Inaugural Sir Harry Gibbs Memorial Oration

Chief Justice Gibbs: Defending the Rule of Law in a Federal System

Hon Justice Dyson Heydon, AC

The "bad" Roman Emperors of the first two centuries – Caligula, Nero, Domitian and Commodus – habitually had meted out to them, after their periods in office ended in violent death, the fate known as *damnatio memoriae*. Fortunately, Sir Harry Gibbs lived a long and productive life after his retirement from the High Court in 1987, but from 1987, at least in some fastidious legal circles, he has suffered a similar fate. He has been blamed for faults he lacked, and criticised for lacking qualities he had.

It is true that he has left no disciples. He has founded no school. Modern counsel desperate for an argument have recourse to him, but he is not much esteemed by modern courts. Yet he was one of the greatest judges, and one of the greatest Australians, of the 20th Century. Time does not permit any demonstration of that thesis in detail. The present audience is unlikely to dispute propositions of that kind about our former President, who made such prodigious efforts on the Society's behalf for so long. I want only to identify a few of Sir Harry's characteristics, and correct a few misunderstandings about him.

Manner in court

There was in him no element of schizophrenia or of split personality. There was no contrast of style and substance. He was a man of complete integrity in every sense of the word – in particular, all the qualities he exhibited operated in a mutually and harmoniously integrated way.

Most people will have had their first personal encounter with him in court. There he was cool, mild-mannered, unpretentious and tactful. He was quiet, unflustered, and, above all, unfailingly polite.

In this he was generally thought to stand in contrast to his energetic but combative predecessor, Sir Garfield Barwick, who was Chief Justice for 17 years. You will recall Sir Garfield's characteristic observations about his style at the Bar in his farewell remarks on leaving the Court in 1981:

> "I early found that I liked talking to a judge and I liked him to talk to me.... And I came to think that the silent judge, the chap who would not speak to me, was almost anathema. I had to devise means of making him talk. I may have succeeded in that. No-one has ever had to stretch himself much to make me talk, I am afraid, and no-one has had to work very hard to find out what the tendency of my mind may be, and some that may have disturbed. I am sorry if it has".[1]

Sir Maurice Byers, in a speech farewelling Sir Harry in 1986, said that Sir Garfield's style did not change on the bench:

> "As a Judge he liked talking to a barrister, particularly when the barrister was advancing his argument. I don't mean to suggest that when putting an argument you felt like a despatch rider delivering a message across no man's land against a storm of shells and bullets – only that you needed your wits about you to keep upright".

Sir Maurice said that the first few times he appeared before Sir Harry as Chief Justice:

> "I was quite disconcerted. It took me some time to spot the difference. I was the only one talking. All the Judges appeared to be listening".[2]

In temperament Sir Harry Gibbs was serene, calm, reasonable, balanced, controlled, thoughtful and moderate. Apart from ample professional learning across every field of the law, he had great wisdom, incisive powers of analysis, quickness of thought and acuity of mind. He was cultivated, fair minded, and in every way honourable. He was deeply sensitive to sufferings and disappointments and purposelessness in other lives – young people, for example, who could get no job and could see no prospect of getting one, or who preferred the dole to work.[3] He deplored what he saw as widening gaps between the standards of private and public schools,[4] and widening unmerited inequalities between rich and poor.[5] He was also deeply conscious of, and grateful for, the labours of Australians in all walks of life over earlier generations – "an inventive, self-reliant and very capable people".[6] He disliked any criticisms of the present generation for laziness. But he did not

have a starry-eyed view of either the nature or the destiny of man.

As to human nature, he deplored the ravaging of modern Australian society by crime, drugs and corruption, and the decline in standards of responsibility, decency and consideration for others.[7] He did not care for what he called "those wizards of law and accountancy who, using alchemy in reverse, seek to transmute the gold of income into the dross of something that is not taxable or, even better, tax deductible".[8] He would not have sympathised with Jack Cassidy, QC, a great figure at the New South Wales Bar in the 1950s and 1960s. When the late Justice Peter Hely started at the Bar on Sir Jack Cassidy's floor, his wife fell into conversation with Lady Cassidy at the first floor function. Lady Cassidy said: "How is Peter getting on?". Mrs Hely said: "He's finding it hard to pay the provisional tax on his income". Lady Cassidy said: "Ah, Jack doesn't have that problem. He gets paid in capital".

As to human destiny, Sir Harry was not over-optimistic. He said:

> "... in a world where so much labour is marred by monotony and tedium a man or woman engaged in professional activity has the opportunity to do work which is often satisfying, interesting and useful as well as modestly rewarding from a financial point of view and a sensible person cannot hope for much more from his occupation than that".[9]

Sir Harry had humanity, humility, dignity and civility. But he also had authority. He was vigorous, forceful, decisive, efficient, energetic, steely and tenacious. He was fully capable of making up his mind, unlike Sir Edward Davidson, Foreign Office Legal Adviser in the years 1918-1929. Davidson was known in the Foreign Office as "quoad Davidson", because when once asked his opinion, he said that quoad Legal Adviser he thought one thing, but quoad Davidson he thought something else.[10] Sir Harry could be direct to the point of bluntness. Neither in court nor anywhere else did he admire irrelevance, arbitrariness, long-windedness, affectation, pretentiousness, hypocrisy or emotion in others, and he avoided all these things in himself. Although his personal tastes and habits were of the simplest kinds, he took great care with his appearance, his attire being as impeccable as his courtesy.

Sir Harry was completely lacking in that common judicial vice, pomposity – unlike, for example, Sir Reginald Long Innes, Chief Judge in Equity in the Supreme Court of New South Wales in the 1930s. On one occasion Innes was called to give evidence as a witness in some dispute. The counsel who called him was a rather rough common lawyer who did not like him. Examination in chief usually opens with witnesses giving their names and occupations. This examination in chief began as follows: "What's your name?". With massive self-importance, as if disclosing a most portentous and significant truth, the witness said: "My name is Reginald Heath Long Innes, knight". Counsel then asked: "And what do you do for a living, Mr Knight?".

Manner in private

This summary suggests that Sir Harry had a remote and wintry personality, but informal contact revealed this to be illusory. Although shy and unassuming, he was approachable, good humoured and friendly. In an address delivered on the occasion of the centenary of Sir Owen Dixon's birth, he said that soon before Sir Owen's death he took Mr Justice Walsh, whom Sir Owen had not met, to see him at Hawthorn, "where Sir Owen entertained us with some candid descriptions of his predecessors on the Court".[11] To describe Sir Owen as "candid" in reminiscence is to speak with some euphemism, of course, but like Sir Owen, Sir Harry liked discussing the human comedy, particularly so far as it was reflected in the affairs of lawyers and judges. He enjoyed telling candid anecdotes of his own in his distinctive voice – rasping but not unattractive – about "Gar", or about the strange remark addressed to him by James Callaghan at Buckingham Palace, or about many other incidents in his long life.

In short, while in many respects no doubt the label "conservative" fitted him, any overtones it bears of hard, grasping, selfish indifference to the existence and difficulties of others were quite alien to him. They are also negated by the warm family life he and Lady Gibbs experienced with their four children.

There were other respects in which the label "conservative" did not fit. Some will be identified below, but one can be noted here. He was a monarchist and a Privy Councillor, he sat on the Privy Council, and he enjoyed doing so. He respected his colleagues as "eminent and well-known lawyers experienced in the common law".[12] Yet in 1981 he opposed the retention of Privy Council appeals in non-federal matters from courts other than the High Court as "anomalous and anachronistic".[13] He had probably come to this view, like Sir Garfield Barwick, years earlier. He said:

> "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".[14]

Nor, indeed, did it.

Prose style

When Joseph Chamberlain died, Asquith said of him in the House of Commons:

> "As has been the case with not a few great men, speech, the fashion and mode of his speech, was with him the expression and the revelation of his character".[15]

The same was true of Sir Harry. He had a remarkable prose style – pithy, terse, precise, crisp, trenchant, undecorated and unambiguous. In one of Sir Harry's last cases as a barrister before the High Court, Sir Owen Dixon delivered a dissenting judgment rejecting his contentions. But that judgment took the unusual course of congratulating him on what it called his "very clear argument".[16] Above all, Sir Harry's judgments had pellucid clarity. Sir Maurice Byers said of his clarity:

> "This is at once the most difficult of skills to master and the writer's most precious gift to the reader. There is about almost every judgment of Sir Owen Dixon that I have read a slight haze of ambiguity, a hint of baffling distances and remote horizons. A Gibbs judgment is crystal clear".[17]

What Prince Ranjitsinhji said of W G Grace was true of Sir Harry: he made "utility the criterion of style". It is common for barristers to seek to start their researches by asking, "What's the principle?"; or saying, "Let's go to first principles". They then hunt for a short and forceful statement of the point in a book or judgment. Once found, that statement triggers unconscious recollection, and leads off into veins of learning to be mined for their valuable ore at leisure. In this process the wise lawyer took Sir Harry's judgments as the first port of call. To read a judgment of his is to be taken on a businesslike journey, without preliminary throat clearing or the erection of scaffolding, without any fuss or unnecessary elaboration or excursions into side issues, through the crucial questions to the end. The saying goes that if it is not clear, it is not French; it is certainly true that if it is not clear, it is not Gibbs.

While Sir Harry was on the High Court, it was commoner than it is now for each Judge to deliver a separate judgment, rather than the majority judgment being joint. For the reader joint judgments are dangerous. Reviewers say that it is important never to be rude about the autobiographies of sporting stars, because you never know who wrote them. The same is true of joint judgments. The relative rarity of joint judgments in Sir Harry's time means that posterity can enjoy his own prose, unpolluted by other hands. The quality of that prose was of the first importance for a defender of the rule of law.

Personal advantages

Sir Harry Gibbs came to the High Court with numerous advantages. One was a good school and university education, which gave him wide literary and historical interests. They were reflected, for example, in his address to the Johnson Club, Brisbane, on 13 December, 1984, the 200th anniversary of Dr Johnson's death. The address revealed a deep knowledge of that astonishing man and his times – a man, incidentally, who shared more than one quality with Sir Harry. Another advantage was six years in the Australian Army, including time at the front in New Guinea, for which he was decorated.

He had spent 16 years at the Bar. For quite a number of those years he carried out part-time law teaching at the University of Queensland, an activity that provides an opportunity for grasping, organising and stating simply the most fundamental aspects of legal principle.[18] He had a father who had been, and a brother who was, engaged in politics. He had spent six years doing all the work falling to a judge of the Supreme Court of Queensland at trial and on appeal, and three doing the work of a Federal bankruptcy and Australian Capital Territory judge. He thus had a wide acquaintance with human affairs. But there was a specific aspect of his background which was very important.

He had been brought up in Ipswich, a locality, of course, associated also with Sir Samuel Griffith, with a former Governor-General, and with the most famous female politician yet produced by this country. He lived there at a time when it was quite separate from Brisbane, having a distinct character as a mining and industrial city. His education at the University of Queensland, which he remembered with gratitude and affection, took place at a time when the University was very small and its Law School had just started, after a period when Queenslanders wanting a university education in law had to go south. Brisbane itself only had a population of 313,000.[19]

The time of his youth and early adult life was a time of limited communications, difficulties in travel, and a very small federal judiciary, not seen much outside Sydney and Melbourne. It was a time when citizens drew life from their local regions. They were provincial when provincialism gave strength – probably it still

does, but they gloried in their provincialism. Their ties to State governments seemed closer than their ties to the federal government. He understood deeply and instinctively the immense differences between the life and world view of residents of Queensland, living in its many large and small country towns scattered over vast distances with great variations in climate, topography and economic activity, and the life and world view of residents of already huge and ever-growing cities like Sydney and Melbourne. He knew the variegated make-up of the Queensland population, as did Arthur Fadden, who when Italy attacked France in June, 1940 was approached by an agitated constituent, the owner of a fruit shop. The constituent said that an angry mob had wrecked the shop and called him an Italian bastard. Artie Fadden sympathised. The unfortunate man protested: "But Mr Fadd, I no the Italian bastard, I the Greek bastard".

Just as Sir Harry cannot have liked the modern tendency of the Sydney-Melbourne vortex to suck people away from other parts of Australia, so he disliked the tendency of the Canberra vortex to suck governmental power away from the regions. He would have responded sympathetically to the future Mr Justice Crawford, who welcomed him at his first sitting in Tasmania as Chief Justice with the words:

> "Your Honour comes from a State like Tasmania, somewhat distant from the centre of affairs in this country".[20]

In short, although he left Queensland in 1967, he remained a Queenslander, and Queensland was of his very being.

Sir Harry Gibbs' conception of the rule of law

For Sir Harry one element of "the rule of law" was the idea that "cases, civil or criminal, are decided by applying legal rules, antecedently established, to facts dispassionately found".[21] To that succinct statement he added other elements:

> "..... that no-one however powerful is above the law, that no-one however humble can be made to suffer in person or property except in accordance with the law and that the law is administered openly with complete independence and with reason and moderation".[22]

In this way order and liberty could be balanced – "order, without which no civilisation can exist and liberty, without which existence may lose much of its value".[23] As one who had witnessed the Battle of Brisbane in 1942 between Australian and American troops, he knew something about the consequences of anarchy and had little doubt about its vices. He admired Australian courts; they:

> "..... display a genuine respect for the liberty of the individual citizen and are able to stand between the weak and the strong and to prevent the rights and freedoms of the individual from being subordinated to the interest of the State, or to powerful groups within the State".[24]

These criteria called for independence in judges. But that independence had to be rooted in principle. Temptations to search for expedient results for individual litigants or to use the litigation "to reshape society" had to be resisted.[25]

> "A Justice, unlike a legislator, cannot introduce a programme of reform which sets at nought decisions formerly made and principles formerly established".[26]

He thought it wrong to elevate "into legal principles one's own idiosyncratic views of justice". He deplored "using a computer to scour the law books of the world, from Wyoming to Swaziland, in the hope of finding some pronouncements that will fit one's preconceived notions".[27]

These are statements which his critics would expect him to have made and think the less of him for making. But he was not averse to the orderly development of the common law, particularly in the light of technological change. An example may be taken from the law of evidence, on which he was an expert.

From the 1970s, concern began to grow about police reliance on unsigned records of interview. On the High Court, Murphy J began to reveal it from 1975.[28] With respect, this was to be expected, given the particular attitudes and interests of that judge. But his principal High Court ally came to be Gibbs J, who from 1977 advocated the use of aural or video-tape recording of police interrogation,[29] and who began to develop, and stimulate others to develop, principles restricting the admissibility of confessions the making of which is not corroborated. These principles are now partly found in case law and partly in legislation more recently introduced in all jurisdictions. The near universal use of video recording has proved a boon to accused persons who have not made admissions, has saved courts much time in hearing arguments about whether confessions were made and whether they are admissible, and has proved extremely disadvantageous to many guilty persons, for their videotaped confessions tend to have a much more damning impact on the trier of fact

than the impersonal and sometimes questionable record of a police officer's notebook.[30] Murphy J and Gibbs J may seem strange allies on this issue, but only to those who have become unduly blinkered by paying excessive attention to slogans and stereotypes.

He was conscious of many factors which were capable of eroding the substance of the rule of law while leaving its form in place. They included very high legal costs caused by, among other things, the rise of mega firms of solicitors, coupled with the limited availability of legal aid; delay caused by the excessive duration of litigation; the incompetence of lawyers; the ill-effects of fusion between barristers and solicitors; and "the suggestion ... that contingency fees might be charged" which, he said, "is one that I could not possibly support".[31] But he paid particular attention to factors adversely affecting the courts directly – the creation of new federal courts, with "resulting tangles of jurisdiction", many of which had to be dealt with during his Chief Justiceship;[32] the creation of special tribunals to deal with special subjects, which "may tend to narrow the vision and perhaps heighten the zeal of the members and cause them to lose a proper sense of proportion";[33] and the damaging impact of a Bill of Rights on judicial independence and the general work of the courts.[34]

Sir Harry's particular concern related to incompetence in the judiciary, for he thought it was vital to protect the public from insolence in judicial office as well as other forms of office. He was troubled by the risk of incompetence existing in judges appointed for reasons other than merit.[35]

Sir Harry several times[36] identified 1946 as the time when judicial appointments in England ceased to be political. He identified the author as Lord Jowitt, Lord Chancellor in the Attlee government. That some earlier appointments had been political cannot be doubted. Even so great a statesman as Lord Salisbury had, with his characteristic mixture of cynicism and self-mockery, explained that while one day great judicial officers like the Master of the Rolls might "be appointed by a competitive examination in the Law Reports", for the moment to ignore the claims of party "would be a breach of the tacit convention on which politicians and lawyers have worked the British Constitution together for the last two hundred years".[37] But not even Lord Salisbury's addiction to the old ways caused him to believe that this was an ideal system.

If it was Lord Jowitt who effected this beneficent change in it, it is not surprising. Old Tories used to say of Churchill: "Some of us have been members of the Conservative Party longer than Winston, but none of us so often". But Churchill only changed his party twice. Lord Jowitt did it four times. In 1929 he was elected to the House of Commons as a Liberal, but accepted the offer by the Labour Prime Minister, Ramsay MacDonald, of the Attorney-Generalship. He joined the Labour Party, stood again as a Labour candidate and won. In August, 1931 he was expelled by the Labour Party for joining the National Government, and in the ensuing election stood unsuccessfully as a National Labour candidate. In 1932 he unsuccessfully sought a Conservative seat. In 1936 he was readmitted to the Labour Party.

Jowitt's acceptance of the Attorney-Generalship in 1929 at the hands of the Labour Prime Minister had led to an unpleasant scene between himself and his erstwhile party leader, Lloyd George. Whatever his faults, Lloyd George had a long memory. Six months later, in a debate on the *Coal Mines Bill*, after Jowitt had spoken as Attorney-General, Lloyd George said: "As the Attorney-General has reminded us – and who should know better? – those who are genuinely seeking work cannot discriminate in the jobs which are offered them".[38] A Lord Chancellor with this supreme indifference to questions of political conscience was obviously the ideal man to introduce complete political neutrality into judicial appointments.

One aspect of the rule of law which Sir Harry Gibbs valued and sought to foster was reasonable certainty and stability. A well-known illustration can be found in the *First Territories Representation Case*.[39] The High Court by a 4:3 majority upheld legislation providing for the Australian Capital Territory and the Northern Territory each to elect two Senators. Gibbs J was one of the dissenters. He did so on the ground that when s. 7 of the Constitution provided that the "Senate shall be composed of senators for each State", it did not mean that it was merely to include Senators from each State, but was to be composed of them exhaustively. Section 122 permitted the Parliament to make laws allowing the representation of Territories in either House for the Parliament "to the extent and on the terms which it thinks fit". However, he held that those words had to give way to s. 7: while s. 122 permitted the election of representatives of Territories to the Senate they could not be Senators. He saw that conclusion as flowing as a matter of language and by reason of the central role of the Senate as the States' house in the legislature.

The *Second Territories Representation Case*[40] concerned the same legislation as did the *First Territories Representation Case*, and also concerned legislation providing for the Australian Capital Territory and the Northern Territory to be represented in the House of Representatives by two members each. The argument

for the invalidity of the latter legislation was that s. 24 of the Constitution confined membership of the House of Representatives to members chosen by the people of the Commonwealth in the States.

Although this argument was not formally inconsistent with the reasoning of the majority in the *First Territories Representation Case*, it was inconsistent in substance. And so far as there was a challenge in the *Second Territories Representation Case* to the decision of the first in relation to Senators, there was complete inconsistency. The only reason the argument was advanced was that one member of the majority in the *First Territories Representation Case*, McTiernan J had retired, and his replacement, Aickin J was thought likely to take the minority view in that case. So he did. But the outcome did not change, because although Barwick CJ adhered to the dissenting stand he had taken up in the *First Territories Representation Case* and, like Aickin J, declined to overrule it, Gibbs and Stephen JJ decided to follow that case rather than overruling it, despite their disagreement with it. Gibbs J did not see it as a sufficient reason to overrule the *First Territories Representation Case* "that one Justice has gone and another has taken his place".[41] He said:[42]

> "No Justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank, or as though the authority of the decision did not survive beyond the rising of the Court.... It is only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a Justice may give effect to his own opinions in preference to an earlier decision of the Court".

He did not see the earlier decision as having been given in ignorance of some authority or principle, or as being in conflict with other decisions of the Court. All arguments advanced in the *Second Territories Representation Case* had been fully considered in the *First Territories Representation Case*; and the *First Territories Representation Case* had been acted on, in that Senators had been elected under the legislation.

Sir Harry Gibbs showed that same quality – subordination of personal opinion to duty – in two of his earliest decisions on the Court. In *Kotsis v. Kotsis*[43] he held that a registrar of a State court could exercise federal jurisdiction conferred on that court, but was in a minority of one. When the same issue arose soon afterwards in *Knight v. Knight*, he said: "I could not agree with the conclusion but I am bound by the decision".[44]

Sir Harry's adherence to the values of certainty and stability is illustrated in a different way by *Viro v. The Queen*.[45] The question was how a jury should be directed in murder cases where the issue of self-defence arose. One set of directions was favoured by Stephen, Mason and Aickin JJ. The other four justices disagreed, but without agreeing on a single position. Gibbs J decided in the circumstances that it was better for him to depart from the view he personally preferred and support that of Stephen, Mason and Aickin JJ. He said:

> "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".

Sir Harry Gibbs' conception of federation

Sir Harry Gibbs saw the Constitution as having seven vital characteristics – six positive, one negative. The six positive characteristics were that it created a system of government which was *indissoluble*, *federal*, *monarchical*, with a *bicameral* federal legislature, to which the executive was *responsible*, and regulated by the *judicial power* of the Commonwealth, which gave to the High Court, ultimately, the power to invalidate legislative and executive actions which were unconstitutional. The seventh, negative, characteristic was that the Constitution contained *no general bill of rights*.[46] It is fairly plain that Sir Harry approved of each of these characteristics. No controversy affecting the first, third, fifth, sixth or seventh came before the Court in his time. However, the third – the monarchical element – affected some of the Justices other than himself in different ways in November, 1975, and he himself was greatly concerned to defend it after he retired. He saw the second – the federal element – and the fourth – the bicameral character of Parliament – as closely related, and numerous controversies about them came before the Court in his time. Although he approved of these two features, he deplored the extent to which, by the time he came onto the Court, the position of the States had weakened in relation to the Commonwealth.

He considered that the only basis on which the people of the colonies would have agreed to unite was a federal basis, and that to this day no majority of electors in a majority of States could be found to support any change to a unitary system. He saw the key conception as being that the central government should have powers in matters of national concern, while in matters of regional concern the States – the constituent members of the federation – should have power.[47] He saw the States as "neither subjects of the Commonwealth nor subordinate to it".[48]

On the other hand, he accepted that in terms of legislative power, to some degree the Commonwealth was placed in a "position of supremacy, as the national interest required", by reason largely of s. 109, providing that Commonwealth laws validly made under the 39 heads of power conferred by s. 51, for example, should prevail over State laws to the extent of any inconsistency between them. But he said in one of his earliest High Court judgments, the *Payroll Tax Case*:

> "..... it would be inconsistent with the very basis of the federation that the Commonwealth's powers should extend to reduce the States to such a position of subordination that their very existence, or at least their capacity to function effectually as independent units, would be dependent upon the manner in which the Commonwealth exercised its powers, rather than on the legal limits of the powers themselves".[49]

For that reason there were implications in the Constitution as to the manner in which the Commonwealth and the States respectively could exercise their powers vis-à-vis each other. Thus he said that a "general law of the Commonwealth which would prevent a State from continuing to exist and function as such would ... be invalid".[50]

Sir Harry applauded the slogan which Barton had used while campaigning for federation – that for the first time in history there would be a continent for a nation and a nation for a continent.[51] That was a true statement, for while the United States and Canada were of continental size, each actually occupied only half a continent, Canada contained two nations, and the Russian Czars ruled many nations. Sir Harry would also have been familiar with Roscoe Pound's aphorism that countries of continental dimensions can only be ruled as either federations or autocracies. His Queensland origins and attachments must have helped influence his antipathy to strong central power.

The weakening of the States

However, in the course of his own lifetime, even before he became a judge, the States had lost ground in many significant respects.

First, shortly after he was born, the *Engineers' Case* had overthrown two key doctrines advanced by the first three Justices of the High Court which favoured the States. One was the doctrine of "implied immunity of instrumentalities", which was thought to prevent the States and State offices from being taxed. The other was the doctrine of reserved powers: the doctrine that from the allocation to the Commonwealth of specific legislative powers in s. 51 could be inferred the existence of other powers reserved to the States. For example, it was said that s. 51(i) gave the Commonwealth power to legislate over international and interstate trade; that implied a prohibition on interfering with State powers over intrastate trade; and in turn it was said that other s. 51 powers should be interpreted in such a way as not to destroy the implied State power over intrastate trade.[52]

These doctrines were said to be erroneous in 1920, in the *Engineers' Case*.[53] The overthrow of the "implied immunity of instrumentalities" doctrine was less important, since it has come to be replaced by another principle serving a similar function, although in a weaker form. But the fall of the reserved powers doctrine seriously altered the federal structure. Sir Harry thought the case was "a prime cause of the decline of federalism in Australia".[54]

A second development adverse to the States arose from the attachment of conditions to grants made by the Commonwealth to the States under s. 96 of the Constitution. This had the effect of giving the Commonwealth some influence over or control of policy in fields like education and health over which it had no direct legislative power.

A further development was the legislative termination in 1942 of a double system of federal and State income taxes, and its replacement by the Commonwealth as the sole levier of income tax in return for reimbursement to the States of the sums lost.[55]

Another fiscal development adverse to the States took place in relation to s. 90 of the Constitution, which prevents the States from levying duties of excise. High Court decisions widening the conception of a duty of excise tended to squeeze State access to indirect taxes,[56] and to force the States to develop an artificial system of fees for licences to carry on business in the future levied by reference to past periods. This system was approved by the High Court in two cases argued in succession, *Dennis Hotels Pty Ltd v. State of Victoria*[57] and *Whitehouse v. State of Queensland*,[58] in the second of which H T Gibbs, QC was the successful counsel. Ex-barristers are often proud of, and defensive about, their forensic children, but this particular favoured child of victory, though never spurned by its father, came under increasing disfavour in Sir Harry's time on the High

Court, although it survived until 1997, well after his departure.[59]

Sir Harry summarised these developments as leading to "a lessening of financial responsibility on the part of the States and a duplication of governmental functions as the Commonwealth bureaucracy expands its empire into State territory".[60]

Another area of increased Commonwealth power which Sir Harry found particularly distasteful related to s. 51(xxxv), giving the Commonwealth legislative power over conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State. On this Sir Harry cast a cold eye:

> "My predecessors on the High Court, by a series of decisions marked by a metaphysical subtlety of reasoning that would have delighted a medieval schoolman, invented a doctrine of paper disputes which has had the result that disputes which to the uninitiated might appear to be purely local in character have been held to extend beyond the limits of one State. The Commonwealth Conciliation and Arbitration Commission has thus acquired power to affect the wages and working conditions of most workers in Australia. It is something of a legal oddity that an instrumentality created by the Commonwealth Parliament has power to bring about economic results which the Parliament itself cannot achieve".[61]

All these developments took place during or were foreseeable in the period of Sir Harry's pre-judicial lifetime. They were the result of a mixture of legal and practical factors classically summarised by Windeyer J in the *Payroll Tax Case*, one of the first High Court cases in which Sir Harry sat.[62] Windeyer J said that at federation Australia:

> "….. became a nation. Its nationhood was in the course of time to be consolidated in war, by economic and commercial integration, by the underlying influence of federal law, by the decline of dependence upon British naval and military power and by a recognition and acceptance of external interests and obligations. With these developments the position of the Commonwealth, the federal government, has waxed; and that of the States has waned. In law that is a result of the paramount position of the Commonwealth Parliament in matters of concurrent power. And this legal supremacy has been reinforced in fact by financial dependence. That the Commonwealth would, as time went on, enter progressively, directly or indirectly, into fields that had formerly been occupied by the States, was from an early date seen as likely to occur. This was greatly aided after the decision in the *Engineers' Case* ….".

The pace of such developments quickened during Sir Harry's judicial lifetime. From its inception, the Gorton Government which appointed Gibbs J to the High Court showed signs of a desire to widen the exercise of federal power. Coming events cast their shadows before, and these signs multiplied under the Whitlam Government and all succeeding Commonwealth governments.

These changes, then, arose through non-legal and legal factors. Among the non-legal factors which changed the position of the States were, for example, improvements in transport and falls in its cost: this increased interstate trade, and widened the trading field open to federal regulation. Some of the non-legal factors depended on political desire. Once the Commonwealth government was happy to make generous provision for the States by grants or by taxation arrangements provided the States accepted appropriate conditions, the *de facto* power of the Commonwealth was bound to rise. Indeed, Deakin had foreseen this in 1902, when he said that the Constitution had left the States "legally free, but financially bound to the chariot wheels of the Commonwealth".[63]

As we have seen, Sir Harry deplored this, but it was a matter outside his control, because by the mid 1970s the will of politicians to exercise their powers to the full was becoming very strong. In England it was the age of Mrs Thatcher. When Lord Carrington was asked, "What will happen if Margaret is run over by a bus?", he answered grimly, "It wouldn't dare". A similar political will on occasions began to show itself here. What upset Sir Harry more than a strong political will to use uncontroversial powers to the full was the employment of what he saw as invalid legal reasoning to disturb "the federal balance of the Constitution", to use a phrase much employed by him.[64]

Apart from legal developments which either had been controversial, like the *Engineers' Case*, or remain so, like the widening of "excise" or s. 51(xxxv), there were of course legal factors which had inevitably and uncontroversially changed the position of the States. They included the rendering invalid, under s. 109 of the Constitution, of State laws inconsistent with Commonwealth laws enacted pursuant to entirely uncontroversial exercises of legislative power pursuant to the heads of power in s. 51 – for example, many fields of commercial and intellectual property law, family law, and laws relating to postal, telegraphic, radio and television services.

Sir Harry did not criticise these trends. Indeed, he himself was to participate in them.

Sir Harry Gibbs' recognition of Commonwealth power

Sir Harry is sometimes represented as always taking the position most adverse to Commonwealth power in any case he heard. That is not correct. Take the *Concrete Pipes Case*.[65] On 30 June, 2005, *The Sydney Morning Herald*, in discussing his career, informed its readers:[66]

> "For most of [the Whitlam-Fraser period] of expansiveness in Commonwealth powers, Gibbs was in the minority.
>
> "In the *Rocla Concrete Pipes Case*, which enlarged the corporations power – constitutionally a move from the ice age to the concrete age – Gibbs was in the minority".

The imputation is that Sir Harry, unlike the forward looking majority, remained in the ice age. The fact is that all of the Justices, including Gibbs J, considered that s. 51(xx) of the Constitution gave the Commonwealth power to enact a law to regulate the trading activities of foreign, trading and financial corporations for the purpose of preserving competition in trade. The difficulty was that the key provisions of the Act were drafted so as to apply to all persons, not just these corporations. A majority of the Court held that it was not possible to employ s. 7 of the *Trade Practices Act* 1965 and s. 15A of the *Acts Interpretation Act* 1901 to read down the key provisions so as to apply only to those corporations, and to rest on other heads of power such as the trade and commerce power, the power to regulate dealings with the Commonwealth, and the Territories power. Gibbs J took the contrary view,[67] and McTiernan J briefly agreed.[68] Thus while it was true to say that Gibbs J was in the minority, it would have been even truer to say that he voted for a more expansive exercise of Commonwealth power than the majority did.

Another example of the fact that Sir Harry cannot be represented as a last-ditch opponent of all exercises of Commonwealth power is *Murphyores Inc Pty Ltd v. The Commonwealth*.[69] The High Court held that a regulation prohibiting the export of minerals without Ministerial approval was valid under s. 51(i) (which gives power to legislate on international trade and commerce), and that it was open to the Minister to take into account not merely matters of trade policy, but also the environmental impact of mining and processing mineral sands so as to extract the minerals to be exported. The High Court accepted the Commonwealth's argument that if a prohibitory law is within power, it does not matter whether the grounds for relaxing the prohibition relate to matters within that power.

The High Court was unanimous. Gibbs J agreed[70] with Stephen J and Mason J. Stephen J said it was not necessary for the factor appealing to the Minister as a ground for granting or refusing consent to be a ground relevant to international trade or commerce, or any other head of Commonwealth legislative power.[71] Mason J said that the regulation was wide enough to include environmental factors as relevant,[72] and that even so widely construed, it was not beyond s. 51(i): the law remained a s. 51(i) law whatever the motives which inspired it or the consequences which flowed from it.[73]

That case refutes another fallacy which has attached itself to Sir Harry's memory. In hindsight popular myth tends to position Mason CJ as the leader of centralist thought, and Gibbs CJ as the leader of anti-centralist tendencies. The *Murphyores Case*, where they were at one, demonstrates that that myth too must be qualified.

Difficulties for federalism after 1970

Some of the trends noticed by Windeyer J in the *Payroll Tax Case* and deplored by Gibbs J were not to reach their apotheosis until after the retirement of the latter, like the striking down of State indirect taxes as being duties of excise in *Ha v. New South Wales*.[74]

But many were in full flood before his retirement. Two may be noted briefly: the dilution of State representation in federal Parliament and the growth in use of the external affairs power to support Commonwealth legislation incapable of support by any other power.

The composition of the Senate

Gibbs CJ saw the Senate as a key element in the protection afforded by the Constitution for the States. The Senate "is an essential part of the Parliament in which the legislative power of the Commonwealth is vested". Apart from three limitations in s. 53, it has equal power with the House of Representatives in respect of all proposed laws. Beyond these limitations, the Senate could amend, reject or delay the passage of Bills proposed by the Government which had passed the House of Representatives.[75]

"The requirements that the Senate shall be composed of senators for each State, directly chosen by the people of the State, and that equal representation of the original States shall be maintained, were not mere details of legislative machinery. They were obviously regarded as indispensable features of a federal Constitution and as a means of enabling the States to protect their vital interests and integrity".[76]

He quoted with approval Quick and Garran's statement that the Senate:[77]

"….. is the chamber in which the States, considered as separate entities, and corporate parts of the Commonwealth, are represented. They are so represented for the purpose of enabling them to maintain and protect their constitutional rights against attempted invasions, and to give them every facility for the advocacy of their peculiar and special interests, as well as for the ventilation and consideration of their grievances".

Quick and Garran also said that the Senate was created for the purpose of enabling the States "effectively to resist, in the legislative stage, proposals threatening to invade and violate the domain of rights reserved to the States". Gibbs CJ saw "the protection of State interests by means of equal membership of the Senate" as "one of the conditions on which the people of the colonies agreed to unite". That was not so of the Territories: at the time of federation the Australian Capital Territory did not exist, and the Northern Territory of South Australia and British New Guinea were in a state of dependency, not comparable with the position contemplated for the States.[78] It was for these reasons, as seen above, that he construed s. 7 of the Constitution as prevailing over s. 122.

The external affairs power: s. 51(xxix) of the Constitution

Many have found s. 51(xxix) difficult to construe, and in the course of Sir Harry Gibbs' life on the Court, it came sharply to divide the Justices. By the time of his retirement, the majority in succeeding cases had established that s. 51(xxix), which gives the Commonwealth power to legislate in respect of external affairs, supported a law the purpose of which was to implement an international treaty entered into by Australia. Since then it has been said that a law implementing recommendations of international bodies, draft international conventions and international recommendations and requests is valid.[79] This may be called the "treaty interpretation" aspect of s. 51(xxix). It has also been held that a law relating to any person, matter, thing or conduct outside Australia can be supported by the external affairs power.[80] This "geographic externality" view rarely came before the Court directly while Sir Harry was a member.[81] After his retirement he said that the "geographic externality view" accords with the natural meaning of s. 51(xxix), though he did not specifically approve it.[82] However, in contrast, at all stages he strongly opposed the treaty implementation doctrine, at least in its broad form. In that broad form the majority recognised four limits to it, but they are not closely restrictive.

The first limit is that the Commonwealth must find another country willing to enter a convention with it. The second is that the convention must be made in good faith – not merely as a subterfuge to give the Commonwealth legislative power it would otherwise lack. However, as Gibbs CJ said in *Koowarta v. Bjelke-Petersen*,[83] that doctrine is "at best ... a frail shield, and available in rare cases" because it would be difficult to establish. Later he went further and said it was "for practical purposes ... meaningless".[84] Thirdly, the Commonwealth law must be reasonably appropriate and adapted to give effect to the convention: while legislation has sometimes failed this test, it is not hard to satisfy. Fourthly, since s. 51(xxix) is subject to the rest of the Constitution, it is subject to the implication in the Constitution that the legislation must not (a) discriminate against a State or (b) prevent it from continuing to exist and function: but this criterion too is not hard to satisfy. In Mason CJ's judgment in the *Tasmanian Dam Case* this limitation is recognised,[85] but three years later he pointed out to an American audience that the first limb of it had only been successfully invoked as a ground of invalidity twice in the previous 40 years,[86] and that the second limb was "such an abstract notion that it has so far proved incapable of useful definition".[87]

Gibbs CJ unavailingly urged a further limitation: the law must not operate entirely within Australia. If that limitation were not recognised, s. 51(xxix) would leave it open to Parliament to enact legislation which it had no other power to enact, and thereby deprive the States of any power to legislate in that field because of the operation of s. 109. That would ignore, and destroy, the federal nature of the Constitution. It may be noted that legislation which concerns matters entirely external to Australia does not have this vice; that is no doubt why Sir Harry was not concerned to dispute the geographic externality view extrajudicially, strong though the arguments against it are.

The majority judges in the leading cases, *Koowarta v. Bjelke-Petersen* and the *Tasmanian Dam Case*,[88] criticised the minority views as flawed. The supposed flaw is that they revived the "reserved powers" doctrine,

which had been repudiated in the *Engineers' Case*.[89] The majority did not, however, deal with the key point made by Gibbs CJ in particular.[90]

Gibbs CJ made it plain that his stand did not depend on the revival of the reserved powers doctrine, or on the concomitant need to identify any particular powers which were reserved to the States. His point was a different one. His point was that the external affairs power differed from all other powers conferred by s. 51 in its capacity for "almost unlimited expansion". Some of the other powers were broad and some were not, but there were limits to the application of all of them. That was scarcely true of the external affairs power:

> "….. there is almost no aspect of life which under modern conditions may not be the subject of an international agreement, and therefore the possible subject of Commonwealth legislative power".

Hence he relied on what Latham CJ said in the *Bank Nationalisation Case*:[91]

> "….. no single power should be construed in such a way as to give to the Commonwealth Parliament a universal power of legislation which would render absurd the assignment of particular carefully defined powers to that Parliament".

On Gibbs CJ's approach, a law, even if it gives effect to a treaty, is not a law with respect to external affairs if it forbids the building of a dam in Australia,[92] or forbids the cutting down of trees within Australia,[93] or regulates industrial relations in Australia.[94] However, a law relating to fugitive offenders or aerial navigation, although domestic in part of its operation, might involve international relations: if so, it could be within s.51(xxix).

Gibbs CJ also rejected the idea that a law was valid under s. 51(xxix) if it dealt with a matter of "international concern". He said:

> "The fact that a domestic issue gives rise to international concern does not convert a law with respect to a domestic issue into a law with respect to external affairs".[95]

I think it is correct to say that Gibbs CJ's argument has not been answered. That means that, despite the weight of steadily accumulating authority against his view, courageous counsel in future have at least some intellectual straw with which to make bricks in any challenge to the majority doctrine.

Any such challenge could also rely on a fallacy in the majority reasoning. It adopted the view that a wide power to legislate on external affairs is desirable in order to avoid Australia being a "cripple", unable responsibly to conduct international affairs.[96] The fallacy in that view is that the reasoning ignores a fundamental warning which Gibbs CJ gave about the task of constitutional interpretation:

> "... The function of this Court is to consider not what the Constitution might best provide but what, upon its proper construction, it does provide".[97]

The question: "Is there a constitutional gap?" is not to be answered merely by wishing or pretending that no gap exists.

Conclusion

It may be an illusion, but at least in major constitutional litigation Sir Harry appeared to be in dissent more frequently than is usual for a Chief Justice. He did not complain or rail about this, any more than he boasted about anything. Despite his discomfort about constitutional trends in the years before his retirement, and his even greater discomfort thereafter, Sir Harry thought the Constitution worked "reasonably well". He praised it for having "allowed democracy and the rule of law to survive in Australia". Provided democracy and the rule of law survived, he thought it would not be the particular provisions of the Constitution which determined whether the nation would thrive or decline, but "the intelligence, energy and decency of the people".[98]

We must hope that the future raises up people of his intelligence, energy and decency to defend the rule of law in our federal system as worthily as he did. For he was a sturdy and forceful and unselfconscious expounder of plain truths as he saw them. He confronted opposing views directly, head-on, without flinching. To use the words he used of Sir Samuel Griffith, he was "an exemplar of unselfish dedication to the law".[99]

Let me conclude by also applying to Sir Harry what Lytton Strachey said of James Fitzjames Stephen, another man who fought against the trends of his epoch. He said that he was: "A character of formidable grandeur, with a massive and rugged intellectual sanity and colossal commonsense".[100]

Endnotes:

1. Address of Sir Garfield Barwick on retirement on 11 February, 1981, 148 CLR v at vii.

2. Toast to Sir Harry Gibbs, New South Wales Bar Association Dinner, 5 December, 1986, *Bar News*, Autumn 1987, 9.

3. *Future of Youth* (1986) 19 *Australian Journal of Forensic Sciences*, 6 at 6-7.

4. Address – Speech Night at Knox Grammar School, 6 December, 1983, p.5.

5. Occasional address, College of Advanced Education, Canberra, 30 April, 1982, p.13.

6. *Sir Harry Gibbs Reflects*, in *Law Institute Journal*, May, 1987, 417 at 421.

7. Occasional address, College of Advanced Education, *op. cit.*, pp.11-12.

8. Address to the 23rd Annual Conference of the North Queensland Law Association, 17 October, 1981, p.4.

9. *Ibid.*, p.22.

10. A W Brian Simpson, *Hersch Lauterpacht and the Genesis of the Age of Human Rights* (2004) 120 LQR 49 at 50.

11. *Address of Thanks to his Excellency the Governor-General at the Commemoration of the 100th Anniversary of the Birth of Sir Owen Dixon*, 28 April, 1986, p.3.

12. *Concluding Remarks*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 4 (1994), 329 at 330.

13. *The State of the Judicature* (1981) 55 ALJ 677 at 679-680. See also *The State of the Australian Judicature* (1985) 59 ALJ 522 at 524-525.

14. *Ibid.* (1981), at 680.

15. House of Commons, 6 July, 1914, *Hansard*, p.847.

16. *Whitehouse v. State of Queensland* (1960) 104 CLR 609 at 617.

17. Toast to Sir Harry Gibbs, New South Wales Bar Association Dinner, *loc. cit.*, at 10.

18. For valuable biographical material, together with a classification and analysis of Sir Harry's judgments, see Justice G N Williams, *Sir Harry Gibbs* in (ed) M White and A Rahemtula, *Queensland Judges on the High Court*, ch. 3. See also the entries by the following in the *Oxford Companion to the High Court of Australia*: David Jackson and Joan Priest (*Harry Talbot Gibbs*) and Anne Twomey (*The Gibbs Court*).

19. Address on the occasion of the 75th anniversary of the University of Queensland Union, 19 July, 1986, p.3.

20. Address on 12 December, 1981.

21. Remarks at the Opening of the Lawasia Conference at Manila on 9 September, 1983, p.2.

22. *Ibid.*, p.6.

23. *Ibid.*.

24. Speech at swearing in as Chief Justice on 12 February, 1981, 148 CLR xi at xiii.

25. *Address of Thanks to his Excellency the Governor-General at the Commemoration of the 100th Anniversary of the Birth of Sir Owen Dixon*, 28 April, 1986, p.2.

26. *Queensland v. The Commonwealth* (1977) 139 CLR 585 at 599.

27. Reply by Sir Harry Gibbs to Toast, New South Wales Bar Association Dinner, *loc. cit.*, 9 at 12.

28. *Burns v. The Queen* (1975) 132 CLR 258 at 265.

29. *Driscoll v. The Queen* (1977) 137 CLR 517 at 542.

30. The history is discussed in *Kelly v. The Queen* (2004) 218 CLR 216 at paras [22]-[37].

31. *The State of the Australian Judicature* (1985), *loc. cit.* at 526.

32. *The Law – Fifty Years Later*, Address on the Occasion of the 75th Anniversary of the University of Queensland and the 50th Anniversary of the Establishment of the Faculty of Law, 7 May, 1985, p.20.

33. *Ibid.*, p.19.

34. *A Constitutional Bill of Rights?* (1986) 45 *Australian Journal of Public Administration*, 171 at 175.

35. *The State of the Australian Judicature*, *loc. cit.* at 527.

36. For example, *The Appointment of Judges* (1987) 61 ALJ 7.

37. Robert Stevens, *The English Judges*, p.14.

38. Peter Rowland, *Lloyd George*, p.657.

39. *Western Australia v. The Commonwealth* (1975) 134 CLR 201 at 243-249.

40. *Queensland v. The Commonwealth* (1977) 139 CLR 585.

41. *Ibid.*, at 600.

42. *Ibid.*, at 599.

43. (1970) 122 CLR 69 at 101-113.

44. (1971) 122 CLR 114 at 131.

45. (1978) 141 CLR 88 at 128.

46. *Some Thoughts on the Australian Constitution*, Address delivered at the All Nations Club, 21 November, 1985, pp.3-4.

47. *Ibid.*, p.6.

48. *Bradken Consolidated Ltd v. Broken Hill Pty Co Ltd* (1979) 145 CLR 107 at 122-123.

49. *Victoria v. The Commonwealth* (1971) 122 CLR 353 at 417-418.

50. *Ibid.*, at 424.

51. *Some Thoughts on the Australian Constitution*, *op. cit.*, p.15.

52. *R v. Barger* (1908) 6 CLR 41 at 54 per Griffith CJ ("inter-state" where secondly appearing is a slip for "intra-state").

53. *Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

54. *Concluding Remarks*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 11 (1999), 291 at 294.

55. The legislation was held valid: *South Australia v. The Commonwealth* (1942) 65 CLR 373 (*The First Uniform Tax Case*).

56. For example, *Parton v. Milk Board (Victoria)* (1949) 80 CLR 229.

57. (1960) 104 CLR 529.

58. (1960) 104 CLR 609.

59. *Ha v. State of New South Wales* (1997) 189 CLR 465.

60. *Some Thoughts on the Australian Constitution*, *op. cit.*, p.8.

61. *Ibid.*.

62. *Victoria v. The Commonwealth* (1971) 122 CLR 353 at 396.

63. A J Hannan, *Finance and Taxation* in (ed) Mr Justice Else-Mitchell, *Essays on the Australian Constitution* (2nd ed, 1961) at p.249.

64. For example, *Second Territories Representation Case* (1977) 139 CLR 585 at 601; *The Commonwealth v. Tasmania* (1983) 158 CLR 1 at 100 (*The Tasmanian Dam Case*). It was an expression less respected by other Justices: in the *Tasmanian Dam Case* at 129 Mason J spoke of "ritual invocations of 'the federal balance' ".

65. *Strickland v. Rocla Concrete Pipes Ltd* (1971) 124 CLR 468.

66. *The Sydney Morning Herald*, 30 June, 2005, p.13.

67. (1971) 124 CLR 468 at 525-528.

68. *Ibid.*, at 499.

69. (1976) 136 CLR 1.

70. *Ibid.*, at 9.

71. *Ibid.*, at 14.

72. *Ibid.*, at 23-24.

73. *Ibid.*, at 20.

74. (1997) 189 CLR 465.

75. *Victoria v. The Commonwealth* (1975) 134 CLR 81 at 143-144.

76. *Western Australia v. The Commonwealth* (1975) 134 CLR 201 at 246.

77. *Constitution of the Australian Commonwealth*, p.414.

78. *Western Australia v. The Commonwealth* (1975) 134 CLR 201 at 247-248.

79. *Victoria v. The Commonwealth* (1996) 187 CLR 416 at 483 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ (*Industrial Relations Act Case*).

80. *Polyukovich v. The Commonwealth* (1991) 172 CLR 501.

81. Except for observations in *New South Wales v. The Commonwealth* (1975) 135 CLR 337 at 360 per Barwick CJ, 470-471 per Mason J, 497 per Jacobs J and 502-504 per Murphy J (*Seas and Submerged Lands Case*).

82. *External Affairs Power: A Critical Analysis*, in *Oxford Companion to the High Court of Australia*, p.264.

83. (1982) 153 CLR 168 at 200.

84. *External Affairs Power: A Critical Analysis*, *loc. cit.*, p.264.

85. (1983) 158 CLR 1 at 128.

86. *Melbourne Corporation v. The Commonwealth* (1947) 74 CLR 31; *Queensland Electricity Commission v. The Commonwealth* (1985) 159 CLR 192. It has since had a little more application: *Austin v. The Commonwealth* (2003) 215 CLR 185.

87. *The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience* (1986) 16 *Federal Law Review* 1 at 18. An example of the second limb is *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188.

88. *The Commonwealth v. Tasmania* (1983) 158 CLR 1.

89. *Koowarta v. Bjelke-Petersen* (1982) 153 CLR 168 at 227 per Mason J and 241 per Murphy J; *Tasmanian Dam Case* (1983) 158 CLR 1 at 126-127 per Mason J, 168 per Murphy J, 220 per Brennan J and 255 per Deane J.

90. *Tasmanian Dam Case* (1983) 158 CLR 1 at 99-100. See Zines, *The High Court and the Constitution* (4th ed), p.283. At 284 Professor Zines works up an argument based on a remark of Mason J's which is claimed to meet Gibbs CJ's point: *sed quaere*.

91. *Bank of New South Wales v. The Commonwealth* (1948) 76 CLR 1 at 184-185.

92. *Tasmanian Dam Case* (1983) 153 CLR 1.

93. *Richardson v. Forestry Commission* (1988) 164 CLR 261.

94. *Victoria v. The Commonwealth* (1996) 187 CLR 416.

95. *External Affairs Power: A Critical Analysis*, *loc. cit.*, p.264.

96. *Koowarta v. Bjelke-Petersen* (1982) 153 CLR 168 at 229-230 per Mason J, at 241 per Murphy J; *Tasmanian Dam Case* (1983) 158 CLR 1 at 127 per Mason J, 221 per Brennan J and 258 per Deane J.

97. *Western Australia v. The Commonwealth* (1975) 134 CLR 201 at 249.

98. *Some Thoughts on the Australian Constitution*, *op. cit.*, p.16.

99. *Sir Samuel Walker Griffith Memorial Lecture*, 30 April, 1984, p.1.

100. K J M Smith, *Sir James Fitzjames Stephen*, in *Oxford Dictionary of National Biography*, vol 52, 439 at 442.