# QUEENSLAND JUDICIAL PERSPECTIVE - A CENTURY ON

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I should commence by warning my audience that I have used the title of this paper to justify my making observations from a Queensland vantage point, looking to an extent outward, rather than providing an account which is exclusively inward-looking. However, since the occasion calls for it, I shall give generous attention to the position of Sir Samuel Walker Griffith as it was both more and less than one hundred years ago.

Griffith's world from the time he became Queensland Chief Justice in 1893 until he accepted the Chief Justiceship of the High Court ten years later was, as the cliché puts it, very different from ours. The population in all of Queensland was just over 430,000 in 1893 and, on recent figures, it now exceeds 3 million. The population of Brisbane in 1893 was barely over 100,000 and is now about 1.4 million. The size of the private profession in Queensland one hundred years ago is harder to state even relatively exactly. Although the names that appear on the official rolls showing those who were admitted to the two branches of the profession prior to that time are readily accessible and may be taken into account, those rolls do not purport to state the position after original admission and many of the persons named may not have been in private practice in 1893 or been in Queensland or even still alive. While at this distance it is hard to be accurate, allowing for all of the difficulties we can probably accept this as the situation in 1893: about thirty-five practising barristers and less than 200 practising solicitors. Contrast the present position. The figure provided by the Bar Association from its roll of Queensland barristers practising at the private bar at the end of 1992 is 356 and the Law Society's current figure for solicitors in private practice in Queensland exceeds 3,600.

A real escalation in the size of the practising profession has occurred since 1960. Looking at the bar, about forty years ago in the mid-50s there were only about seventy in private practice in Brisbane and they constituted most of the State total.

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Voices are now being raised in alarm over the large numbers in the community undertaking legal studies. It is, of course, patently obvious that all of those who will graduate in the future cannot be accommodated within the private profession. In the past, the Queensland legal world by contrast was not only small but also relatively static. On another occasion I remarked that a peculiarly stable period occurred in the spread of years from 1930 to 1938 when no appointments at all were made to the Queensland Supreme Court and there was no District Court in existence, that institution having been abolished in 1921 not to be re-established until 1959. Vaulting ambition must have remained earth-bound and fretting in those nine years in the 1930s.

Griffith, during his years in politics, had to confront separatist pressures. This was a movement to which an ancestor of mine, also in politics, gave his support, although I am pleased to say that he was, notwithstanding, an ardent federalist. During the 1890s there were pressures in Rockhampton for separation for Central Queensland. The creation of a Central Division of the Supreme Court with its resident Rockhampton judge appears to have been offered as some response to those pressures. However, it was felt at the time that Queensland was already over-judged. Counting the two northern judges, it had five Supreme Court judges while New South Wales and Victoria with their larger populations had only seven and six respectively and South Australia three. Decentralised justice may cut down on costly circuit expenses but those who do the sums need to note that it tends to result in a need for a greater number of judges overall. Instead of further adding to the size of the Queensland bench a judge was found for Central Queensland in the 1890s by transferring one of the two existing northern judges to Rockhampton. The bench, like the State, has grown with time and there are now twenty Supreme Court judges in Queensland, a number which includes the four judges of the Court of Appeal established at the end of 1991 and includes also a Northern and a Central Judge.

How then did the more compact legal world of Griffith function? Some insight into one aspect of it is provided by noticing Sir Samuel's progress and, after due allowance is made for his outstanding ability, the thought remains that such accelerated advancement as he achieved may not be possible in the larger, more complex world which has followed him. Those anxious to discuss high personal achievement in a legal context may contemplate these bare facts.

Griffith became an articled clerk at the age of seventeen and after touring England and Europe on a travelling scholarship was admitted to the bar in October, 1867 at the age of twenty-two. So far there is nothing remarkable but, thereafter, these more impressive matters may be considered. He took silk in May 1876 after only eight years at the bar when he was still just thirty years of age, having had his first spell as Attorney-General at the age of twenty-nine. He became leader of his party at the age of thirty-three, Premier at thirty-eight and Chief Justice of Queensland at the age of forty-seven.

Brisbane in its early days was called Edenglassie, a name which was chosen by the New South Wales Chief Justice Forbes. I am pleased that we outlived that misfortune. I noted recently that Robert Morley, the English actor, taking an outsider's view and musing on the name of Sydney found plebeian overtones dominant and wondered why they had not called it "Bert". It would have been a fair revenge for Edenglassie.

In early times Brisbane competed with Ipswich as a centre of influence in the new northern settlements of which they were part and while Brisbane soon won that particular contest it must be admitted that Ipswich has had its share of famous sons. They have included not only Sir Samuel whose first home it was when he came as a child with his family to Australia but also Sir Harry Gibbs, Queensland's second High Court Chief Justice. The present tally is that no Queenslanders other than Ipswich men have occupied that exalted position. Griffith built himself his grand house "Merthyr" at New Farm and Douglas Graham, who served as judge's associate to Griffith for a period, records how Griffith described himself as leaving "Merthyr" to live in Australia when he went as Chief Justice to the High Court. He survived the period of residence in Sydney demanded by his High Court years but, when eventually he resigned, he returned to "Merthyr" without, however, having much longer to live. Griffith, both on the High Court and on the Queensland bench, did a lot of circuit work. The High Court moved amongst the State capitals and, at his earlier time as Queensland Chief Justice, Griffith visited the larger provincial centres and even undertook circuits at distant Normanton and Cooktown.

Queensland and the Commonwealth in the years which have passed since the Griffith era, have grown in population and in social, political and legal complexity, increasing also, I hope it is correct to say, in wisdom and in stature. So what has changed? Is the life of the judge essentially different?

I am sure that a great deal of popular misconception prevails in respect of judgment and judgment-writing. Many outsiders think that a judge's life passes in this fashion. He struggles out of bed, probably late, attends in court bearing with him as his only advantages his experience and his memory of what are assumed to be some easily mastered, solve-all legal principles learned during his time at law school years ago. With a degree of patience which cannot confidently be predicted he listens to the cases presented by each side before him, those presentations being understood to consist to a large degree of play acting and, as an easy matter, proceeds to deliver his judgment. In short, he is spared all agony and has not a care in the world. This summary is wrong at all points. Most judgments, other than the very simplest, have a lot in common with scholars' theses or the reports of experts. A judge is obliged to state the reasons for his decision. The judgment which he produces must justify itself and it should stand sufficiently high in the estimation of the judge's peers to ensure its survival against the hostile scrutiny which the losing party to litigation is likely to bring to bear. Both in its assessment of the evidence presented in the case and in its statement and application of legal principles the judgment must be convincing. Judges are not granted the freedom to pronounce in autocratic fashion as their fancy prompts them. They have to tie their judgments in with what has gone before. They are obliged to seek the legitimacy of consistency. Legal principle is the bulwark of the system and without it there would be chaos and total unpredictability, even if, with it, complete predictability is not achieved.

The judicial process is a little different at the top appellate level where the High Court stands from that which prevails in a superior court a little down the hierarchy. Both courts will be ruled by principle but the top appellate court has and should have a greater measure of freedom which, and perhaps I should repeat it, is a freedom not to be self-indulgent but a freedom to some degree to develop and adapt.

The great change for the High Court in the ninety years since Griffith first joined it is that it has become the final court of appeal as well as being the highest court in the local judicial system. The High Court is now fully in charge of Australia's legal destiny. Griffith, as Chief Justice, had to conform with principles pronounced and progressively extended by the courts of highest authority in England, the Privy Council and the House of Lords, and,

in addition, would have felt a very strong pressure to conform with the Court of Appeal, England's next highest court. In the years that followed, the grip of these pressures became less and now the High Court finds itself bound by decisions of no other court but simply open to persuasion and thus placed to take the best available from legal thinking in the rest of the common law world.

The Superior Courts of the Australian States, which used to be bound into a relatively elaborate legal hierarchy, now find acceptance of the hegemony of the High Court their only obligation. The substantial and growing collection of principle as pronounced by the High Court can be consulted as a sufficient source providing most of the answers that are needed. The *Commonwealth Law Reports*, the authoritative collection of the High Court's decisions, now reach over 175 volumes. When Griffith left the High Court bench in 1919 there were only twenty-six volumes and his last reported decision appears in Volume 26. It still remains true that when legal authority is needed in the Australian courts the decisions available from England are utilised to a significant degree. The English judges from whom, in a broad sense and at a considerable remove, we learnt our craft use legal methods which are closely similar to our own. There is an element of habit in this as well. We are used to consulting the English sources. Consider, however, the changes that have occurred. If, as an exercise, we regard the source of cited legal precedent in the reported judgments of the High Court over a five year span from its beginning in 1903 and make a comparison with, say, two recent years, 1990 and 1991, something of interest emerges. Those kind enough to perform this task on my behalf report the result as follows: for the period 1903 to 1907 approximately seventy-nine per cent of the earlier decisions referred to are from a U.K. source, while previous High Court decisions constitute three per cent and other Australian decisions eleven per cent of the total. This may be contrasted with the years 1990 and 1991 for which the comparative figures are: U.K. source thirty per cent, previous High Court forty-five per cent and other Australian twenty per cent. In parenthesis, I add that in those two recent years all other citations, including U.S., Canadian and New Zealand, together total only five per cent. I return to the main point I wish to make. While in the earlier period, when the stock of High Court decisions, starting from the beginning, was comparatively small, it is not surprising that references to them in the Court's judgments should also be infrequent, the more significant feature is the extent

to which reference to U.K. legal precedent is reduced in recent times, although remaining at a substantial level. This says something about changes in the approach of Australian judges over the intervening period. It may be seen as consistent with a general shift in relationship between Britain and Australia that has occurred over the same period in a legal constitutional sense. It is consistent also with a shift which has occurred in a broader social and cultural sense. The narrower school curriculums of Australian primary schools, preoccupied with empire, persisted until after the end of World War II when they gave way to newer structures which more fully expressed a world view and Australian books, films and plays, good and bad, now abound and discussion ensues concerning the possibilities of a new flag and change to republican status. While I do not consider that it is the role of judges to make public pronouncements upon any steps which, as a nation, we ought to take in these last two respects, since we should leave that to others, the judges would be singularly lacking in perception if they failed to notice what has been going on. Griffith would probably not have anticipated any of this. Until the First World War the unconscious assumption was no doubt that the empire would endure. It was a stable world into which the only external excitements that intruded came from apprehension about Russian intentions and then imperial German expansionist aims in the southern Pacific.

Griffith's sense of position and consciousness of empire were probably reflected in the pride which he apparently took in the award of his imperial honours, the G.C.M.G. and appointment as Privy Councillor, and perhaps also by the eagerness with which he arranged that he should be photographed in his new Queensland Chief Justice's robes. These same robes feature in a very fine portrait which was painted and which now, as a gift of the profession, hangs in the Queensland Supreme Court. It has been copied for the High Court building in Canberra.

Griffith, again according to his associate Douglas Graham, was conscious of a certain lack of enduring memorials to mark his achievements. This deficiency, if deficiency in recognition there was, has now been remedied by taking his name for Brisbane's third university. He would have been pleased by that, especially as a man who in his political career had endeavoured to arrange for the establishment of a university in Queensland, going so far as to introduce, although unsuccessfully, a bill to provide for it. The University of

Queensland, the first in this State, was not in fact established until 1910 and the State's first law school not until 1935, a date which I regard as surprisingly delayed.

Griffith's greatest assets were his all round competence, his pre-eminent legal skills, his energy and his abilities as draftsman. The high contemporary opinion of Griffith is best shown by Barton's selection of him as Chief Justice of the High Court and by Barton's willingness to serve with him on that Court as one of a bench of three. It seems that the high estimation of him demonstrated in this choice had to overcome prejudice felt in some quarters against the selection of a Queenslander.

Although Griffith himself certainly and also the other Queensland judges in his time worked hard and in scholarly fashion on the cases with which they had to deal, the pace seems not to have compared with what a judge of the Court must contend with at present. What Sir Samuel did in the course of his judicial duties he did extremely well as the judgments which he produced attest but we observe that he appears to have had time left over to undertake a lot else besides. The smaller scale of life which was part and parcel of a lesser population and lower level of economic activity may have provided more opportunity for egos to expand as well as for minds to devote themselves to general contemplation and escape from the mundane. Griffith's obvious culture and broad knowledge affirm what was possible in his time. Although the tasks connected with the administration of the Court during his years on the Queensland bench would undoubtedly have been simpler than they are now and the cases to be dealt with fewer, essentially the tasks of the judges then were similar to those at the present time - interpreting statutory provisions; reading and applying precedents; analysing decided cases; listening to witnesses and counsel; summing-up to juries; passing sentences; sitting on appeal; and combining, to the greatest degree possible, courtesy and efficiency. The persistence of this essential substratum in a judge's life means that the judges of the past can, through their written judgments, speak directly and persuasively to the judges of today.

In thinking of a judge's task and in considering Griffith's career it would be a mistake to think of the work of the State Supreme Court judge as lacking substantial connection with that of the High Court. One obligation assumed by the High Court under our Federal system is to guide the uniform development of the common law within the several constituent jurisdictions. A Supreme

Court judge, as he undertakes his work, is both conscious and appreciative of the close presence of the High Court. Correspondingly, I do not believe that the High Court regards the judges of the Supreme and Federal Courts as unruly children. On the contrary, I think that the High Court appreciates the attention which will have been given by courts at earlier stages to the cases which eventually appear in its own lists even if in the average case that attention may not have all of the scholarly depth which the High Court will in its turn contribute.

Speaking generally, judges do not think of themselves as simply giving judgment in a number of unconnected instances but are conscious of their role in sustaining a continuum, a total heritage which has potential for further development. In Griffith's day it might more comfortably have been felt that law ruled as Dicey guaranteed and that with the help of the British Navy we could sleep safely in our beds and there may, as I have indicated, been more of a feeling that the English courts had the ultimate responsibility of deciding what the law was and should be. The task of the High Court then would have been more closely one of answering a need to provide "spot" rulings rather than chart the general areas. In respect of that we could look to England. But the High Court has the additional task of interpreting the Constitution. In that function it would, like the High Court today, have considered that it was proceeding strictly textually and by what Sir Owen Dixon has referred to as "close adherence to legal reasoning". The High Court in its beginnings would also have felt fortified by an insider's knowledge of what the text was meant to say. The reality is that a textual approach will not guarantee a consistent result if only because there will be inevitable underlying assumptions in the minds of the judges providing the interpretations, whether or not those assumptions are explicitly demonstrated in their judgments. The old constitutional argument about reserved powers was, to an extent, a semantic dispute and a quarrel about degree. Even if the full ambit of the express powers conferred on the Commonwealth under the Constitution is not regarded as controlled by a need to achieve a balance with the powers reserved to the States, the Commonwealth powers will nevertheless be restricted because they are located in a constitutional document meant to guarantee the continuing functioning of a federation.

Many judicial decisions are arrived at after giving due weight to competing factors rather than through the strict application of logic leading to happy, ineluctable conclusions. There is nothing too remarkable in this except for a human tendency to borrow additional weight for a conclusion by dressing up a decision of the former class as though it fell strictly within the latter. The High Court's constitutional decisions may involve a degree of choice but all decisions must be grounded in principle and justified by reference to one aspect or another of precedent. They do not result from an untrammelled exercise of power. Into this area of debate and without further comment other than to say that such statements cannot amount to more than a half truth, I place the following observation attributed to U.S. Supreme Court Chief Justice Hughes: at "the constitutional level where we work ninety per cent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilections". What can be detected in the history of a court like the High Court depends upon which part of a double aspect the viewer is inclined to emphasise.

People sometimes speak as though Griffith is a man of the past, meaning, apart from the obvious, that he is no longer the source of any particular influence. Being out of date is a matter of fashion as well as of degree. While it is not possible to know what revivals or revisions will occur in the area of constitutional interpretation, the dominant interpretation of any one age may be only temporary however impressive is its contribution to the contemporary onlooker. Griffith has not been displaced in any way which applies peculiarly to him. In one sense he occupies a fairly standard position in the pavilion of heroes of yesteryear. The legal decisions of contemporaries are much cited in the courts of today but those of eminent figures of past eras are, everything considered, surprisingly less frequently referred to. When the citations of earlier High Court decisions appearing in the reported judgments in the volumes of the *Commonwealth Law Reports* from 1990 and 1991 are examined, I am informed that seventy-five per cent of them come from the second half of the full series of the reports and only twenty-five per cent from the first half of the series up to 1953. *Sic transit gloria* perhaps.

Our Constitution has up to this point been interpreted in a way which gives increasing power to the central government and this to a greater extent than its framers ever envisaged. Taxation, industrial relations and the *deus ex machina* of international treaties are obvious examples of areas where this has

occurred. But there is no complete assurance that there will never be a retreat from this tendency perhaps due to some interpretative shift or perhaps as a result of constitutional change following a referendum. The *Engineers Case* and, more recently *Cole v. Whitfield* show that interpretation is not always a continuous, straight line evolution. All trends are shown to be potentially reversible.

It is possible to wonder sometimes if the majority of people are really federalist. There are, of course, many who keenly wish to maintain the position of the States but mostly this does not appear to be true of the majority. Except for the purpose of adding savour to competitive sporting events, many people do not seem to find the separate existence of the States a particularly valuable asset or even a feature that is worth preserving. State governments can be obliged, and even content, to do as the Commonwealth Government wishes. An appreciation of the way in which the taxing powers are presently distributed undoubtedly puts heavy pressure upon the States. An alternative to the view that the States are of little consequence is the proposition that the separate entities constituted by the States make a rich social contribution and add a spur to higher achievement through competition and inspiration.

One topic of the hour is the extent to which judges should speak out. The decision of the judges in recent times has been broadly to refrain from public utterance but this does not save them from anguish when misconceptions are promulgated and their training and traditions render them powerless to make corrections. Their traditions do, in some ways, make them an "unprotected species". In England the present Lord Chief Justice has advocated loosening the traditional bonds upon public utterance. If, as individuals, we were to become more vocal we would run the risk of undermining confidence in the institution to which we belong since we would speak with diverse voices. Also, nothing would be more damaging to trust than for people to have an insight or supposed insight into judges' predilections before they commence to hear a case. A ghost of this kind haunts the High Court when it is called on to decide constitutional questions and commentators advance confident predictions concerning each judge's decision. I suggest that the current assumption of inscrutability by the judges is forced upon them by a public expectation that they should behave in that fashion and by the judges' own acceptance of the

seemliness of conforming to that expectation. On the wider question whether judges should be a little more forthright in public utterance, it is possible to argue that there should be some movement in their present stance but the courts would certainly be the losers if they were to engage in anything resembling slanging matches. The continuing strategy will be largely to suffer in silence.