

Appendix I

Tribute to the late Sir Harry Gibbs

John Stone

Since its seventeenth Conference, to which these Proceedings are principally devoted, The Samuel Griffith Society suffered a tragic blow from the death, on 25 June, 2005, of its President, the Right Honourable Sir Harry Gibbs, GCMG, AC, KBE. Apart from an article which I was able to contribute on 1 July to *The Australian* (see below), and an appropriate donation which the Society has made to Kidney Health Australia (in lieu of flowers, on the occasion of the State Memorial Service for Sir Harry in St. Stephen's Church, Macquarie Street, Sydney on 11 July), there has been no opportunity for any more formal tribute from the Society's members to the memory of the man who, since the Society's inception, presided over it and, in doing so, lent to it the lustre of his name and reputation.

In editing these Proceedings I have therefore felt it appropriate – and I trust that members may agree – to include this short Appendix as a tribute to Sir Harry, on behalf of all members of the Society.

Since much of what I would wish to say in such a tribute has already been said in that newspaper article to which I referred above, and since in all probability the great majority of our members will not have seen it at the time, it may be best to begin by quoting it in full.

***The Australian*, 1 July, 2005**

Harry Gibbs – a wealth of wisdom

John Stone farewells Sir Harry Gibbs, a former chief justice of Australia and an avowed federalist.

“In *The Knight's Tale* Chaucer describes his principal character as ‘a verray, parfit gentil knyght’. There could hardly be a more apt description of the late Sir Harry Gibbs, who died in Sydney last Saturday aged 88, and whose remains were cremated in the utmost privacy on Tuesday. Under his extremely firm instructions, all public notice of his death was withheld until after his cremation. In death, as in life, he remained modest almost to a fault -- a truly perfect gentle knight indeed.

“Legal commentators will doubtless attest to Sir Harry's greatness as a judge -- first in the Supreme Court of Queensland, then in the Federal Bankruptcy Court, and finally during his 16-year career in the High Court, including as Chief Justice from February, 1981 until retirement in August, 1987.

“Others have previously assessed his judicial standing. Lord Wilberforce, often described as the greatest English 20th Century judge, who became a friend of Sir Harry's after sitting with him in the Privy Council, described him as ‘essentially the professional Judge, patient, receptive,....’, and said that he (Wilberforce) ‘was personally the better -- and the happier -- for having known him’. So were we all.

“That quote, from Joan Priest’s biography, *Sir Harry Gibbs: Without Fear or Favour*, accompanies another from a very different but also eminent Law Lord. Lord Denning, often regarded as a radical, paid Sir Harry the supreme professional compliment of saying not only that ‘his work as Chief Justice was of the first quality’, but also that ‘I would rank him as one of the greatest of your Chief Justices, rivaling even..... Sir Owen Dixon’.

“I first met the Right Honourable Sir Harry Gibbs, GCMG, AC, KBE (to give him, rightfully, his full title) after he became Chief Justice. The National Debt Commission (since abolished) was then chaired, *ex officio*, by the Chief Justice of the High Court, and the Secretary to the Treasury was also, *ex officio*, a member. The Commission’s meetings were brief and formal, but his attention to detail and his unfailingly courteous conduct of proceedings were evident.

“When The Samuel Griffith Society was first conceived in late 1991, there arose the question of who should be its inaugural President. I phoned Sir Harry and, after explaining the nature of our enterprise, invited him to accept this wholly unpaid office in this wholly unknown body. Having examined our draft Statement of Purpose (and indeed contributed to its final form) he readily accepted. Overnight, the Society became one which – all the animadversions of the *bien pensants* notwithstanding – could not be ignored.

“Why choose Sir Harry Gibbs in this role? First, because the Society’s central purpose was to promote debate about Australia’s Constitution from a *federal* (i.e., anti-centralist) perspective. Even to one not learned in the law, it was obvious that Sir Harry had long been the outstanding judicial exponent of such a viewpoint. His dissent in the *Australian Assistance Plan Case* (the Whitlam Government’s abuse of the Appropriations power), his dissent in *Koowarta* and, above all, his dissent in the *Tasmanian Dams Case* (the Hawke Government’s abuse of the external affairs power), all marked him out as one respecting the fundamentally federal nature of Australia’s constitutional arrangements, and distrustful, on general civil liberties grounds, of the creeping concentration of constitutional power in that most un-Australian of our cities, Canberra.

“Incidentally, those concerned about the headlong rush of Commonwealth Ministers into areas having nothing to do with their responsibilities would do well to recall Sir Harry’s dissenting judgment in the *AAP Case*, where, as he truly said, the Whitlam Government’s interpretation of Section 81 (the Appropriations power) was such that, if accepted, it would mean that the Commonwealth could do anything it liked merely by including a two line expenditure item in the relevant *Appropriations Bill*.

“During the following thirteen years The Samuel Griffith Society has held 17 weekend conferences. Apart from the first, which he was forced to miss because of an unbreakable engagement in London (the installation in St Paul’s Cathedral of his personal heraldic banner as a Knight Grand Cross of the Order of Saint Michael and Saint George), Sir Harry attended all but the last two, in Perth and Coolangatta, to which, on medical advice, he was unable to travel. For all those years he also presided, with that same attention to detail and that same unfailing courtesy, over our telephone hook-up Board meetings.

“From 1993 onwards, he composed each year an Australia Day message to members of the Society, edited texts of some of which have appeared on *The Australian’s* Opinion page. Apart from contributing no less than eleven papers to our conferences, he also wrote for the Society several ‘tracts for the times’ on

such issues as the 1999 proposal to amend the Preamble to the Australian Constitution.

“Last year, Volume 16 of the Society’s Proceedings, *Upholding the Australian Constitution*, included Sir Harry’s Australia Day messages for 1993 to 2000 (the 2001 to 2005 messages will appear in Volume 17). In an introductory note I said that, ‘Over the years, those brief messages have conveyed, in Sir Harry’s characteristically limpid prose, a wealth of wisdom distilled from the mind of one of Australia’s finest and most honourable public servants (employing that phrase in its time honoured, and best, sense)’. They were ‘moderate, judicial (naturally), logical, incisive and pithily expressed’.

“Sir Harry’s messages were also often extremely topical. In 1993, when we were being lectured *ad nauseam* about our ‘shameful’ past by people laughably describing themselves as historians, how refreshing it was to read that: ‘During this century, in almost every continent there has been mass murder, inhuman torture and a total denial of basic human rights on a scale rarely seen before in history. At the same time Australia has enjoyed internal peace, order and stability – a bright beacon in a dark world’.

“In 1994, among all the hand-wringing then (and to a lesser degree, still) prevalent within the Aboriginal industry and its collaborators, consider the following words of calmly moderate reason: ‘No person of goodwill would fail to recognise that Aboriginal people who suffer special disadvantages should be treated with justice and generosity. It is another question whether any class of persons should be granted special privileges, not to remedy their particular disadvantages, but simply because their ancestors suffered injustices. There is a danger that.....the result will be resentment rather than reconciliation’.

“A more recent (2002) message confronted squarely much of the nonsense spouted by refugee activists: ‘To acknowledge, as the *Convention Relating to the Status of Refugees* provides, that there should be no discrimination against refugees on the ground of race, does not mean that it would be in any way wrong in principle for a government to adopt an immigration policy that is racially based so far as persons other than refugees are concerned’.

“Even more confronting to those thoughtless persons who, in the face of the mounting body of evidence as to the non-viability of non-integrated societies, continue to insist that our immigration policy should be rigidly ‘multicultural’, are the immediately following sentences: ‘While it would be grossly offensive to modern standards for a state to discriminate against any of its own citizens on the ground of race, a state is entitled to prevent the immigration of persons whose culture is such that they are unlikely readily to integrate into society, or at least to ensure that persons of that kind do not enter the country in such numbers that they will be likely to form a distinct and alien section of society, with the resulting problems that we have seen in the United Kingdom’ (and not only there).

“At a time when, in particular, legitimate questions are being increasingly raised about the capacity of Muslim immigrants either to whole-heartedly embrace their fellow Australians, or to give their loyalty first and foremost to Australia rather than to their religious culture, these words continue to put to our government questions of a kind which it appears fearfully reluctant to answer.

“At the time of his swearing in as Chief Justice, Sir Harry said that, if Australia’s courts were generally trusted, ‘it is because they are seen to apply

the law. Individuals and governments are not prepared to entrust their destinies to the whim of a few persons who will determine their controversies in accordance with their individual beliefs and principles’.

“It was Sir Harry’s unhappy fate, over the next 24 years, to observe a growing number of judicial persons doing just that – most grossly so in *Mabo* – with consequences for Australians’ trust in their courts that, as his words implied, have predictably flowed from such activist behaviour”.

The article was accompanied, I should add, by a most appropriate photograph of Sir Harry, at his desk and surrounded by his books, and carrying the following caption: “**Modest almost to a fault:** Sir Harry confronted those who insisted that our immigration policy should be rigidly ‘multicultural’ ”.

That caption, of course, draws upon the passage, quoted in the article, from Sir Harry’s Australia Day message to members for 2002. That message, along with those for 2001 and 2003-2005, is included in Appendix II to this volume of the Proceedings.

It goes without saying that Sir Harry was held in the highest respect by our members for his learning, his scholarship, and his transparent integrity of character. Beyond that, however, he was also regarded with great personal affection. In May, 2003, at the outset of the Society’s fifteenth Conference, held in Adelaide (and as it proved, the last which, because of health problems, he was able to attend in person), the Board of Management, on behalf of the membership and without Sir Harry’s foreknowledge, made a formal presentation to him.

The presentation took the form of four books, plus a “rare” copy of *The Commonwealth of Australia Constitution Act together with the Debates and Speeches on the same in the Imperial Parliament*, published in 1900. Professor David Flint, who was entrusted by the Board with the task of making the presentation speech, concluded by saying that the Society made “this presentation to you, Sir Harry, as a small token of the esteem in which we hold you, and for the active leadership you have given to The Samuel Griffith Society,.....”. (The full text of Professor Flint’s remarks is given in Appendix I to Volume 15 of the Proceedings).

At a meeting on 6 July, 2005 the Board of Management discussed, in a preliminary fashion, ways in which the Society might seek to commemorate our former friend and colleague. It resolved that, at the Society’s next Conference in 2006, arrangements should be made for the delivery of a lecture in his honour, to be known as The Sir Harry Gibbs Memorial Oration, and that this Oration should be given on a regular basis (annually or biannually) at Society Conferences thereafter. It also resolved that some part of the 2006 Conference should be set aside for papers constituting a more general *festschrift* in appreciation of Sir Harry’s life and achievements.

That is all to the good. However, I personally believe that the power of Sir Harry Gibbs’s life and achievements is such as to live on in any case for other reasons. Two examples spring immediately to mind.

This volume of our Proceedings contains, at Chapter Nine, a particularly important paper by Mr Bryan Pape, *The Use and Abuse of the Commonwealth Finance Power*, in which he forcefully traces the abuse by successive Commonwealth governments over the years of ss. 81 and 83 of the Constitution. Beginning in a small way as early as 1926 in respect of the *Commonwealth Aid*

Roads Act of that year, the abuse in question came to its first full flowering in the *Australian Assistance Plan Act 1974*, when the Whitlam Government (of course!) purported to take power to make grants to various so-called Regional Councils throughout Australia. Encouraged by the weak and divided decisions of a majority of Justices who heard the resulting High Court challenge by the State of Victoria in 1975, successive Commonwealth governments have continued to abuse the Appropriations power ever since, and the Howard Government not least.

Sir Harry's dissenting opinion in the *Australian Assistance Plan Case (AAP Case)* was, as always, a model of intellectual clarity and federal constitutional principle. It is not, I believe, mere wishful thinking on my part when I say that his words in that dissent will ring out again in some future challenge to this increasingly flagrant abuse of Commonwealth power.

My second example is of a rather different kind. Two days ago, on Sunday, 17 July, 2005 the ABC TV *Insiders* program was largely devoted to the aftermath of the London bombings by Islamist terrorists. In the course of that program its presenter, Mr Barrie Cassidy (formerly chief press secretary to Prime Minister Bob Hawke) put up on the screen the words occurring in the third paragraph of Sir Harry's Australia Day 2002 message, which had been quoted in that article in *The Australian* reproduced above.

In doing so, Mr Cassidy drew particular attention to what he called Sir Harry's "prescient" reference, three years ago, to "the resulting problems that we have seen in the United Kingdom", when "persons whose culture is such that they are unlikely readily to integrate into society" are allowed to "enter the country in such numbers that they will be likely to form a distinct and alien section of society". This very morning, here in Sydney, Australia's most prominent and highest-rating radio talk-back host, Mr Alan Jones, quoted in full (twice, at different points of his program on Station 2GB) those same words of Sir Harry's. I predict that, in this respect also, the latter's "wealth of wisdom" will continue to be drawn upon by successive generations of Australians.

Let me conclude with those words quoted by Sir Harry's biographer, Joan Priest, from Lord Wilberforce, who, as noted in my article in *The Australian*, is often described as the greatest English 20th Century judge. He said of Sir Harry that he, Wilberforce, was "personally the better – and the happier – for having known him". I believe that I speak for every member of our Society in saying that the same was true for us all.

Sydney
19 July, 2005