Sir Samuel Griffith as Chief Justice of the High Court of Australia

[The Fifth Sir Harry Gibbs Memorial Oration]

The Honourable Dyson Heydon

The judicial career of Sir Samuel Griffith falls into two parts. From 1893 to 1903 he was Chief Justice of Queensland. From 1903 to 1919 he held the office of Chief Justice of the High Court of Australia (not "Chief Justice of Australia", as some of his successors have preferred to style it).

The first phase of this judicial career falls outside the present topic. But it deserves to be briefly mentioned. It did cover 10 years of his 26 years on the bench.

The appointment of Sir Samuel as Chief Justice by himself as Premier was unusual. Sir Harry Gibbs dealt with it in his brief biography of Griffith CJ. Sir Harry was not a man to mince words. He did not evade uncomfortable points. But he had tact. And it is not possible to surpass the tactful way in which he described this episode. "In 1893 Griffith became Chief Justice of Queensland, having first negotiated with the Government of which he was Premier, an increase in salary."[1] Turning to the substance of Griffith CJ's Queensland career, Sir Harry continued in warmer vein: "As Chief Justice, he revealed the mastery of legal principle and soundness and promptness of decision that later marked his career on the High Court". That verdict is confirmed by a detailed analysis of his work as Chief Justice of Queensland carried out by Justice Thomas.[2] His decisions, where not affected by statute or judicial overruling, continue to be cited and read.

But it would not be true to say that the Supreme Court of Queensland either in the 1890s or since has enjoyed fame throughout the common law world. In 1893, Queensland was a relatively new colony with a very small population. Most of the other Australasian colonies were not much larger. The population of Australia was only about one percent of that of the whole British Empire. The common law world was dominated by the English and American courts. The English courts were operating in a tradition 800 years old, at the heart of a vast Empire, in a city which was a great commercial centre. The American courts were operating in a powerful country which was well on the way to developing a new Empire. But Griffith CJ as a judge is not alone in his obscurity.

There are many English decisions of Griffith CJ's era that are still living law. Though there are famous English, Irish and Scottish judges of Griffith's era whose fame survives, their number is low – Lord Macnaghten, Lord Haldane, Lord Sumner, Lord Justice Scrutton, Lord Justice Atkin. As for the United States of America, one of Griffith CJ's contemporaries was the famous Oliver Wendell Holmes Jr, Justice and then Chief Justice of the Supreme Judicial Court of Massachusetts, and then Justice of the United States Supreme Court. But hardly any other American judge of that age remains familiar even to American lawyers. So the obscurity of Griffith CJ now on the world stage is matched by that of most of his contemporaries. But when Griffith CJ's Queensland judgments are examined, they can be seen to approach the best that was being written elsewhere in the common law world of that time. The same is true of his High Court judgments in non-constitutional fields.

Had the Australian colonies never federated into a Commonwealth of States, Griffith CJ's name would be little known today even in Australia. It was the path to federation and the achievement of federation which made him famous locally.

For the Australian people federation was generally beneficial. And it released many creative forces in Australian legal life as well. In form, it is true, federation did not make a radical change in the relationship between the Australian polities and the imperial government. The Australian colonies "had practically unlimited powers of self-government through their legislatures."[3] The limits lay in the *Colonial Laws Validity Act* 1865; the power of the Queen to disallow colonial statutes within one year; and the fact that laws reserved for her pleasure lacked force unless she assented to them within two years. These last two powers were preserved by sections 58-60 of the Constitution. But they have fallen into desuetude. They have been overtaken partly by the convention that the Governor-General acts only on the advice of her Australian Ministers and partly by the gradual movement to full Australian independence – via partial separation of military command in the First World War, participation in the Versailles Peace Conference, signature of the Treaty of Versailles, attendance at the Washington Naval Conference of 1921-22, the Balfour Report of 1926, the Statute of Westminster in 1931, the development of a separate foreign policy, the *Royal Style and Titles Act* 1973 (Cth) and the Australia Acts of 1986.[4]

From 1903 to 1906 the High Court was at its most unified and its happiest. Its overall quality was probably then at its highest. Its three members, Griffith CJ, Barton J and O'Connor J, were all graduates of the University of Sydney. Griffith was 58, Barton 54 and O'Connor 52. They had known and liked each other for many years, though there had been some disagreements, and the reasonable ambition of two of them to be Chief Justice was never fulfilled. On the High Court they lunched together daily. Griffith had drafted the Constitution in 1891. Barton had manoeuvred it through the 1897 and 1898 Conventions. Like Barton, O'Connor had extensive political experience. That is an asset for judicial work which is now sadly underrated. Indeed, it is almost totally missing from the present Australian judiciary.

Opinions differ as to the respective abilities of the first three justices. Barton J is generally seen as the least hard-working. But he did have the experience and ability to be expected of a former Prime Minister. In his bittersweet address at the sitting of the High Court on 13 April 1964 to mark his retirement, Sir Owen Dixon passed on the opinion of Sir Leo Cussen that "Barton's judgments were the best, … they had more philosophy in them, more understanding of what a Constitution was about, more sagacity; … they were well written, and … they were extremely good."[5] Griffith CJ is generally seen as the ablest of the three, but Sir Owen Dixon, though he praised him in various ways on various occasions, said: "I think – speaking for myself – that Mr Justice O'Connor's work has lived better than that of anybody else of the earlier times."[6] Sir Anthony Mason agreed with that last judgment, at least in relation to the foundation Justices, for he thought Isaacs J superior in influence and output.[7]

Whatever the merits of these comparisons, the equipoise of the Court was suddenly upset in 1906, when the membership was increased from three to five with the appointment of Justices Isaacs and Higgins. Isaac Isaacs was a very able, determined and aggressive man. Sir Anthony Mason has recently said that in a judicial career spanning 45 years he has never personally encountered a judge who sought to dominate weaker and compliant colleagues, "though I suspect one or two might have

had aspirations to become so. Nor have I ever encountered a single 'compliant' judge on the High Court. On the other hand, one suspects that Isaacs J may have been a dominant judge … and that in the Isaacs era there may have been compliant judges."[8] He wrote long, argumentative, passionate judgments. They often contained passages beginning, "The policy of the Act is irrelevant to its validity", but then proceeding over many pages to defend that policy very strongly, and to conclude that the legislation was valid. His biographer, Sir Zelman Cowen, said of him: "Even in his own day he stood apart from his brethren in the single-mindedness of his devotion to the cause of advancing the national power".[9] And for him, unlike Griffith CJ, nationalism implied "the strengthening and growth of central power".[10]

The other appointment of 1906, Mr Justice Higgins, was milder-mannered than Isaacs. But though not a member of the Australian Labor Party, he had served under a Labor government. He was in a sense the most left-wing judge ever appointed to the Court until Senator Murphy.

Justices Isaacs and Higgins fell into fairly speedy dissent from the original justices on some key constitutional approaches.

In 1912, Mr Justice O'Connor, suffering from chronic nephritis, and unable to retire because no pension was available, worked himself to death. In 1913, four new justices were appointed. One of them, A B Piddington, did not last long after it came to light that he had indicated to W M Hughes, the Attorney-General in the Fisher Labor Government, that he was "in sympathy with supremacy of Commonwealth powers". Had he not resigned, whatever his centralist sympathies, he probably would have turned out much better than the second new justice. Charles Powers was the least qualified person ever to be appointed to the High Court. Against that background, his performance on the Court was not surprising.

The third new justice, Justice Gavan Duffy, received one fine tribute from Sir Owen Dixon on his advocacy powers: "if ever there was a man who could make bricks without straw in open court, it was Sir Frank Gavan Duffy".[11] But on the bench his career was less distinguished.

The fourth new member was Mr Justice Rich. It is enough to repeat his biographer's bleak summary: "His reputation rested on a talent for stating complex propositions clearly and concisely. Over his 37 years as a Justice of the High Court, he too rarely exploited this talent."[12]

The unity of the first three years was shattered by the appointments of Isaacs and Higgins in 1906. And the high quality of the period between 1903 and 1912 was diluted by the appointments of Powers, Gavan Duffy and Rich. Not until the appointment of Starke in 1920, Dixon in 1929 and Evatt in 1930 did the quality of the Court as a whole begin to rise again to anything approaching that of the first three years.

Griffith CJ played a very influential role on the Court, particularly the early Court. In part this was because of Barton J's self-effacing conduct. It was the practice of those days for the judges to prepare "their individual reasons for judgment separately, and for those separate reasons for judgment to be read out by their authors in order of seniority in open Court on the day of judgment. The practice meant that it could happen that the first time one justice came to know of the reasons of another was when he heard them read out on the day he was to deliver his own".[13] In 1947, R G Menzies said: "Many times, I have reason to believe, Barton wrote separate reasons for

judgment and then, on the Bench, having heard Griffith read his, put his own away, and said 'I concur' ".[14] This practice may have been less than ideal, but Menzies praised it. It tends to refute allegations that Barton was lazy.

Griffith CJ was very active in argument. Sir Harry Gibbs said:

> When presiding in Court, Griffith was dignified, but firm and decisive. He was quick to grasp the point, intolerant of ill-prepared argument, and impatient of mere technicalities. He commenced the practice, followed ever since, of intervening in argument by questioning counsel. He raised the standard of legal argument in Australia. He was prompt in giving judgment.[15]

In contrast, in his speech on being sworn in as Chief Justice on 21 April 1952, Sir Owen Dixon said that when he began to practise before the Court, which was in the time of Griffith CJ, "its methods were entirely dialectical, the minds of all the judges were actively expressed in support or in criticism of arguments. Cross-examination of counsel was indulged in as part of the common course of argument." He stated that while he himself found that system advantageous, many counsel disliked it, and that he came to form the conviction that it was not desirable.

> I felt that the process by which arguments were torn to shreds before they were fully admitted to the mind led to a lack of coherence in the presentation of a case and to a failure of the Bench to understand the complete and full cases of the parties, and I therefore resolved, so far as I was able to restrain my impetuosity, that I should not follow that method and I should dissuade others from it.[16]

The Griffith style has re-emerged from time to time since Sir Owen Dixon's retirement. Sir Harry Gibbs's point about Griffith CJ's promptness in judgment, to which I have twice referred, is devastatingly illustrated by the performance of the Court in its early cases. Let all allowance be made for the fact that at the beginning the Court was not encumbered by long lists of reserved judgments. Let allowance also be made for the fact that the pristine energies of the judges carrying out new roles in the prime of their lives were high. Even so the record is remarkable. If one takes the first few cases reported in volume 1 of the Commonwealth Law Reports, judgment was delivered in the first three cases the day after oral argument closed. Judgment was delivered two days after argument closed in the fourth. Judgment was delivered the day after oral argument closed in the fifth. In the sixth, the important case of *D'Emden v Pedder*, judgment was reserved only for a little over two months. In another case, important because of O'Connor J's magisterial exposition of statutory and constitutional interpretation, *Tasmania v Commonwealth*, judgment was delivered five days after a three-day oral argument closed. Promptness of this kind has not endured into our own day. The modern judiciary at all levels ought to feel a deep sense of shame and inferiority about this.

It is not now proposed to examine in detail Griffith CJ's individual judgments in either non-constitutional law or constitutional law. Instead three particular themes will be picked up. They are the introduction of constitutional judicial review; the distinctive doctrines of the early Court; and the Court's striving for independence.

Introduction of Constitutional Judicial Review

It is a striking feature of both the American and the Australian systems of federal government that the judiciary is accepted to have power to declare legislation unconstitutional and treat individual legislative provisions as nullities. This is known as constitutional "judicial review" – to be distinguished from the ancient power of the courts to engage in judicial review of administrative action and deal with it if it is not supported by the statutory or common law power relied on. In the 19th century there was no power of constitutional judicial review in equivalent systems like the German Federation or in Switzerland. There was no express power of judicial review in the United States Constitution. Article 6 of that Constitution provided that it "shall be the supreme law of the land; and that judges in every State shall be bound thereby". But neither that nor any other provision gave the judiciary power to declare that laws were inconsistent with the Constitution and hence void. Its acceptance in dicta by Marshall CJ in *Marbury v Madison* in 1803 was controversial.[17] It was not asserted afresh or acted on by the Supreme Court for another 54 years.[18]

In Australia it seems that the delegates to the Conventions "intended judicial invalidation of legislation to be an aspect of the constitutional framework."[19] Sir Owen Dixon said that to the framers this was "obvious".[20] Even if these things are so, the intention was not embodied in the text of the Constitution. Sir Owen Dixon argued that the words of section 76(i) of the Constitution "impliedly acknowledged the function of the Courts".[21] Section 76(1) provides:

> The Parliament may make laws conferring original jurisdiction on the High Court in any matter –
>
> (a) Arising under this Constitution, or involving its interpretation . . .

The problem is that the Parliament has not made laws conferring jurisdiction of that kind which would justify judicial review. Even if it had, the conferral could be reversed by another law. Constitutional judicial review depends on finding a Constitution-based power of judicial review, unchangeable by legislation. It could only be found in section 75 of the Constitution, which gives the High Court original jurisdiction in relation to five matters. But none of those matters can be said to support a power of judicial review.

In Australia this has never been treated as a problem. From the outset the High Court followed the view of the Supreme Court of the United States that judicial review was available. No-one ever seems to have argued the contrary. In *Australian Communist Party v Commonwealth*,[22] Fullagar J said: "In our system the principle of *Marbury v Madison* is accepted as axiomatic". Of course, one man's axiom is another man's blind and invincible prejudice.

It would be possible to have a federal system in which constitutionality was not a matter for the judiciary but was simply debated at the political level and treated as a factor relevant to the outcome of elections. That is common in non-federal systems. In America it has been argued that that possibility rests on the idea that legislators sit for short terms, that the legislature has two houses (originally only one of them the result of popular election) acting as checks on each other, that the suffrage has been wide (but for the slaves, and, indeed, the former slaves), that the President was elected only indirectly through the Electoral College, that the President can veto legislation, and that overriding that veto requires a two-thirds majority in the legislature. There are

differences in Australia. Both houses are and always have been popularly elected. There were no slaves. There was no Electoral College. Apart from the now obsolete sections 58-60, there was no veto by the executive. The doctrine of responsible government makes the separation of powers between legislature and executive much less marked. It remains an interesting question whether, in both the United States and Australia, federalism, in the sense of States' rights, would have been stronger if there had been no judicial review, and the matter fought out politically.

Certainly it must be regarded as a serious thing for the humblest and most mediocre magistrate to have the power to declare invalid the most carefully and solemnly considered Commonwealth or State statutes. And it is also a serious thing for invalidation to take place not on the basis of the express language of the Constitution, but on the basis of implications into it not noticed for many decades after its inception.

In the United States, in 1893, a very distinguished member of the Harvard Law School in its golden age, James Bradley Thayer, delivered an important lecture. He analysed competing views about judicial review before and after the time when the United States Constitution came into force. He accepted that judicial review had come into existence, but said that legislation should not be declared void unless there was no room for reasonable doubt about its unconstitutionality. His line of thought rested on the idea that while the judiciary had the primary role of decision on questions of law, the legislature had the role of initiating and enacting legislation. The question was not whether the courts thought legislation unconstitutional, but what degree of judgment the courts should allow to another department of government which had been given the responsibility under the Constitution of making the legislation.[23] This doctrine has been extremely influential in America. It was favoured by Justices Holmes, Brandeis and Frankfurter. To some extent it reflects modern American constitutional law.

What of Australian constitutional law? The courts here practise self-restraint in the sense that the constitutionality of legislation will not be considered unless it is necessary for the outcome, and in the sense that if there are two or more constructions available, one will be selected which renders the legislation constitutionally valid rather than invalid. In *Australian Communist Party v Commonwealth* Fullagar J said that the principle of judicial review was modified "by the respect which the judicial organ must accord to the opinions of the legislative and executive organs".[24] Beyond that, though there have been a few references to a "beyond reasonable doubt" test,[25] it does not bulk large.

At all events, neither Griffith CJ nor his colleagues ever doubted the capacity of the High Court to engage in judicial review of the constitutionality of legislation – and, indeed, the capacity of any Australian court to do this. They saw it as "necessary" that a legal tribunal exist to resolve conflicts between the constitutional powers of the central government and the State governments, they said that the role of the United States Supreme Court as such an arbiter was well known, and they saw themselves as rightfully performing the same role.[26] The utter and superb self-confidence of this claim to the supremacy of the judiciary over the legislature and the executive, then, is the first of the three themes to be stressed.

Distinctive Doctrines of the Early Court

The second theme concerns two doctrines distinctively associated with Griffith CJ's

name.[27] He saw the Commonwealth and the States as each sovereign within their respective field. To be sovereign is to be subject to no power. Hence each was to be free to operate without interference from any other government. Both the Commonwealth and the States necessarily acted through agents – "instrumentalities". These instrumentalities had to be free of burdens imposed by other governments, like the burdens to be found in taxes on the income of public servants. This was the doctrine of "immunity of instrumentalities".

Apart from its correspondence with 19th century American ideas,[28] the doctrine had two sources.

First, the Constitution was seen as an agreement between sovereign powers – the old colonies, now the new States – to give up some power to a central body while preserving sovereignty over what each retained. The only subordination was this: in fields of Commonwealth legislative power, where the States were also free to legislate, Commonwealth legislation prevailed over State legislation in the event of inconsistency, by reason of section 109 of the Constitution.

Secondly, it was a rule of interpretation that statutes did not bind the Crown in the absence of express words or necessary implication. Hence powers granted to the Commonwealth did not bind the Crown in the right of each State.[29]

The theories of sovereignty on which the immunity of instrumentalities doctrine rested correspond with those stated by John Austin in 1832 in his work, *The Province of Jurisprudence Determined*. This may have been one reason why Sir Owen Dixon described Griffith as having "a dominant legal mind . . . a legal mind of the Austinian age".[30] Another may have sprung from the fact that Austin's key doctrine was that law was a command backed by a sanction – a doctrine which Griffith CJ's masterful approach to legal problems may not have found unsympathetic.

Pursuant to the immunity of instrumentalities doctrine, the Court held that State statutes could not tax Commonwealth officers[31] and Commonwealth statutes could not tax State officers.[32] The doctrine was a two-way doctrine.

But even Griffith CJ accepted that some Commonwealth powers could be employed against the States, for if it were not so, those powers would be emptied of utility. A principle of "necessity" was said to compel these modifications.[33] Examples of laws which were valid on this principle included a federal law as to bankruptcy discharging a bankrupt from debts owed to the State;[34] customs duties applying to the States;[35] and laws under the defence power.[36] In addition, from 1906, Isaacs J and Higgins J began to diverge from the immunity of instrumentalities doctrine as applied by the first three justices. Isaacs J's dislike of the immunity had been presaged in his losing argument as counsel in *Deakin v Webb*.[37] Isaacs J came to require heavier burdens to be established if the immunity of instrumentalities doctrine was to apply.[38] Higgins J rejected that doctrine outright.[39]

A second important doctrine of the early High Court was the "reserved powers" doctrine. It can be illustrated by section 51(i) of the Constitution. That provision expressly gives power to the Commonwealth to make legislation concerning interstate and international trade and commerce. It was said to follow that the power to legislate in relation to intrastate trade and commerce was reserved to the States. It was also said to follow that no other head of legislative power should lightly be interpreted so as to permit significant impairment of the States' reserved powers. Griffith CJ stated the reserved powers doctrine thus: "When the intention to reserve any subject to the States

to the exclusion of the Commonwealth clearly appears, no exception from that reservation can be admitted which is not expressed in clear and unequivocal words".[40] On this doctrine the exclusive Commonwealth power over excise in section 90 was read down.[41] So was the trade mark power in section 51(xviii).[42] And so, very significantly for the future, was the corporations power (section 51(xx)).[43] The revival of that power in 1971, in the *Concrete Pipes* case,[44] is a badge of the decline in Griffith CJ's influence in this respect.

There was much more to be said for the reserved powers doctrine than Griffith CJ is usually given credit for. One provision which supports it is section 107. The Commonwealth legislative powers granted by section 51 are expressed to be "subject to this Constitution". Section 107 is not subject to the Constitution, that is, it is not subject to section 51. It provides:

> Every power of the Parliament of a Colony which has become … a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission of the State . . .

That points to a substantial residue of State powers, and points to the correctness of Griffith CJ's "reserved powers" doctrine.

As Gageler J said in his youth, 26 years ago:

> The strict rules of statutory construction, if applied independently of wider considerations, would not unquestioningly dictate an expansive reading of s 51 at the expense of s 107. A strong argument could be made that they point in the other direction.[45]

Perhaps during his long career on the Court which lies ahead, he will be able to develop that argument. On the other hand, Dixon J said that "the attempt to read s 107 as the equivalent of a specific grant or reservation of power lacked a foundation in logic".[46] But Griffith CJ was not contending for a "specific grant or reservation of power" – only a principle of construction requiring clear words for the statement of Commonwealth powers.

Again, both Isaacs J and Higgins J attacked the reserved powers doctrine.[47] Higgins J adopted a metaphor from the law of wills which proved later to be influential, fallacious though it is. He said:

> We must find out what the Commonwealth powers are before we can say what the State powers are. The Federal Parliament has certain specific gifts; the States have the residue. We have to find out the extent of the specific gifts before we make assertions as to the residue.[48]

The early cases developing the immunity of instrumentalities and reserved powers doctrines are significant in another way. They introduce the third theme of Griffith CJ's work.

Striving for Independence by the High Court

In *Deakin v Webb*, the losing party was Victoria. Its legislation taxing a Commonwealth officer's salary had suffered the fate of being struck down because of the immunity of instrumentalities doctrine. Victoria sought a certificate from the Court to permit an appeal to the Privy Council. This was a necessary step pursuant to section 74 of the Constitution. Section 74 provided that no appeal lay to the Privy Council on questions as to the limits inter se of the constitutional powers of the Commonwealth and those

of the States, unless the High Court granted a certificate that the question ought to be determined by the Privy Council. The certificate was only to be granted if there was "any special reason" for doing so. Victoria contended that special reasons were to be found: the five Premiers of the other States supported the grant of a certificate, and so did "the public opinion of Australia". In an unreserved judgment, Griffith CJ said:

> I hope that the day will never come when this Court will strain its ear to catch the breath of public opinion before coming to a decision in the exercise of its judicial functions. If it does so, it will be perhaps the practice, if ever there is a Court weak enough, to adjourn the argument in order that public meetings may be held, leading articles written in the newspapers, and pressure brought to bear to compel the Court to shirk its responsibility, and cast its duty upon another tribunal.[49]

Earlier he referred to the High Court's responsibility in disputes arising out of the limits inter se of the constitutional powers of the Commonwealth in a State. He went on:

> We should be guilty of a dereliction of duty almost amounting to a breach of trust if we were to decline to accept that responsibility unless we were in a position to say in intelligible language that there was some special reason, capable of being formulated, why the Privy Council was, and why we were not, the proper ultimate judges of the question.[50]

Griffith CJ, then, saw the "special circumstances" test as being very difficult to satisfy because of the superior capacity of Australian judges to construe the Australian Constitution. This was judicial nationalism. It insisted that while other issues could go from Australian courts to the Privy Council freely, on inter se questions the High Court was to be the tribunal of ultimate appeal almost always. Indeed, only one certificate was ever granted.

Griffith CJ repeated these themes a little later in *Baxter v Commissioners of Taxation (NSW)*. The background to it was *Webb v Outtrim*.[51] That was an appeal directly from the Supreme Court of Victoria to the Privy Council. The Earl of Halsbury presided. He was the most stern and unbending of Tories. He was then aged 84, but with plenty ahead of him – a massive constitutional crisis over the refusal of supply by the House of Lords as well as another decade's judicial work. The Privy Council disagreed with *Deakin v Webb*. Of *Webb v Outtrim*, Barton wrote in correspondence:

> Old man Halsbury's judgment deserves no better description than that it is fatuous and beneath consideration. But the old pig wants to hurt the new federation and does not much care how he does it.[52]

In *Webb v Outtrim*, Lord Halsbury used some phrases about Griffith CJ which he may later have regretted. He said Griffith CJ's analogy between the cases on the United States Constitution and Australia "fails"[53] and that "there is no such analogy".[54] He said that Griffith CJ had been guilty of "an extraordinary extension of legal principle".[55] He said that the principle underlying the immunity of instrumentalities cases had been "variously stated" in those cases and was "extremely difficult to understand".[56] As we shall see, what Lord Halsbury could do in pejorative courtesies and discourtesies, Griffith CJ could do better.

In *Baxter's* case[57] the High Court refused to follow the Privy Council decision in *Webb v Outtrim* on the ground that the question was an inter se question and the appeal to the Privy Council had been incompetent in the absence of a certificate from the High Court. It was not a small thing to say that the highest court in the Empire had

lacked jurisdiction. Gleeson CJ, in his address to this Society in 2002, said that he strongly commended a reading of *Baxter's* case to "anyone interested … in the personality of Sir Samuel Griffith".[58] It reveals a personality which was pugnacious, acute and independent.

The principal judgment in *Baxter's* case was a vigorously expressed joint judgment by Griffith CJ, Barton and O'Connor JJ. The case was argued for six days, and judgment was reserved for only three weeks. The judgment fell into two parts.

To some degree the first part offered a trenchant summary of the path to federation and the justifications for it. It also summarised the resemblances between the Australian and United States Constitutions, and the differences between the Australian and Canadian Constitutions. These passages were interspersed with allegations that English lawyers, and members of the Privy Council, were ignorant of these things. The judgment stated:

> The object of the advocates of Australian federation . . . was not the establishment of a sort of municipal union, governed by a joint committee, like the union of parishes for the administration of the Poor Laws, say in the Isle of Wight, but the foundation of an Australian commonwealth embracing the whole continent with Tasmania, having a national character, and exercising the most ample powers of self-government consistent with allegiance to the British crown.[59]

The underlying point was that fundamental issues arose in a country with both Federal and State governments. They were different from those in a unitary jurisdiction like England. Further on the judgment said:

> no disrespect is implied in saying that the eminent lawyers who constituted the Judicial Committee were not regarded either as being familiar with the history or conditions of the remoter portions of the Empire, or as having any sympathetic understanding of the aspirations of the younger communities which had long enjoyed the privilege of self-government.[60]

One interpolates – if that does not imply disrespect, what would?

The judgment then explained how, while section 74 left the Privy Council at the apex of the Australian appellate hierarchy in most ways, it gave the High Court control over access to that apex in inter se constitutional questions. This part of the judgment then concluded:

> the High Court was intended to be set up as an Australian tribunal to decide questions of purely Australian domestic concern without appeal or review, unless the High Court in the exercise of its own judicial functions, and upon its own judicial responsibility, forms the opinion that the question at issue is one on which it should submit itself to the guidance of the Privy Council. To treat a decision of the Privy Council as overruling its own decision on a question which it thinks ought not to be determined by the Privy Council would be to substitute the opinion of that body for its own, which would be an unworthy abandonment of the great trust reposed in it by the Constitution.[61]

So the first part concluded that the High Court was not bound by the Privy Council decision in *Webb v Outtrim* to abandon the immunity of instrumentalities doctrine. The second part of the judgment dealt with the question whether, notwithstanding the Privy Council decision, that doctrine should be overruled after being examined afresh. The joint judgment declined to do so. It did so in passages revealing considerable

hostility to the Privy Council in general and Lord Halsbury in particular. In Army circles the expression "dumb insolence" is used. The joint judgment engaged in a fair amount of "speaking insolence". Examples include phrases like "It does not appear … that the Board addressed their minds" to an issue;[62] "So far as we are able to follow the opinion of the Board";[63] "If the learned Lord who delivered the opinion of the Board had read the whole of the paragraph";[64] "we may be permitted to express regret that in a case of such vast importance to the Commonwealth their Lordships did not seek enlightenment from counsel or from the documents the subject of comparison";[65] "Apparently the main ground for this opinion is expressed in the following passage";[66] "we will, out of respect to the learned Board, make some observations";[67] "Their Lordships seem to have thought";[68] and "We confess therefore our inability to understand the language of the learned Board".[69]

One line of reasoning advanced against the immunity of instrumentalities doctrine was that, in lieu of it, reliance could be placed on the monarch's power to disallow legislation, and extend that power to a power to disallow particular parts of an Act. Of this the joint judgment said: "If this is what the Australian Colonies gained by Federation, they indeed asked for bread and received a stone."[70] The joint judgment pointed out that it would require the creation of new bureaux in each State, in the Commonwealth and in London, to determine whether the monarch should be advised to disallow enactments. It said that this "would be dangerous and ruinous for the States, and dangerous and ruinous for the Commonwealth, and would substitute chaos for order, and set up an official in London subject to political accidents in the place of the High Court as the guardian of the Constitution."[71]

In all this there were no doubt inessential things. There was some rhetoric. There may have been some irritation with Isaacs J and Higgins J, whose judgments in various respects disagreed with the joint judgment. There was certainly some vengeance at Lord Halsbury's expense. But the importance of *Baxter's* case is that it took a step down the path of complete independence – national independence and judicial independence. It was right to stress the importance in constitutional questions of local decision-makers. The Privy Council's record in deciding Australian appeals on non-constitutional questions was very good – and the abolition of those appeals has tended to stimulate excessive adventurism in the High Court and in other Australian courts. But the Privy Council's record in constitutional law was, understandably, less impressive. *Baxter's* case showed that Isaacs J was not the only strong patriot on the High Court. And *Deakin v Webb* had shown Griffith CJ's perfectly correct desire to maintain independence from public opinion. Griffith CJ's vindication of the High Court against the Privy Council was matched by a fairly speedy acceptance of its capacity by the State Supreme Court judges, not all of whom were happy with the decision to create the High Court.

Sir Anthony Mason said of the early Court that the "judgments of the foundation Justices exhibit a perceptive appreciation of the relationship between the various branches and institutions of government and of the workings of government and administration".[72] This was a generous tribute, considering that some of Sir Anthony's work was at odds with what the Griffith Court did.

By 1920, the original three justices had all left the Court. In that year both the immunity of instrumentalities doctrine and the reserved powers doctrine were overruled in the *Engineers'* case by a majority – on 31 August, about three weeks after

Griffith CJ's death on 9 August. There was a single judgment of Knox CJ, Isaacs, Rich and Starke JJ. It was rather strident and abusive in form, which betrays the authorship of Isaacs J. It was not entirely convincing. There was a separate judgment to similar effect by Higgins J. Gavan Duffy J dissented.

The successful counsel in the *Engineers'* case was R G Menzies. He had won the case at the age of 25. As Horace Rumpole would have said, he had done it alone and without a leader. No other advocate has ever enjoyed a forensic achievement of such great importance for his country, for good or ill – not Cicero, not great English politician/barristers like Erskine or F E Smith, and not any American.

Let us move on from that romantic note to harsh reality. The *Engineers'* case concerned and disposed of the doctrine of the implied immunity of instrumentalities, but in a brief passage the doctrine of reserved powers was also disposed of.[73] The doctrine of implied immunity of instrumentalities was said to be vague, confused, uncertain and productive of inconsistency in the cases.[74] The new order was said to rest on ordinary principles of construction. It was said that section 107 did not reserve for the States and keep from the Commonwealth whatever fell outside the explicit terms of an express grant of legislative power in section 51.[75]

The essential difference between Griffith CJ and the *Engineers'* case majority is this. He started from the pre-1901 position – the colonies had various powers. Those powers were protected by section 107. They could only be cut down by clear language in section 51. In contrast, the *Engineers'* case majority started with what was created in 1901 – the Commonwealth, endowed with various powers, leaving the States what remained.[76]

This is not the occasion on which to defend or attack the *Engineers'* case. It was very damagingly attacked by Geoffrey Walker at this conference in 2002.[77] The majority judges, in holding that Federal industrial law could bind State government enterprises, could have reached that conclusion on narrower grounds than overthrowing the immunity of instrumentalities doctrine. Hence what the majority said on that doctrine and the reserved powers doctrine was, in a sense, obiter dicta. But what was said has not been treated in that way.

However, one misleading analogy used to support the majority conclusion may be noted. It was referred to above. The analogy is between two relationships. The first is the relationship between the express Commonwealth legislative powers and the powers left to the States. The second is the relationship between those who receive specific bequests under a will and those who are residuary legatees. A testator who misjudges his wealth can leave so much by way of specific bequest that nothing is left to the residuary beneficiaries. But it is highly questionable whether this analogy has any useful application to governmental powers in a federation.

As Zines has said:

> It is . . . unbelievable, having regard to the attention given to the States in the Constitution, that they were (with their Parliaments, viceregal representatives and the express limitations on their powers) to be left as impotent governmental ornaments with plenty of glory and no power.[78]

The *Engineers'* case has certainly been influential. Sir Harry Gibbs was always scrupulous to apply whatever the authorities as they stood said. Hence, although he later came to dislike the effect of the *Engineers'* case on the external affairs power, in 1971, in the *Concrete Pipes* case, he followed the *Engineers'* case. He therefore gave

the corporations power a much wider reach than the founding justices, acting in accordance with the reserved powers doctrine, had done in 1909, in *Huddart Parker & Co Pty Ltd v Moorehead*.[79] Indeed, Sir Harry called Griffith CJ's views "extreme".[80]

But the *Engineers'* case has not survived wholly unscathed. Both Dixon J and Evatt J disliked it.[81] In *Melbourne Corporation v Commonwealth (The State Banking Case)* Dixon J said that it would take clear language in the Constitution to authorise the Commonwealth to make a law "aimed at the restriction or control of a State in the exercise of its executive authority".[82] This antipathy to legislation discriminating against the States has been adopted most recently in relation to federal imposts on the superannuation benefits of State judges[83] and members of State parliaments.[84] He also thought that federal laws could not affect a State exercise of the royal prerogative.[85] And Gibbs J went further in saying that the Commonwealth could not legislate, even in a non-discriminatory way, to prevent a State from continuing to exist and function as a State.[86] Debates about the relationship between State and federal power have continued to this day.[87] To that extent the problem Griffith CJ was trying to solve remains alive, even if his precise solutions do not.

The most astonishing thing about the *Engineers'* case is that no full-blooded assault on it has ever been carried out. One opportunity to launch that assault arose in the *WorkChoices* case. The expansion of the corporations power in the *Concrete Pipes* case, which was relied on to uphold the legislation in the *WorkChoices* case, is an illustration of the overthrow of the reserved powers doctrine by the *Engineers'* case. The *Engineers'* case compelled the narrowness of the conciliation and arbitration power in section 51(xxxv) of the Constitution to be outflanked by the intrusion of the corporations power into the vacant space. But in the *WorkChoices* case no application was made to overrule either the *Concrete Pipes* case or the *Engineers'* case.

As Julian Leeser explained some years ago at this Conference, the opportunity was not taken. Perhaps this was because the plaintiffs – trade unions and States ruled by Labor governments – were not sorry to see strong central power being maintained, even at the risk of the WorkChoices legislation being held valid, as, by majority, it was. Perhaps they foresaw, and welcomed, the electoral damage it would cause. Perhaps it was because the doctrines of the *Engineers'* case are so vague, slippery and mercurial as to be difficult to pin down. Neither the *Engineers'* case nor the *Concrete Pipes* case have ever been challenged. If they had been, the thoughts of Griffith CJ would have been invaluable aids to the debate. As it is, confused and vague though the *Engineers'* case is, it has exercised a baleful influence on the Constitution. It lies behind the vast expansion of the external affairs power under section 51(xxix) of the Constitution[88] – a modern tendency which Sir Harry Gibbs abhorred above all others. The view that the Commonwealth has capacity to exercise legislative power in relation to domestic law even though none of the powers to legislate on domestic matters depends on the ideas underlying the *Engineers'* case.

In 1917, Griffith suffered a stroke. He sat on the Court very little thereafter. In 1919 he retired. In 1920 he died. The Court sat in Brisbane in 1919 to mark his retirement. Neither Griffith CJ nor Barton J was well enough to attend. Isaacs J read a farewell message sent by the dying Barton J. In it Barton J spoke of Griffith's display of "ceaseless devotion, . . . unwearied labour, and … matchless ability". He called him "a great Chief Justice".[89] The former Justice Bruce McPherson, whose death in October

2013 is something which all lawyers must mourn, uttered some remarks about Griffith's role as Chief Justice of Queensland which can apply to his role on the High Court: "His judgments frequently delivered orally with books and law reports before him on the bench, show a mastery of legal principle that places him among the two or three leading Australian lawyers of all time".[90] Sometimes there is nothing cheaper in life than judicial flattery. But this praise by Barton J and McPherson is not cheap. And not even Griffith's harshest critics could demur to their estimations.

Endnotes

1. Harry Gibbs, "Samuel Walker Griffith" in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia,* Oxford University Press, Melbourne, 2001, 309 at 310.

2. "Griffith at Work (1893-1903): A Snapshot", in M White and A Rahemtula (eds), *Sir Samuel Griffith: The Law and the Constitution*, Law Book Co, Sydney, 2002, 203.

3. *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1109 per Griffith CJ, Barton and O'Connor JJ.

4. See generally *Sue v Hill* (1999) 199 CLR 462.

5. (1964) 110 CLR viii at xii.

6. (1964) 110 CLR viii at xi.

7. "Griffith Court" in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia,* Oxford University Press, Melbourne, 2001, 311 at 312.

8. "Reflections on the High Court: Its Judges and Judgments" (2013) 37 *Aust Bar Rev* 102 at 109.

9. *Isaac Isaacs*, Melbourne University Press, Melbourne, 1967, 190.

10. L Zines, *The High Court and the Constitution*, 5th ed, The Federation Press, 2008, 18.

11. (1964) 110 CLR viii at xiii.

12. Simon Sheller, "Sir George Rich" in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia,* Oxford University Press, Melbourne, 2001, 605.

13. Stephen Gageler, "Why Write Judgments?", 2013 Sir Frank Kitto Memorial Lecture,

Monday, 11 November 2013, 15.

14. Foreword to J Reynolds, *Edmund Barton*, Angus and Robertson, Sydney, 1948, (xiii).

15. "Samuel Walker Griffith" in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia,* Oxford University Press, Melbourne, 2001, 309 at 310.

16. (1952) 85 CLR xi at xiv-xv.

17. 5 US (1 Cranch) 137 at 176-80 (1803).

18. See F A Hayek, *The Constitution of Liberty*, Routledge & Kegan Paul, London, 1960, 187 and 475-6 nn 44-49.

19. J A Thomson, "Constitutional Authority for Judicial Review: A Contribution From the Framers of the Australian Constitution" in G Craven (ed), *The Convention Debates 1891-1898: Commentaries, Indices and Guide*, Legal Books Ltd, Sydney, 1986, 201. See also B Galligan, "Judicial Review in the Australian Federal System: Its Origins and Function" (1979) 10 *Fed LR* 367 at 372-392; Stephen Gageler, "Foundations of Australian Federalism and the Role of Judicial Review" (1987) 17 *Fed LR* 162 at 173-4.

20. "Marshall and the Australian Constitution" (1955) 29 *ALJ* 420 at 425.

21. Sir Owen Dixon, "Marshall and the Australian Constitution" (1955) 29 *ALJ* 420 at 425.

22. (1951) 83 CLR 1 at 262. Gibbs J concurred with Fullagar J in *Victoria v Commonwealth* (1975) 134 CLR 338 at 379.

23. "The Origin and Scope of the American Doctrine of Constitutional Law" (1893) 7 *Harv LR* 129. See also Richard A Posner, *Reflections on Judging*, Harvard University Press, Cambridge, Mass, 2013, 51-77.

24. (1951) 83 CLR 1 at 282-3.

25. *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 180; *Shell Co of Australia Ltd v FCT* (1930) 44 CLR 530 at 545 (Privy Council); *R v Quinn; Ex p Consolidated Foods Corporation* (1977) 138 CLR 1 at 8. It has been argued that this approach derives from references by Isaacs J in particular to responsible government in the *Engineers'* case (1920) 28 CLR 129 at 146-7 and 151-3 and in *Commonwealth v Kreglinger & Fernau Ltd* (1926) 37 CLR 393 at 411 and 413: see Stephen Gageler, "Foundations of Australian Federalism and the Role of Judicial Review" (1987) 17 *Fed LR* 162 at 184-90.

26. *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1111 per Griffith CJ, Barton and O'Connor JJ.

27. For what follows, see generally the lucid discussion in L Zines, *The High Court and the Constitution*, 5th ed, The Federation Press, 2008, 1-20.

28. See *McCulloch v Maryland* 4 Wheat 316 (1819); *Collector v Day* 11 Wall 113 (1870); *United States v E C Knight Co* 156 US 1 (1895).

29. *R v Sutton* (1908) 5 CLR 789; *AG (NSW) v Collector of Customs (The Steel Rails case)* (1908) 5 CLR 818.

30. (1964) 110 CLR viii at xi.

31. *D'Emden v Pedder* (1904) 1 CLR 91; *Deakin v Webb* (1904) 1 CLR 585.

32. *Federal Amalgamated Government Railway and Tramway Service Association v NSW Railway Traffic Employees Association (The Railway Servants' Case)* (1906) 4 CLR 488.

33. *AG (NSW) v Collector of Customs (The Steel Rails Case)* (1908) 5 CLR 818.

34. *Railway Servants' Case* (1906) 4 CLR 488 at 505.

35. *R v Sutton* (1908) 5 CLR 789 at .

36. *Farey v Burvett* (1916) 21 CLR 433 at 441.

37. (1904) 1 CLR 585 at 592-600.

38. *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1160-1.

39. For example, *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1164-5.

40. *Union Label Case* (1908) 6 CLR 469 at 503.

41. *Peterswald v Bartley* (1904) 1 CLR 497.

42. *AG (NSW) v Brewery Employees Union of NSW (The Union Label Case)* (1908) 6 CLR 469.

43. *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330.

44. *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468.

45. Stephen Gageler, "Foundations of Australian Federalism and the Role of Judicial Review" (1987) 17 *Fed LR* 162 at 181.

46. *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 at 83.

47. *R v Barger* (1908) 6 CLR 41 at 84 and 113.

48. *R v Barger* (1908) 6 CLR 41 at 113.

49. *Deakin v Webb* (1904) 1 CLR 585 at 625.

50. *Deakin v Webb* (1904) 1 CLR 585 at 622.

51. [1907] AC 81.

52. G Bolton and J Williams, "Edmund Barton" in Tony Blackshield, Michael Coper and George Williams, *The Oxford Companion to the High Court of Australia,* Melbourne University Press, Melbourne, 2001, 53 at 55.

53. [1907] AC 81 at 88.

54. [1907] AC 81 at 89.

55. [1907] AC 81 at 89.

56. [1907] AC 81 at 90.

57. (1907) 4 CLR 1087.

58. "The Birth, Life and Death of Section 74" in *Upholding the Australian Constitution Volume 14: Proceedings of the Fourteenth Conference of the Samuel Griffith Society*, The Samuel Griffith Society, Lane Cove, 2002, xxix.

59. *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1108.

60. *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1111-1112.

61. *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1117.

62. *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1122.

63. *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1123.

64. *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1123.

65. *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1123.

66. *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1123.

67. *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1124.

68. *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1125.

69. *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1139.

70. *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1132.

71. *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1133.

72. "Griffith Court" in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia,* Oxford University Press, Melbourne, 2001, 311 at 312.

73. *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (The Engineers' Case)* (1920) 28 CLR 129.

74. (1920) 28 CLR 129 at 142-5.

75. (1920) 28 CLR 129 at 154.

76. L Zines, *The High Court and the Constitution*, 5th ed, The Federation Press, 2008, 17.

77. Geoffrey de Q Walker, "The Seven Pillars of Federalism: Federalism and the Engineers' Case" in *Upholding the Australian Constitution Volume 14: Proceedings of the Fourteenth Conference of the Samuel Griffith Society*, The Samuel Griffith Society, Sydney, 2002, 1.

78. *The High Court and the Constitution*, 5th ed, The Federation Press, 2008, 15. See also G Sawer, *Australian Federalism in the Courts*, Melbourne University Press, Melbourne, 1967, 199-200.

79. (1909) 8 CLR 330.

80. "Samuel Walker Griffith" in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia,* Oxford University Press, Melbourne, 2001, 309 at 310.

81. *West v Commissioner of Taxation* (1937) 56 CLR 657 at 681-2 and 687-710 respectively. See also G Sawer, *Australian Federalism in the Courts*, Melbourne University Press, Melbourne, 1967, 133.

82. (1947) 74 CLR 31 at 83.

83. *Austin v Commonwealth* (2003) 215 CLR 185.

84. *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272.

85. See Gibbs J's discussion in *Victoria v Commonwealth* (1971) 122 CLR 353 at 418.

86. *Victoria v Commonwealth* (1971) 122 CLR 353 at 424.

87. *Henderson's Case* (1997) 190 CLR 410.

88. See *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1.

89. (1919) 26 CLR v at vii.

90. B H McPherson, *The Supreme Court of Queensland 1854-1960: History, Jurisdiction, Procedure*, Butterworths, Sydney, 1989, 191.