

**THE FIVE QUEENSLAND JUSTICES OF THE HIGH COURT  
OF AUSTRALIA**

The Hon Justice Michael Kirby AC CMG

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### FIVE QUEENSLAND JUSTICES

It is natural on my first visit to Queensland as a Justice of the High Court of Australia that I should reflect upon the links of the Court with Queensland and upon the service of the five men from Queensland who have held the offices of Chief Justice and Justice of the Court.

The five are Sir Samuel Griffith PC, GCMG who was Chief Justice from 5 October 1903 to 17 October 1919; Sir Charles Powers KCMG, who held office as a Justice from 5 March 1913 to 22 July 1929; Sir William Webb KBE who held office from 16 May 1946 to 16 May 1958; Sir Harry Gibbs PC GCMG AC

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\* Address to the annual Bar Dinner of the Bar Association of Queensland, Customs House, Brisbane, 19 June 1996.

\*\* Justice of the High Court of Australia.

KBE who held office as a Justice from 4 August 1970 until 12 February 1981 when he was appointed Chief Justice, an office he held until 5 February 1987; and Sir Gerard Brennan AC KBE, who was appointed a Justice on 12 February 1981 and elevated to Chief Justice on 21 April 1995, a position he still holds.

To prepare myself for this reflection, I read the scholarly book by Justice Bruce McPherson, *The Supreme Court of Queensland 1859-1960*<sup>1</sup>. Despite the judge's criticisms of it as a book of attempted psychoanalysis rather than a book of history, I then read Professor R B Joyce's biography of Sir Samuel Griffith<sup>2</sup>. There is an entry in the *Australian Dictionary of Biography* on Sir Charles Powers<sup>3</sup> but little else. Apart from the entry in Justice McPherson's book relatively little is written on the remarkable career of Sir William Webb<sup>4</sup>. Sir Harry Gibbs

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1 Butterworths, Sydney, 1989.

2 R B Joyce, *Samuel Walker Griffith*. See also entry by R B Joyce in *Australian Dictionary of Biography*, 1891-1939, vol 9 at 112-119 and by A C Castles in A W B Simpson (ed) *Biographical Dictionary of the Common Law*, Butterworths, London, 1984 at 216-218.

3 *Australian Dictionary of Biography* 1891-1939, vol 11 at 271-272.

4 Cf P Crockett *Evatt - A Life*, OUP, Oxford 1993 at 207-8.

enjoys a recent biography by Joan Priest<sup>5</sup>. His life of service to our country will eventually call forth a more detailed analysis; but it will probably have to be one that does without his own input as he is not the kind of man to chatter away to biographers, being a person who has always distained personal publicity. Sir Gerard Brennan's life and work deserve detailed analysis. Bruce McPherson, in his book, recounts the life of his father<sup>6</sup>. But the Chief's life is still being lived to the full in the busy work of the Court, at the apex of Australia's legal system.

There is relatively little judicial biography in Australia. We have tended to neglect the lives of our legal figures. This tendency may be reversed with the announcement by Oxford University Press in Australia that it plans a *Companion to the High Court of Australia* similar to the impressive volume on the Supreme Court of the United States of America<sup>7</sup>. Indeed, the study of the lives of the Chief Justices and Justices of the Supreme Court of the United States is a large industry in that

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<sup>5</sup> *Sir Harry Gibbs - Without Fear or Favour*, Hyde Park Press, Adelaide, 1995.

<sup>6</sup> See McPherson, above n 1 at 327, 300. See also G E Barwick, *A Radical Tory - Reflections and Recollections*, Federation, 1995 at 22.

<sup>7</sup> *The Oxford Companion to the Supreme Court of the United States*, OUP, New York.

country<sup>8</sup>. But it caters to a market of no fewer than 800,000 lawyers and to a highly law-involved society which elevates its highest judges to a position of personalities who enjoy public fascination rarely, if ever, achieved by judges in Australia.

Nevertheless, the five Queensland Judges of whom I speak, who have served for a time on the High Court of Australia, are notable and interesting personalities. Although they are very different from one another, in studying their lives I began to detect certain common characteristics which marked their service. It was those characteristics which, it occurred to me, might suggest a kind of ethos or common features of the Bar and legal profession of Queensland which would be worth exploring as I sought to prepare myself for these remarks and for my first prolonged encounter with the legal profession of Queensland as a Justice of the Court.

In saying this, I am conscious that five is a very small sample. Indeed, in the opinion of Justice McPherson, as suggested in his book, it is too small a sample for, to procure

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<sup>8</sup> See eg The Supreme Court Historical Society, *The Supreme Court Justices 1789-1995* (ed C Cushman), Congressional Quarterly, Washington, 1995; P J Cooper *Battles on the Bench - Conflict Inside the Supreme Court*, Uni Kansas, 1995.

appointment, Queenslanders have to overcome the disadvantage of their Queensland domicile. Certainly, the ascendancy of appointments from New South Wales and Victoria has lately become the subject of comment and criticism. Academic and other writers, stimulated by the growing appreciation of the importance of the decisions of the High Court of Australia, are beginning to urge changes to the procedures for appointment of the Justices<sup>9</sup>. Suggestions have been made that we, in Australia, like Canada, should embrace a principle of regional "representation" on the High Court. Others criticise this notion as entirely inappropriate to a court of ultimate and general appellate jurisdiction whose members should be appointed strictly on merit. But what is merit? For my own part, I consider that, at least in a general way, the Federal Supreme Court<sup>10</sup> should reflect the diversity of the legal profession of the nation. I have myself known fine judges of Tasmania and South Australia who would have graced the Bench of the High Court of Australia and made an important contribution to its work. A Tasmanian (Justice Inglis Clark) almost became one of the initial appointees and a South Australian, Sir Samuel Way, was

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9 see eg G Craven, "Improving the Appointment Process for High Court Judges - Would it Make any Difference?", unpublished paper delivered to the 7th Conference of the Samuel Griffith Society, Adelaide, 8 June 1996.

10 Australian Constitution, s 71.

certainly in the running<sup>11</sup>. So far no Justices have ever been appointed from those States. Although Sir Douglas Menzies was educated at the Hobart and Devenport High Schools and, initially, at the University of Tasmania, he was born in Ballarat, Victoria and he was quintessentially a Victorian practitioner.

This is a large debate inappropriate to the occasion. Nor is it appropriate to speculate on whether persons appointed were necessarily the best Queensland practitioners on offer at the time. That would be embarrassing and out of my ken. The appointment of Powers was strongly criticised when it was made and not only on the ground that he was a solicitor. An editorial in the Melbourne *Argus*<sup>12</sup> asserted that, in appointing Powers (and Piddington), the Cabinet has "not done the right thing". It had not "chosen men of the highest standing in the legal world, or men of distinguished ability as lawyers". Of Powers, it said his work as Crown Solicitor of the Commonwealth:

"was marked by zeal and thoroughness. Indeed, he has been one of the most painstaking officers in the Commonwealth service, and one of the most popular. These are qualifications and advantages of a useful character in the ordinary walks of life, but they do not fit their possessor for the duty of

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11 J M Bennett, *Keystone of the Federal Arch*, AGPS, Canberra, 1980, 21.

12 14 February 1913, cited Bennett, above n 11 at 33.

deciding appeals from the highest courts in the different States."

The appointments invoked a boycott by the Bars of New South Wales and Victoria<sup>13</sup>. Piddington succumbed but Powers toughed it out.

David Marr in his biography of Sir Garfield Barwick describes Webb as "cautious and colourless"<sup>14</sup>. Justice McPherson describes him as a "competent but not an outstanding lawyer who made no particularly memorable contribution to the work of the High Court"<sup>15</sup>. Nevertheless, he acknowledges that his "period on the Bench in Queensland revealed qualities of moral courage". He certainly performed a wide variety of functions and, as I shall show, contributed in a notable way to institution building. In that other source of High Court memorabilia, the recorded statements on the death of the Justices, Chief Justice Barwick is recorded as paying tribute to Webb's harmonious work with other colleagues<sup>16</sup>, a feature of

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13 *Australian Dictionary of Biography* 1891-1939, vol 11, 271.

14 D Marr, *Barwick* at 83.

15 McPherson, above n 1, at 327.

16 (1972) 127 CLR v at vii:

"In his judicial work, as well as in his social contacts, Sir William was equable and friendly, thoughtful and generous in his attitudes. On

Footnote continues



High Court collegiality that has sometimes been notably missing<sup>17</sup>.

I also realise that Queensland is a very big place. In fact it is the most decentralised of all the States of Australia. So large is it that it takes a modern jet many hours to traverse its vast terrain. In Europe, it would be seen as many countries in one. Even in Queensland there have been traditional districts which mark off work of the State courts and the organisation of the legal profession. In them, different traditions have been followed and robust personalities have flourished. I do not make the mistake of thinking that the five lawyers whom I celebrate, all of whom derived from the south-eastern corner of Queensland are necessarily representative of the great variety of the Queensland Bar and legal tradition. But these are sons of Queensland and they were not unmindful of that fact.

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the Bench he was always attentive, most courteous, direct in his questioning and his contribution to argument. He had a lively sense of humour and was always kindly in its employment. His judgments exhibited ... practicality and knowledge of the law which were to be expected of a man with the wide and varied experience which he had. ..."

<sup>17</sup> C Lloyd "Not with Peace but with a Sword! - The High Court under J G Latham (1987) 11 *Adelaide L Rev* 175, 180.

SONS OF QUEENSLAND

For all of these qualifications and the proper circumspection that rests upon the absence (for the most part) of detailed analyses of the lives of the five, it can be said, nonetheless, that certain themes emerge. It is these which I wish to isolate and lay before you for consideration.

The first feature to notice is that each of the five Justices came to the Bench of the High Court after distinguished service in the Queensland legal profession. Samuel Griffith had a remarkable career<sup>18</sup>. He quickly built on a brilliant academic record to become a leader of the Bar. He entered the colonial Parliament and served as Attorney-General and Premier. His appointment as Chief Justice of the Supreme Court of Queensland, to succeed Lilley, occurred in 1893. He served as Chief Justice until his appointment in 1903 as the first Chief Justice of Australia. Despite his part in the federal movement, which was notable, and his move south to take up his position on the High Court at its then principal seat in Melbourne, Griffith remained resolutely a Queenslander. He never acquired a residence in Melbourne. He lived there, and at other places on

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<sup>18</sup> The outlines are recorded in the books and notes on Griffith. See n 2 above.

circuit, in hotels. His much-loved home named for his Welsh birthplace "Merthyr", was in Brisbane. To it he loved to return. It became the practice of the High Court to visit Brisbane in May of each year. The first such sitting commenced on 16 May 1904<sup>19</sup>. There was not a little resistance to the Court's peripatetic practice from federal officials and ministers who resented the peregrination<sup>20</sup>. But the notion that Queensland appeals should all be argued in far-away Melbourne was uncongenial to the Queensland profession and to Griffith. Like the Judges of King Henry II in England, he believed in taking justice to the people, particularly the people of Queensland.

Powers too had a notable public life in Queensland. It began with his election as Mayor of Maryborough. In 1888 he was elected to the Legislative Assembly of the colony. He rose to ministerial office, including Postmaster-General of the Colony. In the Legislative Assembly he was looked upon as something of a radical and a reformer<sup>21</sup>.

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<sup>19</sup> Bennett, above n11, 103.

<sup>20</sup> Bennett, above n 11, 100-103.

<sup>21</sup> ADB, vol 11, 271.

Webb was a foundation student at the new law school of the University of Queensland when it was established. He was appointed as Crown Solicitor of the State at the remarkably early age of 30. He served as Solicitor-General before his appointment to the Supreme Court and to the Industrial Commission in 1925. He held office as a Justice of that Court until 1940 when he was elevated to Chief Justice. It was from the position of Chief Justice of Queensland, as in the case of Griffith, that he took his seat on the High Court of Australia. He too remained a Queenslander, returning to Brisbane as often as his duties permitted<sup>22</sup>.

Sir Harry Gibbs was another who served as a Judge of the Supreme Court of Queensland. Although he too went south, he remained, according to his biographer, a "dedicated Queenslander". I can attest to this from my many conversations in recent years with Sir Harry Gibbs. Some commentators have even suggested that his intonation and speech bear the special mark of a Queensland variety of Australian English, assuming that to exist.

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<sup>22</sup> see McPherson, above n 1.

Chief Justice Brennan was educated and grew up in Queensland. He became an acknowledged leader of the Queensland Bar. He was elected President of the Bar Association of Queensland - a position he held until his appointment to his first judicial post as a member of the Australian Industrial Court. It has been a special pleasure for me, having known the Chief Justice for twenty-one years, to return with him, as a colleague, to Queensland and to see him lost in conversation with barristers and solicitors concerning the famous (and some infamous) luminaries of the law of the past - whose memories are scattered over this State. They were, by the account of the stories, extraordinary and often larger than life figures. They are clearly still lively in the memory of Chief Justice Brennan. He is the third Chief Justice of Australia from Queensland. In this, Queensland ranks with New South Wales. Only Victoria, with four Chief Justices, can boast more.

For all of these loyalties and the record of the past service in Queensland, another feature marks the lives of the five Queensland Justices. I refer to their perception of themselves as Australians. They answered the call to the service of a wider national community. They saw the wider context for the law which our Federal Constitution opens up to lawyers throughout the continent. They came to serve in the Court at the head of the legal system of the country. They could see that, beyond even the vast expanse of Queensland, there opened up a nation : the only continent on earth governed under the one democratic

Constitution, speaking the one language, submitting to the unbroken application of the rule of law, living under the protection of independent judges and an independent legal profession with a long tradition and a long memory.

#### INSTITUTION BUILDERS

Another characteristic of all five of the Queensland Justices is that each contributed in remarkable ways to the building of novel institutions. Griffith was no ordinary politician. Not only did he perform in the hum-drum work of politics, in Government and in Opposition in the colony of Queensland. He also spent much time on the reform of the law, developing the *Criminal Code* which was to influence like codes adopted in Western Australia, New Guinea and substantially in Tasmania as well as affecting the development of the criminal law in other parts of the Commonwealth of Nations, including Nigeria<sup>23</sup>. His work on the *Defamation Code* also influenced defamation law reform in many other jurisdictions. So did his work on the Rules of the Supreme Court of Queensland which, to this day, provide the basis of the Rules of the High Court.

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<sup>23</sup> McPherson, above n 1, at 191.

But Griffiths' greatest institutional legacy is in the High Court itself and in the Constitution which gave it birth. He was a somewhat cautious contributor to the federation movement. He has been criticised by some as being too sympathetic to the Imperial Government. But he represented a strand of opinion in the nation<sup>24</sup>. His clear-headed legal ability and his steady commitment to the federal cause were important ingredients in the success of its achievement. So was his swift action to assert the authority of the High Court and to set at naught the prophecies of politicians, journalists and others who had described it as a redundant tribunal with no exalted status. In *Hannah v Dalgarno*<sup>25</sup> he declared that the Court "as the embodiment of the judicial power ... is an essential part of the structure of the Commonwealth"<sup>26</sup>. By his brilliant legal gifts, judicial experience and constitutional wisdom he played a crucial role in ushering the new Court into its vital role.

Griffiths' first sitting in the Privy Council came in 1913, in the midst of his service as Chief Justice of Australia. There too he attempted institutional reform. He urged upon the British

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24 ADB, vol 9, 117.

25 (1903) 1 CLR 1.

26 at 11.

Government participation of more judges from other countries of the Empire<sup>27</sup>. Sadly, the Imperial Government lacked the imagination, the will or the interest to make the change. To the very end, the Judicial Committee of the Privy Council has remained, overwhelmingly, a body of English judges. This is a great misfortune for it deprived the countries of the common law of the Empire and Commonwealth of Nations the opportunity of building a truly international appellate court for at least defined areas of the law. Now, we must depend upon non-institutional means to keep the common law in general harmony. We must also depend upon the service of judges (such as Sir Harry Gibbs still exhibits) in the courts of common law countries of the Pacific, who are our neighbours. One of the richest experiences of my own professional life, now sadly ended, was to succeed Justice Peter Connelly of the Supreme Court of Queensland, as President of the Court of Appeal of Solomon Islands and to serve on that Court with two fine Queensland judges, Justice Bruce McPherson and Justice Glen Williams. In this way, indirectly,

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27 R B Joyce, *Samuel Walker Griffin*, above n 2, at 322-323. For criticism of the Judicial Committee see Stevens, *The Independence of the Judiciary*, 1993, 139-162 and "Vignettes from the End of Empire" (1991) 40 UNBLJ at 149. The problem was often financial parsimony. The proposal to appoint deSilva, former Acting Supreme Court Judge of Ceylon caused great bureaucratic wrangling culminating in the decision to provide him with £5 per day for expenses. See Stevens, above.



Australian judges and retired judges are seeking to build the type of trans-national judicial institutions which Griffith urged upon the British Government but without success.

Powers made an important contribution to the establishment of that unique institution of Australia: The Conciliation and Arbitration Tribunal. In fact, eight Justices of the High Court of Australia have served at some time in their career on the national Conciliation and Arbitration body<sup>28</sup>. I am one of them, as is Justice Mary Gaudron. Powers, with O'Connor, Higgins, and later Rich, Isaacs and Starke served as judges of the old Conciliation and Arbitration Court before it was struck down by the *Boilermakers'* decision in 1956<sup>29</sup>. In those early days, Powers' contribution to the Arbitration Court were vital. It was he who introduced the notion of automatic cost of living adjustments known as the "Powers three shillings"<sup>30</sup>. There is no doubt that his considerable legal skills, devoted almost exclusively to his work on the Arbitration Court, helped that other federal court to its early success. It left a deep mark

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28 M D Kirby, "Industrial Relations - After "The Club", unpublished address to the Australian Industrial Relations Commission Conference, 1996, Mt Eliza, Victoria.

29 *Reg v Kirby: Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (HC); (1957) 95 CLR 529 (PC).

30 ADB vol 11, 271.

on the framework of the institutions of our country which is still embedded there and derives ultimately from the enabling provision in the Constitution<sup>31</sup>.

Webb's institutional efforts were directed in his early days to the arbitration system in Queensland and also to various State committees over which he presided. However, the most important was his participation in the International Military Tribunal for the Far-East which was established following the end of the Second World War. Webb was appointed by the victorious allies on the recommendation of the Australian Government<sup>32</sup>. We see today the legacy of this Tribunal. The establishment of International Criminal Tribunals for the former Yugoslavia and for Rwanda represent a belated response of the international community to unbridled criminality in time of war and genocidal brutality in time of national unrest. Eventually it is hoped that these ad hoc tribunals will give birth to the establishment of an International Criminal Court with jurisdiction to bring war criminals and others guilty of crimes against humanity to justice<sup>33</sup>. If and when this happens, a proper

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<sup>31</sup> s 51(xxxv).

<sup>32</sup> See Crockett, above n 4.

<sup>33</sup> see eg J Deschênes, "Bringing War Criminals to Justice in Our Time" in E Cotler (ed) *Nuremberg Forty Years Later*, McGill-Queen's, Montreal, 1995 at 45.

assessment of the role of judges (such as Sir William Webb) in the Nuremburg and Tokyo Tribunals, will doubtless be enlivened. Webb participated in the International Military Tribunal from 1946 to 1948. The appointment was temporary and doubtless inconvenient to the Queensland Court as it seemed unending. Webb was threatening to return to his position as Chief Justice of Queensland unless some more permanent office was found for him. It was at this instant that Dr H V Evatt, Minister for Foreign Affairs and a former Justice of the High Court, proposed Webb for appointment to the High Court. According to Justice McPherson, he did this because he was "keen to maintain a high profile for Australia in the international sphere"<sup>34</sup>. How quite the appointment of Webb to the High Court could have enhanced Evatt's ambitions is not explained.

Chief Justice Gibbs resigned from his post on the Supreme Court of Queensland to take up appointment in 1967 as the Judge of the Federal Court of Bankruptcy. It was generally expected at the time that this move was preliminary to his appointment to a seat on the new federal court of more general jurisdiction which was then under consideration. That post did not come about. The creation of the new court was delayed.

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<sup>34</sup> McPherson, above n 1, at 327.

But so impressive was Justice Gibbs' work in the unfavourable and unpromising conditions of bankruptcy work that he was, instead, appointed directly to the High Court in 1970.

Chief Justice Brennan's major institutional contributions lie in the field of administrative law. He presided over one of the greatest legal and institutional changes that the law in our country has ever witnessed. In a land generally reluctant to strike out on its own with fresh ideas and enjoying what is still, overwhelmingly, a derivative legal culture, Justice Brennan led the remarkable reforms that saw the introduction, in the federal sphere, of the Administrative Appeals Tribunal, the establishment of the Administrative Review Council, the passage of the *Administrative Decisions (Judicial Review) Act 1976* (Cth), and the other components of the reformed federal administrative law. In July 1996 we will celebrate the 20th anniversary of this extraordinary institutional development. It is now well entrenched in the federal sphere. It provides a model and a challenge to the reform of administrative law in the States. The *Judicial Review Act* has been substantially copied in Queensland. Justice Brennan also played a vital part in the early years of the Federal Court of Australia and in securing for that court the high reputation for judicial excellence which it now enjoys. His

judicial contribution in *Mabo*<sup>35</sup> to the reconsideration of the legal rights of Australia's indigenous peoples changed forever the face of Australian law in a matter of the greatest importance.

### ROBUST EGALITARIANISM

A further characteristic which, I think, can be found in the lives of each of the five Justices is a robust attitude to the law and an egalitarianism which is in harmony with the spirit that I have always observed in Queensland.

Griffith was a barrister at a time when capital punishment was still in force in Queensland. As it happens, Queensland was one of the first jurisdictions of the common law world to abolish that form of punishment. But Griffith, like many young counsel of his day, represented many prisoners on capital charges. Inevitably, he lost some to the gallows. One was Thomas Griffin, a police magistrate charged with involvement in the murder of Chinese gold-diggers. Griffith's arguments failed<sup>36</sup>. In his daily diary he recorded the scene which followed in language which gives an insight into his attitude to life and the practice of

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<sup>35</sup> *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 16 (Mason CJ and McHugh J concurring).

<sup>36</sup> *R v Griffin* (1868) QSCR 1 at 176.

the law at that time. "Prisoner sentenced to death. Judge overcome, terrible scene ... Bathed. Conversation with Lilley. Went to theatre etc"<sup>37</sup>. A year later he viewed Griffin's skull which was displayed in Rockhampton<sup>38</sup>. For all the awful burdens of barristers today, at least they do not carry this responsibility. In my early days as a Judge I spoke with Sir Murray McInerney, a judge of the Supreme Court of Victoria, concerning his days as a young barrister representing prisoners facing capital charges. He described to me the awful tension and awesome responsibility when the risk of losing the case involved losing the client's life. In this way the collective memory of the legal profession is handed down. It is a link with the days of legal practice at the Bar of Queensland that Sam Griffith knew.

Powers too was robust in his many disagreements with Higgins in the early days of the Arbitration Court. These disagreements concerned Powers who was as anxious as Higgins that the new province for law and order would succeed. He offered his resignation on a number of occasions but Higgins

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<sup>37</sup> Diary, 25 March 1868 cited R B Joyce *Samuel Walker Griffin*, above n 2, at 25.

<sup>38</sup> *Ibid*, 16 October 1869. See Joyce, above n 2, at 25.

would have none of it<sup>39</sup>. Powers simply continued in the Arbitration Court, as a good judge should, to follow his own conscience and understanding of the law and the requirements of the case. One is left with the distinct feeling that he spent nearly all of his time in that Court, rather than the High Court, to the mutual satisfaction of himself and the High Court Justices. But in one particular matter Powers gave Griffith wise advice to withhold participation in a war-time commission of inquiry into seven members of the Irish Republican Brotherhood (Sinn Fein) which Griffith had initially accepted for himself and then proposed for Powers<sup>40</sup>.

Webb was decisive in his work in the International Military Tribunal. He sentenced General Tojo to death as a war criminal and he was duly hanged.

Sir Harry Gibbs' *sang froid* is illustrated many times in Joan Priest's biography<sup>41</sup>. Lingered over the telephone until five minutes before he was required to address the Full Court on a complex legal question, Gibbs is pictured as dealing with

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<sup>39</sup> ADB, vol 11, at 271.

<sup>40</sup> See Joyce, above n 2, at 354-355.

<sup>41</sup> Priest, above n 5, at 25.

litigants, dictating complex opinions and then rushing to the Court, with apparent ease, to present his persuasive and well organised submissions. Barristers are expected to work under such conditions. The Queensland Bar has produced many formidable exemplars of the self-discipline and presence of mind that are necessary to a highly successful life in the practice of the law.

In terms of egalitarianism, I believe that Powers emerges in the sharpest focus. According to his biographer he often preferred to travel second class by train in order to converse with working people and to understand their problems<sup>42</sup>. Griffith had nothing to do on his first day at the Bar. His diary records that he spent the day reading *Jane Eyre*<sup>43</sup>. This lack of work that is often a humbling experience for young lawyers did not last long in his case. Sir Harry Gibbs was a judge utterly without pretension who retained, throughout a long and distinguished public career, a great personal simplicity which is a model for all who follow.

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42 ADB, vol 11, at 271.

43 Joyce, above n 2, at 24.



CONSERVATIVE BUT WITH A NUDGE TO JUSTICE

The next characteristic that can be seen through the five appointees is, I believe, a commitment to law reform. It is probably fair to say that, overall, the Queensland legal profession is rather conservative, even by the standards of Australia. Nonetheless, although reflecting this general sentiment, each of the five Justices would give the law a nudge, when they could do so, in the direction of justice and fairness to all<sup>44</sup>.

I have already mentioned Griffith's contributions to law reform in the *Criminal Code*, the *Defamation Code* and the *Rules of Court*. There are many entries in Joyce's biography which show that Griffith was in advance of his time in his concern for Aboriginal and Islander people<sup>45</sup>. For example, he introduced legislation into the Queensland Parliament providing for amendments to the *Oaths Act* to permit evidence to be given, including by Aboriginals, without an oath. He drew attention to

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<sup>44</sup> This is Justice McPherson's assessment of Sir Harry Gibbs.

<sup>45</sup> Joyce, above n 2, at 112-115. ADB, vol 9, 115:

"Although Aboriginal problems were not central to his administration [as Premier] he was more humanitarian than most Queenslanders; indeed a press report wrote of 'Mr Griffith and his black sympathisers'."

a point, later reflected in legal doctrine<sup>46</sup>, that great care had to be taken in receiving the evidence of traditional Aboriginal people who were inclined to agree with the interrogator, often to their own great disadvantage<sup>47</sup>.

Powers pushed the rule of law forward creatively into a new realm of industrial arbitration. Webb did so in the international sphere. But also in Australia, he defied the clamouring mob at the time in the decision in the High Court in the *Communist Party Case*<sup>48</sup> where a majority of the High Court struck down the Menzies Government's legislation to dissolve the Communist Party and to impose legal liabilities on Australian communists. Justice McPherson describes Sir Harry Gibbs as a "Presbyterian socialist"<sup>49</sup>. Whilst I do not feel confident in assessing either of these descriptions, a consideration of Sir Harry Gibbs' contributions to legal principle denies the often-stated description of him as an unreconstructed legal conservative. In my view, his contributions to the pages of the *Commonwealth Law Reports* will long endure because of his gifts

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46 *R v Anunga* (1976) 11 ALR at 412.

47 Joyce, above n 2, at 52-53.

48 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 232.

49 McPherson, above n 1.

as a legal craftsman and his skills in simple, conceptual expression of complex ideas.

Chief Justice Brennan's contribution remains for the future and is still being offered. No-one doubts that history will judge amongst his important contributions to Australian jurisprudence his work in the crucial early days of reformed federal administrative law and his leading judgment in *Mabo*<sup>50</sup>. Quite apart from the importance of that judgment, exploding the notion that Australia was *terra nullius* upon its acquisition by the Crown, it also embraced an important conception which points to the likely future relationship between Australia's domestic law and the growing body of international law, particularly in the field of human rights<sup>51</sup>.

#### DEVOTION TO LAW

Finally, it can be said of each of the five subjects of these remarks that, in their different ways, they were each devoted to the law and its institutions. They accepted the exacting standards which the law and the judicial life impose upon those

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<sup>50</sup> (1992) 175 CLR 1.

<sup>51</sup> *Ibid*, at 42.

called to the banner. Griffith, Gibbs and Chief Justice Brennan in particular supported the independent Bar within the legal profession which is essential to the performance of the work of the judiciary in a common law country. Griffith was a supporter of the Legal Practitioners Bill 1872 (Q). He was a stalwart defender of the residence requirement which, until *Street v Bar Association of Queensland*<sup>52</sup> imposed a rarely surmounted obstacle to the admission of other Australian legal practitioners to practise in Queensland.

Powers and Webb were sometimes criticised by their colleagues for their rather unorthodox professional experience before their appointment to office in the High Court. But Sir Harry Gibbs and Chief Justice Brennan, like Griffith before them, were true sons of the Bar of Queensland. Each, on their journey south, embraced the corporate life of the independent Bars of Sydney and Canberra respectively. Each was welcomed into the fold where each was notably comfortable. Lady Gibbs is recorded in Joan Priest's biography of her husband as declaring that the law was the great love of Sir Harry's life<sup>53</sup>. It certainly represents one of the great wellsprings of the life of the present

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52 (1989) 168 CLR 461.

53 Priest, above n 5, at 24.

Chief Justice. Fortunate are we in this country that we have had the service in the High Court, of Justices dedicated, with such entire conviction, to a life of service in the law.

### LESSONS

These, then, are some of the characteristics that are woven, like golden threads, through the five lawyers of Queensland who have been appointed to the High Court of Australia. A proud attachment to Queensland, with its bright light and broad expanse, its special ways and sometimes different outlook. Each was conscious of the call of a wider nation and each contributed, or still contributes, to the life of that nation standing, as it does now, on the brink of a new millennium with enormous challenges and facing great changes. If, as a nation, we have the resilience to meet those challenges and accommodate to those changes, it will, in part, be because of the contributions to our Federal Supreme Court of Justices such as these.

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Each responded to changing times. Each was willing to build new institutions to serve the State, the nation and the wider world. Each exhibited the robustness in the performance of legal duties which is a general feature of the legal profession of Queensland. Each exhibited, or still exhibits, the egalitarian attitude to fellow men and women which is a specially happy feature of social intercourse north of the Tweed. Each was, or

is, in various ways, conservative in his view of the law. Yet each has proved willing, where judged necessary and appropriate, to nudge the law forward in the direction of justice. Each supported the role of the independent legal profession. Each imposed upon himself exacting standards.

The features which I have discerned are far from irrelevant to the needs of the legal profession and the judiciary in Australia today. They are, in fact, abiding qualities which are required in a country living under the shelter of the rule of law. The Queensland Bar, and the wider legal profession of Queensland, have contributed notably to the life of the High Court of Australia. They have done so in the preparation of cases and the presentation of argument at the Bar table. They have done so when those of their number have been appointed to the Court. I have ventured no more than to call to attention the contributions of five members of the legal profession of Queensland whose lives are closely linked to the history of the High Court of Australia, who deserve to be remembered and whose works deserve to be honoured.

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