The High Court and Constitutional Identity – the 2019/2020 term[1]

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Good morning. Thanks to Ros for the invitation to speak today and for the Centre for hosting this wonderful annual event.

I'd like to acknowledge that we stand, sit and speak on the traditional lands of the Gadigal people of the Eora Nation, pay my respects to elders past, present and emerging, and acknowledge Aboriginal and Torres Strait Islander colleagues here today.

We know that is a common statement at public events but, as I'll come to in the second part of my presentation this morning, we'll see that it has particular relevance to us and for the focus of this conference, in that the facts underlying that statement have constitutional implications which we're still struggling to identify, unravel and address.

Of course that means I am going to talk about the Love and Thoms cases.

The keynote at this conference is ostensibly about the 2019 cases. And there is always a question of how to mark the temporal boundaries of those cases. With Ros' agreement, this year I'll give a two part presentation. First, I'll address the key cases decided in 2019. Then, I'll turn to the much anticipated judgment of *Love and Thoms*. I'll bring all the cases together by my overriding thematic focus.

I will consider the cases by asking:

What do we learn about Australian Constitutional Identity?

To talk of constitutional identity can mean many things. It is a phrase that is used in some constitutional courts, particularly throughout the EU, and which has been developed over the last couple of decades in scholarship. I'm not going to take you down a theoretical path or into comparison with other countries and constitutions.

What I want to do today is tease out three elements of Australian constitutional law that tell us something about who we are, how we distinguish the role of our High Court from what other institutions of power do within our system and what we value under the Constitution.

Specifically, who are 'the people' under the Constitution and how does the Court understand that concept of 'the people' – that will take us to the implied freedom cases of 2019 and it will obviously be a significant part of my analysis of Love.

Second, how does the Court explain its distinct role under the Constitution and the distinction between the courts and the political branches of government. Again, we look to the implied freedom cases, but also the Ch 3 cases, and what the Court thinks is legitimate for a judicial body to do also affects the reasoning in *Love.*

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Last, what values affect the reasoning of the Court? I'll outline how the court, across the cases of 2019, explicitly calls on a selection of constitutional values – and then in looking at *Love*, I'll dig into what I see are the deep divides between the majority and dissenting reasons, which indicate some broad concerns – we might call them values – that determine why they reach different conclusions in that case.

So, starting with the cases decided last year, and the first element of constitutional identity I want to highlight - 'the people'.

We have the phrase 'the people' in sections 7 and 24, where the choice of elected members of Parliament made by those people is the core of the textual foundation for the system of representative government from which the Court has implied the freedom of political communication.

When I spoke about the concept of 'the people' at this conference about a decade ago, there was some scepticism expressed about its doctrinal relevance. Yet, we can see that across decades, and especially in more recent years, the Court has given concrete content to the concept of 'the people' and given it constitutional heft.

We see cases like *Roach* and *Rowe*, which, although controversial in some ways, use the phrase 'the people' to impose limitations on federal legislative power. There are more than 100 High Court cases which refer to 'the people', but I won't traverse that broad ground now.

In 2019 we have the cases of *Unions NSW (No 2)*, *Clubb v Edwards* and *Preston v Avery*, and *Comcare v Banerji*, all being cases which focused on the operation of the implied freedom of political communication.

One common thread across those cases is that the constitutional people, who are the beneficiaries of the freedom, are understood as both individuals and collectives.

In terms of the people being treated as individuals:

We see that the people each share a role in the democratic system. That is, everyone has a stake in the system and therefore an individual stake in the implied freedom. The outcome for when addressing the freedom is that when considering whose communication is relevant – the answer is – everyone's individual communication is relevant.

This is the underlying rationale for the freedom – we see members of the Court referring back to the earlier cases – to say that each member of the Australian community has a relevant interest.

But, as we hear repeated in the Court in every case the freedom is not a personal right, so while for the purpose of satisfying the judicial process we need an individual whose circumstances demonstrate that a law has burdened their ability to communicate, that only gets them in the door of the courtroom.

And even there we see the Court suggesting that sometimes they may avoid the constitutional question if the speech of the individual in question, is not relevantly political. We have an example of that kind of suggestion in *Clubb*.

In *Clubb and Preston* we saw the Court uphold legislation in Victoria and Tasmania respectively, each of which imposed safe access zones around abortion clinics. Those safe access zones operated by restricting communication within a 150m radius of the relevant institutions. The Court decided the laws were justified and therefore despite the burden placed on political communication, the laws fell on the right side of the balancing act.

The Commonwealth intervening argued that the Court should not address the implied freedom, because *Clubb* was engaged in personal not political communication when interacting with the couple seeking access to the clinic. There are interesting comments in the joint reasons about the distinction between those 2 categories of speech, but in the end the Court did address the legal question.

So – we have the people having an individual stake in the freedom, and in some ways being treated as individuals. But, in terms of working out whether a law is valid or not, the Court is concerned with the impact on the communication of all. So, there, the people are understood as a collective.

In *Clubb and Avery* and then in *Banerji* – we see the Court emphasising that it is communication as a whole that is relevant, rather than the communication of individuals. Similar language is used to that effect in both cases.

While assessing the extent of the burden on communication of the whole people is essential, the Court does not always seem to turn their mind to that impact in the sense of explicitly addressing it. And even where they might, that collective impact alone does not determine the outcome of a case (because it may nevertheless be justified because of a very strong competing interest).

We can see this in *Banerji*. In *Banerji*, about which we'll hear more in a later session today, the Court upheld the validity of parts of the Cth Public Service Act of 1999, which incorporated the Australian Public Service Code of Conduct that in turn required, amongst other things, that public servants uphold APS values which include being apolitical and impartial.

Banerji, a public servant, had tweeted thousands of times, including being critical of the Department for which she worked. As a result, her employment was terminated due to contravention of the Code of Conduct. The Court found her termination was lawful, because the underlying Code did not contravene the implied freedom, despite the extensive burden it placed on political communication.

In argument before the Court there was mention that the Public Service Act applied to nearly a quarter of a million people. But in most of the judgments nothing is said about what that means for communication as a whole.

The exception is in the reasoning of Justice Edelman, who notes the burden is deep, and broad. But, that given the history of restrictions and expectations of public servants, the impact is "shallower and narrower than the burden that existed for the better part of a century" [197] and therefore, given the strong and legitimate purpose behind the burden on the freedom, Justice Edelman, like the other members of the Court, holds the restriction to be valid.

So, we have the people as individuals or as one large collective. We also see the people as grouped into distinct communities, or bound by common interests, or brought together because of different roles in the political system.

We see the people considered as a series of collectives as something that may affect how the Court reasons through the validity of the law as against the implied freedom. For example, In *Unions N2*, we see that the Court accepts that people are members of collectives with distinct interests like candidates for election or third party campaigners.

We heard about the *Unions (No 2)* case at last year's conference – in that decision the Court invalidated part of the NSW Electoral Funding Act of 2018, which cut the expenditure cap for third-party campaigners in the lead up to the NSW election. The NSW Parliament had not sufficiently justified the restriction on funding caps, which in turn impacted upon the ability of third party campaigners to engage in relevant communication.

In that case, the Court rejects the proposition that candidates may be given a privileged position in the political system in terms of privileging their communication over others. We also see a concern for minority voices, at least in the reasons of Justice Gageler – the people are there collected into a different type of grouping.

So, through the implied freedom cases of 2019 we see that the notion of 'the people' in the Constitution is used to denote individuals as well as collective groupings, each with an individual and collective share in political power.

This dual nature of the people leads to some tensions, but it also fits with other elements of judicial reasoning regarding the people over time, in which the people have multiple characteristics. One obvious analogy is the national-federal system, that we see for example, in the case law on s 117 - in which the people are individuals, who are both a national unitary people and distinct state peoples.

I'll return to this combination of the people as individuals and collectives later, in relation to the *Love* case, where the Court takes us into unchartered waters with respect to the concept of 'the people' under the Constitution and where deeper questions about our identity emerge.

The next element of constitutional identity I want to address is about how we structure our government.

The Australian Constitution is typically seen as a document which is concerned only with institutions and divisions of power – because of the way it is structured in terms of chapters and also because of what it does *not* address – namely rights and explicit fundamental values.

What we see specifically in the cases of 2019 is how the Court seeks to mark out its roles under the Constitution.

Two distinct but related issues arise:

First, in explaining the legitimacy of judicial review of legislative action, how to demarcate the appropriate scope of the value judgment engaged in by judges to determine validity, as opposed to the range of choices open to the political branches.

Second, how the Court understands judicial power in the sense of Ch 3 and the longstanding demarcation of judicial power for the purpose of knowing whether the legislature or executive has stepped over the line of separation of powers from *Boilermakers*.

So, looking at the first element - the way in which the Court explains the legitimacy of intervening to assess the validity or otherwise of a Parliament's choice – this arises in the implied freedom cases I've already introduced. We see not only that the Court does engage in making a judgment regarding validity, but that they explicitly set out how that judgment is a valid exercise of its power.

In *Unions N 2*, where the Court struck down the impugned law regarding caps on third party campaigners, we see that the Court keeps for itself the power to determine constitutional validity. And, that in order for the Court to assess validity, the government actor – here the Parliament – has to provide sufficient materials to the court for the Court to be able to make that judgment for itself. It was not enough for the Parliament to assert a justification of a burden on the implied freedom. Because in the absence of relevant materials, the justification will be rejected and the law held invalid.

So what we see is a repetition from earlier cases that there is a domain of choice for the Parliament, but that the Court will interrogate the choice and require justification of it.

In *Clubb and Avery* – the joint reasons make explicit what they see as the difference between policy decisions made by the Parliament in terms of the social importance of a law, and the judicial role to determine the balancing exercise of the impact on the implied freedom and the purpose of the law in question. [72]

They acknowledge that "to an extent a value judgment is required" and they refer to the structured proportionality test as a way to reduce the extent of that value judgment and to avoid a merely impressionistic or intuitive judgment. Justice Edelman also uses the term 'value judgment' in describing the task of the Court, and agrees with the joint reasons that elements of the structured test give tools to legitimise the judicial role.

We can have different views as to whether that test does in fact provide clarity or transparency any better than any other approach. And we see Justices Gageler and Gordon each expressing continuing reservations about the structured test.

I'm not sure that the Court is giving us any guidance here on how to draw the line between the two types of value judgments. In the end, it is salutary to note – on the side of Parliaments and governments, that they need to provide evidence to support their purported justification of a law. But, also, that the Courts recognise that they are engaged in a value judgment.

Some commentators find that to be inherently objectionable, but I don't see there is an alternative if we are to accept that the Court is the institution which will interpret and apply the Constitution, and therefore be the one to keep all institutions within their valid spheres of power.

I'll come to interrogate this a little further when we see the contrast in approaches in the *Love* case.

The second aspect regarding divisions between judicial and non-judicial roles we see in the cases decided in 2019 is in relation to what is a Ch 3 judicial role, and what is not. I know that this overlaps conceptually with what I've just been talking about, but let me take it as a distinct issue and then note what I see as a possible contrast between the two.

In the last year, we've had a steady stream of Ch 3 cases. There was a failed attempt in *M47* to have the Court adopt the minority reasoning in *Al-Kateb*, centring on issues of the power to detain and its consistency with Ch 3. Due to the lack of agreed facts between the parties in M 47, and the inability of the Court to thereby make the necessary factual inferences, the Court did not get to the legal question. So *Al-Kateb* remains, and we will hear in a later session more on that line of cases. As we know, the state of play is that the executive can detain for non-punitive purposes.

So what 2019 cases do give us some treatment of Ch 3? I'll mention two - *Minogue* and *Vella*. *Minogue* was a challenge to Victorian legislation which changed the rules relating to parole, applicable explicitly to the plaintiff Craig Minogue. That alone makes one think of the *Kable* case and ad hominem legislation. But here the law was upheld as valid. In *Minogue* we are looking at, in the words of Kiefel CJ, Bell, Keane, Nettle, Gordon JJ. the "undisputed proposition that the imposition of punishment, or punitive treatment,… as a consequence of criminal guilt is an exclusively judicial … function." [13]

What we get from that case in terms of demarcating the judicial and non-judicial functions is as follows. Judicial power is involved in sentencing, and thereby imposing punishment, but that judicial role is exhausted at the moment of sentencing. If later the Parliament changes the rules of parole which apply to a person already sentenced, there has been no invalid attempt by the Parliament to impose additional punishment. The Parliament has simply removed the possibility of parole or made it more difficult to obtain parole.

The plaintiff had a big problem here with earlier authority, in that the Court held that the provisions, held valid in the earlier cases of *Knight* and *Crump*, were relatively indistinguishable and that was the end of that. What this case really does is leaves us with a lingering unease regarding the formal notion of punishment, the same that we see in the executive detention cases that were not re-opened in *M47*. That is, we say punishment is not imposed by the Parliament because the sentence was already in effect and imposed by a Court. Even if that denies that the substantive effect of what the Parliament may do is felt and experienced as punishment.

Both Justices Edelman and Gageler in different ways give us food for thought in this respect. Justice Gageler draws out the notion of punishment compared to a life with a meaningful prospect of parole. [30] He agrees that the impugned provision has the purpose and practical effect of subjecting Dr Minogue to a life without meaningful prospect of parole. But that this was not "punishment" in the sense of connoting a legislative exercise of judicial power. This was 'Punishment', in the generic sense of State infliction of involuntary hardship or detriment."

Justice Edelman includes the following reference to Hart in his judgment-

> "Hart once observed that a prisoner who was told that his sentence was extended as a measure of social protection rather than punishment "might think he was being tormented by a barren piece of conceptualism – though he might not express himself in that way".

Despite these comments, all the judges agreed that the relevant legislation was not an exercise of judicial power. So here what we see is a continuation of a formal approach to the Ch 3 cases, at least in recent times.

Whereas by contrast there is an open discussion of value judgments when one gets to the judicial role in relation to the political cases re the implied freedom. One easy response is to observe that in cases concerned with the system of democracy, the Courts may be more interventionist or at least engage more explicitly with values whereas they may be more hands off in relation to other areas. But this distinction I'm making doesn't hold for all the cases and for all the judges. Because in *Vella*, we see a contrast between the majority and dissenting judges in how they engage with questions of the lines between institutional roles. The difference in approach comes from the way in which the various judges draw on underlying values.

This brings me to the last of the 3 elements of constitutional identity I want to note in relation to the 2019 cases – the identification and use of constitutional values. The text – while a starting point – is not the only source for judges in interpreting and applying the Constitution. We know that sometimes historical records, or historical intentions are drawn upon, and case law gives some guidance. But what we see in the current court – as in earlier High Courts – is a reference to values as affecting decision-making in the Court. And with the current Court we also have individual members who have written and spoken extra-judicially regarding the role of values in constitutional law.

The main values we see explicitly in 2019 are liberty, dignity and political equality. Not quite the French tripartite, but an intriguing collection nonetheless. So I'll go back to the cases I've noted so far, beginning by saying something about the *Vella* case.

Vella was a challenge to NSW law which, in the words of the joint judgment, empowers the District or Supreme Court to make 'preventive orders' that can restrain the liberty of an individual including without proof of commission of a crime by that person. The plaintiffs argued the law was incompatible with the institutional integrity of those State Courts. That argument failed by majority. We'll be hearing in a later session about this case in detail. For now, I want to make one small point. The majority judges place the case of *Vella* in the same basket as the earlier cases in which legislative schemes which bore some similarities were held valid.

Justices Gageler and Gordon, by contrast, in their separate dissenting judgments, take a different approach. They both commence their reasoning by asking what underpins the idea of an independent judiciary – and their answer is - a concern for liberty. They describe it as a core value or principle. This starting point of liberty leads them to take a different view of the legislation in question, rather than beginning from a classic case law position of determining whether the previous cases are relevant by analogy and that being sufficient to dispose of the case.

The second explicit value referred to in 2019 is that of dignity:

Dignity comes through the safe access zone cases of *Clubb and Avery*. The protection of dignity of women accessing abortion services is identified as the purpose of the laws in question. The joint reasons quote Aharon Barak, a former President of the Supreme Court of Israel, writing extra-judicially, that "most central of all human rights is the right to dignity. … Dignity unites

the other human rights into a whole." The joint reasons go further than simply holding dignity to be a purpose compatible with the system of government, they explicitly label it a *constitutional* value in their conclusion that the burden on the freedom imposed by the law is justified because the law's purpose is based on "the very considerations of the dignity of the citizen as a member of the sovereign people that necessitate recognition of the implied freedom." Justice Edelman also seems to place it in the realm of a constitutional value.

The last value to note very briefly is that of - Political equality. This continues a line from *ACTV* and *McCloy*. We see it last year in the *Unions* case. It plays out in different ways between the judges but appears throughout. In the joint reasons we see that the implied freedom ensures the equal participation of the people in the exercise of political sovereignty [40], so therefore political candidates have no privileged position. Justice Edelman says, drawing on Harrison Moore, that the great underlying purpose of the Constitution is that the rights of individuals are secured by an equal share in political power. [178] The difference arises in what the judges do with that value of equality – and how they interpret the legislation in question. If it is to prevent voices being drowned out, it can be legitimate, but if it is to quieten voices then it might not be.

So, in the cases decided in 2019, we see the values of liberty, dignity and political equality coming through.

So, where have I got to? What I've done so far is ask what the 2019 decided cases have told us about who we are, how we identify divisions or interactions between institutions of public power, and how constitutional values are used and identified. We can see that these elements of constitutional identity appear in the reasoning of the Court and are used to determine or at least affect the outcome of cases. Obviously across all three areas I've touched on, the cases of 2019 are simply a snapshot of the ongoing development of these elements of our constitutional law.

Now let me take you to the case you really want to hear about, that of *Love and Thoms.*

Here we have the cases of two aboriginal men, Daniel Love a Kamilaroi man, and Brendan Thoms a Gangarri man. Each was born overseas to one Australian parent and one foreign parent, and each was born with foreign citizenship. Love and Thoms came to Australia as young children, lived their lives in Australia and never took out Australian citizenship. After having committed certain offences, the government sought to deport them as aliens. The Court, by majority, concluded that Aboriginal Australians are not within the reach of the 'aliens' power conferred by s 51(xix) of the Constitution'. Therefore, the Migration Act – being the enactment under which the government sought to deport Love and Thoms – would not apply to Aboriginal people. That seems intuitively correct, in that it would seem absurd for Aboriginal people to be considered foreigners in their own land and vulnerable to physical exclusion.

And yet – we have 7 separate judgments, over 160 pages, with strong dissents from Chief Justice Kiefel, and Justices Gageler and Keane. And even within the majority – all writing separately, we have different reasoning to reach the agreed conclusion.

I'll reflect on what this case says about the elements of constitutional identity I used to frame my overview of the 2019 cases.

First, who are amongst the people of the Commonwealth, who cannot be aliens, and therefore have a right to enter and remain in Australia?

We know there is no mention of Australian citizenship in the Constitution. In terms of categories of membership in the text, we see the phrase the people of the Commonwealth, and subject of the Queen. In terms of exclusionary statuses, we have those of immigrant and alien. This case focuses on the concept of 'alien' – the category of those who can be excluded and subject to disabilities not applicable to members of the Australian constitutional people.

The key to the majority conclusion is that Aboriginal people have a distinct connection to country which means they cannot be considered as other or foreign and hence cannot be aliens.

I need to explain all three elements here, as seen in the reasoning.

1. What makes a person relevantly Aboriginal?
2. What is the connection to country at issue – and how is it legally sourced.
3. And lastly, how that does connection come to impact upon the Constitutional status of alien.

Then I'll move to pulling out what are the key concerns which lead to the differences between the majority and minority judges.

So – who is relevantly Aboriginal?

I know I don't need to take this audience through the detail of how the law has had a long and difficult history in identifying Aboriginal people – both in terms of the ways in which that has been done, and the purposes for which that has been done. In this case, the Court rests on the tripartite test ostensibly drawn from Mabo N 2, but being a test with a longer history and life outside that case. That test requires a combination of descent, self-identification as Aboriginal and acceptance by the relevant Aboriginal community of one's membership of that group.

Two main points should be made in terms of constitutional doctrine here:

The first is that the Court has recognised that some element of self-identification can affect membership or immunity from the aliens power. The second is that the Court explicitly draws on Aboriginal law to determine constitutional membership.

Throughout the case law, the Court has always taken the approach that alien status is a formal status determined by whether there is a legal relationship between the sovereign and the individual in question. That is how the minority place it, with no necessary connection between that status and a person's subjective feelings of attachment or otherwise to a place. This is in contrast to the other exclusionary category under the Constitution – that of immigrant. If a person is found to be absorbed into the community, in a substantive sense – then that person is no longer an immigrant. Attempts have been made to incorporate that absorption doctrine into the law on aliens, overall those attempts have been explicitly rejected by the Court.

In this case, what is important to recognise is that the majority *does not* reverse that position. There is no statement that if a person feels membership of the community they are beyond the aliens power. But, the reasoning does allow for a measure of self-identification to affect

constitutional status. Because, to be Aboriginal - relevantly for this context – includes the fact that a person self-identifies as Aboriginal.

To work out who is relevantly Aboriginal, another required element is community recognition as such. That is recognition by the relevant Aboriginal community, according to Aboriginal law. This is the element of the test that led to the difference between some of the members of the Court as to whether or not Brendan Love is outside the aliens power. He was recognised as Kamilaroi by one elder, but there was not evidence before the Court that the Kamilaroi community recognised him as such. So, the question of Love's aboriginality has been remitted to the Federal Court for determination.

Obviously, this is not the first time an Australian court refers to some element of Aboriginal law as relevant to its reasoning. But it is notable, because it gives us another example of how Aboriginal law is recognised as a formal set of rules that operates within a community. And here it comes to have constitutional significance. This is done in the majority reasoning together with an explicit rejection of Aboriginal sovereignty – but I'll return to that later.

So the majority identify a distinct claim of Aboriginal people to membership. That claim rests on a recognition of connection to country. What is the nature of that connection, and how is it legally sourced?

Across the majority judgments, it is described as a unique connection, metaphysical in nature, deeper and older than the Constitution. It is sourced in aboriginal law, and then recognised by the Common law – in *Mabo*. That recognition by the common law is described as the deeper truth underlying that case, necessarily antecedent to the law of native title. It gives Aboriginal people a belonging to country, a connection to country, recognised within the Australian legal system.

But if it is recognised in the common law, how does it become constitutionally relevant? Here we see some differences in emphasis amongst the approaches of the members of the majority, and it is at this point that the distinctions between the majority and dissentients overall also become the sharpest – because the dissentients do not deny Aboriginal connection to country. Instead they deny that it has constitutional significance.

It comes back to how each judge understands the concept of alien. Throughout all the judgments, there is reference to the fact that the Parliament has a lot of leeway in regulating membership through citizenship legislation. But, that it can't thereby define for itself who is an alien, at least the Parliament can't treat as an alien someone who does not answer the ordinary meaning of that term. So what is the ordinary meaning that imposes some constraint on the Parliament? The majority justices all take a slight distinct approach.

For Justice Bell – aliens belong to another place. Given the nature of connection of Aboriginal people to the land and waters of Australia, recognised by the common law, it would be incongruous for them to be considered aliens, even if born overseas, so she says they're not aliens.

For Justice Nettle – it is more complicated. He rests the notion of alien on an absence of permanent allegiance and the correlative obligation of protection by the sovereign. He doesn't clearly set out what is meant by that obligation of protection. But he does say that, given the common law recognition of distinct Aboriginal societies with their own internal authority

regarding membership of those societies, all of which predates the imposition of British sovereignty, then members of those societies all owe permanent allegiance and are thus not aliens.

For Justice Gordon, she emphasises the stream of case law regarding aliens which says they include people who *lack a connection* to Australia. Once the deeper truth of the recognition by the common law of Aboriginal communities, their laws and their connection to land and waters is made clear, then for her the logic flows that aboriginal people cannot be aliens, as they do not *lack* a connection to Australia. They in fact have a very deep connection to Australia. And she says failure to recognise that connection would distort the very concept of alienage.

For Justice Edelman, he emphasises the notion that aliens are foreigners. He also looks at how the connection to territory, including metaphysical ties to territory, has been significant in the conceptualisation of political community and relevant to legal status. He goes broader than the other members of the majority in focusing on how norms of attachment to territory feature in law. He says that belonging or connection to land is inherent in Aboriginal identity, therefore Aboriginal people are members of the political community and cannot be aliens.

So the majority, at the most simplistic – see the common law recognition of Aboriginal connection to country leading to Aboriginal individuals not being aliens.

But this common law origin of recognition of connection leaves open some difficult questions. Can that recognition per se be overridden by statute – assuming the Parliament has a relevant head of power to draw upon, thus destroying the foundation of the basis for non-alienage? Or, has it become relevantly constitutionalised such that Parliament cannot now change that foundation? I see hints that the majority are taking a view of legal developments over time – which include BOTH common law and legislation, in addition to potentially international and comparative legal developments, that all inform the ordinary meaning of alien. So I think the better view might that Parliament could not unilaterally, through one statute, destroy the foundations in this case.

Another live question is whether the recognition of connection to country is bound to notions of continuity and society that we see in native title law? Particularly in the Yorta Yorta case. Justice Nettle is the most explicit in this – suggesting that if a community has not maintained its connection, then the members of that community may be susceptible to the aliens power. Here we get into difficult territory about exactly what that continuity looks like, and exactly what the requirements of community might be. We have hints going in different directions amongst the majority, including a suggestion in Justice Edelman's judgment that it an individual connection in question, OR that of a community, might be sufficient.

There is plenty more to be said about all this, and about issues raised in obiter regarding other elements of membership law – regarding dual citizenship, the relevance of foreign citizenship, and the relationship between various inclusionary and exclusionary categories under the Constitution.

But let me move now to considering how the Court has grappled with working out its role in this case, as compared to the role of the Parliament. Because it is here we see the gulf between the majority and the dissentients most clearly.

The dissents are more generous towards allowing the Parliament to determine the criteria for alienage, being careful not to say that it is completely open-ended, but certainly rejecting the approach of the majority. The dissentients seem to accept the dichotomy of statutory citizen-alien, with the consequence that they identify no limit on the aliens power, except for the general statement that the Parliament can't treat as an alien someone who does not answer that description on the ordinary understanding of that term. But for the minority, that limit is not reached in this case, as Love and Thoms were not statutory citizens, so they therefore were aliens, and their aboriginality was not relevant to their constitutional status.

The reasons for the difference between the conclusion of the majority and dissentients are multiple. But at their heart it seems that the dissentients support the position that rules of membership and exclusion are inherent to the power of a sovereign state, so the Parliament should be the one to decide those boundaries. But I do think it goes further than that, and in very revealing ways.

So what is going on?

To understand how and more particularly WHY the majority and dissents diverge, I need to add what I think is driving the reasoning – and here I go a little beyond notions of values as used in my overview of the cases decided in 2019. In Love, there are no explicit references to those values I referred to earlier. Instead, we see other factors affecting the reasoning of the Court.

The trigger notions seem to me to be:

First, how some judges in the case use notions of race in a generic sense and find that it is an impermissible distinction for judges to impose, whereas others differentiate race from indigeneity.

Second, how some judges use formal notions of equality and others take a different view regarding difference and the law.

And lastly, how there are various approaches to sovereignty.

I'll briefly go through each.

Race is a divisive word and concept – and in this case, it divides the Court. The dissentients reject any use of race as a basis of distinction in terms of membership, at least to the extent that it would involve the Court interpreting the constitution with that distinction in mind. By contrast, the majority reason in a way which sidelines arguments of race per se, to pursue a more directed enquiry regarding indigenous peoples and their distinct claims.

Justice Bell says the Commonwealth's concern to avoid racial distinctions is overstated, and that it is not offensive to recognise cultural and spiritual dimensions of the distinctive connection between indigenous peoples and their lands and waters. [73]

Justice Nettle says that in general, legislative power cannot be constrained on the basis of race [256], but that "different considerations apply … to Aboriginal people" precisely because of the growing recognition of Aboriginal peoples as the original inhabitants of Australia. [263].

Justice Gordon says it is not simply a question about race, and quotes the former Chief Murray Justice Gleeson writing in an extra-judicial capacity, where he states: 'It has been suggested that it is divisive to treat Indigenous people in a special way. The division between Indigenous people and others in this land was made in 1788. It was not made by the Indigenous people." [370]

But it is not just how the word or concept of race is used that separates the two groups of judges. It is also how they use notions of equality and difference. A concern for formal equality comes through most clearly in the reasoning of Justice Keane, who refers to justice being administered equally to all. [180], [182].

By contrast, Justice Edelman gives us a very intriguing insight into his views of community. He states: "the legal recognition of the powerful ties between Aboriginal people and Australian land would not have been possible if the membership of a political community involved a lockstep of such stifling homogeneity as could make Aboriginal people aliens … under the Constitution.'

One thing that he says is essential to community is difference. [396] This comes on the back of the Commonwealth's argument that legal developments since federation brought the legal rights of Aboriginal people into a position of formal equality with other members of the Australian community. [452].

Justice Edelman says the Commonwealth effectively submitted that this movement towards equality requires aboriginal non-citizens to be treated the same as non-Aboriginal non-citizens. [453] Justice Edelman responds by saying: This view reflects a human inclination towards homogeneity… which misunderstands the concept of equality before the law. To treat differences as though they were alike is not equality. It is a denial of community. [453].

So we can see a divide between, on the one hand, concerns for formal equality and avoidance of racial distinctions, and on the other – the distinct position of Indigenous peoples and a consideration of substantive equality and diversity.

But one deep concern underlying all of the reasoning is a divergence in how the members of the Court interact with the inevitable tension which continues to exist since the Mabo decision – what to do with the formal position of the assertion of British sovereignty, over a land which was inhabited with systems of law that were not recognised, and yet not have Australian law continue to completely close its eyes to those systems of law? And this returns us to how one is identified by the law as Aboriginal, including a component being self-identification and acceptance by the relevant Aboriginal community under the relevant Aboriginal laws of membership.

The Chief Justice says that to use that definition and give it constitutional weight 'would attribute to the group the kind of sovereignty implicitly rejected by Mabo and subsequent cases' [25], [37].

Justice Gageler says it comes 'perilously close' to such attribution. [125] He particularly dislikes the outcome of conceding constitutional capacity to 'a non-constitutional, non-representative non-legally-accountable sub-national group.' [137].

Justice Keane calls it 'political sovereignty'. [197].

While I can see how those justices place their concerns in those terms, I don't see it as quite as perilous as they do. Because the majority's reasoning explicitly seeks to put those concerns to rest by making this case an analogue of Mabo – British sovereignty remains, and is non-justiciable, and they justify their conclusion in the terms of Mabo itself.

Justice Gordon says the recognition of connection to country, making Aboriginal people not aliens, does not 'fracture a skeletal principle of our legal system' [349]. In fact, for her, recognising Indigenous people as part of the people of Australia is directly contrary to accepting any notion of indigenous sovereignty persisting after the assertion of British sovereignty [356]. Justice Nettle I think refers to something similar in the sense of subsuming Aboriginal people under the sovereign when he says that to fail to recognise Aboriginal people as members would be 'to tear the organic whole of the society assunder'. [272]

So, the Love and Thoms case tells us a lot about what each individual judge is thinking in terms of constitutional identity – who are the people included and excluded, on what basis, whether and how the Court can play a role in this space, and what underlying concerns there are regarding that judicial role and the interaction between the Constitution and Australia's First Peoples.

So what can I say by way of conclusion, given the broad and disparate nature of the cases from 2019, and the reasoning and outcome of the Love and Thoms cases?

Today I've taken you through some of the cases of 2019, to show how they demonstrate an ongoing development of aspects of constitutional identity. And I've shown how fundamental questions of identity have been addressed in the most recent decision of the Court. So, the Court clearly does exercise A role in relation to determining or revealing or indicating some aspects of constitutional identity – albeit without unanimity and certainly with some stark divisions amongst the current court.

But I'd like to end by suggesting that these questions of identity cannot and should not be comprehensively answered by the Court. The written Constitution, and its interpretation and application, is only a partial repository of our identity. It is legitimate for the Court to answer the questions before it, and to traverse broad concerns beyond text and history to decide specific cases. But it has a limited scope of power and legitimacy.

It is for the combination of constitutional actors to operate in their respective spheres in order to see the complete picture of Australian constitutional identity.

What the Love and Thoms case reminds us, is that our Constitution has a deep constitutive flaw – it is premised on an incomplete legal history, and the flaw will continue to fester until something is done. We require a proactive consultative process by which First Nations people have a seat at the table of democratic deliberation, in a way which constitutionalises an iterative process to address historical and ongoing and future questions of our identity.

The Court alone cannot do this. All they have said – by majority, and even then in 4 separate judgments - is a seemingly obvious point that Aboriginal people are not foreigners in this land. In doing so, they hint at the partial nature of that decision, its potential impact on official power, and the potential for legal actors to find a way around that conclusion, and the potential complications raised by this very limited decision.

Parliament, government and the people must take up the challenge of addressing the gaps and silences in our written Constitution. The Constitution is, returning to the words of the early Court – "intended to apply to the varying conditions which the development of our community must involve." If the current text cannot do that, then it needs to be changed.

We need to incorporate the modest proposal by First Nations people themselves – to grant them a Voice, to address the challenge of Treaty and to let the Truth be told.
We lack political will in government, but the Uluru Statement from the Heart, as a call to the Australian people, is one which provides us with an opportunity to resolve our constitutive flaw and ensure our full, complex identity is better reflected.

What I said in the earlier part of my presentation today – regarding the decided cases of the High Court in 2019, is still valuable, it gives us part of the picture of our identity. But the whole picture is yet to be painted by all constitutional actors together. Surely if we are here today to talk about the Constitution, then we must go beyond simply what the cases say, but also what the Constitution can and should include in order to be a document to enable for the living recognition of the Australian people in all our complex and diverse reality.

Thank you.