Chapter Four
Sir Harry Gibbs and Federalism: The Essence of the Australian Constitution

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It is difficult to present Sir Harry Gibbs in a new light. As the fifth speaker on a panel that is much more distinguished than I, my task is a hard one. It is an honour to follow: Justice Heydon, who is not only a judge of immense intellect but possibly Australia's finest after dinner speaker; Justice Kirby who, even through the virtual medium, is one of Australia's great juristic communicators; the distinguished former Attorney-General Tom Hughes, AO, QC; and David Jackson, QC, of whom it is said that, if High Court appearances were rugby tests, he would be among our most capped players.

Like the other speakers, I knew Sir Harry Gibbs. I was privileged to know him through my involvement in Australians for Constitutional Monarchy and this Society. He gave great intellectual weight to the things many felt instinctively. The man I knew was always very shy and reserved but he could also display a fine sense of humour.

During the republic referendum campaign, I attended a press conference at New South Wales Parliament House with Sir Harry and then accompanied him to his car. On the way out he was asked by a journalist what he thought of his former colleagues, Sir Anthony Mason and Sir Gerard Brennan, supporting the republic model. He replied, "Even Homer erred". The journalist gave him a puzzled look. I said to Sir Harry, "I don't think she quite got the reference". He replied, "I imagine she thought I meant Homer Simpson".

Sir Harry was also always generous with his time. He was happy to address law students and encourage young lawyers. He gave a well attended speech on his view of the role of the Chief Justice of the High Court at UNSW in my final year, replete with his capacity for clever understatement. I have had, throughout my short working life, a photo of Sir Harry Gibbs and me on my wall at work. It is a useful talisman from which to draw inspiration. A *festschrift* in honour of Sir Harry Gibbs is long overdue. I am delighted that the Society has decided to dedicate this conference to Sir Harry's work and am honoured to be part of it.

The Hon R P Meagher, AO, QC once said:

> "It is one of Sir Harry's great achievements to utter simple truths in a way that makes them seem blindingly obvious, although they were not so before he uttered them".[1]

This is true of Sir Harry's statements on federalism.

The issue of federalism is the focus of my paper. In it I am going to examine:

(a) Sir Harry Gibbs' background and his view of federalism; and
(b) His concerns about Commonwealth legislative and financial power.

The contribution of Sir Harry's experience and background

Sir Harry Gibbs grew up in Queensland. He attended school and university there and he practiced at the Queensland Bar from 1946 to 1961. During his time at the Bar he was regularly counsel for the Queensland Government in the High Court. He was counsel in two cases, both before the High Court and the Privy Council, involving s. 90 of the Constitution which deals with the prohibition on States raising excise duties. This issue became an interest of Sir Harry's both on the bench and in retirement. He was counsel in the *Dennis Hotels v. Victoria*[2] and *Whitehouse v. Queensland*[3] cases which establish that a backdated licence fee is not an excise.

Sir Harry's judgments do not espouse a broad general theory of federalism, although they do present a consistently federal approach to the Constitution. His judgments display what the obituarist Mark McGinness described as an "exemplary style – simple, logical, lucid, unambiguously expressed, without diversion, flourish or frills".[4] Sir Harry respected the great federalist Chief Justice, Sir Samuel Griffith and kept a picture of Griffith on the wall in his chambers.[5] Right from the time he was welcomed to Perth at his first sitting as Chief Justice he stressed the value of federalism. On that occasion he said:

"It is of great importance in a federation that federal instrumentalities do not lose touch with the people of the States where most of the inhabitants of the nation live and most of the activities vital to its well-being are carried out".[6]

The first speech I have been able to find by Sir Harry Gibbs on federalism was given in 1985, late in his chief justiceship. He said of the federation that "[a]s a matter of history, the people of the colonies would not have united on any other basis". But he lamented that the framers' vision had not been implemented:

"…..largely as a result of decisions of the High Court. By a process of expansive interpretation some of the powers given to the Commonwealth by the Constitution [have] already…been widened in a way which no one in 1901 would have thought possible. The result has not been entirely satisfactory".[7]

Gibbs' model of federalism

Gibbs believed that the essence of a federation is that:

"…..there should be two levels of government, each of which is limited to its own sphere, but neither of which is subordinate to the other. There must be a division of powers, effected by a written Constitution which binds both levels of government, so that neither has absolute sovereignty. Each level of government should be independent and supreme within the area of its powers, and each should have under its control the financial resources necessary to enable it to perform its functions".[8]

Sir Harry's model of federalism was a coordinate model where two levels of government each have separate powers and functions. He told this Society in 1992 that federalism "is of the essence of the Constitution".[9] I would like to describe him as a "bright-line federalist". His vision for the appropriate division of powers in Australia "can be summed up in one sentence: nothing should be done by the Commonwealth that could be done equally well by the individual States themselves".[10]

Gibbs' support for federalism, both as a Justice of the High Court and as a writer and commentator after that time, was predicated on his view that it was the federal system that the framers of the Constitution had established "in the true sense".[11] The framers' conception was that they were creating a nation where the States would continue to have a separate sphere of responsibility where, to paraphrase Sir Henry Parkes, their powers would not be crippled, their authority diminished, or their rights invaded. Commonwealth powers were to be restricted and defined in s. 51 of the Constitution "for example, in relation to banking, insurance, fisheries and industrial conciliation and arbitration. The [framers] restricted the application of the provisions regarding trial by jury, and freedom of religion, to Commonwealth laws. They prohibited the Commonwealth from taxing State property".[12] The federal government was to be "given power only over specific matters in respect of which uniform legislation was desirable and that the residue of power was left to the States".[13] The framers, as Gibbs understood it, "proceeded on the assumption that State functions would include, as Griffith said, 'almost all matters which have a direct bearing on the social and material welfare of the people' ".[14]

Gibbs' federalist interpretation of the Constitution

Gibbs' view of the importance of the federal balance influenced his approach to the interpretation of the Constitution. As he said in *Koowarta v. Bjelke Peterson*, "in determining the meaning and scope of a power conferred by s. 51 it is necessary to have regard to the federal nature of the Constitution".[15] This was not a revolutionary concept. Nor was it the reserved powers doctrine which Gibbs, consistent with the *Engineers Case*,[16] rejected. It was a view of the Constitution that was, to some extent, shared by judges of the Latham Court who, in 1947, in *Melbourne Corporation v. The Commonwealth*[17] drew implications from federalism to prevent the Commonwealth legislating to impose special burdens or disabilities on State governments.

What underlay Sir Harry's federalism jurisprudence was best expressed in *Queensland Electricity Commission v. The Commonwealth*,[18] a case considering the application of *Melbourne Corporation* doctrine. Gibbs held that:

"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 organized. The Constitution predicates their continued existence as independent entities': *Melbourne Corporation v. The Commonwealth*. The fundamental purpose of the Constitution, and its 'very frame' (*Melbourne*

Corporation v. The Commonwealth), reveal an intention that the power of the Commonwealth to affect the States by its legislation must be subject to some limitation".[19]

This meant that provisions of the Constitution need to be read, not in isolation, but in the context of the whole document. Gibbs' hope was that in defining the limits of Commonwealth power:

> "…..the Courts would have resolved any ambiguity by interpreting the provisions in a way that would maintain the federal distribution of power which the Constitution so obviously appears to guarantee. In other words, on principle one would have expected the Courts to hold that no single power of the Commonwealth should be given so wide an effect that the careful definition of other powers would be meaningless and that the States would be rendered subordinate to the Commonwealth in areas of power left to them by the Constitution.... The Court has rightly laid emphasis on the need to give a broad interpretation to constitutional provisions, but has ignored the necessary qualification that the Constitution as a whole may indicate that to give a narrower meaning to particular provisions would better preserve the federal balance that the Constitution intends to maintain".[20]

In relation to the limitations of the *Melbourne Corporation* doctrine and its extension Gibbs noted that:

> "There is not much value in a principle that protects the existence of the States and at the same time places no limit on the extent to which the Commonwealth can deprive the States of their functions".[21]

In relation to the external affairs power, for instance, Gibbs' notions of the federal balance required "that some limits be imposed on the power to implement international obligations conferred by par (xxix)".[22] This is particularly so as the external affairs power "differs from other powers conferred by s. 51 in its capacity for almost unlimited expansion".[23] In explaining the limits of Commonwealth power, imposed by the federal balance, Gibbs sought in aid a decision of Latham CJ, Rich, Dixon, McTiernan, Williams and Webb JJ, on the defence power, where the Court held:

> "Nearly all the limitations imposed upon Commonwealth power by the carefully framed Constitution would disappear and a unitary system of government, under which general powers of law-making would belong to the Commonwealth Parliament, would be brought into existence notwithstanding the deliberate acceptance by the people of a Federal system of government upon the basis of the division of powers set forth in the Constitution. We proceed to state reasons why the Court should not ascribe an operation so far-reaching and, indeed, revolutionary".[24]

Gibbs held that in deciding whether legislation purportedly enacted under the external affairs power is valid it will be "necessary to have regard to the fact that the Constitution is a federal and not a unitary one".[25]

Similarly the federal nature of the Constitution placed limits on how Sir Harry viewed the scope of the corporations power. In *Actors and Announcers Equity Association v. Fontana Films*,[26] he said:

> "[H]aving regard to the federal nature of the Constitution, it is difficult to suppose that the [corporations power was] intended to extend to the enactment of a complete code of laws, on all subjects, applicable to the persons named in those paragraphs ... extraordinary consequences would result if the Parliament had power to make any kind of law on any subject affecting such corporations".[27]

And:

> "…..The method which the courts have followed in the past, of approaching the solution of the difficult problems presented by such a provision as s. 51(xx) gradually and with caution, proceeding no further at any time than the needs of the particular case require, is the most likely, in the end, to achieve the proper reconciliation between the apparent width of s. 51(xx) and the maintenance of the federal balance which the Constitution requires".[28]

It is important to note however that Gibbs' view of federalism did not mean he was fast and loose with the provisions of the Constitution. Nor did it detract from his strict, technical approach to reading its provisions. Nevertheless, it did infuse his thinking about the outer limits of Commonwealth power.

Concerns about Commonwealth legislative power

Sir Harry Gibbs' view of coordinate federalism suggests that each level of government was to be independent of the other. This view of the federation influenced his thinking about the limits of Commonwealth power.

External affairs

As I have mentioned, one of Sir Harry's key concerns was the potential interpretation that could be given to

s. 51 (xxix) of the Constitution – the external affairs power, which provides:

> "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to ..... external affairs".

Sir Harry acknowledged that the external affairs power would give rise to "difficult decisions"[29] and would create "grave difficulties of interpretation". He agreed with Sir Harrison Moore who described it as a "somewhat dark"[30] power. The cases on the external affairs power raised the question of what constitutes "external affairs". Sir Harry's view was that the expression was a confined one. It related to: "the external relations of the Commonwealth",[31] "some matter indisputably international in character",[32] "relations with other countries or persons or things outside Australia",[33] or "matters concerning other countries".[34] However "a matter does not become an external affair simply because Australia has entered into an agreement with other nations with regard to it".[35]

He contrasted laws made pursuant to the external affairs power with laws which related to the "internal organization of the nation" and therefore "could not be regarded as a law with respect to external affairs".[36]

Sir Harry's view did not mean that the external affairs power has a narrow scope. For example, he conceded that the power could properly be used "in some circumstances, at least",[37] to pass a law to carry into effect an international agreement to which Australia is a party. It is not limited to matters geographically external to Australia. For instance, Sir Harry thought that diplomatic privileges, the pursuit of fugitives from another country, and laws making it an offence to excite disaffection with a friendly nation or aerial navigation are all matters which fall within the ambit of the external affairs power.[38]

Sir Harry rejected a view that the external affairs power would support the Commonwealth Parliament enacting laws to execute any treaty to which the Commonwealth is a party, regardless of whether the subject matter of the treaty was purely domestic and involved matters which did not relate to relations with other countries. He was particularly concerned that such a view would give the Commonwealth Executive the ability to "determine the scope of Commonwealth power".[39] This would potentially give the Commonwealth the power to:

> "…..control education, to regulate the use of land, to fix the conditions of trading and employment, to censor the press, or to determine the basis of criminal responsibility …the Commonwealth would be able to acquire unlimited legislative power. The distribution of powers made by the Constitution could in time be completely obliterated; there would be no field of power which the Commonwealth could not invade, and the federal balance achieved by the Constitution could be entirely destroyed".[40]

In retirement Sir Harry continued to worry about the scope of the external affairs power. In a provocative statement to this Society he suggested that "[i]t is hardly an exaggeration to say that it would not make any practical difference if the word 'anything' were substituted for 'external affairs' in this provision".[41] Gibbs called for an amendment to the external affairs power to limit its scope along the lines he was suggesting in his judgments.[42] With the Commonwealth in possession of an unlimited treaty making power, Gibbs became worried about the amount of scrutiny treaties were receiving. He was pleased to see Parliament beginning to subject treaties to more effective probing.[43] He was also alarmed about the central role that the *Racial Discrimination Act* 1975, which had been enacted pursuant to the external affairs power, played in *Mabo*,[44] where it was used to strike down Queensland land law.[45]

Sir Harry was in the minority in almost all the cases concerning the federal balance. The minority view of the external affairs power has not prevailed. Gibbs thought that the combined effect of the external affairs power and s. 109 of the Constitution could annihilate State legislative power.[46] He concurred with a comment of David Jackson, QC, who in 1984 observed that "in the future the issue between State and Commonwealth Governments is more likely to be whether the Commonwealth power should be exercised, rather than whether it exists. In other words the resolution of the issue is likely to be by political, rather than by legal, means".[47]

Gibbs' fellow judges in the minority in cases concerning the federal balance were, variously, Sir Daryl Dawson, Sir Keith Aickin and Sir Ronald Wilson. It is appropriate also to pay tribute to Sir Ronald, who passed away last year shortly after Sir Harry. Whatever view one takes of Sir Ronald's role as President of the Human Rights Commission, as a High Court Justice, he should be remembered, like Sir Harry, as a great federalist.[48]

Corporations power

A discussion of Sir Harry Gibbs and federalism could not be held at this time without some further mention of the corporations power. Section 51(xx) provides that:

> "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to ..... Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth".

In the cases that examined the limit of the power, Gibbs found that the trading activities of trading corporations could be regulated.[49] He held that legislation could apply to a trading corporation "only in relation to such of its activities as are properly regarded as trading activities".[50] If its activities are "preparatory to the trade [and] do not form part of it",[51] then they are not trading activities:

> "The authorities in which s. 51 (xx) has been considered are opposed to the view that a law comes within the power simply because it happens to apply to corporations of the kind described in that paragraph…in the case of trading and financial corporations, laws which relate to their trading and financial activities will be within the power. This does not mean that a law under s. 51 (xx) may apply only to the foreign activities of a foreign corporation, for *ex hypothesi* the law will be one for the peace, order and good government of the Commonwealth. It means that the fact that the corporation is a foreign corporation should be significant in the way in which the law relates to it".[52]

Gibbs' view of the corporations power has not, at this stage, commanded majority support. His view was cited in aid in the recent challenge to the *Work Choices* legislation particularly as counsel tried to explain Sir Harry's view. If trading activities of trading corporations could be regulated, and financial activities of financial corporations could be regulated, but he did not mean that only the foreign activities of a foreign corporation could be regulated, what did he mean by the observation that "the fact that the corporation is a foreign corporation should be significant in the way in which the law relates to it"?[53]

It is difficult to speculate on the result of that challenge before the present High Court. It is also unwise to guess how Sir Harry might have determined the matter. Sir Harry's speeches in retirement seemed to express different views. At Samuel Griffith Society conferences, in 1992 and 1993, Sir Harry initially expressed concern at the potential of the corporations power, given the state of the authorities.[54] However, by 2001 he seemed, at least on one reading, to be expressing a somewhat different view. Sir Harry hoped that politicians of all major parties would put aside political differences and work "out anew which powers should be given to the Commonwealth and which to the States". In this context he observed that "some issues should be easy to decide – for example, to increase the power of the Commonwealth with regard to corporations".[55] At any rate it is idle to hypothesise what Sir Harry might write were he a Justice of the High Court hearing the *Work Choices* challenge.

Concerns about Commonwealth financial power

The second essential characteristic of a federation as Gibbs saw it was for each component part to have financial independence. The interpretation given to three of the financial provisions of the Constitution have made the achievement of this goal difficult.

Section 90 excise duties

Gibbs, using the words of Dr Johnson, described the taxes mentioned in s. 90 of the Constitution as "hateful".[56] His view of s. 90 was reflected in his statement that:

> "It is essential to the nature of a true federation that the States should have under their independent control financial resources sufficient to perform their functions. The way in which s. 90 has been interpreted is one of the factors which have contributed to the instability of federation in Australia".[57]

Section 90 prevents the States from raising excise duties. An excise duty has a vague meaning, but by 1983 it meant:

> "…..a tax directly related to goods imposed at some step in their production or distribution before they reach the hands of the consumer. This means that the person on whom the tax is imposed is charged by reason of and by reference to the fact that he has taken such a step in relation to the goods e.g., as manufacturer, producer, processor or seller".[58]

What was controversial is how this manifested itself. That is, in considering impugned legislation, the Court divided between those who thought that the practical effect of the tax was central to the law's validity

(i.e., if it produced the same result as an excise duty it was an excise duty) and those who favoured the legal effect (i.e., did the legislation provide for an excise duty?). Sir Harry favoured the legal effect test. He explained his view in *Hematite Petroleum v. Victoria*:

> "[Section] 90 makes exclusive to the Commonwealth a particular sort of tax. The question whether a State law infringes s. 90 can be answered only by determining whether it imposes that sort of tax. One must first define 'excise', and then ask whether the tax imposed by the State statute comes within that definition. It is irrelevant that the State statute brings about the same practical result as a duty of excise, for s. 90 does not forbid the States to achieve any particular economic result; it forbids them to enact a particular form of taxation".[59]

This led Sir Harry to support schemes whereby the States could charge licence fees to a business, based on the previous year's turnover, without being an excise duty, as such charges would not constitute taxes on goods. However he was not always in the majority and, partly because of the shifting composition of the Court during his 17 years on the bench, inconsistent decisions resulted.

Backdated licence fees relating to tobacco[60] and petrol[61] were upheld as not being excises. However an annual levy on the owners of livestock was held to be an excise,[62] as was a levy calculated on the number of animals slaughtered at an abattoir in a previous year[63] or the processing of fish.[64] Gibbs was critical of the uncertainty and lack of precision about whether a particular tax is an excise.[65] When the backdated licence fees were finally invalidated, in 1997, in *Ha v. New South Wales*,[66] he warned that the result of the decision was that "the imbalance between revenue and expenditure of both the Commonwealth and the States has become even more extreme and the financial dependence of the States on the Commonwealth has become even greater".[67]

Sir Harry Gibbs applied a purposive approach to s. 90. It was, in his view, an essential part of the pact of federation to abolish "customs barriers erected by the Australian colonies. The inclusion of excises and bounties in the areas forbidden to the States was obviously intended to make effective the Commonwealth's control of its tariff policy".[68] Sir Harry rejected a view that the section was designed in order to give the Commonwealth "a real control of the taxation of commodities",[69] or that it "enabled it to control the national economy as an economic union".[70]

Sir Harry also believed that the presence of s. 109 of the Constitution, which enshrined the supremacy of Commonwealth laws, also provides a reason to take a narrow view of the prohibition on excise duties. The presence of s. 109 in the Constitution means that "a State excise duty which counteracted the effect of a Commonwealth tariff" would be invalid.[71]

A wide interpretation of the meaning of excise duties would, in Sir Harry's view, force the States to "impose some forms of taxation which, although constitutionally permissible, are less economically desirable than taxes now categorized as duties of excise".[72] It would also continue to cripple the States financially as they had been "virtually prevented" from imposing income tax.

Sir Harry Gibbs' views of excise duties are not the accepted law, and in retirement he campaigned for an amendment to the Constitution to allow the States to raise excise duties.

It is interesting to consider the backgrounds of those Justices who, like Sir Harry, took a narrower view of excise duties. Every Justice who had been a State Solicitor-General prior to their appointment has adopted a narrow view of excise duties, and every Justice from a State other than New South Wales and Victoria (with the exception of Sir Gerard Brennan) also adopted a narrow view. It is also interesting to observe that there have been no cases on s. 90 since *Ha* in 1997, despite the fact that in that decision the Court was split 4:3 and only two justices, Gummow and Kirby JJ (of the majority), remain on the Court from that time. Perhaps the effect of the Goods and Services Tax has meant that the States have been less likely to attempt creative taxation measures.

The other interesting observation about cases involving s. 90 is that in 1974 in *Dickenson's Arcade Pty Ltd v. Tasmania*[73] the Court held that a tax on consumption was not an excise duty. This means that from 1974 the States would have had the power to raise their own consumption tax. Sir Harry said, while supporting the legality of a consumption tax raised by the States, that:

> "..... the exclusion of a consumption tax from the conception of an excise seems to be an anomaly in principle, because a tax on consumption would appear to have the same effect in passing into the price of the commodity, and reducing demand for it, as a tax on production, distribution or sale".[74]

It is interesting that despite the many complaints about vertical fiscal imbalance, no State took up this option.

Appropriations power

The second area of financial power where there was a potential for the Commonwealth to reach into areas of State action was, in Gibbs' view, the appropriations power. Section 81 of the Constitution relevantly provides:

> "All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution".

Gibbs understood the potential reach of this power. In the *Australian Assistance Plan Case*,[75] the Court was asked to consider what appropriating money "for the purposes of the Commonwealth" meant. Gibbs, in classic federalist style, observed:

> "It would be contrary to all principles of interpretation to treat the words 'for the purposes of the Commonwealth' in s. 81 as adding nothing to the meaning of the section. The words do not in their ordinary sense have the same meaning as 'for any purpose whatever' or 'for such purposes as the Commonwealth may think fit'. They appear in a Constitution by which specific powers of legislation were conferred upon the Commonwealth and the general powers of the colonies which became the States were, with certain exceptions, continued. Throughout the whole of the Constitution, including the Chapter in which s. 81 appears, the expressions 'the Commonwealth' and 'State' are used to refer to the respective bodies politic rather than to the people forming a particular community. In this context the words 'the purposes of the Commonwealth' in s. 81 naturally refer to purposes for which the Commonwealth, as a political entity, is empowered by the Constitution to act.[76]
>
> "It therefore seems correct to say that 'purposes of the Commonwealth' are purposes for which the Commonwealth has power to make laws – purposes which however are not limited to those mentioned in ss. 51 and 52 but which ... may include matters incidental to the existence of the Commonwealth as a state and to the exercise of its powers as a national government".[77]

Gibbs was in dissent in this case, but it provides another example of his application of federalist principles.

Section 96: grants power

The third provision of the Constitution whose interpretation created problems of vertical fiscal imbalance was s. 96. Section 96 allows the Commonwealth to make grants to the States on such terms and conditions as the Commonwealth Parliament thinks fit. The power was originally designed to last for the first ten years of federation "and thereafter until the Parliament otherwise provides". However, the Commonwealth Parliament has never chosen to limit its options under this power. In broad terms, s. 96 allows the Commonwealth, by making tied grants to the States, to enact legislation in areas in which it does not have express power to do so. Section 96 was the constitutional centrepiece of the Whitlam Government's policy programme.[78] Some s. 96 grants are made free of conditions but many are not. Sir Harry regarded the effect of grants made under s. 96 "as the most important cause of the distortion of the financial relations between the Commonwealth and the States",[79] and the source of a "Commonwealth bureaucracy which duplicates that of the States".[80]

In Sir Harry's view the most significant financial impact s. 96 has had on the States has been through the 1942 uniform taxation scheme which has effectively centralised income taxation. Under that scheme the Commonwealth imposed income tax rates about as high as the same sum previously collected by the Commonwealth and States combined. The tax rates have remained high enough to make it politically difficult for the States to raise their own income tax. This has led to a vertical fiscal imbalance where the Commonwealth raises more taxation than it needs and the States do not raise enough. Sir Harry suggested that the consequence of this imbalance was to place:

> "..... a strain on the federal system; it puts the financial relationship between the States and the Commonwealth out of balance. The result is a reduction of accountability, because the Commonwealth raises money although it is not responsible for the way in which it is spent while the States spend money although they are not accountable for the manner in which it is raised".[81]

As a judge, Sir Harry Gibbs only considered the extent of s. 96 grants on one occasion, in the *DOGS Case*.[82] No party asked the Court to overrule previous authority on s. 96 so there is no substantial consideration of the provision. Gibbs therefore held, one suspects reluctantly, that "if money is granted by the Commonwealth to a State, there is a grant of financial assistance to the State within s. 96 notwithstanding that the condition of the grant requires the State to pay all the moneys away".[83] He did add however that:

"The State cannot be compelled to accept the moneys, and the fact that it does accept them may be regarded as an acknowledgement of the fact that the moneys granted are of assistance to the State".[84]

States have been more willing to reject Commonwealth grants of recent times. But this has had consequences of both a political and economic nature. Nowhere is this better illustrated than in Victoria, where the Commonwealth government offered to pay $90 million towards refurbishment of the Melbourne Cricket Ground on the condition that federal workplace inspectors would be allowed on the site. By the Victorian government refusing the federal government's assistance for ideological reasons, the MCG redevelopment cost the Victorian taxpayers more than it otherwise would have.

Sir Harry also called for consideration of possible amendments to s. 96, but he was not really satisfied with either of the suggestions he made on this topic. The first suggestion was "to amend the Constitution in a way that would forbid the Commonwealth to make grants except for defined purposes". But he acknowledged that "such a course presents great practical difficulties… it is not easy to suggest a formula that would include purposes for which grants should be made and exclude those for which they should not".[85] His second proposal was in effect to revive and refine the "Braddon clause" to provide that "a specified proportion of the total revenues of the Commonwealth should be distributed to the States and to specify the proportions in which the States should share in the amount distributed".[86] An unsuccessful amendment of this kind was attempted in 1910.

Other issues

Over the years Sir Harry expressed a number of other concerns about the state of federalism both in his judgments and in speeches. He found the Whitlam Government's attempts to introduce legislation providing for Senators for the Territories to be invalid. This was because of his conception of the Senate as an institution designed to protect the interests and integrity of the States and the potential for the Commonwealth to undermine this by potentially placing:

"…..no limit to the number of Senators who may be chosen for each Territory. By legislation allowing a sufficiently large representation to the Territories, the House that is intended to be the organ of the States could be brought entirely under the control of Senators elected by residents of the Territories".[87]

Gibbs was again in the minority in this case. When, almost two years later, and as the result of the change of only one member of the Court, the Justices were asked to reconsider the issue,[88] Gibbs felt bound by the precedent of the earlier authority. In a phrase that beautifully encapsulates Sir Harry's approach to the judicial function he said, "I have had much difficulty in deciding what course my duty requires".[89] His duty indicated that he should follow the precedent although he thought it wrong. In retirement, Sir Harry maintained his support for the Senate, and was concerned about plans to weaken the Senate's power "to operate as an effective check on the combined power of the Executive and the House of Representatives".[90]

Even in relation to Court accommodation he was a federalist. As a High Court Justice he was the principal opponent of Sir Garfield Barwick's idea that all the Justices would be permanently based in Canberra.[91] No doubt this was in part because he was concerned that judges would lose touch with people in other parts of Australia. He was a strong supporter of the idea that the Court should continue to travel to the State capitals despite its permanent home in Canberra.[92]

Ironically, despite being promised appointment to the mooted federal superior court in the 1960s, Sir Harry did not support the place of the Federal Court in the justice system. He said in 1981 that "it is difficult to discover any valid reason for bringing it into existence".[93] His concerns related to the effect that the growth of the Federal Court may have on the position of the State Supreme Courts. He felt that rather than passing the original jurisdiction of the High Court to a new court, it could have been passed to the State Supreme Courts. His concerns have turned out to be justified, as the Federal Court's jurisdiction has continued to grow. Recently plans have been announced to allow the Federal Court to hear a limited class of criminal trials involving hard core cartel conduct under the Trade Practices Act. Cases involving Commonwealth crimes have traditionally been heard by State Supreme Courts.[94]

In retirement Sir Harry Gibbs became increasingly distressed by the state of federalism. He became the founding President of this Society, which has been dedicated to "promote discussion of constitutional matters through the articulation of a clear position in support of decentralisation of power through the renewal of our federal structure".[95]

In particular Sir Harry was worried that towards the end of the 20th Century plans were being made to

rewrite the Constitution with, as he put it: "the ultimate aim ... to destroy federalism … encouraged in the pursuit of that objective by the fact that federalism in Australia has already been weakened by the actions of Governments and the decisions of the Courts".[96]

He was therefore opposed to plans which he saw as weakening the federation, in particular, a mooted separate Aboriginal state. He warned that, based on overseas experience, a separate state might lead to division and potentially "the ultimate dissolution of the federation"[97] due to ethnic tensions which Australia has managed to avoid.

Similarly, as the republic debate gained a head of steam Gibbs became worried that not enough attention had been paid to the role of the States in a republic: in particular whether, in order to alter the Constitution pursuant to s. 128 to make Australia a republic, the referendum would need to pass in all States because, in effect, one was being asked to dissolve the "*indissoluble* federal Commonwealth under the Crown". His other concern related to the position of State Governors, and the need to consider amendments to the State Constitutions as well as the Commonwealth Constitution concurrently.[98] As we know, the republic referendum was soundly defeated, but those who seek its revival have not focused enough on these particular questions.

Conclusion

As a Justice of the High Court Sir Harry Gibbs did his duty. He interpreted the Constitution with particular regard to its federal character. As his time on the bench drew to a close, and in retirement, as the case law increasingly went against the meaning he believed the Constitution to have, he became ever more concerned with the state of federalism.

The further the interpretation of the Constitution moves from his vision, the harder it may be to return it to a jurisprudence that has regard to its federal character. I believe that the focus of federalism in the future will be less on legal federalism and more on political federalism. On the state of current authorities the question in the future seems to be not, does the Commonwealth have the power, but should it exercise it? The challenge of political federalism will be to resolve the tension between Commonwealth governments of both political colours wishing to pursue a broader agenda, and the need for the State governments to make themselves more efficient and dynamic to keep the Commonwealth at bay. If the proper balance can be achieved then we will well and truly serve the distinguished memory of Sir Harry Gibbs.

Endnotes:

1. Roderick Meagher, *Address Launching "Upholding the Australian Constitution", Volume 1*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 3 (1993), 150.

2. (1960) 104 CLR 529.

3. (1960) 104 CLR 609.

4. Mark McGinness, *Conservative stickler followed precedent*, *The Sydney Morning Herald,* 2 July, 2005.

5. Joan Priest, *Sir Harry Gibbs: Without Fear or Favour* (1995), 57.

6. Transcript of Proceedings, *Welcome to the Chief Justice, Sir Harry Gibbs and Mr Justice Brennan at Perth* (High Court of Australia, 21 September, 1981).

7. Sir Harry Gibbs, *Some thoughts on the Australian Constitution*, Speech delivered at the All Nations Club, 21 November, 1985, 7.

8. Sir Harry Gibbs, *The Threat to Federalism*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 2 (1993), 183-184.

9. Sir Harry Gibbs, *Rewriting the Constitution*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 1 (1992), x.

10. *Ibid*, xiv.

11. Sir Harry Gibbs, *The Decline of Federalism?*, 18 (1) *University of Queensland Law Journal*, 1.

12. Sir Harry Gibbs, *The Constitution 100 Years On* in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 13 (2001), xvi.

13. Sir Harry Gibbs, *Federalism in Australia*, in Alan Gregory (ed), *The Menzies Lectures 1978-1998* (1998), 261.

14. Sir Harry Gibbs, *The Decline of Federalism?*, *loc. cit.*, 1.

15. (1982) 153 CLR 168 at 199.

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

17. (1947) 74 CLR 31.

18. (1985) 159 CLR 192.

19. *Ibid.*, at 205 (citations omitted).

20. Sir Harry Gibbs, *The Threat to Federalism*, *op. cit.*, 186.

21. *Ibid.*.

22. (1983) 158 CLR 1 at 99.

23. *Ibid.*, at 100.

24. *R v. Foster* (1949) 79 CLR 43 at 83.

25. (1982) 153 CLR 168 at 192.

26. (1982) 150 CLR 169.

27. *Ibid.*, at 181-182.

28. *Ibid.*, at 182.

29. *New South Wales v. The Commonwealth (The Seas and Submerged Lands Case)* (1975) 135 CLR 337 at 389.

30. *Koowarta v. Bjelke-Petersen* (1982) 153 CLR 168 at 188.

31. (1975) 135 CLR 337 at 389.

32. *Ibid.*, at 390.

33. (1983) 158 CLR 1 at 99.

34. (1982) 153 CLR 168 at 188.

35. *Ibid.*, at 201-202.

36. (1975) 135 CLR 337 at 390.

37. (1982) 153 CLR 168 at 189.

38. *Ibid.*, at 190-191.

39. *Ibid.*, at 198.

40. *Ibid.*.

41. Sir Harry Gibbs, *Address launching "Upholding the Australian Constitution", Volume 1*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 3 (1993), 137.

42. Sir Harry Gibbs, *Concluding Remarks*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 7 (1996), 250.

43. Sir Harry Gibbs, *Australia Day Message, 26 January, 1996*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 16 (2004), 264.

44. *Mabo v. Queensland* (1992) 157 CLR 1.

45. Sir Harry Gibbs, *The Decline of Federalism?*, *loc. cit.*, 5.

46. *Ibid.*.

47. *Ibid.*.

48. Interestingly, in an interview Sir Ronald undertook in 1997 in the light of *Bringing Them Home*, he was asked whether he would have taken a different approach to adjudication if he were to return to the High Court today. He responded:

> "I don't think that I would, but because my dominant feeling on the bench is that I have sworn to 'do justice according to law'. And it's that 'according to law' that makes it so damned difficult… the two decisions that I would not wish to confront again was the *Koowarta* decision and secondly *Mabo #1*. I wrestled for ages with *Mabo #1* and I still can't read section 10 of the *Racial Discrimination Act* in such a way as to find that it applies and so I dissented. Mind you, I wasn't alone. It was 4:3. So two other minds of some eminence reasoned along same lines, but I was longing to find with the majority. So you've posed a conundrum and frankly my only defence is that I gave it my best shot in these two cases but was compelled by my legal reasoning the way I did. It was a great honour to serve on the High Court but I can't say it was the highlight of my professional career. It was damned hard work". (From Julian Morrow, "Interview with a Commissioner", *Blackacre* (1997) 27, 29).

49. *Strickland v. Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 at 525.

50. (1983) 158 CLR 1 at 117.

51. *Ibid.*, at 118.

52. (1982) 150 CLR 169 at 182-183.

53. For instance in oral argument by NSW, South Australia and Queensland and distinguished by the Commonwealth.

54. See for example Sir Harry Gibbs, *Rewriting the Constitution*, *loc. cit.*, xviii, and Sir Harry Gibbs, *The Threat to Federalism*, *loc. cit.*,187.

55. Sir Harry Gibbs, *The Constitution 100 Years On*, *loc. cit.*, xix-xx.

56. Sir Harry Gibbs, *A Hateful Tax*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 5 (1995), 123.

57. *Ibid.*, at 126.

58. *Hematite Petroleum Pty Ltd v. Victoria* (1983) 151 CLR 599, 615 per Gibbs CJ.

59. *Ibid.*, at 618.

60. (1974) 130 CLR 177.

61. *H C Sleigh Ltd v. South Australia* (1977) 136 CLR 475.

62. *Logan Downs Pty Ltd v. Queensland* (1977) 137 CLR 59.

63. *Gosford Meats Pty Ltd v. New South Wales* (1985) 155 CLR 368.

64. *MG Kailis Pty Ltd v. Western Australia* (1974) 130 CLR 245.

65. Sir Harry Gibbs, *Vertical Fiscal Imbalance and the Allocation of Tax Powers: Constitutional Reform*, in DJ Collins (ed), *Vertical Fiscal Imbalance and the Allocation of Taxing Powers* (1993), 336.

66. (1997) 189 CLR 465.

67. Sir Harry Gibbs, *Federalism in Australia*, *loc. cit.*, 271.

68. Sir Harry Gibbs, *A Hateful Tax*, *loc. cit.*, 127-128.

69. Sir Harry Gibbs, *Vertical Fiscal Imbalance and the Allocation of Tax Powers: Constitutional Reform*, *loc. cit.*, 334.

70. *Ibid.*, 335.

71. (1983) 151 CLR 599 at 617.

72. *Ibid.*.

73. (1974) 130 CLR 177.

74. Sir Harry Gibbs, *Vertical Fiscal Imbalance and the Allocation of Tax Powers: Constitutional Reform*, *loc. cit.*, 336.

75. *Victoria v. The Commonwealth and Hayden* (1975) 134 CLR 338.

76. *Ibid.*, at 374.

77. *Ibid.*, at 375.

78. Gough Whitlam, *The Labor Government and the Constitution*, in G Evans (ed), *Labor and the Constitution 1972-1975* (1977) 308.

79. Sir Harry Gibbs, *The Threat to Federalism*, *loc. cit.*, 188.

80. Sir Harry Gibbs, *The Decline of Federalism?*, *loc. cit.*, 5.

81. *Ibid.*, 6.

82. *Attorney-General (Vic); Ex rel Black v. Commonwealth* (1981) 146 CLR 559.

83. *Ibid.*, at 592.

84. *Ibid*..

85. Sir Harry Gibbs, *Vertical Fiscal Imbalance and the Allocation of Tax Powers: Constitutional Reform*, *loc. cit.*, 339.

86. *Ibid*., 340.

87. (1975) 134 CLR 201 at 247.

88. *Queensland v. The Commonwealth* (1977) 139 CLR 585.

89. *Ibid.*, at 599.

90. Sir Harry Gibbs, *Australia Day Message, 26 January, 2004*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 17 (2005), 379.

91. Joan Priest, *op. cit.*, 81.

92. Transcript of Proceedings, *Official Welcome from the Tasmanian Bar* (High Court of Australia, 28 April, 1981).

93. Sir Harry Gibbs *The State of the Australian Judicature* (Address to the Australian Legal Convention, Hobart, 10 July, 1981), 3-4.

94. Peter Costello, *Additional Funding for the ACCC: Criminal Cartel Enforcement* (Press Release, 9 May, 2006).

95. *Appendix 2: The Samuel Griffith Society*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 2 (1993), 273.

96. Sir Harry Gibbs, *The Threat to Federalism*, *loc. cit.*, 183.

97. Sir Harry Gibbs, *Federalism in Australia*, *loc. cit.*, 269.

98. Sir Harry Gibbs, *A Republic: The Issues*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 8 (1997), 1-16.