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HEARTBEAT IN THE HIGH COURT: *LOVE V COMMONWEALTH* (2020) 375 ALR 597

I Introduction

Approaching its 30-year anniversary, the decision of the High Court in *Mabo v Queensland [No 2]* (‘*Mabo [No 2]*’) remains at the core of Australian legal consciousness,[1] not merely as a consequence of the Court’s recognition of native title in that case.[2] Having rejected the myth of terra nullius,[3] Brennan J held that questions now arising as to the basis of the sovereignty of the Commonwealth were non-justiciable.[4] The *Uluru Statement from the Heart* is a reminder that these questions remain unresolved,[5] and constitutional reform is the subject of present debate.[6] While such reform remains for the consideration of Parliament, the High Court has made an important contribution to post-*Mabo [No 2]* jurisprudence in *Love v Commonwealth* (2020) 375 ALR 597 (‘*Love*’). In a decision comprising seven individual judgments,[7] a 4:3 majority held that Aboriginal people[8] are beyond the

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1 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 (‘*Mabo [No 2]*’).

2 Ibid 43, 57 (Brennan J, Mason CJ and McHugh J agreeing at 15), 86 (Deane and Gaudron JJ).

3 Ibid 38–42.

4 Ibid 32. See also Michael Dodson, ‘Sovereignty’ (2002) 4 *Balayi: Culture, Law and Colonisation* 13, 18; Gerry Simpson, ‘*Mabo*, International Law, *Terra Nullius* and the Stories of Settlement: An Unresolved Jurisprudence’ (1993) 19(1) *Melbourne University Law Review* 195, 197–8.

5 Referendum Council, ‘Uluru Statement from the Heart’ (First Nations National Constitutional Convention, 26 May 2017) <https://ulurustatement.org/the-statement>. The *Uluru Statement from the Heart* calls for ‘the establishment of a First Nations Voice enshrined in the *Constitution*’, and a ‘Makarrata Commission to supervise a process of agreement-making between governments and First Nations and truth-telling about our history’.

6 See, eg, Megan Davis et al, ‘The Uluru Statement’ [2018] (Autumn) *Bar News* 41. See also Murray Gleeson, ‘Recognition in Keeping with the Constitution: A Worthwhile Project’ (Speech, Sydney, 18 July 2019) <http://www.upholdandrecognise.com>; Robert French, ‘Voice of Reason Not Beyond Us’, *The Australian* (online, 31 July 2019) <https://www.theaustralian.com.au/commentary/voice-of-reason-not-beyond-us/news-story/1e1715b36c7eeb49f3f1b98c3c377774>.

7 This decision was the first in over a decade comprising seven individual judgments. See *HML v The Queen* (2008) 235 CLR 334. Cf Susan Kiefel, ‘The Individual Judge’ (2014) 88(8) *Australian Law Journal* 554.

8 This term is used respectfully as an all-encompassing term for Aboriginal and Torres Strait Islander peoples.

reach of the 'aliens power', conferred by s 51(xix) of the *Constitution*.[9] As such, persons who are held to satisfy the legal test of Aboriginality cannot lawfully be detained or deported from Australia under ss 189 and 198 of the *Migration Act 1958* (Cth) ('*Migration Act*').[10] In so holding, the majority articulated the 'deeper truth' of the decision in *Mabo [No 2]*: the common law recognises the powerful spiritual and metaphysical connection of Aboriginal people with country.[11] The decision in *Love* has not been without controversy, however. Fierce public scrutiny of the Court has erupted (perhaps not witnessed to such an extent since its decisions in *Mabo [No 2]* and *Wik Peoples v Queensland*)[12] with criticism of perceived 'judicial activism',[13] and calls for the appointment of 'capital C conservatives' to the Court upon the approaching retirement of Justices Nettle and Bell.[14]

This case note seeks to locate a through line in the majority and dissenting reasons. It analyses the Court's approach to interpreting s 51(xix), arguing that the minority's strict legalism was misplaced, ultimately favouring the approach of Gordon J and Edelman J. Further, it dispels the minority's concerns with drawing constitutional distinctions based on race,[15] arguing that this view is blind to the legacy of colonialism.

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9 *Love v Commonwealth* (2020) 375 ALR 597, 615 [74], 616 [81] (Bell J), 664 [272], 667 [279], 668 [284] (Nettle J), 670 [296], 679 [335], 685 [364], 687 [373]–[374] (Gordon J), 692 [398], 715 [467] (Edelman J) ('*Love*').

10 Ibid 668 [285] (Nettle J), 670 [293], 689 [390] (Gordon J).

11 Ibid 669 [289], 679–80 [340] (Gordon J), 710 [451] (Edelman J).

12 *Wik Peoples v Queensland* (1996) 187 CLR 1. In this decision, the Court held that native title is not extinguished by grants of pastoral lease: at 122 (Toohey J), 155 (Gaudron J), 202–3 (Gummow J), 242–3 (Kirby J). In the aftermath, then Deputy Prime Minister Peter Fischer suggested that only 'capital C conservative' judges should be considered for future appointments: see, eg, David Bennett, 'What "Capital-C"?' (2008) 27(1) *University of Queensland Law Journal* 23, 23. The appointment of Justice Callinan in 1998 is regarded by some as having been motivated by such considerations: see, eg, Greg Taylor, 'Justice Callinan's Contribution to the Law of Torts' (2008) 27(1) *University of Queensland Law Journal* 91, 91–2.

13 See, eg, 'Concerns High Court Has Descended into "Activism"', *Sky News* (online, 20 February 2020) <https://www.skynews.com.au/details/_6134044694001>. On the 'elusive' notion of judicial activism, see Robert French, 'Judicial Activists: Mythical Monsters?' (2008) 12 *Southern Cross University Law Review* 59. Broadly speaking, judicial activism is a term used to describe the departure by a judge from the accepted 'judicial function', by taking into account considerations external to the applicable law: at 60–1.

14 See, eg, Olivia Caisley and Nicola Berkovic, '"Activism" Puts Focus on High Court Vacancies', *The Australian* (online, 19 February 2020) <https://www.theaustralian.com.au/nation/politics/activism-puts-f…high-court-vacancies/news-story/9cb395e022d2950d638b5e303d0d9c0c>. But see George Williams, 'There Is No Place for Politics in the Appointment of High Court Judges', *The Australian* (online, 15 March 2020) <https://www.theaustralian.com.au/commentary/there-is-no-place-fo…f-high-court-judges/news-story/cb079fb6b8670df86d34ca7995c4c4a4>.

15 *Love* (n 9) 608 [44] (Kiefel CJ), 628 [126], 630 [133] (Gageler J), 646–7 [217] (Keane J).

Overall, while the implications of the decision in *Love* are uncertain, it is suggested that the decision gives further force to the campaign for constitutional reform,[16] as a judicial expression of the unique constitutional position of Aboriginal people.

II Background

A *Facts*

There were two special cases stated for the opinion of the Court.[17] The plaintiff in the first special case, Daniel Love, is a citizen of Papua New Guinea, his place of birth.[18] Mr Love is not an Australian citizen,[19] but has resided continuously in Australia since 1985, holding a permanent residency visa since 1994.[20] He is descended from members of the Kamilaroi nation, identifies as a member of that nation,[21] and is recognised as a member by one Kamilaroi Elder.[22] In May 2018, Mr Love was sentenced to 12 months' imprisonment for assault causing bodily harm.[23] A delegate of the Minister for Home Affairs ('Minister') cancelled Mr Love's visa,[24] and in August 2018 he was taken into immigration detention on suspicion of being an unlawful non-citizen,[25] to await deportation from Australia.[26] This decision was revoked,[27] and Mr Love was released in September 2018.[28]

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16 See above nn 5–6 and accompanying text.

17 Hereinafter, the 'Love proceeding' and 'Thoms proceeding'.

18 *Love* (n 9) 598 [2] (Kiefel CJ), 610 [55] (Bell J), 647–8 [222] (Nettle J).

19 See *Australian Citizenship Act 2007* (Cth).

20 *Love* (n 9) 598 [2] (Kiefel CJ), 647–8 [222] (Nettle J).

21 Also 'Gamilaraay', 'Gamilaroi' or 'Gomeroi'. The traditional lands of the Kamilaroi nation extend from northern New South Wales to southern Queensland: Hilary Smith, 'Kamilaroi, Gamilaraay, or Gomeroi?', *Winanga-Li* (Web Page, November 2018) <https://winanga-li.org.au/index.php/yaama-gamilaraay/kamilaroi-gamilaraay-or-gomeroi/>; Australian Institute of Aboriginal and Torres Strait Islander Studies, 'Gamilaraay/Gamilaroi/Kamilaroi', *AIATSIS Collection* (Web Page) <https://collection.aiatsis.gov.au/austlang/language/d23>.

22 *Love* (n 9) 598–9 [3] (Kiefel CJ), 616 [79] (Bell J), 647–8 [222] (Nettle J).

23 *Criminal Code Act 1899* (Qld) s 339 ('*Criminal Code* (Qld)'). See *Love* (n 9) 633 [153] (Keane J), 649 [228] (Nettle J).

24 *Migration Act 1958* (Cth) s 501(3A) ('*Migration Act*'). The Minister must cancel a visa that has been granted to a person if 'the Minister is satisfied that the person does not pass the character test'. A person with a 'substantial criminal record' does not pass the character test: at s 501(3A). A person has a substantial criminal record 'if the person has been sentenced to a term of imprisonment of 12 months or more': at ss 501(6)(a), (7)(c).

25 Ibid s 189. 'Unlawful non-citizen' includes a person whose visa has been cancelled: at s 15.

26 Ibid s 198. See *Love* (n 9) 598 [2] (Kiefel CJ), 633 [153] (Keane J), 649 [228] (Nettle J).

27 *Migration Act* (n 24) s 501CA(4).

28 *Love* (n 9) 649 [228] (Nettle J), 692 [397] (Edelman J).

The plaintiff in the second special case, Brendon Thoms, is a citizen of Aotearoa/New Zealand, his place of birth.[29] Mr Thoms is not an Australian citizen.[30] He held a special category visa, and has resided permanently in Australia since 1994, continuously since 2003.[31] He identifies as, and is recognised as, a member of the Gunggari People.[32] He is a holder of native title.[33] In September 2018, Mr Thoms was sentenced to 18 months' imprisonment for assault causing bodily harm,[34] and the Minister cancelled Mr Thoms' visa.[35] He was taken into immigration detention, where he remained at the time of the High Court's decision.[36]

B *Issues and Applicable Law*

Only one question of law was stated for the opinion of the Court, namely, whether the plaintiffs were 'aliens' within the meaning of s 51(xix) of the *Constitution*.[37]

Section 51(xix) states:

> The Parliament shall, subject to this *Constitution*, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:
>
> …
>
> (xix) naturalization and aliens …[38]

The applicable principle was laid down by Gibbs CJ in *Pochi v Macphee* ('*Pochi*').[39] While s 51(xix) confers the power to determine who shall be treated as 'aliens',[40] 'the

29 Ibid 598 [2] (Kiefel CJ), 610 [55] (Bell J), 649 [229] (Nettle J).

30 Ibid 598 [2] (Kiefel CJ), 649 [229] (Nettle J).

31 Ibid 598 [229] (Nettle J).

32 Also 'Kunggari'. The traditional lands of the Gunggari People surround the Maranoa River in south-west Queensland: 'Gunggari Country', *Gunggari Native Title Aboriginal Corporation RNTBC* (Web Page) <http://www.gunggaripbc.com.au/gunggari-country/>. See *Love* (n 9) 689 [387] (Gordon J), 713–4 [462] (Edelman J).

33 *Love* (n 9) 598–9 [3] (Kiefel CJ), 634 [158] (Keane J), 649 [229] (Nettle J), 689 [387] (Edelman J). See *Kearns v Queensland* [2012] FCA 651 (Reeves J); *Foster v Queensland* [2014] FCA 1318 (Rangiah J).

34 *Criminal Code* (Qld) (n 23) s 339(1). See *Love* (n 9) 650 [235] (Nettle J).

35 *Love* (n 9) 598–9 [2] (Kiefel CJ), 650 [235] (Nettle J). See above n 24 and accompanying text as to the cancellation of Mr Thoms' visa under the *Migration Act* (n 24).

36 Ibid 650 [235] (Nettle J).

37 Ibid 647 [221] (Nettle J).

38 *Constitution* s 51(xix).

39 *Pochi v Macphee* (1982) 151 CLR 101 ('*Pochi*').

40 See, eg, *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 400 [7] (Gleeson CJ) ('*Re Patterson*').

Parliament cannot, simply by giving its own definition of "alien", expand the power … to include persons who could not possibly answer the description of "aliens" in the ordinary understanding of the word'.[41]

The *Migration Act* is enacted under s 51(xix).[42] Thus, if the plaintiffs were beyond the reach of the aliens power, the statutory provisions authorising their detention and deportation would be read down so as not to apply to them.[43] Ultimately, the Court was to determine whether Mr Thoms could lawfully be kept in immigration detention and deported from Australia. While Mr Love had been released from detention, the issue was live in proceedings instituted by Mr Love against the Commonwealth for false imprisonment.[44]

Antecedent to the question stated was the issue as to whether the plaintiffs were Aboriginal, as a matter of law. In argument,[45] the plaintiffs adopted the tripartite legal test of Aboriginality set out by Brennan J in *Mabo [No 2]*:

> Membership of the indigenous people depends on biological descent from the indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among those people.[46]

III Decision

Justice Bell, Nettle J, Gordon J and Edelman J held that persons held to satisfy the legal test of Aboriginality set out in *Mabo [No 2]* are not 'aliens' within the meaning of s 51(xix). Chief Justice Kiefel, Gageler J and Keane J dissented. Applying the tripartite test adopted in argument by the plaintiffs, the majority agreed that Mr Thoms was Aboriginal, as a matter of law.[47] The Court was unable to determine this issue on

41 *Pochi* (n 39) 109 (Gibbs CJ, Mason J agreeing at 112, Wilson J agreeing at 116).

42 *Love* (n 9) 598–9 [3] (Kiefel CJ), 631–2 [139] (Gageler J). See *Migration Act* (n 24) long title, s 4; *Re Patterson* (n 40) 443 [156] (Gummow and Hayne JJ).

43 *Acts Interpretation Act 1901* (Cth) s 15A.

44 *Love* (n 9) 692 [397] (Edelman J).

45 The Commonwealth made no submissions on this issue in either proceeding, which it considered to be 'irrelevant' to the determination of the question of law: ibid 608–9 [49] (Bell J). See also at 689 [388] (Gordon J), 713 [461] (Edelman J).

46 *Mabo [No 2]* (n 1) 70. See also *Commonwealth v Tasmania* (1983) 151 CLR 1, 274 (Deane J) ('*Tasmanian Dam Case*').

47 *Love* (n 9) 608–9 [49] (Bell J), 669 [288] (Nettle J), 689 [387] (Gordon J), 713–4 [462] (Edelman J).

the material before it with respect to Mr Love,[48] however, and the Love proceeding was remitted to the Federal Court for further argument.[49]

A *Majority*

Perhaps the only ratio to be extracted from the majority reasons is the ultimate answer to the question stated in the special cases, as was contemplated by Bell J: 'although we express our reasoning differently, we agree that Aboriginal Australians … are not within the reach of the "aliens" power'.[50] The majority did, however, join on several initial findings. Their Honours rejected suggestions that the constitutional expression 'aliens' is synonymous with the statutory expression 'non-citizen'.[51] The *Pochi* test necessarily shifted the enquiry away from statutory citizenship. It was possible, as a matter of principle, for there to exist a status of 'non-citizen, non-alien'.[52] Their Honours also departed from the view that previous decisions of the Court had established the indicia of 'alienage',[53] most relevantly, allegiance to a foreign power.[54] Those decisions were confined to their facts.[55]

Importantly, the majority held that the common law recognises the unique spiritual and metaphysical connection of Aboriginal people with country.[56] Although not expressed by the Court in *Mabo [No 2]*,[57] such recognition was implicit in the Court's recognition of native title in that case.[58] Traditional laws and customs, the continuing

[48] Justice Bell and Gordon J regarded the Commonwealth's conduct of the proceeding on this issue as amounting to acceptance of Mr Love's case: ibid 616 [79]–[80] (Bell J), 689 [388] (Gordon J). Justice Edelman agreed that there was 'no contest' as to the Aboriginality of Mr Love, and it was 'plainly open' to conclude that he satisfied the legal test in the absence of any contrary argument: at 713–4 [462] (Edelman J). Chief Justice Kiefel and Gageler J (in obiter), as well as Nettle J, considered there to be insufficient evidence to decide this issue: at 604 [24] (Kiefel CJ), 627 [120] (Gageler J), 647 [221] (Nettle J). Justice Keane held that it was unnecessary to reach a decision: at 632–3 [147] (Keane J).

[49] It is not evident that any judgment has been handed down in this proceeding at the time of writing.

[50] *Love* (n 9) 616 [81] (Bell J).

[51] Ibid 612 [64] (Bell J), 657 [252] (Nettle J), 670 [295], 672 [304] (Gordon J), 690–1 [394] (Edelman J).

[52] Ibid.

[53] Ibid 610–1 [58] (Bell J), 657 [253]–[255], 659 [260] (Nettle J), 676 [321] (Gordon J), 702–3 [429] (Edelman J).

[54] *Singh v Commonwealth* (2004) 222 CLR 322, 398 [200] (Gummow, Hayne and Heydon JJ) ('*Singh*').

[55] *Love* (n 9) 611 [59] (Bell J), citing *Koroitamana v Commonwealth* (2006) 227 CLR 31, 38–9 [14] (Gummow, Hayne and Crennan JJ) ('*Koroitamana*'). See also *Love* (n 9) 676 [321] (Gordon J).

[56] *Love* (n 9) 614 [71] (Bell J), 663 [269] (Nettle J), 669–70 [289]–[293], 671 [298], 679 [337] (Gordon J), 691 [396] (Edelman J).

[57] Ibid 608 [45] (Kiefel CJ).

[58] Ibid 663 [269] (Nettle J), 669 [289], 679–80 [340] (Gordon J).

observance of which gives rise to native title rights and interests under the *Mabo [No 2]* doctrine,[59] 'do not exist in a vacuum'.[60] Rather, they are 'part … of one indissoluble whole',[61] encompassing Aboriginal people and country.

For Bell J, it followed that Aboriginal people 'cannot be said to belong to another place',[62] which her Honour accepted was incongruent with alienage.[63] The notion of belonging was further articulated by Edelman J. His Honour revisited the Convention debates, noting that the meaning of the term 'aliens' at Federation, although 'in flux',[64] was essentially being 'foreign … to a political community'.[65] As Aboriginal people became subjects of the Crown upon the reception of the common law,[66] Edelman J considered that it would be 'bizarre' if they could now be treated as aliens,[67] particularly in light of historical developments such as the 1967 constitutional referendum,[68] and the enactment of the *Racial Discrimination Act 1975* (Cth) and *Native Title Act 1993* (Cth).[69] Rather, Aboriginal non-citizens were 'belongers' to Australia.[70]

Justice Gordon proceeded from a similar understanding of the term 'aliens'.[71] Her Honour noted that the sovereign authority of the Commonwealth is delimited by territory. Thus, membership of the Australian polity necessarily has a territorial dimension.[72] It is this same territory, 'the same lands and waters',[73] with which Aboriginal people have a recognised connection. It followed that Aboriginal people are part of 'the people' of Australia.[74]

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59 See *Mabo [No 2]* (n 1) 57.

60 *Love* (n 9) 663 [269] (Nettle J), quoting *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 445 [49] (Gleeson CJ, Gummow and Hayne JJ).

61 *Love* (n 9) 669 [290] (Gordon J), quoting *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 167 (Blackburn J).

62 *Love* (n 9) 217 [74] (Bell J).

63 Ibid 614 [71] (Bell J).

64 Ibid 692–3 [400]–[401] (Edelman J).

65 Ibid 689 [390], 696–7 [409] (Edelman J). See also at 680 [343] (Gordon J).

66 Ibid 697 [411] (Edelman J).

67 Ibid 689–90 [391] (Edelman J).

68 See Megan Davis and George Williams, *Everything You Need to Know about the Referendum to Recognise Indigenous Australians* (NewSouth, 2015) ch 2.

69 *Love* (n 9) 710 [452] (Edelman J). See also at 628–9 [126] (Gageler J), 683–4 [355]–[360] (Gordon J).

70 Ibid 690–1 [394], 691 [396] (Edelman J).

71 Ibid 670 [296] (Gordon J). Her Honour posited that '[t]he constitutional term "aliens" conveys otherness, being an "outsider", foreignness'.

72 Ibid 681 [348] (Gordon J).

73 Ibid 681–2 [349] (Gordon J).

74 Ibid 682 [353] (Gordon J). See *Constitution* Preamble, ss 7, 24.

Justice Nettle held that, as a consequence of the centrality of country, a person cannot effectively *be* a member of an Aboriginal society if they are not present in Australia.[75] Thus, subjecting Aboriginal people to liability to deportation from Australia, a corollary of the status as an alien, would amount to an abrogation of the common law's recognition of connection with country.[76] Significantly, his Honour took one step further than the other members of the majority, holding that the Crown in right of the Commonwealth owes Aboriginal people a 'unique obligation of protection',[77] and Aboriginal people reciprocally owe 'permanent allegiance' to the Crown.[78] This was necessarily inconsistent with alienage, as 'informed by centuries of legal history and political theory'.[79]

B *Minority*

The minority accepted that 'aliens' is synonymous with 'non-citizen'.[80] While the category of 'non-citizen, non-aliens' was accepted by the Court 'for a short time',[81] its decision in *Shaw v Minister for Immigration and Multicultural Affairs* ('*Shaw*') had rejected such a category.[82] Plainly, it was open to Parliament to treat the plaintiffs as aliens,[83] and '[j]udicial intervention … [was] not constitutionally justified'.[84] Their Honours also held that, given the importance of the sovereign's power to determine membership of the polity,[85] accepting the plaintiffs' argument 'would be to attribute … [to Aboriginal people] the kind of sovereignty which was implicitly rejected in *Mabo [No 2]*'.[86] A person's 'status … as a "non-citizen, non-alien" would

75 *Love* (n 9) 663–4 [271] (Nettle J).

76 Ibid 664 [272] (Nettle J).

77 Ibid 664 [272], 667 [278]–[279] (Nettle J).

78 Ibid 667 [279] (Nettle J). His Honour was the only member of the Court to accept this argument, on which the Court had invited submissions from the parties following the hearing of the special cases. The Commonwealth subsequently filed a Notice under s 78B of the *Judiciary Act 1903* (Cth), and the State of Victoria intervened in support of the plaintiffs. See *Love* (n 9) 613 [67] (Bell J). See also Attorney-General (Vic), 'Submissions for Attorney-General for the State of Victoria (Intervening)', Submission in *Love v Commonwealth*, B43/2018, 22 November 2019.

79 *Love* (n 9) 653 [245] (Nettle J). See also at 653–4 [246] (Nettle J).

80 Ibid 600–1 [9], 602 [18] (Kiefel CJ). See also at 620–2[93]–[98], 630 [132] (Gageler J), 632–3 [147], 637 [169] (Keane J).

81 Ibid 606 [39] (Kiefel CJ), citing *Re Patterson* (n 40) 412 [52] (Gaudron J), 437 [136] (McHugh J), 493–4 [308] (Kirby J), 518 [377] (Callinan J).

82 *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 ('*Shaw*').

83 *Love* (n 9) 599 [5] (Kiefel CJ), 629 [130] (Gageler J), 645 [210] (Keane J).

84 Ibid 629 [130] (Gageler J).

85 Ibid 599–600 [6], 601 [14] (Kiefel CJ), 619–20 [91], 621 [97] (Gageler J).

86 Ibid 604 [25] (Kiefel CJ). See also at 628 [125] (Gageler J), 642–3 [197]–[199] (Keane J).

follow from a determination [of membership] by the Elders'.[87] Their Honours also expressed concern as to the 'race-based constitutional limitation on legislative power' arising from acceptance of the plaintiffs' argument.[88] Chief Justice Kiefel and Gageler J added that the majority's articulation of the common law's recognition of connection with country was not an 'accepted method … of constitutional interpretation'.[89] The minority appeared to doubt, however, whether such recognition was even implicit in the decision in *Mabo [No 2]*,[90] the significance of which could not be extended beyond the Court's recognition of native title.[91]

IV Comment

A *Broken Bones*

The most significant fracture within the Court was as to the Court's very function in s 51(xix) jurisprudence. For Kiefel CJ, echoed by Gageler J,[92] the question stated in the special cases was 'apt to mislead as to the role of this Court … It would usurp the role of the Parliament'.[93] Justice Nettle responded, quoting *Singh v Commonwealth*: the fact '[t]hat Parliament has [purportedly] made a law … with respect to aliens presents the *constitutional question* for resolution; it does not provide an answer'.[94]

There is more to be said about this fundamental disagreement as to the Court's function, and it is not proposed to provide an exhaustive discussion in this case note. The following, however, may briefly be noted. Chief Justice Kiefel and Gageler J appeared to be concerned with the fact that, contrary to settled application of the overarching principle espoused by Fullagar J in *Australian Communist Party v Commonwealth*,[95] there was no contest in *Love* as to the power of Parliament to

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87 Ibid 604 [25] (Kiefel CJ). See also at 631 [137] (Gageler J).

88 Ibid 628–9 [126], 630 [133] (Gageler J). See also at 608 [44] (Kiefel CJ), 639 [178] (Keane J).

89 Ibid 600–1 [8]–[9], 604–5 [27]–[32] (Kiefel CJ). See also at 629 [128] (Gageler J).

90 Ibid 607 [42] (Kiefel CJ), 643 [202] (Keane J).

91 Ibid 605 [31] (Kiefel CJ), 641 [192] (Keane J).

92 Ibid 618 [87]–[88] (Gageler J).

93 Ibid 599 [4] (Kiefel CJ).

94 Ibid 678 [330] (Nettle J), quoting *Singh* (n 54) 383 [153] (Gummow, Hayne and Heydon JJ) (emphasis in original).

95 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 258 (Fullagar J) ('*Communist Party Case*'). His Honour famously pronounced:

> The validity of a law or of an administrative act done under a law cannot be made to depend on the opinion of the law-maker, or the person who is to do the act, that the law or the consequence of the act is within the constitutional power upon which the law in question itself depends for its validity. A power to make laws with respect to lighthouses does not authorize the making of a law with respect to anything which is, in the opinion of the law-maker, a lighthouse.

pass a law.[96] With respect, this was a narrow application of the law. Admittedly, in *Pochi*, Gibbs CJ spoke of Parliament '*giving its own definition* of "aliens"',[97] his Honour referring to a statutory definition enacted in the *Migration Act*, as amended at the time. This definition has since been removed,[98] yet the principle enunciated by Gibbs CJ remains authoritative and immutable: the aliens power cannot be extended 'to include persons who could not possibly answer the description of "aliens" in the ordinary understanding of the word'.[99] Indeed, the Court is also concerned with 'substance' in s 51(xix) jurisprudence,[100] namely, the *application* of laws passed under s 51(xix) to particular persons, purportedly extending the scope of the aliens power to include those persons, validly or not.[101] Unless the authority of *Pochi* is to be re-examined, a course neither proposed nor taken by Kiefel CJ and Gageler J, it is submitted that the majority view is to be preferred.

There was also a schism within the Court as to preferred methods of constitutional interpretation. Although the minority did not engage with s 51(xix) in detail, their Honours' legalism in applying the decision in *Shaw* to reject the category of 'non-citizen, non-aliens' was misplaced.[102] As Gordon J noted, there was 'no binding authority' on the question stated in the special cases.[103] *Shaw*, and the earlier decision in *Nolan v Minister for Immigration and Ethnic Affairs* ('*Nolan*'),[104] concerned the changing constitutional status of non-Aboriginal British subjects.

Justice Gordon and Edelman J engaged in an evolutionary originalist interpretation of s 51(xix), their Honours highlighting the unsettled meaning of 'aliens' at Federation,[105] and drawing upon the common law and Convention debates to locate its

96 *Love* (n 9) 600 [7] (Kiefel CJ), 618 [87]–[88] (Gageler J).

97 *Pochi* (n 39) 109 (emphasis added).

98 Ibid 106. See *Love* (n 9) 676–7 [323]–[325] (Nettle J).

99 *Pochi* (n 39) 109.

100 See *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 32 (Brennan, Deane and Dawson JJ, Mason CJ agreeing at 10). On the Court's general concern with 'matters of substance as well as of form' in constitutional jurisprudence, see *Crump v New South Wales* (2012) 247 CLR 1, 26 [60] (Heydon J).

101 *Love* (n 9) 678 [330] (Nettle J). See also *Singh* (n 54) 329 [4] (Gleeson CJ), 372 [118] (McHugh J), 429 [305] (Callinan J).

102 On legalism, see *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 152 (Knox CJ, Isaacs, Rich and Starke JJ) ('*Engineers Case*'). See also Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience' (1986) 16(1) *Federal Law Review* 1, 4–5; George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams: Australian Constitutional Law and Theory* (Federation Press, 7th ed, 2018) 170–82.

103 *Love* (n 9) 670 [294] (Gordon J). See also at 657 [255], 660 [262]–[263] (Nettle J).

104 *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 ('*Nolan*').

105 *Love* (n 9) 671–2 [301]–[303] (Gordon J), 692–3 [400]–[401] (Edelman J).

'essential meaning'.[106] Contrary to the assertions of the minority, this approach was compatible with the Court's essential/non-essential originalism in *Shaw* and *Nolan*.[107] Those decisions rested upon the significance of historical developments, namely, the enactment of the *Australia Acts*,[108] and broader 'retreat of Empire'.[109] While these developments were apt to demonstrate the changing 'practical designation' of the term 'aliens' with respect to non-Aboriginal British subjects, the events discussed in *Love* reinforced the term's *inapplicability* to Aboriginal people.[110] Indeed, not only has the last century involved the emergence of the independent Australian nation,[111] it has equally been marked by the growing recognition of First Nations peoples and culture as integral to the Australian identity.

B *'Judicial Activism': A Pas de Deux*

Although regarding the plaintiffs' argument as being '[m]orally and emotionally engaging', but 'not legally sustainable',[112] the minority's objection to drawing constitutional distinctions based on 'race' (described as being an objection 'of principle')[113] appeared itself to rest upon policy considerations. Indeed, race is not a concept foreign to the *Constitution*.[114] For Keane J, the 1967 referendum 'brought about a situation in which Aboriginal people were no longer singled out'.[115] Accepting the plaintiffs' argument, therefore, was 'not consistent with fundamental notions of equality', and his Honour queried whether all Aboriginal people 'would … embrace the rank paternalism that suffuses this argument'.[116] Justice Bell contended

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106 Ibid 680–1 [342]–[345] (Gordon J), 692 [399], 695–7 [405]–[410] (Edelman J).

107 *Nolan* (n 104) 186 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ), cited in *Shaw* (n 82) 54 [71]–[71] (Kirby J). See also at 41 [23]–[24] (Gleeson CJ, Gummow and Hayne JJ). This theory of constitutional interpretation contends that, although the 'essential' meaning of a term was fixed at Federation, its 'practical designation' may change to accommodate legal and societal developments. See generally Williams, Brennan and Lynch (n 102) 194–202.

108 *Australia Act 1986* (Cth); *Australia Act 1986* (UK), cited in *Love* (n 9) 682 [352], 684 [359] (Gordon J).

109 *Love* (n 9) 621 [97] (Gageler J).

110 See above nn 68–69 and accompanying text.

111 See, eg, *Victoria v Commonwealth* (1971) 122 CLR 353, 395–6 (Windeyer J) ('*Payroll Tax Case*').

112 *Love* (n 9) 629 [128] (Gageler J). See also at 600 [8] (Kiefel CJ), 639 [178] (Keane J).

113 Ibid 630 [133] (Gageler J).

114 See, eg, *Constitution* s 51(xxvi). Justice Gordon and Edelman J highlighted the centrality of 'race' to s 51(xix) at Federation, as elucidated by the Convention debates: *Love* (n 9) 680 [343] (Gordon J), 689 [390], 696–7 [409] (Edelman J). Cf at 608 [44] (Kiefel CJ). See generally Robert Dubler, 'Race and the Constitution' (2002) 76(7) *Australian Law Journal* 456.

115 *Love* (n 9) 639 [180] (Keane J).

116 Ibid 646–7 [217] (Keane J).

that the majority's decision was 'not offensive' in any such way.[117] Justice Edelman added: 'To treat differences as though they were alike is not equality. It is a denial of community. Any tolerant view of community must recognise that community is based upon difference.'[118]

This disagreement within the Court fell along the same lines as the public debate surrounding the reforms proposed in the *Uluru Statement from the Heart*.[119] Here, the work of Will Kymlicka is instructive. Kymlicka argues that 'group-differentiated rights' are not corrosive for the liberal egalitarian polity; rather, they should be viewed as productive, as an expression of 'a desire for integration' by a historically excluded minority group.[120] The *Uluru Statement from the Heart* itself contemplates this thinking, against the historical backdrop of colonialism and dispossession: 'We seek constitutional reforms to empower our people and take a *rightful place* in our own country.'[121]

This is not to dismiss the minority's disquiet entirely. Indeed, there remain broader questions as to the appropriateness of courts determining the Aboriginality of a person as a matter of law.[122] The minority reasons articulated such concerns as arising from potential issues of proof in future cases.[123] While the tripartite test rests primarily upon the determination of membership by the relevant Aboriginal nation, cases in which the court is required to interrogate the issue are indeed likely, if not unavoidable. The Love proceeding was one such instance, the High Court remaining undecided as to whether recognition by one Kamilaroi Elder was sufficient to

117 Ibid 614 [73] (Bell J).

118 Ibid 710–1 [453] (Edelman J).

119 See above nn 5–6 and accompanying text. Then Prime Minister Malcolm Turnbull suggested that the *Uluru Statement from the Heart* call for a Voice to Parliament was inconsistent with individual equality: Calla Wahlquist, 'Indigenous Voice Proposal "Not Desirable", Says Turnbull', *The Guardian* (online, 26 October 2017) <https://www.theguardian.com/australia-news/2017/oct/26/indigenous-voice-proposal-not-desirable-says-turnbull>. This view was criticised by some Aboriginal people. See, eg, Sean Gordon, 'Indigenous Rejection: Turnbull Government's Rejection of Uluru Statement from the Heart Indefensible', *ABC News* (online, 27 October 2017) <https://www.abc.net.au/news/2017-10-27/decision-to-reject-uluru-statement-is-indefensible/9093408>.

120 Will Kymlicka, *Multicultural Citizenship: A Theory of Minority Rights* (Oxford University Press, 1995) 175–7.

121 Uluru Statement from the Heart (n 5) (emphasis in original). See also Stan Grant, 'Chance for Morrison to Give a Voice to the Quietest Australians of All', *The Canberra Times* (online, 27 May 2019) <https://www.canberratimes.com.au/story/6182412/chance-for-morrison-to-give-a-voice-to-the-quietest-australians-of-all/>.

122 See, eg, Marcia Langton, 'Hysteria over High Court's Ruling Is Hateful and Wrong', *The Australian* (online, 14 February 2020) <https://www.theaustralian.com.au/inquirer/hysteria-over-high-cour…-is-hateful-and-wrong/news-story/034fe0a7a578ef76b17da6e01338f3bc>.

123 *Love* (n 9) 604 [24]–[25] (Kiefel CJ), 631–2 [139] (Gageler J), 642 [196] (Keane J).

satisfy the tripartite test.[124] The Federal Court was recently required to rule on the Aboriginality of a person without evidence of biological descent.[125] As Nettle J noted, however, 'difficulty of proof is not a legitimate basis to hold that a resident member of an Aboriginal society can be regarded as an alien in the ordinary sense of the term … There is nothing new about disputed questions of fact'.[126]

Overall, considerations of policy and practicality informed both the majority and minority judgments in *Love*. This raises some doubt as to the credibility of one-sided allegations of 'judicial activism', which were levelled at the majority in the aftermath of the decision.[127] Evidently, the minority reasons were no exhibition of strict constitutional positivism either.

V Conclusion

Despite the intrigue surrounding the High Court's decision in *Love*, it remains to be seen how significant the decision will prove to be. As Megan Davis has noted, 'there are not too many blackfellas who are born overseas and need a visa to come back home'.[128] Plainly, the decision must be confined to its facts, as is apparent from its early judicial treatment.[129] In any event, Parliament may attempt to legislate around the decision, a possibility contemplated by three members of the Court,[130] and subsequently echoed by the Commonwealth Attorney-General.[131]

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124 See, eg, *Love* (n 9) 604 [24] (Kiefel CJ), 689 [388] (Gordon J).

125 *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 416, [200]–[236] (Anderson J) ('*McHugh*').

126 *Love* (n 9) 668 [281] (Nettle J).

127 See above n 13 and accompanying text.

128 Megan Davis, 'The High Court and the "Aliens" Power', *The Saturday Paper* (online, 15 February 2020) <https://www.thesaturdaypaper.com.au/opinion/topic/2020/02/15/the-high-court-and-the-aliens-power/15816852009396>. See also *Love* (n 9) 289 [456] (Edelman J). Cf at 631–2 [139] (Gageler J).

129 *McHugh* (n 125) [191]; *Hopkins v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 33, [36], [41]–[42] (Logan, Wigney and Gleeson JJ).

130 Justice Gageler suggested that legislation 'targeted' at Aboriginal people in this context might be supported by the immigration power conferred by s 51(xxvii) of the *Constitution*, or the race power conferred by ss 51(xxvi): *Love* (n 9) 632 [140] (Gageler J). Justice Nettle held some doubt as to whether such legislation 'would be within the ambit of Commonwealth legislative power': at 668 [283] (Nettle J). Justice Gordon ruled that the question 'need not be decided': at 687 [373] (Gordon J).

131 Paul Karp and Calla Wahlquist, 'Coalition Seeks to Sidestep High Court Ruling That Aboriginal Non-Citizens Can't Be Deported', *The Guardian* (online, 12 February 2020) <https://www.theguardian.com/australia-news/2020/feb/12/coalition-seeks-to-sidestep-high-court-ruling-that-aboriginal-non-citizens-cant-be-deported>.

There are strands of reasoning, however, that may be productive of future developments. *Love* establishes that *Mabo [No 2]* has significance beyond its recognition of native title.[132] Justice Gordon made clear that the existence of native title was merely 'one legal consequence' flowing from the 'deeper truth' of *Mabo [No 2]*.[133] That Aboriginal people are beyond the scope of the power conferred by s 51(xix) of the *Constitution* is now another, and there may still be further consequences to be uncovered by future cases. Another seed that has been planted is Nettle J's recognition of the 'unique obligation of protection' owed to Aboriginal people by the Crown in right of the Commonwealth,[134] which may represent the beginning of a shift in Australian law towards acceptance of a broader fiduciary obligation in this context.[135]

Although the Court remained within the boundaries of justiciability established in *Mabo [No 2]*,[136] perhaps a more immediate implication stems from the common law's recognition of connection with country, as articulated in *Love*. Not only did the Court's decision rest upon this connection, so too does the *Uluru Statement from the Heart*:

> 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 united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty.*[137]

Parliament should take the Court's decision, a declaration of the unique constitutional position of Aboriginal people, and build upon it. Three years on from the *Uluru Statement from the Heart*, the time for constitutional reform must surely be approaching, when this unique position will at long last be formally recognised.

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132 See above n 3 and accompanying text.

133 *Love* (n 9) 684–5 [363]–[364] (Gordon J). See also at 663 [269] (Nettle J).

134 See above nn 77–78 and accompanying text.

135 The only judicial recognition of such an obligation in Australia came from Toohey J in *Mabo [No 2]*: see *Mabo [No 2]* (n 1) 203 (Toohey J). It is settled law in Canada: *Guerin v The Queen* [1984] 2 SCR 335.

136 That is, the non-justiciability of questions as to the acquisition of sovereignty over Australia by the Crown: see *Love* (n 9) 661–2 [264] (Nettle J), 683 [356] (Gordon J).

137 Uluru Statement from the Heart (n 5) (emphasis in original).