THE ELEVENTH SIR HARRY GIBBS MEMORIAL ORATION

SIR HARRY GIBBS: A LEGAL CONSERVATIVE

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Next year will mark 50 years since Sir Harry Gibbs was appointed a justice of the High Court of Australia and 39 years since he became its eighth Chief Justice. It has been said that the Court over which he presided bridged the gap between the Barwick Court's conservatism and the Mason Court's progressivism.[1] But the reality is more complex. Certainly, Gibbs steered the High Court away from the Barwick Court's laissez-aller approach to tax avoidance towards a more purposive approach to the construction of revenue legislation. In that sense, it may be said that Gibbs was more 'progressive' than Barwick. But in other respects, particularly States' rights and federalism, Gibbs was more 'conservative' than Barwick. His judgment in the *Payroll Tax Case*[2] being a good example.

Gibbs has been described as a *legal* conservative: by his detractors, as a mark of disdain of what they perceive to have been his lack of jurisprudential innovation,[3] and, by his admirers, in recognition of Gibbs' insistence that 'the law is more important than one's personal preferences and that the hard logic of legal principle should not be overborne by sociological considerations'.[4] The latter view of him is the more accurate. As one of Gibbs' most informed and eloquent admirers observed, Gibbs had in the highest degree two qualities essential to a great judge: 'total commitment to legal principle and a positive inability to compromise once persuaded what the law requires'.[5] But even that description is not entirely accurate nor sufficient to reflect the full extent of Gibbs' contribution.

Gibbs was unquestionably a Queen's man: an influential advocate of what he conceived to be the unparalleled advantages of Australia's constitutional monarchy,[6] and a distinguished member of the Privy Council.[7] He was also a strong adherent to Privy Council precedent and, more generally, a strong proponent of the special worth of English authority. As he observed[8] in an address delivered to the Queensland Bar in 1983, although it had become fashionable at that time 'to comb the law reports of the common law world for authorities' and 'to treat decisions of the English courts as entitled to no greater deference than those of other common law countries', it was to be remembered 'not only that England is the source of our law but also that most of the judges of the English courts have a distinction in the law which was not always uniformly attained on benches elsewhere'.

For a man of Gibbs' generation and experience, it is unsurprising that his intellectual and patriotic sympathies remained to some extent bound to the Privy Council and more generally to England. After all, he was born in 1917, when Australia was still very British, and he served with distinction during World War II.[9] But Gibbs was also a judge like a number of others of his age who appreciated the great importance of Australia's increasingly independent post-war legal identity, and he embraced it. In that respect, he was not unlike his predecessor, Sir Garfield Barwick, albeit that, in other respects, each man was the antithesis of the other.

I THE ABOLITION OF APPEALS TO THE PRIVY COUNCIL

In 1968, the Commonwealth Parliament passed the *Privy Council (Limitation of Appeals) Act 1968* (Cth) which restricted the right of a litigant to seek special leave to appeal from a decision of the High Court to the Privy Council to matters in

which the High Court's decision was given on appeal from a decision of the Supreme Court of a State, otherwise than in the exercise of federal jurisdiction, and which did not involve application or interpretation of the Constitution, a law of the Commonwealth Parliament or an instrument made under a law of the Commonwealth Parliament.

Seven years later, the *Privy Council (Appeals from the High Court) Act 1975* (Cth) extended the restriction to all decisions of the High Court, including its decisions involving only State law. But it was not until the passage of the *Australia Act 1986* (Cth), a decade later, that the right of appeal from a State Supreme Court to the Privy Council was finally abolished.

In 1973, in the midst of the Bjelke-Petersen government's resistance to what it perceived to be the improper encroachment of the Whitlam government's policies on States' rights, the State of Queensland enacted the *Appeals and Special Reference Act 1973* (Qld). By that legislation, Queensland purported to provide that it should be lawful for the Attorney-General of the State of Queensland to apply to the Supreme Court of Queensland for a certificate that any *inter se* question or matter of the kind specified in s 3 of the Act was one which, by reason of its great general or public importance or otherwise, ought to be referred to the Privy Council, whereupon it would be referred to the Privy Council for decision. The Commonwealth challenged the validity of the Act and, in what came to be known as the *Queen of Queensland case*, the High Court held it to be invalid. Gibbs J, with whom Barwick CJ, Stephen and Mason JJ agreed, delivered the leading judgment. Gibbs J concluded that the legislation was invalid because, in face of s 74 of the *Constitution* (which provides for the High Court to grant a certificate to enable an inter se question to be referred to the Privy Council for decision),

the 'legislation would be contrary to the inhibitions which, if not express, are clearly implicit in Ch III of the *Constitution*'.[10]

Significantly, however, his Honour also added that, subject to special considerations, the 'limits of Commonwealth and State powers, having a peculiarly Australian character, and being of fundamental concern to the Australian people, should be decided finally in this Court.'[11]

Arguably, as Michael Kirby has since observed, Gibbs J's judgment in *Queen of Queensland* was not what one might have expected in view of Gibbs' States' rights-based approach to federalism.[12] It was, however, entirely consistent with Gibbs J's later judgment in *Viro v The Queen*[13] that, in view of the *Privy Council (Appeals from the High Court) Act 1975*, the Privy Council was no longer at the apex of a hierarchy of courts of which the High Court was a member; and it was consistent with the fact that, throughout the decade that separated enactment of the *Privy Council (Appeals from the High Court) Act 1975* and the *Australia Act 1986*, Gibbs was publicly, highly critical of the continuing existence of direct rights of appeal from State Supreme Courts to the Privy Council.

For example, in his speech on the State of the Australian Judicature delivered in Hobart at the Australian Legal Convention in 1981, Gibbs CJ forcefully reemphasised concerns earlier expressed by Sir Garfield Barwick in addresses in 1977 and 1979 about the existence of potential for 'conflict' between jurisdictions and the embarrassment and inconvenience likely to result if State courts were faced with conflicting decisions of the High Court and the Judicial Committee. Gibbs CJ branded the right of appeal to the Privy Council as a 'relic of Empire' which was 'now anomalous and anachronistic'[14] and said that:[15] 'Although I would in many ways sincerely regret the breaking of this tie with the nursery of our laws, the present situation can

hardly continue for long.' Gibbs also queried why no practitioners had yet challenged the constitutional validity of the continuing availability of the right of appeal as no longer possessing the necessary connection to State appeals under s 51(xxxviii) of the *Constitution*.[16] In passing, one may wonder what would be said today if the present Chief Justice issued an invitation to the profession to bring on a comparable Constitutional challenge.

To similar effect, in an address entitled 'The State of the Australian Judicature' in 1983, Gibbs spoke disapprovingly of:[17]

> [O]ne case which came before my Court this year, [in which] the Court of Appeal of New South Wales had held that exemplary damages could be awarded to the plaintiff, but had reduced the amount of damages awarded by the trial judge. From this decision, the plaintiff ha[d] appealed to my Court on the ground that the damages awarded are inadequate but the defendant ha[d] sought leave to appeal to the Judicial Committee on the ground that no exemplary damages can as a matter of law be awarded.
>
> In another case, where three actions, involving common questions of law, were heard together in the Supreme Court of Queensland, and where one judgment was given in respect of the three cases, one of the actions ha[d] been brought on appeal to my Court and the others ha[d] been taken on appeal to the Judicial Committee. There is at least one other pending case in which one party is seeking to appeal to the Judicial Committee and the other to the High Court.

Gibbs CJ proclaimed that this 'anomalous position should not be allowed to continue' and that '[i]t is to be hoped that the reports are correct that legislation will soon be introduced as a

result of agreement between the United Kingdom, the Commonwealth and the States to abolish these appeals'.[18]

In a further speech given in 1983, entitled 'The High Court Today', Gibbs criticised the fact that some appeals to the Privy Council could be taken as of right. In his view, a test based on the amount of money at stake was not satisfactory[19] and the 'obvious alternative' was to provide that no appeal should lie except by special leave.[20]

A year later, in an address to the Lord Denning Appreciation Society, Sir Harry again took aim at the continuance of the right of appeal to the Privy Council, which he deprecated as a 'jurisdiction in relation to Australia [that] is difficult to explain to foreigners or to reconcile with our pretensions to independent nationhood',[21] and he once again emphasised the practical difficulties, as well as the legal precedential difficulties, which he said it created:[22]

> It is by no means uncommon now for a litigant dissatisfied with a decision of the Supreme Court to lodge simultaneous applications for leave to appeal to the High Court and to the Privy Council. In one case which came before us, *Caltex Oil (Aust) Pty Ltd v XL Petroleum (N.S.W.) Pty Ltd* (1984) 58 ALJR 38, one of the two parties to a decision of the Supreme Court of New South Wales instituted an appeal to the High Court and the other sought leave to appeal to the Privy Council. The High Court held that the appellant was entitled as of right to appeal to the Privy Council, but that the High Court should nevertheless proceed to hear the appeal brought before it. In the end, the entire proceedings were heard in the High Court. In another case, *Attorney-General v Finch*, a person convicted of murder in the Supreme Court of Queensland had made application to the High Court for special leave

> to appeal which was refused. Some years later he sought to seek leave to appeal to the Privy Council from the decision of the High Court refusing him special leave. The High Court held that it was not competent for him to do so, and restrained him from proceeding with his application: (1984) 58 ALJR 50. Then he sought leave to appeal to the Privy Council directly from the decision of the Supreme Court. The High Court held that the fact that it had already refused him special leave to appeal from that decision did not preclude him from making the application to the Privy Council. He made the application, but it was dismissed on its merits.

The following year, Gibbs CJ remarked, acerbically, as Priestly JA of the Court of Appeal of the Supreme Court of New South Wales had previously observed, 'that New South Wales case law [was as a result] growing relatively more quickly in London than in Canberra'[23] and Gibbs observed, with apparent disdain, that litigants from Western Australia — previously no great clients of the Judicial Committee of the Privy Council — evidently found it cheaper and more desirable to appeal from a single judge direct to London than to the Full Court of the Supreme Court of Western Australia and then to the High Court.[24]

Even in 1985, some three years after the Commonwealth and State governments had reached agreement with the United Kingdom government to remove all rights of appeal to the Privy Council, Sir Harry said[25] in his speech entitled 'The State of the Australian Judicature' that he 'felt it necessary to point to the difficulty and inconvenience of the present situation, because progress in this matter has been so slow that one feels that not all of those concerned understand the urgency of the need to close this chapter in our judicial history.'

II THE INTRODUCTION OF THE REQUIREMENT FOR SPECIAL LEAVE

Many in the legal profession did not share Gibbs' view that it was necessary or desirable to abolish rights of appeal to the Privy Council. To some it also presented as paradoxical that, even as Gibbs was striving for abolition of rights of appeal to the Privy Council, he was pushing hard for the divestiture of large parts of the High Court's original jurisdiction and the introduction of a requirement for special leave to appeal to the High Court. In that respect, however, Gibbs was once again like his predecessor, Barwick, with whom those proposals had originated, although not entirely. Gibbs' view of the matter was more States-oriented than that of his predecessor.

Barwick CJ had first formulated the idea of a special leave requirement in his capacity as Attorney-General in the early 1960s, as part of a plan to establish a Federal Superior Court. After his appointment as Chief Justice in 1964, he published an article in the *Federal Law Review* which explained that:[26]

> [T]he basic objective in proposing a new federal superior court was to free the High Court of Australia, as of this time but particularly for the future, for the discharge of its fundamental duties as interpreter of the *Constitution* and as the national court of appeal untrammelled by some appellate and much original jurisdiction with which it need not be concerned.

Barwick considered that the right of appeal to the High Court should be by leave only[27] in order to ensure that the 'High Court of Australia may move into a new phase of development as the court mainly of ultimate resort in Australia'.[28] Gibbs was of the same view, and, following his appointment as Chief Justice in 1981, campaigned hard in support of it until his objective was

achieved by the passage of the *Judiciary Amendment Act (No 2) 1984* (Cth).

It is, however, a mark of the profession's opposition to the idea that, upon the passing of the amending Act, the editors of the *Australian Law Journal*, after quoting Senator Peter Durack's statements in the Senate that the Act was to implement a very significant change in the future role of the High Court, wrote[29] that:

> It is a moot question indeed whether so radical a modification of the functions of the High Court as an appellate tribunal under s 73 of the *Constitution* was intended by the Founding Fathers of that instrument, or by the Federal Parliament which in 1903 debated the Bill which eventually became the *Judiciary Act 1903* (Cth) ... The citizens of this nation have thus been deprived of a traditional right to appeal to the High Court as of right, regardless of the cogency of the arguments for this measure, and this deprivation has certainly not been received with enthusiasm by the legal profession as a whole in Australia.

Gibbs was unmoved. In his 1984 address to the Lord Denning Appreciation Society, he stated that the High Court, as distinct from the United States Supreme Court, which had to accept the law as laid down by the Supreme Courts in State matters, 'has played a significant part in bringing about a unity not only of the law but of the nation'[30] and that:[31]

> The Court therefore unanimously urged the Attorney-General to amend the law to provide that appeals from the Supreme Courts and from the Federal Court could be brought to the High Court only by special leave. The Law Council of Australia strongly opposed this change, but fortunately the Attorney-General

> supported it, and introduced legislation which was passed by the Parliament earlier this year.

Likewise, in his 1985 'The State of the Australian Judicature' address, Gibbs stated that:[32]

> Turning now to my own Court, a welcome reform was made last year, when finally it was enacted that no appeal could be brought to the High Court except by special leave. When I describe that as a welcome reform, I mean that it was welcomed by the members of my Court, for some sections of the Bar opposed it and perhaps still regret it.
>
> Nevertheless, it was a necessary and logical reform — necessary to prevent the High Court from being overburdened with cases of no real importance, and logical, because in a well ordered judicial system it is enough to allow one appeal as of right, with the safeguard of a further possible appeal by leave in appropriate cases.

Gibbs followed that with a comparison to the workload of the House of Lords, and the Supreme Court of the United States.[33]

As has been observed, however, Gibbs was more States-oriented than Barwick, and so rejected the idea of a Federal Court, as opposed to State courts, exercising federal jurisdiction. Initially, Gibbs' objections appeared modest. On accepting the commission as Chief Justice, he spoke in his acceptance speech of the jurisdictional issues facing the Supreme Court and the Federal Courts:[34]

> It is unfortunate that in some respects the boundary line between the jurisdiction of Federal Courts on the one hand, and State Supreme Courts on the other, remains ill-defined, because no legal proceedings are more futile and unproductive than disputes as to jurisdiction. It may not be too much to hope that it

> will not be beyond the capacity of the Commonwealth and the States, acting in conjunction, with a view to advancing the public interest, rather than in any attempt at self-aggrandisement, eventually to integrate both Federal and State courts into one harmonious system.

In later speeches, his observations became more strident. He referred to the establishment of the Federal Court of Australia to exercise federal jurisdiction as unnecessary and described the jurisdictional clashes between the Federal and State courts as 'reminiscent of the Middle Ages'.[35] He commented that '[t]he scope of the accrued jurisdiction (by which, by that stage, the Federal Court had unilaterally, greatly expanded its jurisdiction) ha[d] been said to be a matter of impression and practical judgment — hardly a precise delimitation of jurisdiction'.[36] And he castigated the idea of establishing an integrated Australian Court of Appeal as one that 'baffles the imagination to discover any good reason why the creation of a new court should assist in resolving the jurisdictional conflicts between two other courts'.[37]

III Resolving Clashes Between Concurrent Appeals to the High Court and the Privy Council

Ironically, given the force and nationalistic zeal with which Gibbs opposed the retention of Privy Council appeals, and went about ensuring that the High Court became Australia's ultimate court of appeal, his Honour had the highest regard for Privy Council authority and viewed it as vital that, generally speaking, judges should follow and apply the principles established by courts of the requisite authority. And as Gibbs revealed in his address to the Queensland Bar in 1983,[38] his reasons for that approach were conservative. As he said: 'we cannot all hope to

match the combined wisdom of our predecessors', and 'courts which are too prone to overrule their own decisions are likely to lose public confidence'. In Gibbs' view,[39] adherence to precedent was 'particularly important in the fields of commercial, fiscal and property law ... so that people may arrange their affairs with some degree of confidence'.

That is not to say that Gibbs' version of legal conservatism was inflexible. Plainly, he was mindful of the need to reconcile the requirement of certainty with the attainment of justice in a given case, and, as he said, well aware that unfairness may sometimes result as much from the application of settled principle as from the application of a principle developed for the first time.[40]

Consequently, Gibbs' technique of judicial reasoning was one of conservative incrementalism: a careful case-by-case approach to the development of principle which, as has been said, enabled new aspects of a given legal problem quietly to be accommodated and the unsatisfactory features of a past decision quietly to be modified.

Upon Gibbs' retirement as Chief Justice in 1987, one commentator posited that, if there were 'any discernible weakness in [Gibbs'] formidable judicial armoury, it lay in the field of equity and equitable practice.'[41] Given the command of equitable principle which Gibbs demonstrated, for example, in *Simpson v Forrester*,[42] *Consul Developments Pty Ltd v DPC Estates Pty Ltd*,[43] *Regent v Miller*[44] and *Delehunty Carmody*,[45] that suggestion appears doubtful. Possibly, Gibbs' approach to the notion of a remedial constructive trust in *Muschinski v Dodds*[46] reflected a degree of strict adherence to precedent that a more incisive appreciation of equitable principle would have surpassed. Although English authority at that time was against the notion of a constructive trust based on a common intention

ascribed to the parties by operation of law,[47] as Deane J demonstrated[48] a synthesis of established rules of equity disclosed two general principles of equity: that constructive trusts may be imposed to prevent unconscionable retention of property; and that retention of contributions to a failed joint relationship or endeavour is unconscionable. Hence, as was subsequently accepted by a unanimous High Court in *Baumgartner v Baumgartner*,[49] a remedial constructive trust can give effect to a common intention imputed to the parties by operation of law in such circumstances.

If Gibbs were at all 'weak' in equity, however, he was second to none in the fields of crime and tort, and, ultimately, he brought to the process of statutory interpretation a degree of leadership which still informs the way in which the High Court goes about that task. The strength of Gibbs' adherence to precedent and his predilection for incrementalist development of legal principle were instrumental in his achievements in those respects.

IV CRIME

In crime, Gibbs regarded adherence to precedent as necessary to secure what he described as 'that essential element of certainty which in civil law countries is given by the codes'. His judgment in *Viro v The Queen*,[50] concerning the doctrine of excessive self-defence manslaughter, which entailed the reconciliation of previously expressed divergent views of the Privy Council and the High Court in *R v Howe*[51] and *R v Palmer*,[52] demonstrates the point.

As is now generally accepted,[53] the doctrine was first articulated in Australia in the mid-1950s, in *R v McKay*.[54] McKay had been convicted of murder after firing a shotgun at

an intruder that caused the intruder to die. On appeal against conviction, Lowe J of the Victorian Full Court enunciated[55] six propositions which, he reasoned, were sufficient to test the cogency of the trial judges' directions. The sixth was that:

> If the occasion warrants action in self-defence or for the prevention of felony or the apprehension of the felon, but the person taking action acts beyond the necessity of the occasion and kills the offender, the crime is manslaughter - not murder.

McKay's conviction was, however, upheld, and, despite significant public criticism and media commentary regarding the convictions,[56] the High Court refused McKay leave to appeal. But in the following year, in *R v Howe*,[57] the High Court expressly approved[58] Lowe J's sixth proposition and thus the doctrine of excessive self-defence manslaughter was authoritatively established in this country.

Conceivably, it would not thereafter have been questioned had it not been for the Privy Council's subsequent rejection of it, in 1971, in *Palmer v The Queen.*[59] In delivering the judgment of the Privy Council, Lord Morris of Borth-y-Gest held[60] that, contrary to *McKay* and *Howe*, the correct statement of the law was that '[t]he defence of self-defence either succeeds so as to result in an acquittal or it is disproved in which case as a defence it is rejected.' As a result, in *Viro* it fell to the High Court to determine whether the Court should follow its previous recognition of the doctrine in *Howe* or follow the Privy Council's subsequent rejection of it in *Palmer*.

That necessitated consideration, first, of whether the doctrine of precedent bound the High Court to follow the Privy Council's later decision in *Palmer*; and, secondly, if the High Court were not so bound, which of the competing positions was the correct.

The High Court were unanimous in holding that the abolition of Privy Council Appeals by the *Privy Council (Appeals from the High Court) Act 1975* (Cth) had secured the High Court's position as the ultimate court of appeal in all cases coming before it and, therefore, that the High Court was *not* bound by the Privy Council's decisions.[61] As Gibbs J explained, that was the result of a simple syllogism: the major premise being the English rule that 'every court is bound to follow any case decided by a court above it in the hierarchy',[62] and the minor premise being that the Privy Council no longer occupied a position above the High Court in the judicial hierarchy. But significantly, Gibbs J also emphasised that the High Court's new function as the ultimate Australian court of appeal both reflected and contributed to an emergent Australian legal identity. As his Honour said:[63]

> Part of the strength of the common law is its capacity to evolve gradually so as to meet the changing needs of society. It is for this Court to assess the needs of Australian society and to expound and develop the law for Australia in the light of that assessment. It would be an impediment to the proper performance of that duty, and inconsistent with the Court's new function, if we were bound to defer, without question, to every judgment of the Privy Council, no matter where the litigation in which that judgment was pronounced had originated, and even if we considered that the decision was inappropriate to Australian conditions or out of harmony with the law as it had been developed, and was being satisfactorily applied, in Australia.

That said, the High Court was divided as to whether to follow *Howe* or *Palmer*. Stephen, Mason and Aickin JJ preferred[64] the High Court's previous decision in *Howe*. Jacobs J expressed[65] what has been described extra-curially as a 'somewhat divergent view', but which was probably 'closer to [...] *Howe* than [...] *Palmer*'.[66]

Murphy J was also conceptually closer to *Howe*[67] but, since his Honour's approach more generally to the law of self-defence was to abandon the objective limb of it in its entirety,[68] it effectively excluded any conception of *excessive* self-defence. Gibbs J took a different view. Despite his Honour's conclusion that the Court was not bound by the Privy Council's decisions, he considered that *Palmer* was correct in principle and so should be preferred.[69] He criticised *Howe* as 'obscure',[70] '[un]sound in legal theory',[71] 'likely to lead a jury to confusion and error',[72] and as likely to 'invite the possibility of a compromise verdict of manslaughter'.[73] Interestingly, Barwick CJ, writing separately, in substance agreed[74] with Gibbs J.

Gibbs' exposition of principle in *Viro* was, with respect, surely correct. But what perhaps most distinguished Gibbs J's judgment from the others was the concern that Gibbs demonstrated for the certainty of precedential effect. Given that there were only three clear adherents to the holding in *Howe*, there might have been a real question as to the status of *Viro* as authority for either position.[75] But in a passage of Gibbs J's judgment which bespeaks recognition of the need to reconcile the requirements of certainty with flexibility in order to attain justice, his Honour concluded:[76]

> [S]ince writing the foregoing I have had an opportunity to read the reasons prepared by the other members of the Court. It is apparent that we hold diversity of opinions. It seems to me that we would

> be failing in our function if we did not make it clear what principle commands the support of the majority of the Court. The task of judges presiding at criminal trials becomes almost impossible if they are left in doubt what this Court has decided on a question of criminal law. In the present case the view which appears to have more support than any other is that we should accept as correct the statement of Dixon CJ in *R v Howe*. Contrary to my personal opinion, but in a desire to achieve a measure of certainty, I am prepared to agree.

Ultimately, Gibbs J's (and Barwick CJ's) preference for *Palmer* was vindicated a decade later, in *Zecevic v DPP*,[77] when a majority of the High Court (including Mason CJ) concluded that the doctrine of excessive self-defence as recognised in *Howe* had created significant difficulties for trial judges and juries, and, on that basis, determined[78] that the law on the topic should conform to *Palmer*.[79]

Viro also entailed a second issue as to whether the trial judge had erred in failing to direct the jury that the accused's intoxication by heroin was irrelevant to the assessment of the accused's capacity to form a murderous intent.[80] Gibbs J held[81] that the judge was in error because the crime with which Viro was charged was a crime that entailed a specific intent and the possibility of intoxication by heroin was thus relevant to the jury's assessment of whether Viro was capable of forming that intent. In reasoning to that conclusion, Gibbs J emphasised[82] the correctness of the Privy Council's decision in *DPP v Majewski*[83] as to the distinction between crimes of basic and specific intent and that, short of intoxication amounting to incapacity, intoxication was not a defence to an offence of basic intent. Strictly speaking, since *Viro* involved a crime of specific intent, it was unnecessary for the High Court to pass upon the

correctness of *Majewski*. But such was the strength of Gibbs J's analysis that the weight of contemporaneous academic commentary regarded it as having validated *Majewski.*[84]

Gibbs J later had the opportunity to conduct a thoroughgoing defence of *Majewski* when the issue of intoxication in crimes of basic intent squarely arose for consideration in *R v O'Connor*.[85] Despite Mason and Wilson JJ agreeing with Gibbs J, however, a majority of the Court concluded that evidence of voluntary intoxication was relevant and admissible irrespective of whether the crime was one of basic or specific intent. But Gibbs J's approach was in a sense one again later vindicated by the subsequent enactment of legislation to give effect to it in most Australian jurisdictions.[86]

V TORT

In the law of torts, Gibbs' conservative, incrementalist approach to authority is perhaps best illustrated by his seminal decisions in *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstadt"*[87] and *Shaddock Associates Pty Ltd v Parramatta City Council (No 1)*.[88] Each involved the ancient exclusionary rule, emphatically stated[89] in *Cattle v Stockton Waterworks Co*, that damages are generally not recoverable for economic loss not intended or consequential upon injury to another's person or property. Shortly before *Caltex Oil* was decided, the House of Lords had famously laid down, for the first time, in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*,[90] that a negligent misrepresentation may give rise to an action for damages for financial loss. The issue of principle which thus presented in *Caltex Oil* was whether the exclusionary rule survived *Hedley Byrne* and, if so, whether any exception might apply to negligent acts.

As Gibbs J observed,[91] *Hedley Byrne* could be understood as merely recognising an exception limited to negligent misrepresentations, as distinct from negligent conduct. But as his Honour reasoned,[92] that would be a 'surprising result' given that it is frequently not easy to decide whether a particular act of negligence can properly be described as a negligent misstatement or negligent misconduct. Gibbs J accepted[93] that it was still right to say that, as a general rule, damages were not recoverable for pure economic loss, but he also recognised that there are 'exceptional cases' where a defendant has 'knowledge or means of knowledge that the plaintiff individually, and not merely as a member of an unascertained class, will be likely to suffer economic loss as a consequence of [the defendant's] negligence', and thus that the defendant will owe a duty to take care. Gibbs J added,[94] in emphasis of the incrementalist nature of his conclusion, that it was 'not necessary, and would not be wise, to attempt to formulate a principle that would cover all cases in which such a duty is owed', and that, in the words of Lord Diplock in *Mutual Life & Citizens' Assurance Co Ltd v Evatt*, '[t]hose will fall to be ascertained step by step as the facts of particular cases which come before the courts make it necessary to determine them'.[95]

In *Shaddock,* Gibbs returned to the subject of pure economic loss in the context of negligent misstatement. Extending but qualifying his earlier analysis in *Caltex*, Gibbs acknowledged three 'obvious differences between negligent words and negligent acts', that words cause loss not by themselves, but because others rely upon them; that people speak less carefully in social or informal contexts than in professional or business contexts; and that words may be circulated, raising the spectre of indeterminate liability. His Honour then proceeded to relate those differences to what he described as the 'general principles'

(in contrast to 'hard and fast rules') in *Hedley Byrne* and *Evatt*, according to which liability for negligent misstatement turns on the defendant's knowledge and the objective reasonableness of the plaintiff's reliance.

As Gibbs CJ observed, in *Evatt* a majority of the Privy Council had *further* limited the duty to those who, whether by profession or otherwise, claimed to possess some special skill. In response, Gibbs CJ referred to academic and judicial criticism of that view; observed that the High Court, unlike the Court of Appeal of New South Wales, was by then free to depart from the Privy Council's view; and expressed his own doubts about its correctness. In the result his Honour concluded that:

> In this branch of the law it seems desirable to follow the example already set by the House of Lords and the Judicial Committee, and to avoid attempting to lay down comprehensive rules but rather to proceed cautiously, step by step. It is unnecessary in my opinion to choose between the conflicting views in [*Evatt*] because even if the views of the majority of the Judicial Committee are accepted, it should in my opinion be concluded that the respondent owed a duty of care to the appellants in the present case.

Although *Caltex Oil* was not immediately well received in England,[96] the High Court has persisted with *Caltex Oil* and *Shaddock* reasoning,[97] and that has proved productive of relative certainty. By contrast, the English courts have retained the *Cattle v Stockton Waterworks* exclusionary rule[98] and yet, apparently, also have now moved more generally away from the application of general principles to an approach of attaching greater significance to established categories or distinct and recognisable situations as guides to the existence, scope and omits of the varied duties of care which the law imposes.[99]

One of the more striking features of Gibbs' reasoning in *Caltex* and *Shaddock* is its disclosure of elements of Gibbs' judicial temperament that, at first blush, appear inconsistent with one another: an inclination towards general principles unfettered by illogical distinctions but, at the same time, an unwillingness to venture beyond the particular facts of the case; a strong commitment to Australian legal independence but, at the same time, a pronounced hesitancy about departing from English authority. As Gibbs might have said, however, it is only by a careful case-by-case approach to the development of legal principle that 'new aspects of a given legal problem [may be] quietly ... accommodated and the unsatisfactory features of a past decision quietly ... modified'. Therein lies the answer.

VI STATUTORY INTERPRETATION

Sir Harry Gibbs' contribution to statutory interpretation is arguably the most significant, and yet, perhaps, the most controversial, manifestation of his legal conservatism. To appreciate why that is so, it is necessary to recall a little of the history of the High Court's approach to s 260 of the *Income Tax Assessment Act 1936* (Cth). A couple of decades ago, that was notorious. Now it is largely forgotten.

In effect, it comprised three stages. The first, which ran between 1921 and 1966, resulted in the development of what came to be called the 'predication test'. The second, which began following the appointment of Sir Garfield Barwick as Chief Justice in 1964, led to the repudiation of most of the previous learning on the subject and culminated in an extreme version of what was called the 'choice principle'. The third, which commenced with the appointment of Sir Harry Gibbs as Chief Justice in 1981, led to a re-engagement with previous

learning and Privy Council authority and the adoption of a purposive approach that today substantially still holds sway in the interpretation of revenue statutes.

In 1957, in *Newton's case*,[100] the High Court, by majority (Dixon CJ, McTiernan, Williams, and Fullagar JJ; Taylor J dissenting), upheld the Commissioner's contention that an elaborate tax avoidance scheme entered into to avoid the payment of Div. 7 undistributed profits tax by companies comprising the Lanes Motors and Melford Motors groups, was annihilated by s 260. In the leading judgment, with which Dixon CJ agreed, Fullagar J traced[101] the course of s 260 authority beginning with the High Court's decision in *Purcell's Case*[102] in 1921, through *Jaques' Case*[103] in 1924, *Clarke's Case*[104] in 1932 and then *Bell's Case*[105] in 1953, and concluded[106] that no other inference was open than that 'the very remarkable series of operations' which had been undertaken in Newton had been 'carried out in pursuance of an arrangement, which had for its purpose the avoiding of a liability to income tax imposed by the Act on persons in the position of [each company] and its shareholders.'

In short, if one could predicate from the very form of the transaction that the transaction had been entered into for the purpose of avoiding tax, s 260 would apply. That was the predication test. *Newton* was argued before the Full Court between May and October 1956 and decided in May 1957. After it had been argued but before judgment was delivered, in December 1956 a Full Court comprised of Dixon CJ, McTiernan, Webb, Kitto and Taylor JJ heard argument in an appeal in *W P Keighery Pty Ltd v Federal Commissioner of Taxation*.[107] There, the Commissioner of Taxation had assessed the taxpayer as a 'private company', and therefore as liable to pay undistributed profits tax: in part on the basis that the

company's issue of redeemable preference shares to 20 persons on terms which enabled the two original shareholders to redeem the preference shares before any general meeting could be called, was a transaction entered into for the avoidance of undistributed profits tax, and so void as against the Commissioner under s 260 of the Act. On appeal to the Full Court, the majority held that it was not.

In a joint judgment of Dixon CJ, Kitto and Taylor JJ, published in December 1957, in effect seven months after the publication of the High Court's judgment in *Newton*, their Honours held that Div. 7 presented a taxpayer with a choice — between remaining a private company liable to undistributed profits tax or converting to a public company which was not so liable — and that s 260 did not apply to render ineffectual the taking advantage of a choice for which the Act provided. That was what came to be called the choice principle:

> Whatever difficulties there may be in interpreting s 260, one thing at least is clear: the section intends only to protect the general provisions of the Act from frustration, and not to deny to taxpayers any right of choice between alternatives which the Act itself lays open to them. It is therefore important to consider whether the result of treating the section as applying in a case such as the present would be to render ineffectual an attempt to defeat etc. a liability imposed by the Act or to render ineffectual an attempt to give a company an advantage which the Act intended that it might be given.
>
> It is the outstanding feature of Div. 7 that it makes a company's liability to be assessed for additional tax depend upon the company's possessing certain characteristics on a particular day, the characteristics being such that whether the company possesses them

> on that day is a matter within the antecedent control of shareholders or other persons interested. ... If they so alter the relevant facts that, when the last day of the year of income arrives, the company will not be a 'private company', their action cannot be regarded as tending to defeat a liability imposed by the Act; it is one which the Act contemplates and allows.
>
> Because this is so, an attempt by the commissioner to rely upon s 260 in the present case in order to avoid only the applications for and allotments of the redeemable preference shares would be an attempt to deny to the appellant company the benefit arising from an exercise which was made of a choice offered by the Act itself. The very purpose or policy of Div. 7 is to present the choice to a company between incurring the liability it provides and taking measures to enlarge the number capable of controlling its affairs. To choose the latter course cannot be to defeat evade or avoid a liability imposed on any person by the Act or to prevent the operation of the Act. For that simple reason the attempt must fail, and the commissioner cannot rely upon s 260 in order to treat as void any more extensive set of facts, for an attempt to do so could not stop short of including the incorporation of the appellant company itself.

The taxpayer in Newton appealed from the High Court to the Privy Council and that appeal was heard in May 1958 and decided in July of the same year. As appears from the reports, Sir Garfield Barwick QC, then leader of the New South Wales Bar, represented the taxpayer and argued[108] that s 260 did not apply because, among other things, its effect had been stultified in 1936 by the insertion in it of the words 'as against the Commissioner', or, if that were not right, the section was

confined to arrangements which attempted to displace an already accrued liability to tax.

The Privy Council rejected[109] both of Barwick's arguments. As to the first, Lord Denning, who delivered the advice of the Judicial Committee, observed that it was plain that the only effect of the 1936 addition to s 260 of the words 'as against the Commissioner' was to overcome the decision in *De Romero v Read* that, without those words, the section also had the effect of avoiding a transaction as between the participants.[110] And as to the second argument, his Lordship remarked presciently, that: '[i]f the submission of Sir Garfield Barwick were accepted, it would deprive the words of any effect: for no one can displace a liability to tax which has already accrued due, or in respect of income which has already been derived'. The better view, as the Privy Council held,[111] was that:

> [T]he word "avoid" is used in its ordinary sense — in the sense in which a person is said to avoid something which is about to happen to him. He takes steps to get out of the way of it. It is this meaning of "avoid" which gives the clue to the meaning of "liability imposed". To "avoid a liability imposed" on you means to take steps to get out of the reach of a liability which is about to fall on you.

The Privy Council also rejected Sir Garfield Barwick's protest, that, if that were so, there would be no end to the reach of the provision, in effect waiving it away with the now-famous pronouncement[112] that:

> The answer to the problem seems to their Lordships to lie in the opening words of the section. They show that the section is not concerned with the motives of individuals. It is not concerned with their desire to

> avoid tax, but only with the means which they employ to do it. …
>
> In order to bring the arrangement within the section you must be able to predicate — by looking at the overt acts by which it was implemented — that it was implemented in that particular way so as to avoid tax. If you cannot so predicate, but have to acknowledge that the transactions are capable of explanation by reference to ordinary business or family dealing, without necessarily being labelled as a means to avoid tax, then the arrangement does not come within the section. Thus, no one, by looking at a transfer of shares *cum* dividend, can predicate that the transfer was made to avoid tax. Nor can anyone, by seeing a private company turned into a non-private company, predicate that it was done to avoid Div. 7 tax, see *W P Keighery Pty Ltd v Commissioner of Taxation*. Nor could anyone, on seeing a declaration of trust made by a father in favour of his wife and daughter, predicate that it was done to avoid tax, see *Deputy Federal Commissioner of Taxation v. Purcell*. But when one looks at the way the transactions were effected in *Jaques v Federal Commissioner of Taxation*, *Clarke v. Federal Commissioner of Taxation* and *Bell v Federal Commissioner of Taxation* — the way cheques were exchanged for like amounts and so forth — there can be no doubt at all that the purpose and effect of that way of doing things was to avoid tax.

As such, the Privy Council's judgment in *Newton* accorded closely to the predication test established by the previous course of High Court authority including the High Court's decision in *Newton*. The problem with it, however, was that it failed to deal sufficiently with the fact that *Keighery* was not decided on the

basis of the predication test but on the basis of the choice principle. Instead of ruling that *Keighery* was wrongly decided — which arguably it was given that there was nothing in the text or context of the Act that suggested that discrimination between companies was intended to provide an incentive for private companies to convert to public companies — or alternatively, holding that *Keighery* was confined to cases where the Act specifically left open to a taxpayer two alternative courses of which one attracted less tax than the other, Lord Denning characterised[113] *Keighery* as an example of an ordinary business or family dealing of which it could not be predicated that it was entered into for the dominant purpose of the avoidance of tax. Consequently, although, for some time after *Newton* was decided, the High Court applied the predication test as it had been approved in *Newton*, notably in *Hancock v Federal Commissioner of Taxation*[114] and in *Peate v Federal Commissioner of Taxation,*[115] it was left to the High Court to decide how *Newton* could be squared with *Keighery*.

The denouement came in 1971 in *Casuarina,*[116] by which time Sir Garfield Barwick had become the Chief Justice and Sir Harry Gibbs had recently been appointed a Justice. In the leading judgment, Walsh J held[117] that what had been said in *Newton* about the predication test in no way weakened what had been said in *Keighery* about the choice principle. Strictly speaking, that was so. But Barwick CJ then added[118] in more general terms that appear to have been the progenitor of the Court's later emasculation of s 260, that there was 'no room for the application of s 260 where [a] taxpayer ha[d] become liable for the amount of tax appropriate under the terms of the *Assessment Act* to the state of affairs obtaining at the date made relevant by that Act for the ascertainment of the taxpayer's

liability', in effect, the very proposition which the Privy Council had rejected in *Newton*.

In contrast to Walsh J and Barwick CJ, it is apparent from Gibbs J's judgment in *Casuarina* that his Honour was troubled by the artificiality of the preference share issue, and why, therefore, it should not be concluded that s 260 applied to it. But evidently, he was also troubled by the Privy Council's mischaracterisation of *Keighery* as an ordinary business or family dealing of which it could *not* be predicated that its purpose was the avoidance of tax. For as Gibbs J observed,[119] it was plain that the preference share issue in *Keighery* was for the avoidance of tax. Ultimately, therefore, Gibbs J essayed[120] to resolve the problem on the basis that:

> [A]lthough one can predicate that the conversion of a private into a public company was done to escape Div. 7 tax, this does not mean that the purpose or effect of the arrangement was to avoid a liability imposed on the company by the Act, since the Act itself imposes the additional tax payable under Div. 7 only on private companies, and contemplates that companies will, and lawfully may, choose to become public companies within the description of s 103A and so escape liability to pay the tax. It seems to me that the authority of *W. P. Keighery Pty Ltd v Federal Commissioner of Taxation* and *Federal Commissioner of Taxation v Sidney Williams (Holdings) Ltd (No 3)* has not been affected by *Newton v Federal Commissioner of Taxation* or by any subsequent decision.

In the result, Barwick CJ and Gibbs J both reached the same conclusion — that s 260 did not apply — but whereas Barwick CJ's approach was in effect to reject *Newton* in favour of what was characterised as the choice principle established by

Keighery, Gibbs J's more principled adherence to precedent treated *Newton* as establishing a generally applicable ordinary business or family dealing test and *Keighery* as an exception to the general rule limited to the conversion of a private company to a public company for the avoidance of Div. 7 tax. With respect, Gibbs J's reasoning was superior. Although criticised at the time,[121] it better accorded to *Newton* while accommodating the exigencies of *Keighery*.

There then followed, however, a quick succession of three further decisions of the High Court — to none of which Gibbs J was party — which radically expanded the scope of choice principle and rendered s 260 essentially devoid of effect.

The first was *Mullens v Federal Commissioner of Taxation*,[122] which involved a bespoke contrived tax avoidance arrangement to generate deductions under s 77A(3) and (4) in the *Income Tax Assessment Act 1936*. It was held[123] by Barwick CJ and Stephen J, McTiernan J dissenting, that s 260 did not apply, because, according to Barwick CJ, *Keighery* and *Casuarina*, taken in conjunction with Lord Tomlin's dictum in *Duke of Westminster's Case*[124] — that one is entitled so to arrange his affairs as to minimise tax — sustained the conclusion that a taxpayer was entitled to cast a transaction into which he proposes to enter in a form which has taxation advantages without attracting the operation of s 260. Notably, Barwick CJ made no mention of *Newton* or the predication test, despite both being implacably opposed to his conclusion.

The second was the now infamous *Slutzkin v Federal Commissioner of Taxation,*[125] which involved a particularly aggressive form of dividend stripping operation that upon further development later led to the bottom of the harbour schemes ultimately countered in subsequent years by the enactment of the *Taxation (Unpaid Company Tax) Assessment*

Act 1982 (Cth).[126] In *Slutzkin*, Barwick CJ, Stephen and Aickin JJ concluded[127] that s 260 did not apply because, according to their Honours, a taxpayer was quite entitled to choose a form of transaction that will not subject him to tax. Barwick CJ made no reference to authority other than the *Duke of Westminster's Case* and *Europa Oil*.[128] Stephen J referred to no authority at all. Aickin J referred to *Newton* but held, delphically, that it did not apply because the subject transaction was one which, according to the terms of the Act, attracted no tax consequences.[129]

The third case was *Cridland v Federal Commissioner of Taxation*,[130] where the High Court took the further step of discarding *Newton* completely. *Cridland* involved a commercially marketed tax-avoidance scheme designed to provide university students with the benefit of primary producer averaging provisions. A Court comprised of Barwick CJ, Stephen, Mason, Jacobs and Aickin JJ held that s 260 did not apply to it. Mason J, who delivered the principal judgment, with which Barwick CJ expressly agreed, reasoned[131] that that result flowed from *Mullens*:

> Although the very restricted operation conceded to s 260 by the course of judicial decision and the generality of the language in which the section is expressed stand in high contrast, the construction of the section is now settled. …
>
> The distinction drawn by Lord Denning in *Newton v Federal Commissioner of Taxation*, between arrangements implemented in a particular way so as to avoid tax and transactions capable of explanation by reference to ordinary business or family dealing has not been regarded as the expression of a universal or exclusive criterion of operation of s 260. Lord Denning's observations were applied neither in the

> *Mullens Case* nor in the subsequent case of *Slutzkin v Federal Commissioner of Taxation*. …
>
> The transactions into which the appellant entered in the present case by acquiring income units in the trust funds in question were not, I should have thought, transactions ordinarily entered into by university students. Nor could they be accounted as ordinary family or business dealings. They were explicable only by reference to a desire to attract the averaging provisions of the statute and the taxation advantage which they conferred. But these considerations cannot, in light of the recent authorities, prevail over the circumstance that the appellant has entered into transactions to which the specific provisions of the Act apply, thereby producing the legal consequences which they express.

A good deal has been written about the approach in *Cridland*.[132] One view of the decision is that it was a forthright summary of the effect of earlier decisions. Another is that it was a remarkable, unwarranted repudiation of previous Privy Council authority regarding s 260. But that was about to change.

In 1981, Barwick CJ retired as Chief Justice and Gibbs CJ was appointed in his place. Then, in 1985, it fell to the High Court, led by Gibbs CJ, to decide *Gulland, Watson and Pincus*.[133] In its facts, *Gulland* was substantially identical to an earlier decision of the High Court in *Peate*. Dr Gulland, who had practised medicine on his own account, transferred his practice into trusts, of which his wife and children were the ultimate beneficiaries, and entered into a contract to serve as employee of the head trustee.[134] Consistently with *Peate*, the Commissioner had assessed Dr Gulland to pay tax on the basis that s 260 applied to annihilate the trust structure as against the

Commissioner. Understandably, the taxpayer contended inter alia that *Cridland* had changed the position.

The question which was thus presented to the High Court in *Gulland* was whether the choice principle could any longer be reconciled with *Newton*. *Mullens*, *Slutzkin* and *Cridland* had foreclosed a synthesis of the kind posited by Gibbs J in *Casuarina* of a limited exception for the conversion of a private company into a public company. But in returning to the problem as Chief Justice in *Gulland*, Sir Harry presented a more principled solution. Crucially, Gibbs CJ justified[135] the *Keighery* choice principle by reference to the maxim *generalia specialibus non derogant*, thus trumping the *a priori* entitlement asserted[136] by Lord Tomlin in *Inland Commissioners v Duke of Westminster* on which Barwick CJ had relied in leading the Court away from *Newton*.[137] On Gibbs CJ's approach, the specific conferral of a choice was a matter to be tested, not assumed. And as Gibbs CJ reasoned,[138] 'it [was] simply not right to say that the Act allows a taxpayer the opportunity' there asserted, namely, 'to have his own income from personal exertion taxed as though it were income derived by a trust and held for the benefit of a number of beneficiaries.' In the result, as Gibbs CJ concluded, 'the general rule enunciated by Lord Denning' in *Newton* could operate generally except where 'displaced' because 'the purpose of the arrangement in question is to make use of a tax advantage for which the Act provides.'[139] What was determinative was that, like the arrangements in *Peate*, the arrangement in *Gulland* bore on its face the stamp of tax avoidance, and so s 260 applied.

Gibbs CJ's judgment in *Gulland* was severely criticised by some commentators as an abrupt change in tack and as inferior to what was said to be the more principled, strict legalism of the Barwick Court's approach to revenue statutes.[140] According to such criticisms, adherence to precedent required the High Court

to continue to apply a strict or literal construction to revenue statutes as exemplified by the judgments of Barton J in *Burt v Commissioner of Taxation (WA)*,[141] Latham CJ in *Anderson v Commissioner of Taxes (Vic)*,[142] and Barwick CJ in *Federal Commissioner of Taxation v Westraders Pty Ltd.*[143] It was contended that there was simply no room for the kind of purposive approach that Gibbs CJ's judgment entailed.

Similar criticisms were also made of the High Court's later decision in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*[144] in which the High Court, once again led by Gibbs CJ, but this time including Mason and Stephen JJ, shunned a strictly literal approach to the construction of s 80C(3) of the *Income Tax Assessment Act 1936*, on the basis that it was apparent that a mistake had been made in its drafting. Their decision was characterised by a variety of commentators as, in effect, caving into the pressure of a ground swell of public opinion against tax avoidance,[145] dismantling traditional learning,[146] and, in its place, adopting an unprecedented emphasis on statutory purpose.[147]

If anything, however, *Gulland* and *Cooper Brookes* represented a return to orthodoxy. Traditionally, the principle of strict construction of taxing statutes was not regarded as radically different from ordinary principles of statutory construction. In *Heward v The King*, Barton J observed[148] that 'this rule, while valuable as a caution, cannot be taken as substantially varying the ordinary rules for construing all statutes'. Lord Tomlin's remarks in the *Duke of Westminster's Case* were made 'in the course of rejecting an attempt to treat judicial disapproval of a taxpayer's conduct as a substitute for applying the language of the Act.'[149] And even Barwick CJ's many references to the need for unambiguous clarity are more

naturally understood as stating an ideal for Parliament than a principle of interpretation.

Cooper Brookes reflected long established doctrine that principles regarding 'objects which the legislature is presumed not to intend' were capable of displacement 'by implication' as well as 'in express terms'[150] and that a provision like s 80C(3) of the *Income Tax Assessment Act 1936*, which was 'devised specifically to remedy a particular failing in the law', 'will obviously be construed so as to ensure, so far as possible, that the intended remedial effect succeeds.'[151]

Nor was Gibbs CJ's emphasis on statutory purpose particularly novel. As he noticed, the difficulties of construction presented by s 80C(3) had been recognised by Mason J, Barwick CJ and Gibbs J himself the better part of a decade before in *Kolotex Hosiery (Australia) Pty Ltd v Federal Commissioner of Taxation.*[152] And as Gibbs CJ said in *Cooper Brookes*: although, where the meaning of a provision is clear and unambiguous, it ordinarily remains only to give effect to its unqualified words, it had long been established that, where the result of giving words their ordinary effect may be so irrational that the court is forced to the conclusion that the draftsman has made a mistake, the canons of construction are not so unrealistic as to prevent a solution in such a case.

Finally, it is notable that among other authorities to which Gibbs CJ referred in support of his purposive approach to statutory the construction was the decision of the House of Lords in *River Wear Commissioners v Adamson.*[153] As Lord Blackburn observed[154] in that case, the purposive construction of '*all* statues' has been the law since at least *Heydon's Case:*[155]

> And after all the Barons openly argued in Court ... it was resolved by them, that for the sure and true interpretation of all statutes in general (be they penal

> or beneficial, restrictive or enlarging of the common law,) four things are to be discerned and considered: —
>
> 1st. What was the common law before the making of the Act.
>
> 2nd. What was the mischief and defect for which the common law did not provide.
>
> 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.
>
> And, 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo* [for private gain], and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico* [for public good].[156]

VII CONCLUSIONS

What conclusions may be drawn from this history? I contend for four.

First, and fundamentally, although it is apparent that Sir Harry Gibbs had one eye cast back to the Australian common law's English origins, his Honour was firmly seized of the changing order of events and very much focussed on the future. His was a form of legal conservativism that involved an ability to shape the development of legal principle according to changing societal requirements while remaining true to the demands of *stare decisis*.

Secondly, in crime, Gibbs adhered closely to a doctrine of precedent because he considered that it was vital as a protection

against oppression, but, at the same time, as he demonstrated in *Viro*, he was ready to depart from precedent when persuaded that the case required it. His was a conservative, yet pragmatic, perception of the function of precedent and its significance to Australia's evolving legal identity.

Thirdly, in the law of torts, Gibbs was at the forefront in perceiving the dangers of attempting to lay down broad-ranging principles and in recognising the advantages of a conservative, incrementalist process of legal development. That approach continues to serve us well.

Finally, in tax, and more generally in the process of statutory construction, Gibbs' strong adherence to precedent and incrementalism informed his resistance to what he perceived to be the excesses of the Barwickian notion of unqualified strict legalism, and imbued Gibbs' leadership of the Court's re-engagement with the purposive construction of statutes which is sometimes necessary to achieve the results that Parliament intended.

At the time of the enactment of the *Privy Council (Appeals from the High Court) Act*, Edward St John QC wrote[157] that '[f]rom now on [the High Court] must be the great Australian Court, developing Australian law for the Australian people'. As Gibbs CJ himself observed[158] in the speech which he delivered to the Lord Denning Appreciation Society some years later, '[i]n Australia the High Court has played a significant part in bringing about a unity not only of the law but of the nation'. Beyond question, Sir Harry Gibbs, Constitutional monarchist and legal conservative, was a signal contributor to both of those achievements.

Endnotes

1 Anne Twomey, 'Gibbs Court' in Blackshield, Coper and Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 303.

2 *Victoria v The Commonwealth* (1971) 122 CLR 353 at 417, 424. See also David Jackson and Joan Priest, 'Gibbs, Harry Talbot' in Blackshield, Coper and Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 302, discussing *The Commonwealth v Tasmania* (1983) 158 CLR 1.

3 The Hon Senator Gareth Evans, quoted in Jack Waterford, 'Gibbs named to succeed Barwick', *Australian Financial Review* (Sydney, 30 January 1981).

4 Peter Connolly, 'Appendix: The Years on the High Court and After' in Joan Priest, *Sir Harry Gibbs: Without Fear or Favour* (1995) 146, 168.

5 Ibid 146.

6 Sir Harry Gibbs, 'Re-Writing the Constitution' (1992) 1 *Upholding the Australian Constitution: Proceedings of the Samuel Griffith Society* ix at xii-xiii.

7 See, eg, *Newmont Pty Ltd v Laverton Nickel NL* [1983] 1 NSWLR 131, in which he delivered the advice of the Board (Lord Diplock, Lord Keith of Kinkel, Lord Roskill, Sir John Megaw and Sir Harry Gibbs) affirming a

decision of the Supreme Court of New South Wales (Needham J): [1978] 2 NSWLR 325.

8 Sir Harry Gibbs, 'The Doctrine of Precedent Today', paper delivered at the Bar Practice Centre, 3 November 1983 at 21.

9 *Commonwealth of Australia Gazette*, G140, 19 July 1945 at 1548.

10 *The Commonwealth v Queensland* (1975) 134 CLR 298 at 315.

11 Ibid.

12 See for example the *Payroll Tax Act Case* and in *Gazzo v Comptroller of Stamps (Vic)* (1981) 149 CLR 227 at 240.

13 (1978) 141 CLR 88.

14 Sir Harry Gibbs, 'The State of the Australian Judicature', speech delivered at the Australian Legal Convention, 10 July 1981 at 9.

15 Ibid 12.

16 Ibid 13.

17 Ibid 15.

18 Ibid 16.

19 Sir Harry Gibbs, 'Comment - The High Court Today' (1983) 10 *Sydney Law Review* 1 at 2.

20 Ibid 3.

21 Sir Harry Gibbs, 'Courts and Tribunals in Australia', speech delivered to the Lord Denning Appreciation Society, Sydney 1984 at 10.

22 Ibid 12.

23 Ibid 12.

24 Ibid 12.

25 Ibid 13.

26 Sir Garfield Barwick, 'The Australian Judicial System: The Proposed New Federal Superior Court' (1964) 1 *Federal Law Review* 1 at 2.

27 Ibid 17.

28 Ibid 21.

29 The Editors of the Australian Law Journal, 'Current Topics - Cessation of appeals as of right to High Court' (1984) 58 *Australian Law Journal* 433 at 433.

30 Gibbs, above n 21, 3.

31 Ibid 4-5.

32 Sir Harry Gibbs, 'The State of the Australian Judicature', speech delivered to the Australian Legal Convention, 5 August 1985 at 5.

[33] Ibid 6.

[34] David Jackson, 'Sir Harry Gibbs', in Michael White and Aladin Rahemtula (Eds), *Queensland Judges on the High Court* (2003) at 49, citing pg 14 of the Transcript of Proceedings, High Court of Australia, 12 February 1981.

[35] Gibbs, above n 21, 15.

[36] Ibid 16.

[37] Ibid 17.

[38] Gibbs, above n 8, 7.

[39] Ibid 6.

[40] Ibid 7.

[41] 'Personalia' (1987) 61 *Australian Law Journal* 102 at 102.

[42] (1973) 132 CLR 499 at 514-517.

[43] (1975) 132 CLR 373 at 393-398.

[44] (1976) 133 CLR 679.

[45] (1986) 161 CLR 464 at 470-473.

[46] (1985) 160 CLR 583 at 595.

47 *Gissing v Gissing* [1971] AC 886 at 898 per Lord Morris of Borth-y-Gest, 900 per Viscount Dilhorne, 904 per Lord Diplock.

48 (1985) 160 CLR 583 at 618-620.

49 (1987) 164 CLR 137 at 146-148 per Mason CJ, Wilson and Deane JJ, 152 per Toohey J, 156 per Gaudron J.

50 (1978) 141 CLR 88.

51 (1958) 100 CLR 448.

52 [1971] AC 814.

53 *R v Howe* (1958) 100 CLR 448 at 492 per Dixon CJ; Mark Weinberg, 'Moral Blameworthiness - The "Objective Test" Dilemma' (2003) 24 *Australian Bar Review* 173 at 191.

54 [1957] VR 560.

55 [1957] VR 560 at 562-563.

56 The public response was quite astonishing: '...the Associated Poultry Farmers of Australia and other representative organisations of the poultry industry were determined, consistent and assiduous in their public protestations that McKay was a victim of the law's failure clearly to define their rights to protect their property against chicken thieves': Norval Morris, 'The Slain Chicken Thief' (1958) *Sydney Law Review* 415 at 432.

57 (1958) 100 CLR 448.

58 (1958) 100 CLR 448 at 462 per Dixon CJ (McTiernan and Fullagar JJ agreeing at 464).

59 [1971] AC 814.

60 [1971] AC 814 at 832.

61 *Viro* (1978) 141 CLR 88 at 93 per Barwick CJ; at 120 per Gibbs J; at 129 per Stephen J; at 135 per Mason J; at 150-151 per Jacobs J; at 163 and 166 per Murphy J; at 172-173 per Aickin J.

62 *Viro* (1978) 141 CLR 88 at 120, citing Rupert Cross, *Precedent in English Law,* 2nd ed, (Clarendon Law Series, 1968) 6.

63 *Viro* (1978) 141 CLR 88 at 128.

64 *Viro* (1978) 141 CLR 88 at 135 per Stephen J; at 138 per Mason J; at 180 per Aickin J.

65 *Viro* (1978) 141 CLR 88 at 155-158.

66 Weinberg, above n 53, 193 (fn 109).

67 Ibid.

68 *Viro* (1978) 141 CLR 88 at 167-171.

69 Ibid 128.

70 Ibid 125.

71 Ibid 127.

72 Ibid 127.

73 Ibid 126.

74 Ibid 93.

75 See and compare *Monis v The Queen* (2013) 249 CLR 92.

76 *Viro* (1978) 141 CLR 88 at 128.

77 (1987) 162 CLR 645.

78 (1987) 182 CLR 645 at 653-654 per Mason CJ; at 661-662 per Wilson, Dawson and Toohey JJ; at 670 per Brennan J; cf at 676 per Deane J and 683 per Gaudron J.

79 The position has since been reversed by Statute: See *Crimes Act 1900* (NSW), s 421; *Criminal Code* (WA), s 248(3).

80 *Viro* (1978) 141 CLR 88 at 109 per Gibbs J.

81 Ibid 113.

82 Ibid 112.

83 [1976] AC 443.

84 Gordon Walker 'Voluntary Intoxication - The Australian Response to *Majewski's* Case' (1979) 3 *Criminal Law Journal* 13 at 18.

85 (1980) 146 CLR 64 at 89-94.

86 *Criminal Code* (Qld), s 28(3); *Criminal Code* (WA), s 28(3); *Criminal Code* (Tas), s 17(1); *Crimes Act* (NSW), s 428C; *Criminal Code* (ACT), s 31(1); *Criminal Code* (NT), s 43AS(1) (in respect of certain offences).

87 (1976) 136 CLR 529.

88 (1981) 150 CLR 225.

89 (1875) LR 10 QB 453.

90 [1964] AC 465.

91 (1976) 136 CLR 529 at 552.

92 Ibid 553.

93 Ibid 555.

94 Ibid.

95 (1970) 122 CLR 628 at 642; [1971] AC 793 at 809.

96 See *Candlewood Corporation v Mitsui OSK Lines Ltd* [1986] AC 1 at 24 per Lord Fraser of Tullybelton for the Board (on appeal from the Supreme Court of New South Wales).

97 See, eg, *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 481 per Brennan J; *Hill v Van Erp* (1997) 188 CLR 159 at 178 per Dawson J; *Crimmins v Stevedoring*

Industry Finance Committee (1999) 200 CLR 1 at 32 [73], 34 [77] per McHugh J, 97 [272] per Hayne J.

98 *Leigh & Sullivan v Aliakmon Shipping Co* [1986] AC 785 at 809 per Lord Brandon of Oakbrook (Lords Keith of Kinkel, Brightman, Griffiths and Ackner agreeing); *Caparo Industries plc v Dickman* [1990] 2 AC 605 at 618 per Lord Bridge of Harwich (Lords Roskill, Ackner and Oliver of Aylmerton agreeing); *Murphy v Brentwood District Council* [1991] 1 AC 398 at 485 per Lord Oliver of Aylmerton (Lord Ackner agreeing).

99 See, eg, *Caparo* [1990] 2 AC 605 at 618 per Lord Bridge of Harwich (Lords Roskill, Ackner and Oliver of Aylmerton agreeing); *Murphy v Brentwood District Council* [1991] 1 AC 398 at 461 per Lord Keith of Kinkel (Lords Bridge of Harwich, Brandon of Oakbrook, Ackner and Oliver of Aylmerton agreeing); *Michael v Chief Constable of South Wales Police* [2015] AC 1732 at 1762 [106] per Lord Toulson JSC (Lords Neuberger of Abbotsbury PSC, Mance, Reed and Hodge JJSC agreeing); *Robinson v Chief Constable of West Yorkshire Police* [2018] AC 736 at 745-746 [24]-[26] per Lord Reed JSC (Baroness Hale of Richmond PSC and Lord Hodge JSC agreeing).

100 *Federal Commissioner of Taxation v Newton* (1957) 96 CLR 577.

101 *Federal Commissioner of Taxation v Newton* (1957) 96 CLR 577 at 647-654.

102 (1921) 29 CLR 464.

103 (1924) 34 CLR 328.

104 (1932) 48 CLR 56.

105 (1953) 87 CLR 548.

106 *Federal Commissioner of Taxation v Newton* (1957) 96 CLR 577 at 654-655.

107 (1957) 100 CLR 66.

108 *Newton v Federal Commissioner of Taxation* (1958) 98 CLR 1 at 6.

109 Ibid 7.

110 (1932) 48 CLR 649 at 655 per Gavan Duffy CJ and Starke J, 657-658 per Rich J, 660-661 per Dixon J.

111 *Newton* (1958) 98 CLR 1 at 7.

112 Ibid 8.

113 Ibid 9.

114 (1961) 108 CLR 258 at 271-272 per Fullagar J, affirmed at 279 per Dixon CJ (Windeyer J agreeing at 300), 284 per Kitto J, see also at 296-297 per Menzies J.

115 (1964) 111 CLR 443 at 459-461 per Menzies J, affd at 469 per Kitto J (McTiernan and Owen JJ agreeing at 466, 481), 474-475 per Taylor J, 478, 481 per Windeyer J, affd (1966) 116 CLR 38 at 43 per Viscount Dilhorne (for Lord

Morris of Borth-y-Gest, Lord Pearce, Lord Pearson and himself).

116 *Federal Commissioner of Taxation v Casuarina Pty Ltd* (1971) 127 CLR 62.

117 Ibid 101.

118 Ibid 81.

119 Ibid 104.

120 Ibid 105.

121 See, eg, Yuri Grbich, 'Section 260 Re-Examined: Posing Critical Questions about Tax Avoidance' (1976) 1 *UNSW Law Journal* 211, 219.

122 (1976) 135 CLR 290.

123 (1976) 135 CLR 290 at 298 per Barwick CJ, 318-319 per Stephen J.

124 [1936] AC 1.

125 (1977) 140 CLR 314.

126 See generally Patrick McCabe and David Lafranchi, *Report of Inspectors Appointed to Investigate the Particular Affairs of Navillus Pty Ltd and 922 Other Companies* (1982); Arie Freiberg, 'Abuse of the Corporate Form: Reflections from the Bottom of the Harbour' (1987) 10 *UNSW Law Journal* 67.

127 (1977) 140 CLR 314 at 319-321 per Barwick CJ, 322 per Stephen J, 325 per Aickin J.

128 *Inland Revenue Commissioner (NZ) v Europa Oil (NZ) Ltd* [1971] AC 760.

129 *Slutzkin* (1977) 140 CLR 314 at 325.

130 (1977) 140 CLR 330.

131 Ibid 337.

132 See and compare Allan Myers, 'Tax Avoidance and the High Court since Sir Garfield Barwick', paper delivered as the 2005 Annual Tax Lecture at Melbourne Law School, 12 April 2005 at 6-8; Anthony Slater, 'Tax in Australian Society: An 80 Year Perspective' (2007) 81 *Australian Law Journal* 681 at 694.

133 *Federal Commissioner of Taxation v Gulland* (1985) 160 CLR 55.

134 Ibid 64.

135 Ibid 66.

136 [1935] AC 1 at 19.

137 See, eg, *Slutzkin* (1977) 140 CLR 314 at 319.

138 *Gulland* (1985) 160 CLR 55 at 70.

139 Ibid.

[140] See, eg, Robin Speed, 'The High Court and Part IVA' (1986) 15 *Australian Tax Review* 156; Ian Spry, 'The New Approach by the High Court on Section 260' (1986) 15 *Australian Tax Review* 1.

[141] (1912) 15 CLR 469 at 482.

[142] (1937) 57 CLR 233 at 239.

[143] (1980) 144 CLR 55 at 59-60.

[144] (1981) 147 CLR 297.

[145] See Myers, above n 132, 11-12.

[146] See and compare *London Australia Investment Company Ltd v Federal Commissioner of Taxation* (1977) 138 CLR 106 at 116-118 per Gibbs J, extending assessable income.

[147] See, eg, Robert Allerdice, 'The Swinging Pendulum: Judicial Trends in the Interpretation of Revenue Statutes' (1996) 19 *UNSW Law Journal* 162.

[148] (1905) 3 CLR 117 at 127-128. See also Graham Hill, 'A Judicial Perspective on Tax Law Reform' (1998) 72 *Australian Law Journal* 685, 688-689.

[149] Murray Gleeson, 'Justice Hill Memorial Lecture: Statutory Interpretation', paper delivered at the 24th National Convention of the Tax Institute of Australia, 11 March 2009 at 9.

150 *Potter v Minahan* (1908) 7 CLR 277 at 304 per O'Connor J.

151 Graham Hill, 'A Judicial Perspective on Tax Law Reform' (1998) 72.

152 (1973) 130 CLR 64 at 85 per Mason J, affd (1975) 132 CLR 535 at 547.

153 (1877) 2 App Cas 743.

154 Ibid 764.

155 (1584) 3 Co Rep 7a [76 ER 637].

156 (1584) 3 Co Rep 7a at 7b [76 ER 637 at 638].

157 Edward St John, 'The High Court and the Privy Council; the New Epoch' (1976) 50 *Australian Law Journal* 389, 398.

158 Gibbs, above n 21, 3.