# *Dispossession Cycles and Resistance: Historical Continuums in the Deportation of First Nations Peoples*

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***Abstract***

This article surveys the historical and contemporary context of Indigenous peoples' entanglement in systems of criminal justice and migration control. Government attempts to remove First Nations peoples from Australia under visa cancellation provisions present a striking contemporary development in border control. Despite the High Court of Australia's ruling that 'Aboriginal Australians' cannot be 'aliens' and therefore subject to visa cancellation provisions, Indigenous peoples continue to be targeted for exclusion and subject to the gaze of border control authorities. We use documentary research and draw on two case studies to explore the historical use of deportation to target First Nations peoples. We identify previous attempts to achieve law reform to rectify past injustices and prevent Indigenous peoples from being caught up in migration laws aimed at excluding non-citizens. We review the extensive literature on *Love v Commonwealth* and analyse the expanded visa cancellation provisions that have resulted in increased numbers of people being targeted for removal, and removed, from Australia. When analysed against the long shadow of colonisation, we argue that these applications of criminal and migration law represent a continuation of attempted exclusion and dispossession that has been, and continues to be, actively resisted by Indigenous peoples. In analysing the cyclical nature of dispossession and its resistance, the complex interaction of criminal and migration law can be seen to have created novel impacts for First Nations peoples in Australia.

Please cite this article as:

Alison Gerard and Annette Gainsford, 'Dispossession Cycles and Resistance: Historical Continuums in the Deportation of First Nations Peoples' (2024) 46(3) *Sydney Law Review* (advance).

DOI: https://doi.org/10.30722/slr.20596



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### *Acknowledgement of Country*

We acknowledge the traditional custodians of the lands upon which this article was written, in particular the lands of the Wiradyuri and Ngunnawal. We acknowledge Aboriginal and Torres Strait Islander peoples as the sovereign peoples of this land we now call Australia. We express our gratitude and respect to the Elders-in-Residence at our respective university campuses for their guidance as part of our professional development across the areas of curriculum, research and governance.

## I Introduction

Aboriginal and Torres Strait Islander peoples have occupied this land since time immemorial.[1] Indigenous peoples' connection to this Country now known as Australia is unique and embodies complex notions such as law, identity, place, language, spirituality, culture, family and sustenance.[2] This connection, recognised in international law,[3] is widely understood as the foundation for health and wellbeing[4] and core to Indigenous resistance and survival.[5] Despite this, Indigenous peoples, families and communities continue to endure the prospect of removal from Australia, and containment within immigration detention, under the Australian government's newly expanded visa cancellation powers. Over the past two decades, the government has significantly shifted its focus from external border controls to the removal of non-citizens lawfully present in Australia through administrative processes based on the 'character test' in s 501(6) of the *Migration Act 1958* (Cth) ('*Migration Act*').[6] Before, and even after, the High Court's decision in *Love v Commonwealth* that 'Aboriginal Australians' could not be considered 'aliens',[7] Indigenous peoples were and are being entangled in protracted legal disputes with

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1 Michael Mansell, 'Australians and Aborigines and the *Mabo* Decision: Just Who Needs Whom the Most?' (1993) 15(2) *Sydney Law Review* 168, 168.

2 Australian Institute of Aboriginal and Torres Strait Islander Studies, *Welcome to Country* (Web Page) <https://aiatsis.gov.au/explore/welcome-country>.

3 *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) art 26 ('*UNDRIP*').

4 Marcelle Burns, 'Closing the Gap between Policy and Law: Indigenous Homelands and a "Working Future"' (2009) 27(2) *Law in Context* 114, 119; Jacynta Krakouer, Sana Nakata, James Beaufils, Sue-Ann Hunter, Tatiana Corrales, Heather Morris and Helen Skouteris, 'Resistance to Assimilation: Expanding Understandings of First Nations Cultural Connection in Child Protection and Out-of-Home Care' (2023) 76(3) *Australian Social Work* 343, 343; Patricia Dudgeon and Abigail Bray, 'Indigenous Relationality: Women, Kinship and the Law' (2019) 3(2) *Genealogy* 23, 24.

5 Dudgeon and Bray (n 4) 24.

6 Leanne Weber and Alison Gerard, 'Robodeport or Surveillance Fantasy? How Automated is Automatic Visa Cancellation in Australia? (2024) 9 *Frontiers in Sociology* 1336160:1–16, 1. See also Mary Crock and Kate Bones, 'The Creeping Cruelty of Australian Crimmigration Law' (2022) 44(2) *Sydney Law Review* 169, 173; Peter Billings, 'Regulating Crimmigrants through the "Character Test": Exploring the Consequences of Mandatory Visa Cancellation for the Fundamental Rights of Non-Citizens in Australia' (2019) 71(1) *Crime, Law and Social Change* 1, 7 ('Regulating Crimmigrants').

7 *Love v Commonwealth* (2020) 270 CLR 152, 192 [81] (Bell J) ('*Love*').

immigration authorities regarding permanent exclusion from Australia.[8] The *Love* case involved Daniel Love and Brendon Thoms, both of whom identified — and were accepted by their communities — as Aboriginal,[9] but who were not born in Australia and did not have Australian citizenship. Although visa cancellation is the focus of this article, we note that, historically, Aboriginal and Torres Strait Islander peoples 'were denied citizenship' and basic citizenship rights.[10]

This article surveys the historical context and contemporary social reality of Indigenous peoples' entanglement in systems of criminal justice and migration control. Migration control and colonisation are tightly linked through their contested relationships with, and access to, sovereign territory. Contemporary and historical writings on immigration and racism in settler colonies have been criticised for failing to 'take Indigenous decolonization seriously'[11] as the 'question of land as contested space is seldom taken up'.[12] Migration controls impact First Nations peoples against a backdrop of rising rates of incarceration and victimisation globally as colonisation and its ongoing effects continue to resonate.[13] The legal fiction of the declaration of terra nullius led to the swift possession of Australia. As Indigenous legal scholar Aileen Moreton-Robinson writes, whereas international customary law required that colonies be established under conquest or cession, 'Australia was taken on a different basis', denying the customary proprietary rights and the rights of Indigenous peoples as 'subjects of the crown'.[14] The application of this legal fiction led to the Frontier Wars and to the systematic dispossession (attempted and actual), including the forced relocation of Indigenous peoples, which continues today. The laws, policies and practices of colonisation are, and have been, resisted by Indigenous peoples with

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8 Paul Karp, 'Albanese Government Urged to End Legal Fight over Power to Deport Aboriginal People', *The Guardian* (online, 18 June 2022) <https://www.theguardian.com/australia-news/2022/jun/18/albanese-government-urged-to-end-legal-fight-over-power-to-deport-aboriginal-people> ('Government Urged to End Legal Fight').

9 *Love* (n 7) 191–2 [79] (Bell J), 215 [157]–[158] (Keane J).

10 Michael Dodson, 'Citizenship in Australia: An Indigenous Perspective' (1997) 22(2) *Alternative Law Journal* 57, 57. See also Dodson at 57–8; Peter Prince, 'Was Namatjira an Alien? The High Court's Flawed History of Belonging in Australia' in Kate Bagnall and Peter Prince (eds), *Subjects and Aliens: Histories of Nationality, Law and Belonging in Australia and New Zealand* (ANU Press, 2023) 151, 166.

11 Bonita Lawrence and Enakshi Dua, 'Decolonizing Antiracism' (2005) 32(4) *Social Justice* 120, 120.

12 Ibid 126.

13 Amanda Porter, 'Aboriginal Sovereignty, "Crime" and Criminology' (2019) 31(1) *Current Issues in Criminal Justice* 122.

14 Aileen Moreton-Robinson, *The White Possessive: Property, Power, and Indigenous Sovereignty* (University of Minnesota Press, 2015) 4–5.

the Uluru Statement from the Heart[15] calling for Voice,[16] Treaty and Truth-Telling[17] as central to efforts to reconcile this past and ongoing contemporary legacies.

Deportation, in particular, has unique impacts on Indigenous peoples globally.[18] Government attempts to remove First Nations peoples from Australia under visa cancellation provisions present a striking contemporary development in border control. This article contributes to existing analysis of the High Court ruling in *Love* that 'Aboriginal Australians' cannot be 'aliens',[19] by focusing on two central arguments. First, the targeting of Indigenous peoples for exclusion represents a continuation of colonisation practices and a rejection of recommendations to the contrary. Second, Indigenous peoples remain entangled in migration controls and actively resist containment and exclusion. In concluding our analysis, we highlight the important role of legal education in providing a vehicle for truth-telling, and recognising the role played by our discipline and profession in addressing ongoing harms.[20]

In Part II of this article, we review the literature on deportation and analyse the expanded visa cancellation provisions that have resulted in increased numbers of people being targeted and removed from Australia. The intensifying interplay between criminal and immigration law, termed 'crimmigration',[21] is said to be uniquely shaping the differential and more-punitive experience of non-citizens. We use this framing to understand the impact of crimmigration on First Nations peoples and sovereignty. In Part III we outline our methodological approach. Documentary research and two case studies are relied upon to explore the historical continuities in deportation and to platform the experiences, strength and resistance of First Nations peoples caught up in this push to remove and exclude non-citizens permanently from Australia.

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15 *Uluru Statement from the Heart* (Statement, First Nations National Constitutional Convention, 26 May 2017). The Uluru Statement from the Heart was issued to the Australian people in 2017 by Aboriginal and Torres Strait Islander peoples in attendance at the First Nations National Constitutional Convention ('Uluru Convention'). It called for a First Nations Voice to Parliament, a process to follow that for agreement-making, and truth-telling. These proposals are known as Voice, Treaty, Truth: see Megan Davis and George Williams, *Everything You Need to Know about the Uluru Statement from the Heart* (UNSW Press, 2021) 6.

16 'Voice' signifies a First Nations Voice to the Commonwealth Parliament that is enshrined in the *Australian Constitution*: see Dani Larkin and Kate Galloway, 'Constitutionally Entrenched Voice to Parliament: Representation and Good Governance' (2021) 46(3) *Alternative Law Journal* 193. The referendum to establish a permanent Aboriginal and Torres Strait Islander Voice to Parliament was defeated in October 2023 and it remains unclear how this proposal will be realised.

17 In the Regional Dialogues that led to the Uluru Convention and the creation of the Uluru Statement from the Heart, First Nations participants emphasised that 'truth was not about them as victims, survivors or as resistance fighters but about all Australians — now and, through ongoing educational programs, in the future': Megan Davis, 'Speaking Up: The Truth about Truth-Telling' (2022) 76 *Griffith Review* 25, 34.

18 Karl Gardner, 'Indigenous Anti/Deportation: Contesting Sovereignty, Citizenship, and Belonging in Canada and Australia' (2024) 33(2) *Social & Legal Studies* 168, 168.

19 *Love* (n 7) 192 [81].

20 Annette Gainsford, Alison Gerard and Emma Colvin, 'Challenges and Strategies for Incorporating Indigenous Laws and Histories across Legal Education Curriculum' in Nicole Watson and Heather Douglas (eds), *Legal Education Through an Indigenous Lens: Decolonising the Law School* (Routledge, 2025).

21 Juliet Stumpf, 'The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power' (2006) 56(2) *American University Law Review* 367, 376 ('The Crimmigration Crisis').

In Part IV of this article, we discuss the history and present practices of deportation of First Nations peoples which form the context of the two case studies. The first of our case studies, pre-dating *Love*, is *WSML and Minister for Home Affairs*,[22] a successful appeal on merit to the Administrative Appeals Tribunal ('AAT') concerning a citizen from Aotearoa New Zealand who claimed both Aboriginal and Māori identity. In this case study we investigate the routine entanglement of Indigenous peoples with visa cancellation powers. We explore how historical legacies of colonisation reverberate in the present through contemporary practices of visa cancellation and removal. Our second case study is *Montgomery v Minister for Immigration*, a case which also concerned a New Zealand citizen who identifies as an Aboriginal Australian.[23] In this case study we analyse the continuous need for Indigenous peoples to argue against exclusion, and how the advocacy and resistance of Indigenous peoples and lawyers, including native title organisations, continue in the aftermath of the High Court's pronouncement in *Love*. We argue that Indigenous peoples continue to be subject to the gaze of border control authorities for removal. We argue that more needs to be done to counter the contemporary reality whereby only a 'wafer thin' majority prevented the government from deporting a traditional custodian from Australia.[24]

## II Indigenous Sovereignty, Crimmigration and Deportation

The move to deport, or attempt to deport, First Nations peoples from Australia reveals the 'foundational and continuing role of "race" and "whiteness" in the formation of Australian sovereignty and citizenship'.[25] In the Australian setting, Moreton-Robinson writes that racism is 'inextricably tied to the theft and appropriation of Indigenous lands in the first world' despite the 'omnipresence of Indigenous sovereignties'.[26] The prevalence of what Moreton-Robinson terms 'patriarchal white sovereignty'[27] has meant that Indigenous sovereignty is perceived as threatening and enhances the fear of dispossession from a 'foreign other', as represented by asylum seekers and refugees. Louise Boon-Kuo draws on Moreton-Robinson's work in her analysis of punitive approaches in border control, understood as 'part of the expressive performance of patriarchal white sovereignty responding to the crisis of legitimacy of its illegal foundation'.[28] Border security policy is thus intrinsically connected to the denial of Indigenous sovereignty,[29] and stands to have a differential impact on First Nations peoples.

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22 *WSML and Minister for Home Affairs (Migration)* [2019] AATA 41 ('*WSML*').

23 *Montgomery v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1423 ('*Montgomery*').

24 Asmi Wood, 'Australia and Pandemics v BLM: No, *Love* Lost (at the High Court)' (Pt 1) (2021) 46(3) *Alternative Law Journal* 178 ('No, *Love* Lost Pt 1').

25 Louise Boon-Kuo, '"Race", Crimmigration and the Deportation of Aboriginal Non-Citizens' in Peter Billings (ed), *Crimmigration in Australia: Law, Politics, and Society* (Springer, 2019) 39, 40.

26 Moreton-Robinson (n 14) xiii.

27 See, eg, ibid 138.

28 Boon-Kuo (n 25) 39.

29 Moreton-Robinson (n 14) 5.

## A *Legal Framework of Visa Cancellation and Removal*

Australia's visa cancellation and removal framework is so robust there is now a 'suite of tools' available to exclude non-citizens.[30] Historically, the main mechanism for removal was the criminal deportation power, contained within ss 200 and 201 of the *Migration Act*.[31] Section 201 provides that a non-citizen can be 'deported' if convicted of a criminal offence and sentenced to imprisonment for at least one year. Long-term residents (initially, people who had been in Australia for 5 years, a period increased to 10 years in 1983)[32] were recognised as occupying a different position and exempted from deportation.[33] Section 200 was the main deportation power used until the early 1990s when a series of migration law reforms was introduced that expanded the use of visa cancellation and removal, in effect unseating deportation powers.[34]

The dominant provision now relied upon to effect the visa cancellation of non-citizens is 'character grounds' found in s 501 of the *Migration Act*. A visa can be refused or cancelled if the non-citizen does not pass the 'character test' as defined in s 501(6). The original 'character test', introduced in 1992, enabled the Minister to refuse or cancel a visa if satisfied the person was not of good character.[35] Notably, when s 501 was originally introduced the provisions were aimed at visa refusal and not removal.[36] Section 501 contained no exemption for long-term residents, in contrast to the criminal deportation power in ss 200 and 201.[37] Section 501 was bolstered with the *Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Act 1998* (Cth), which shifted the onus onto the applicant as a 'character test' that applicants must satisfy.[38] It introduced the 'substantial criminal record' provision, which meant that someone did not pass the 'character test' if they were sentenced to imprisonment for more than 12 months.[39] Finally, the amendments allowed the Minister to cancel a visa without applying

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30 Evidence to Joint Standing Committee on Migration, Parliament of Australia, Canberra, 27 June 2018, 4 (Justine Jones). The *Migration Act 1958* (Cth) ('*Migration Act*') provides a range of powers to cancel visas under 'character grounds' in s 501 and 'specified grounds' such as in ss 116–18.

31 The criminal deportation power, formerly in s 12 of the *Migration Act* (n 30), was amended by the *Migration Amendment Act 1983* (Cth) to become s 200 and apply to all non-citizens convicted and sentenced to at least one year of imprisonment: see Khanh Hoang and Sudrishti Reich, 'Managing Crime through Migration Law in Australia and the United States: A Comparative Analysis' (2017) 5(1) *Comparative Migration Studies* 1, 8; Rebecca Powell, 'A Return to the 10-Year Rule? The Deportation of Convicted New Zealander Long-Term Residents from Australia under Section 501 of the *Migration Act*' (2024) 36(3) *Current Issues in Criminal Justice* 347, 349–50; Peter Billings and Khanh Hoang, 'Characters of Concern or Concerning Character Tests? Regulating Risk through Visa Cancellation, Containment and Removal from Australia' in Peter Billings (ed), *Crimmigration in Australia: Law, Politics, and Society* (Springer, 2019) 119, 121.

32 Powell (n 31) 349.

33 *Migration Act* (n 30) s 201.

34 Hoang and Reich (n 31) 8.

35 The original version of the 'character test' was s 180A and was inserted in 1992: Michelle Foster, '"An 'Alien' by the Barest of Threads": The Legality of the Deportation of Long-Term Residents from Australia' (2009) 33(2) *Melbourne University Law Review* 483, 510.

36 Ibid 510. See also Powell (n 31).

37 Hoang and Reich (n 31) 8.

38 Foster (n 35) 510.

39 *Migration Act* (n 30) s 501(7).

natural justice[40] and gave the Minister the power to overturn a decision of a merits review tribunal.[41] This already represented a dramatic enhancement of the Minister's powers, but even more powers to exclude were to follow.

Section 501 was significantly bolstered by amendments in 2014 to introduce mandatory visa cancellation and expand existing discretionary grounds for visa cancellation.[42] The *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) stipulated that a visa must be cancelled if a non-citizen receives a prison term of 12 months or more or is convicted of sexually based offences involving a child, and is serving a term of imprisonment.[43] Where sentences are to be served concurrently, the whole length of each term is used to calculate whether or not a person has reached the 12-month threshold.[44] The reforms also introduced much broader discretionary provisions in s 501(2) that identify people for visa cancellation based on their risk of committing crime or other forms of conduct labelled suspicious. A strengthened 'character test' set out in s 501(6) stipulates that, in addition to having a criminal record, a person will fail the 'character test' if the Minister 'reasonably suspects' that they have been, or are, a member of a group or organisation or have had 'an association' with a group, organisation or person 'involved in criminal conduct'.[45] The provisions have been widened to include risk as a basis on which to cancel a visa under the discretionary provisions in s 501(2). To illustrate, under s 501(6)(d) a visa can be cancelled if there is a risk that the person would engage in criminal conduct.[46]

The introduction of mandatory visa cancellation to cancel a visa without natural justice or prior notice to the visa holder was accompanied by a process through which a visa holder could seek 'revocation' of the visa cancellation decision.[47] Section 501CA(4) of the *Migration Act* gives the Minister or a delegate the power to revoke a decision to cancel a visa under s 501(3A) if the person makes representations in accordance with the invitation and the Minister or delegate is satisfied that the person passes the 'character test' (as defined by s 501 and including all limbs), or there is another reason why the original decision should be revoked.[48] For those unsuccessful in their application for revocation, a merits review process is available in limited circumstances. Application can be made to the AAT for a merits

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40 *Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Act 1998* (Cth) sch 1 item 23, inserting s 501A(4).

41 Ibid sch 1 item 23, inserting s 501A.

42 *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) sch 1 item 8 inserted s 501(3A) which introduced mandatory visa cancellation for non-citizens who were deemed to have failed the 'character test'. Under s 501(3A), which applies retrospectively, the Minister must cancel the visa of a person if they have been sentenced to a term of imprisonment of 12 months or more or have been convicted of sexually based offences involving a child, and are serving the sentence full-time in a custodial institution. For a description of the key legislative provisions see Billings, 'Regulating Crimmigrants' (n 6) 7–10.

43 *Migration Act* (n 30) s 501(3A).

44 Ibid s 501(7A).

45 Ibid s 501(6)(b).

46 Ibid s 501(6)(d)(i).

47 Ibid s 501CA. See Weber and Gerard (n 6) 11.

48 Ibid s 501CA(4)(b). See Weber and Gerard (n 6) 11. Approximately three-quarters of those who have their visa cancelled do apply for revocation of the mandatory visa cancellation decision: see Department of Home Affairs (Cth), Freedom of Information Request: FA21/02/00558 (January 2021) questions 3, 4, 5 <https://www.homeaffairs.gov.au/foi/files/2021/fa-210200558-document-released.PDF>.

review of a decision by a delegate of the Minister not to revoke a decision to cancel a visa.[49] A Minister can still set aside a decision of the AAT not to cancel a visa if satisfied that the cancellation is in the national interest.[50] Ministerial Directions, issued under s 499 of the *Migration Act*, provide guidance to delegates of the Minister, and AAT Members, in making decisions around the refusal and cancellation of visas and the revocation of mandatory visa cancellation. *Direction No 110* is the most recent at the time of writing,[51] and sets out five 'primary considerations':

(1) protection of the Australian community from criminal or other serious conduct;

(2) whether the conduct engaged in constituted family violence;

(3) the strength, nature and duration of ties to Australia;

(4) the best interests of minor children in Australia;

(5) expectations of the Australian community.[52]

In taking these considerations into account, the Ministerial Direction makes clear that the protection of the Australian community from criminal or other serious conduct in para 8(1) is 'generally to be given greater weight' than the other primary considerations.[53] 'Other considerations' taken into account include the legal consequences of the decision, extent of impediments if removed, and impact on Australian business interests.[54]

The strengthening of the 'character test' in 2014 was presented as a necessary aspect of ensuring the integrity of Australia's migration program.[55] The Australian government asserted at the time that the community expected there to be 'a low tolerance for criminal, noncompliant or fraudulent behaviour by noncitizens'.[56] It is unclear what evidence was relied upon to support this assertion. The 2014 changes have resulted in a dramatic increase in the numbers of non-citizens, including First Nations peoples, having their visas cancelled. In total terms, the 2014 amendments increased the number of people having their visas cancelled under s 501 from 76 in 2013–14[57] to 588 in 2014–15[58] and 1,284 in 2015–16.[59] The figures continue to fluctuate and for 2022–23 the number was 626, almost all of which were mandatory visa cancellations.[60] It is understood that just under half of those affected are New

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49 *Migration Act* (n 30) s 500(1)(b).

50 Ibid s 501BA(2).

51 Minister for Immigration, Citizenship and Multicultural Affairs (Cth), *Direction No 110: Visa Refusal and Cancellation under Section 501 and Revocation of a Mandatory Cancellation of a Visa under Section 501CA* (7 June 2024) <https://immi.homeaffairs.gov.au/support-subsite/files/ministerial-direction-110.pdf> ('*Direction No 110*').

52 Ibid para 8(1)–(5).

53 Ibid para 7(2).

54 Ibid para 9(1)(a)–(c).

55 Commonwealth, *Parliamentary Debates*, House of Representatives, 24 September 2014, 10325 (Scott Morrison, Minister for Immigration).

56 Ibid.

57 Department of Immigration and Border Protection (Cth), *Annual Report 2013–14* (Report, 2014) 169.

58 Department of Immigration and Border Protection (Cth), *Annual Report 2014–15* (Report, 2015) 159.

59 Department of Immigration and Border Protection (Cth), *Annual Report 2015–16* (Report, 2016) 8.

60 Department of Home Affairs (Cth), *Character (s501) and General Cancellation Statistics* (30 June 2023) table 2 <https://www.homeaffairs.gov.au/research-and-stats/files/character-and-general-cancellation-stats-

Zealanders, and Māori and Pasifika New Zealanders are proportionally over-represented in the statistics on visa cancellation.[61] We know from media sources, and some case law, that First Nations peoples are included in these figures,[62] but exact figures are unobtainable.

## B *Crimmigration: Merging Immigration and Criminal Law*

New theoretical approaches have sought to capture the way in which criminal and immigration law have combined to enhance the precarity of non-citizens.[63] This intensification has been referred to by law scholar Juliet Stumpf as 'crimmigration', or the merging of immigration and criminal laws to exclude. Stumpf originally coined the term 'crimmigration' to characterize developments in three domains: the overlapping of substantive criminal and immigration law; the similarities between strategies and technologies used to detect and prosecute criminal and immigration law offenses; and the procedural way in which both immigration and criminal law are managed.[64] Stumpf's thesis, which is based on membership theory, asserts that the merger is draconian and aims to exclude those who are not part of a social contract with government, with criminal and immigration law providing the tools to exclude.[65] Deportation provides the method of expulsion.[66] But not all attributes have become part of the merger, with Stumpf noting that protections in criminal law available to defendants are not part of the union.[67] In later writing, Stumpf analyses the crimmigration process as a form of punishment of non-citizens, noting it is often harsher than that faced by citizens who commit similar offences.[68]

Scholars applying Stumpf's work have sought to use it to capture what they term 'transformations'. Analysing the Norwegian context, Katja Franko Aas writes about a 'transformation' in criminal justice — a more exclusionary penal culture directed at non-citizens.[69] Perhaps this characterisation as 'transformational' reflects the fact that Western Europe has some of the highest rates of imprisonment of non-citizens in the globe.[70] For Western Europe, citizenship has become a technique of

30-jun-2023.pdf>. In 2022–23, of the 626 visa cancellations 9 were discretionary cancellations under s 501(2) of the *Migration Act* (n 30) and 617 were mandatory visa cancellations under s 501(3A).

61 Powell (n 31) 348, 354; Elizabeth Stanley, 'Expanding Crimmigration: The Detention and Deportation of New Zealanders from Australia' (2018) 51(4) *Australian & New Zealand Journal of Criminology* 519, 524; Henrietta McNeill and Marinella Marmo, 'Past–Present Differential Inclusion: Australia's Targeted Deportation of Pacific Islanders, 1901 to 2021' (2023) 12(1) *International Journal of Crime, Justice and Social Democracy* 42, 49–50.

62 Non-citizens with Aboriginal ancestry have been deported: see, eg, *Wehi v Minister for Immigration and Border Protection* [2018] FCA 1176, [20] (Rangiah J).

63 Stumpf, 'The Crimmigration Crisis' (n 21) 376–9.

64 Alison Gerard, 'Crimmigration and the Australian Legal Lexicon: Reflecting on Border Control, Theory and the Lived Experience' in Peter Billings (ed), *Crimmigration in Australia: Law, Politics, and Society* (Springer, 2019) 89, 92.

65 Stumpf, 'The Crimmigration Crisis' (n 21) 377.

66 Ibid 378.

67 Ibid 392.

68 Juliet Stumpf, 'Crimmigration: Encountering the Leviathan' in Sharon Pickering and Julie Ham (eds), *The Routledge Handbook on Crime and International Migration* (Routledge, 2013) 237.

69 Katja Franko Aas, 'Bordered Penality: Precarious Membership and Abnormal Justice' (2014) 16(5) *Punishment & Society* 520, 520.

70 Ibid 522.

'bordered penality'.[71] Applying this to the Australian context tests the claim that this is a new phenomenon, because an exclusionary penal culture, and restrictions on legal citizenship,[72] have existed since invasion.[73] It was also central to the law-making efforts of our first federal Parliament in 1901.[74] The over-representation of First Nations peoples in child protection statistics[75] and incarceration shows that criminalisation and other techniques of exclusion persist. This makes the impact of crimmigration on First Nations peoples, and its resistance, an important site of analysis.

## C *Sovereignty, Crimmigration and First Nations Peoples*

The governing of mobility is a key demonstration of the state's sovereign power.[76] Although crimmigration scholars have begun to recognise the 'racialised dimensions of crimmigration', 'the role of settler colonialism as constitutive of racial formation remains marginal'.[77] The Australian context provides a rich basis for analysing the role of settler colonialism and the unique way in which criminal and migration systems are intertwined. The merging of immigration and criminal law is not new for Australia given our history of colonisation and the White Australia policy.[78] Australia is also the site for the routine criminalisation and differential status of Aboriginal and Torres Strait Islander peoples,[79] such that the assumption of protections in the criminal justice system, depicted as eroded by crimmigration, may not be as 'protective' in the first place.

Building on Stumpf's thesis that crimmigration privileges sovereign power over membership, Boon-Kuo argues that

> utilising the sanction of deportation for Aboriginal people who are not Australian citizens and have been convicted of criminal offences communicates not only condemnation of the non-citizen offender, but also denial of First Nation sovereignties, and works ideologically to naturalise a raced notion of citizenship that is embedded in 'patriarchal white sovereignty'.[80]

Crucially, Boon-Kuo argues that the visa cancellation decision-making process 'operates as a forum for the production of racialised evaluations of Aboriginality and

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71 Ibid 531–2.

72 This is not expanded upon in this article, but for a review see John Chesterman and Brian Galligan, *Citizens Without Rights: Aborigines and Australian Citizenship* (Cambridge University Press, 1997).

73 In support of our use of the term 'invasion' see Moreton-Robinson (n 14) 34; Teela Reid, 'The Power of the First Nations Matriarchy: Warrior Women Reckoning with the Colony' (2022) 76 *Griffith Review* 43, 46.

74 Mark Finnane and Andy Kaladelfos, 'Australia's Long History of Immigration, Policing and the Criminal Law' in Peter Billings (ed), *Crimmigration in Australia: Law, Politics, and Society* (Springer, 2019) 22.

75 Productivity Commission (Cth), *Closing the Gap: Annual Data Compilation Report* (Report, July 2024) 33 (socio-economic areas 11, 12).

76 Mary Bosworth, 'Border Control and the Limits of the Sovereign State' (2008) 17(2) *Social & Legal Studies* 199, 199. See also Gardner (n 18) 169.

77 Boon-Kuo (n 25) 40.

78 See ibid; McNeill and Marmo (n 61) 42; Finnane and Kaladelfos (n 74) 19, 19.

79 Porter (n 13) 122.

80 Boon-Kuo (n 25) 41, referencing Moreton-Robinson's 'patriarchal white sovereignty'.

community connection'.[81] Boon-Kuo alerts us to the risk 'that decision-making in this field has and will increasingly become another vehicle in which state practice effects the separation of First Nation families and communities'.[82]

Attempts to deport Aboriginal and Torres Strait Islander peoples from Australia represent the physical severing of connections to land. While Indigenous sovereignty persists regardless of removal, disconnection from land '"compromises cultural connections" and causes extreme distress and powerlessness commonly felt by many Indigenous groups worldwide'.[83] Removal under s 198 of the *Migration Act* means permanent exclusion from Australia; one can never return. Indigenous relationships to land are spiritual and political, and an important site of resistance and sustenance.[84] As Bonita Lawrence and Enakshi Dua write, they also have 'tremendous longevity'.[85] The connections between Indigenous cultures and Country are recognised in the *United Nations Declaration on the Rights of Indigenous Peoples* ('*UNDRIP*').[86] Analysing deportation cases from Canada and Australia, Karl Gardner introduces the notion of Indigenous 'anti/deportation' to capture the contestation of deportation and its impact on Indigenous sovereignty and solidarity movements between migrants and Indigenous peoples.[87] Given the sacred nature of connection to Country, it might be expected that this reality, evidenced within several Royal Commissions and national inquiries,[88] would be given prominence in policy and laws and might temper the application of visa cancellation and deportation.

## D *Love v Commonwealth*

The decision by the High Court in February 2020 in *Love* was a significant one for Australian legal scholarship and a litmus test of how Australian jurisprudence understands Aboriginal and Torres Strait Islander peoples, sovereignty, connection to Country and the severance of that connection through removal or deportation. By a slim majority of four judges to three, the High Court ruled that 'Aboriginal

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81 Ibid 42.

82 Ibid 56.

83 Jonathan Kingsley, Mardie Townsend, Claire Henderson-Wilson and Bruce Bolam, 'Developing an Exploratory Framework Linking Australian Aboriginal Peoples' Connection to Country and Concepts of Wellbeing' (2013) 10(2) *International Journal of Environmental Research and Public Health* 678, 682–3.

84 Irene Watson, 'Aboriginal Relationships to the Natural World: Colonial "Protection" of Human Rights and the Environment' (2018) 9(2) *Journal of Human Rights and the Environment* 119, 124. See also Moreton-Robinson (n 14) 11.

85 Lawrence and Dua (n 11) 126.

86 *UNDRIP* (n 3) art 26.

87 Gardner (n 18) 170, citing Peter Nyers, *Irregular Citizenship, Immigration, and Deportation* (Routledge, 2019).

88 See *Royal Commission into Aboriginal Deaths in Custody* (National Report, 1991) vol 1, 295; Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (Report, April 1997) ('*Bringing Them Home*'); Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (ALRC Report No 31, 1986) 95; Australian Law Reform Commission, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, December 2017) ('*Pathways to Justice*'); Australian Human Rights Commission, *Wiyi Yani U Thangani (Women's Voices): Securing Our Rights, Securing Our Future Report* (2020).

Australians' cannot be aliens and cannot be deported.[89] According to Asmi Wood, 'in seeking to deport two Aboriginal men the current executive is attempting to do what not even the most racist of their forebears' dared to do.[90] Wood argued for constitutional recognition[91] and called 'on the non-Indigenous peoples, who now share this continent to shake off their apathy and force their recalcitrant leaders to "do the right thing by Blacks" something they claim to have done for the immigrants to this continent'.[92] Wood stated that *Love* bought Australia time to 'do the right thing'.[93]

A considerable amount has been written on *Love*,[94] much of it focusing on the implications for constitutional recognition of Indigenous sovereignty.[95] Some law academics have argued that *Love* represents 'aggressive judicial activism by the High Court'.[96] The case involved Daniel Love and Brendon Thoms who were not born in Australia and did not have Australian citizenship.[97] Love was born in Papua New Guinea and Thoms in Aotearoa New Zealand.[98] Both had been permanently living in Australia since they were six years old (Love since 1985 and Thoms since 1994).[99] Upon being convicted of a criminal offence, both were sentenced to periods of imprisonment that triggered mandatory visa cancellation under s 501(3A) of the *Migration Act*.[100] Thoms was taken into immigration detention upon commencing court-ordered parole.[101] Love was taken to immigration detention after serving almost two months of his sentence, then released almost two months later when the cancellation of his visa was revoked.[102] The appellants argued in the High Court that they have 'special status' as a 'non-citizen, non-alien'.[103] Thoms identifies as a member of the Gunggarri people, and is a native title holder as recognised by the

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89 *Love* (n 7) 192 [81].

90 Wood, 'No, *Love* Lost Pt 1' (n 24) 178; Asmi Wood, 'Australia and Pandemics v BLM: No, *Love* Lost (at the High Court)' (Pt 2) (20012021) 46(4) *Alternative Law Journal* 314 ('No, *Love* Lost Pt 2').

91 Wood, 'No, *Love* Lost Pt 1' (n 24); Wood, 'No, *Love* Lost Pt 2' (n 90).

92 Wood, 'No, *Love* Lost Pt 1' (n 24) 178.

93 Wood, 'No, *Love* Lost Pt 2' (n 90) 317.

94 See, eg, Johnny M Sakr and Augusto Zimmermann, 'Judicial Activism and Constitutional (Mis)Interpretation: A Critical Appraisal' (2021) 40(1) *University of Queensland Law Journal* 119; Mischa Davenport, '*Love v Commonwealth*: The Section 51(xix) Aliens Power and a Constitutional Concept of Community Membership' (2021) 43(4) *Sydney Law Review* 589; 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; Elisa Arcioni and Rayner Thwaites, 'Constitutional Law and Citizenship: Aboriginal Australians not Vulnerable to Deportation' [2020] (65) *Law Society of NSW Journal* 68; SA McDonald, 'The Detention of Non-Aliens Suspected of Being Unlawful Non-Citizens: Thoms v Commonwealth' (2023) 33(4) *Public Law Review* 287; Boon-Kuo (n 25).

95 See, eg, Shireen Morris, '*Love* in the High Court: Implications for Indigenous Constitutional Recognition' (2021) 49(3) *Federal Law Review* 410; Daniel Lavery, 'Judicial Distancing in the High Court: *Love/Thoms v Commonwealth*' (2020) 26 *James Cook Law Review* 159; Flyn Wells, 'Heartbeat in the High Court: *Love v Commonwealth* (2020) 375 ALR 597' (2020) 41(2) *Adelaide Law Review* 657.

96 Sakr and Zimmermann (n 94) 137.

97 *Love* (n 7) 169 [2] (Kiefel CJ).

98 Ibid.

99 Ibid 214 [152], 215 [157], [159] (Keane J).

100 Ibid.

101 Ibid 215 [159] (Keane J).

102 Ibid 234 [225] (Keane J).

103 Ibid 170 [3] (Kiefel CJ).

Federal Court of Australia.[104] Love identifies as Kamilaroi 'and is recognised as such by one Elder of that group'.[105] The central contention of the plaintiffs was that 'the common law of Australia recognises the unique connection which Aboriginal people have with land and waters in Australia'.[106]

Each judge wrote their own judgment which gives a sense of the complexity and wrangling of unique approaches to get to the majority decision that Aboriginal people could not be deported. The majority ruled that 'Aboriginal Australians (understood according to the tripartite test in *Mabo [No 2])* are not within the reach of the "aliens" power conferred by s 51(xix) of the *Constitution*'.[107] The tripartite test was set out by Brennan J in *Mabo [No 2]* as follows:

> 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.[108]

This approach supported earlier expressions of the tripartite test by Deane J in *Commonwealth v Tasmania*,[109] and followed what had been adopted by federal government departments as the 'working definition' of Aboriginality since the early 1980s.[110] The Australian Law Reform Commission has urged use of a flexible definition,[111] and 'that these matters should be determined by Aboriginal and Torres Strait Islander people themselves, working through their own communities, institutions and consultation processes'.[112] In short, the tripartite test requires Aboriginal and Torres Strait Islander descent, self-identification and community recognition.[113]

The minority in *Love* argued that 'alien' was akin to 'citizen' and a legislative issue for Parliament, concluding that Indigeneity was irrelevant to determining citizenship.[114] This determination is reminiscent of what Irene Watson characterises as 'a violent space within which Aboriginality is measured for its degree of authenticity, and where those who do the measuring are ignorant or deniers of the history of colonialism'.[115] Issues in contention were whether or not Aboriginal Elders should have the power to determine the boundaries of membership of Aboriginal society,[116] and whether connection to Country means connection to a particular nation group or the whole of Australia.[117] Ultimately the Court found that

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104 *Kearns v Queensland* [2012] FCA 651; *Foster v Queensland* [2014] FCA 1318.
105 *Love* (n 7) 170 [3] (Kiefel CJ).
106 Ibid 175 [21] (Kiefel CJ).
107 Ibid 192 [81] (Bell J, for the majority).
108 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 70 ('*Mabo [No 2]*').
109 *Commonwealth v Tasmania* (1983) 158 CLR 1, 274.
110 Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia* (Report No 96, 2003) 914–15 [36.14] ('*Essentially Yours*').
111 Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (Report No 31, 1986) [95].
112 *Essentially Yours* (n 110) 913 [36.10].
113 *Mabo [No 2]* (n 108) 70 (Brennan J).
114 *Love* (n 7) 170 [4] (Kiefel CJ).
115 Irene Watson, 'In the Northern Territory Intervention: What Is Saved or Rescued and at What Cost?' (2009) 15(2) *Cultural Studies Review* 45, 49.
116 *Love* (n 7) 253 [271] (Nettle J).
117 Ibid 189 [71] (Bell J).

Indigenous peoples' connection to Country was 'constitutionally significant'.[118] As Brendan Thoms' Indigeneity had been already 'proven' he was released from immigration detention, whereas Daniel Love's proof of Indigenous status was sent to the Federal Court for determination.[119] In the aftermath of the decision, nine Indigenous people who had demonstrated that they satisfied the tripartite test articulated in *Mabo [No 2]* were released from detention, and a further 20 were reported to be having their claims assessed.[120] Thoms lost a subsequent case seeking compensation for the 500 nights he spent in immigration detention and not in the community with his family.[121]

Because of *Love*, the Standard Operating Procedures of immigration authorities now stipulate that officers can only detain a person under the *Migration Act* if they reasonably suspect 'the person does not meet, or probably does not meet, all three limbs of the tripartite test'.[122] The three limbs of the test as set out in the Procedures are:

1. the person must be biologically descended from Aboriginal or Torres Strait Islander people, and
2. the person must self-identify as a member of those same Aboriginal or Torres Strait Islander people, and
3. the person must be recognised as a member of those same Aboriginal or Torres Strait Islander people by elders or other persons enjoying traditional authority among those people.[123]

As a result, First Nations peoples who are non-citizens and who might not meet the tripartite test continue to be the subject of migration controls, as we explore below.

## III Method

In this article we use documentary research to analyse 'historical patterns of bordering'.[124] Marinella Marmo's method of analysing interconnections between past and present interdisciplinary approaches corresponds with Cindy Blackstock and colleagues' Indigenous ontological perspective that is critical of 'new approaches' and discoveries in Western academia.[125] Blackstock recognises that an Indigenous ontological approach places connection to culture and lived experience

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118 Harry Hobbs, 'Drawing an Implied Limitation to the Race Power' (2021) 32(3) *Public Law Review* 184, 189.

119 *Love* (n 7) 260 [288] (Nettle J).

120 Paul Karp, 'Government Accused of "Shirking Responsibility" in Bid to Overturn Ruling Against Aboriginal Deportation', *The Guardian* (online, 16 October 2021) <https://www.theguardian.com/australia-news/2021/oct/16/government-accused-of-shirking-responsibility-in-bid-to-overturn-ruling-against-aboriginal-deportation>.

121 *Thoms v Commonwealth* (2022) 276 CLR 466.

122 Department of Home Affairs (Cth), *Interviewing Located Persons* (Standard Operating Procedure, Document ID (PPN) BC-5436, 2021) 7 <https://www.homeaffairs.gov.au/foi/files/2022/fa-220800065-document-released.pdf> ('*Interviewing Located Persons*').

123 Ibid.

124 Marinella Marmo, 'Continuity and Durability of Violent Border Policies and Practices Directed at Undesirable Migrants in Britain and Australia: Some Reflections on the Past–Present Continuum' (2022) 40(1–2) *Immigrants & Minorities* 240, 243.

125 Cindy Blackstock, Muriel Bamblett and Carlina Black, 'Indigenous Ontology, International Law and the Application of the Convention to the Over-Representation of Indigenous Children in Out of Home Care in Canada and Australia' (2020) 110(1) *Child Abuse & Neglect* 104587.

as a central part of Indigenous ways of knowing, being and doing,[126] thereby reinforcing Indigenous peoples' distinctive sense of belonging to the physical and spiritual environment through cultural and kinship ties.

To explore 'historical patterns of bordering' and their resistance,[127] this article adopts a case study approach drawing on two cases decided either side of the High Court's decision in *Love*. Our selection of each case study did not occur through a systematic case law or media analysis, which would constitute a useful area for future research. Instead, as we detail below, our case studies were derived from our literature review and from media attention at the time of undertaking this research on the visa cancellation of Shayne Montgomery, who asserted Aboriginality through cultural adoption.[128] A case study approach was adopted as it enables a contextual and in-depth understanding of contemporary practices and their historical legacy using a variety of sources.[129] We used documentary research and information that was publicly available through judgments and media interviews instead of directly interviewing people subject to visa cancellation and removal. We took this approach as it offered a less intrusive way to platform the experiences of those subject to the tumult of visa cancellation.

This research is of particular significance to Aboriginal and Torres Strait Islander peoples and as such engages the Australian Institute of Aboriginal and Torres Strait Islander Studies Code on the ethical and responsible conduct of research ('*AIATSIS Code*').[130] The four principles underpinning the *AIATSIS Code* and reflected in this research are:

1. Indigenous self-determination
2. Indigenous leadership
3. Impact and value
4. Sustainability and accountability.[131]

Each principle involves a number of responsibilities for researchers, and we were alive to these at every stage of the research. Our responsibilities around respect and recognition were in some ways more onerous given we were relying on documentary research. As a non-Indigenous and Indigenous researcher with a long history of collaboration, we walked together in this inquiry privileging Indigenous leadership

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126 Cindy Blackstock, 'Why Addressing the Over-Representation of First Nations Children in Care Requires New Theoretical Approaches Based on First Nations Ontology' (2009) 6(3) *Journal of Social Work Values and Ethics* 1, 29.

127 Studying and understanding resistance is a counterweight to the deficit discourses that pervade education, health, law and justice framing of Aboriginal and Torres Strait Islander peoples: see Melitta Hogarth, 'Speaking Back to the Deficit Discourses: A Theoretical and Methodological Approach' (2017) 44(1) *Australian Education Research* 21, 32; William Fogarty, Melissa Lovell, Juleigh Langenberg and Mary-Jane Heron, 'Deficit Discourse and Strengths-Based Approaches: Changing the Narrative of Aboriginal and Torres Strait Islander Health and Wellbeing' (Report, Lowitja Institute, 2018); Marcelle Burns, Simon Young and Jennifer Nielsen, '"The Difficulties of Communication Encountered by Indigenous Peoples": Moving Beyond Indigenous Deficit in the Model Admission Rules for Legal Practitioners' (2018) 28(2) *Legal Education Review* 1, 9.

128 Karp, 'Government Urged to End Legal Fight' (n 8).

129 John W Creswell and J David Creswell, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (Sage Publications, 6th ed, 2023) 14.

130 Australian Institute of Aboriginal and Torres Strait Islander Studies, *AIATSIS Code of Ethics for Aboriginal and Torres Strait Islander Research* (2020) ('*AIATSIS Code*').

131 Ibid 3.

within the research team and outside it, responding to calls from Indigenous leaders for Indigenous sovereignty to be respected within visa cancellation processes.[132] Our ongoing commitment, advanced in this collaboration, is to participate in research that benefits Aboriginal and Torres Strait Islander people and contributes to a more socially just future in fulfilment of the *AIATSIS Code*.[133]

Selecting case studies from before and after *Love* was important to us in understanding how Aboriginal and Torres Strait Islander peoples continue to be entangled with border control. Our first case study was identified through a literature review on the topic of Indigenous peoples and visa cancellation and removal. Boon-Kuo[134] had recently written about the case of WSML, a New Zealand citizen who descended from peoples living in North-East Lutruwita/Tasmania. This ancestral link led us to focus on the historical operation of deportation of Aboriginal peoples, using the contemporary case study of *WSML*.[135] We came to our second case study through the media attention given to the case of Shayne Montgomery when Senator Lidia Thorpe called on the government to discontinue a High Court appeal challenging a decision not to deport Montgomery, who identified as an Aboriginal person through cultural adoption.[136] The High Court case was an appeal by the Commonwealth that sought to re-open or limit *Love*.[137] Elisa Arcioni and Kirsty Gover write that the case

> highlights the challenges entailed in efforts to determine the scope of the Australian Parliament's power to determine membership of the constitutional polity, and appropriately describe Aboriginal Australians in a way that respects the complexities of Aboriginal and Torres Strait Islander identity and membership.[138]

We consider the resistance to the deportation of Aboriginal people by analysing submissions by Indigenous stakeholders in the High Court. Both the Northern Land Council ('NLC') and the National Native Title Council ('NNTC') intervened and their submissions were the first contribution of Indigenous organisations to the High Court on questions of membership and deportation.[139] Analysing these acts of resistance amplifies the knowledges, leadership and sovereignty of Aboriginal and Torres Strait Islander peoples. It also counters the harmful deficit narratives that dominate representations of Aboriginal and Torres Strait Islander peoples in law and

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132 See, eg, Northern Land Council, 'Proposed Submissions of the Northern Land Council', Submission in *Minister for Immigration, Citizenship and Multicultural Affairs v Shayne Paul Montgomery*, Case No S192/2021, 9 March 2022, 3 [10] ('*NLC Submission*'); National Native Title Council, 'Submissions of the National Native Title Council Seeking Leave to Intervene', Submission in *Minister for Immigration, Citizenship and Multicultural Affairs v Shayne Paul Montgomery*, Case No S192/2021, 9 March 2022, 4 [7] ('*NNTC Submission*'); Indigenous Law and Justice Hub, 'Swift Successes Towards Indigenous Justice', *University of Melbourne* (Web Page) <https://www.unimelb.edu.au/alumni/impact/community/swift-successes-towards-indigenous-justice>.

133 See *AIATSIS Code* (n 130) 20–1 principle 3.

134 Boon-Kuo (n 25) 39.

135 *WSML* (n 22).

136 Karp, 'Government Urged to End Legal Fight' (n 8).

137 Transcript of Proceedings, *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery* [2022] HCATrans 51.

138 Elisa Arcioni and Kirsty Gover, 'Aboriginal Identity and Status under the *Australian Constitution*: *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery*' (2022) 44(1) *Sydney Law Review* 137, 137.

139 *NLC Submission* (n 132); *NNTC Submission* (n 132).

justice discourses.[140] We begin our analysis with a historical overview of the use of deportation on First Nations peoples.

## IV Historical and Contemporary Context of Deporting First Nations Peoples

Deportation has been operationalised as a tool of colonisation since European invasion. *Bringing Them Home*, the final report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families ('Stolen Generations Inquiry'), revealed through powerful storytelling[141] two primary uses of the power to deport. The first use was the forced removal of Aboriginal and Torres Strait Islander peoples to remote islands *within* Australia. The terminology of deportation had been used to describe the removal of Indigenous peoples to island settlements, such as Palm Island in Queensland, and Flinders Island and Sara Island in Lutruwita/Tasmania.[142] In the case of Palm Island, deportation had many aims including enabling Aboriginal parents to be separated at a distance that made it impossible for them to visit their children.[143] On Flinders Island, deportation targeted (unsuccessfully) the removal of all Aboriginal people from Lutruwita/Tasmania to seize land and stop the 'Black War', an 1820s conflict between Aboriginal people and non-Aboriginal peoples.[144] We return to Flinders Island in our case study in Part IV(A).

The second use of deportation, and the primary focus for this article, was the forced removal of Aboriginal and Torres Strait Islander peoples from Australia, including children fostered or adopted into families as part of the policies informing the Stolen Generations.[145] This aligns with the definition of deportation in international law which requires the crossing of an international border.[146] The Stolen Generations Inquiry heard testimony from those impacted by the deportation of Aboriginal and Torres Strait Islander peoples who sought to return to Australia but remained non-citizens. As the report states, an 'unknown number' of Aboriginal and Torres Strait Islander children forcibly removed from their families and communities were subsequently taken overseas by foster families or adoptive parents.[147]

Deportation through forced removal resulted in the loss of citizenship by current and future generations of Aboriginal and Torres Strait Islander peoples. The Stolen Generations Inquiry heard about 'Jack', whose grandmother was forcibly taken from the Torres Strait in the early 1900s.[148] It is understood that Jack's grandmother was taken by missionaries to Fiji to work in domestic service. Jack

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140 See generally Burns, Young and Nielsen (n 127).

141 Narelle Bedford, 'Storytelling in Our Legal System: Healing for the Stolen Generations' (2019) 45(2) *Australian Feminist Law Journal* 321.

142 *Bringing Them Home* (n 88) 75.

143 Ibid.

144 Ibid 79–80.

145 Ibid 211–14, 320–1.

146 Vincent Chetail, 'Is There Any Blood on My Hands? Deportation As a Crime of International Law' (2016) 29(3) *Leiden Journal of International Law* 917.

147 *Bringing Them Home* (n 88) 211.

148 Ibid.

came to Australia on a tourist visa in 1988, overstayed his visa, and at the time of the Stolen Generations Inquiry was liable to deportation. Jack had re-established family and community ties, was working and was accepted by relatives and community, yet he was not eligible for citizenship or even permanent residence. According to his great-uncle who testified at the Inquiry:

> [T]he Australian Government owes a historical debt to Jack's grandmother (my sister) which it can only repay by granting Jack the right to remain in this country. Jack's birthright was stolen from him by Missionaries acting with the consent of the Queensland Government at the turn of the century and he is morally entitled to compensation. The least that can be done to compensate him would be to grant him a right to reside in his own country.[149]

Jack's grandmother was not a citizen when removed from Australia as citizenship was only extended to Aboriginal people with the passing of the *Nationality and Citizenship Act 1948* (Cth), well after his grandmother was removed.[150] We do not know what happened to Jack and whether he was deported. The generational impact of colonisation and its intersection with migration is enlivened by the courageous testimony provided by his family to the Inquiry.

The Stolen Generations Inquiry found that for people impacted by forced removal such as Jack, and those who could not afford to return to establish ties, 'the Commonwealth should assist those living overseas to return to this country permanently should they so choose'.[151] The Inquiry found this should occur in 'recognition of the fact that forcible removal was wrongful and of the need of many to re-establish their Indigenous identity, kinships and cultural links'.[152] The Inquiry produced a number of recommendations in *Bringing Them Home* that pertained to addressing the impact of deportation on those who told their stories to the Inquiry:

> Recommendation 31a: That the Commonwealth create a special visa class under the *Migration Act 1951* (Cth) to enable Indigenous people forcibly removed from their families and from Australia and their descendants to return to Australia and take up permanent residence.
>
> Recommendation 31b: That the Commonwealth amend the *Citizenship Act 1948* (Cth) to provide for the acquisition of citizenship by any person of Aboriginal or Torres Strait Islander descent.
>
> Recommendation 31c: That the Commonwealth take measures to ensure the prompt implementation of the *International Transfer of Prisoners Bill 1996*.[153]

While the government asserts that these recommendations have been fulfilled, it is hard to see this claim realised when Aboriginal peoples without the security of citizenship continue to face the same challenges in returning and staying in Australia.

On the citizenship and visa recommendations (31a and 31b), the government has argued that provisions already exist in migration and citizenship legislation for

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149 Ibid (Confidential evidence 138, Victoria).

150 Indigenous Australians automatically became Australian citizens with the passing of the *Nationality and Citizenship Act 1948* (Cth), but there was a difference between status and rights for Aboriginal and Torres Strait Islander peoples: see John Chesterman and Brian Galligan, *Citizens Without Rights: Aborigines and Australian Citizenship* (Cambridge University Press, 1997).

151 *Bringing Them Home* (n 88) 320.

152 Ibid.

153 Ibid 321.

granting entry to people removed from Australia, or the children of those removed.[154] A Senate Committee examining the implementation of the recommendations from the Stolen Generations Inquiry stated that, in receiving this submission from the government, 'the Committee received no evidence to suggest that this response was insufficient, or that members of the [Stolen Generations] had experienced difficulties in returning to Australia'.[155] (This particular submission from the government and the then Minister for Aboriginal and Torres Strait Islander Affairs, John Herron, also characterised *Bringing Them Home* as a 'misrepresentation of the historical record' and discussed at length the 'benign' intent of government policies that led to the Stolen Generations.[156]) Notwithstanding this assertion, it remains the case that if recommendation 31b had been implemented, Daniel Love and Brendan Thoms would not need to have taken their case to the High Court.

Despite the government stating that these recommendations have been implemented, Indigenous peoples forcibly removed from Australia still face challenges in returning. Recommendation 31c sought to enable the return of Aboriginal and Torres Strait Islander peoples deported and then jailed overseas. Russell Moore, whose adopted name was James Hudson Savage,[157] was born to a Koori mother in Victoria in 1963 and as a newborn forcibly removed and adopted to a couple who emigrated to the United States when he was six years old.[158] By his early teens he was homeless and caught up in the criminal justice system.[159] In 1991 he was sentenced to life imprisonment for murder.[160] Moore's birth mother and other family members located him while he was in a United States prison. Following the *Bringing Them Home* report recommendations, the Commonwealth did pass legislation to enable his transfer to Australia,[161] yet his bids to return to Australia were rejected by the United States Government in 2007 and 2012.[162] His bids to return were supported by the Victorian and Australian governments.[163] His mother campaigned for his return but passed away in 2017.[164] Russell Moore also died in Apalachee Correctional Institution in Florida of a sudden medical emergency aged 58.[165] He had already served his sentence but was not able to leave jail or return

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154 Human Rights and Equal Opportunity Commission, *Healing: A Legacy of Generations* (Parliamentary Paper No 410, November 2000) 28 [1.105] ('*Healing: A Legacy of Generations*'), citing Minister for Aboriginal and Torres Strait Islander Affairs (Cth), Submission No 36 to Senate Legal and Constitutional References Committee, Parliament of Australia, *Inquiry into the Stolen Generation* (21 March 2000) 599–600.

155 *Healing: A Legacy of Generations* (n 154) 28 [1.105].

156 Minister for Aboriginal and Torres Strait Islander Affairs (Cth), Submission No 36 to Senate Legal and Constitutional References Committee, Parliament of Australia, *Inquiry into the Stolen Generation* (21 March 2000) 599–600.

157 *Bringing Them Home* (n 88) 411.

158 Ibid.

159 See ibid.

160 Erin Pearson, 'Indigenous Man Dies in US Prison Following 30-Year Fight to Come Home', *The Sydney Morning Herald* (online, 3 June 2021) <https://www.smh.com.au/national/indigenous-man-dies-in-us-prison-following-30-year-fight-to-come-home-20210603-p57xra.html>.

161 *International Transfer of Prisoners Act 1997* (Cth).

162 Pearson (n 160).

163 Ibid.

164 Ibid.

165 Ibid.

home. This tragic outcome of forced removal and deportation reverberates in the current moment where Aboriginal and Torres Strait Islander peoples continue to face deportation and permanent exclusion from Australia. It is also illustrative of the significant stressors faced by people detained indefinitely. We now turn to examine contemporary examples of the threatened or attempted deportation of First Nations peoples.

## A *Cyclical Nature of Colonisation and Deportation: WSML and Minister for Home Affairs*

Contemporary examples of the visa cancellation and attempted removal of Aboriginal and Torres Strait Islander peoples from Australia show the ongoing and cyclical nature of colonisation. Australia's history of dispossession and resistance links concretely to the 2019 case of *WSML*.[166] WSML faced permanent exclusion from Australia after receiving a notice that he may not pass the 'character test' and that his visa was liable to cancellation based on discretionary cancellation provisions in s 501(2) of the *Migration Act*.[167] WSML was born in Aotearoa New Zealand and entered Australia on a temporary visa at age 22 with his partner (later wife).[168] While his partner took up Australian citizenship in 2013,[169] WSML did not. WSML has Aboriginal and Māori ancestral ties, having learnt at a family reunion some years prior that his family tree was traced to the Palawa people of Lutruwita/Tasmania.[170] At the time of the tribunal hearing, WSML had two children, both of whom identified as Aboriginal, and his partner was pregnant.[171] WSML's visa had been cancelled by a delegate of the Minister for Immigration and so he applied to the AAT for merits review of this decision. At the AAT he submitted:

> Even though I was born in New Zealand, I identify as indigenous Australian as my mother has ancestral connections to the indigenous people of Tasmania. My grandfather (5 generations back) [name omitted] left Tasmania for New Zealand to escape the massacre of Tasmania's indigenous people. My material (sic) family has always recognised its indigenous ties to Australia and I have applied to become a member of the [name omitted] Aboriginal Corporation. Many of my maternal family members are already members of the Corporation and are recognised as being of Aboriginal descent. Both of my sons identify as indigenous Australians as well.[172]

A media article reported in more detail about his links to Lutruwita/Tasmania. Interviewed by journalist Hannah Ryan, WSML stated that his ancestors were removed from the Tasmanian mainland and taken to the settlement of Wybalenna on Flinders Island.[173] His 'nan's great grandfather, escaped [Wybalenna] by sailing to

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166 *WSML* (n 22).
167 Ibid [3] (Senior Member M Evans).
168 Ibid [143].
169 Ibid [2].
170 Ibid [5], [122].
171 Ibid [113], [122], [150].
172 Ibid[147].
173 Hannah Ryan, 'This Man Was Told That Just Because He's Aboriginal That Doesn't Make Him an Australian', *Buzzfeed* (online, 5 March 2019) <https://www.buzzfeed.com/hannahryan/aboriginal-deportation-new-zealand-home-affairs-dutton>.

New Zealand'.[174] Putting these threads together, WSML's family were deported to Flinders Island and escaped to New Zealand. WSML returned to Australia and was then subject (again) to deportation as a result of having his visa cancelled under the *Migration Act*. Evaluating this context brings the cyclical nature of deportation to the surface and into full view.

Deportation, understood as 'a constituent element of historical genocides',[175] was one of several strategies undertaken by the British government against the Aboriginal peoples of Lutruwita/Tasmania. Lutruwita/Tasmania was invaded by the British in the early 19th century.[176] In a period known then as the Black War, violent conflict between Aboriginal and non-Aboriginal peoples ensued.[177] Martial law was declared on 30 October 1828,[178] Lutruwita/Tasmania being one of only three locations in Australia where this occurred.[179] Aboriginal people were 'methodically hunted down' in 'hunting expeditions',[180] and their lands stolen in a series of land 'grants' to non-Aboriginal people. This culminated in the establishment of a 'final all-out assault':[181] a military operation known as the Black Line which involved 2,000 men walking in a line across Lutruwita/Tasmania, seeking to drive the Aboriginal population to the south-east.[182] This was a costly military operation and ultimately unsuccessful, leading to the pursuit of deportation as a strategy.[183]

Deportation to Flinders Island was intended to expel Aboriginal peoples to be 'remade as human beings in British terms'.[184] It took place under ostensibly 'humanitarian' terms by its champion, George Augustus Robinson.[185] Humanitarianism is regularly invoked in securitisation discourse as a mode of governing.[186] Robinson 'suggested to the government that he negotiate with [Aboriginal people to gain their trust] and offer protection, food, clothing and shelter away from the mainland'.[187] *Bringing Them Home* records the impact of this so-called 'friendly mission'.[188] More than 200 Aboriginal peoples were moved to the

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174 Ibid.

175 John Docker, 'A Plethora of Intentions: Genocide, Settler Colonialism and Historical Consciousness in Australia and Britain' (2015) 19(1) *International Journal of Human Rights* 74, 79–80, citing Raphaël Lemkin, *Axis Rule in Occupied Europe* (Carnegie Endowment for International Peace, 1944).

176 Docker (n 175) 75, 80, citing Ian McFarlane, *Beyond Awakening: The Aboriginal Tribes of North West Tasmania* (Fullers Bookshop, 2008).

177 *Bringing Them Home* (n 88) 79.

178 Docker (n 175) 78.

179 One of the other sites for martial law was the authors' hometown of Bathurst: see Alison Gerard, Andrew McGrath, Emma Colvin and Annette Gainsford, *Children, Care and Crime: Trauma and Transformation* (Routledge, 2023) 29–30.

180 Ian McFarlane, *Beyond Awakening: The Aboriginal Tribes of North West Tasmania* (Fullers Bookshop, 2008), quoted in Docker (n 175) 80.

181 James Boyce, *Van Diemen's Land* (Black Inc, 2008), quoted in Docker (n 175) 79.

182 *Bringing Them Home* (n 88) 79.

183 Ibid 79–80.

184 Docker (n 175) 82.

185 Ibid 81–2.

186 Marmo (n 124) 258–9. See also Alison Gerard and Leanne Weber, '"Humanitarian Borderwork": Identifying Tensions between Humanitarianism and Securitization for Government Contracted NGOs Working with Adult and Unaccompanied Minor Asylum Seekers in Australia' (2019) 23(2) *Theoretical Criminology: An International Journal* 266.

187 *Bringing Them Home* (n 88) 80.

188 Docker (n 175) 81.

newly created Wybalenna settlement on Flinders Island by 1835.[189] Children were forcibly separated on the island and sent to live with the storekeeper and catechist.[190] Devastatingly, by 1843, only about 50 people remained due to inadequate shelter, insufficient rations and disease.[191] Forty-eight survivors from Wybalenna were moved to Oyster Cove on the Tasmanian mainland in 1847, with children again separated and sent to an orphan school in Hobart.[192] Those of 'mixed descent' again had to leave Oyster Cove in 1855, and by 1876 'everyone left had died'.[193] This use of deportation had catastrophic consequences.

The impact on WSML and his family of the prospect of visa cancellation, removal and being detained in immigration detention was immense. He slipped into 'deep depression' for which he was medicated.[194] Both he and his wife had expected that notification of his Aboriginality would prompt the proceedings against him to be stopped.[195] His Aboriginality had been recognised by other government departments, and in *WSML* was recognised by the AAT.[196] Despite this, the Department's view was that WSML was still a non-citizen.[197] In November 2018 he was taken into Yongah Hill immigration detention centre, separating him from his family, for whom he was the primary breadwinner, and his employment. His wife, who was pregnant at the time, was the only parent to support the family.[198] These impacts on WSML and his family could have been prevented had the recommendations of the Stolen Generations Inquiry been implemented. If the discretion under s 501(2) had been exercised differently by immigration authorities, WSML could have avoided spending over two months in immigration detention. Ultimately, the AAT set aside WSML's visa cancellation and made a decision in substitution that discretion should not be exercised to cancel the visa.[199] WSML may still be liable to visa cancellation in the future.

Departmental officers and AAT members are instructed to take different matters into account when assessing the discretionary cancellation of visas and when considering when cancellation should be revoked or set aside, as outlined in Part II(A) above.[200] The Ministerial Direction which applied at the time of this decision, *Direction No 65*, contained no reference to Aboriginality, Indigenous sovereignty, or the importance of cultural ties, specifically to land and family.[201] Moreover, while the best interests of the children are a primary consideration, the Direction did not list the impact on Aboriginal and Torres Strait Islander children of separating them from their families and communities. We know from other policy

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189 *Bringing Them Home* (n 88) 80.
190 Ibid.
191 Ibid.
192 Ibid.
193 Ibid.
194 *WSML* (n 22) [95].
195 Ryan (n 173).
196 *WSML* (n 22) [148].
197 Ibid [6].
198 Ibid [150].
199 Ibid [174].
200 *Migration Act* (n 30) s 499.
201 *Ministerial Direction No 65: Visa Refusal and Cancellation under s501 and Revocation of a Mandatory Cancellation of a Visa under s501CA* (Direction under Section 499 of the Migration Act 1958, 22 December 2014) ('*Direction No 65*').

areas that without specific reference to these particular collective rights of Indigenous peoples, the result can be discriminatory.[202] As Marcelle Burns writes, 'policy driven by the normalised and universalised values may too easily become "colour-blind" to Indigenous needs and aspirations'.[203]

The lack of any reference to the specific collective rights of Indigenous peoples in the Ministerial Direction continued in the three Directions that followed[204] and remains the case in *Direction No 110* today.[205] In relation to child protection, the lack of consideration given to 'cultural connection' in determining the best interests of Aboriginal and Torres Strait Islander children has been heavily criticised.[206] Writing in the context of child protection, Krakoeur and colleagues argue that 'the values and ideologies that are prioritised when "best interests" are conceptualised through an Anglo-European lens can result in problematic assumptions about risk and safety for Indigenous children'.[207] They advance their own definition of cultural connection that emphasises subjectivity and the complexity of this connection:

> We conceptualise cultural connection as a process of culturally connecting that encompasses the complexity of culture and identity, where subjectivity is pertinent. In this way, individual experiences of culturally connecting are diverse (as are First Nations cultures and identities), and are impacted by the broader settler-colonial environment within which identity is formed and cultures are practised.[208]

Krakouer and colleagues write that it is important to harness self-determination to navigate these complexities.[209] They argue that this principle of cultural connection risks becoming a bureaucratic site of compliance rather than the source of health and wellbeing Aboriginal activists intended this to be.

In contrast, at a state level, in Western Australia, where WSML resides, the government had an emphasis on cultural ties to family and land. Its Building Safe and Strong Families strategy of September 2016 recognises 'the long history of Aboriginal and Torres Strait Islander peoples on this land and acknowledges that the past is not just in the past. The past, the present and the future are, as they always are, part of each other — bound together.'[210] Moreover, the Director General of the Department for Child Protection and Family Support recognises that a 'critical measure of the success of earlier intervention and family support must be to establish improvement in the outcomes and life circumstances for Aboriginal children and families'.[211] By contrast with this emphasis, the Australian government was seeking to separate this family by deporting WSML to New Zealand. The impact of forced

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202 Burns (n 4) 119.
203 Ibid 120.
204 *Ministerial Direction No 79* (28 February 2019); *Ministerial Direction No 90* (8 March 2021); *Ministerial Direction No 99* (23 January 2023)
205 *Direction No 110* (n 51) is the current Ministerial Direction at the time of writing.
206 Krakouer et al (n 4) 346.
207 Ibid 351.
208 Ibid 352.
209 Ibid 353.
210 Department for Child Protection and Family Support (WA), *Building Safe and Strong Families: Earlier Intervention and Family Support Strategy* (September 2016) 2.
211 Ibid 3.

separation on families, particularly Aboriginal and Torres Strait Islander families, is clear,[212] yet the Australian government was seeking to do this again, in a repeat of the past. As noted at the end of Part II(C), given the sacred nature of connection to Country, it might be expected that cultural connection would be given prominence in policy and laws on visa cancellation and removal.

## B *Indigenous Resistance to 'Transformative Coloniality': Montgomery v Minister for Immigration*

Despite the victory in *Love*, however slim, the effect of 'transformative coloniality'[213] or 'shape-shifting'[214] can be seen in what happened next. The government sought to re-open, or limit, the *Love* decision with a High Court appeal against *Montgomery*.[215] In this case the Federal Court had ordered the release from immigration detention of an Aboriginal man with New Zealand citizenship whose Special Category (Temporary) visa had been cancelled.[216] Shayne Montgomery identified as Aboriginal and was the father of five children.[217] He identifies as a member of the Mununjali people and is recognised by Elders, having been culturally adopted decades before these court proceedings.[218] The Commonwealth argued that the decision in *Love* was 'entirely novel' and 'not carefully worked out in a succession of cases'.[219] It argued that 'biological descent' was defined in a positivist way to preclude cultural adoption,[220] despite the prevailing view otherwise in native title determinations, under international law, and in most indigenous communities around the globe.[221] Ultimately, the Commonwealth argued that Montgomery did not meet one of the limbs of the tripartite test of Indigeneity[222] — 'biological descent' — which the Commonwealth argued should apply in all cases where the definition of 'alien' in accordance with *Love* is being considered.[223] This was challenged by Montgomery's legal team and several organisations, including the NNTC and the NLC who intervened to resist the re-opening of *Love* and the Commonwealth's claims.

Shayne Montgomery was born in New Zealand and came to Australia as a 15 year old in 1997.[224] In the same year, he was placed in Dundalli House, a homeless

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212 *Bringing Them Home* (n 88).
213 Marmo (n 124) 259.
214 Moreton-Robinson (n 14) 192.
215 *Montgomery* (n 23).
216 Ibid 6 [2].
217 Ibid 18 [53].
218 Ibid.
219 Commonwealth, 'Submissions of Appellants and Attorney General for the Commonwealth (Intervening)', Submission in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Shayne Paul Montgomery*, Case No S192/2021, 28 January 2021, 9 [21] ('*Appellants Submission*').
220 Ibid 21 [53].
221 Kirsty Gover, 'Indigenous Citizenship in Settler States' in Ayelet Shachar, Rainer Bauböck, Irene Bloemraad and Maarten Vink (eds), *The Oxford Handbook of Citizenship* (Oxford University Press, 2017) 453.
222 *Mabo [No 2]* (n 108) 70 (Brennan J).
223 *Appellants Submission* (n 219) 23–5 [54]–[56].
224 *Montgomery* (n 23) [1], [26] (SC Derrington J).

shelter for Aboriginal youth in Brisbane.[225] He learned about Aboriginal cultures from Elders and was taken on Country.[226] He was initiated by Mununjali Elders in 2000,[227] and lived with an Aboriginal family in Brisbane from 1998 to 2006.[228] Prior to his initiation, he had registered with Centrelink and Aboriginal and legal medical services as an Aboriginal person. Commonwealth government agencies had considered Shayne Montgomery to be Aboriginal for decades.[229]

In 2018 Montgomery received a 14-month sentence of imprisonment upon which his visa was cancelled under mandatory visa cancellation provisions in s 501(3A) of the *Migration Act*.[230] He requested revocation of this decision and was taken into immigration detention in February 2019 after serving 11 months in prison.[231] After more than a year in immigration detention without an outcome on his revocation request, in May 2020 he made an application to the Federal Court seeking a writ of mandamus to obtain a result on the revocation application with the Department of Home Affairs.[232] A few days after filing this claim, the Minister decided not to revoke the visa cancellation.[233] This meant that the decision could not be appealed on a merits basis to the AAT and Montgomery's only option became judicial review in the Federal Court.[234] Montgomery then amended his Federal Court application seeking review of the Minister's decision, adding a writ of habeas corpus, a declaration that he is not an 'alien' within s 51(xix) of the *Constitution*, and an order that he not be detained under ss 189 and 196 of the *Migration Act.*[235] In November 2021, the Federal Court granted his application and ordered that Montgomery be released from immigration detention and the matter be sent back to the Minister for determination.[236] By this time, Shayne Montgomery had spent close to three years in immigration detention.

Shortly after Montgomery's release from immigration detention, the Commonwealth lodged an appeal in the High Court, and several Indigenous organisations, lawyers and advocates — alongside the Australian Human Rights Commission and the Attorney-General of Victoria — intervened. Senator Lidia Thorpe called upon the government to discontinue the case, a request echoed by Dr Eddie Cubillo.[237] Submissions by Indigenous lawyers and advocates, rallied by the Indigenous Law and Justice Hub at the University of Melbourne, led by Dr Cubillo, created a Black Caucus, 'a group of Indigenous organisations who pool their

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225 Shayne Paul Montgomery, 'Amended Submissions of Respondent', Submission in *Minister for Immigration, Citizenship and Multicultural Affairs v Shayne Paul Montgomery*, Case No S192/2021, 5 April 2022, 3 [5].

226 Ibid.

227 Ibid 3 [8].

228 *Montgomery* (n 23) [53].

229 See ibid.

230 Ibid [29]–[30].

231 Ibid [29], [31].

232 Ibid [7].

233 Ibid.

234 See ibid [8].

235 Ibid [12].

236 Ibid [160]; Minister for Immigration, Citizenship and Multicultural Affairs and Minister for Home Affairs, 'Appellants' Chronology', Submission in *Minister for Immigration, Citizenship and Multicultural Affairs v Shayne Paul Montgomery*, Case No S192/2021, 28 January 2022, 3–4.

237 Karp, 'Government Urged to End Legal Fight' (n 8).

resources to have the greatest impact'.[238] As we explore below, the impact was significant. After several rounds of hearings and submissions, the new Labor Government abandoned the High Court appeal in July 2022. The Department of Immigration then revoked Montgomery's original visa cancellation.[239] In doing so, it is unclear whether or not immigration authorities can cancel Montgomery's visa in the future. This has the effect of creating protracted legal uncertainty, and a change of government could again threaten deportation. Montgomery's lawyer told *The Guardian* her client had 'lost years of his life fighting to remain with his children, his family, including his parents and siblings, and his community'.[240]

The High Court submissions by the NNTC and the NLC resist the ongoing impacts of colonisation that saw Montgomery entangled in visa cancellation and removal. *Love* was absent an Indigenous 'voice at the table' which the NNTC states was 'wholly unsatisfactory'.[241] This absence was also noted by Gageler J in *Love*.[242] In their submissions, the NNTC and the NLC set out the complexities of defining Indigeneity and of seeking to place limits on Indigenous peoples' connections to Country. The NLC is a land council of the Northern Territory representing the northern half and is a recognised representative body under the *Native Title Act 1993* (Cth) ('*Native Title Act*'). The NNTC is the peak native title body in Australia. Both submissions illustrate the knowledge of Indigenous peoples since time immemorial and the impact that deportation and attempts to sever connection to Country create. In the view of the NNTC:

> *Love* provides recognition of what Aboriginal and Torres Strait Islander people … have always known, that people are part of 'an organic part of one indissoluble whole' with the land, and that this connection is of the most profound 'cultural and spiritual' significance.[243]

Both the NNTC and the NLC argued that only Aboriginal and Torres Strait Islander peoples should decide who is Aboriginal and Torres Strait Islander. It was a matter for self-determination as reflected in art 26 of the *UNDRIP*. The NLC stated that

> self-identification and community acceptance are probative of descent … The better view, in the NLC's submission, is to understand the concept of descent as capturing the principles of descent that are recognised by the Aboriginal peoples concerned in accordance with their customs and traditions determining status or membership, which may not be confined to a European view of genealogy.[244]

The NNTC and NLC refer to this position being accepted in native title determinations.

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238 Indigenous Law and Justice Hub (n 132).

239 Rachael Knowles, 'Labor Stops High Court Appeal Aimed at Skittling Aboriginal "Aliens" Ruling', *SBS NITV* (online, 28 July 2022) <https://www.sbs.com.au/nitv/article/labor-stops-high-court-appeal-aimed-at-skittling-aboriginal-aliens-ruling/a90yxtxfx>.

240 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> ('Labor Drops Coalition Bid').

241 *NNTC Submission* (n 132) 7 [18].

242 *Love* (n 7) 211 [134].

243 *NNTC Submission* (n 132) 7 [16], citing *Love* (n 7) 260 [290] (Gordon), 314 [451] (Edelman J), 276 [349] (Nettle J).

244 *NLC Submission* (n 132) 14 [33] (citations omitted).

The NLC went on to outline how the government's preoccupation with defining Aboriginality was a historical legacy of colonisation with ongoing impacts. The NLC referred to the 'bewildering array of legislative and administrative acts that imposed genetically and fractionally based (blood quantum) definitions of Aboriginality'.[245] It stated that these were racist and discriminatory measures that 'reflected the misconceptions of Aboriginal social organisation that underpinned the doctrine of terra nullius'.[246] The NLC's submission outlined research highlighting that 'assessments of descent were unreliable and capable of giving offence, and failed to take account of self-identification and community acceptance'.[247] It also highlighted art 33(1) of the *UNDRIP* which provides that 'it is the right of Indigenous peoples to determine their own identity or membership in accordance with their customs and traditions'.[248] The normative standard should be 'set by the customs of the Aboriginal peoples concerned'.[249] Moreover the 'arguments of administrative convenience put by the Commonwealth parties … cannot control the point of principle in issue'.[250]

An international survey of the constitutions and membership codes of Indigenous peoples across the globe revealed that naturalisation is common in over half of those surveyed.[251] Gover writes:

> Contemporary expressions of indigenous citizenship reveal the legal pluralism of settler states by showing that many indigenous persons are dual nationals, and that legal indigeneity is the product of a jurisdictional relationship between settler and tribal governments.[252]

In 2008 Gover did a survey of 535 'tribal constitutions and membership codes' and found that all 'use descent to allocate birthright citizenship'.[253] Moreover, 57% of the surveyed documents contain a pathway to naturalisation for non-descendants 'at the discretion of the tribal decision-makers'.[254] Membership by 'social descent' is common within Aboriginal communities, as also highlighted in the submissions to *Montgomery* by the Australian Human Rights Commission.[255] These understandings of 'descent' offer a pointed contrast to the government's narrow view of sovereign power and membership. This Indigenous knowledge has the potential to influence policy and jurisprudence in migration law, as it has in native title determinations, such that 'belonging' is better understood. To illustrate, this approach may assist to determine appropriate limits on the power to cancel visas and remove people from Australia.

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245 Ibid 6 [16].
246 Ibid (citations omitted).
247 Ibid 7 [17].
248 Ibid 7 [19].
249 Ibid 9 [23].
250 Ibid 15 [34], citing *Appellants Submission* (n 219) 24 [55].
251 Gover (n 221) 463.
252 Ibid 454.
253 Ibid 463.
254 Ibid.
255 Australian Human Rights Commission, 'Submissions of the Australian Human Rights Commission Seeking Leave to Appear As Amicus Curiae', Submission in *Minister for Immigration, Citizenship and Multicultural Affairs v Shayne Paul Montgomery*, Case No S192/2021, 9 March 2022, 13 [34].

The NNTC and NLC submissions do not set out a test for 'Aboriginality'. The NNTC rejected that the tripartite test was 'a universally applicable test of "Aboriginality"' and considered that 'given the plurality and diversity of Aboriginal and Torres Strait Islander communities … a single legal test for determining who is Aboriginal Australian may be inappropriate'.[256] The submission emphasised that the legal framework and the timeframes of the proceeding did not allow for 'the kind of extensive consultations with memberships that should in the NNTC's view, be conducted in order to reach a collective view about the appropriate test to apply in factual circumstances' like those in *Montgomery*.[257] Since that time, however, the definition of Aboriginality captured by immigration authorities and applied is the tripartite test in *Mabo [No 2]*, as documents released under freedom of information laws reveal.[258]

The NNTC rejected the conflation of 'Aboriginal Australians' and 'native title holders'. It stated that

> while all native title holders may be 'Aboriginal Australians', not all 'Aboriginal Australians' hold native title'. So much flows from the judgments in *Love*, in recognising the existence of Aboriginal Australian identity distinct from the existence of native title rights. The NNTC acknowledges that some Aboriginal Torres Strait Islander peoples do not know which first people they connected to or belong to. This is a product of settler-colonialism.[259]

The NNTC submission spelt out the way in which dispossession has precluded, for many Aboriginal and Torres Strait Islander peoples, any capacity to show continuous observance of their traditional customs, or inhabitancy, such that they can apply for and attain legislative native title rights.[260] The NNTC and NLC took issue with the Commonwealth's submissions that sought to narrow *Love* to native title holders only.[261] 'In the communities the NNTC knows and represents, traditional law and custom is determinative of belonging. Belonging is not impacted by whether the communities have claimed or hold native title.'[262] The NNTC argued it can bring a perspective on

> (a) the recognition of individuals within a wider traditional collective as applied under traditional law and custom, as well as through the [*Native Title Act*] and alternative legislative and policy processes;
>
> (b) understanding of the challenges of coming to a unified position amongst Aboriginal and Torres Strait Islander peoples on the appropriate 'test(s)' for 'Aboriginality' in various contexts, including constitutional contexts, given the plurality of groups and cultures;
>
> (c) the impact of colonisation on … connections to culture and land and the challenges of native title law; and
>
> (d) the likely impacts of [the current proceedings] on native title claims and rights holders.[263]

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256 *NNTC Submission* (n 132) 17–18 [50].
257 Ibid 8 [19].
258 *Interviewing Located Persons* (n 122) 7.
259 *NNTC Submission* (n 132) 12 [31].
260 Ibid 12 [32].
261 Ibid 12 [31]; *NLC Submission* (n 132).
262 *NNTC Submission* (n 132) 8 [21].
263 Ibid 5–6 [12].

The NNTC also drew the distinction between the government's arguments and the National Agreement on Closing the Gap which recognises the 'unique and enduring connection' of Indigenous peoples to this land and a commitment 'to no longer make decisions *for* and *about* Aboriginal and Torres Strait Islander peoples without the genuine involvement of the "community" through representative bodies'.[264]

News of the discontinuance of the High Court appeal was welcomed by different advocacy groups. NNTC chief executive Jamie Lowe wrote, 'We applaud the Albanese government for their intervention so those First Nations people could be set free on their own soil.'[265] According to *The Guardian*, 12 people were released from detention as a result of this decision.[266] One of them was Jack Hobson, a New Zealand citizen with Aboriginal ancestry and recognised by the Darug people, whose visa had been cancelled for suspicion of being a member of a bikie gang, a claim he denied.[267] Hobson had never been charged or convicted of a crime, but spent time in immigration detention which he described as an 'awful place' that aimed to 'break your spirit'.[268] He told *The Guardian*: 'I'm happy, I'm relieved. Hopefully, I can move on to a better life and not have to look over my shoulder'.[269] Yet First Nations peoples will continue to face the effects of 'crimmigration' into the future. This highlights that lasting change is needed at all levels — including legal education — to transform skills, knowledge and attitudes to appropriately recognise Indigenous sovereignty.

# V Conclusion

This article analyses how deportation and colonisation continue to overlap by examining the case studies of *WSML* and *Montgomery*. Our analysis makes visible the historical legacy relevant to the contemporary moment in which First Nations peoples again face deportation from Australia under s 501 of the *Migration Act*. Critically, this article reveals that if the recommendations of *Bringing Them Home* had been implemented, Aboriginal and Torres Strait Islander peoples would not have faced the crimmigration gaze leading to deportation and would not have endured immigration detention and the concomitant impact on families and communities.

The attempted and actual deportation of First Nations peoples from Australia has multiple tributaries including the lack of recognition of Indigenous sovereignty and self-determination, and the contemporary legacy of colonisation that is chiefly implicated in the ongoing criminalisation of Aboriginal and Torres Strait Islander peoples. Since the *Love* and *Montgomery* decisions, many Indigenous peoples have been released from detention but many others still face an uncertain future.

Migration policy has a lot to gain from Indigenous peoples' understanding of belonging and membership. Membership by 'social descent' is common within Indigenous communities and is a sharp contrast to the Australian government's

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264 Ibid 8 [20] (emphasis in original).

265 Giovanni Torre, 'Number of Indigenous People Facing Threat of Deportation Revealed after Court Case Canned', *National Indigenous Times* (online, 9 August 2022) <https://www.nit.com.au/number-of-indigenous-people-facing-threat-of-deportation-revealed-after-court-case-canned>.

266 Karp, 'Labor Drops Coalition Bid' (n 240).

267 Ibid.

268 Ibid.

269 Ibid.

narrow view of sovereign power and membership. It could teach policymakers much about ties and belonging and the measure of fairness in visa cancellation, removal and deportation.

This article has explored the current and historical appetites for expulsion and severing connections to Country/family/culture in deporting — or attempting to deport — First Nations peoples. Aboriginal and Torres Strait Islander peoples, scholars and organisations have been resisting these ongoing forms of colonisation, and the article highlights these contributions as strength-based approaches to navigating previously unthinkable developments to control our borders. Clearly more needs to be done to recognise Indigenous sovereignty and prioritise realising the specific collective rights of Indigenous peoples. Two ways this can be achieved are through the Ministerial Direction on visa refusal and cancellation under s 501 of the *Migration Act* and revocation under s 501CA, and through the broader policy process applied by immigration authorities. At present, these collective rights are silenced in the migration control system, which is uniquely impacting First Nations peoples yet continues to be resisted.

## *Epilogue*

> For many years there have been repeated calls for legal education to prepare graduates who have the knowledge and professional capabilities to work effectively with and for First Nations peoples across the legal profession.[270] Decolonisation requires recognition of the leadership of First Nations peoples,[271] and legal education provides one avenue for this. Legal education plays a pivotal role in shaping the perspectives and approaches of future lawyers, particularly in relation to Indigenous communities. By integrating professional capabilities to work with and for Indigenous peoples, legal education ensures that future lawyers are well prepared to understand and address the unique challenges faced by Indigenous communities. This not only helps close the gap between Indigenous and non-Indigenous Australians but also promotes a more inclusive and equitable legal system.[272] To date there continues to be limited action by law schools in Australia to embed professional capabilities into legal education, with only a few demonstrating a commitment to the call.[273] Exploring the concept of sovereignty and the sovereign rights of First Nations peoples, understanding First Nations peoples' unique connection to Country, and recognising how First Nations

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[270] See *Royal Commission into Aboriginal Deaths in Custody* (National Report, 1991) vol 1, 295, 91; *Bringing Them Home* (n 88) 256.

[271] Thalia Anthony, Harry Blagg, Carly Stanley and Keenan Mundine, 'Decolonizing Criminology Theories by Centring First Nations Praxis and Knowledges' in Chris Cunneen, Antje Deckert, Amanda Porter, Juan Tauri and Robert Webb (eds), *The Routledge International Handbook on Decolonizing Justice* (Routledge, 2023) 504.

[272] Larissa Behrendt, Steven Larkin, Robert Griew and Patricia Kelly, *Review of Higher Education Access and Outcomes for Aboriginal and Torres Strait Islander People* (Final Report, July 2012) xi; Marcelle Burns, Anita Lee Hong and Asmi Wood, *Indigenous Cultural Competency for Legal Academics Program* (Final Report, 2019) v.

[273] See Alison Gerard, Annette Gainsford and Kim Bailey, 'Embedding Indigenous Cultural Competence: A Case Study' in Kevin Lindgren, François Kunc and Michael Coper (eds), *The Future of Australian Legal Education: A Collection* (Thomson Reuters, 2018) 323; Ambelin Kwaymullina, 'Teaching for the 21st Century: Indigenising the Law Curriculum at UWA' (2019) 29 (1–2) *Legal Education Review* 155; Burns, Hong and Wood (n 272). See also Gainsford, Gerard and Colvin (n 20).

peoples were impacted by colonisation — including through deportation — are essential knowledge requirements for legal education. This article has shown how the incorporation of such understandings is critical to shifting the operation of criminal, migration and citizenship law to prevent further injustice to First Nations peoples. As Michael Guerzoni and Maggie Walters argue, decolonisation requires recognition of the colonial nature of a discipline and its use of Western perspectives, people and power as the default.[274] It also requires revision and reconfiguration for the betterment of Indigenous peoples.

[274] Michael Guerzoni and Maggie Walter, 'Decolonizing Criminological Research Methodologies: Cognition, Commitment, and Conduct' in Chris Cunneen, Antje Deckert, Amanda Porter, Juan Tauri and Robert Webb (eds), *The Routledge International Handbook on Decolonizing Justice* (Routledge, 2023) 492.