Chapter Two
Sir Harry Gibbs: An Advocate's Perspective

Hon Tom Hughes, AO, QC

In my brief term of office as Attorney-General of the Commonwealth, two events served to establish a relationship between Sir Harry Gibbs and myself. First, I was responsible for recommending to Cabinet his appointment as a Justice of the High Court of Australia. Cabinet accepted my recommendation. He was sworn in on 4 August, 1970. I thought of him as the obvious candidate. So did Barwick. I proposed no alternative nominee. He replaced Sir Frank Kitto, whose letter of resignation I had received only a few weeks earlier.

Sir Harry's path to the High Court had been paved with disappointment. He was appointed to the Supreme Court of Queensland in 1961. There he soon established a reputation based on his undoubted competence, extending to fields (such as criminal law) where his practice at the Bar had not taken him. In 1966 the Chief Justiceship of that Court fell vacant upon the retirement of Sir Alan Mansfield to become Governor of the State. Many thought Gibbs to be the appropriate choice of successor. But his juniority in the pecking order told against him; Mack J succeeded to the office. He was senior, but inferior in ability, to Gibbs, who viewed with concern the prospect of a long association in office with his new Chief. A major difference between them was that Mack CJ possessed a more relaxed work ethic than that which actuated Gibbs in the discharge of judicial duties.

However, Gibbs derived some solace from an informal understanding that he was earmarked for appointment to the then proposed Commonwealth Superior Court, then on the drawing board as a scheme for relieving the pressure of work on the High Court. Even in those days there was such pressure. It has become greater since, notwithstanding drastic limitation of rights of appeal by means of an across the board requirement of special leave, and the ultimate establishment of the Federal Court of Australia in 1976.

In the meantime, Gibbs was appointed Federal Judge in Bankruptcy, where the work load was not sufficient to absorb his energy and talents. Some of the slack was taken up with his appointment under a concurrent commission to the Supreme Court of the Australian Capital Territory.

The second event that served to establish a relationship between Gibbs and myself was that in 1970 I instigated and then appeared as Commonwealth Attorney in the litigation that opened the door to effective Commonwealth trade practices legislation. This litigation became known as the *Concrete Pipes Case*.[1] Sir Harry was one of the seven Justices who heard that case in March, 1971, a hearing that was contemporaneous with ructions in the parliamentary Liberal Party that led to my loss of office later that month.

This was not my first appearance before a Court of which Sir Harry was a member. I had earlier – only a week after participating in his welcome to the Bench – appeared with WP Deane, QC and KR Handley on behalf of the Commonwealth in *Kotsis v. Kotsis*,[2] a case in which I was able to persuade only Sir Harry, among a Bench of seven Justices, that the attempted investiture of Commonwealth judicial power in the Supreme Court of New South Wales enabled a deputy registrar of that Court validly to make an order for interim costs in a matrimonial cause under the *Commonwealth Matrimonial Causes Act*. That decision was delivered on 24 December, 1970. Barwick and I found ourselves in New Delhi a few weeks later, at a Commonwealth Law Conference. I remember him making, after his fashion, a jocularly disparaging but friendly remark about the strength of my argument.

The tables were turned nearly twelve years later when a Court of seven Justices unanimously overruled *Kotsis*, with Sir Harry in the centre seat.[3] That was one of the very few High Court cases which Maurice Byers, QC lost while in office as Solicitor-General of the Commonwealth. He relied unsuccessfully on *Kotsis* to argue that a Master of the Supreme Court of NSW had no power to exercise invested federal jurisdiction to determine a question of privilege from production of documents, on the ground of public interest immunity, in an action in which the Commonwealth was a party. Between *Kotsis* and the *HCF Case*, Sir Harry, in *Knight v. Knight*[4] supported, albeit with expressed reluctance, the earlier decision, thus demonstrating his loyalty to the judicial principle embodied in the doctrine of *stare decisis*.

If one seeks an underlying, albeit unexpressed, reason for Sir Harry's dissent in *Kotsis* it was, I surmise, essentially this: his basic approach to the working of the Constitution was that the component organs of government (federal and State) should, as far as possible, be meshed together in their working. The investiture of federal jurisdiction in State courts – described by Dixon as the "autochthonous expedient" – would work with full effectiveness only if State courts were allowed to operate in accordance with the structure of their organisation under State law. If that meant that some invested functions would be exercised by persons who did not hold commissions as judges of the Court, so be it. An official such as a Master or Registrar could be a part of the Court, even though not one of its judges. This was the pragmatic view that appealed to Sir Harry as a lone dissentient in *Kotsis*.

Sir Frank Kitto, whose resignation paved the way for Sir Harry's appointment, had been, in more than one sense, a formidable judge. His appointment from the Bar in 1950 brought to the Court a luminous legal mind, deeply versed in equity jurisprudence. He possessed a gift for clear oral and written expression. However, great patience was not one of his virtues: he did not suffer gladly counsel whose contributions to argument he regarded as insufficient or deficient. By contrast, Sir Harry's patience and courtesy were legendary. In demeanour he was always a model judge. In many appearances before him I never heard a discourteous or acerbic word from his lips. He would test counsel's argument with very pertinent questions, but never with an edge in his voice.

Kitto was only 67 when he left the Court. I have no doubt that tensions between himself and Barwick contributed to his decision. I remember that when I was working with Barwick in London on a Privy Council brief in October, 1955, he described Kitto's contribution to the *Bank Case* as that of an "equity draftsman". That was an unjust "put down": Barwick's multiple good qualities, which I greatly admired, did not obliterate a tendency to engage in occasional harsh criticism of others.

Participation in the decision of the Full Court in *Strickland v. Rocla Concrete Pipes*[5] was a major task faced by Sir Harry in his first year on the High Court. What was at stake was the extent, if any, to which the corporations power expressed in s. 51(xx) of the Constitution authorised the enactment of Commonwealth legislation for the regulation of trade practices. The *Trade Practices Act* 1965 which Barwick, prior to his elevation to the Chief Justiceship in 1964, had pioneered when in office as Attorney-General, was the embodiment of his determination, as a self-styled radical Tory, to achieve reform in this area of the law.

The first obstacle to progress was the 62-year-old decision of the High Court in *Huddart Parker v. The Commonwealth*,[6] given in the days prior to the extirpation (in the *Engineers Case*) of the doctrine of reserved State powers. In short, this doctrine denied constitutional validity to any Commonwealth law that trenched upon the supposedly exclusive power of the States, implicitly reserved by s. 51(i), to regulate trade and commerce conducted within their borders. According to this old doctrine, the grant of power to the Commonwealth by s. 51(i) to legislate with respect to inter-state trade and commerce excluded by implication any power to legislate with respect to intra-state trading activities.

By 1971, *Huddart Parker* was an anomaly – an isolated island around which modern constitutional principle to the contrary had developed. But because it was directly in point, it was a road-block that had to be removed. Otherwise the spectre of invalidity stalked the 1965 Act. I appeared for the prosecutor in the first stage of the *Concrete Pipes Case*, in the Commonwealth Industrial Court. The defendants were charged with failure to register an agreement which, if the Act were valid, they were liable to register. As was expected, that Court regarded itself as bound by the decision in *Huddart Parker*, which had invalidated key provisions of the *Australian Industries Preservation Act* on the ground that the corporations power did not support them. That Act was the legislative product of the Deakin Government, which was of liberal hue.

As leading counsel for the Commonwealth in the *Concrete Pipes Case* I had the assistance of a galaxy of talent: Ellicott, QC (then Solicitor-General for the Commonwealth), WP Deane, QC and AM Gleeson. We obtained leave to appeal without difficulty, and then settled down to an argument which lasted for six days in March, 1971. I have a vivid recollection of an unsuccessful attempt by Richard Fullagar, QC, for one of the respondent companies, to persuade Barwick to disqualify himself on the ground of apprehended bias, because of his participation in the drafting and parliamentary progress of the Act under challenge. In the course of that argument, Barwick's displeasure was obvious. Leading counsel for the other respondent, JW Smyth, QC, a downy bird if ever there was one, did not join in the application – an abstention which left Fullagar isolated.

In contemporary conditions the argument in such a case would seldom, if ever, be allowed to last so long. Judgment was delivered on 3 September, 1971. By then I was six months out of office, swept to the back-bench by the onward march of troglodytic influences in the Liberal Party which had led to John Gorton's

replacement by William McMahon. The new Prime Minister, in uttering his words of dismissal, expressly – but hardly courageously – relied on pressure in the parliamentary party as the ground for doing so. The pressure was the product of the position I had taken on trade practices and on the territorial sea issue. About the latter I shall say more later.

The result of the *Concrete Pipes Case* was that the Commonwealth lost the battle but won the war. All the seven Justices, including Sir Harry, disapproved of *Huddart Parker* as an anachronistic relic of a bygone age. They consigned it to legal history's dust-heap.

However, five of the Justices, not including Sir Edward McTiernan or Sir Harry, dismissed the appeal on the ground of the inoperability of severance provisions designed to preserve partial validity in case the reach of the Act trespassed to some extent beyond permissible constitutional limits. In a judgment of that signal clarity which everyone practising before him came to regard as a hallmark of his judicial style, Sir Harry upheld the effectiveness of the severance provisions; in his view they were effective to preserve the validity of the 1965 Act in its application to corporations of the kind referred to in s. 51(xx) of the Constitution. So in two important constitutional cases heard during his first year of office, Sir Harry exhibited his judicial independence by delivering powerful dissenting judgments expressed in customarily felicitous and succinct language.

In constitutional cases concerned with the competitive interplay of constitutional power between the Commonwealth and the States, his inclination was generally towards a federalist solution; tending to be sceptical of the expansion of Commonwealth power at the expense of the States. For example, he took a narrow view of the external affairs power in s. 51(xxix) of the Constitution, as illustrated by his dissenting judgment in the *Territorial Sea Case*[7] and later in *Koowarta v. Bjelke* Petersen.[8] I appeared in the first of those cases for the Commonwealth, but in a non-speaking role, led by Maurice Byers, QC. Gough Whitlam had paid me the compliment of instructing that I be briefed, in recognition of the role that I had played as Attorney-General in promoting the case for Commonwealth legislation designed to establish legislative paramountcy in this area. That role led one journalist – the late Ian Fitchett – to describe me as John Gorton's "evil genius".

Sir Harry's first judicial encounter with the case-encrusted intricacies of s. 92 of the Constitution was in *SOS Mowbray v. Mead*.[9] The issue was whether a Tasmanian statute prohibiting the sale within that State of cooking margarine to which there had been added either a prohibited colouring substance or a prohibited flavouring substance infringed s. 92 insofar as it applied to sales of such products within the State by a company which had imported them for the purpose of so selling them. The court split 4-3 in favour of the validity of the law. To Barwick's disappointment (as he later intimated to me) Gibbs was one of the majority. I too was disappointed because I, with John Spender, had appeared for the importer, SOS Mowbray, a subsidiary of Marrickville Margarine, which had led the charge in several challenges based on s. 92 to State legislation dealing with trade in commodities.

The case turned on a knife's edge. One became embroiled in an argument, originated by Barwick's epoch-making submissions in the *Bank Case*, as to whether the admitted burden on inter-State trade was direct or remote. It is difficult to criticise the reasoning on either side of the judicial divide. In essence the matter for decision was one of impression. The case illustrated the high degree of technical artificiality which had enveloped the interpretation of s. 92. But Barwick thought that Gibbs "had let the side down" – which was an unjust conclusion.

The Tasmanian legislation was obviously designed to protect the local dairy industry: there was no public health factor justifying the prohibitions under attack. The importer would quite possibly have done better under the simple rubric established in *Cole v. Whitfield*,[10] according to which the criterion of infringement of s. 92 is the discriminatory, protectionist impact of legislation on inter-state trade. In thinking as he did about Gibbs's adhesion to the majority in SOS Mowbray, Barwick was perhaps giving expression to an underlying concern that a new member of the Court showed signs of breaking away from the complex and technical juridical doctrines that his work as counsel (in the *Bank Case*) and as Chief Justice had developed with respect to s. 92.

In writing about the judicial work of Sir Harry from the perspective of an advocate, it is unavoidable that I should, in part at least, assess his contributions to the law mainly through the lens of my own experience of appearing before him. I make no apology for doing so. That brings me to *Hospital Products v. United States Surgical Corporation*.[11]

This was a case in which the principal protagonists were denizens of a commercial jungle in New York

city. My client, Hospital Products, in the person of one Alan Blackman, prevailed upon United States Surgical Corporation in the person of one Leon Hirsch, who, with his wife, controlled it, to appoint Hospital Products as the Australian distributor of surgical stapling devices for which USSC had acquired patent protection in the US but not in Australia. Blackman utilised the appointment, obtained by making fraudulent assurances of his intention to serve the interests in Australia of USSC, as a cover for setting up an ingenious reverse engineering operation conducted on USSC demonstration instruments obtained under the distributorship. By means of that operation he was able to displace USSC product with facsimile product, thus appropriating and developing the Australian market for his own benefit in breach of a statutory obligation, arising under the proper law of the contract, to use best endeavours to promote the sale of USSC's product.

USSC went into battle in the Equity Division of the Supreme Court of NSW with the flag of fiduciary duty flying at its masthead. The case became a leading decision on the place of this equitable doctrine in commercial contracts. Sir Harry was in the majority for allowing an appeal from a judgment of the Court of Appeal, which had substituted explosive indignation for calm consideration of principle by subjecting the whole of Hospital Products assets to a constructive trust. Sir Harry burst the bubble of USSC's forensic pretensions in his usual pithy way by saying:

> "What is attempted in this case is to visit a fraudulent course of conduct and a gross breach of contract with equitable sanctions. It is not necessary to do so in order to vindicate commercial morality, for the ordinary remedies for fraud and breach of contract were available to USSC ……..".

Lest it be thought that Sir Harry's judgment in *Hospital Products* disclosed a negative attitude to the development of principle in the field of fiduciary duty, one need only turn to *United Dominions Corporation v. Brian Pty Limited*,[12] where my victory in the former case was soon afterwards counter-balanced by experiencing the ashes of defeat on a question not then burdened with much authority. The question was whether "A", one of several intending partners, was under a fiduciary duty to disclose to the others in the course of negotiating for a partnership, all material facts known to A, but not to the others, that might affect a decision by an ignorant party whether or not to enter into the proposed partnership. With characteristic circumspection, Sir Harry forebore from propounding any general rule that "persons negotiating for a partnership *always* stand in a fiduciary relationship" to each other in the course of the negotiation. But he added: "I have no doubt that they may sometimes do so".[13]

The issue was whether the facts of the case opened the door to fiduciary obligation. One of the properties earmarked for inclusion in the proposed joint venture was owned by SPL, one of the intending venturers, which had given to UDC, another intending venturer, in connexion with another transaction, a mortgage containing a collateralisation clause, under the terms of which UDC was entitled to appropriate and receive from SPL moneys that might be derived from the proposed joint venture. UDC had not disclosed this clause to Brian Pty Limited, one of the venturers, during the course of negotiations. Brian was understandably put out when it found that what otherwise would have been part of its share of the profits had been eaten up by the operation of the collateralisation clause.

Views will always differ as to the position taken by Sir Harry when, in July-August, 1986, a sharp difference arose between him and Murphy J concerning the question whether the latter should take his seat on the Court while his conduct was under scrutiny by a Commission, appointed by the Commonwealth Government, and constituted by three former judges (Sir George Lush, Sir Richard Blackburn and The Hon Andrew Wells) to consider whether Murphy's conduct in relation to Morgan Ryan amounted to "proved misbehaviour" within the meaning of s. 72 of the Constitution. Sir Harry's publicly announced attitude was that his colleague should not sit while his conduct was under investigation. Murphy's strong view to the contrary, also publicly announced, was that he had a constitutional right and duty to sit until his guilt of misbehaviour was established.

The totality of my professional involvement on behalf of Lionel Murphy, before the Senate Committee which considered the allegations concerning Morgan Ryan, later in the High Court, led by Maurice Byers, QC (when back in private practice), and later again in the Court of Criminal Appeal when Murphy's conviction at his first trial was set aside, combines to make it inappropriate for me to say much about those unhappy and (as they appeared at the time) potentially cataclysmic events. I confine myself to saying:

(a) The public position adopted by Sir Harry demonstrated the steely determination of a mild-mannered man to act as he thought right in agonising circumstances under which a lesser person would have taken a softer option.

(b) History may well have taken a different course had Lionel Murphy exercised his option of testifying before the Senate Committee. It is a pity that Murphy, who displayed resolution during the whole unhappy affair, did not exercise that option.

Sir Harry went into compulsory retirement at the statutory age on 5 February, 1987. His enforced departure from the Court demonstrated the unwisdom of the constitutional change, effected by referendum during the lifetime of the Fraser Government, reducing the tenure of federal judges to age 70. Sir Harry (like all the others who have followed him in the office of Chief Justice) was very much at the height of his powers when the statutory time clock struck, as was demonstrated by his powerful and lucid contributions to public debate on a number of issues for many years afterwards.

Endnotes:

1. *Strickland v. Rocla Concrete Pipes* (*Concrete Pipes Case*) (1971) 124 CLR 468.

2. *Kotsis v. Kotsis* (1970) 122 CLR.

3. See *The Commonwealth v. Hospital Contribution Fund of Australia* (*HCF Case*) (1981-1982) 150 CLR 49.

4. *Knight v. Knight* (1971) 122 CLR 114.

5. *Loc. cit.*.

6. *Huddart Parker v. The Commonwealth* (1909) 8 CLR 330.

7. *New South Wales v. The Commonwealth; Victoria v. The Commonwealth; Queensland v. The Commonwealth; South Australia v. The Commonwealth; Western Australia v. The Commonwealth; Tasmania v. The Commonwealth* (*Territorial Sea Case*) (1975) 135 CLR 337.

8. *Koowarta v. Bjelke-Petersen* (1982) 153 CLR 168.

9. *SOS Mowbray v. Mead* (1971) 124 CLR 529.

10. *Cole v. Whitfield* (1988) 165 CLR 360.

11. *Hospital Products v. United States Surgical Corporation* (1984) 156 CLR 41.

12. *United Dominions Corporation v. Brian Pty Limited* (1984-1985) 157 CLR 1.

13. *Ibid.*, at 6.