The Thirteenth Sir Harry Gibbs Memorial Oration

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Two Recent Constitutional Cases

1. Ladies and gentlemen,
2. It is an honour to deliver the Sir Harry Gibbs Memorial Oration.
3. This is the thirteenth occasion upon which the Oration has been delivered. I follow a distinguished body of twelve former orators, all lawyers, mostly judges and quite a few Queenslanders.
4. One thing evident from the twelve Orations, the texts of which I have taken the precaution to read, is that praise for Sir Harry Gibbs, the man and the judge, is a common thread of every Oration. I will not do otherwise.
5. I knew him as a judge. I have taken from the shelves the volumes of the Commonwealth Law Reports for the period of his tenure of office as a Judge and Chief Justice of the High Court of Australia to remind myself of the reported cases in which I appeared, always, save once, as junior counsel led by an experienced silk, before a bench on which Sir Harry Gibbs was sitting. My memory, even thus stimulated, does not yield any recollection of what Sir Harry Gibbs said or did in any of those matters, and there were quite a number. Many of the other judges I do remember, generally not for their assistance to my client's case, it should be said. I have appeared before all Chief Justices of the High Court since, but not including, of course, Sir Owen Dixon, and Sir Harry Gibbs is the Chief Justice whose interventions in court I least remember. I infer, therefore, that in contrast to his immediate predecessor, Sir Garfield Barwick, and his successors to date, that Sir Harry Gibbs was, as Dyson Heyden described him in the inaugural Memorial Oration, "*mild*

mannered, unpretentious, tactful, quiet, unflustered and, above all, unfailingly polite."

6. The only occasion upon which I appeared without a leader before Sir Harry Gibbs was also the only occasion on which, in almost 50 years at the Bar, I have been late for court and not present at the Bar Table when the matter, in the case in point a special leave application in which I was briefed for the respondent, was called on for hearing. I was detained by the lift in the then new High Court building in Canberra, which would not release me. When I was called upon to address the Court, Sir Harry Gibbs, who was the presiding judge, cut short my attempt to explain my absence, "*Yes, yes, just get on with it*." Again, therefore, I agree with Dyson Heydon that Sir Harry Gibbs was, on the bench, "*vigorous, forceful... decisive, efficient*," had authority "*and could be direct to the point of bluntness*."
7. After his retirement, Sir Harry Gibbs led an active life, including as an arbitrator. I appeared before him in an arbitration in which he was the presiding arbitrator. For many who have long been judges the translation to arbitrator is not straightforward, and those former judges are inclined to continue to conduct themselves as if they exercise the authority of the office of judge. Sir Harry's manner as an arbitrator was somewhat judicial.
8. Sir Harry Gibbs' written judgments have a distinctive character. He wrote in clear, concise, direct, uncluttered prose. Not for him "*bluebell time in Kent*" or 100 pages of clutter written according to a template prescribed in some course of instruction for new Judges. His judgments are easy to read and his reasons are stated with as much direct simplicity as the subject allows. In this respect, Sir Harry Gibbs stands in contrast with much which is now written by Judges, not excepting judges of the High Court.
9. The qualities of personality and intellect possessed by Sir Harry Gibbs were ideal for the career he pursued. Like all of us, he possessed the vices of his virtues. I have not seen it written, nor heard it said, that Sir Harry Gibbs had any of those qualities of imagination,

insight or taste which are admired in mankind and make a person sought solely for the pleasure and joy of his or her company. Often, it is said that the qualities that make good lawyers also ensure they are dull.

10. In the inaugural Oration, Sir Harry Gibbs is said, like Sir Owen Dixon, to enjoy discussion of the "*comedy of life*." In that respect, both of those great lawyers were men of a class Horace Walpole had in mind when he said "*the world is a comedy to those who think, a tragedy to those who feel*." Could it be that those who practice in the law acquire a carapace of indifference to the tragedies of life?

11. Sir Harry Gibbs was born in 1917, almost a decade before my father was born and only a decade after his mother, my grandmother, was born. Harry Gibbs grew up in country Queensland. He was born, therefore, and his character and personality formed, in a world remote from today. His work as a judge of the High Court is a reminder of judicial qualities not always evident in recent times.

12. He upheld the federal character of the Constitution of the Commonwealth of Australia. He stood for the rule of law and the importance of a competent judiciary and a conscientious and honourable legal profession. I believe he was also of the view that it is not likely that a competent judiciary will be found where judges are appointed for reasons other than merit. Merit means the possession of qualities that make for excellence as a judge. They are qualities of intellect and character, and a commitment to do justice according to law.

13. Three of the judges whose judgments I will discuss today were appointed while another orator, Senator Brandis, was Commonwealth Attorney-General. I doubt Senator Brandis foresaw in their legal and judicial careers before appointment to the High Court the manner of discharge of their judicial function in one of the decisions of the High Court I wish to speak about today. In that case they engaged in judicial creativity of a nature and

degree not within the scope of the judicial function. In the other of those two cases five judges of the High Court did not adhere to the proper limits of judicial creativity and thereby damaged the fabric of the Australian federation.

14. I have adhered inflexibly to a resolution made when I came to the Bar that I would never read a report of a legal case out of interest or amusement, but only if briefed to do so. Thus, I have only recently, in preparation for my remarks today, read these cases. The first is Love v Commonwealth (2019) 270 CLR 152. The second is Palmer v Western Australia {2021) 272 CLR 505.

15. Before examining the reasons for decision in Love, may I make a few prefatory remarks. First, it is an attribute of a sovereign state that it has the power to decide who is a citizen of the state and who is an alien. It follows that a sovereign state may determine whether and when an alien should be admitted to membership of the community which constitutes that state and expel an alien whom it chooses not to allow to remain within its sovereign territory. Sir Samuel Griffith said as much in Robtelmers v Brenan (1906) 4 CLR 395 at 400-401. I would also add, without, I think, express judicial approbation, that the criteria for membership of that community should be clear, and readily applicable in any particular case, so that it is easily known who is a member of the community and who is not.

16. Second, it has not, so far, been contended in any proceedings before an Australian court, that indigenous Australians, however identified, have at any time constituted a sovereign entity, separate from the Commonwealth of Australia. At least, no judge has asserted that in any judgment, but, it must be conceded, it is very likely said at dinner parties and the like attended by judges who let it be known how virtuous and advanced are their opinions on social and political issues. The present fashion of referring to "First Nations" obscures important facts. If it is intended to refer to Australian Aborigines as a nation, it is false. If

it means that there are many Aboriginal nations in Australia, that too conveys a wrong impression about the relations between Aboriginal people at the time of British settlement. At the time of the British settlement of Australia, and since, Australian Aboriginals have identified as belonging to small groups or clans generally related by family, but never as a nation. According to The Encyclopedia of Aboriginal Australia, there are about 500 different groups of Australian Aboriginals, and some larger groups may include smaller identifiable groups and clans. It is also the case that there is enormous genetic diversity within Australian Aboriginals and huge diversity of language and cultural practices. Each group had a connection to a particular locality, not to the whole of the land that is now the Commonwealth of Australia.

17. Third, it is settled that section 51 (xix) of the Constitution, which empowers the Parliament of the Commonwealth to make laws with respect to "*naturalisation and aliens*," confers power to determine who has and has not the legal status of alien and to specify the legal consequences of that status. It also confers power to determine the conditions upon which a person may be "*naturalised*," that is, become a citizen.

18. Fourth, in Pochi v Macphee (1982) 151 CLR 101 at 109, Gibbs CJ observed that there must be a limit to Parliament's power to determine who comes within the definition of an "*alien*," that limit being that Parliament could not expand the power under section 51 (xix) by defining as "*alien*" persons who could not possibly answer the description of "*alien*" in the ordinary understanding of that word. Subject to that obvious limit, the Parliament of the Commonwealth of Australia can establish the criteria by which a person is or is not an alien.

19. What were the facts of Love? Daniel Alexander Love was taken into immigration detention on 10 August 2018 following the cancellation of his visa under a provision of the Migration Act 1958. On 10 September 2018, Love commenced proceedings by

summons in the original jurisdiction of the High Court. On 27 September 2018, the cancellation of his visa was revoked and he was released from immigration detention. On 23 November 2018, Love, by amended writ of summons, sought declarations that his detention, before the purported cancellation of his visa, was unlawful, and was not supported by any provision of the Migration Act and that he was neither an "*alien nor a person requiring naturalisation of the purpose of section 51 (xix) of the Constitution*." He also sought damages for false imprisonment. I have not been able to determine if Love did secure an award for damages or, as is perhaps more likely, as shown by recent events, a payment from the Commonwealth in settlement of his claim. Brendan Craig Thoms, being in circumstances similar to Love, commenced similar proceedings on 5 December 2018. The Thoms case was determined by the High Court at the same time as Love.

20. Each of Love and Thoms was born outside Australia, and each was the citizen of another country. Each lived in Australia as a visa holder for a substantial period. Neither sought to become an Australian citizen. Love "*identified*" as a descendant of the Kamilaroi group of Indigenous Australians and was recognised "*as such*" by one Elder of the group. Thoms identified "*as a man of the Guggari People*" and was a common law holder of native title recognised by determination of the Federal Court of Australia.

21. Love and Thoms did not challenge the validity of the provisions of the Migration Act 1958 or the Australian Citizenship Act 2007. They did not contend that the criteria stated in the Australian Citizenship Act for Australian citizenship were not within the power given by section 51 (xix).

22. The question stated for the consideration of the High Court was whether each of the plaintiffs was an "*alien*" within the meaning of section 51 (xix). Thus, the case advanced by Love and Thoms is that they were not "*aliens*," notwithstanding they were not citizens under the enactments validly made by Parliament. Put another way, they contended that

the Constitution recognised that there is a category of "*non-citizen, non-alien*," of which each of them was an instance.

23. The submissions on behalf of Love and Thoms were put in several slightly different ways, but, however understood, those submissions amounted to saying that they, by race, were Australian Aboriginals whom the Parliament could not, by valid legislation, exclude from Australia. They said an Australian Aboriginal is not an "*alien*," although born elsewhere and a citizen of another sovereign state.

24. Four members of the High Court (Bell, Nettle, Gordon and Edelman JJ), each of whom delivered a separate judgement, upheld the contentions advanced on behalf of Love and Thoms. The Chief Justice and Gageler and Keane JJ dissented.

25. Mabo [No 2] (1992) 175 CLR 1 held that the common law, that is, the non-statutory law derived from England, recognised a form of native proprietary interest in land and waters, which survived the acquisition of sovereignty of the land of Australia by the British Crown. The common law did not create that native title but recognised its continuance after British settlement of Australia. Native title could be extinguished by statute or by grant by the Crown of property interests to others which were inconsistent with the continuance of the native title. Native title allowed persons who were holders of native title rights determined by reference to the content of traditional laws and customs. The nature of the connection to land and water ascertained by reference to traditional laws and customs, which is the basis of native title, has been the subject of considerable judicial exegesis following Mabo [No 2] and has been explained by reference to spiritual and cultural conceptions. Thus, native title is not created by the common law and relates to a local connection with the traditional land of a group or clan, not to the whole of Australia.

26. I now turn to the reasons of the judges forming the majority in Love, which occupy most of the 170 pages of the Commonwealth Law Reports devoted to that case. I will refer

later to the views of the minority, in particular to a cogent judgment of Gageler J. I will quote at some length from the majority judgments to give an unmediated flavour of the majority opinions.

27. Bell J expressed the essence of her reasoning at [71] as follows:

> "*To observe that the capacity of an alien to hold proprietary interests in land has no bearing on his or her status as an alien fails to address the core of the plaintiff's argument. Their argument does not depend on the holding of native title rights and interests. In many instances those rights and interests have been extinguished. The plaintiffs' and Victoria's argument depends upon the incongruity of the recognition by the common law of Australia of the unique connection between aboriginal Australians and their traditional lands, with finding that an aboriginal Australian can be described as an alien within the ordinary meaning of that word*."

In this manner, Bell J said that Aboriginal Australians stood in a special position by reason of a "*unique connection*" with "*their traditional lands*."

28. In response to the contention that Love and Thoms relied upon "*a race-based limitation on [Commonwealth] power*," Bell J said at [73]:

> "*The Commonwealth's concern, that to hold its legislative power does not extend to treating an Aboriginal Australian as an alien is to identify a race-based limitation on power, is overstated. It is not offensive, in the context of contemporary international understanding, to recognise the cultural and spiritual dimensions of the distinctive connection between indigenous peoples and their traditional lands, and in light of that recognition to hold that the exercise of the sovereign power of this nation does not extend to the exclusion of the indigenous inhabitants from the Australian community*."

In that way, Bell J emphasised again the basis of the special status she asserted for Aboriginal Australians was the cultural and spiritual connection Aboriginal Australians have to the traditional lands of their group or clan.

29. Bell J dealt with the contention that the case put by Love and Thoms is to deny an attribute of every sovereign state, namely the power to decide whether an alien is to be admitted to its community, and acknowledged that power is vital to the welfare, security, and integrity of the nation. However, Her Honour decided that the abrogation of that power was justified in the case of Love and Thoms by the bald assertion that "*the position of Aboriginal Australians, ... is sui generis*." On the question of whether a person is an "*Aboriginal Australian*," Bell J said it is "*a question of fact*." Her Honour identified an Aboriginal Australian as "*a person of Aboriginal descent, albeit mixed, who identifies himself as such and who was recognised by the Aboriginal community as an Aboriginal*." This is based on the definition proposed by Deane J in the Tasmanian Dam case {1983) 158 CLR 1, at p274, a case which did not concern section 51 (xix). The facts in Love disclose that Love's "*paternal great-grandfather, Frank Wetherall, was born in Queensland and was descended in significant part from people who inhabited Australia immediately prior to European settlement, as was his paternal great-grandmother Maggie Alford*." Love was said "*to identify as a descendent of the Kamilaroi tribe and is recognised as such a descendant by Janice Margaret Wetherall, an elder of that tribe*." Thus, as Bell J reasoned, if Love is to be regarded as an Aboriginal Australian he has by that fact alone the special spiritual and cultural connection with the land which meant he was not an "*alien*" within the meaning of section 51 (xix).

30. Can I turn to Nettle J, who identified the question for decision as follows [255]:

> "*The question remains, however, whether Aboriginal descent, self-identification as a member of an Aboriginal community and acceptance by such a community*

as one of its members constitute such a relationship with the Crown in right of Australia as to put a person beyond the reach of … legislative power granted by section 51 (xix)."

The reasons given by Nettle J for answering the question he posed are tortuous and obscure.

31. At [256], Nettle J appears to have dismissed "race" as a consideration for determining the extent of Parliament's power under section 51 (xix). He also rejected as a relevant matter "*a person's experience, perception of being connected to the Australian territory, community or polity*." This is consistent with the High Court decision in Falzon v Minister for Immigration and Border Protection (2018) 262 CLR 333, in which the Court decided that Falzon, who had lived in Australia for 61 years since the age of three years, was still an "*alien*." However, Nettle J hedged his statement about race with expressions including "*By and large*," "*at the level of principle*," and "*in terms of history and precedent*."

A few paragraphs later he said at [262]:

"*Different considerations apply, however, to the status of a person of Aboriginal descent who identifies as a member of an Aboriginal society and is accepted as such by the elders or other persons enjoying traditional authority among those people under laws and customs deriving from before the Crown acquired sovereign over the territory of Australia*."

At [271] he went on:

"*Axiomatically, a person cannot be a member of an Aboriginal society continuously united in the acknowledgment of its laws and customs unless he or she is resident of Australia. Nor can a person be a member of such an Aboriginal society unless he or she is accepted as such by other members of the society according to the traditional laws and customs of the society deriving from before*

the Crown's acquisition of sovereignty over the Australian territory. Thus, for present purposes, the most significant of the traditional laws and customs of an Aboriginal society are those which allocate authority to elders and other persons to decide questions of membership. Acceptance by persons having that authority, together with descent (an objective criterion long familiar to the common law of status) and self-identification (a protection of individual autonomy), constitutes membership of an Aboriginal society: a status recognised at the 'intersection of traditional laws and customs with the common law."

32. In the next paragraph, His Honour said that membership of an "*Aboriginal society*" is "*necessarily inconsistent with alienage*." He referred to the Crown's "unique obligation of protection" to Australian Aboriginal societies. At [276], Nettle J quoted a statement by Michael Dodson, a lawyer, as follows: "*Everything about Aboriginal society is inextricably interwoven with, and connected to, the land. Culture is the land, the land and spirituality of Aboriginal people, our cultural beliefs or reason for existence is the land. You take that away and you take away our reason for existence.... Removed from our lands we are literally removed from ourselves*." His Honour remarked, by way of commentary on Mr. Dodson's statement, that "*a connection of that kind runs deeper than the accident of birth in the territory or immediate parentage*." The statements were apparently treated as fact. As well as quoting Michael Dodson, Nettle J called in aid Pope Paul Ill and the papal bull "*Sublimis Deus*" of 1537, [274]. The Pope asserted the equality of men, but not different rights existing according to race, which is to assert inequality. At [277] the Judge said:

> "*Being a matter of history and continuing social fact, an Aboriginal society's connection to country is not dependent on the identification of any legal title in respect of particular land or waters within its territory.*"

At [278] he said: "*So long as an Aboriginal society which enjoyed a spiritual connection to country before the Crown's acquisition of sovereignty has, since that acquisition of sovereignty, remained continuously united in and by its acknowledgement and observance of laws and customs deriving from before the Crown's acquisition of sovereignty over the territory, including the laws and customs which allocate authority to elders and other persons to decide questions of membership of the society, the unique obligation of protection owed by the Crown to the society and each of its members in his or her capacity as such will persist*."

Finally, in a sentence of about 100 words, Nettle J concluded: "*It follows from what has been said that to classify a resident non-citizen of Aboriginal descent who identifies and is accepted as a member of an Aboriginal society according to traditional laws and customs continuously observed since before the Crown's acquisition of sovereignty as an alien is to treat as an "alien" a person who is incapable of answering that description in the ordinary sense of the word; and, therefore, that to impose the liabilities of alienage on a member of such an Aboriginal society is beyond the legislative competence of the Parliament under section 51 of the Constitution*."

As far as one can derive from almost 40 pages of complex language referring to international legal conceptions, history, social, community and spiritual beliefs, Nettle J's decision boils down to an assertion that an Aboriginal Australian, as defined by Deane J in Mabo [No2], has a connection with the land of Australia which means that person cannot be an "alien" within section 51 (xix) of the Constitution and, therefore, cannot be excluded from Australia.

33. The third member of the majority, Gordon J, appears to have taken a position more radical than Bell J and Nettle J.

Gordon J declared at [289]:

> "*The fundamental premise from which the decision in Mabo v Queensland [No2] proceeds - the deeper truth - is that the Indigenous peoples of Australia are the first people of this country, and the connection between the Indigenous peoples of Australia and the land and waters that now make up the territory of Australia was not severed or extinguished by European 'settlement'*."

34. The connection referred to is "*spiritual and metaphysical*" [289] (But apparently still within the competence of a High Court judge to opine about in deciding a "*constitutional question*"). Gordon J's opinion is quite simple: the constitutional term "*aliens*" does not apply to "*Aboriginal Australians, the original inhabitants of the country*."

Gordon J asserted at [298], presumably as a truth deeper than the law or the Constitution,

> "*Failure to recognise that Aboriginal Australians retain their connection with land and waters would distort the concept of alienage by ignoring the content, nature and depth of that connection. It would fail to recognise the first peoples in this country. It would fly in the face of decisions of this Court that recognise that connection and give it legal consequences befitting its significance. And yet that is what is sought to be done here to Mr Love and Mr Thoms, two Aboriginal Australians: to ignore their Aboriginality because they were born overseas, do not have Australian citizenship and owe foreign allegiance*."

It is not a cheap debating point to say that Her Honour hit the nail on the head. They are exactly the reasons why Love and Thoms are aliens and should be subject to removal from Australia according to the Migration Act.

35. The fourth member of the majority, Edelman J, delivered another lengthy judgment. It is based upon a textual analysis of section 51 (xix), by which he concludes that the provision limits the power of Parliament to legislate in respect of "*aliens*." He points out that a child

born in Australia of parents both of whom are only citizens of Australia could not be considered an alien within the meaning of section 51 (xix) [466]:

> "*A premise of the submissions of all parties and the intervener to these special cases, consistently with the same premise in previous cases in this Court, solidly based upon repeated statements in this Court, is that the constitutional concept of an alien is not co-terminous with any person whom the Commonwealth Parliament chooses to make statutory citizens. That longstanding assumption is correct. Political community is not a concept that is wholly a creature of legislation. For example, a child born in Australia to two parents who have only Australian citizenship is not an alien. The metaphysical ties between that child and the Australian polity, by birth on Australian land and parentage, are such that the child is a non-alien, whether or not they are a statutory citizen. The same must also be true of an Aboriginal child whose genealogy and identity includes a spiritual connection forged over tens of thousands of years between person and Australian land, or 'mother nature'*."

36. The connection with Australia of the child born here of two Australian parents is not metaphysical. The child has connection with and allegiance to only the place of his or her birth. It is certainly true, however, that the connection with Australia of an Aboriginal child born outside Australia is not the physical connection or allegiance present in the other case. The decision of Edelman J distinguishes (as do the other judges forming the majority) between the rights of non-Aboriginal and Aboriginal persons. But it does so on the basis of a definition of Australian Aboriginal which is contrived and not contestable. It is also based upon assumptions that all Aboriginal persons have a metaphysical, sometimes called religious, connection with the land of Australia of a kind that persons with no Aboriginal blood cannot have. These assumptions are sometimes said to have

some legal significance. But the fact is they are mere assertions of belief which cannot be examined, or justified, rationally.

37. Edelman J says in [467] that his conclusion about a spiritual connection cannot be denied because to do so would be contrary to the essential meaning of section 51 (xix). But the children in his two scenarios are not in like case. One is born in Australia of two parents, both of whom are only Australian citizens; the other is born abroad of parents, both of whom are not Australian citizens. The exercise of sovereignty so as to discriminate between the two cases is rational and based upon facts readily ascertainable, incontestably relevant to that exercise of sovereignty and consistent with any sensible conception of human rights.

38. What is the significance of this decision? First, a person who is not entitled to remain in Australia, under enactments the constitutional validity of which is accepted, is nonetheless entitled to remain in Australia because he is not an "*alien*" within the meaning of section 51 (xix).

39. Second, the decision limits the sovereign capability of Australia to control who comes to Australia and who may remain here. As observed by Gleeson CJ in Re MIMA Ex Parte Te (2002) 212 CLR 162, at 171 [24], this is an element of sovereignty vital to the "*welfare, security and integrity of the nation*."

40. Third, the limitation on sovereignty identified in Love is based upon race. By reason of belonging to a particular race, persons are deemed to enjoy a metaphysical connection with the land of Australia which precludes "*alienage*."

41. Fourth, what is the criterion by which it is said the limitation on sovereignty arises? It is based upon an identification of race by reference to vague criteria which are incapable of clear and objective application. Imagine a person presenting at the immigration counter and stating that he or she, a non-citizen, born abroad, and a citizen of a foreign state,

cannot be excluded from Australia because he or she identifies as Aboriginal and is descended in small part from indigenous ancestors. What does the immigration officer do when that person adds: "And if you refuse me entry, I will sue you for false imprisonment or assault or both."?

42. Fifth, the test of connection with country, of "*belonging to the land*," is a "*spiritual*" connection. A spiritual connection can never be denied or tested, if asserted. If New Zealand were to become part of the Commonwealth of Australia, as provided for by the Constitution, following Love, Australian Aboriginals will apparently acquire a metaphysical and spiritual connection to the land of New Zealand.

43. Sixth, the analysis based in Mabo [No 2] is flawed. Mabo [No2] concerned the recognition by the common law, that is, law made by judges, of certain "*native title*" for the purpose of land claims. It has nothing to do with the usual criteria for determining whether a person is an alien as a matter of ordinary usage.

44. Finally, I return to the decision of Gageler J. In a few pages, [127] to [140], he rejects the majority reasoning. He says he cannot be a party to implication or constitutional interpretation to create a race-based constitutional limitation on legislative power. He says that "*creativity*" of the nature and of the "*degree*" to create such a limitation is not within the scope of the acknowledged judicial function: it is a "*supra constitutional innovation*." In a sense, that says it all. But why have the majority engaged in such innovation? They have forgotten they are judges whose function is to administer the law. They are not innovators remaking society. Their duty is to administer the law and thereby to keep the foundations of society steady. If they are unhappy with the constraints of judicial office, they should, like Doc Evatt did, resign from office and seek election to Parliament.

45. Palmer v Western Australia. Section 92 of the Constitution provides that "*trade,*

commerce and intercourse among the States ... shall be absolutely free." The headnote of Palmer sets out the facts, and I quote it as an accurate summary.

> *Section 56(1) of the Emergency Management Act 2005 (WA) relevantly provided that the Minister for Emergency Services might, in writing, declare that a state of emergency existed in the whole or in any area or areas of the State. Pursuant to s 56(2), the Minister must not make a declaration unless, relevantly, the Minister had considered the advice of the State Emergency Coordinator; was satisfied that an emergency had occurred, was occurring or was imminent; and was satisfied that extraordinary measures were required to prevent or minimise loss of life, prejudice to the safety, or harm to the health, of persons or animals. "Emergency" was defined in s 3 to mean "the occurrence of imminent occurrence of a hazard which is such a nature or magnitude that it requires a significant and coordinated response". "Hazard" was defined to include "a plague or an epidemic". A state of emergency declaration made under s 56 remained in force for three days, but under s 58 could be extended for a period not exceeding 14 days or further extended from time to time. Section 67 relevantly provided that, for the purpose of emergency management during an emergency situation or state of emergency, an authorised officer might direct, or by direction, prohibit the movement of persons, animals and vehicles within, into, out of or around an emergency area or any part of the emergency area.*
>
> *The Minister for Emergency Services for Western Australia declared a state of emergency in respect of the Covid-19 pandemic, applying to the whole of Western Australia. The State Emergency Coordinator, being an authorised*

officer for the purposes of ss 3 and 67 of the Emergency Management Act, then issued the Quarantine (Closing the Border) Directions (WA) ("Directions"), the effect of which was to close the border of Western Australia to all persons from any place unless they were the subject of exemption under the Directions.

46. It must be said at the outset that the High Court has found section 92 a difficult subject. In the end, the High Court has dealt with the difficulty by saying that the section does not mean what it says: that is, "*absolutely free*" means "*not free.*" In Palmer, the High Court upheld State laws which closed state borders and prohibited travel between states. The five judges who decided Palmer delivered four judgments.

47. The High Court had remitted the matter to a judge of the Federal Court to find relevant facts. The Federal Court judge concluded that COVID-19 was a risk to the health of the Western Australian population mainly because of two factors: first, the probability that COVID-19 would be imported into the population and the seriousness of the consequences if it were imported.

48. The first judgment was a joint judgment of the Chief Justice, Susan Keifel, and Justice Patrick Keane, both earlier distinguished Sir Harry Gibbs orators. The Chief Justice and Keane J began by observing that "*it is sometimes convenient to refer to section 92 as having two limbs, the trade and commerce limb and the intercourse limb,*" but also observed that the words "*trade, commerce and intercourse*" are a composite expression. The observation that those words are a "composite expression," even if true as a matter of grammar, obscures the significance of the difference between "*trade and commerce*" and "*intercourse*." The freedom of "*intercourse,*" whether or not bundled with other

freedoms, encompasses a wide range of personal, social and public activities, especially travel, unconnected with trade and commerce. A proper approach to the meaning of the respective "*limbs*" could require consideration of the differences between the activities encompassed within the respective freedoms of "*trade and commerce*" and "*intercourse.*"

49. In Cole v Whitfield (1988) 165 CLR 360, the High Court drew a distinction between "*trade and commerce*" and "*intercourse*." As the Chief Justice and Keane J said in Palmer at [41] and [42]:

> "*Consistently with the rejection of the individual rights approach with respect to interstate, trade and commerce, the Court in Cole v Whitfield regarded s 92 as effecting a limit on laws which may be made affecting those subjects. But in discussion about interstate intercourse it took quite a different approach. It regarded the guarantee of freedom of interstate movement as extending to a "guarantee of personal freedom to pass 'to and fro among the States without burden, hindrance or restriction*[111] *drawing in part on what had been said by Starke J in Gratwick v Johnson.*
>
> *It is understandable why it was thought necessary in Cole v Whitfield to make plain that s 92 was not intended as a protection of individual interstate traders. It was concerned more generally with effects on interstate trade and commerce. It is not entirely clear why it was thought necessary to retain the notion of a right of persons to pass between the States. It was not fully explained. The matter in Cole v Whitfield engaged only the trade and commerce limb. Having distinguished the intercourse limb, no further discussion about it was engaged in. It was put to one side.*"

One does not have to be a High Court judge to understand why it was "*necessary*" to

retain "*the notion of a right of persons to pass between the States*." The plain English meaning of an absolute freedom of intercourse requires exactly that. The Chief Justice and Keane J decided the two limbs of section 92 should be treated the same, although they deal with different freedoms. They then said that the bounds of the "*absolute freedom*" of the section were determined by a doctrine of "*structured proportionality*." See if you can find a hint of that doctrine anywhere in section 92 or elsewhere in the Constitution.

50. I invite you to consider what the Chief Justice and Keane J say at [55] and [56]:

> "*It is not sufficient to discern why courts have favoured its application [that is "structured proportionality"]. It reflects a rational approach to the question of whether a law which burdens a right or freedom can be justified, which requires the courts to make "something" of a value judgment. It discourages conclusory statements, which are apt to disguise the motivation for them, and instead exposes a court's reasoning. It is not obvious that the fact the same questions are to be applied in each case, albeit to different statutory contexts, is a bad thing. It might be said that it reflects the certainty to which the law aspires.*
>
> *It has not been suggested in any case since McCloy that a line of arguments otherwise available as a means of justifying a law has been foreclosed. No one could doubt that proportionality is necessary to justification. This Court has repeatedly said so. It cannot be suggested that structured proportionality is a perfect method. None is, but some method is necessary if lawyers and legislators are to know how the question of justification is to be approached in a given case. Structured proportionality certainly seems preferable to its main competitors. It has been said that calibrated scrutiny*

will ultimately end up as a rules-based approach, even though it seeks to avoid that outcome, and that the problem with tiered scrutiny is that the court's task becomes one merely of categorising the case."

51. The elements of this "*structured proportionality*" appear to be that it is "*non-discriminatory*," "*reasonably necessary*," and there is no better way to achieve a reasonably necessary object. The one thing that may be said with certainty about structured proportionality is that it hands to judges the power to make decisions involving judgments about matters which are not mentioned in section 92.

52. A further blow to the constitutional freedom so plainly granted by section 92 arises thus. The joint judgment accepted a submission made by Victoria that the question of constitutional validity was to be answered by reference to the authorising provisions of the Western Australian Act rather than to any particular exercise of those statutory powers. The Chief Justice and Keane J said, at [65),

> "*that constitutionally guaranteed freedoms operate on legislative and executive power in the sense that, a question of compliance with the constitutional limitation ... is answered by the construction of the Statute ... [and] any complaint respecting the exercise of power thereunder ... does not raise a constitutional question as distinct from a question of the exercise of statutory power*."

The judges said [67],

> "*The clarification of where the constitutional question involving freedoms resides is admittedly recent. The delay in stating it may in part be explained by difficulties which attended administrative law and its remedies for some time and which have only been resolved relatively recently. In any event the approach taken in Wotton is that which should be followed*."

53. This approach to the constitutional validity of regulations made under an Act and executive behaviour generally is at odds with what hitherto been understood by the High Court. This new approach will encourage the formulation of Acts which are framed with a high level of generality with reference to objects that apparently do not have any connection with, say, the freedom of interstate movement, but can sustain regulations made thereunder or acts done in purported enforcement of the regulations which limit interstate movement. Palmer's case is itself an example: the Directions had the purpose and effect of stopping interstate movement, but because the enabling Act did not "*reasonably require*" those restrictions, the Act does not contravene section 92.

54. Gageler J took a different path to reach the same conclusion as the Chief Justice and Keane J. He summarised his views in a few paragraphs. He said:

"At *the outset, I deal with the resolution of that part of the riddle of 92 left unresolved by Cole v Whitfield. I address what it means for intercourse among the states to be absolutely free: it means interstate intercourse must be absolutely free from discriminatory burdens of any kind. The guarantee of the intercourse limb is of absolute freedom from laws imposing differential burdens on intercourse (in comparison to intrastate intercourse) which cannot be justified as a constitutionally permissible means of pursuing constitutionally permissible non-discriminatory legislative ends… Next, I explain why compliance with the guarantees of absolute freedom of trade and commerce and absolute freedom of intercourse was appropriately determined by considering whether the provisions of the Act which authorise the making of directions of the kind impugned met the standard of reasonable necessity required to comply with both limbs of s 92 in all their potential applications, rather-than by considering whether the impugned directions directly*

complied with that standard."

55. Gageler J treated "*absolute freedom*" as meaning freedom from discrimination which cannot be justified. It is evident that one may not suffer discrimination yet, in common with all others, have no freedom whatsoever. Thus, by this intellectual alchemy, absolute freedom comes to mean freedom from "*unjustified discrimination*."

56. Gageler J is the only member of the Court who attempts to explain the Court's departure from its decision in Gratwick v Johnson (1945) 70 CLR 1. The first thing to notice about Gratwick (in contrast to Palmer) is that, whereas in Palmer the Court spends over 95 pages emasculating a constitutional guarantee of freedom of intercourse among States, in Gratwick the High Court upholds that constitutional guarantee in clear, concise and lucid reasons in five separate judgments over 14 pages.

57. In 1942, Dulcie Johnson, to visit her fiance, travelled by rail from New South Wales to Western Australia without a permit. She was charged under the National Security Act 1939-1942 that she did, without a permit, travel by rail from South Australia to Western Australia. The Magistrate who determined the matter dismissed the complaint on the ground that the Order made under the regulations under the National Security Act, and for breach of which she was charged, infringed section 92 of the Constitution.

58. It was argued for the Appellant Gratwick that the Order was valid because first, it is authorised by the regulations and, secondly, that the regulations were authorised by the National Security Act and, thirdly, the Order does not infringe section 92.

59. Latham CJ held that the defence power did not exclude the application of section 92 and that, even if the regulations and the Order, apart from section 92, are wholly

valid, they could not be upheld because they were inconsistent with section 92. The Chief Justice rejected the contention that the abrogation of freedom of intercourse could be justified by the extraordinary circumstances of wartime or, indeed, any other emergency. He pointed out that the provisions in issue were a "*mere prohibition of interstate intercourse*." It was "*directed against*" such intercourse.

60. Rich J decided the Order was a "*direct restraint on the freedom conferred by s. 92*." Starke J decided that it was "*immaterial...that the object or purpose of the legislation, gathered from its provisions, is for the public safety or defence of the Commonwealth or any other legislative purpose if it be pointed directly at the right guaranteed and protected by the provisions of s. 92 of the Constitution*." He referred to the right as "*freedom at the frontier*." Dixon J observed that there was "*no difficulty*" in the case before the Court. His Honour could not see how the Order left intercourse among the States "*absolutely free*," because s. 92 expressly commands that it should be. McTiernan J said that, although the Order was made "*in circumstances of grave national peril*," it must give way to section 92.

61. Gageler J identified the circumstance that in Gratwick the Order considered therein prohibited interstate, but not intrastate, travel by rail. Thus, he said, "*Gratwick usefully illustrates a differential burden on interstate intercourse which was not justified as constitutionally permissible non-discriminatory legislative end*." But the decision in Gratwick does not depend upon any analysis about "*discriminatory*" burdens on freedom of intercourse among States. Furthermore, the analysis in Gratwick is not about the validity of the National Security Act, but about the constitutional validity of the Order.

62. When Gageler J turned to the question of whether the Western Australian legislation contravened section 92, he put it thus [127]:

"*The Constitutional question so isolated was whether the provisions of the Act, insofar as they authorised the making of directions imposing a differential burden on interstate intercourse, are sufficiently constrained in their terms to allow a conclusion to be reached that imposition of a burden of that nature meets the requisite standard of justification across the range of potential outcomes*."

This does not seem to me to be asking the question of whether the Act imposes a burden on absolute freedom of intercourse among States. It is asking, "although the Act burdens absolute freedom of intercourse, do I think (for whatever reason I regard as sufficient) it should not be struck down as unconstitutional?" This formulation is nothing more than an assertion of a judicial power not given by the Constitution.

63. Gageler J fastened on the expression "*reasonable necessity*" as the test for the "*requisite standard of justification*" to determine whether a law imposing a discriminatory burden on absolute freedom of intercourse among States was to be taken to be a contravention of section 92. As is evident, Gageler J rejected the test of "*structured proportionality*." Whatever the test contrived in substitution for the plain words of section 92, the result will be that the freedom allowed by the High Court is what the Judges believe, as a matter of political, social or economic theory or ideology, is a reasonable restraint upon the absolute freedom granted by the Constitution. In many, perhaps all cases, the judgment made will be honest, well-intentioned and maybe after a lot of soul searching. But the fact remains that step by step, the words of the Constitution are left behind, and, in their stead, judges have contrived to substitute a complicated confection which does not guarantee absolute, or any, freedom.

64. In the case of the Western Australian legislation, the powers in question are given to a Minister who is "*satisfied*" that a "*state of emergency*" should be declared. There is then a power to control the movement of persons within, into and out of an "*emergency area*" (which can be the whole state) granted to a "*State Emergency Coordinator*." Without any apparent sense of irony, Gageler J remarked [163] that the discretion of the State Emergency Coordinator "*could have been more tightly confined*." Nonetheless, His Honour's conclusion was that the "*culmination of the statutory constraints means that a differential burden on intercourse that might result from an exercise of the power of direction is justified according to the requisite standard of reasonable necessity across the range of potential exercises of the power*" [166]. This is the language of '*Yes Minister*.'

65. I do not have time to examine the other judgments in Palmer. Gordon and Edelman JJ showed no more inclination than their senior colleagues to uphold the Constitution.

66. The exercise of the power resulted in Western Australia being, for two years, closed to persons who were not within it when the impugned power was exercised. Other States acted in like manner to Western Australia. The Commonwealth of Australia was fractured. Similar powers will be exercised by States in the future. The lives, health and wellbeing of Australians were harmed. What occurred was the denial of the "*absolute freedom*" granted by the Constitution. The High Court was weak, timorous, and engaged in an absurd debate about vague conceptions which are not found in the Constitution. The High Court failed in its fundamental duty to uphold the Constitution and to protect the Federation created by the Constitution.

67. This takes me back to the inaugural Oration, which Dyson Heydon entitled "Chief Justice Gibbs: Defending the Rule of Law in a Federal System." We need another

Harry Gibbs to defend the rule of law and to uphold the federal system created by the Constitution.