A 'KIND OF SOVEREIGNTY': TOWARD A FRAMEWORK FOR THE RECOGNITION OF FIRST NATIONS SOVEREIGNTIES AT COMMON LAW

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The common law rejects 'Aboriginal sovereignty' as being inconsistent with Crown sovereignty. Yet the common law defines 'Aboriginal sovereignty' as a single, homogenous sovereignty adverse to the Crown. The position at common law differs from the literature by First Australians which maintains that their sovereignties are a spiritual notion, have not been ceded, and are heterogeneous. In the same way that the Uluru Statement from the Heart *conceives of its authors' sovereignty as 'shining through' legal and political institutions, this article contends that the recognition of additional rights at common law would be an implicit recognition of sovereignty. This article puts forward three interconnected and alternate sources for such rights: as additional land-related rights as presupposed by native title, via the 'preferable rule' in* Mabo, *or via the connection to land as identified in* Love.

CONTENTS

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I Introduction

In *Love v Commonwealth* ('*Love*'), in a 4:3 split, the High Court ruled that First Australians who were also non-citizens could not be deported as 'aliens' within the meaning of s 51(xix) of the *Constitution*.[1] The four majority justices, while disavowing the word 'sovereignty', differed on the underlying principle prohibiting the deportation.[2] Chief Justice Kiefel in dissent, however, was clear:

> [T]he legal status of a person as a 'non-citizen, non-alien' would follow from a determination by the Elders, or other persons having traditional authority amongst a particular group, that the person was a member of that group. To accept this effect would be to attribute to the group the kind of sovereignty which was implicitly rejected by *Mabo [No 2]* — by reason of the fact of British sovereignty and the possibility that native title might be extinguished — and expressly rejected in subsequent cases.[3]

The cases cited by Kiefel CJ as rejecting 'Aboriginal sovereignty' maintain that 'Aboriginal sovereignty' is not compatible with Crown sovereignty. However, this article contends that the rejection of 'Aboriginal sovereignty' is really a rejection of a single, homogenous, Eurocentric, state-kind of sovereignty

[1] (2020) 270 CLR 152 ('*Love*'). See at 192 [81] (Bell J), 259–60 [284]–[285] (Nettle J), 286 [387]–[388], [390] (Gordon J), 290 [398] (Edelman J).

[2] See ibid 190 [73]–[74] (Bell J), 258 [279] (Nettle J), 284 [373]–[374] (Gordon J), 320–1 [466]–[467] (Edelman J).

[3] Ibid 176–7 [25] (citations omitted), citing *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 57–60, 63 (Brennan J, Mason CJ and McHugh J agreeing at 15) ('*Mabo*'); *Coe v Commonwealth* (1993) 118 ALR 193, 200 (Mason CJ) ('*Coe (1993)*'); *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 443–4 [44] (Gleeson CJ, Gummow and Hayne JJ) ('*Yorta Yorta*').

conceived as 'adverse to' the Crown.[4] This article further contends that, on this basis, the notion of 'Aboriginal sovereignty' rejected by the common law is different to sovereignty as conceived by First Australians.

The *Uluru Statement from the Heart* ('*Uluru Statement*') pronounced that the authors' ancient sovereignties are a spiritual notion coexisting with Crown sovereignty which 'can shine through as a fuller expression of Australia's nationhood'.[5] It follows that the *Uluru Statement* does not conceive of its authors' sovereignties as a Eurocentric kind of sovereignty but instead as a 'spiritual notion' that exists outside of the law but that can nevertheless interact with it.[6] Therefore, the two reforms proposed by the Referendum Council — a First Nations constitutional Voice to Parliament and an extra-constitutional Declaration enacted by all Australian parliaments[7] — are not the authors' sovereignties but rather incidents of sovereignty shining through the *Constitution* and Acts of Parliament. This article contends that, in the same way, rights that may arise at common law and vest in First Nations would be incidents of First Nations' sovereignty shining through, or being recognised, at common law. Indeed, while the High Court clings to the notion of an undivided Eurocentric sovereignty to refuse First Nations sovereignties, it also houses an emergent degree of recognition of the continuity of certain elements of First Nations sovereignties (eg the authority of elders to determine membership and the existence of traditional law and custom underpinning native title). Thus, this article aims to navigate this tension in the jurisprudence by proposing a framework for how First Nations sovereignties might continue via the recognition of other land-related rights.

The relevant right for the purpose of this article is a right to self-government to protect traditional authority in relation to land. We contend that, based on current authority, it is possible to argue that the common law can recognise other land-related rights in addition to native title.[8] A successful argument for an additional right should accord with the *Uluru Statement*'s conception of

[4] In *Coe v Commonwealth* (1979) 24 ALR 118 ('*Coe (1979)*'), Gibbs J and Aickin J required First Nations to have 'legislative, executive or judicial organs by which sovereignty might be exercised' before domestic sovereign status could be considered: at 129 (Gibbs J, Aickin J agreeing at 138).

[5] *Uluru Statement from the Heart* (Statement, First Nations National Constitutional Convention, 26 May 2017) ('*Uluru Statement*').

[6] See Shireen Morris, 'An Australian Declaration of Recognition: The Case for Semi-Entrenched Symbolism' (2020) 44(1) *Melbourne University Law Review* 267, 312 ('An Australian Declaration').

[7] Referendum Council, *Final Report of the Referendum Council* (Report, 30 June 2017) 2.

[8] For the meaning of common law 'recognition', see Robert French, 'Native Title: A Constitutional Shift?' (JD Lecture Series, Melbourne Law School, 24 March 2009) 18–20.

sovereignty: that is, sovereignty as an ancient, spiritual notion shining through the common law as a fuller expression of Australian law.

It should be said from the outset that it is not our view that common law recognition of First Nations sovereignties would be sufficiently broad as to satisfy all the aspirations tied up in First Australians' understandings of sovereignty.[9] This would be beyond the common law and necessarily raises issues of international law which the High Court has determined to be non-justiciable.[10] Any common law recognition of a specific First Nations right would complement the important political action, treaties, and international law advocacy taking place.[11] This article aims to supplement the recent literature surrounding the *Uluru Statement*, emphasising constitutional recognition to argue that common law principles are not necessarily inimical to First Nations sovereignties.[12]

Any attempt to synthesise First Australians' understanding of their sovereignties is prone to criticism, not least because such an undertaking is an attempt to 'speak for' First Australians.[13] Part II argues that despite the complex and at times disparate literature, four fundamental propositions emerge: knowledge by First Australians has developed since *Mabo v Queensland [No 2]* ('*Mabo*');[14] First Nations sovereignties have never been ceded; those sovereignties are heterogeneous; and they are fundamentally and inextricably in connection with land.

Part III reviews the common law concept of 'Aboriginal sovereignty' and outlines three interconnected possible sources of other land-related rights. The

[9] See Megan Davis and George Williams, *Everything You Need To Know about the Uluru Statement from The Heart* (NewSouth Publishing, 2021) 143–4; Shireen Morris, 'False Equality' in Shireen Morris (ed), *A Rightful Place: A Road Map to Recognition* (Black, 2017) 209, 235–6 ('False Equality'); Shireen Morris, *A First Nations Voice in the Australian Constitution* (Hart Publishing, 2020) 86 ('*A First Nations Voice*').

[10] *Mabo* (n 3) 32 (Brennan J). See below Part IV(A)(1) for further discussion.

[11] See Shireen Morris, '*Love* in the High Court: Implications for Indigenous Constitutional Recognition' (2021) 49(3) *Federal Law Review* 410, 427–8 ('*Love* in the High Court').

[12] See generally Davis and Williams (n 9); Dylan Lino, 'The Uluru Statement: Towards Federalism with First Nations', *Australian Public Law* (Blog Post, 13 June 2017) <https://www.auspublaw.org/2017/06/towards-federalism-with-first-nations/>, archived at <https://perma.cc/R7Q5-NPCB>; Dylan Lino, 'Thinking Outside the Constitution on Indigenous Constitutional Recognition: Entrenching the Racial Discrimination Act' (2017) 91(5) *Australian Law Journal* 381; Shireen Morris (ed), *A Rightful Place: A Road Map to Recognition* (Black, 2017); Morris, 'An Australian Declaration' (n 6); Morris, *A First Nations Voice* (n 9); Morris, '*Love* in the High Court' (n 11).

[13] See generally Jackie Huggins, 'Respect v Political Correctness' (1994) 26(3) *Australian Author* 12, 12–13; Karen Lillian Martin, *Please Knock before You Enter: Aboriginal Regulation of Outsiders and the Implications for Researchers* (Post Pressed, 2008).

[14] *Mabo* (n 3).

conceptual distinction that animates this part is the difference between Aboriginal title to land on the one hand, and other land-related rights on the other.[15] There is some slippage between these concepts and this distinction, we argue, is under-interrogated as a matter of Australian scholarship and law. To this end, we acknowledge the body of research, mostly from North America, based on the research of McNeil, Secher, Slattery and Walters, which was applied generally to British colonies and which applied earlier Australian law.[16] This literature has informed our analysis of more recent Australian case law although we do not rely on it for the arguments we advance here. Instead, we focus on Australian judicial pronouncements and occasionally refer to this literature where that is appropriate.

Following the *Coe v Commonwealth* ('*Coe*') cases,[17] Crown sovereignty has been conceptualised so that the judicial focus has been on the narrow colonial concept of native title at the expense of recognising other land-related rights. Yet other land-related rights may expose sovereignties as interdependent, related, and connected ways of knowing and being. The three possible sources for other land-related rights identified in this part are those presupposed by native title, or arising via the 'preferable rule' in *Mabo* or via the connection to land as explicated in *Love*.

Notwithstanding which source of other land-related rights is argued, Part IV puts forward considerations that any such argument must confront. The primary consideration is that any argument must be consistent with the act of state doctrine and must therefore be conceptualised as an effect of the Crown's assertion of sovereignty rather than framed as 'adverse to' Crown sovereignty. In addition, such arguments must not be parallel to the Crown's lawmaking

[15] See generally Kent McNeil, 'A Question of Title: Has the Common Law Been Misapplied To Dispossess the Aboriginals?' (1990) 16(1) *Monash University Law Review* 91; Kent McNeil, 'The Source, Nature, and Content of the Crown's Underlying Title to Aboriginal Title Lands' (2018) 96(2) *Canadian Bar Review* 273, 276–8; Ulla Secher, 'The Reception of Land Law into the Australian Colonies Post-*Mabo*: The Continuity and Recognition Doctrines Revisited and the Emergence of the Doctrine of *Continuity Pro-Tempore*' (2004) 27(3) *University of New South Wales Law Journal* 703 ('The Reception of Land Law'); Ulla Secher, 'The *Mabo* Decision: Preserving the Distinction between "Settled" and "Conquered or Ceded" Territories' (2005) 24(1) *University of Queensland Law Journal* 35, 41–8; Brian Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* (University of Saskatchewan Native Law Centre, 1983); Mark D Walters, 'The Continuity of Aboriginal Customs and Government under British Imperial Constitutional Law as Applied in Colonial Canada: 1760–1860' (DPhil Thesis, University of Oxford, 1995).

[16] See above n 15.

[17] (1978) 18 ALR 592 ('*Coe (1978)*'); *Coe (1979)* (n 4); *Coe (1993)* (n 3).

function and must be consistent with decided cases, including *Walker v New South Wales* ('*Walker*').[18]

Consistently with respectful research protocols, we introduce ourselves as Australian-born men.[19] One of us speaks with maternal English–German ancestry and paternal Scottish–Yugambeh ancestry,[20] and the other speaks with maternal Irish–German ancestry and paternal English–Irish ancestry. We recognise this article would not have been possible to write without the knowledge, wisdom, history and experience of First Australians, both past and present. We also draw upon the literature written by other Australians. Often this latter body of literature recognises various forms of the continuing lived nature of First Nations sovereignties but tends to assume that the High Court has closed the door on any common law recognition of First Nations sovereignties or regards political action as more promising.[21] This body of literature tends to urge recognition of First Nations sovereignties through political action, treaties, international law, or a combination of these.

II First Nations Sovereignties

We do not claim to 'speak for' First Australians asserting sovereignty.[22] Instead, we turn to First Australian voices to show that they have not yet been heard in the High Court in a properly pleaded case concerning sovereignty as we present it here.[23] We have drawn upon the writings of First Australians, mostly but not

[18] (1994) 182 CLR 45 ('*Walker*').

[19] Martin (n 13) 19, quoting Aileen Moreton-Robinson, *Talkin' Up to the White Woman: Aboriginal Women and Feminism* (University of Queensland Press, 2000) xv. See also Ambelin Kwaymullina, 'Research, Ethics and Indigenous Peoples: An Australian Indigenous Perspective on Three Threshold Considerations for Respectful Engagement' (2016) 12(4) *AlterNative* 437, 441–2.

[20] The Yugambeh People historically lived around the Nerang River: see generally Ysola Best and Alex Barlow, *Kombumerri: Saltwater People* (Heinemann Library, 1997) 9–16.

[21] See, eg, Melissa Castan, 'The Recognition of Indigenous Australians in the Teaching of Federal Constitutional Law' (2014) 7 *Journal of the Australasian Law Teachers Association* 87, 90; PH Lane, 'Nationhood and Sovereignty in Australia' (1999) 73(2) *Australian Law Journal* 120, 121–2; Andrew Lokan, 'From Recognition to Reconciliation: The Functions of Aboriginal Rights Law' (1999) 23(1) *Melbourne University Law Review* 65, 116; Morris, '*Love* in the High Court' (n 11) 411, 424, 426–7; Stanley Yeo, 'Criminal Cases in the High Court of Australia: Walker v New South Wales' (1995) 19(3) *Criminal Law Journal* 160, 162.

[22] See Huggins (n 13) 13; Martin (n 13) 19.

[23] Cf *Coe (1979)* (n 4) 128 (Gibbs J); *Coe (1993)* (n 3) 194–9 (Mason CJ).

always academics,[24] to examine the meaning of First Nations sovereignties.[25] We recognise that the following outline of First Nations sovereignties is limited to the extent that it is a review of the literature rather than, with the exception of the analysis of the *Uluru Statement*, the word of First Australian Elders with the authority to speak for their Peoples.[26] Despite these limitations, four fundamental propositions emerge from the literature: (1) knowledge of First Nations sovereignties has developed since *Mabo*; (2) First Nations sovereignties have never been ceded; (3) sovereignties are heterogeneous and unique to people and place; and (4) it is antithetical to First Nations sovereignties and reductionist to recognise a Eurocentric colonial 'native title' without recognising the interdependent, related, and connected ways of knowing, being and doing that make First Australians one with their ancestors, Country, law and society (together, 'First Nations sovereignties').

A *Knowledge about First Nations Sovereignties since* Mabo

Since *Mabo*, a plethora of knowledge written by First Australians about First Nations sovereignties has been published which was not available to the judiciary at the time when several key Australian sovereignty cases were decided.[27] This new knowledge follows the nascent acknowledgement in *Mabo* that the common law and colonial views about First Australians were 'frozen in an age of racial discrimination'.[28] Accordingly, contemporary knowledge critiques

[24] See, eg, Wendy Brady, 'That Sovereign Being: History Matters' in Aileen Moreton-Robinson (ed), *Sovereign Subjects: Indigenous Sovereignty Matters* (Routledge, 2020) 140, 141–2; Aileen Moreton-Robinson, 'I Still Call Australia Home: Indigenous Belonging and Place in a White Postcolonizing Society' in Sara Ahmed et al (eds), *Uprootings/Regroundings: Questions of Home and Migration* (Berg, 2003) 23 ('Belonging and Place'); Aileen Moreton-Robinson, 'Writing Off Indigenous Sovereignty: The Discourse of Security and Patriarchal White Sovereignty' in Aileen Moreton-Robinson (ed), *Sovereign Subjects: Indigenous Sovereignty Matters* (Routledge, 2020) 86, 88 ('Indigenous Sovereignty'); Kwaymullina (n 19) 442.

[25] See, eg, Michael Anderson, 'Self-Determination and Sovereignty of Aboriginal Nations and Peoples Defined', *Sovereign Union: First Nations Asserting Sovereignty* (Web Page, 23 February 2012) <http://nationalunitygovernment.org/content/self-determination-and-sovereignty-aboriginal-nations-and-peoples-defined>, archived at <https://perma.cc/N28E-F6KE>; 'Freed Murrumu To Thank Magistrate', *National Indigenous Television* (Web Page, 6 August 2015) <https://www.sbs.com.au/nitv/article/2015/08/05/freed-murrumu-thank-magistrate>, archived at <https://perma.cc/25HH-YWEK>. We have also drawn upon Nicolas Peterson and Fred Myers (eds), *Experiments in Self-Determination: Histories of the Outstation Movement in Australia* (Australian National University Press, 2016).

[26] Larissa Behrendt, 'No One Can Own the Land' (1994) 1(1) *Australian Journal of Human Rights* 43, 55.

[27] See above n 24.

[28] *Mabo* (n 3) 42 (Brennan J).

anachronistic colonial approaches to the construction of knowledge because they positioned First Australians as the known rather than as knowers.[29] Thus, contemporary knowledge has, in part, shifted from a history characterised by narratives of contact, settlement, dispossession and alienation, to narratives of resilience and survival. This contemporary knowledge is reflected in the growing body of literature around the world concerning 'Indigenous resurgence' scholarship and practice.[30] We have used the phrase 'First Nations sovereignties' as opposed to 'Aboriginal sovereignty', which is the phrase used by earlier authority,[31] to capture this shift in knowledge and to acknowledge the historical truth of the world's longest surviving cultures.[32]

The shift in knowledge construction has not yet been engaged with by the law beyond the narrow colonial concept of native title.[33] While in the academy, various models have been proposed to facilitate empowerment, emancipation, participation, respect, and the general improvement of the quality of knowledge construction, the key ingredient is a move from 'research "on" or "about" Aboriginal People, to research "with"' Aboriginal People.[34] To the extent that the law has not embraced this change, it remains 'an instrument of colonialism, when entrenched in non-Aboriginal worldviews, theories, beliefs, values and agendas'.[35] For example, for Aileen Moreton-Robinson, the colonising power 'writes off' First Nations sovereignties by the social construction of whiteness

[29] See, eg, Kwaymullina (n 19) 438; Moreton-Robinson, 'Belonging and Place' (n 24) 32; Aileen Moreton-Robinson, 'Towards an Australian Indigenous Women's Standpoint Theory: A Methodological Tool' (2013) 28(78) *Australian Feminist Studies* 331, 341–2; Lester-Irabinna Rigney, 'A First Perspective of Indigenous Australian Participation in Science: Framing Indigenous Research towards Indigenous Australian Intellectual Sovereignty' (2001) 7 *Kaurna Higher Education Journal* 1, 7. See generally Aileen Moreton-Robinson (ed), *Sovereign Subjects: Indigenous Sovereignty Matters* (Routledge, 2020).

[30] See, eg, Taiaiake Alfred and Jeff Corntassel, 'Being Indigenous: Resurgences against Contemporary Colonialism' (2005) 40(4) *Government and Opposition* 597; Taiaiake Alfred, 'Cultural Strength: Restoring the Place of Indigenous Knowledge in Practice and Policy' [2015] (1) *Australian Aboriginal Studies* 3; Jeff Corntassel, 'Re-Envisioning Resurgence: Indigenous Pathways to Decolonization and Sustainable Self-Determination' (2012) 1(1) *Decolonization* 86; Jeff Corntassel and Mick Scow, 'Everyday Acts of Resurgence: Indigenous Approaches to Everydayness in Fatherhood' (2017) 19(2) *New Diversities* 55; Glen Coulthard, 'Place against Empire: Understanding Indigenous Anti-Colonialism' (2010) 4(2) *Affinities* 79; Suzanne von der Porten, Jeff Corntassel and Devi Mucina, 'Indigenous Nationhood and Herring Governance: Strategies for the Reassertion of Indigenous Authority and Inter-Indigenous Solidarity regarding Marine Resources' (2019) 15(1) *AlterNative* 62; Audra Simpson, 'On Ethnographic Refusal: Indigeneity, "Voice" and Colonial Citizenship' (2007) 9 *Junctures* 67.

[31] See, eg, *Coe (1978)* (n 17) 597 (Mason J); *Coe (1979)* (n 4) 129 (Gibbs J).

[32] Cf *Yorta Yorta* (n 3) 445–6 [49]–[50], 455 [82]–[84] (Gleeson CJ, Gummow and Hayne JJ).

[33] But see *Love* (n 1) 262 [297] (Gordon J).

[34] Martin (n 13) 29 (emphasis omitted).

[35] Ibid.

resulting in First Nations sovereignties being rendered invisible through a narrative of white possession.[36] This understanding of the logic of white possession is reflected in *Mabo* and the *Coe* cases. In these cases and their antecedents, Crown sovereignty was maintained not by truth, but by legal fiction, initially by the fiction of the doctrine of terra nullius and then subsequently by the fiction of the doctrine of tenure together with the act of state doctrine.[37] Common law doctrine has been criticised by Simpson for resolving one 'interpretative crisis' and creating another.[38] Similarly, Ambelin Kwaymullina has explained that the originating claim of colonisation was 'founded [on] the alleged inferiority of Indigenous peoples'.[39] This makes the denial of First Nations sovereignties, and the denial of First Australian humanity, 'one and the same'.[40] For Kwaymullina, it is impossible to respectfully engage with Aboriginal and Torres Strait Islanders without acknowledging their sovereignties.[41] This reflects not just an incongruity between fact and law, but is also demonstrative of a fundamental gap between knowledge and law arguably akin to being 'frozen in an age of' colonial knowledge domination, as opposed to 'racial discrimination'.[42] This 'fundamental truth'[43] about knowledge of the continuity of the world's longest surviving cultures underpins an anomaly in the common law's silence or refusal to acknowledge existing sovereignties prior to the assertion of Crown sovereignty.[44]

[36] Moreton-Robinson, 'Indigenous Sovereignty' (n 24) 87–8; Aileen Moreton-Robinson, *The White Possessive: Property, Power, and Indigenous Sovereignty* (University of Minnesota Press, 2015) xx–xxi.

[37] *Mabo* (n 3) 42, 45, 47, 58 (Brennan J), 212 (Toohey J); *Coe (1993)* (n 3) 199–200 (Mason CJ).

[38] Gerry Simpson, '*Mabo*, International Law, Terra Nullius and the Stories of Settlement: An Unresolved Jurisprudence' (1993) 19(1) *Melbourne University Law Review* 195, 197, 202, 205–6.

[39] Kwaymullina (n 19) 442.

[40] Ibid.

[41] Ibid.

[42] *Mabo* (n 3) 42 (Brennan J).

[43] *Love* (n 1) 314 [451] (Edelman J), quoting *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 167 (Blackburn J) ('*Milirrpum*').

[44] See, eg, the ambiguous status of First Nations sovereignties in *Yorta Yorta* (n 3) when the Court refers to the Crown's 'assertion of sovereignty': at 435 [17], 443–4 [43]–[46], 446–7 [54], 458 [94] (Gleeson CJ, Gummow and Hayne JJ).

B *Sovereignties Have Never Been Ceded*

Although Australian law assumes that there are no First Nations sovereignties to cede,[45] this is at odds with the lived experience, indeed truth, of the world's longest continuing cultures. Whether by negotiation,[46] petition,[47] direct political action,[48] or warfare,[49] First Nations have asserted their continuing connection with land and have never formally ceded their sovereignties to the Crown. Had cession occurred, local law would have continued to the extent it was not altered by or inconsistent with the terms of the new sovereignty.[50] Since 1788, Crown sovereignty has been imposed and maintained by both law and force.[51] Michael Mansell distinguishes between the 'existence' of First Nations sovereignties and the legal 'exercise of sovereign authority' by them.[52] This

[45] *Coe (1979)* (n 4) 129 (Gibbs J, Aickin J agreeing at 138); *Mabo* (n 3) 29, 36 (Brennan J).

[46] See, eg, 'Abduction Research', *Finding Bennelong* (Web Page, 2013) <http://findingbennelong.com/abduction-research>, archived at <https://perma.cc/S4CB-WFCS>.

[47] For example, in 1933, William Cooper, founder of the Australian Aborigines' League and Yorta Yorta leader, petitioned the King, and on 14 August 1963, the Yirrkala People presented their petition to the Commonwealth Parliament: 'Collaborating for Indigenous Rights 1957–1973', *National Museum of Australia* (Web Page) <https://www.nma.gov.au/explore/features/indigenous-rights/timeline>, archived at <https://perma.cc/87TH-M3QW>.

[48] See, for example, in 1924, when the Australian Aboriginal Progressive Association was formed: 'Formation of the AAPA', *National Museum of Australia* (Web Page, 6 March 2023) <https://www.nma.gov.au/defining-moments/resources/formation-of-the-aapa>, archived at <https://perma.cc/LR6S-HFTP>; and on 26 January 1972, when the Tent Embassy was established in Canberra: 'Aboriginal Tent Embassy', *National Museum of Australia* (Web Page, 14 March 2023) <https://www.nma.gov.au/defining-moments/resources/aboriginal-tent-embassy>, archived at <https://perma.cc/MDZ3-LJ7C>.

[49] See *Mabo* (n 3) 104 (Deane and Gaudron JJ). From 1792 until 1802, Aboriginal warrior Pemulwuy led resistance against Sydney colonists: 'Pemulwuy', *National Museum of Australia* (Web Page, 18 November 2022) <https://www.nma.gov.au/defining-moments/resources/pemulwuy>, archived at <https://perma.cc/C452-7KXJ>. In 1894, Bunuba man Jandamarra began a war of resistance against colonisers in the West Kimberley: see *Jandamarra's War: Documentary* (Web Page, 2011) <https://www.screenwest.com.au/film-in-wa/production/jandamarras-war/>, archived at <https://perma.cc/TY2C-HSZY>. See generally Dennis Foley, 'Leadership: The Quandary of Aboriginal Societies in Crises, 1788–1830, and 1966' in Ingereth Macfarlane and Mark Hannah (eds), *Transgressions: Critical Australian Indigenous Histories* (ANU E Press, 2007) 177.

[50] *Mabo* (n 3) 34–5 (Brennan J). See also below Part III(C).

[51] See Michael Mansell, 'Back to Basics: Aboriginal Sovereignty', *The Koori History Website* (Web Page, September 1998), archived at <https://web.archive.org/web/20160322092415/www.koori web.org/gst/sovereignty/back-to-basics.html> ('Back to Basics'); Morris, *A First Nations Voice* (n 9) 86. Cf *Mabo* (n 3) 68 (Brennan J): 'Aboriginal rights and interests were not stripped away by operation of the common law on first settlement by British colonists, but by the exercise of a sovereign authority over land exercised recurrently by Governments.'

[52] Michael Mansell, 'Finding the Foundation for a Treaty with the Indigenous Peoples of Australia' (2002) 4 *Balayi* 83, 87. See also Mansell, 'Back to Basics' (n 51).

distinction is shared by First Australians maintaining that their Nations' sovereignties continue to exist despite the lack of political or legal recognition.[53] The reason for this distinction goes much deeper than sovereignty in the Eurocentric, Western political sense, and is based on the relationship that First Australians have with Country. As Galarrwuy Yunupingu of the Gumatj clan said in 2008:

> The clans of east Arnhem Land join me in acknowledging no king, no queen, no church and no state. Our allegiance is to each other, to our land and to the ceremonies that define us. It is through the ceremonies that our lives are created. These ceremonies record and pass on the laws that give us ownership of the land and of the seas, and the rules by which we live.[54]

Other First Australians have argued that any potential constitutional recognition would not foreclose a claim for First Nations sovereignties because First Australians have never ceded their sovereignties to the Crown.[55] Constitutional recognition would merely confirm what already exists.[56] For Noel Pearson, it is 'misguided … to reduce the [I]ndigenous predicament in Australia to the banal idea of "closing the gap" on [I]ndigenous disadvantage' because there 'is something more fundamental at stake'.[57] Irene Watson has argued that sovereignty is an argument to open a 'space' for First Australians to have a greater part in politics and to renegotiate their place within the state.[58]

In 2017, the delegates at the First Nations National Constitutional Convention adopted the *Uluru Statement*, significant because it represented a united voice of First Australians, which was attached to the Referendum Council's *Final Report*.[59] The *Uluru Statement* recommends a declaration that

[53] See, eg, Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *Two Hundred Years Later: Report on the Feasibility of a Compact, or 'Makarrata' between the Commonwealth and Aboriginal People* (Parliamentary Paper No 107, 13 September 1983) 10 [2.6].

[54] Galarrwuy Yunupingu, 'Tradition, Truth and Tomorrow', *The Monthly* (online, 1 December 2008) <https://www.themonthly.com.au/issue/2008/december/1268179150/galarrwuy-yunupingu/tradition-truth-tomorrow>, archived at <https://perma.cc/E5GE-RZCE>.

[55] Megan Davis, 'Constitutional Recognition Does Not Foreclose on Aboriginal Sovereignty' (2012) 8(1) *Indigenous Law Bulletin* 12, 13–14.

[56] See ibid 14.

[57] Noel Pearson, 'A Rightful Place: Race, Recognition and a More Complete Commonwealth' (2014) 55 (September) *Quarterly Essay* 1, 5.

[58] Irene Watson, 'Settled and Unsettled Spaces: Are We Free To Roam?' in Aileen Moreton-Robinson (ed), *Sovereign Subjects: Indigenous Sovereignty Matters* (Routledge, 2020) 15, 31–2 ('Settled and Unsettled Spaces').

[59] Referendum Council (n 7) i.

> Aboriginal and Torres Strait Islander tribes … possessed [sovereignty] under our own laws and customs. … This sovereignty is a spiritual notion … It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown. … With substantive constitutional change and structural reform, we believe this ancient sovereignty can shine through as a fuller expression of Australia's nationhood.[60]

Thus, the Indigenous delegates and Referendum Council did not conceive of sovereignties as 'adverse to'[61] Crown sovereignty, but rather as 'spiritual notion[s]' and, having never been ceded, as being able to 'shine through' the law.[62] It follows that the reform the *Uluru Statement* envisions is not the assertion of First Nations sovereignties but rather the expression of them in the form of a constitutional amendment to provide for a Voice to Parliament and a legislative declaration to 'articulate a symbolic statement of recognition to unify Australians'.[63] The reforms are therefore conceived as an interaction between First Nations sovereignties and Australian law. In the same way, this article maintains the distinction between the potential common law recognition of First Nations sovereignties and *unceded* First Nations sovereignties.[64]

C *Heterogeneity*

First Nations sovereignties are not a singular Aboriginal sovereignty which was expressly rejected in the first *Coe* case and assumed in later cases.[65] They are heterogeneous, unique to the culture, the people, and the place.[66] For evidentiary purposes, the relevant traditions and laws must be determined in each place.[67] That First Nations sovereignties are heterogeneous and unique to each place is tacitly recognised by routine 'acknowledgement of Country' protocols

[60] *Uluru Statement* (n 5) (emphasis omitted).

[61] Cf *Coe (1993)* (n 3) 200 (Mason CJ).

[62] *Uluru Statement* (n 5).

[63] Referendum Council (n 7) 2.

[64] See Davis and Williams (n 9) 181–4. Davis and Williams refer to a 'handful of delegates' who left the Convention at Uluru because they felt that constitutional recognition would detract from First Nations sovereignties, unlike treaties: at 144. See also Morris, 'False Equality' (n 9) 235–6.

[65] *Coe (1978)* (n 17) 595–6 (Mason J). See also below Part III(A).

[66] Watson, 'Settled and Unsettled Spaces' (n 58) 15. See also Noel Pearson, 'Reconciliation' (2001) 5(11) *Indigenous Law Bulletin* 24, 25–6.

[67] *Milirrpum* (n 43) 167, 179–80, 267 (Blackburn J), cited in *Mabo* (n 3) 186 (Toohey J).

practised extensively throughout Australia by all levels of government, business, and community.[68]

Noonuccal Quandamoopah woman, Karen Lillian Martin, illustrates the differences between First Australian sovereignties.[69] In 2000, Martin undertook research as an 'Outsider' in Rainforest Country in North Queensland and, in doing so, developed protocols for the proper way for an outsider to engage with People and Country.[70] Her research has fundamentally changed the conduct of knowledge construction.[71] Although Martin is a First Australian, she is also a saltwater woman observing different law, values, beliefs and assumptions to a person from Rainforest Country.[72] Thus, Martin's work speaks to protocols grounded in the fundamental differences from Country to Country and the respect for 'Ways of Knowing, Ways of Being and Ways of Doing' that coming onto Country necessarily entails.[73] In each Nation, these vary[74] and this exhorts the heterogeneity and uniqueness of each First Nations' law and sovereignty according to place.

Tent embassies also illustrate the heterogeneous nature of First Nations sovereignties. Between 1972 and 2013, eleven separate Nations declared their sovereignty through the act of establishing an embassy.[75] Each embassy had its own unique values.[76] Examples of tent embassies are the Wiradjuri Sovereign

[68] See, eg, Queensland Law Society, 'Country Protocols Guide' (Guide, September 2022) <https://www.qls.com.au/Content-Collections/Protocols/Country-Protocols-Guide>, archived at <https://perma.cc/6R7L-TYX9>; Griffith University, 'Welcome to Country and Acknowledgement of Country Policy' (Policy Document, April 2015) <http://policies.griffith.edu.au/pdf/Welcome to Country and Acknowledgement of Country Policy.pdf>, archived at <https://perma.cc/FQ7X-2NGM>; 'Welcome to Country and Acknowledgement of Traditional Owners', *Victorian Government* (Web Page, 6 October 2021) <https://www.firstpeoplesrelations.vic.gov.au/welcome-country-and-acknowledgement-traditional-owners>, archived at <https://perma.cc/EJ57-MH26>; 'Address to the Indigenous Welcome to Country', *Department of Foreign Affairs and Trade* (Web Page) <https://dfat.gov.au/people-to-people/public-diplomacy/programs-activities/Pages/address-to-the-indigenous-welcome-to-country>, archived at <https://perma.cc/9WPL-YF7Y>.

[69] Martin (n 13) 19–20.

[70] Ibid 32–3.

[71] See also Dennis Foley, 'Book Review: *Please Knock before You Enter: Aboriginal Regulation of Outsiders and the Implications for Researchers* by Karen Lillian Martin' (2009) 38 (Supp) *Australian Journal of Indigenous Education* 110, 110–11.

[72] See Martin (n 13) 32, 70.

[73] Ibid 138. See also at 145.

[74] See ibid 138.

[75] Alessandro Pelizzon, 'Aboriginal Sovereignty Claims: Contemporary Voices in Australia' (2014) 4(4) *Settler Colonial Studies* 368, 369–70.

[76] See ibid 370–1.

Embassy established in 2012 by the Wiradjuri People,[77] and the Murrawarri Republic which claims independence for its People.[78] The Murrawarri claim to independence is instructive because they conceive their independence as consisting of a bundle of rights including the right to self-governance, the right to manage their Country and the right to a nationality.[79] In 2012, the Gugada Original Sovereign Tribal Federation announced their embassy in an act expressing that sovereignty has never been ceded.[80]

This heterogeneity is also reflected in Norman Tindale's 1974 map[81] and the 1996 David Horton map published by the Australian Institute of Aboriginal and Torres Strait Islander Studies ('AIATSIS').[82] Although the 1996 map is itself a colonial construct, it indicates that there were over 250 culturally and linguistically distinct First Australian groups prior to colonisation.[83] It follows that because First Australians have never ceded their sovereignties, and because there are substantial differences between Nations, the sovereignty of First Australians can be located at the level of the Nation, the clan or, in theory, the individual. Indeed, Brennan J recognised this attribute of native title in *Mabo*, referring to the interests in land as being 'communal, group or individual'.[84]

[77] Les Coe, 'Wiradjuri Sovereign Embassy: The Way Forward', *Sovereign Union: First Nations Asserting Sovereignty* (Web Page) <http://nationalunitygovernment.org/node/163>, archived at <https://perma.cc/DJ4H-SYL3>.

[78] 'Why Have We Claimed Continued Independence and Statehood?', *Murrawarri Republic* (Web Page) <http://kyliegibbon4.wixsite.com/murrawarri-republic/page-2>, archived at <https://perma.cc/GEX8-ZAKF>.

[79] Ibid.

[80] 'Gugada Sovereign Embassy in Port Augusta SA', *Sovereign Union: First Nations Asserting Sovereignty* (Web Page, 15 August 2012) <http://nationalunitygovernment.org/content/gugada-sovereign-embassy-port-augusta-sa>, archived at <https://perma.cc/DDA5-84RU>.

[81] See generally Norman B Tindale, *Aboriginal Tribes of Australia: Their Terrain, Environmental Controls, Distribution, Limits, and Proper Names* (Australian National University Press, 1974).

[82] 'Map of Indigenous Australia', *AIATSIS* (Web Page, 11 October 2022) <https://aiatsis.gov.au/explore/map-indigenous-australia>, archived at <https://perma.cc/97VK-79RM>.

[83] According to AIATSIS,

> [the] map attempts to represent the language, social or nation groups of Aboriginal Australia. It shows only the general locations of larger groupings of people which may include clans, dialects or individual languages in a group. It used published resources from the eighteenth century–1994 and is not intended to be exact, nor the boundaries fixed. It is not suitable for native title or other land claims.

Ibid.

[84] *Mabo* (n 3) 57.

D *First Nations Sovereignties and Land*

Based on contemporary knowledge of First Nations sovereignties,[85] limiting the common law recognition of First Australian sovereignties to title to land is reductionist.[86] Native title presumes a deep spiritual connection between First Australians and Country only to sever First Nations sovereignties from this form of title to land. First Nations sovereignties are much more complex. In this respect, each Nation and Peoples has a unique sense

> of knowing who I am, where I come from and how I am related to the Ancestors, Creators and all Entities.
>
> The core conditions of Ways of Knowing are to know, as fully as it is possible, 'who your People are'; 'where your Country is' and 'how you are related to the Entities'.[87]

This ontology is expressed in the *Uluru Statement* in a frequently cited passage,[88] and has also received judicial attention in both *Mabo*[89] and *Love*.[90] The relevant passage in the *Uluru Statement* speaks of a spiritual sovereignty based on the link existing since time immemorial between Aboriginal and Torres Strait Islander Peoples and Country:

> Our Aboriginal and Torres Strait Islander tribes were the first sovereign Nations of the Australian continent and its adjacent islands, and possessed it under our own laws and customs. This our ancestors did, according to the reckoning of our culture, from the Creation, according to the common law from 'time immemorial', and according to science more than 60,000 years ago.
>
> This sovereignty is a spiritual notion: the ancestral tie between the land, or 'mother nature', and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be

[85] And to a certain extent, the majority judgments in *Love* (n 1). See especially at 262 [298] (Gordon J).

[86] According to Gordon J, '[i]t would fly in the face of decisions of this Court that recognise that connection and give it legal consequences befitting its significance': ibid 262 [298].

[87] Martin (n 13) 72 (emphasis omitted).

[88] See, eg, Davis and Williams (n 9) 183–4; Morris, '*Love* in the High Court' (n 11) 426–7; Morris, 'False Equality' (n 9) 235; Noel Pearson, 'A Rightful Place' in Shireen Morris (ed), *A Rightful Place: A Road Map to Recognition* (Black, 2017) 5, 98–9.

[89] See *Mabo* (n 3) 41 (Brennan J), quoting *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12, 85–6 (Vice-President Ammoun) ('*Western Sahara*').

[90] See *Love* (n 1) 189 [71] (Bell J), 256–7 [276], [278] (Nettle J), 260–1 [289]–[290], 280–1 [363]–[365] (Gordon J), 320 [466] (Edelman J).

> united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty.[91]

The normative significance of the italicised passage was drawn upon by Brennan J in *Mabo* to overturn the fiction of terra nullius.[92] There, Brennan J quoted Vice-President Ammoun in the 1975 *Western Sahara* advisory opinion, who 'commended as penetrating the views expressed on behalf of the Republic of Zaire' by Mr Bayona-Ba-Meya.[93] Vice-President Ammoun explained:

> Mr Bayona-Ba-Meya goes on to dismiss the materialistic concept of terra nullius, which led to this dismemberment of Africa following the Berlin Conference of 1885. Mr Bayona-Ba-Meya substitutes for this a spiritual notion: the ancestral tie between the land, or 'mother nature', and the man who was born therefrom, remains attached thereto, and must one day return thither to be united with his ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty.[94]

In *Love*, Edelman J located Parliament's constitutional power to legislate the concept of an alien within the common law, remarking:

> The metaphysical ties between that child and the Australian polity, by birth on Australian land and parentage, are such that the child is a non-alien, whether or not they are a statutory citizen. The same must also be true of an Aboriginal child whose genealogy and identity includes a spiritual connection forged over tens of thousands of years between person and Australian land, or 'mother nature' …[95]

In other words, the traditions and customs referenced to support a native title claim, or the ancestral tie between First Nations people and the land as explained in *Love*, are a fragment of a connected whole that constitutes sovereign knowledge and, hence, First Nations sovereignties. Accordingly, to carve the legal concept of 'native title' out of First Nations sovereignties traps the common law in the racially based colonial epoch in which that concept was conceived. To paraphrase Brennan J in *Mabo*, we submit that the common law would 'perpetuate injustice'[96] if it were to continue to limit the recognition

[91] *Uluru Statement* (n 5) (emphasis in original).

[92] *Mabo* (n 3) 41–2.

[93] Ibid 41.

[94] *Western Sahara* (n 89) 85–6 (Vice-President Ammoun), quoted in ibid 41.

[95] *Love* (n 1) 320 [466], citing *Western Sahara* (n 89) 85 (Vice-President Ammoun), *Mabo* (n 3) 41 (Brennan J).

[96] *Mabo* (n 3) 58 (Brennan J).

of First Australian sovereignties to title to land, as opposed to extending recognition to other land-related rights.

E *Native Title and Other Land-Related Rights*

For the purpose of this article, we contend that the relevant right that may be recognised by the common law is a right of self-government to protect traditional authority. That is, a right of organisation in relation to land. Recognition of such a right is consistent not only with an understanding of First Australian sovereignties as being inextricably connected to the land, but also with the understanding of sovereignty as an argument for a space for deeper engagement within the state.[97] We submit that such a right moves closer to the literature of First Australians concerning their sovereignties because it sets up native title as but one example of ways in which First Nations sovereignties can interact with the common law concept, rather than as a basic truth of the lived history of First Australians. Moreover, it starts to address an anomaly between recognising native title according to continuing traditions and laws, and the disregard of those traditions and laws otherwise.[98]

As Gordon J observed, native title, which was only recognised in 1992, was a 'significant acknowledgement of the position of Indigenous peoples that took place long after Federation'.[99] Her Honour added that the traditional law underpinning native title is not limited to rights and interests in land and waters.[100] Consequently, it is 'wrong to see the connection to land and waters through the eyes of the common lawyer as a *one-way* connection'.[101] It is, rather, a connection

[97] See generally Watson, 'Settled and Unsettled Spaces' (n 58) 15, 31.

[98] In *Mabo* (n 3), Brennan J stated that '[t]he common law can, by reference to the traditional laws and customs of an indigenous people, identify and protect the native rights and interests to which they give rise': at 60.

[99] *Love* (n 1) 280 [362].

[100] Ibid.

[101] Ibid 274 [341] (emphasis in original), citing *Commonwealth v Yarmirr* (2001) 208 CLR 1, 37–9 [11]–[16] (Gleeson CJ, Gaudron, Gummow and Hayne JJ) ('*Yarmirr*'), *Western Australia v Ward* (2002) 213 CLR 1, 64–5 [14], 93 [88], [90] (Gleeson CJ, Gaudron, Gummow and Hayne JJ) ('*Ward*'), *Northern Territory v Griffiths* (2019) 269 CLR 1, 85–6 [153] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ) ('*Griffiths*').

> where the land 'owns' the people and the people are responsible for the land; a two-way connection rather than the one-way connection common lawyers identify as rights *with respect to* or *over* an article of property.[102]

For Gordon J, 'the tendency to think only in terms of native title rights and interests must be curbed'.[103] Justice Edelman expressed a similar view:

> [U]nderlying that particular connection is the general spiritual and cultural connection that Aboriginal people have had with the land of Australia for tens of thousands of years. In other words, underlying a connection to any particular land is a general, 'fundamental truth … an unquestioned scheme of things in which the spirit ancestors, the people of the clan, particular land and everything that exists on and in it, are organic parts of one indissoluble whole'. … Those connections are inextricably part of Aboriginal identity as members of the broader community of the first people of the Australian land generally.[104]

He rejected the proposition that to recognise rights beyond native title would be to create two classes of Australian citizens.[105] Instead, for Edelman J, equality before the law means that it is necessary to 'recognise that community is based upon difference',[106] and that the Australian political community is based on recognition of 'each other's difference'.[107] Because

> then and only then is there a common world as the foundation of a community between us … For one of us to impose their view on the other … is a denial of respect for the other, and therefore a denial of our community.[108]

Finally, such a right is consistent with the right recognised by Australia by way of the *United Nations Declaration on the Rights of Indigenous Peoples* that

[102] *Love* (n 1) 274 [341] (Gordon J) (emphasis in original) (citations omitted), citing Larissa Behrendt and Loretta Kelly, *Resolving Indigenous Disputes: Land Conflict and Beyond* (Federation Press, 2008) 89, Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2015) 31.

[103] *Love* (n 1) 281 [363].

[104] Ibid 314 [451] (citations omitted), quoting *Milirrpum* (n 43) 167 (Blackburn J) and citing *Gerhardy v Brown* (1985) 159 CLR 70, 149 (Deane J), *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327, 356–7 (Brennan J), *Ward* (n 101) 64 [14] (Gleeson CJ, Gaudron, Gummow and Hayne JJ), *Griffiths* (n 101) 85–6 [153] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

[105] *Love* (n 1) 315–16 [453]–[454].

[106] Ibid 315 [453].

[107] Ibid, quoting MJ Detmold, 'Law and Difference: Reflections on Mabo's Case' in *Essays on the Mabo Decision* (Law Book, 1993) 39, 39.

[108] *Love* (n 1) 315 [453] (Edelman J), quoting Detmold (n 107) 39.

'Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions'.[109]

III The Common Law and Sovereignty

Any argument for other land-related rights is subject to the settled principles of law for the purposes of recognition. A successful argument must not conflict with the High Court's concept of 'Aboriginal sovereignty' and must be made in accordance with established principles. This part summarises the High Court's definition of Aboriginal sovereignty. It then proposes that there are three alternative sources to locate other land-related rights: as presupposed by native title; via the preferable rule identified in *Mabo*; or via the connection to land as identified in *Love*.

A *The High Court's Definition of Aboriginal Sovereignty*

The common law's definition of Aboriginal sovereignty, or, in other words, the rejection of Aboriginal sovereignty, can be succinctly stated.[110] First, the High Court has held that, following annexation of the Australian landmass by the Crown, only the Crown carries the power to create and to extinguish private rights and interests in land.[111] Native title interests are subordinate to this power.[112] Second, as stated by Mason CJ in *Coe*, Aboriginal people do not enjoy a

> limited kind of sovereignty embraced in the notion that they are 'a domestic dependent nation' entitled to self-government and full rights (save the right of alienation) or that as a free and independent people they are entitled to any rights and interests other than those created or recognised by the laws of the Commonwealth, the state of New South Wales and the common law.[113]

[109] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) annex, art 33(1) ('*Declaration on the Rights of Indigenous Peoples*').

[110] See, eg, *Love* (n 1) 177 [25] (Kiefel CJ), citing *Mabo* (n 3) 57–60 (Brennan J), *Coe (1993)* (n 3) 200 (Mason CJ), *Yorta Yorta* (n 3) 443–4 [44] (Gleeson CJ, Gummow and Hayne JJ).

[111] *Mabo* (n 3) 63, 69–70 (Brennan J)

[112] Ibid 63.

[113] *Coe (1993)* (n 3) 200.

Finally, the assertion of Crown sovereignty meant that thereafter there could be 'no parallel law-making system' in Australia.[114] This means that only rights and interests that find their origin in pre-sovereignty law and custom will be recognised by the Crown.[115] The remainder of this part considers the three possible sources for other land-related rights. We argue that these sources are not only consistent with the High Court's rejection of 'Aboriginal sovereignty' but in fact rely on the judgments and principles said to reject it.

B *Other Land Rights as Presupposed by Native Title*

'Native title is not regarded as a creation of the common law'.[116] The majority in *Mabo* conceived of native title as a title ('whether proprietary or personal and usufructuary in nature')[117] which survived colonisation and derives from the law and custom of Aboriginal and Torres Strait Islanders under their own legal systems which existed prior to the assertion of sovereignty.[118] That is to say, '[n]ative title has its origin in the traditional laws acknowledged and the customs observed by the [I]ndigenous people who possess the native title'.[119] Although recognised by the common law, native title is neither an institution of the common law nor a form of common law tenure;[120] it is, according to the majority in *Members of the Yorta Yorta Aboriginal Community v Victoria* ('*Yorta Yorta*'), an intersection of traditional laws and customs with the common law.[121]

The *Native Title Act 1993* (Cth) ('*Native Title Act*') does not alter the position at common law. Section 3(a) of the *Native Title Act* states that one of the Act's main objects is 'to provide for the recognition and protection of native title'.

114 *Yorta Yorta* (n 3) 444 [44] (Gleeson CJ, Gummow and Hayne JJ). See also at 443 [43] (emphasis in original):

> Upon the Crown acquiring sovereignty, the normative or law-making system which then existed could not thereafter validly create new rights, duties or interests. Rights or interests in land created after sovereignty and which owed their origin and continued existence *only* to a normative system other than that of the new sovereign power, would not and will not be given effect by the legal order of the new sovereign.

115 Ibid 443–4 [44].

116 *Love* (n 1) 179 [34] (Kiefel CJ).

117 *Mabo* (n 3) 61 (Brennan J).

118 Ibid 58–63 (Brennan J, Mason CJ and McHugh J agreeing at 15), 100 (Deane and Gaudron JJ), 184 (Toohey J). See also *Yorta Yorta* (n 3) 440–1 [33]–[35] (Gleeson CJ, Gummow and Hayne JJ).

119 *Yorta Yorta* (n 3) 439–40 [31] (Gleeson CJ, Gummow and Hayne JJ), quoting *Fejo v Northern Territory* (1998) 195 CLR 96, 128 [46] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) ('*Fejo*').

120 *Mabo* (n 3) 59, 61 (Brennan J).

121 *Yorta Yorta* (n 3) 440–3 [38]–[42] (Gleeson CJ, Gummow and Hayne JJ).

That is, the Act deals with rights and interests in relation to land or waters which are rights and interests finding their origin in traditional law and custom, and not some other species of rights and interests created by the Act.[122] Accordingly, for the purpose of both the Act and the common law,

> '[n]ative title' means certain rights and interests of [I]ndigenous peoples. Those rights and interests may be communal, group or individual rights and interests, but they must be 'in relation to' land or waters.[123]

In *Yorta Yorta*, Gleeson CJ, Gummow and Hayne JJ stated that native title rights and interests 'must have three characteristics'.[124] The first is that they must be 'possessed under the traditional laws acknowledged and the traditional customs observed by' the claimants.[125] 'That is, they must find their source in traditional law and custom, not in the common law.'[126] The second is that 'the rights and interests must have the characteristic' that the claimant group has '"a connection with" the land or waters'.[127] Finally, 'the rights and interests in relation to land must be "recognised" by the common law of Australia'.[128]

Kent McNeil has pointed out that Aboriginal title has 'jurisdictional dimensions'.[129] McNeil explains that in *Delgamuukw v British Columbia*, Lamer CJ observed that 'Aboriginal title cannot be held by individual [A]boriginal persons; it is a collective right to land held by all members of an [A]boriginal nation. Decisions with respect to that land are also made by that community'.[130] The salience of this is that

> where title is held communally by an Aboriginal group that has decision-making authority, there must be a political structure for exercising that authority. In other words, communal title and decision-making authority necessitate self-government, at least in relation to Aboriginal title land.[131]

122 *Native Title Act 1993* (Cth) s 223(1); ibid 453–4 [76]–[77].

123 *Yorta Yorta* (n 3) 440 [33] (Gleeson CJ, Gummow and Hayne JJ).

124 Ibid.

125 Ibid.

126 Ibid (citations omitted).

127 Ibid 440 [34].

128 Ibid 440 [35].

129 Kent McNeil, 'Judicial Treatment of Indigenous Land Rights in the Common Law World' in Benjamin J Richardson, Shin Imai and Kent McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009) 257, 267 ('Judicial Treatment').

130 [1997] 3 SCR 1010, 1082–3 [115] (Lamer CJ for Lamer CJ, Cory and Major JJ), quoted in ibid.

131 McNeil, 'Judicial Treatment' (n 129) 268, citing *Campbell v A-G (British Columbia)* (2000) 79 BCLR (3d) 122, 151–2 [137]–[143] (Williamson J) (Supreme Court of British Columbia).

The basic argument for this source may be stated this way. First Australians have a different understanding of the connection to land and rights to property that does not correspond with rights and interests in land familiar to the Anglo-Australian property lawyer.[132] Native title rights and interests are sui generis[133] and

> owe … their origin to a normative system other than the legal system of the new sovereign power; they owe … their origin to the traditional laws acknowledged and the traditional customs observed by the [I]ndigenous peoples concerned.[134]

Therefore, supposing that the normative system conceived of a wider view of the relationship to land than that presently afforded by the narrower concept of native title, it follows that native title may encompass wider rights and interests that more closely reflect the connection to land that native title owes its origin to. This has been described by Mark Walters as 'native law and government' and can be located in imperial common law doctrine as opposed to received common law doctrines.[135]

An obvious criticism of this source is that a right to self-government to protect traditional authority cannot be properly considered 'in relation to' lands and waters. Yet, for reasons identified elsewhere in this article, First Australian views are not so limited.[136] Also, the High Court has accepted that 'a less demanding and more flexible approach' to rights arising from land is preferable to an approach requiring strict adherence to proprietary rights based on 'a degree of conformity with the social and legal mores of England or Europe'.[137] In particular, Brennan J specified that native title claimants would need to be ascertained 'by the elders or other persons enjoying traditional authority among those people'.[138] With respect to native title, it has been said that

> who has the necessary and sufficient connection with land or waters can be determined *only* in accordance with, and by reference to, traditional laws and customs.[139]

[132] *Yorta Yorta* (n 3) 442 [40] (Gleeson CJ, Gummow and Hayne JJ).

[133] Ibid 491 [180] (Callinan J), citing *Mabo* (n 3) 89 (Deane and Gaudron JJ), 133 (Dawson J).

[134] *Yorta Yorta* (n 3) 441 [37] (Gleeson CJ, Gummow and Hayne JJ).

[135] Walters (n 15) 18. See generally at 18–24, 312–14.

[136] See above Part II(B).

[137] *Mabo* (n 3) 84 (Deane and Gaudron JJ). See also at 83–5.

[138] Ibid 70.

[139] *Love* (n 1) 273 [339] (Gordon J) (emphasis in original) (citations omitted), citing *Fejo* (n 119) 128 [46] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ), *Yarmirr* (n 101)

Similarly, we argue that because native title is not a creature of the common law, the precise meaning of 'in relation to land' should properly be determined in accordance with and by reference to traditional laws and customs. Since First Nations' traditional laws and customs conceive 'native title' as a fragment of a more connected whole,[140] it follows that native title, which owes its origin to traditional laws and customs, necessarily implies the existence of other land-related rights which may be determined in accordance with traditional laws and customs.

C *Via the 'Preferable Rule' in* Mabo

Mabo addressed the specific issue pleaded in that case: the legal rights of the members of the Meriam people to native title to the land of the Murray Islands.[141] While it considered the consequences of the Crown's acquisition of sovereignty, it was not concerned with what, if any, other land-related rights may have endured in Australia's First Peoples beyond native title. Accordingly, we contend that an alternative source for other land-related rights is via the same mechanism by which the High Court said that native title survived the Crown's assertion of sovereignty, namely the 'preferable rule' as stated by Brennan J.[142]

According to international law, at the time of the British assertion of sovereignty, the three modes of acquisition were 'conquest, cession, and occupation of territory that was terra nullius'.[143] Under conquest and cession, the local laws and rights of the original inhabitants could continue until those laws were altered by the new sovereign.[144] Australia, however, was said to have been acquired via settlement.[145] Under settlement, the original law and custom of the inhabitants did not survive the Crown's assertion of sovereignty because 'there was no sovereign law-maker in the territory'.[146] Until *Mabo*, it was understood that the common law allowed an inhabited territory to be acquired via settlement when it was inhabited the 'wrong way' by 'backward peoples'.[147] The

37 [9], 51 [48]–[49] (Gleeson CJ, Gaudron, Gummow and Hayne JJ), *Yorta Yorta* (n 3) 441–7 [37]–[56] (Gleeson CJ, Gummow and Hayne JJ).

140 See above Part II(B).

141 *Mabo* (n 3) 17 (Brennan J).

142 Ibid 57.

143 Ibid 32.

144 Ibid 35.

145 See ibid 36.

146 Ibid 58.

147 Ibid 32.

reason for this is what Brennan J called the 'enlarged notion of terra nullius'.[148] The Court rejected the enlarged notion of terra nullius as wrong in fact, discriminatory and, after the *Western Sahara* case, out of step with international law.[149] In doing so, the Court was able to recognise that native title rights and interests in land survived the acquisition of sovereignty, and that these derive their content from traditional laws and customs recognised as being in existence at the change of sovereignty.[150]

For Brennan J, with whom Mason CJ and McHugh J concurred, the mechanism or the 'preferable rule' by which native title rights endured the change of sovereignty equated the rights of 'indigenous inhabitants of a settled colony with the inhabitants of a conquered colony in respect of their rights and interests in land'.[151] However, despite this majority view, we acknowledge, as Ulla Secher has, that 'there were three different approaches' in *Mabo* concerning the effect of Crown sovereignty.[152] Secher wrote that

> Deane, Gaudron and Toohey JJ applied the doctrine of continuity as articulated by Slattery and adopted by McNeil, whereas Justice Brennan's reasoning, which was adopted by Mason CJ and McHugh J, involved elements of both the doctrine of continuity and the recognition doctrine.[153]

Accordingly, for Brennan J, the 'preferable rule' has two limbs: the continuity limb and the recognition limb.[154] Under the continuity limb, 'there is a presumption that pre-existing rights survive a change in sovereignty', and under the recognition limb, 'the sovereign has power unilaterally to extinguish these surviving pre-existing rights'.[155] The point for Secher is that, by combining the previously separate continuity and recognition doctrines, Brennan J effectively recognised 'a new class of … colony at common law': 'inhabited settled territories'.[156] And, for present purposes, in inhabited settled territories, the fused doctrines of continuity and reception apply only to land rights, with 'other legal rights being immediately subjected to English law (as per the conventional doctrine of reception)'.[157] Similarly, according to Secher, Toohey J assumed the

148 Ibid 36, 40, 58.

149 Ibid 41–2 (Brennan J), 109 (Deane and Gaudron JJ).

150 Ibid 69–70 (Brennan J, Mason CJ and McHugh J agreeing at 15).

151 Ibid 57.

152 Secher, 'The Reception of Land Law' (n 15) 714.

153 Ibid 711–12 (citations omitted). See generally above n 15.

154 Secher, 'The Reception of Land Law' (n 15) 712.

155 Ibid 721.

156 Ibid 719.

157 Ibid 727.

doctrine of reception was 'inapplicable to the Australian situation' because it was clear that it was not uninhabited and, therefore, 'the doctrine of continuity applied automatically to protect native rights to land'.[158] By contrast, for Deane and Gaudron JJ,

> the principle that only so much of the common law was introduced as was 'reasonably applicable to the circumstances of the Colony', 'left room for the continued operation of some local laws or customs among the native people and even the incorporation of some of those laws and customs as part of the common law'.[159]

Acknowledging the three different approaches identified by Secher, we contend that the *Mabo* decision does not pose a barrier to the possibility that other land-related rights survived the change in sovereignty in the same way that native title has survived the change in sovereignty. Justice Brennan explained the 'preferable rule' this way:

> The preferable rule equates the indigenous inhabitants of a settled colony with the inhabitants of a conquered colony in respect of their rights and interests in land and recognizes in the indigenous inhabitants of a settled colony the rights and interests recognized by the Privy Council in *In re Southern Rhodesia* as surviving to the benefit of the residents of a conquered colony.[160]

In *Re Southern Rhodesia*, Lord Sumner highlighted the difficulty of determining exactly what sort of rights might endure a change of sovereignty and the 'inherent' difficulty in estimating the rights of Aboriginal tribes.[161] Thus, Deane and Gaudron JJ said in *Mabo*:

> The judgments in past cases contain a wide variety of views about the kinds of pre-existing native interests in land which are assumed to have been fully respected under the common law applicable to a new British Colony. In some cases, a narrow and somewhat rigid approach was taken.[162]

Their Honours identified the approach in *Re Southern Rhodesia* as narrow because the Privy Council spoke of protecting rights in land

> only if they 'belonged to the category of rights of private property' and were the product of a 'social organization' whose 'usages and conceptions of rights and

[158] Ibid 716.

[159] Ibid 715 (citations omitted), quoting *Mabo* (n 3) 79 (Deane and Gaudron JJ).

[160] *Mabo* (n 3) 57.

[161] [1919] AC 211, 233–4 (Lord Sumner for the Court) ('*Re Southern Rhodesia*').

[162] *Mabo* (n 3) 83.

> duties' were able 'to be reconciled with the institutions or the legal ideas of civilized society'.[163]

However, Deane and Gaudron JJ also noted that

> their Lordships went on to make clear that those requirements could be satisfied in the case of rights claimed by 'indigenous peoples whose legal conceptions' were differently developed from those recognized by the common law.[164]

Justices Deane and Gaudron ultimately preferred the 'clear support in other judgments … for a less demanding and more flexible approach'.[165] For Toohey J, relying on the doctrine of continuity:

> The content of the interests protected is that which already exists traditionally; the substance of the interests is irrelevant to the threshold question. Moreover, it would defeat the purpose of recognition and protection if only those existing rights and duties which were the same as, or which approximated to, those under English law could comprise traditional title; such a criterion is irrelevant to the purpose of protection.[166]

While Toohey J was referring to the threshold question of the existence of native title, his Honour also pointed out that the content of that title is not to be determined by narrow forms associated with private property rights.[167] A defining feature of private property is that estates are alienable.[168] As the foregoing has established, native title cannot be equated with private property for the purposes of the 'preferable rule' regardless of which of the three versions of it from *Mabo* is applied. Also, in *Oyekan v Adele*, Lord Denning held that courts should not look at what rights the Aboriginal people might have retained, but rather at the conduct of the Crown to see if the Crown has extinguished rights.[169] This is consistent with the doctrine of recognition applied as one of the two limbs of Brennan J's 'preferable rule', and the

163 Ibid, quoting *Re Southern Rhodesia* (n 161) 233 (Lord Sumner for the Court).

164 *Mabo* (n 3) 83 (citations omitted), quoting *Re Southern Rhodesia* (n 161) 234 (Lord Sumner for the Court).

165 *Mabo* (n 3) 84.

166 Ibid 187.

167 Ibid.

168 Brendan Edgeworth, *Butt's Land Law*, ed Lara Weeks and Merilyn Shields (Thomson Reuters, 7th ed, 2017) 15–16, 38; William C Sprague, *Blackstone's Commentaries: Abridged* (Callaghan and Company, 9th ed, 1915) 203–7. 'By the common law any man might dispose of his lands to any other private man at his own discretion, especially when the feodal restraints of alienation were worn away': at 198.

169 [1957] 1 WLR 876, 880 (Lord Denning for the Court), quoted in *Mabo* (n 3) 56 (Brennan J).

approaches taken by the other judges in holding that native title survived a change in sovereignty by implication. Accordingly, the key proposition for the purpose of recognition of rights is whether the Crown has acted inconsistently with them or has extinguished them.

As the High Court pointed out in *Love*, the tripartite test involves traditional authority so that mutual recognition can be proven.[170] Although the Crown does not necessarily defer to the exercise of that authority, the recognition of the authority itself is inconsistent with the Crown having extinguished a right to self-government to protect traditional authority. Assuming that a society, via its observance of traditional laws and customs, has continued and its connection to traditional territory has been maintained, then we contend that a right to self-government to protect traditional authority has also continued, in the sense of not having been extinguished. Stated another way, the proposition that a right to self-government also survives the change in sovereignty is not inconsistent with the 'preferable rule' in *Mabo*. Accordingly, the 'preferable rule' may therefore provide a source for other land-related rights.

D *Via the Connection to Land as Identified in* Love

In *Love*, the majority ruled that Aboriginal Australians are not within the reach of the 'aliens' power and therefore cannot be aliens for the purposes of s 51(xix) of the *Constitution*.[171] We submit that the significance of *Love* is that the majority recognised the 'fundamental truth'[172] or the 'deeper truth'[173] that First Nations' connection to, and occupation of, the land is anterior to native title. On this basis, it is arguable that the majority's reasoning, although slightly different, may support an alternative argument for other land-related rights.

Justice Bell emphasised the 'contemporary international understanding' that Indigenous peoples have a 'distinctive connection' with traditional lands as grounding the decision that First Australians cannot be considered aliens under the *Constitution*.[174] For Bell J,

[170] *Love* (n 1) 261 [291], 281 [366] (Gordon J), 317 [458] (Edelman J); *Mabo* (n 3) 70 (Brennan J).

[171] *Love* (n 1) 192 [81]. The majority comprised Bell J, Nettle J, Gordon J and Edelman J, while Kiefel CJ, Gageler J and Keane J were in dissent.

[172] Ibid 314 [451] (Edelman J).

[173] Ibid 260 [289], 274 [340] (Gordon J).

[174] Ibid 190 [73] (Bell J), citing *Declaration on the Rights of Indigenous Peoples* (n 109), *R v Van der Peet* [1996] 2 SCR 507, 534–5 [17]–[19], 538–9 [30] (Lamer CJ for Lamer CJ, La Forest, Sopinka, Gonthier, Cory, Iacobucci and Major JJ).

> the amplitude of the power conferred by s 51(xix) … [did] not extend to treating an Aboriginal Australian as an alien because, despite the circumstance of birth in another country, an Aboriginal Australian cannot be said to belong to another place.[175]

Consequently, it would be incongruous to have

> recognition by the common law of Australia of the unique connection between Aboriginal Australians and their traditional lands, with [a] finding that an Aboriginal Australian can be described as an alien within the ordinary meaning of that word.[176]

Taking a wider view, Edelman J's finding was grounded in First Australians' connection to the Australian landmass generally. Justice Edelman pointed out the need for congruence between law and fact to recognise the 'sense of identity that ties Aboriginal people to Australia' and which predates the Crown's assertion of sovereignty.[177] Unlike the word 'citizenship', whose meaning can be changed by legislation, the words 'Aboriginal' and 'Indigenous' represent an underlying 'fundamental truth' that 'cannot be altered or deemed not to exist by legislation'.[178]

Similarly, Gordon J emphasised the connection to the landmass generally. According to Gordon J:

> The fundamental premise from which the decision in *Mabo v Queensland [No 2]* proceeds — the deeper truth — is that the Indigenous peoples of Australia are the first peoples of this country, and the connection between the Indigenous peoples of Australia and the land and waters that now make up the territory of Australia was not severed or extinguished by European 'settlement'.[179]

Justice Gordon observed that '[s]ettlement and Crown radical title did not extinguish that connection, one legal consequence of the connection being recognised by native title'.[180] Her Honour added that this connection with land gives rise to 'rights and duties' which are 'determined by Indigenous laws and customs' and 'include rights and duties with respect to land and waters within

175 *Love* (n 1) 190 [74] (citations omitted).

176 Ibid 189 [71] (Bell J).

177 Ibid 314 [451].

178 Ibid.

179 Ibid 260 [289] (emphasis omitted) (citations omitted).

180 Ibid 273 [338], citing *Mabo* (n 3) 51–2 (Brennan J).

the territory of Australia'.[181] Therefore, native title is 'one legal consequence' of this connection;[182] another is that

> the common law can *and does* recognise that Indigenous peoples can and do possess certain rights and duties that are not possessed by, and *cannot be possessed by*, the non-Indigenous peoples of Australia.[183]

The change to Australian sovereignty did not necessarily end traditional law. Instead, '[n]one of the events of settlement, Federation or the advent of citizenship in the period since Federation have displaced the unique position of Aboriginal Australians'.[184] To be sure, the assertion of sovereignty together with 'European settlement did not abolish traditional laws and customs, which establish and regulate the connection between Indigenous peoples and land and waters'.[185]

Somewhat differently from Bell J, Gordon J and Edelman J, Nettle J focused on the proposition that First Australians have

> a claim to the permanent protection of — and thus so plainly owe permanent allegiance to — the Crown … that their classification as aliens lies beyond the ambit of the ordinary understanding of the word.[186]

Justice Nettle observed a historical '"incongruity between legal characterisation and historical reality", or between "theory [and] our present knowledge and appreciation of the facts"', such that it ought not sustain a separation of truth and law.[187] Justice Nettle did, however, reiterate the principle from *Mabo* that

> the common law … recognises … rights and interests in land and waters possessed under laws acknowledged, and customs observed, by Aboriginal peoples since before the Crown's acquisition of sovereignty.[188]

Recognition of those rights and interests continues to the point where it is not extinguished.[189] Justice Nettle also distinguished between native title and 'the

[181] *Love* (n 1) 279 [357].

[182] Ibid 281 [364].

[183] Ibid 279 [357] (emphasis in original).

[184] Ibid 272 [335].

[185] Ibid 262 [297].

[186] Ibid 244 [252].

[187] Ibid 250 [265] (citations omitted).

[188] Ibid 252 [268], citing *Mabo* (n 3) 57, 69–70 (Brennan J, Mason CJ and McHugh J agreeing at 15), 109–10 (Deane and Gaudron JJ), 187 (Toohey J), *Western Australia v Commonwealth* (1995) 183 CLR 373, 452–3 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

[189] *Love* (n 1) 252 [268] (Nettle J).

common law's recognition of the Aboriginal societies from which those laws and customs organically emerged'.[190] He quoted the majority in *Yorta Yorta* for the proposition that native title cannot be recognised unless what is '[l]ogically anterior' to it exists,[191] observing that

> under the common law of Australia, an Aboriginal society retains an identifiable existence so long as its members are 'continuously united in their acknowledgement of laws and observance of customs' deriving from before the Crown's acquisition of sovereignty, and such may be inferred from 'subsidiary facts' of a social, cultural, linguistic, political or geographical kind.[192]

In other words, 'law and custom' are socially derived and 'define a particular society' in which '"society" is to be understood as a body of persons united in and by its acknowledgment and observance of a body of law and customs'.[193] In addition to native title, the common law also recognises the authority of traditional law to determine who is a member of a particular society.[194] Like the other majority justices, Nettle J regarded the connection to land as anterior to his Honour's finding:

> So long as an Aboriginal society which enjoyed a spiritual connection to country before the Crown's acquisition of sovereignty has, since that acquisition of sovereignty, remained continuously united in and by its acknowledgment and observance of laws and customs deriving from before the Crown's acquisition of sovereignty over the territory, including the laws and customs which allocate authority to elders and other persons to decide questions of membership of the society, the unique obligation of protection owed by the Crown to the society and each of its members in his or her capacity as such will persist.[195]

We submit that the unifying feature of the majority judgments in *Love* is that First Australians' connection to land informed the High Court's interpretation of the *Constitution* and that the connection to land is anterior to native title. Stated another way, the connection to land recognised in *Love* has legal

[190] Ibid 252 [269].

[191] Ibid, quoting *Yorta Yorta* (n 3) 445 [49] (Gleeson CJ, Gummow and Hayne JJ).

[192] *Love* (n 1) 253 [270] (citations omitted).

[193] *Yorta Yorta* (n 3) 445 [49] (Gleeson CJ, Gummow and Hayne JJ), quoted in ibid 252–3 [269] (Nettle J).

[194] *Love* (n 1) 253 [271] (Nettle J), citing *Commonwealth v Tasmania* (1983) 158 CLR 1, 274 (Deane J), *Mabo* (n 3) 61, 70 (Brennan J, Mason CJ and McHugh J agreeing at 15), *Yorta Yorta* (n 3) 439–40 [31], 442 [40], 445 [49] (Gleeson CJ, Gummow and Hayne JJ) and quoting *Fejo* (n 119) 128 [46] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

[195] *Love* (n 1) 257 [278].

consequences: the constitutional category of Indigenous non-citizen, non-alien is one; and native title is another. On this basis, we contend that this reasoning can be extrapolated to support other rights or incidents of the connection to land. However, we concede that the majority judgments did not support the notion of dual sovereignties.[196] Instead, we argue that *Love* supports the proposition that

> more fundamental than the common law's recognition of rights and interests arising under traditional laws and customs is the common law's recognition of the Aboriginal societies from which those laws and customs organically emerged.[197]

This argument is different to what the plaintiffs themselves submitted in *Love*. In *Love*, the plaintiff's argument proceeded from the proposition that it is traditional laws and customs which are recognised by the common law.[198] Plainly, this is not the case. It is that the society must have existed, and their connection to their traditional territory must have been maintained, in a way that has been 'substantially uninterrupted' since sovereignty in order for their native title rights and interests to be recognised.[199] However, on the analysis that we draw from *Love*, the Court recognised that the connection to land is a defining feature of Aboriginality and the connection to land has consequences whether or not native title has been proven. Thus, in differentiating between native title as a burden on the Crown's radical title and the 'deeper truth' of First Australians' connection to land, we contend that *Love* opens the possibility for an argument that the common law can recognise other land-related rights based on the connection to land which would not necessarily be subject to the limitations of arguments framed by the principles of native title.

This part identified the common law approach to 'Aboriginal sovereignty'. It then proposed three interconnected and alternate potential sources for First Nations sovereignties as land-related rights: as presupposed by native title; via the preferable rule in *Mabo*; or via the connection to land as identified in *Love*. For the reasons identified in this part, we submit that there is scope to argue for incidents of First Nations sovereignties at common law. Whatever source may be argued, it must be consistent with the common law concept of 'Aboriginal sovereignty'. The next part sets out considerations for such an argument.

196 See, eg, ibid 278–9 [356] (Gordon J).

197 Ibid 252 [269] (Nettle J), quoting *Yorta Yorta* (n 3) 445 [49] (Gleeson CJ, Gummow and Hayne JJ).

198 *Love* (n 1) 179 [35]–[37] (Kiefel CJ).

199 *Yorta Yorta* (n 3) 456 [87] (Gleeson CJ, Gummow and Hayne JJ).

IV Toward a Framework for the Common Law Recognition of First Nations Sovereignties

Supposing First Nations sovereignties are a spiritual notion that can nevertheless interact with the law, we contend that any recognition of additional rights at common law would be an implicit recognition of sovereignty. We further contend that a right to self-government to protect traditional authority in relation to land is arguable if it is consistent with the High Court's definition of 'Aboriginal sovereignty' and with settled principles from cases concerning native title rights. This part outlines the considerations for such an argument. Any argument must not be framed as 'adverse to' Crown sovereignty; the right must be framed as a consequence of the Crown's acquisition of sovereignty; the right argued for must not be parallel to the Crown's lawmaking function; and the argument must be consistent with decided cases such as *Walker*.

A *The Act of State Doctrine, Claims Adverse to the Crown and Consequence of Sovereignty*

The act of state doctrine establishes that the acquisition of territory by a sovereign state cannot be challenged or interfered with by the courts of that state.[200] Since *Mabo*, judgments concerning 'Aboriginal sovereignty' often reference the act of state doctrine and characterise claims for Aboriginal sovereignty as claims that are 'adverse to' or inconsistent with Crown sovereignty.[201] Thus the application of the act of state doctrine takes various forms and allows courts to dismiss First Nations rights claims merely by reference to the doctrine.

1 *The Act of State Doctrine*

Although often cited as authority for the proposition that sovereignty does not reside within the Aboriginal people of Australia,[202] *Mabo* is in fact an example of how the doctrine can operate and be consistent with the recognition of other land-related rights. *Mabo* did not directly concern Crown sovereignty; rather, the decision turned on the effects of the Crown's acquisition of sovereignty.[203] Thus, in finding that First Nations peoples had a surviving right to occupy the land based on traditional custom, the Court also found that

[200] *New South Wales v Commonwealth* (1975) 135 CLR 337, 388 (Gibbs J), quoted in *Mabo* (n 3) 31 (Brennan J); *Coe (1993)* (n 3) 200 (Mason CJ).

[201] See, eg, *Northern Territory Land Corporation v Rigby* [2016] NTSC 18, [15]–[16] (Barr J); *Lacey v Earle* [2014] ACTSC 397, [15]–[19] (Murrell CJ).

[202] See, eg, *Coe (1993)* (n 3) 200 (Mason CJ).

[203] *Mabo* (n 3) 32 (Brennan J).

> the act of State doctrine does not preclude proceedings … in which … it is sought to vindicate domestic rights arising under the common law consequent upon that act of State.[204]

Similarly, all three sources for land-related rights outlined in this argument approach Crown sovereignty in the same way. The sources for land-related rights based on native title and the 'preferable rule' in *Mabo* turn on the same mechanism by which the common law is presently able to recognise native title. The source based on the connection to land as identified in *Love* follows the High Court's decision in *Mabo* and deals with, in our view, the effect of the First Australians' occupation of the land and, therefore, with the effects of the Crown acquiring sovereignty. With that being said, any argument for an additional right must be cognisant of earlier cases that framed claims as 'adverse to' Crown sovereignty.

2 *Not Adverse to the Crown*

In *Coe*, the plaintiff sought

> declarations and relief on behalf of the [A]boriginal people of Australia in respect of the occupation, settlement and continuing dealing in the lands comprising the Australian continent by the defendant governments.[205]

The statement of claim also alleged that the basis for Crown sovereignty was wrong and contrary to 'the [A]boriginal nation having enjoyed from time immemorial prior to 1770 exclusive sovereignty over Australia'.[206]

Framed in this way, the case presumed a contest between two competing sovereigns: Crown sovereignty and a singular national Aboriginal sovereignty. Justice Mason noted that the pleadings were confined to 'the [A]boriginal community and nation of Australia' and spoke of 'the [A]boriginal nation as a sovereign [A]boriginal nation'.[207] His Honour considered this problematic because there was no 'Aboriginal nation' of Australia:

> There is, in all this, no justification for the view advanced by the plaintiff's counsel that the plaintiff's case is that the [A]boriginal people constitute a community within the Australian nation and that this community is not itself a sovereign nation. No doubt this submission is designed to take advantage of the concept of a 'domestic dependent nation' mentioned by Marshall CJ in *Cherokee Nation v*

[204] Ibid 81–2 (Deane and Gaudron JJ).

[205] *Coe (1978)* (n 17) 592; *Coe (1979)* (n 4) 118.

[206] *Coe (1978)* (n 17) 593 (Mason J).

[207] Ibid 593, 595.

> *State of Georgia* (1831) 5 Pet 1 at 17; 30 US 178 at 181; 8 L Ed 25 at 31 [sic]. It is, however, a submission which is quite at odds with the case that is sought to be pleaded.[208]

Accordingly, the Court found that the plaintiff's claim of continuing sovereignty in the Aboriginal people was 'unarguable' and 'inconsistent with the accepted legal foundations of Australia'.[209]

The first *Coe* case was unsuccessfully appealed before Gibbs, Jacobs, Murphy and Aickin JJ.[210] Three of the justices held that Crown sovereignty could not be questioned as an act of state.[211] According to Gibbs J (with whom Aickin J agreed), there was also no cause of action because the annexation of the east coast of Australia were 'acts of state whose validity cannot be challenged'.[212] Justice Jacobs agreed, declaring that '[t]hese are not matters of municipal law but of the law of nations and are not cognizable in a court exercising jurisdiction under that sovereignty which is sought to be challenged'.[213] His Honour added that the plaintiff's claim 'cannot be allowed because generally it is formulated as a claim based on a sovereignty adverse to the Crown'.[214]

On the question of whether there was an Aboriginal nation which has sovereignty over its own people in the sense of a domestic dependent nation, Gibbs J and Aickin J were certain.[215] There could be no possibility because the factual histories were different.[216] Unlike the Cherokee in *Cherokee Nation v Georgia*,[217] the '[A]boriginal people of Australia' were not, in the words used by

[208] Ibid 595.

[209] Ibid 596.

[210] *Coe (1979)* (n 4) 131 (Gibbs J, Aickin J agreeing at 138), 132–3 (Jacobs J, Murphy J agreeing at 138).

[211] Ibid 128 (Gibbs J, Aickin J agreeing at 138), 132–3 (Jacobs J). But see *Coe (1993)* (n 3) 198 (citations omitted), where Mason CJ summarises this differently:

> The principal points of departure between the four justices who sat on the appeal were that Gibbs and Aickin JJ considered (a) that it was settled law that the Australian colonies were acquired by Great Britain by settlement and not by conquest, that view having been expressed by the Privy Council in *Cooper v Stuart*; and (b) that the amended statement of claim did not plead sufficiently or appropriately a claim that the Aboriginal people had rights and interests in land which were recognised by the common law and were still subsisting. Jacobs and Murphy JJ, on the other hand, thought that the view taken in *Cooper v Stuart* was open to challenge and that the claim to proprietary and possessory rights to land recognised by the common law was sufficiently pleaded.

[212] *Coe (1979)* (n 4) 128 (Gibbs J, Aickin J agreeing at 138).

[213] Ibid 132.

[214] Ibid 133.

[215] Ibid 129 (Gibbs J, Aickin J agreeing at 138).

[216] Ibid.

[217] 30 US (5 Pet) 1 (1831).

Marshall CJ, 'organized as a "distinct political society separated from others", or … uniformly treated as a state'.[218] Justice Gibbs and Aickin J required First Nations to have 'legislative, executive or judicial organs by which sovereignty might be exercised' before domestic sovereign status could be considered.[219] They added that even if 'such organs existed, they would have no powers, except such as the law of the Commonwealth, or of a State or Territory, might confer upon them'.[220] It followed that 'it is quite impossible in law to maintain' the 'contention that there is in Australia an [A]boriginal nation exercising sovereignty, even of a limited kind'.[221]

Coe makes it clear that Crown sovereignty is not justiciable as the law cannot conceive of a rival sovereignty in an Aboriginal nation because First Australians lack the European quality of being 'a people organized as a separate state or exercising any degree of sovereignty'.[222] *Coe* also makes clear that any argument regarding First Nations sovereignties cannot be premised on the proposition that the Australian landmass was incorrectly acquired. Arguably, however, in light of *Mabo* and *Love*, these concerns may not pose a barrier to a more nuanced argument for other land-related rights. It is clear now that following the later cases, the effect of Crown sovereignty is justiciable. As in *Mabo* and *Love*, such an argument would need to invite the court not to examine the act of state which created it but rather to examine the consequences of that act and its effect on continuing First Nations sovereignties.

The three alternative sources outlined in this article do not propose to frame other land-related rights as a contest between competing sovereigns or as an attack on the Crown's acquisition of sovereignty. The two sources based on native title — other land-related rights as presupposed by native title and via the 'preferable rule' in *Mabo* — are both premised on the 'preferable rule' in *Mabo*. The 'preferable rule' in *Mabo* proceeds from the proposition that radical title and Crown sovereignty are undisturbed.[223] The 'connection to land' source is premised on the connection to land as explicated in *Love* and contemplates what other effects may flow from it. Accordingly, the sources outlined in this article do not cross the adversity threshold as contemplated by the *Coe* cases and, therefore, the adversity threshold does not pose a barrier to this article's argument. The following section considers the proposition that the substance of the right might cross the adversity threshold.

218 *Coe (1979)* (n 4) 129 (Gibbs J, Aickin J agreeing at 138), quoting ibid 12 (Marshall CJ).

219 *Coe (1979)* (n 4) 129 (Gibbs J, Aickin J agreeing at 138).

220 Ibid.

221 Ibid.

222 Ibid 131.

223 *Mabo* (n 3) 57–60 (Brennan J).

3 *No Parallel Lawmaking System*

The High Court decision of *Yorta Yorta* has been criticised for making it difficult to succeed in native title claims.[224] While the judgment may appear to push against our argument, it is not fatal to a claim for other land-related rights. *Yorta Yorta* concerned an application under the *Native Title Act* for a declaration that native title existed over areas of land and waters in northern Victoria and southern New South Wales.[225] The majority judgment of Gleeson CJ, Gummow and Hayne JJ emphasised that native title must be continuous from the 'assertion of sovereignty'.[226] The significance of an 'assertion of sovereignty' for their Honours was that from that moment forward, 'the normative or law-making system which then existed could not thereafter validly create new rights, duties or interests'.[227] This is because there could be 'no parallel law-making system in the territory over which [the Crown] asserted sovereignty'.[228] However, it is possible for rights or interests in relation to land or waters to 'be recognised after the assertion of that new sovereignty' provided they 'find their origin in pre-sovereignty law and custom'.[229] Thus the majority stated:

> It is important to recognise that the rights and interests concerned originate in a normative system, and to recognise some consequences that follow from the Crown's assertion of sovereignty. Upon the Crown acquiring sovereignty, the normative or law-making system which then existed could not thereafter validly create new rights, duties or interests. Rights or interests in land created after sovereignty and which owed their origin and continued existence only to a normative system other than that of the new sovereign power, would not and will not be given effect by the legal order of the new sovereign.[230]

The majority upheld the finding of 'fact' of the trial judge and based their decision on the grounds that the traditions and customs of the Yorta Yorta had been interrupted somewhere in the 19th century.[231] As a consequence, their Honours found that

224 See, eg, Richard Bartlett, 'An Obsession with Traditional Laws and Customs Creates Difficulty Establishing Native Title Claims in the South: *Yorta Yorta*' (2003) 31(1) *University of Western Australia Law Review* 35, 45–6.

225 *Yorta Yorta* (n 3) 431 [1] (Gleeson CJ, Gummow and Hayne JJ).

226 Ibid 443–4 [43]–[44], 446–7 [51]–[54], 458 [94]–[96] (Gleeson CJ, Gummow and Hayne JJ).

227 Ibid 443 [43].

228 Ibid 444 [44].

229 Ibid.

230 Ibid 443 [43] (emphasis omitted).

231 Ibid 458 [94]–[96].

> the forebears of the claimants had ceased to occupy their lands in accordance with traditional laws and customs and that there was no evidence that they continued to acknowledge and observe those laws and customs. Upon those findings, the claimants must fail.[232]

Similarly, Callinan J held that native title required a continuous physical occupation of the lands and, because that had been broken around 1840, the claim had to fail.[233] Although McHugh J commented that 'this Court has now given the concept of "recognition" a narrower scope than I think the Parliament intended', referring to the majority's approach to native title, his Honour agreed with their conclusion.[234] He held that the findings of the trial judge 'were not influenced by any error of law' and 'so, the claimants must fail'.[235]

Therefore, *Yorta Yorta* makes it clear that no new rights and interests in land which find their origin in a pre-sovereignty normative system may be created following Crown sovereignty. The decision also makes it clear that there cannot be a 'parallel law-making system' in territory over which the Crown 'asserted sovereignty'.[236] In addition, it should be pointed out that the Court in *Yorta Yorta* was limited to making a determination of native title to land and waters in northern Victoria and southern New South Wales. Accordingly, the decision is not necessarily fatal to a novel case presented on a new set of facts.

We contend that the sources for other land-related rights outlined in this article do not conflict with the principles in *Yorta Yorta*. Each source for other land-related rights proceeds from the proposition that it finds its origin in a pre-sovereignty normative system. They are not 'new' rights but are rather continuous rights predating the Crown's assertion of sovereignty. Moreover, acknowledging the traditional authority of First Nations is not an acknowledgment of a parallel lawmaking system; it is a recognition of other land-related rights continuing as a consequence of the assertion of Crown sovereignty. Recognition of such rights would sit comfortably with native title, which depends on mutual recognition determined by traditional authority.[237] It would also sit comfortably with the decision of *Love* which recognises, as a matter of historical and social fact, the existence of Aboriginal communities living in

[232] Ibid 458 [96].

[233] Ibid 492–3 [186]–[189].

[234] Ibid 468 [134].

[235] Ibid 468 [135].

[236] Ibid 444 [44] (Gleeson CJ, Gummow and Hayne JJ).

[237] *Mabo* (n 3) 70 (Brennan J); *Love* (n 1) 192 [81] (Bell J), 317 [458] (Edelman J).

accordance with traditional laws and customs whether or not those communities have been determined to do so by a judge in a hearing concerning native title.[238]

B Walker v New South Wales

Walker is the only case in which the High Court has considered an argument that the *Mabo* principles might apply to non-land rights.[239] The statement of claim in *Walker* alleged, among other things, 'that the common law is only valid in its application to Aboriginal people to the extent to which it has been accepted by them'.[240] It also alleged that Australian parliaments 'lack the power to legislate in a manner affecting [A]boriginal people without the request and consent of the [A]boriginal people' and that, in the alternative, a statute could not operate on Aboriginal people until it is adopted by them.[241] Chief Justice Mason rejected the argument that Parliament lacks legislative capacity because absolute legislative capacity was the result of the acquisition of Crown sovereignty.[242]

In oral submissions, however, the plaintiff's counsel advanced an argument that

> customary Aboriginal criminal law is something which has been recognized by the common law and which continues to this day, in the same way that *Mabo* … decided that the customary law of the Meriam people relating to land tenure continues to exist.[243]

The consequence of this proposition, it was submitted, was that 'the criminal statutes of New South Wales did not apply to people of Aboriginal descent'.[244] Chief Justice Mason rejected this proposition because of the 'basic principle that all people should stand equal before the law'.[245] This presumption has 'added force in … criminal law, which is inherently universal in its operation, and whose aims would otherwise be frustrated'.[246] According to Mason CJ:

238 *Love* (n 1) 189 [71] (Bell J), 257 [277] (Nettle J), 280–1 [362]–[364] (Gordon J), 314 [451] (Edelman J).

239 *Walker* (n 18) 49 (Mason CJ).

240 Ibid 48.

241 Ibid.

242 Ibid 48–9.

243 Ibid 49.

244 Ibid.

245 Ibid.

246 Ibid 50.

> Even if it be assumed that the customary criminal law of Aboriginal people survived British settlement, it was extinguished by the passage of criminal statutes of general application. In *Mabo* … the Court held that there was no inconsistency between native title being held by people of Aboriginal descent and the underlying radical title being vested in the Crown. There is no analogy with the criminal law.[247]

The crucial point about this case is that the Court was open to, at least hypothetically, an argument advanced along the lines of the doctrine of continuity as supporting rights other than rights in land. We argue that there are three ways to contextualise this judgment in the framework outlined in this article. First, this quoted passage is strictly obiter dicta and not binding on the High Court. Second, the plaintiff's oral argument can be distinguished from the argument we make here. Unlike the plaintiff's argument, we submit that any recognition of First Nations sovereignties would 'shine through' and not be contrary to or adverse to existing law. Third, *Walker* has arguably been tempered by *Love*. The effect of *Love* is that, in certain circumstances following an exercise of traditional authority by a particular Nation, certain sections of the *Australian Citizenship Act 2007* (Cth) do not have effect. Or in other words, the exercise of traditional authority sometimes has the effect of placing a person beyond the legislative capacity of the Crown.[248] It would depend on the interpretation of the statute.

C *An Australian Common Law or a British Imperial Common Law?*

Based on the foregoing analysis and the argument we have advanced for the common law recognition of First Nations sovereignties, one further point must be mentioned. Much has been made about the independence and uniqueness of an emerging Australian common law since the *Privy Council (Appeals from the High Court) Act 1975* (Cth) and the *Australia Act 1986* (Cth)[249] — a system

[247] Ibid.

[248] Cf *Coe (1979)* (n 4) 129 (Gibbs J).

[249] See, eg, *Mabo* (n 3) 29 (Brennan J):

> Australian law is not only the historical successor of, but is an organic development from, the law of England. Although our law is the prisoner of its history, it is not now bound by decisions of courts in the hierarchy of an Empire then concerned with the development of its colonies. It is not immaterial to the resolution of the present problem that, since the *Australia Act 1986* (Cth) came into operation, the law of this country is entirely free of Imperial control. The law which governs Australia is Australian law.

no longer regarded as colonial or imperial but rather as 'Australian'.[250] This raises the question of whether or not a uniquely Australian common law is anything more than the severance of appeals and the domestic changes since those Acts (for example, the recognition of native title), or whether there is a truly Australian common law based upon an Australian Grundnorm inclusive of the world's longest continuing cultures, languages, and law.

In *Mabo*, Brennan J declared that '[t]he law which governs Australia is Australian law', and that recently, not only has the common law 'been substantially in the hands of this Court', the High Court has 'the ultimate responsibility of declaring the law of the nation'.[251] He then proposed the standard to be applied by the Court to change the common law 'to bring it into conformity with contemporary notions of justice and human rights' — that it cannot destroy the 'skeleton of principle' of our legal system:

> Whenever such a question arises, it is necessary to assess whether the particular rule is an essential doctrine of our legal system and whether, if the rule were to be overturned, the disturbance to be apprehended would be disproportionate to the benefit flowing from the overturning.[252]

Whether it might be claimed that a source or the substance of other land-related rights would cross the adversity threshold, we argue that, based on the preceding analysis of the case law, there is no rule or principle preventing the High Court from acknowledging incidents of First Nations sovereignties as we have argued them here. In other words, the High Court can develop the common law according to a Grundnorm inclusive of First Nations sovereignties shining through the common law's Anglo-Australian heritage.[253]

[250] Stephen Gray, 'Planting the Flag or Burying the Hatchet: Sovereignty and the High Court Decision in *Mabo v Queensland*' (1993) 2(1) *Griffith Law Review* 39, 60. There, according to Gray,

> [t]he Grundnorm of the Australian State is no longer British law as it was in the nineteenth century. It is unnecessary to pinpoint exactly when this change of Grundnorm occurred: there is nothing in Kelsen's theory to suggest that a change in the Grundnorm of a society cannot occur over a period of time. The Grundnorm of the Australian State now rests in Australian law. Consequently the High Court has the authority to adjudicate on the validity of the English act of State in 1788, just as it would an act of State of the French or any other foreign nation.

For Secher, 'the grundnorm of Australian real property law is no longer the English (feudal) doctrine of tenure; instead, it is the Australian doctrine of tenure with radical title as its postulate': Secher, 'The Reception of Land Law' (n 15) 703.

[251] *Mabo* (n 3) 29.

[252] Ibid 30.

[253] See, eg, this possibility in relation to Canada: James (Sa'ke'j) Youngblood Henderson, 'Constitutional Vision and Judicial Commitment: Aboriginal and Treaty Rights in Canada' (2010) 14(2) *Australian Indigenous Law Review* 24, 31.

V Conclusion

The *Uluru Statement* declared that First Nations sovereignties are a spiritual notion that can shine through the *Constitution* and Acts of Parliament. Applying this understanding, we have argued that, in the same way, sovereignties can shine through and be recognised by the common law. Although it has been argued that the question of surviving First Nations sovereignties 'can best be fully recognised and peacefully reconciled with Australian state sovereignty through constitutional reform authorised by Parliament and the people',[254] we do not see that as foreclosing the possibility of common law recognition. Since *Mabo*, the High Court has been grappling with the truth of the continuity of the world's longest surviving cultures with their own unique languages and laws connecting them with traditional lands. A close reading of the High Court jurisprudence reveals a tension between the strict observance of the concept of 'Aboriginal sovereignty' and the developing, more nuanced conception of First Nations sovereignties. This reading suggests that the common law is not necessarily inimical to the recognition of First Nations sovereignties.

To this end, we have contended that the common law can recognise rights of self-government to protect traditional authority — that is, rights of organisation in relation to land. Recognition of such rights would be consistent not only with an understanding of First Nations sovereignties as being inextricably connected to the land, but also with the understanding of sovereignty as an argument for a space for deeper engagement within the state.[255] Recognition would also be consistent with the basic truth of the lived history of First Australians as articulated in *Love*. The argument we have made here accords with the literature by First Australians concerning their sovereignties and the growing global body of Indigenous resurgence scholarship, and would be in harmony with Australia's international law obligations. If gains are made politically in terms of a Voice to Parliament or constitutional recognition, or via the state treaties under negotiation, the common law risks being out of step. Although the common law has developed since *Mabo* when the High Court first recognised the common law was out of step with contemporary understandings of history, human rights, knowledge, and values,[256] it is yet to reconcile the

[254] See, eg, Morris, '*Love* in the High Court' (n 11) 411.

[255] See Watson, 'Settled and Unsettled Spaces' (n 58) 26–7, 31.

[256] See *Mabo* (n 3) 29–30, 38, 42 (Brennan J), 78 (Deane and Gaudron JJ).

obvious inconsistency between recognising native title according to continuing tradition and laws, and disregarding those traditions and laws otherwise.[257]

We outlined three interrelated alternative arguments that might support a common law case for the recognition of incidents of sovereign rights. Whether it is (1) due to other land rights presupposed by native title, (2) via the 'preferable rule' in *Mabo* or (3) via the connection with land as identified in *Love*, the common thread is that local law continues to the extent that it is not repugnant to the common law, or abrogated or changed by Crown sovereignty.[258] Although we advance these three strands as interconnected and alternative grounds, we submit that our argument stands regardless of whether one may be vulnerable to reconsideration in the High Court.

We note here that at the time of writing, the *Montgomery* appeal which may have had implications for our characterisation of the *Love* decision has been discontinued following the election of the 47th Parliament.[259] However, the possibility that First Nations sovereignties can forever be denied by Australian law due to the fallibility of a particular argument is more than counterbalanced by the truth of lived experience of these Nations, the trajectory of an emerging Australian legal system as opposed to a British imperial legal system, and the capacity of the common law to change and to promote justice. As Chief Justice Kiefel has stated, '[v]iews may differ about whether in particular cases the courts exceed the limits of change. And those views in turn may change over time'.[260] We contend that, at some point, whether in response to political change or in response to argument, the common law will adjust to the truth of Australian society and change to reflect a fuller expression of Australia's nationhood.

[257] 'The common law can, by reference to the traditional laws and customs of an indigenous people, identify and protect the native rights and interests to which they give rise': ibid 60 (Brennan J).

[258] See ibid 35, 37 (Brennan J), 100 (Deane and Gaudron JJ), 183 (Toohey J).

[259] *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery* (High Court of Australia, S192/2021, commenced 29 November 2021); Paul Karp, 'Labor Drops Coalition Bid To Overturn High Court Ruling that Indigenous Australians Can't Be Aliens', *The Guardian* (online, 28 July 2022) <https://www.theguardian.com/australia-news/2022/jul/28/labor-drops-coalition-bid-to-overturn-high-court-ruling-that-indigenous-australians-cant-be-aliens>, archived at <https://perma.cc/T6ZA-KNHB>.

[260] Chief Justice Susan Kiefel, 'The Adaptability of the Common Law to Change' (Speech, The Australasian Institute of Judicial Administration, 24 May 2018) 11 <https://www.hcourt.gov.au/publications/speeches/current/speeches-by-chief-justice-kiefel-ac>, archived at <https://perma.cc/DD43-DVGZ>.