

NSW Bar Honours Sir Harry Gibbs

On December 5, 1986 the NSW Bar Association paid tribute to Sir Harry Gibbs G.C.M.G., K.B.E. in anticipation of his retirement as Chief Justice of the High Court on February 5, 1987. Sir Maurice Byers Q.C. proposed the toast.



(L to R) The President of the Court of Appeal, Mr Justice Kirby, Sir Harry Gibbs, Sir Frank Kitto and Sir Garfield Barwick.

There must be something about the air of Ipswich. Not only did Sir Harry Gibbs spend his boyhood there, but so did Sir Samuel Griffiths. There is at least one thing they have in common — The Chief Justiceship of Australia. Those who have seen his portrait in the High Court (rather I should say the copy presented by the judges of Queensland's Supreme Court) can easily understand the daunting effect the first Chief Justice had upon his early colleagues. You have Mr Justice Barton "strongly" concurring (Vol. 1 CLR at 233) and saying later after like language "it would not therefore be any use to add anything to what he has already said". Sometimes the reporter mentions the presence of his fellow Justices only in the side note at the commencement of the report (Vol.1 CLR 421).

Supreme legal craftsman as he is — indeed, if I may say so, undoubtedly one of the most accomplished ever to have sat on the court — Sir Harry has to date failed to elicit from any of his brethren such heartfelt tributes. I can't imagine Sir Anthony Mason saying so, even in jest. But in those days they often expressed their debt to counsel not only for his argument but for his ability as well. May I say I mention Mr Justice Mason only by way of example. If necessary I'll run through the rest.

I'm sorry to harp on this, but I notice that in the last case reported in Vol.1 of the Commonwealth Law Reports Mr Justice Barton says "I entirely agree with what my learned brother has said". No reservations. No agreement in the conclusion only — implying reservation about the reasoning.

At his swearing in as Chief Justice on 12 February 1981 Sir Harry said: "It is the proper role of the courts to apply and develop the law in a way that will lead to decisions that are humane, practical and just, but it would eventually be destructive of the authority of the courts if they were to put social or political theories of their own in place of legal principle. It is the most extreme heresy to suggest that the theories in accordance with which the courts should decide should be those which find favour

with any Government or powerful section of society. The great powers which society accords to the courts are only conceded because the courts are regarded as instruments for the impartial application of law?"

Those words were well said and have been adhered to by the court. No lawyer, more importantly no citizen, would deny the necessity for Judge made law, indeed all law, to be humane, practical and just. It is easy for Judges to lose sight of what is humane and just when they feel in the grip of some supposed principle of law apparently compelling a decision both inhumane and unjust. It is hard then to pause and inquire whether a principle compelling those conclusions really exists, or, if it appears to, whether judicial development of it is desirable. The common law gives the Bench a reasonably free hand in order that the rule of law may be humane and just, but never to create a prison of inflexible rules.

I remember very well hearing Sir Harry speak the words I have just quoted. The day before Sir Garfield Barwick had said farewell and that had been a moving occasion. but while Sir Garfield would I'm sure have agreed with what his successor said, I doubt that he would have said it. So expectation of change was for me at least confirmed.

Nonetheless the first few times I appeared before the Gibbs High Court (to adopt a catchy Americanism) 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. I don't mean to imply that Sir Garfield was ever rude. He wasn't; but his judicial style was a participatory one. He had said in his farewell remarks that as a barrister he liked talking to a Judge and that he liked the Judge to talk to him. Well, he retained that liking and 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 dispatch rider delivering a message across no mans land amidst a storm of shells and bullets — only that you needed your wits about you to keep upright. Now Sir Garfield knew all this and you'll find his apologia but no apology if you read his farewell remarks.

Sir Harry has always been courteous and serene. He doesn't interrupt as a rule unless goaded by stupidity or heresy. As is often the case, the other Justices, according to the measure of their natures, take their cue from him. Under him the rapier has replaced the gatling gun. Advocates should remember however the wounds from each can be fatal.

When he retires next February, Sir Harry will have been a High Court Justice since 4 February 1970 — some sixteen and a half years. His appointment to that bench met the same universal approbation as did his appointment as Chief Justice. He had been a Judge of the Federal Court of Bankruptcy and of the Supreme Court of the Australian Capital Territory from 1967. It was common knowledge at the time that this appointment was offered and accepted as a preliminary to membership of the Federal Superior Court then mooted but which never eventuated. Prior thereto Sir Harry had been a Judge of the Supreme Court of Queensland from 1961. He has been a Privy Councillor since 1972, a Knight Commander of the Order of Saints Michael and George since 1981 and a Knight of the Order of the British Empire since 1970.

This recital means that the community will have

received the benefits of his great legal gifts for twenty six years and only 15 or 16 were given to the rewards of private practice.

After being educated at Ipswich Grammer School, the University of Queensland and Emmanuel College he was admitted to the Queensland Bar in 1939. He was a member of the Australian Military Forces from 1939 to 1942 and of the AIF from 1942 to 1945 and was mentioned in dispatches. When Major Gibbs returned to the Bar he found time to lecture at the University of Queensland and took silk in 1957.

His career at the Bar was phenomenal. I still encounter Judges and members of that Bar who by direct or indirect knowledge speak of him with bated breath. A measure of his skill and eminence may be found in the High Court's decision in **Whitehouse v Queensland** (1960) 104 CLR 609 in which he persuaded them that a license fee calculated upon the hotelier's gross payments for liquor in the twelve months preceding the year of payment was not a duty of excise and hence that the Queensland statute was not struck down by S.90 of the constitution. The appeal to the Privy Council ran foul of S.74 and was dismissed, so that the consequences of the fatal argument remain with us today.

Sir Harry's years on the High Court have seen momentous changes not only in the law as declared by the court, but in the relationship between this country and the United Kingdom. The Federal Court and the Family Court are new Federal ventures — the validity of the latter's jurisdiction being sustained by a whisker and an imaginative exercise in reading down by Mr Justice Mason. I don't think it is an institution close to Sir Harry's heart.

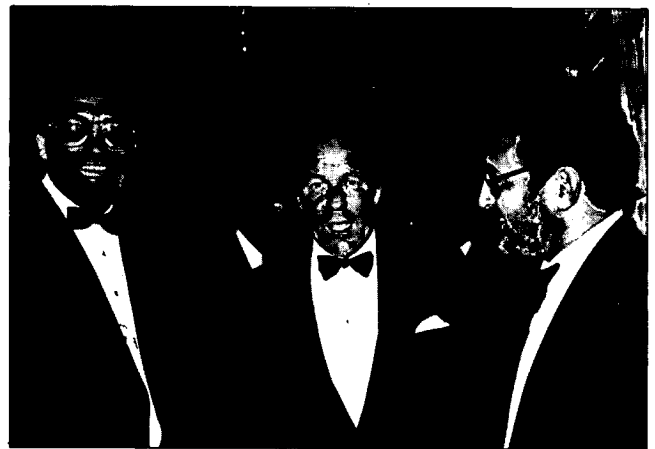


(L to R) Mr Justice Glass, Sir John Kerr and Sir Maurice Byers Q.C.

But the existence of these courts side by side with the more venerable State Supreme Courts has greatly added to the High Court's work. Its responsibility has been increased by the abolition of Federal, and now State, appeals to the Privy Council. The High Court for some years appeared unmoved by the absurdity of the co-existence of two ultimate courts of appeal from the States in State Jurisdiction. Fortunately the Australia Act has remedied that and the situation now answers Sir Samuel

Griffith's expectation in 1907. There is "an Australian Court, immediately available, constant in its composition, well versed in Australian history and conditions, Australian in its sympathies and whose judgements, rendered as occasion arose, . . . form a working code for the guidance of the Commonwealth", **Baxter v Commissioner of Taxation** (NSW) 4 CLR 1087 at p.1118.

Sir Harry's role in those years has been vastly important. His powerful intellect and authoritative yet courteous presence have put Counsel on their metal while



(L to R) Mr Justice McHugh, The Chief Justice, Sir Laurence Street and David Bennett Q.C.

they have been made to feel at their ease. I think it is easier and quicker now to acquaint the bench with your argument than it has been for many years., For this the Bar is greatly in Sir Harry's debt. Its members appreciate his attendance at their functions and his unassuming and approachable manner, although candour compels me to say that I rate his skill on the dance floor no higher than my own.

I earlier mentioned Sir Harry's legal craftsmanship. His judgments are like crystals — by that I mean not fragile, but clear and structured. They begin at the beginning and end at the end, have progressed through the middle. Not all judgments do that. Your are left in no doubt of the writer's meaning. 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. Its clarity and structure give it a certainty and permanence that may not always have been intended by the author.

He is an indefatigable traveller. Not only has he withstood those peregrinations around Australia that High Court Justices feel impelled to inflict on themselves, but, to my certain knowledge, has stood gazing at Darwin's finches on the Galapagos Islands. I have seen him disappearing down rocky and uncomfortable chasms in Central Australia; though when I come to think of it, it was always up these gorges while I sat breathless and with bruised feet far in the rear.

He has been a uniquely skilled lawyer, a courteous and gifted Judge and a fine gentleman.

Chief Justice this Bar is very much in your debt. □