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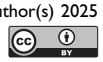

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First Nations' sovereignties and the Australian common law: Unfinished business for the High Court

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Abstract
In this article, I propose a return to the High Court in the wake of the failure of the Voice referendum. This would enable a critical review of the common law's treatment of First Nations' sovereignties. I argue that, as with *Mabo* in 1992 regarding native title, recognition of prior First Nations' sovereignties is available within existing common law. While case law appears unpromising, I critique judicial reasoning, identify crevices in judgments and mount an argument for pleading a justiciable case before the High Court. This proposal provides for a potential improvement in justice for First Nations Australians by recognising their sovereignties.

Keywords
First Nations, sovereignty, justiciability, principles, common law, high court

As one of Australia's most prominent First Nations leaders and advocates, Marcia Langton concluded shortly after the Voice to Parliament referendum that the time for political and democratic reconciliation was over.[1] One aspect of that whole sorry debate was a widespread reluctance to appreciate that First Nations peoples are not just the first Australians, they are the *quintessential* Australians. First Nations Australians maintain they have never ceded their territory or sovereignty and did not surrender to the British colonists. These facts are fundamental to claims of enduring sovereignties, and inform First Nations peoples' approach to the failure of non-Indigenous Australia and the legal system to respond adequately. First Nations peoples assert the need for clear recognition of their prior and enduring sovereignties over country.

I argue that political events now demand a return to the High Court. This conclusion is a product of the outcome of the referendum as well as the history before and since the *Mabo* case.[2] Justice Gerard Brennan noted late in 1992 that the High Court's role of maintaining the common law had emerged because, '[L]egislatures have disappointed the theorists'.[3] The proposal in this article is a direct consequence of the 2023 referendum not merely *disappointing* First Nations peoples, but of it dismissing their enduring interests and concerns. This experience was the bitter outcome of political advocacy and social and legal action since the passage over 30 years ago of the *Native Title Act*[4] in 1993. The body politic has again shown its

[1] 'Marcia Langton on the future of the Voice', *Late Night Live* (ABC Radio National, 5 February 2024) https://www.abc.net.au/listen/programs/latenightlive/marcia-langton-future-the-voice-parliament/103429690. For further information about the Voice to Parliament referendum, see Reconciliation Australia, *Voice to Parliament* (Web Page) https://www.reconciliation.org.au/support-a-voice-to-parliament/.
[2] *Mabo v Queensland (No 2)* (1992) 175 CLR 1 ('*Mabo*').
[3] *Dietrich v The Queen* (1992) 177 CLR 292 ('*Dietrich*'). *Dietrich* was handed down in November 1992, five months after *Mabo*. The full text reads: 'The reluctance of the Courts in earlier times … was due in part to the theory that it was the exclusive function of the Legislature to keep the law in a serviceable state. But *Legislatures have disappointed the theorists* and the Courts have been left with a substantial part of the responsibility for keeping the law in a serviceable state' (emphasis added). Brennan J did not clarify his motivation for making this statement in what was a minority judgment. There had, though, been a rapid and widespread conservative reaction to his lead judgment in *Mabo* amid claims of judicial activism. It is a plausible explanation that Brennan was here responding to that criticism.
[4] *Native Title Act 1993* (Cth).

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unwillingness to face the mirror of our national origin story and acknowledge reality with justice, including recognising prior and enduring First Nations' sovereignties as an essential element. We have incontrovertible evidence, were it needed, that the legal problem of the status of First Nations Australia before the colonial creation and modern origins of this nation-state cannot be resolved electorally or politically. Below, I set out the context and discuss key relevant issues concerning sovereignty, justiciability, and the principles of the common law. I propose a focussed return to the High Court on the recognition of First Nations' sovereignties which are not adverse to the Crown and are consistent with Crown sovereignty in right of the Commonwealth and the states.

Context

The social and political environment in which the *Mabo* case arose was materially different to ours today, yet it is important to understand the historical context in order to appreciate not only what has changed, but also how much work still needs to be done. The current legal epoch kicked off in 1975 with two countervailing events. The first was the release by the International Court of Justice (ICJ) of an Advisory Opinion on the Western Sahara. The ICJ considered the concept of 'terra nullius', the significance of territory being 'peopled by tribes', and the relevance of state practice in the process of colonisation. It found that the territory of the 'Western Sahara … at the time of colonization by Spain was not a territory belonging to no-one (terra nullius)'.[5] The second event was the handing down by the High Court of its judgment in the *Seas and Submerged Lands Case,* which determined regarding sovereignty over Australia that: 'The acquisition of territory … is an act of state which cannot be challenged, controlled or interfered with by the courts of that state'.[6] This occurred in December, just a month after the dismissal of the Whitlam government: 1975 was a big year in Australian politics.

We should also bear in mind the highly charged atmospherics of racial and (post-) colonial politics worldwide in the 1970s. Across the globe, apartheid South Africa was centre stage. At home, other than widespread protests against the Springboks rugby tour in 1971, political action centred on the establishment in early 1972 of the Aboriginal Tent Embassy as a permanent protest site on the front lawns of Canberra's Old (but then, current) Parliament House. While the tide of Indigenous land rights and later demands for Treaty shifted considerably over the course of the '70s and 1980s, institutionally there was little progress beyond passage of the *Racial Discrimination Act*[7] in 1975. On the treatment of First Nations peoples, Australia remained out of step with other culturally and politically comparable 'settler' nation-states with a common law heritage. Pressure was nevertheless building for a response that our political institutions, even in the mid-to-late '80s, found unable to deliver. It was in this environment, in the year then Prime Minister Paul Keating gave his Redfern 'act of recognition' speech,[8] that the High Court considered the *Mabo* case.

And yet 33 years later, here we are again, with decades of unfinished 'Makarrata' and eight years after the Uluru Statement from the Heart,[9] at another low point on the rollercoaster of First Nations' recognition.[10] While Keating's 'standout' speech and then Prime Minister Kevin Rudd's 2008 apology[11] to Australia's Indigenous peoples and particularly the stolen generations were inclusive gestures good and worthy enough, both were limited in effect: they had no legal or institutional significance. Fine words better no people, at least when unaccompanied by commensurate actions. Indeed, not even a quarter of a million people participating in a Walk for Reconciliation across the Sydney Harbour Bridge in May 2000 – and which I had expectantly joined – amounted to anything much at all. Gestural politics, even on a large scale, do not cut it.

Arguably, we have come full circle from a low point with the 2002 *Yorta Yorta* case[12] – a High Court decision relying on the loss of traditional law and customs being washed away with the 'tide of history'[13] – which triggered such a strident reaction that, by 2014, scholars had reached a more optimistic position on prospects for constitutional change.[14] Now, as the national momentum for change with a treaty or similar instrument has again stopped hard in its tracks, and electoral or legislative prospects for addressing these foundational concerns are remote for the foreseeable future, the undulating tragedy demands a return to the High Court.[15]

[5] *Western Sahara (Advisory Opinion)* [1975] International Court of Justice (ICJ) Rep 12, 69.
[6] *New South Wales v Commonwealth* (1975) 135 CLR 337 ('*Seas and Submerged Lands Case*').
[7] *Racial Discrimination Act 1975* (Cth).
[8] The Hon Prime Minister Paul Keating MP, *Australian Launch of the International Year for the World's Indigenous People* (Speech, Redfern, 10 December 1992) https://pmtranscripts.pmc.gov.au/sites/default/files/original/00008765.pdf.
[9] *Uluru Statement from the Heart* (Web Page) https://ulurustatement.org/the-statement/view-the-statement/.
[10] As Megan Davis reminds us, Makarrata is a Yolngu word meaning the end of a dispute and the resumption of normal relations. Megan Davis, 'Treaty, Yeah? The Utility of a Treaty to Advancing Reconciliation in Australia' (2006) 31(3) *Alternative Law Journal* 127.
[11] The Hon Prime Minister Kevin Rudd MP, *Apology to Australia's Indigenous Peoples* (Speech, Parliament of Australia, 13 February 2008) https://www.aph.gov.au/Visit_Parliament/Art/Icons/Apology_to_Australias_Indigenous_Peoples.
[12] *Members of the Yorta Yorta Aboriginal Community v State of Victoria* (2002) 214 CLR 422 ('*Yorta Yorta*').
[13] A finding of Brennan J in *Mabo* (n 2) 60.
[14] See Melissa Castan, 'The Recognition of Indigenous Australians in the Teaching of Federal Constitutional Law' (2014) 7(1&2) *Journal of the Australasian Law Teachers Association* 90, 98.
[15] Notwithstanding promising changes to Victoria's legislation – the Statewide Treaty Bill 2025. See 'Victoria's Negotiated Statewide Treaty' (Web Page) https://www.treatyvictoria.vic.gov.au/victorias-negotiated-statewide-treaty. The current proposal concerns only one state; it is by legislative amendment not by referendum or plebiscite, and it is likewise repealable.

Discussion

My proposal is a response to the failure of Australian law to address First Nations sovereignties; the method is by critically assessing the common law. The focus is on judicial reasoning around the recognition of First Nations' sovereignties surviving Crown acquisition. I have analysed and synthesised emerging research challenging the dominant legal view that questions of sovereignty are not domestically justiciable. While the body of case law appears unpromising, there are crevices in judgments and levers of argument by which research may prise open the gates of justiciability.

Although it was groundbreaking, the *Mabo* judgment was only partly transformative; indeed, it has been acknowledged judicially as 'imperfect'.[16] Since then, the law has scarcely developed beyond recognition of the limited concept of native title. While dispatching the concept of terra nullius regarding native title and the 'barbarous' peoples doctrine that denied the prior existence of First Nations laws, the High Court did not erase the companion fiction of the doctrine of Settlement. This is the mode of acquisition that was eventually deployed after the British Crown asserted and, in the Court's current view, *acquired* sovereignty over the totality of the continent in just three formal steps.[17] Settlement is an original, not derivative, mode of acquisition of sovereignty – it assumes that the Indigenous inhabitants, as 'backward peoples', had no sovereignty over their country at the time the British colonists arrived.

In taking this position in *Mabo*, the High Court determined that it may consider the *consequences of* the acquisition of sovereignty, but not the acquisition itself.[18] Although the Court was silent on whether the consequences could include examination of the mode, timing and extent of acquisition, Brennan J in *Mabo* found to go further might be to fracture what he called the 'skeleton of principle' that gives our law its shape and internal consistency.[19] I critique this evaluative view. Just as *Mabo* dismissed the fiction of terra nullius regarding native title, I propose that the High Court commits to dispatching the equivalent fiction of *territorium nullius* regarding sovereignty.[20] This procedure would dismiss the 'backward peoples' doctrine, formally recognise prior First Nations sovereignties, and replace the elaborate fiction that is the doctrine of Settlement with a mode that reflects the reality of acquisition of sovereignty by effective occupation and enduring control of territory, absent consent or surrender.

I have assessed articles by over 100 theorists, largely from the last 35 years, three-quarters of whom are from a background in legal theory. Over 40 of those write on questions relating to First Nations' sovereignties. The balance are from historical, philosophical or socio-political perspectives. Views range from doctrinal criticism of the processes of judicial reasoning in relevant case law,[21] through critical-legal arguments rejecting Anglo-Australian Crown sovereignty and an insistence on referring the issue to an international jurisdiction,[22] to socio-legal arguments that the Crown acquired sovereignty by conquest.[23] Some scholars by contrast accept the doctrine of original settlement while others argue that matters of sovereignty are justiciable but are agnostic on the outcome.[24] Yet the law stands in error. It maintains falsehoods, is conceptually incoherent, and/or is inconsistent in its reasoning, while a cohesive, well-articulated basis to take a compelling case to the High Court remains to be settled.

There are, though, shards of scholarly light in tackling the matters and settling on an optimal approach. The current judicial position on First Nations sovereignties is at best 'ahistorical'. Befittingly, impressive work has come from legal theorists with a strong sense of history as well as historians with a sophisticated understanding of the law.[25] These scholars have shown how the historical and legal accounts of key concepts populating the debate over First Nations' sovereignties are erroneous and anachronistic. Those include the doctrine of Settlement, largely a product of 19th century law, and not the 18th or early 19th century executive acts assumed in case law.[26] These clarifications also highlight the relatively recent deployment in Australian law of the concept 'terra nullius' and the failure in judicial

[16]See Justice Michelle Gordon's 2019 John Toohey Oration, published as Michelle Gordon, 'The Development of Native Title: Opening Our Eyes to Shared History' (2019) 30 *Public Law Review* 314, 321.

[17]By Crown Prerogative and Proclamations made in 1788, 1824 and 1829, and over the Torres Strait Islands in 1879.

[18]*Mabo* (n 2) 32 (Brennan J).

[19]Ibid 29.

[20]See discussion of *territorium nullius* – territory with no sovereign – in Andrew Fitzmaurice, 'The Genealogy of Terra Nullius' (2007) 129 *Australian Historical Studies* 13.

[21]Especially in an as-yet unpublished manuscript (submitted to the *UNSW Law Journal*), Olivia Barr, 'Post-Referendum Possibilities: Under the doctrine of precedent, are questions of First Nations' sovereignty really non-justiciable in Australian Courts?'. See also 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) *UNSW Law Journal* 703.

[22]See Peter Kilduff and Asmi Wood, 'Determining sovereignty: Through law? Or a political option?' (2021) 50(3) *Australian Bar Review* 476.

[23]See Julie Cassidy, 'The Impact of the Conquered/Settled Distinction regarding the Acquisition of Sovereignty in Australia' (2004) 8 *Southern Cross University Law Review* 1; Gerry Simpson, 'Mabo, International Law, Terra Nullius and the Stories of Settlement: An Unresolved Jurisprudence' (1993) 19(1) *Melbourne University Law Review* 195.

[24]See respectively Secher (n 21) and Barr (n 21).

[25]See legal theorists: Garth Nettheim, 'Sovereignty and Aboriginal Peoples' (1991) 2(53) *Aboriginal Law Bulletin* 4; Gerry Simpson (n 23); Sean Brennan, Brenda Gunn and George Williams, '"Sovereignty" and its Relevance to Treaty-Making Between Indigenous Peoples and Australian Governments' (2004) 26(3) *Sydney Law Review* 307; Daniel Lavery, 'Renovating the Orthodox Theory of Australian Territorial Sovereignty' (2022) 45(2) *UNSW Law Journal* 499, 512; and James Aird and Allan Ardill, 'A "Kind of Sovereignty": Toward a Framework for the Recognition of First Nations' Sovereignties at Common Law' (2023) 46(2) *Melbourne University Law Review* 330, 367. See historians: Merete Borch, 'Rethinking the Origins of *Terra Nullius*' (2001) 32(117) *Australian Historical Studies* 222; Henry Reynolds, 'Reviving Indigenous Sovereignty?' (2006) 6 *Macquarie Law Journal* 5; and Andrew Fitzmaurice (n 20). See also lawyer and administrator, Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (Stevens & Sons, 1966).

[26]See Borch (n 25) 230–1.

reasoning to accept the implications of distinguishing its use as 'land with no owner' from the use of 'territory with no sovereignty', for which I see the international law term '*territorium nullius*' as more apt.[27]

This has both built on and informed more specific work in legal theory. That includes analysis on aspects of First Nations' sovereignties which may not be adverse to Crown sovereignty. I attend to the partial overturning in *Mabo* of the decision in the 1889 Privy Council case, *Cooper v Stuart*,[28] by the High Court recognising native title. The Court, however, failed to do so regarding acquisition of sovereignty, while relying on precisely the same factual and legal findings.[29] This connects with questions of domestic justiciability and a focus on arguable means to take such matters to the High Court.[30] By contrast the legal philosophy on principles evident in the debate over First Nations' sovereignties, to the extent it is present at all, is desultory. Scant attention has been paid to the nature and architecture of legal principles and specifically to Brennan J's skeleton of principle first articulated in 1992.[31] As discussed below, tackling this failure to inform judicial decision-making in a coherent and consistent manner warrants increased scholarly focus and attention.

Sovereignty and the common law

The existence of a legal system is predicated on *sovereignty* – that is, the principle of supreme authority within a territory to govern and consequently make laws.[32] As first a political concept, I argue that sovereignty as a power is a social fact that precedes law:

> 'Sovereignty imports supreme internal legal authority';[33] it is 'an attribute which political bodies possess … involving jurisdiction over a particular people … in relation to a society that falls under its government'.[34]

The presence of sovereignty is hence an effective requirement for a social system to be a legal system. Therefore, the existence of a legal system at least provides strong evidence for the conclusion that sovereignty obtains, even if it does not logically entail the conclusion. The recognition of a First Nation's legal system as confirmed in *Mabo*[35] thus at a minimum acknowledges prior First Nations' sovereignties, effective at least until Crown acquisition. This has been alluded to in legal judgments including *Mabo*, in which Brennan J referred to '*fictions* … that there was no sovereign law-maker in the territory of a settled colony before sovereignty was acquired by the Crown'.[36] It has also been noted in scholarship that 'Indigenous peoples … were locally sovereign peoples recognised in international law as the sovereign owners of their territories'.[37] This, however, has not been explicitly pleaded before the High Court.

Sovereignty moreover is a complex concept. It is capable of being shared and instantiated in differing social and political relations.[38] Cultural beliefs and customary practices that bind First Nations peoples are recognisable aspects of sovereignty. I argue these aspects may persist beyond the loss of a First Nation's hitherto exclusive sovereignty to the extent that they are consistent with – that is, not adverse to – the state sovereignty acquired. This would, by its nature, comprise residual unextinguished sovereignties of First Nations peoples as normative systems.[39] It also emphasises that the sovereignty acquired by the Crown was not original, but derivative.

Justiciability and the common law

Brennan J in *Mabo* distinguishes the mode of acquisition of sovereignty from rights and interests in land. While the rejection of 'terra nullius' means that First Nations people retain their native title as consistent with Crown acquisition of sovereignty by settlement, by virtue of the same enlarged doctrine they have been deprived by the High Court of recognition of their prior sovereignties and any enduring aspects. For this disjunction Brennan J relied in *Mabo* on a divergent chain of reasoning, coupling the acquisition of Crown sovereignty with the Act-of-state doctrine enunciated in the *Seas and Submerged Lands Case*. He confirmed this as a principle precluding 'any contest between the executive and the judicial branches of government as to whether a territory is or is not within the Crown's Dominions.'[40]

[27]See respectively: Daniel Lavery, 'No Decorous Veil: The Continuing Reliance on an Enlarged Terra Nullius Notion in *Mabo [No 2]*' (2019) 43(1) *Melbourne University Law Review* 233; and Andrew Fitzmaurice (n 20).
[28]*Cooper v Stuart* (1889) 14 App Cas 286, notably [11]: surely the most egregious finding covered in the literature.
[29]See Aird and Ardill (n 25); and Eddie Synot and Roshan de Silva-Wijeyeratne, 'Constitutional Foundations: The Persistent Myth of *Cooper v Stuart*' in Nicole Watson and Heather Douglas (eds), *Indigenous Legal Judgments Bringing Indigenous Voices into Judicial Decision Making* (Routledge, 2021) 36.
[30]See especially Barr (n 21).
[31]See Simon Chesterman, '"Skeletal Legal Principles": The Concept of Law in Australian Land Rights Jurisprudence' (1998) 30(40) *The Journal of Legal Pluralism and Unofficial Law* 61; Penny Pether, 'Principles or Skeletons? *Mabo* and the Discursive Constitution of the Australian Nation' (1998) 4(1) *Law Text Culture* 115; cf Gordon (n 16).
[32]See, eg, *Max Planck Encyclopedia of Public International Law* (online at 15 September 2025) Samantha Besson, 'Sovereignty'; cf *Stanford Encyclopedia of Philosophy* (online, rev 17 September 2024) Daniel Philpott, 'Sovereignty'.
[33]See Brennan J in *Mabo* (n 2) 36.
[34]Roger Scruton, 'Sovereignty' in *A Dictionary of Political Thought* (1982) 441; see also *Seas and Submerged Lands Case* (n 6) 479–80 (Jacobs J).
[35]Brennan J, *Mabo* (n 2) 39 confirming Blackburn J in *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.
[36]*Mabo* (n 2) 58 (emphasis added).
[37]See Barbara Hocking, 'Aboriginal Law Does Now Run in Australia: Reflections on the Mabo case – from *Cooper v Stuart* through *Milirrpum* to *Mabo*' (1993) 15(2) *Sydney Law Review* 187, 193.
[38]See, eg, Brennan, Gunn and Williams (n 25).
[39]See Aird and Ardill (n 25); Daniel Lavery, 'Renovating the Orthodox Theory' (n 25).
[40]Mabo (n 2) 31, citing *Seas and Submerged Lands Case* (n 6) 388.

Justice Brennan's lead judgment in *Mabo* rejected the authority and precedent of *Cooper v Stuart* regarding the enlarged doctrine of terra nullius, confirmed the existence of First Nations legal systems, and recognised the existence of native title. Nevertheless, Brennan J deployed case law to avert the question of prior sovereignty, in effect so accepting an 'engorged'[41] version of the doctrine of *territorium nullius* over the totality of Australia. The Court did this by denying the examination of the acquisition of sovereignty (and potentially its mode, timing and extent) as not merely a matter of settled law but by, as acts of state, not being justiciable in a domestic jurisdiction.

I argue that the Act-of-state doctrine, elaborated on by Gibbs J in *Coe* (1979)[42] concerning a claim of Aboriginal sovereignty and qualified by Mason CJ in the second Coe case that followed *Mabo* – *Coe* (1993)[43] – is silent on *prior* sovereignty and should not thwart examination of the mode, timing and extent of the Crown acquisition of sovereignty. The Privy Council's brief deliberation in *Cooper v Stuart* showed this to be a *legal* interpretation by the ultimate court of appeal of the mode (and thus potentially the timing and extent) of acquisition of sovereignty over a century after its assertion.[44] It is therefore eminently arguable that the High Court could likewise consider these matters more than 130 years after that.

Principles and the common law

The attention on principles is motivated by inconsistent findings, in *Mabo* and later cases, which rely on conceptual incoherence in their silence on prior sovereignty and in affirming the doctrine of Settlement. These deny the historical reality of a derivative sovereignty acquired over the passage of a century in a process of effective occupation and enduring control of territory, and repudiate demands of justice for First Nations peoples. It thus fails the test of Brennan's 'skeleton of principle' as articulated in *Mabo* and later the same year in *Dietrich* – of judicial reasoning in accordance with justice, and rights and principles that can be rationally explained and consistently justified.[45]

Future scholarly work would provide an opportunity to explore in detail the architecture and function of Brennan's skeletal principles and the synthesis of those as five meta-principles, including one comprising the critical role in law of facts and historical truth abstracted from the speech by Justice Michelle Gordon.[46] The application of these principles to the questions of prior First Nations' sovereignties and the prospect of residual sovereignty not adverse to the Crown would go ultimately to jurisprudence concerning historical truth, conceptual coherence, and justice, and ask: what merits in our legal system should we emphasise?

Conclusion, and scope of the argument

The focus here is on the common law: my proposal is not constitutional in temper. While arguments presented may have relevance for matters of self-government or self-rule, or regarding robust, state-like forms of self-determination or as domestic dependent nations, those debates do not fall within the territory of this article. My working assumption is that any such proposal would likely be constitutional and depend on a successful referendum and, if not, would be of such political moment as to demand a national plebiscite like the same-sex marriage changes in 2017. To reprise, First Nations' sovereignties are here limited to a form consistent with the powers of the Crown in right of the Commonwealth and the states and so not adverse to the Crown. The arguments also focus largely on domestic jurisdiction and justiciability in municipal law; although international law can inform the principles, substance and rationales of judicial reasoning. It is, in Brennan's words in *Mabo*, a 'legitimate and important influence on the development of the common law'.[47]

Likewise, I presume no change to the recognition of title to land in Australia, other than perhaps the effective commencement dates of some original grants: proposed reform does not impinge on the ultimate title of the Crown or the related 'essential doctrine' of tenure.[48] The focus is on forms of sovereignty that I contend have not been extinguished. These will include normative systems of cultural beliefs and customary practices and authority, which may also bleed into aspects of customary laws that do not comprise parallel law-making functions adverse to Crown sovereignty.

While a complete and enduring resolution of First Nations' issues remains somewhere over the next horizon, this business proposal to the High Court presents an effective remedy that enables further steps along the path to Makarrata.[49] The project is of manageable juridical risk with strong prospects of substantial improvement in legal and social functioning, and is jurisprudentially recommended.

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[41] A term of Daniel Lavery's, albeit applied as an engorged version of *terra* nullius regarding sovereignty (n 25).
[42] See *Coe v Commonwealth* (1979) 24 ALR 118, relevantly critiqued in detail by Barr (n 21).
[43] *Coe on behalf of the Wiradjuri Tribe v Commonwealth of Australia and the State of New South Wales* (1993) 118 ALR 193.
[44] *Cooper v Stuart* (n 28), relevantly critiqued in detail by Synot and de Silva-Wijeyeratne (n 29).
[45] *Dietrich* (n 3) [6–7].
[46] Justice Michelle Gordon (n 16). See, eg, discussion in Rick Berino, 'After The Voice: Part Four – Facts, Law, and the Skeleton of Principle', *Substack* (Blog Post, 11 August 2024) https://rickberino.substack.com/p/after-the-voice-part-four.
[47] Brennan J, *Mabo* (n 2) 42.
[48] See especially Brennan J, *Mabo* (n 2) 46–9.
[49] By this, I mean the important psychosocial impact of judicial recognition of the facts of prior and enduring sovereignties on First Nations peoples, and on relationships based in mutual respect with non-Indigenous Australians flowing from such historic recognition. This may be seen as an aspect of Makarrata that provides a measure of improved justice for First Nations peoples expressed in enhanced standing and peaceful resolution, and which aids healing of transgenerational trauma.

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Richard O'Brien is a PhD candidate at Griffith Law School. Consistent with Australian Indigenous perspectives on respectful research protocols, the author notes he is an Australian-born man who speaks with maternal Scottish and paternal Irish-English-German ancestry. The author pays his respects to elders past, present and emerging and acknowledges the Wodi Wodi people of the Dharawal Nation upon whose land he lives and works.