THE SIR HARRY GIBBS ORATION
'SIR HARRY GIBBS AND THE CONSTITUTION'

D.F. Jackson Q.C.[*]

INTRODUCTION

It is a great privilege to deliver the first of the Bar Association's Orations to honour the memory of the Right Honourable Sir Harry Gibbs, GCMG, AC, KBE, a Justice from 1970 to 1981 and Chief Justice from 1981 to 1987 of the High Court of Australia. He was a most distinguished member, and product, of the Queensland Bar. He was also one of its great promoters and defenders.

Sir Harry had a long life. He was born in 1917 and was eighty-eight when he died earlier this year. His involvement in constitutional affairs took place largely in the second half of his life. In years to come, those delivering this Oration will not have known or seen him. I had the good fortune, however, to know him for forty-two years. I was his Associate in 1963 and 1964, I appeared before him on a number of occasions as a junior barrister in the period until he moved to Sydney in 1967, and I argued many cases, constitutional and non-constitutional, before him in the High Court. We also were on friendly terms and after his retirement from the Court I saw him regularly socially, discussing, in the way of lawyers, the failings of others. I hope I may be forgiven if I include in these remarks some personal observations.

This paper will deal principally with his decisions on constitutional matters when a member of the High Court. It should be remembered, however, that his involvement in affairs concerning the Constitution was not only as a jurist. From an early point after retirement from the Court he was active in commenting on constitutional matters, including decisions of the Court which he had left. He was the first President of the Samuel Griffith Society, and held that office for the thirteen years preceding his death. He was also active in the campaign against the proposal for an Australian republic, in 1999.

Perhaps golf and bowls are not as popular as they were, perhaps it is the compulsory retiring age of 70, but it seems more common now than it was at the time of his retirement from the High Court for former Justices to comment publicly on issues which are constitutional or on the constitutional/political boundary.[1] He was a very private man and I was rather surprised that he would expose himself in that way to inevitable criticism.

I have to guess at the factors which led him to take a more public role. They included, I think, a feeling that the legal order had changed very dramatically, and not altogether for the better, from that prevailing when he entered it. Another was that, when a judge, his reasoning on the constitutional issues he regarded as important had most often reflected a minority view, although he was not necessarily in the minority in the actual result. Having left the Bench he was more free to express his own views.

---

[*] Bar Association Of Queensland delivered at the Banco Court, Supreme Court of Queensland, 4 November 2005

[1] There were always exceptions, of course. Sir Isaac Isaacs was an advocate of constitutional reform. Dr Evatt retired from the High Court to go into politics. I counselled Sir Harry against public involvement in controversial issues, but to no avail. I thought it would do his reputation no good. Amongst other things I said: 'You ought to be careful. People will say you're the first Justice since Bert Evatt to leave the High Court to go into politics.' He took badinage in good spirit, but his views were strongly held and, on occasions when he spoke publicly, could be expressed with some vigour.

THE FEDERALIST

What were those views? It involves no original detective work on my part to say that his approach to the Constitution was federalist. That was evidenced in later life by his presidency of the Samuel Griffith Society. It is a body which is avowedly federalist in its outlook.[2]

It is perfectly legitimate, of course, to hold or express views about the Constitution which are federalist, or centrist, or anything else, but those terms are labels at a high level of abstraction. What Sir Harry Gibbs meant, I think, by being federalist was that he had an underlying conception that the nation brought into being by the Constitution was a federation of States, and that the States and the new polity, the Commonwealth, each had its 'role' in government nationally, and regionally. In one sense, of course, that does no more than to restate the question, and in a way which assumes answers to a number of underlying issues. In particular, in speaking of the 'roles' of the polities in the federation, does one start with an *a priori* view of what the Constitution was intended to effect? Does one look only at the words of the Constitution? And in any event, what approaches should be adopted to interpreting the words of the Constitution? Notwithstanding difficulties of that kind, what one can say about such statements is that – and no doubt this itself involves significant elements of restating the issue – they reflect an underlying view that the Constitution involves two levels of government, federal and State, and that, by interpretation or implication, the ambit attributed to the powers of the Commonwealth should not reduce the States to financial mendicants, to impotence in development of policies or to being mere agents of the Commonwealth.

The federalist view could be seen in one of his first constitutional cases on the High Court, *Victoria v Commonwealth* (1971) 122 CLR 353, the issue being whether the Commonwealth could levy payroll tax on the payrolls of the States. Whilst he held the tax valid, he said:

> The intention of the Imperial legislature in enacting the Constitution Act was to give effect to the wish of the Australian people to join in a federal union and the purpose of the Constitution was to establish a federal, and not a unitary, system for the government of Australia and accordingly to provide for the distribution of the powers of government between the Commonwealth and the States who were to be the constituent members of the federation.
>
> and:
>
> In some respects the Commonwealth was placed in a position of supremacy, as the national interest required, but 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

[2] The first of the Society's 'Immediate Objectives' is '[t]he need, in view of the excessive expansion of Commonwealth power, to redress the federal balance in favour of the States, and to decentralise decision making.' In the entry for Sir Harry in the *Oxford Companion to the High Court of Australia* (2001) 303, I bear responsibility for describing the Samuel Griffith Society as 'a conservative body formed to promote the discussion of constitutional law and related issues'. 'Conservative', I think, was an inexact description of the body. It has sponsored many papers from contributors from all parts of the political and legal spectrum.

> 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. Thus, the purpose of the Constitution, and the scheme by which it is intended to be given effect, necessarily give rise to implications as to the manner in which the Commonwealth and the States respectively may exercise their powers, vis-â-vis each other. [3]

The sources of this approach to the Constitution do not immediately appear. I doubt, however, that his practice as a barrister made much contribution to it.[4] I know that he gave advice on a significant number of constitutional matters when at the bar,[5] but he did not appear as counsel in many such cases. According to the *Oxford Companion to the High Court of Australia* he appeared as counsel in 28 cases in that court. [6] Only two of them were constitutional. Each was an excise case.[7] In one he challenged the State law; in the other he defended it.

The more likely cause, I think, is no more than a reflection of the times, and of geography. Although Sir Harry lived in Sydney from 1967, he was very much a product of Queensland, and returned to it frequently. He had grown up when there was not the ease of interstate travel that exists today, and when the governments of the States played a much greater part in the affairs of individuals. It was a time also when the activities of the Commonwealth government in States other than New South Wales and Victoria seemed somewhat remote. In the legal area there were few federal judges. The High Court itself had had very few members from States other than New South Wales and Victoria. Its premises were in both Melbourne and Sydney, and its trips to other States were annual 'visitations'. In short, in New South Wales and Victoria the Commonwealth was a more familiar entity than in the other States. There was also a conception, held rightly or wrongly, that there were some areas which really were the 'preserve' of the States and should be left to them. 'States rights' was a political slogan, but it was thought to have a natural and rational, perhaps even constitutional, base.

Sir Harry's first few years as a Justice of the High Court were initially relatively 'quiet' in constitutional terms. That changed dramatically, however, during the Whitlam government from 1972 to 1975, and thereafter. The Labour Party had been out of office for many years, nearly a quarter of a century, and it came into office with plans for Commonwealth legislation in many new areas. The Fraser government which followed it was also quite prepared to use Commonwealth powers.[8] So too have succeeding Commonwealth governments, whatever their political hue. There has been a vast increase in the amount of federal legislation since 1972 and, as one might expect, the legislative ambitions of the Whitlam government and its successors gave rise to a considerable amount of constitutional litigation during Sir Harry's period on the High Court.

It would be impossible in a limited time to discuss each of the constitutional issues with which Sir Harry Gibbs was concerned, but I would like to make particular reference to four aspects, namely:

---

[3] 122 CLR 353, 417-18.
[4] Except perhaps in relation to duties of excise, a matter discussed below.
[5] I saw some of them in the 1970s.
[6] 2001) 165.
[7] *Brown's Transport Pty Ltd v Knopp* (1958) 100 CLR 117; *Whitehouse v Queensland* (1960) 104 CLR 609. In the latter case he also appeared in the Privy Council appeal: *Dennis Hotels Pty Ltd* v *Victoria* (1961) 104 CLR 621.
[8] See *Murphyores Incorporated Pty Ltd v Commonwealth* (1976) 136 CLR 1.

(a) the composition of the Commonwealth Parliament;
(b) 'money';
(c) the judiciary; and
(d) Commonwealth legislative powers.

THE COMPOSITION OF THE COMMONWEALTH PARLIAMENT

The Constitution provides for two Houses of Parliament, the House of Representatives and the Senate.[9] The former, the lower House, is to be elected in proportion to population; the greater the population of a State, the more members it is to have.[10] The upper House, the Senate, is to have equal numbers of Senators for each Original State.[11] Thus Tasmania has as many as Queensland. Their possible terms are twice as long as those of members of the House of Representatives.[12] The convention is that the government of the day is the party which has the majority in the House of Representatives, and the Prime Minister is in that House.[13]

Except in relation to money bills, the Senate has the same powers as the House.[14] We have had a relatively rigid party system, more so than in the United States, and the Senate has not been quite the 'States' House' which some envisaged, even though for quite long periods the government of the day has not had a majority in that House. The possibility of disagreement between the Houses on the enactment of legislation will arise from time to time, particularly if the Opposition in the House has, or can secure, a majority in the Senate. Such disagreements are to be resolved by the procedure of s 57 of the Constitution.[15] It

---

[9] *Constitution* s 1. As in many other respects, the model of the United States Constitution in the names of the Houses was followed.

[10] *Constitution* s 24. Note that under s 24, an 'Original State' must also have a minimum of five members.

[11] *Constitution* s 7.

[12] *Constitution* ss 7, 13.

[13] Whilst the Constitution makes reference to a 'Federal Executive Council' (s 62) and to 'Ministers of State' (s 64), the office of Prime Minister is not specifically referred to.

[14] *Constitution* s 53.

[15] Section 57 provides:

> If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, and if after an interval of three months the House of Representatives, in the same or the next session, again passes the proposed law with or without any amendments which have been made, suggested or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representative will not agree, the Governor-General may dissolve the Senate and the House of Representatives simultaneously. But such dissolution shall not take place within six months before the date of the expiry of the House of Representatives by effluxion of time.
>
> If after such dissolution the House of Representatives again passes the proposed law, with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may convene a joint sitting of the members of the Senate and of the House of Representatives.
>
> The members present at the joint sitting may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives, and upon amendments, if any, which have been made therein by one House and not agreed to by the other, and any such amendments which are affirmed by an absolute majority of the total number of the

involves dissolution of both Houses, i.e. 'double dissolution', and ultimately a joint sitting of the Houses following the consequent election, if the disagreement continues.

In April 1974 the Governor-General Sir Paul Hasluck proclaimed a double dissolution under s 57 because of failure by the Senate to pass six laws proposed by the Whitlam Government.[16] After the election, at which the Government was returned, the Senate again had not passed the Bills, and the Governor-General convened a joint sitting.

Actions were then brought by two Opposition Senators, and by the State of Queensland, seeking, to put it shortly, injunctions to prevent the holding of the joint sitting: *Cormack v Cope, Queensland v Whitlam* (1974) 131 CLR 432. The applications failed, it being left to the plaintiffs to challenge the proposed laws if they were ultimately passed. An important question, not then finally resolved, was whether the issue was justiciable, i.e. was it an issue which the High Court could decide, or was it for Parliament itself.

The six Bills were passed at the joint sitting and the possible challenge foreshadowed in *Cormack v Cope* emerged in *Victoria v Commonwealth* (1975) 134 CLR 81, in which the validity of the *Petroleum and Minerals Authority Act 1973* (Cth) was in issue. The challenge succeeded, it being held that the Senate had not 'rejected or failed to pass' the Bill when it was first in that House before the double dissolution.

In *Victoria v Commonwealth* the arguments advanced against intervention by the Court were somewhat different from those advanced in *Cormack v Cope*.[17] These arguments failed, and the principle was thus established that the Court could determine whether the requirements of s 57 had been satisfied. This was an important decision as to the respective roles of Parliament, the executive and the judiciary. Sir Harry was one of the majority, and an echo of the federalist can be heard in his observation that:

> Under the Constitution the Senate does not occupy a subordinate place in the exercise of legislative power. It is an essential part of the Parliament in which the legislative power of the Commonwealth is vested. It is expressly provided by s 53 of the Constitution that, except as provided in that section, the Senate

---

> members of the Senate and House of Representatives shall be taken to have been carried, and if the proposed law with the amendments, if any, so carried is affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives, it shall be taken to have been duly passed by both Houses of the Parliament, and shall be presented to the Governor-General for the Queen's assent.

[16] They were the proposed *Commonwealth Electoral Act (No. 2) 1973* (Cth); *Senate (Representation of Territories) Act 1973* (Cth); *Representation Act 1973* (Cth); *Health Insurance Commission Act 1973* (Cth); *Health Insurance Act 1973* (Cth); *Petroleum and Minerals Authority Act 1973* (Cth).

[17] They were summarised by Barwick CJ at 117-8 as being:

> The Commonwealth … advanced an argument of great significance. The submission was that this Court has no power to declare that a law which had not been passed in accordance with the law-making requirements of s 57 of the Constitution was invalid, a submission somewhat akin to, though not identical with but of like consequence to, a submission which had been made by the Commonwealth in *Cormack v Cope* …[where] it was claimed that as long as an Act has received Royal assent the Court cannot entertain the question whether it was passed in accordance with the constitutional requirements relating to the law-making processes. The argument has two distinct bases: first, that the question whether the constitutional law-making process had been followed is not in any case a justiciable matter; second, that the decision of the Governor-General that the Bill was a proposed law within the operation of s 57, a decision to be implied from his assent to the Bill, was decisive and unexaminable by the Court. There was another somewhat cognate submission, namely, that in any case the provisions of s 57 are directory only, so that failure to observe them will not produce invalidity.

> shall have equal power with the House of Representatives in respect of all proposed laws. [18]

Issues as to the composition of the Houses of Parliament arose again in the '*Territory Senators Cases*', *Western Australia v Commonwealth* (1975) 134 CLR 201 and *Queensland v Commonwealth* (1977) 139 CLR 585.

The government of the Territories is dealt with by s 122 of the Constitution. It provides amongst other things that the Commonwealth Parliament may 'allow the representation of such territory in either House of Parliament to the extent and on the terms which it thinks fit.' Section 7 of the Constitution, however, provides that the Senate shall be 'composed of' senators from the States and the issue in the cases was whether 'representation' of the Territories could be by a person who was a senator, or had to be by some lesser form of representation. [19]

In the first case the Act was held valid by a majority of 4:3, Sir Harry being a dissentient. His view was that:

> the Senate is an essential part of the Parliament in which the legislative power of the Commonwealth is vested. 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. If the Senate has in practice not fulfilled the role that was originally expected of it, that is not to the point. [20]

A further challenge was mounted by Queensland a little later, largely on the basis that Sir Edward McTiernan (one of the majority) had retired and been replaced by Sir Keith Aickin, it being thought he would be more amenable to the States' case, and on the basis of some broad hints from Sir Garfield Barwick that another challenge would be worthwhile.[21] The perception of Sir Keith's likely view was correct, but the result in the case was the same, because Sir Harry Gibbs and Sir Ninian Stephen felt that their duty required them to follow the earlier decision. The reasons for judgment in the case deal in detail with the circumstances in which the High Court should overrule its previous decisions. The following passage from Sir Harry's reasons, in which he maintained his previous view, but felt obliged to follow the Court's earlier decision, indicates the measure of the man:

> 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 a decision did not survive beyond the rising of the Court. A Justice, unlike a legislator, cannot introduce a programme of reform which sets at nought decisions formerly made and principles formerly established. 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

[18] 134 CLR 81, 143.
[19] As provided for by the *Senate (Representation of Territories) Act 1973* (Cth).
[20] 134 CLR 201, 246.
[21] See *A-G (NSW) ex rel McKellar v Commonwealth* (1977) 139 CLR 527, 532-3.

> Justice may give effect to his own opinions in preference to an earlier decision of the Court. [22]

He was, as I have said, a man of strong views but he recognized that the institution was greater than the individual.[23]

MONEY

To function, governments need money. To obtain it they impose taxes, and by s 51(ii) of the Constitution the new Commonwealth was given power to make laws with respect to 'taxation; but so as not to discriminate between States or parts of States'.

For most of us, when the gloomy subject of taxation is mentioned, one's mind turns to income tax. But that was not always so, and certainly it was not so at federation when the main sources of colonial revenue were duties of customs and duties of excise.[24]

The Constitution provided in s 88 that within two years after the establishment of the Commonwealth, the Commonwealth was to provide for uniform duties of customs. The imposition of uniform duties of customs would trigger the operation of a number of other provisions of the Constitution, of which two are of present relevance.

One was s 92, which provided that 'trade, commerce and intercourse among the States' was thereafter to be 'absolutely free'. The duties imposed by the colonies on intercolonial movement of goods would thus be abolished. The other was s 90 which provided that on the imposition of uniform duties of customs, the Commonwealth's power to impose duties of customs and excise would become exclusive. There was a transitional provision for the first ten years,[25] but the effect thereafter was that States' principal sources of revenue had gone.

There was also a provision in s 96 that during the first ten years after the establishment of the Commonwealth, and thereafter until Parliament should otherwise provide, the Parliament might 'grant financial assistance to any State on such terms and conditions as the Parliament thinks fit'.

The very broad scope given to s 96 in the '*Uniform Tax Cases*',[26] together with high rates of income tax, has enabled the Commonwealth to be dominant in Commonwealth-State financial relations. It has maintained a system of grants, often tied to the requirement that the States adopt particular courses of action. The freedom of manoeuvre of the States has become significantly reduced.

This was a topic on which Sir Harry felt that the system had become rather badly skewed, and should be changed.[27] In the nature of things there was relatively little he could do about this judicially, but his underlying view was reflected in his views on excise.

---

[22] 139 CLR 585, 599. The first sentence of this passage was referred to recently by McHugh, Gummow and Heydon JJ in *McNamara v Consumer Trader and Tenancy Tribunal* [2005] HCA 55, 661.

[23] The composition of the Houses of Parliament arose in other cases in this period. See *A-G (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1; *A-G (NSW) ex rel McKellar v Commonwealth* (1977) 139 CLR 527.

[24] Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed, 1910) 530. Of course the introduction of the goods and services tax turns the clock back in some respects.

[25] Section 87.

[26] *South Australia v Commonwealth* (1942) 65 CLR 373; *Victoria v Commonwealth* (1957) 99 CLR 575.

[27] He was not alone in this view. As early as August 1944 the Rt Hon W A Watt, said that 'the financial relations between the Central Government and the States' were the 'outstanding weakness' of the Constitution. See the Foreword of Alfred Deakin, *The Federal Story: the Inner History of the Federal Cause* (1944).

I mentioned above that the Constitution denied the States the power to impose duties of customs or excise. The practical extent of that deprivation depended on the ambit of the terms 'duty of customs' and 'duty of excise'. No particular difficulty arose in relation to duties of customs, but the position in relation to duties of excise was different in two significant respects: how to identify a duty of excise, and how to approach the determination of that issue.

The difficulty in identifying duties of excise arose because at federation the scope of the term in s 90 was not entirely clear. The meaning which it had in practice in Australia at that time was as a reference to the taxes imposed on the producers of beer, spirits and tobacco products, and it seemed apparent enough that it would apply to any tax imposed by reference to manufacture or production on manufacturers or producers of any type of goods. The concept, however, had a number of much wider meanings, particularly in England where it referred to whatever taxes – some quite unrelated to goods, or to their manufacture or production — were administered by the Excise Commissioners.

In *Parton v Milk Board (Victoria)* (1949) 80 CLR 229 it had been held that a tax on a commodity at any point in the course of production or distribution before it reached the consumer was a duty of excise. As the concept of duty of excise continued to be expanded by judicial decision, the areas of possible State taxation were reduced correspondingly. That led the States to exercises in considerable ingenuity to develop taxes which were not imposed on a step in production, manufacture, or distribution of goods.

The principal course adopted, which Sir Harry had defended successfully as a barrister in *Whitehouse v Queensland*, was to impose a licence fee, not based on dealings in the goods in the period for which the licence would be in force, but based on the dealings which took place in the previous licence period. Legislation along these lines was adopted enthusiastically by the States. Because it involved a very 'legalistic' distinction, it gave rise to the second question adverted to earlier – how should the issue be approached, as one of substance or as one of form?

In *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 174, *M G Kailis (1962) Pty Ltd v Western Australia* (1974) 130 CLR 245, *H C Sleigh Ltd v South Australia* (1977) 136 CLR 475 and *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59, Sir Harry looked at the issue as one of form.[28] Whilst that view was also held by some other members of the Court, form had not always prevailed over substance in this connection,[29] and in *Ha v New South Wales*,[30] the form (or 'criterion of liability') approach was rejected, leaving *Whitehouse v Queensland* and its companion case *Dennis Hotels v Victoria* sidelined to practical irrelevance. My own view is that that is where those decisions deserve to be. They represented, I think, an approach which did not sufficiently reflect the fact that a constitution was being interrupted, and that its prohibitions should not be avoided by tricks of legislative drafting.

---

[28] In *Logan Downs* he said at 64:

> conflicting opinions have been expressed as to whether the criterion of liability under the statute imposing the tax, or the practical effect of the legislation, is determinative of the question whether the tax is a duty of excise. I accept the former view, although as I endeavoured to explain in *Dickenson's Arcade Pty Ltd v Tasmania* that does not mean that the name given to tax by the taxing statute, or the form of the provisions of that statute, will be decisive; it is still necessary to determine the legal effect of those provisions according to their proper construction.

[29] See, eg, *Peterswald v Bartley* (1904) 1 CLR 497; 511; *Ha v New South Wales* (1997) 189 CLR 465, 498.

[30] (1997) 189 CLR 465.

The other aspect I wish to discuss in this section concerns s 92 of the Constitution – 'trade, commerce and intercourse among the States shall be absolutely free'. The operation of s 92 had been the subject of many cases, before, and during, the time that Sir Harry was a member of the High Court.[31] The tests to be applied were not altogether clear, however, and their application was being eroded by dicta from some of the Justices, who felt that these tests were quite inappropriate.

Just over a year after his retirement, the Court unanimously decided *Cole v Whitfield* (1988) 165 CLR 360 in which it adopted the new test of non-discrimination, namely that a law would only contravene s 92 if it discriminated against, to put it shortly, interstate trade or commerce, in order to prefer intrastate trade or commerce.

The decision in *Cole v Whitfield,* to my mind, was the catalyst for Sir Harry 'going public' on constitutional issues. (At least he did not go so far as Sir Garfield Barwick who announced that the decision was 'tosh'.) In fact the *Cole v Whitfield* approach seems to have been largely satisfactory. There have been many fewer s 92 cases.

THE JUDICIARY

In any consideration of Sir Harry Gibbs' work as a member of the High Court it needs to be remembered that the period was one of profound change for the Australian legal system and for the High Court itself.

One feature was that appeals to the Privy Council were finally abolished, and the role of the High Court as the final appellate court for the nation confirmed. Another, of great long term significance, was the establishment of the two large federal courts, the Family Court of Australia[32] and the Federal Court of Australia.[33] Each took from the Supreme Courts some of the federal jurisdiction previously exercised. Additional federal jurisdiction was also given to them. Conflicts inevitably arose, especially where a federal court was given exclusive jurisdiction in a matter. These conflicts are now largely of historical interest, but I would mention one area, namely the 'accrued jurisdiction' of the Federal Court. The accrued jurisdiction was held to permit the Court to decide issues not arising under federal law but sufficiently factually connected with the circumstances which had attracted federal jurisdiction. (See *Phillip Morris Incorporated v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457.[34]) It will come as no surprise to hear that Sir Harry was not in favour of the existence of such a jurisdiction.

Arguments about the ambit of the powers which might validly be conferred on the Family Court also were before the Court on a significant number of occasions.[35]

MAJOR DECISIONS ON COMMONWEALTH LEGISLATIVE POWERS

Whilst many decisions on this topic in which Sir Harry participated are also now of historical interest only, they were important in their time. May I mention some which have an enduring effect.

---

[31] Three instances during his membership are *S O S (Mowbray) Pty Ltd v Mead* (1972) 124 CLR 529; *Holloway v Pilkington* (1972) 127 CLR 391; *North Eastern Dairy Co Ltd v Dairy Industry Authority of New South Wales* (1975) 134 CLR 559.

[32] *Family Law Act 1975* (Cth).

[33] *Federal Court of Australia Act 1976* (Cth).

[34] An attempt to review that decision failed in *Stack v Coast Securities Pty Ltd* (1983) 154 CLR 261.

[35] See, eg, *Russell v Russell* (1976) 134 CLR 495; *Reg v Demack; Ex parte Plummer* (1977) 137 CLR 40; *Reg v Lambert; Ex parte Plummer* (1980) 146 CLR 447; *Ascot Investments Pty Ltd v Harper* (1981) 148 CLR 337.

Firstly, there is *New South Wales v Commonwealth* (1975) 135 CLR 337 ('*Seas and Submerged Lands Act Case*'), in which the Commonwealth was held to have sovereignty over the territorial sea and sovereign rights in respect of the continental shelf. The States' cases in relation to the continental shelf was always rather speculative, but their argument in relation to the territorial sea was much stronger. It failed when the majority took the view that the instruments which established the colonies had described boundaries which were land boundaries. The territorial sea was therefore external to the States, and they had no sovereign rights in respect of it. Sir Harry dissented, saying:

> for the purposes of the municipal law of Australia there exists that division of sovereign authority which is characteristic of, if not essential to, a federal constitution. …The Convention recognizes that the sovereignty of Australia extends to its territorial sea: it says nothing as to whether that sovereignty is vested solely in the Commonwealth or is divided between the Commonwealth and the States. [36]

Secondly, *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107 raised the question whether the *Trade Practices Act 1974* (Cth) bound the Crown in right of a State. Sir Harry held that it did not, saying that although the Commonwealth could legislate so as to bind a State:

> the States are neither subjects of the Commonwealth nor subordinate to it. It is a consequence of our federal system that 'two governments of the Crown are established within the same territory, neither superior to the other'. It seems only prudent to require that laws of the Parliament should not be held to bind the States when the Parliament itself has not directed its attention to the question whether they should do so. [37]

Thirdly, *Koowarta v Bjelke Peterson* (1982) 153 CLR 168 dealt with the validity of the *Racial Discrimination Act 1975* (Cth) which was sought to be supported by inter alia, the external affairs power. Sir Harry held that the law was invalid. His view was that a law giving effect within Australia to an international agreement would only be valid under s 51(xxix) if the agreement was with respect to a matter which itself could be described as an external affair, and that no effective safeguard against the destruction of the federal character of the Constitution would be provided by accepting the suggestion of Evatt and McTiernan JJ in *R v Burgess*; *Ex parte Henry* (1936) 55 CLR 608, that the power given by s 51(xxix) might not be attracted if entry into a convention was merely a device to procure for the Commonwealth an additional domestic jurisdiction. [38] He said:

> It is apparent that a narrower interpretation of par.(xxix) would at once be more consistent with the federal principle upon which the constitution is based, and more calculated to carry out the true object and purpose of the power which, after all, is expressed to relate, not to internal or domestic affairs, but to external affairs. [39]

---

[36] 135 CLR 337, 385-6.
[37] 145 CLR 107, 122-3 (citations omitted).
[38] 153 CLR 168, 200-1.
[39] 153 CLR 168, 200.

Fourthly, *Commonwealth v Tasmania* (1983) 158 CLR 1 – the '*Tasmania Dam Case*' – concerned the validity of the *World Heritage Properties Conservation Act 1983* (Cth). He held the law invalid. He said in respect of the external affairs power that the problem of construction which arose was whether due regard should be had to the fact that the Constitution is federal in character and that the federal nature of the Constitution required that some limits be imposed on the power to implement international obligations.[40] He went on to say that:

> The division of powers between the Commonwealth and the States which the Constitution effects could be rendered quite meaningless if the federal government could, by entering into treaties with foreign governments on matters of domestic concern, enlarge the legislative powers of the Parliament so that they embraced literally all fields of activity. …Section 51(xxix) should be given a construction that will, so far as possible, avoid the consequence that the federal balance of the Constitution can be destroyed at the will of the executive. To say this is of course not to suggest that by the Constitution any powers are reserved to the States. It is to say that the federal nature of the Constitution requires that 'no single power should be construed in such a way as to give the Commonwealth Parliament a universal power of legislation which would render absurd the assignment of particular carefully defined powers to that Parliament'.[41]

Fifthly, there is *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192. This was when the lights went out in Queensland as a result of a prolonged strike by electricity workers and the Commonwealth sought to pass a special law dealing with it. Five Justices held it invalid, as discriminating against the State. Once again Sir Harry said:

> It is now clear in principle, and established by authority, that the powers granted by s 51 of the Constitution are subject to certain limitations derived from the federal nature of the Constitution. The purpose of the Constitution was to establish a Federation. 'The foundation of the constitution is the conception of a central government and a number of state governments separately organised. The Constitution predicates their continued existence as independent entities'. … The fundamental purpose of the Constitution, and its 'very frame', reveal an intention that the power of the Commonwealth to affect the States by its legislation must be subject to some limitation.[42]

CONCLUSION

This paper has been concerned with Sir Harry's approach to constitutional law, a topic on which he had particular views. A broader perspective of the man may be seen in Justice G N Williams' essay in *Queensland Justices on the High Court of Australia* (2003), where the many fields covered by his judicial and non-judicial activities are discussed.

His views on some constitutional topics did not command a majority at the time they were expressed, but constitutional law has its swings and roundabouts. I would not be

---

[40] 158 CLR 1, 99-100.
[41] 158 CLR 1, 100.
[42] 159 CLR 192, 205 (citations omitted).

surprised if it were sought to re-agitate some of his views if the industrial legislation presently proposed by the Commonwealth is enacted. One might expect to see issues, such as whether the corporations power[43] means that any law which says that a trading or financial corporation must, or must not, engage in certain conduct, is necessarily valid. And the question how the heads of power in s 51 are to be read together may be revisited. Does the presence of the conciliation and arbitration power in s 51(xxxv) affect the ambit of other powers, such as the corporations power?

I started on a personal note. May I conclude on one. Sir Harry Gibbs was unfailingly courteous and pleasant. He inspired great respect and affection from those who knew him well. I have said that he was a very Queensland man; he was also a great Australian.

[43]Section 51(xx).