. It is associated with colonial era legislation, often used to control members of the Indigenous population or encourage them to assimilate into the European settler community, and is viewed by many people as deeply offensive. A brief history of such usage was recounted by French J in *Attorney-General of the Commonwealth v Queensland* (Wouters).[5] French J also referred to the

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[4] This phrase is not universally accepted but does reflect the language of United Nations Declaration on the Rights of Indigenous Peoples.

[5] (1990) 25 FCR 125 at 145-147.

Macquarie Dictionary definition of "aborigine" (apparently then current) in the following terms:

> "1. one of a race of tribal peoples, the earliest inhabitants of Australia.
>
> 2. a descendant of these people, sometimes of mixed blood.
>
> 3. the primitive inhabitants of a country; the people living in a country at the earliest period."

The Macquarie Dictionary definition has since changed to omit the reference to "a race", and to omit the reference to "primitive inhabitants". The Dictionary now includes a note which reads in part:

> "**Usage**: The nouns *Aborigine(s)* and *Aboriginal(s)* are considered by some to carry negative, even derogatory connotations."

147 In 1991 the Royal Commission into Aboriginal Deaths in Custody noted a report by John McCorquodale stating that Australian governments had used, since European settlement, no less than 67 classifications, descriptions or definitions to determine who is an Aboriginal person.[6] The currently used tripartite description is an attempt to recognise that there are social and cultural determinants of indigeneity which are not reflected in the concept of "descent". Nevertheless, "descent" remains an element of the tripartite definition. There is an irony in the use in s 4(2) of the sole test of "Aboriginal descent", as an expansion of the tripartite definition.

148 The concept of "descent" is usually taken to mean "biological descent" in the sense found in a family tree. That meaning may be unduly restrictive.[7] The Australian Law Reform Commission stated in *Essentially Yours: The Protection of Human Genetic Information in Australia*:[8]

> "36.34 The Inquiry was told in some consultations that the three-part definition works well enough in most circumstances. However, a number of concerns were expressed about the test. In some cases, the courts have interpreted 'descent' in terms of biological descent when interpreting the meaning of an Aboriginal person. This tends to undermine the role of social descent within Aboriginal communities whose traditional laws and customs might provide for adoption or other social forms of inclusion into a family or community. The emphasis on biological descent has led to some anxiety that genetic testing

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[6] Royal Commission into Aboriginal Deaths in Custody, National Report (1991), Commonwealth of Australia, Canberra [11.12.5].

[7] L de Plevitz and L Croft, "Aboriginality under the Microscope: The Biological Descent Test in Australian Law" (2003) 3(1) QUTLJJ 104, 111.

[8] ALRC Report 96, 30 May 2003, Ch 36 Kinship and Identity.

might increasingly be used (or even required) as a means of proving a person's kinship relationship with another Aboriginal person.

36.35 Several submissions emphasised the difference between Western and Aboriginal definitions of kinship. The Aboriginal and Torres Strait Islander Social Justice Commissioner commented that:

> 'While Aboriginal people may generally be direct descendants of the original inhabitants of a particular part of Australia, indigenous customary law does not rely on linear proof of descent in the Judeo-Christian genealogical form of "Seth begat Enosh begat Kenan" in order to prove membership of the group. … A person may have been adopted into a kinship group where there is no direct or suitable offspring to carry out ceremonial obligations. … Genetic science should have no part to play in determining whether or not a person should be eligible for benefits. If the element of descent is to remain in Australian law as a test of Aboriginality, it should be interpreted in accordance with Indigenous cultural protocols.'"

149 There may also be an underlying assumption that a genetic classification based on racial groupings may be possible. However, as further explained by the Australian Law Reform Commission, that concept has been debunked:[9]

> "**Genetics and 'race'**
>
> 36.41 One of the most interesting outcomes of the Human Genome Project and other current scientific research is that there is no meaningful genetic or biological basis for the concept of 'race'.[10] As discussed in Chapter 3, any two human beings are 99.9% identical genetically. Within the remaining small band of variation, scientists estimate that there is an average genetic variation of 5% between what are called 'racial groups' — which means that 95% of human genetic variation occurs within 'racial groups'.
>
> 36.42 It is now well-accepted among medical scientists, anthropologists and other students of humanity that 'race' and 'ethnicity' are social, cultural and political constructs, rather than matters of scientific 'fact'."

150 In 1986, well prior to the enactment of the *Adoption Act*, the Australian Law Reform Commission stated, in its report on *The Recognition of Aboriginal Customary Laws*:[11]

> "Experience under Commonwealth and State legislation suggests that it is not necessary to spell out a detailed definition of who is an Aborigine, and that there are distinct advantages in leaving the application of the definition to be worked out, so far as is necessary, on a case by case basis."

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[9] Ibid.

[10] See J Graves, The Emperor's New Clothes: Biological Theories of Race at the Millennium (2001) Rutgers University Press, New Brunswick. See also A Caplan, 'Handle With Care: Race, Class and Genetics' in Timothy Murphy and Marc Lappe (ed), Justice and the Human Genome Project (1994) University of California Press, 30.

[11] Report 31, AGPS, Canberra at [95].

That course may allow a court to construe similar terms in different statutes, depending on the particular purpose. A similar point was accepted by French J in Wouters:[12]

> "In different contexts the class of persons covered by the word "aboriginal" may expand or contract according to the purpose of the statute or instrument under consideration."

151 Indeed, the idea, reflected in innumerable government forms that the question "are you Aboriginal" can be answered by ticking a yes/no box is, for many purposes, misconceived. The question does not lend itself to a binary answer. It requires a declaration of ethnic identity which may have far- reaching and variable consequences. Professor Regina Ganter reported that an ethnographic study of persons in south-east Queensland revealed "the intensely personal nature of such identity choices, and the conflicts they may raise with family, because to finally embrace one's aboriginality immediately implicates one's parents and siblings." She referred to some persons as "half-steps", being those "who see themselves as 'being of Aboriginal descent' without being 'Aboriginal', a position that harbours intensely personal uncertainties, because it is not sanctioned by any socially valid categories."[13]

152 Some of these issues were noted by the New South Wales Law Reform Commission in its Report 81, *Review of the Adoption of Children Act 1965 (NSW)*. The Report quoted from a paper written by E Sommerlad in 1976 for the First Australian Conference on Adoption:[14]

> "The nature of Aboriginal identity is misunderstood by most whites. They fail to understand why a child of mixed parentage should identify as an Aboriginal rather than a white. Social workers are reluctant to place an Aboriginal child who is indistinguishable by his physical appearance with an Aboriginal family since they consider this situation will create identity problems for the child. The major point that whites fail to grasp is that in a racist society an individual is either white or black. One cannot be part black, part white. An Aboriginal child will soon learn from white classmates that he is not one of them, that he is different, and that he belongs to the black community. Even if he looks white. The position taken by Aborigines on this issue is therefore that any child of

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12 25 FCR at 146.

13 R Ganter, "Turning Aboriginal – Historical Bents" in 7 borderlands e-journal, Vol 7, No 2, 2008 at www.borderlands.net.au at p 2.

14 Report 81 at par 9.28.

> Aboriginal parentage, no matter what his physical appearance or his degree of Aboriginality is an Aborigine.[15]"

153 For the reasons articulated in the legislative history discussed by Leeming JA, while the tripartite definition of "Aboriginal person" is apt and useful in some contexts, it is not apt in others, or is not sufficient by itself.[16] The fact that it has been accorded constitutional status for the purposes of limiting the scope of the power to deport aliens under s 51(xix) of the Constitution[17] does not mean that it should have universal application under State law.

154 Nor does it have universal application. As Leeming JA explains, the reference to a child of "Aboriginal descent" is not the same as a child "descended from an Aboriginal". Unlike the latter, the former expression does not require that the forebear be an "Aboriginal person" as defined by the tripartite test.

155 Before turning to the evidence in this case, it is necessary to note the evidential problems created by the concept of descent. To take the example given at [53] above, if one great grandparent is Aboriginal, he or she must satisfy the tripartite test. That is likely to be more problematic with each preceding generation; especially is that so if the relative relied on as Indigenous has died.

156 For generations, Australians with Indigenous connections tended to deny the connections.[18] If appearances suggested indigeneity, it was not infrequently explained by reference to other causes. It may well be that the evidence in this case that Belinda's maternal grandfather said his mother was Maori, and her husband Chinese,[19] was an example of such conduct. Widespread racist attitudes in the European settler community promoted, even necessitated, such an approach. But if a person did not "identify" as Indigenous, the likelihood of recognition by the relevant Indigenous community was reduced. As many Indigenous people have suggested, the third limb of the test should have referred to how people were identified by the non-indigenous community; for

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15 E Sommerlad "Homes for Blacks: Aboriginal Community and Adoption" in C Picton (ed) Proceedings of First Australian Conference on Adoption (The Committee of the First Australian Conference on Adoption, Sydney, 1976) 159 at 164.

16 The history is helpfully recounted in A Whittaker, "White Law, Blak Arbiters, Grey Legal Subjects: Deep Colonisation's Role and Impact Defining Aboriginality at Law" (2017) 20 Aust Indigenous L Rev 4.

17 Love v Commonwealth; Thoms v Commonwealth [2020] HCA 3.

18 See Sheldon v Weir (No 3) [2010] Fam CA 1138, discussed in A Whittaker, fn 16 above, pp 28-34.

19 See [119] above.

example, being ostracised at school, refused service in a bar, or refused a lease of residential premises.

157 Noting the history of abuse, discrimination and humiliation, Merkel J stated in *Shaw v Wolf*:[20]

> "In these circumstances Aboriginal identification often became a matter, at best, of personal or family, rather than public, record. Given the history of the dispossession and disadvantage of the Aboriginal people of Australia, a concealed but nevertheless passed on family oral 'history' of descent may in some instances be the only evidence available to establish Aboriginal descent. Accordingly oral histories and evidence as to the process leading to self-identification may, in a particular case, be sufficient evidence not only of descent but also of Aboriginal identity."

158 Merkel J recorded evidence of one party, Ms Rosalie Medcraft, who gave evidence that both her grandparents in her father's family were Aboriginal.[21] She stated:

> "Through research many years ago we discovered our background but each time we tried to talk about our aboriginality our father became quite angry and distressed so we let the matter drop. To respect his feelings my brothers and sisters and myself did not reveal our aboriginality until our father's death in 1986."

She also stated that "her father had always explained, when asked, that her grandmother 'came from New Zealand'." In other words, he falsely explained his ancestry as Maori.

159 In *Bringing Them Home*, the Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, there is a passage from the evidence of child and adolescent psychiatrist, Dr Brent Waters:[22]

> "The people that I've talked to who were placed in white families … things seem to have gone quite well until they got into the teenage years. Then they started to become more aware of the fact that they were different. Some of these were quite light kids, but nevertheless that they were different. And it was the impact of what peers were doing and saying which seemed to be most distressing to them. And sometimes their families didn't deal with that very well. They were dismissive. 'Look, the best thing to do is just forget you were ever Aboriginal' or 'Tell them that you came from Southern Europe'. To pass off what was obviously a difference in skin colour."

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[20] (1998) 83 FCR 113 at 122.

[21] The evidence is set out only in the Report in (1999) 163 ALR 205, relevantly at 247-248.

[22] Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (Commonwealth of Australia, 1997) p 158.

160 Evidential issues loomed large in the present case. So much was acknowledged by the submissions for the Secretary in reply in identifying the nature of the power conferred on a court by s 4(2) of the *Adoption Act*, namely:[23]

> "In light of these authorities, the question of whether the court hearing adoption proceedings should determine that a child is an "aboriginal child" for the purposes of the *Adoption Act* is a complex question of fact. The court may therefore consider that it is a question that should be considered in light of all of the evidence regarding the family's descent, self-identification and community acceptance. While descent alone *may* be sufficient for the purpose of a determination under s 4(2), it also may not be in the circumstances. It is open to this Court to construe s 4(2) as discretionary such that a child's Aboriginality is a matter that the primary judge, in his or her discretion, should determine no all of the evidence in the proceedings. Whilst that may be accepted, it raises an important question as to how that evidence is to be assessed."

161 It may be doubted that the appropriate degree of flexibility was adopted by the primary judge. Having identified the evidence on the question of indigeneity,[24] the judge referred to the power conferred by s 126 of the *Adoption Act* permitting the Court to act "on any statement, document, information, or matter that may, in its opinion, assist it to deal with the matter of the proceedings or before it for determination whether or not the statement, document, information or matter would be admissible in evidence." He continued:

> "[82] However, *Practice Note* SC EQ 13, which applies to proceedings under the *Adoption Act*, states at [33]:
>
> > 'Although under the *Adoption Act* s 126 the Court has a discretion to act on any statement, document, information, or matter that may, in its opinion, assist it whether or not it would be admissible in evidence, this should be regarded as exceptional and ordinarily the court expects evidence to be given in a form and manner which is admissible in proceedings generally. However, the court will receive copies of learned texts and articles from peer-reviewed journals in relevant fields such as sociology and psychology without further proof.' [Emphasis added in judgment below.]
>
> [83] In any event, this scant and conflicting evidence does not enable me to come to any conclusion as to whether B is of Aboriginal descent. Evidently AC believes that she is of Aboriginal descent, but her paternal grandfather has evidently made inquiries which suggest the ancestry is of Maori rather than Aboriginal, origins. There is no evidence before me as to who prepared the genogram or what documents were relied on to create it. Nor is there evidence as to what matters the Pius X Aboriginal Corporation had regard to when issuing its confirmation of B's Aboriginality.

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[23] Secretary's further submissions filed 22 April 2020, par 19.

[24] Judgment at [79].

> [84] That is not to say that I have reached a conclusion that B is not of Aboriginal descent."

Three aspects of this reasoning are troubling.

162 First, if the practice note were to be understood as diminishing the weight which should be given to material of the kind relied upon in the present case in identifying questions of Aboriginal descent, it would tend to frustrate the application of the Aboriginal child placement principles and the intention underlying s 4(2) of the Act. Such an approach might reveal legal error.

163 Secondly, the description of the evidence as "scant and conflicting" is an inadequate assessment of the material summarised. That material contained 11 items. Of these, seven tended to support a finding of Aboriginality, one was neutral (referring to a request from the Department or a certificate of Aboriginality), and three were negative. Of the negative items, one was a "care plan" lodged under the *Children and Young Persons (Care and Protection) Act 1998* (NSW) ("Care and Protection Act") with the Children's Court in which the Department recorded that the child was not Aboriginal, but, as the judge noted, there was no evidence as to the basis on which the conclusion was reached. A second was a reported statement of Belinda's maternal grandmother that "there is no Aboriginal heritage in the family"; and the third a statement by her husband, Belinda's maternal grandfather, that his grandmother was "Maori, rather than Aboriginal".

164 The primary judge appears to have taken each of these negative statements at face value; at least there was no assessment of their provenance. However, a report of a community Elder with respect to Belinda's great grandmother, noted that "the family did not like to be recognised as Aboriginal in those days".

165 This evidence could not properly have been assessed without reference to the kind of circumstances in which, in the past, it was commonplace to deny Aboriginality and to explain physical features by reference to foreign ancestry, including Maori.[25]

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[25] De Plevitz and Croft, at fn 7 above, p 106.

166 Thirdly, the judge was dismissive of a "Confirmation of Aboriginality" certificate issued by "an organisation called "Pius X Aboriginal Corporation", and a genogram or family tree "prepared by an organisation called Link-up (NSW)".

167 In short, the evidence before the judge was that Belinda's mother identified as Aboriginal, there was clear evidence that her maternal great grandmother was Aboriginal, and there was evidence of acceptance by two Aboriginal corporations whose identity and relevance should not have been called into question without a basis. Further, Belinda's adoptive mother clearly accepted that Belinda was of Aboriginal descent and had taken steps to help her have contact with her Aboriginal culture. She stated that Belinda "now knows where to find her mob on the indigenous map of all the countries". In the case of Belinda's mother, there was objective evidence of Aboriginal ancestry (arguably strong, though that need not be determinative) which was combined with self-identification as Aboriginal and acceptance by community organisations that she, and hence her child, were Aboriginal. That should have been sufficient on any basis to conclude that Belinda was an Aboriginal child.

168 The courts can only work with the materials placed before them. In most cases, the courts will be dependent on material supplied by the Secretary.

169 There is no doubt as to the purposes of the Aboriginal placement principles which are now contained in the Care and Protection Act and in the *Adoption Act*. In the course of the debate on the Adoption Bill, the Parliamentary Secretary stated:[26]

> "[The placement principles] are necessary to provide against any repeat of the shameful history over many years of New South Wales Aboriginal children being taken from their families and their culture. The New South Wales Government is making every effort to redress the wrongs of the past and is committed to putting policies and practices in place to ensure that nothing of the kind can happen again."

170 Despite those words, there has been criticism of the assistance provided by the Secretary in particular cases. For example, the President of the Children's Court, Judge Johnstone, stated in *Gail and Grace*:[27]

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[26] Legislative Assembly, Parliamentary Debates (Hansard), 21 June 2000, p 7384.

[27] [2013] NSWChC 4 at [95].

> "I wish to place on record that this Court is increasingly frustrated by the lack of cultural knowledge and awareness displayed by some caseworkers and practitioners in their presentation of matters before it. The time has come for a more enlightened approach and a heightened attention to the necessary detail required, which may require specific training and education by the agencies and organisations involved."

These statements related to the Secretary's application of the Aboriginal placement principles in matters arising under the Care and Protection Act. The President repeated his comments in the case of *DFaCS and Boyd*.[28] Further, an independent inquiry into the application of the Aboriginal child placement principles in the case of out-of home-care (OOHC) under the Care and Protection Act, chaired by Professor Megan Davis, published a report in November 2019. The report was critical of the application (or failure to apply) the Aboriginal child placement principles (ACPP):[29]

> "Despite the fact the ACPP has been enshrined in legislation, and its elements recognised by all states and territories, there are widespread concerns about the way in which the ACPP is interpreted and applied throughout Australia. For instance, in 2012 the United Nations Committee on the Rights of the Child noted that poor implementation of the ACPP in Australia was compromising the rights of Aboriginal children in OOHC.[30]
>
> The extant literature (comprising government and non-government reports, academic publications and stakeholder submissions) has identified several implementation issues. First, there are widespread concerns about the collection and use of data regarding compliance with the principle (discussed further below). Second, there are concerns about widespread noncompliance with the principle,[31] including concerns that the principle is ignored in practice or applied in a narrow or tokenistic manner.[32] Third, there are concerns about the fact that there are no penalties for non-compliance with the principle,[33] and finally, it has been noted that there are differences in the way the principle is interpreted and applied.[34]
>
> Concerns about compliance with the ACPP have existed for at least 20 years in NSW. The Wood Report, released in 2008, raised a number of issues about the implementation of the ACPP, including that the ACPP provisions were only being considered at the final stages of a matter as opposed to prior to any

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28 [2013] NSWChC 9 at [35].

29 Family is Culture, (NSW Govt, Sydney 2019), p 252.

30 United Nations Committee on the Rights of the Child, Committee on the Rights of the Child, (Sixtieth session 29th May–15th June 2012).

31 Senate Community Affairs References Committee, Out of Home Care (Report, 2015) 8.60.

32 Legislative Council General Purpose Standing Committee No 3, Reparations for the Stolen Generations: Unfinished business (2016) [10.55]; Senate Community Affairs References Committee, Out of Home Care (Report, 2015).

33 Legislative Council General Purpose Standing Committee No 3, Reparations for the Stolen Generations: Unfinished business (2016) [10.54]–[10.57], [10.60].

34 Senate Community Affairs References Committee, Out of Home Care (Report, 2015) 8.56.

> court attendance.[35] The Wood Report found that there was inconsistent compliance with the ACPP both at a regional and individual caseworker level.[36] Again in 2017, the Legislative Council General Purpose Standing Committee No 2 noted that stakeholders to its inquiry on child protection had raised concerns that the principle was not being complied with, and that statistics collected relating to compliance with the principle did not adequately reveal if all aspects of the principle, including the requirement for consultation with Aboriginal organisations, were being complied with.[37] Also in 2017, Aboriginal stakeholders in NSW expressed frustration about the fact that the ACPP is not adhered to in practice.[38]"

171 These concerns have direct relevance in the case of adoptions. It is a requirement of s 35(1) of the *Adoption Act* that, "Aboriginal people should be given the opportunity to participate with as much self-determination as possible in decisions relating to the placement for adoption of Aboriginal children". Where a child is to be placed with a non-Aboriginal adoptive parent, s 35(3) requires that the Court be satisfied the proposed parent:

> "(a) has the capacity to assist the child to develop a healthy and positive cultural identity, and
>
> (b) has knowledge of or is willing to learn about, and teach the child about, the child's Aboriginal heritage and to foster links with that heritage in the child's upbringing, and
>
> (c) has the capacity to help the child if the child encounters racism or discrimination in the wider community,
>
> and that the Aboriginal child placement principles have been properly applied."

172 Similar problems have been raised in other jurisdictions, including under the *Family Law Act 1975* (Cth). For example, in 2010 in *Donnell v Dovey*,[39] the Full Court of the Family Court considered parenting and residence arrangements with respect to an Indigenous child in terms which continue to provide helpful guidance.

> "[320] There was another piece of evidence before his Honour which should have alerted him to the fact that the indigenous peoples of Australia do not subscribe to the benefits that European/white Australians see attaching to the modern nuclear family (which arguably may have as much to do with the

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35 James Wood, Report of the Special Commission of Inquiry into Child Protection Services in NSW (November 2008), [11.150].

36 James Wood, Report of the Special Commission of Inquiry into Child Protection Services in NSW (November 2008), [11.149].

37 Legislative Council General Purpose Standing Committee No 2, Child Protection (2017) [7.37]–[7.42].

38 AbSec, 'What You Told Us—Aboriginal case management policy consultations', Aboriginal Child, Family and Community Care State Secretariat (Web Page, August 2017) < https://www.absec.org.au/images/downloads/AbSec-Developing-Aboriginal-Case-Management-Policy-and-Guidelines-Consultant-Report-What-You-Told-Us-Aug17.pdf >

39 (2010) 237 FLR 53; [2010] FamCAFC 15 at [320]-[323], [332]-[336] (Warnick, Thackray and O'Ryan JJ).

efficient transfer of private property as it does to emotional benefits flowing to children). The piece of evidence to which we refer was that given by O's father in his trial affidavit where he said that in the Torres Strait Islands, 'it is common for children to be raised by extended family members'….

[321] Whilst we accept that the Federal Magistrate was not referred to any writing on this topic, we consider that an Australian court exercising family law jurisdiction in the twenty first century must take judicial notice of the fact that there are marked differences between indigenous and non-indigenous people relating to the concept of family. This is not to say that the practices and beliefs of indigenous people are uniform, since it is well known that they are not. However, it cannot ever be safely assumed that research findings based on studies of European/white Australian children apply with equal force to indigenous children, even those who may have been raised in an urban setting.

[322] In our view, judicial officers dealing with cases involving an indigenous child should be expected to have a basic level of understanding of indigenous culture, at least to the extent that this can be found in what the Full Court in *B v R* called 'readily accessible public information'. It should not be expected that parties must approach the court on the basis that the presiding judicial officer comes to the case with a 'blank canvas'."

[323] It is also to be expected, in our view, that judicial officers will be familiar with the reported decisions of the Full Court dealing with indigenous children, as well as the policy considerations that have informed the significant changes made to the legislation pertaining to indigenous children.

…

[332] We accept that the Federal Magistrate was not assisted at trial by any cross-examination specifically directed to the cultural issues we have discussed. However, we have concluded that his Honour should have been aware of, and taken into account, the fact that the 2006 amendments were aimed at ensuring that cases involving indigenous children are no longer determined on the basis of automatic acceptance of 'modern Anglo-European notions of social and family organisation'. In our view, it should have been apparent that the report writer's recommendations were firmly based on such notions, the writer having failed to take into account in any way the fact that O is an Aboriginal child."

Conclusions

173 The structure of s 4 of the *Adoption Act* suggests that a degree of flexibility was intended to be built into subs (2). The definition in s 4(1) could have been expanded to include "a child of Aboriginal descent". Had the issue been in dispute, it would have been necessary for the Court to be satisfied of that alternative limb. Instead, the definition picked up a different structural element, namely by including a child the subject of a determination of the court that the child is of Aboriginal descent. This should be understood as a recognition of the need for a court to draw inferences from material which may not be unequivocal. Historical material may need to be relied on which is dependent

on oral tradition rather than documentary records. Documentary records may record one person by a range of names or by a name not readily referable to a specific individual. Such problems were well understood in 2000, following more than 20 years of claims under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) which required the identification of traditional owners of land, and seven years of claims for native title, both under the common law and the *Native Title Act 1993* (NSW). It followed numerous well-publicised inquiries and reports which have highlighted the issues in play.

174 In making a determination for the purposes of s 4(2), and more generally, the Court is expressly empowered to consider a broad range of material, including matter which would not be admissible under the *Evidence Act 1995* (NSW): *Adoption Act*, s 126. The making of a declaration does not involve one party having a burden of proof, nor is the standard for the court's state of satisfaction identified. The degree of satisfaction should take into account the purposes of the proposed determination.

175 I agree with Leeming JA that Belinda is an Aboriginal child for the purposes of the Adoption Act. I also agree with the orders proposed by Leeming JA.

176 **MCCALLUM JA**: I agree with Leeming JA that Belinda is an "Aboriginal child" for the purposes of the Adoption Act. I agree with his Honour's reasons concerning the proposed ground of appeal that the primary judge erred in his construction of s 4(2) of the Act (ground 1A). I also agree with the additional reasons given by Basten JA concerning that ground. As to the proposed ground of appeal that there was a denial of procedural fairness (ground 1), I agree with the reasons given by Basten JA for refusing leave with respect to that ground. I agree with the orders proposed by Leeming JA.

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Amendments

21 August 2020 - Coversheet: format of hearing dates amended.

material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.