SIR CHARLES POWERS:

HIS CONTRIBUTION TO THE HIGH COURT

BY

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Even among Queensland lawyers the standard reaction to the inquiry "What was Sir Charles Powers' contribution to the jurisprudence of the High Court?" is the question "Who was Sir Charles Powers?". He was the second Queenslander to be appointed to the Court (after Sir Samuel Griffith). When appointed by the Hughes government in 1913 he was Commonwealth Crown Solicitor, aged 60. Previously he had been the Queensland Crown Solicitor after a significant career as a State politician. As Professor Kay Saunders will point out in more detail in her paper, which concentrates on his career before he became a judge, the appointment was criticised as political, based on Sir Charles' lack of experience at the bar (he had never appeared before the High Court as an advocate), lack of reputation in the profession, lack of any university degree and presumed sympathy for the policies of the government he served. Those criticisms have coloured the scant commentary his career has attracted since then.

To those who have heard it the sharp but witty comment about Sir Charles attributed to Sir Owen Dixon has affected any further assessment of his career almost fatally. Allegedly Sir Owen remarked that it was not until he heard Powers J. deliver a judgment on constitutional law that he, Dixon, fully grasped the meaning of *ultra vires* – the Latin phrase describing a legal doctrine that translates as "beyond [P]owers".[1]

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[1] Humphrey McQueen, 'Shoot the Bolshevik! Hang the Profiteer! Reconstructing Australian Capitalism' in E. L. Wheelwright and K. Buckley (eds), *Essays in the Political Economy of Australian Capitalism* vol. 2 (1978) p. 205 fn. 69.

I suspect the line had its origin in Sir Charles' decision in *Waterside Workers' Federation of Australia v Commonwealth Steamship Owners' Association*[2]. Sir Owen, then still a junior barrister, appeared by himself for the claimant. He was arguing the constitutional validity of s.28(2) of the *Conciliation and Arbitration Act* 1904 (Cth) which provided for the continuation in force of industrial awards until a new award was made. When the judgment was delivered he had to contend, for example, with the following passage in Powers J.'s decision[3]:

> "The only question left is the important one raised by the Association, namely, that sub-sec. 2 of sec. 28 is *ultra vires* of the Commonwealth Parliament. On the construction I place on sub-sec. 2 of sec. 28, I would agree with my learned brothers who hold that it is *intra vires* ; but as the majority of my learned brothers hold that on a proper interpretation of the sub-section it would prevent the settlement of disputes by the Arbitration Court on such terms as the Arbitration Court thinks just as from the date of the expiration of the term for which the Court settled the old dispute under a prior award, I agree with my learned brothers *Isaacs* and *Rich*, and for the reasons so fully given by them, that the sub-section is *ultra vires* ."

His Honour's reasons in that case continued to perplex Sir Owen more than thirty years later. As Chief Justice in 1953 in *R. v. Kelly; Ex parte Australian Railways Union*[4], he wondered about the effect of Powers J.'s decision in argument with counsel, having in the previous year in *R. v. Kelly; Ex parte Waterside Workers' Federation of Australia*[5] spoken about the reasoning of the judges forming the majority "of whom Powers J. may, perhaps, be taken to be one …". McHugh J. has, only recently, continued

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[2] (1920) 28 CLR 209.

[3] At 250-251.

[4] (1953) 89 CLR 461, 464-465.

[5] (1952) 85 CLR 601, 629.

the task of attempting to reconcile his Honour's views with those of the other judges in *Re Pacific Coal Pty Ltd; Ex parte CFMEU*[6].

Now this is just one illustration, perhaps the most graphic, of the real differences between a consummate lawyer such as Sir Owen Dixon and Sir Charles Powers. The contribution of Sir Owen Dixon to the jurisprudence of the Court was described by his pupil, Sir Robert Menzies, the Prime Minister when Sir Owen Dixon retired, in these terms[7]:

> "But Your Honour has never lost sight of the fact that in the High Court of Australia there is the profound duty to the jurisprudence of the country, to the legal scholarship of the country, that in reality the High Court of Australia, with its final quality on so many cases, will make its contribution to jurisprudence in general and to the legal scholarship and legal history of the country of Australia. Now these qualities, though they are trite enough to express, are not common. They are in fact extremely uncommon. And Your Honour has exemplified them in the most remarkable way.
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> … I have heard at least two Lord Chancellors give it as their opinion that your Honour was the greatest judicial lawyer in the English-speaking world, and I have heard that view confirmed by the most brilliant and celebrated occupant of the Supreme Court Bench at Washington."

No one could contend that Sir Charles Powers came anywhere near that level of scholarship. Graham Fricke in the *Oxford Companion to the High Court of Australia*[8] concluded that it was difficult to recall any notable contribution made by him to the jurisprudence of the Court. Sir Charles also behaved quite unjudicially when seeking a knighthood later in his judicial career, a topic to which I shall return.

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[6] (2000) 203 CLR 346, 391-394 at [140]-[148]; see also Kirby J. at 432-433, [256]-[257].

[7] (1964) 110 CLR vi-vii.

[8] (Oxford University Press, 2001) at p. 549.

Nor does he appear to have had the saving grace of humour. Sir Robert Garran tells the story of the search for accommodation for the Commonwealth Arbitration Court[9]:

> "Meanwhile, as the Federal Service grew the difficulty in fitting it into the well-filled city of Melbourne grew also, and every department establishing a new branch or overflowing its boundaries was faced with difficulties. Some, however, were luckier than others. Just as the Commonwealth Court of Industrial Arbitration was having difficulty in getting suitable premises, the Navy Board vacated a building in Lonsdale Street which seemed to be what was needed. Mr Justice Powers, then a judge of the Arbitration Court, asked me to come with him to inspect it. A feature that excited his especial enthusiasm was the Navy Board Room which he said would require little alteration as it was already furnished with a dais that would make an excellent bench for the Court. I said, 'I don't think it will require any alteration at all; look at the motto on the scroll at the back of the dais where you will sit.' He looked: 'Strike first, strike hard, strike often!' Never before had I heard anything remotely resembling an imprecation pass his lips, but he exclaimed, 'Good Heavens, we must paint that out before the Press see it!' I pleaded with him that good jokes were too rare to be repressed, that laughter was the solvent of most of life's troubles, and nothing was more likely to soften the heart of a militant industrialist than to have this text always before him. But he was adamant, and when we left the room he locked the door and pocketed the key until he could get a trusted agent to erase the obscene words."

It was also Sir Charles' boast that he had never taken "an alcoholic drink or had a smoke in his life"[10], not surprising if, as some say, his father was

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[9] Sir Robert Garran, *Prosper the Commonwealth* (Angus & Robertson, 1958) at p.282.

[10] Australian Dictionary of Biography vol. 11 1891-1939 p. 271.

a Methodist minister[11], but intriguing if, as others say, he was a wine and spirits merchant[12].

To dismiss his contribution to the Court out of hand is, however, a mistake.

He was appointed partly, one suspects, because of his experience in industrial law and was soon also appointed as a Deputy President of the Commonwealth Arbitration Court to assist Higgins J. who was then its President. Nominated judges of the High Court then filled those roles also. It was in that field of the law that he made a significant although not original contribution to the interpretation of the conciliation and arbitration power in the *Constitution.* His approach was to give a broad, flexible meaning to the phrase "industrial disputes extending beyond the limits of any one State" in s.51(xxxv) of the *Constitution*.

The early approach of the High Court to the meaning of the term "industrial disputes" in *Jumbunna Coal Mine NL v. Victorian Coal Miners' Association*[13] was very liberal. Shortly after his appointment Powers J. had the opportunity to express his views on these issues. In *Australian*

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[11] Eddy Neumann, *The High Court of Australia: A Collective Portrait 1903-1972* (2nd ed., Occasional Monograph No. 6, Department of Government and Public Administration, University of Sydney, 1973) at p. 24.

[12] Graham Fricke covers both possibilities. In his book *Judges of the High Court* (Hutchinson, 1986) at p. 69 he says he was the son of a Methodist minister but in his article in the *Oxford Companion to the High Court of Australia* at 549 he says he was the son of "James Powers, wine and spirit merchant".

[13] (1908) 6 CLR 309, 333, 365-367, 370.

Tramway Employees' Association v. Prahran & Malvern Tramway Trust[14] he expressed his agreement with the variety of formulas used in the *Jumbunna Case* to define the words of the *Constitution*. In particular[15] he referred to the language in the judgment of O'Connor J. and arrived at a result consistent with an expansive view of the power. Adopting O'Connor J.'s words he said:

> "`Industrial dispute' was not, when the *Constitution* was framed, a technical or legal expression. It had not then, nor has it now, any acquired meaning. It meant just what the two English words in their ordinary meaning conveyed to ordinary persons, and the meaning of these words seems to be now much what it was then." Further on , at p. 366, he said:--'And it is certainly fair to assume that the expression `industrial disputes' was at the time of the passing of the Acts commonly used in Australia to cover every kind of dispute between master and workman in relation to any kind of labour.' And again, at p. 367:--'After an examination of all these sources of information as to the sense in which the word `industrial' in connection with labour disputes was used at the time of the passing of the *Constitution*, I have come to the conclusion that it was used in two senses--in the narrower sense contended for by the appellants, and in the broader sense contended for by the respondents. There is nothing in the *Constitution* to show that the word was intended to be used in the narrower sense.'"

Shortly afterwards in the *Builders' Labourers' Case*[16] he applied a similarly broad approach to a dispute in the building industry claimed to be local by the employers but said to extend beyond the limits of a State by the union:

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[14] (1913) 17 CLR 680, 712-713.

[15] At 713.

[16] (1914) 18 CLR 224, 260-261, a passage relied on later in *Re Australasian Meat Industry Employees Union; Ex parte Aberdeen Beef Co. Pty Ltd* (1992) 176 CLR 154, 167.

> "The building industry is local in one sense although carried on in all the States of the Commonwealth.
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> All industries except transport by land and sea are local in one sense and subject to State laws--such as shearing, coal mining, gold and silver mining, building, tanning, ironfounders, bootmaking, &c.--and some meaning must be given to the words "extend beyond" in sec. 51, pl. xxxv., applicable to the chief industries established in the Commonwealth at the date of the *Constitution*. In the same section (51), pl. xxxv. the word "extends" must be read as "applies"; and in pl. xxxv I think the word "extends" must be read as "exists"--that is, the power given was one to prevent and settle a dispute which exists in more than one State, reserving the power to the State to deal as it thinks fit with disputes which exist only in the one State.
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> Disputes between employers and employees do not extend from one State to another in the same way as a railway does; but they extend by an increasing number of employees engaged at different places in the State or Commonwealth in the same class of industrial enterprise dissatisfied with their wages or conditions, and determined to have their wages increased or conditions altered, demanding from their respective employers the same increased wages or altered conditions, and, after the employers refuse to concede them, persisting in their demands for such increased wages or altered conditions. The fact that some of the employers and employees in the dispute are on a different side of a State boundary line cannot surely of itself prevent the dispute extending."

In applying this approach to a dispute claimed to relate solely to intrastate shipping in *Holyman's Case*[17] his Honour also expressed himself clearly:

> "It appears to me that the contention that an industrial dispute cannot extend beyond the limits of one State because industries carried on solely in one State are under the control of the State and the federal Parliament cannot legislate so as to interfere in any way with the State industries, is not sound. It is true generally speaking, but once the power of the Commonwealth Parliament under the *Constitution* to legislate is clear, State control is subject to that power. The Commonwealth Parliament has unqualified power under sec. 51

[17] (1914) 18 CLR 224, 297.

> (xxxv) to pass laws with respect to the prevention and settlement by conciliation and arbitration of inter-State disputes; and that power is effective, even if the laws affect State shipping or other State industries when effect is given to them. The question whether the dispute does or does not extend does not depend on which Government has control of different parts of the industry affected, the Commonwealth or the State; or whether the employers carry on business in one State only; or on the fact that the industry is in a sense local, such as building, mining, shearing, &c. It is the persons engaged in the industry who dispute, and cause a dispute to extend, without the slightest consideration to State boundaries."

He dissented in the *Tramway's Case [No. 2]*[18] where the majority was not convinced that the demands of the employees represented their real grievances. Then in 1919 in *Federated Municipal and Shire Council Employees' Union of Australia v. Melbourne Corporation (*the *"Municipalities Case")*[19] the Court narrowed the scope of the section by indicating that an industrial dispute meant a dispute in an "industry"[20], a view that lasted until the 1983 decision in *R. v. Coldham; Ex parte Australian Social Welfare Union*[21] but created real difficulties in the application of the constitutional power.

The views of Powers J.[22] remained consistent, however, with the view that the words "industrial disputes" extended beyond disputes in an industry to "every kind of dispute between master and workman in relation to any kind of labour". That is similar to the view which became accepted finally, more than 60 years after the *Municipalities Case*, in *Coldham*.

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[18] (1914) 19 CLR 43.

[19] (1919) 26 CLR 508.

[20] See at 547 per Barton J., 555 per Isaacs, Rich JJ., Gavan Duffy J. at 582 cf. Higgins J. at 573.

[21] (1983) 153 CLR 297.

[22] At 26 CLR 587-588.

Granted that it was the views of Higgins J. that were most influential in persuading the Court in *Coldham* to revert to the earlier view of the law[23], still their Honours referred to Powers J.'s views as including "disputes between employers and employees about wages and conditions of work in any 'undertaking, business or industry', and not only in an 'industry' in the narrowest meaning of the word".[24]

This expansive view of s.51(xxxv) of the *Constitution* was also reflected in his Honour's decision in the leading case, *Burwood Cinema Ltd v. The Australian Theatrical and Amusement Employees' Association*[25], where the Court by majority including Powers J. took the view that an industrial dispute could be created by a union demand on employers where some of the employers did not employ any members of the union and the employees of some individual employers were satisfied with their wages and conditions of labour. By the time of that decision, 1925, his Honour had become President of the Commonwealth Arbitration Court and appears to have drawn on his experience in the jurisdiction, which was then considerable, in reaching his views. It also seems that some of his fellow Judges had by then come to rely upon his knowledge of the field[26]. As a result of the *Burwood Cinema* decision "employers could no longer

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[23] See at 153 CLR 307, 312.

[24] See at 153 CLR 309 and also the decision in *Australian Insurance Staffs' Federation v. Accident Underwriters' Association* (1923) 33 CLR 517, 534-535 where his Honour treated banking and insurance as industries for the purposes of the power.

[25] (1925) 35 CLR 528.

[26] See, e.g., *Ince Brothers v. Federated Clothing and Allied Trades Union* (1924) 34 CLR 457, 470, 474; *Waterside Workers' Federation of Australia v. Gilchrist, Watt & Sanderson Ltd.* (1924) 34 CLR 482, 505, 516.

avoid recognising unions or avoid being subject to the federal award system by simply refusing to employ union members"[27].

The views he expressed in dissent in *Federated Gas Employees Industrial Union v. Metropolitan Gas Co. Ltd*[28] about the ambit doctrine and the ability to vary an award during its existence and the similar approach of Higgins J. in the same case reflected a practical, commonsense approach to the resolution of industrial disputes that probably owed a lot to their experience of the day to day handling of those disputes.[29]

Incidentally, in his role as President of the Commonwealth Arbitration Court, he became popularly known in the early 1920s for the "Powers 3 shillings", the inclusion of a three shilling payment as an integral part, together with other amounts associated with the cost of living, of fixing a minimum weekly wage.[30] It was important at the time and is the only product of his judicial life referred to in the brief obituary in the Australian Law Journal[31].

Another area of the law that gave rise to several decisions by the High Court in Sir Charles' early career arose from the use of the defence power in the First World War particularly where charges of trading with the

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[27] Jeff Shaw QC, "Observations on Trade Union Recognition in Britain and Australia", (2001) 24(1) UNSW Law Journal 214, 223.

[28] (1919) 27 CLR 72, 97-99.

[29] At 91.

[30] *Australian Workers Union v. Commonwealth Railways Commissioner* (1933) 49 CLR 589, 590-591.

[31] (1939) 13 ALJ 20: "He was for some years President of the Arbitration Court where 'the Powers 3/-' has made his name known to a wider circle than that of most Judges."

enemy were laid.[32] The most significant of the judgments he delivered during that time was in *R. v. Kidman*[33]. It was not a case of trading with the enemy. Rather the charge was one of defrauding the Commonwealth by procuring that it should pay "excessive prices for the supply of goods for the use of His Majesty's Armed Forces". The charge was laid pursuant to retrospective criminal legislation and the issue was whether the Commonwealth Parliament had power to pass laws of that nature. The Court held that it did have such power. Sir Charles' reasons included the following passage:[34]

> "The offence charged in the indictment is alleged to have been committed after the passing of the *Crimes Act 1914* , but before the passing of the Act No. 6 of 1915. The United States *Constitution* forbids the passing of *ex post facto* laws. Our *Constitution* does not contain such a prohibition, and it does not give express power to pass such laws. Such laws are very properly generally deprecated, but the Parliament of Great Britain since the declaration of war has thought fit to exercise its undoubted plenary powers to pass *ex post facto* laws for the defence of the Realm, however objectionable such laws are.
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> As there is no express power given in the *Constitution* to Parliament to pass such laws, the power must be found in the *Constitution*; that is, the power must be necessary for effectually carrying into effect the powers vested in Parliament, or incidental to some express power given by the *Constitution*, or incidental to the execution of any power vested by the *Constitution* in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth."

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[32] See, e.g., *Moss & Phillips v. Donohoe* (1915) 20 CLR 580, *Moss v. Donohoe* (1915) 20 CLR 615, *Berwin v. Donohoe* (1915) 21 CLR 1 and *Welsbach Light Company of Australia Limited v. The Commonwealth* (1916) 22 CLR 268.

[33] (1915) 20 CLR 425.

[34] At 458.

His Honour found that the incidental power and the defence power both justified the passage of the relevant retrospective legislation.

The reasoning in *Kidman* was significant in the more recent and important decision of the High Court in *Polyukovich v. The Commonwealth* (*The War Crimes Act Case*)[35]. Powers J.'s decision is referred to on several occasions in the extensive judgments in that case but most significantly by Gaudron J. where her Honour discussed the circumstances in which *ex post facto* or retroactive laws can usurp judicial power by declaring a person guilty of an offence by statute rather than by the determination of a Court. In discussing that issue she referred to Powers J.'s judgment in *Kidman* as showing "the true nature of what is commonly called an '*ex post facto*' law or a 'retroactive law'."[36]:

> "His Honour described a law of that kind as 'a law by which, after an act has been committed which was not punishable … at the time it was committed, the person who committed it is declared to have been guilty of a crime and to be held liable to punishment'. As is there made clear, it is the statute or the Act of the Parliament, and not the determination of a Court, by which a person is declared to have been guilty. That is the usurpation [of judicial power]."

It has to be said that that passage appears to be the high water mark of recent reliance upon the judgments of Sir Charles Powers by the High Court.

So far I have dealt with areas of the law, constitutional and industrial law and retrospective criminal legislation, where Sir Charles' judgments may have had some significance. I shall now turn to what one might think of

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[35] (1991) 172 CLR 501.

[36] At 706.

as lost opportunities. There were many lost opportunities associated with the proper interpretation of s.92 of the *Constitution* until the High Court's decision in *Cole v. Whitfield*[37]. Nobody can blame Sir Charles for not getting that problem right. His first attempt was in *Duncan v. Queensland*[38]. He correctly identified that the critical issue was that, where the section said "trade, commerce and intercourse among the States … shall be absolutely free", it did not say from what it should be free. He also knew that free trade meant something more than the absence of customs duties or bounties because s.90 of the *Constitution* already covered that situation[39]. He went on to say[40]:

> "The Constitution must be read as a whole, and in my opinion the words 'absolutely free' in sec. 92 mean free from any restriction not authorized by the Constitution itself – that is, by any express restriction contained in the Constitution, or by the lawful exercise of any power granted to the Commonwealth or retained by the States. … I hold that no State has the power to prevent trade and commerce among the States in marketable commodities which the owner in any one State is qualified to sell, and is at liberty to sell and dispose of, in that State. … There is to be no obstruction or restriction because of State boundaries; State boundaries are to be forgotten for the purpose of 'inter-state trade, commerce or intercourse'."

So far so good. Further passages in that judgment, however,[41] and his Honour's later decision in *Ex parte Nelson [No. 1]*[42] do not inspire any confidence that he would ever have arrived at the formula eventually

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[37] (1988) 165 CLR 360.

[38] (1916) 22 CLR 556, 642-653.

[39] See at 643-644.

[40] At 644-645.

[41] At 651 in particular and cf. *Barley Marketing Board (N.S.W.) v. Norman* (1990) 171 CLR 182.

[42] (1928) 42 CLR 209, 249-252.

adopted in *Cole v. Whitfield* that the freedom guaranteed to inter-state trade and commerce under s.92 is freedom from discriminatory burdens in the protectionist sense mentioned in that judgment[43].

On the same theme, the Court's decision in *McBride v. Sandland*[44] has been criticised in some quarters for imposing too strict a test as to the doctrine of part performance, that the acts relied upon as part performance be exclusively referrable to the contract alleged. His Honour was party to that approach[45] as were the other members of the Court, but some commentators suggest that the greater flexibility shown by the decision of the House of Lords in *Steadman v. Steadman*[46] according to which a claimant will succeed if it can be shown that on the balance of probabilities the acts done are referrable to the contract alleged should be preferred.

There are other decisions that have attracted criticism. For example his and Sir Edmund Barton's views about whether ships' pilots acted as agents of the Queensland Government in *Fowles v. Eastern & Australian Steamship Co. Ltd*[47] were rejected on the appeal in that case to the Judicial Committee of the Privy Council in favour of Isaacs J.'s views that the pilots were independent public officers[48]. But these types of differing views are common among judges. They cannot be used to condemn.

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[43] (1988) 165 CLR at 395.

[44] (1918) 25 CLR 69.

[45] At 98-99.

[46] [1976] AC 536.

[47] (1913) 17 CLR 149.

[48] [1916] 2 AC 556, 561-562 and *Oceanic Crest Shipping Co. v. Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626, 673-674.

The overall impressions one forms from reading his decisions are that he was generally in favour of central power in the Commonwealth, particularly in relation to the conciliation and arbitration power. He was also inclined to uphold the exercise of power by government[49], but the liberties of individuals exposed to that power were important to him[50].

The obituary in the Australian Law Journal says that his patience and courtesy both in the High Court and on the Commonwealth Arbitration Court were marked and one gains the impression from his decisions that he was a humane man, concerned about the results of his judgments and unwilling to be inhibited by prejudice[51].

Some of his decisions can be criticised for lack of structure and clarity[52]. But, on the whole, they are confident and clear, the work of an apparently articulate man, a regular dissentient who, when he gave reasons, tried to ensure they could be understood. He often agreed or concurred with other judgments or helped prepare a joint judgment. My impression is that he agreed with Isaacs J. very frequently and with Higgins J. to a

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[49] See, e.g. *R v. Snow* (1915) 20 CLR 315, 365-379; *Taylor v. Attorney-General of Queensland* (1917) 23 CLR 457, 479-481 but cf. his reasons in *McCawley v. The King* (1918) 26 CLR 9, 82-86. They were the majority views in the High Court but were overturned in the Judicial Committee; [1920] AC 691.

[50] See his lengthy dissenting views in *Ferrando v. Pearce* (1918) 25 CLR 241, 264-290.

[51] See, e.g., *McBride v. Sandland* (1918) 25 CLR at 98 and *Nelan v. Downes* (1917) 23 CLR 546, 574.

[52] See, e.g., *Meyers v. Casey* (1913) 17 CLR 90, 124-148; *Fowles v. Eastern & Australian Steamship Co. Ltd.* (1913) 17 CLR 149, 197-222; *MacDermott v. Corrie* (1913) 17 CLR 223, 252-260; *Duncan v. Queensland* (1916) 22 CLR 556, 642-653 and *Ferrando v. Pearce* (1918) 25 CLR 241, 264-290.

significant extent. Many of his judgments were brief and proceeded on the basis that the judgments already delivered before his had dealt with much of the evidence and argument. One obtains the impression, however, that when Queensland appeals came to the High Court he generally wished to write his own decision even if a brief one.

His contribution to the work of the Court diminished over time, probably because of the demands of his work on the Commonwealth Arbitration Court, whose President he became after the resignation of Higgins J. in 1921. He had resigned as a Deputy President in 1920 but was reappointed and served as President between 1921 and 1926. It is during that period, in particular, that his contribution to the jurisprudence of the Court diminished.

The most important decision delivered by the Court when he was a member was the *Engineers' Case*[53], decided in 1920. He did not sit. We do not know why but he may have been on leave[54]. So he missed the opportunity to express his views on the fundamental issues governing the interpretation of the *Constitution*. He would, however, have certified that the matter should have gone to the Judicial Committee of the Privy Council, contrary to the majority view on that issue[55].

While on the Court he had the good sense to avoid the role of inquiring into the arrests of seven members of the Irish Republican Brotherhood (Sinn Fein). In 1918, Griffith CJ nominated Powers J. to the government

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

[54] *Oxford Companion to the High Court of Australia* at 549.

[55] *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd* (1921) 29 CLR 406, 413.

for that task but then, after consultation with him, withdrew the nomination[56]. In refusing the task he may have anticipated the approach adopted in 1923 by the Victorian Supreme Court under its Chief Justice, Sir William Irvine, and the similar resistance by Sir Adrian Knox, Sir Samuel Griffith's successor as Chief Justice of Australia, to government pressure to appoint judges to conduct Royal Commissions[57].

It was while he was President of the Commonwealth Arbitration Court that Powers J.'s attempt to be knighted involved conduct that was extraordinarily unjudicial. As Humphrey McQueen puts it[58]:

> "In 1925, Powers wrote to the Attorney-General asking for a knighthood and specifically mentioned his blocking of the Basic Wage Royal Commission's findings, his restoration of the forty-eight hour week and his cutting of 12/- per week off fitters and turners' wages:
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> > [Powers wrote:] 'All these were very unpleasant duties but necessary in the interests of the Commonwealth … Imagine for 11 years refusing requests to increase the basic wage… Where men have families of more than two it is hard work to insist on them getting only the basic wage …'
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> Powers unavailingly pleaded that such devoted public services, and the worry which they had caused him, more than warranted the reward of a knighthood."

A sitting High Court Judge and President of the Commonwealth Arbitration Court who sought that form of reward in those terms from the Government that had benefited politically from his decisions should not,

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[56] R. B. Joyce, *Samuel Walker Griffith* (UQP, 1987), p 354. See also *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 34 fn.100.

[57] Graham Fricke, "The Knox Court: Exposition Unnecessary" (1999) 27 Federal LR 121, 127.

[58] op. cit. at pp. 196-197.

in my view, have held those offices. He seriously compromised their independence. One wonders what had happened to the politically liberal advocate of workers' rights in the 1890s described by Professor Saunders in her paper and once referred to as the "leader of the extreme radical party in Queensland"[59].

He was eventually knighted but not pursuant to that request and retired in 1929, dying in Melbourne in 1939 survived by his wife and nine of their eleven children.

May I end on a sociological note. My researches for this paper took me back to a work by Eddy Neumann published in 1973 analysing the social backgrounds of High Court judges[60]. I had read it long ago, shortly after it was published, while I was working as Sir Harry Gibbs' associate. Sir Harry was sceptical about its worth. He thought it ignored the habits of mind and attitudes that barristers and judges develop as a result of their education, training and experience. I am sure he was right. I did read it, however, and found it full of useful and interesting information.

For example all High Court justices until then had been men, who went, generally speaking, to private schools and excelled at university and the Bar. Sir Charles fitted the description less than most. Granted he went to a private school but he was one of the few who did not obtain a degree and he practised almost wholly as a solicitor. Like most of the other judges of the Court in the early days he had a political career but he was

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[59] *Argus* 18 February 1913 (6a) referred to in Neumann, op. cit., p. 57.

[60] Neumann, op. cit.

not heavily involved in the Federation movement. Did he have other qualifications that the sociologist had missed?

The answer came to me quite by chance. My colleague in our chambers, the then Philip McMurdo QC, was appointed to the Supreme Court of Queensland while I was researching this paper. Shortly after the news of his appointment had been published he told me he had been pleased to receive a note from Justice Callinan pointing out what a sound qualification for judicial office it was to have captained a Brisbane Grammar School premiership winning First XI. Justice McMurdo told me that he wrote back in his facetious way asking: "Is there any other qualification?"

Now Justice McMurdo is a modest man but I have known him for a long time and knew that he had captained a Brisbane Grammar School First XI. I did not know that his team had won the premiership. Similarly I knew that Justice Callinan, also a modest man, had been a highly talented cricketer from Brisbane Grammar School, but did not know until then that he too had captained a Brisbane Grammar School premiership winning First XI.

By then, however, I also knew that Sir Charles Powers had attended both Ipswich Grammar School and Brisbane Grammar School and had been a talented cricketer. The penny dropped. My research broadened. With the assistance of staff at the school I discovered that Sir Charles also captained the Brisbane Grammar School First XI - in 1870. Whether they won any premiership I cannot say. The records are silent and probably the only competition would have been from Ipswich Grammar School.

But I think we can safely assume that, if there was a premiership, his team probably won it.

Through the same research I can also tell you that when he was 28 years of age in 1882 he captained a Wide Bay team against the Hon. Ivo Bligh's touring English team and played for Maryborough against another English touring team in 1885[61]. Unfortunately he scored a pair of ducks in each match.

It would be unkind to draw too close an analogy between those scores and his contribution to the High Court. The better summary is contained in the *Australian Dictionary of Biography*[62]:

> "Powers was described in 1921 as 'tall, erect, grey-haired and dignified' with everything about him 'to win respect and admiration'. Better remembered for his work in the Arbitration Court than as a High Court justice, he was noted throughout his career for his patience and courtesy."

J.S. DOUGLAS QC
Chambers
26 March 2003

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[61] Warwick Torrens, *A Cricket Centenary: England in Queensland* (ABC Printing Brisbane) pp. 26-28.

[62] Vol. 11 1891-1939 p. 271.