SIR HARRY GIBBS AND PAPUA NEW GUINEA

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This article focuses on a relatively unexamined aspect of the life of the late Sir Harry Gibbs: his war service, particularly in and associated with Papua New Guinea, and the influence of that connection on his legal education and some, at least, of his later legal work as a barrister and judge.

I INTRODUCTION

Sir Harry Gibbs' role in our legal pantheon is well established.[1] Members of the profession who did not know him personally will be aware of his biographical details from obituaries and entries, for example in *The Oxford Companion to the High Court of Australia*.[2] There are also illuminating papers published about him, particularly those prepared by two of his former associates, the Hon Glen Williams and David Jackson QC, in *Queensland Judges on the High Court*, published by the Queensland Supreme Court Library.[3] David Jackson also delivered an oration published in the *University of Queensland Law Journal* on 'Sir Harry Gibbs and the Constitution'.[4] There is a popular biography, *Without Fear or Favour*,

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* This article had its origin in a speech delivered to the Hellenic Australian Lawyers Association at the Queensland Supreme Court Library on 15 March 2019. I am grateful to the Association for inviting me to speak about Sir Harry Gibbs, to the Supreme Court Library and my associate, Sophie Dilda, for their research assistance, and to Sir Harry and Lady Gibbs' children for providing me with access to their parents' records and family photographs (which are reproduced herein with consent). Materials relating to Sir Harry are held by the National Archives of Australia, the Supreme Court of Queensland Library, and Mary Collings, one of Sir Harry's and Lady Gibbs' children.

1 See the biography of Sir Harry published on the High Court of Australia website at <http://www.hcourt.gov.au/justices/former-justices/former-chief-justices/sir-harry-talbot-gibbs-pc-ac-gcmg-kbe-qc>, and Michael White, *TC Beirne School of Law: A History* (TC Beirne School of Law, 2nd ed, 2016) app VIII ('TC Beirne Graduates Superior Court Judges').

2 Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2002).

3 The Hon Glen N Williams, 'Sir Harry Gibbs' in Michael White and Aladin Rahemtula (eds), *Queensland Judges on the High Court* (Queensland Supreme Court Library, 2003) ch 3, 25–77; David F Jackson QC, 'Commentary on "Sir Harry Gibbs"' in Michael White and Aladin Rahemtula (eds), *Queensland Judges on the High Court* (Queensland Supreme Court Library, 2003) ch 3, 75–84.

4 David F Jackson QC, 'Sir Harry Gibbs and the Constutution' (2006) 25 *University of Queensland Law Journal* 65. The speech is also published in the *Queensland Bar News*, No 17, December 2005. More recently, on 17 March 2016, he presented a delightful paper on Sir Harry to the Selden Society in

written by Joan Priest in 1995.[5] Many of Sir Harry's speeches are accessible through the Queensland Supreme Court Library's website, and there is a permanent exhibition on the rule of law, dedicated to his life and legacy, in the Sir Harry Gibbs Legal Heritage Centre on the ground floor of the Supreme Court of Queensland in Brisbane. The Commonwealth Law Courts in Brisbane are also named in his honour.

A *Sir Harry's Connection with The University of Queensland*

Of particular interest is Sir Harry's connection with The University of Queensland. He graduated as a Bachelor of Arts with first-class honours in English language and literature in 1937, and as a Bachelor of Laws in 1939, also with first-class honours.[6] He also served as president of The University of Queensland Union in 1938.[7] He completed the degree of Master of Laws ('LLM') in 1946[8] and was awarded a Doctorate of Laws, Honoris Causa, in 1980.[9]

Sir Harry's time at The University of Queensland, and indeed his life after the completion of his studies, is comprehensively canvassed in the second edition of the TC Beirne School of Law's history,[10] where he is deemed a 'noteworthy figure' within the context of the Law School's restructuring and the associated student protests that occurred between 1950 and 1979.[11]

B *Background*

The bare bones of Sir Harry's life can be stated briefly. He was born in 1917 and died in 2005 at the age of 88. In between he had a busy and successful life as a student, barrister (very briefly before the Second World War), army officer, barrister again after the end of the war, university lecturer, Queen's Counsel and judge, culminating in his appointment to the High Court in 1970, and then to the position of Chief Justice of Australia from 1981 to 1987. He continued to remain active in his retirement.

Brisbane. It is illustrated with many photos provided by the Gibbs family; see < https://media.sclqld.org.au/documents/lectures-and-exhibitions/2016/David-Jackson-lecture-one.pdf >.

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

6 White (n 1) 51 and app I ('TC Beirne Graduates 1938–2015').

7 Ibid app V ('Law Student Presidents of the University of Queensland Union').

8 Ibid app I ('TC Beirne Graduates 1938–2015').

9 Ibid.

10 Ibid ch 3.5.2, 50–3.

11 Ibid app I ('TC Beirne Graduates 1938–2015').

He was successful in all of those roles, personally very popular and highly regarded by his peers, as David Jackson and Joan Priest have said, for his 'companionship, erudition and good humour'.[12] He had a long and very happy marriage to Muriel Dunn, a relationship that began when they were law students together at The University of Queensland. They had four children. Those of us who were lucky enough to be his associates remember him with great respect and affection.

C *Focus on Papua New Guinea*

What remains to be said about Sir Harry Gibbs, then, that has not been said already?

This article focuses on a relatively unexamined aspect of his life: his war service, particularly in and associated with Papua New Guinea ('PNG'), and the influence of that connection on his legal education and some, at least, of his later legal work. While serving as an army legal and staff officer he wrote the thesis for his LLM degree, 'The Laws of the Territory of New Guinea: Their Constitutional Source and Basic Content'. He presented it in 1946 and his examiners regarded it as possessing 'outstanding merit'. One of those examiners was Dr Thomas Penberthy Fry, whom I shall mention later.[13]

By one of life's odd coincidences, when I was Sir Harry's associate in 1973 and early 1974, he delivered a substantial judgment in the *Administration of the Territory of Papua and New Guinea v Daera Guba*.[14] That decision dealt with claims by two indigenous groups to ownership of land in Port Moresby purchased in 1886 by an agreement recognised by my great-grandfather, John Douglas, on behalf of the British Crown.[15] John Douglas was then Special Commissioner for the protected territory of New Guinea. It is this connection of Sir Harry with PNG that I consider in this article, and I confine myself principally to his war service, his thesis and the *Daera Guba* decision.[16]

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12 Blackshield et al (n 2) 301. See also the entry in that work on the 'Gibbs Court', ibid 303–5, by Professor Anne Twomey.

13 See Ian Carnell, 'Fry, Thomas Penberthy (1904–1952)' in *Australian Dictionary of Biography* (Melbourne University Press, 1996) vol 14 <http://adb.anu.edu.au/biography/fry-thomas-penberthy-10257>.

14 (1973) 130 CLR 353 ('*Daera Guba*').

15 See RB Joyce, 'Douglas, John (1828–1904)' in *Australian Dictionary of Biography* (Melbourne University Press, 1972) vol 4 <http://adb.anu.edu.au/biography/douglas-john-3430>.

16 Some of Sir Harry's decisions on the Queensland *Criminal Code*, such as *R v Kaporonovski* (1973) 133 CLR 209, also required examination of decisions of the High Court on appeal from the courts of Papua New Guinea dealing with the equivalent provisions of their Criminal Code.

Sir Harry's children tell me that he maintained an interest in PNG, visiting there in the early 1980s, travelling to the highlands and going with a police escort to visit Mount Hagen. He and Lady Gibbs also visited Madang, where the then Prime Minister, Michael Somare, hosted a lunch for them. He also knew Sir Buri Kidu, then their Chief Justice, whom he regarded highly and met on a number of occasions.

II War Service in PNG and Elsewhere

Sir Harry enlisted in the Australian Military Forces the day after Germany invaded Poland on 1 September 1939.[17] After the fall of Singapore in 1942 he volunteered for service in the Australian Imperial Force and was promoted to captain. To that stage he had spent his time at Victoria Barracks in Brisbane, initially in logistics, then as an infantry officer in the 42nd Battalion, as Aide-de-Camp to the General Officer Commanding Northern Command and also in the legal corps. By November 1943 he was posted to PNG as a staff captain at Port Moresby. He was there for a year between November 1943 and November 1944, serving briefly at Lae as well as in Port Moresby during the period leading up to the defeat of the Japanese in PNG. He was mentioned in despatches for services in the southwest Pacific area from 1 April 1944 to 30 September 1944.[18]

A *The Directorate of Research and Civil Affairs*

In November 1944, Sir Harry was promoted to major and transferred back to Melbourne to the Directorate of Research and Civil Affairs (DORCA), a military unit famously led by Colonel Alf Conlon.[19] Graeme Sligo's work, *The Backroom Boys: Alfred Conlon and Army's Directorate of Research and Civil Affairs, 1942–46*,[20] tells

> the remarkable, but little known, story of how a varied group of talented intellectuals were drafted into the Australian Army in the dark days of 1942 and provided high-level policy advice to the Commander-in-Chief of Australia's military forces, General

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17 Sir Harry's service records are the definitive source of information on his military service, digitised by the National Archives of Australia at <http://www.naa.gov.au/go.aspx?i=4488407>.

18 As announced in the Military Secretary's Memo 95305 dated 18 July 1945 (Ech 391/8/15); see particularly Sir Harry's service records at 18.

19 See Peter Ryan, 'Conlon, Alfred Austin (Alf) (1908–1961)' in *Australian Dictionary of Biography* (Melbourne University Press, 1993) vol 13 <http://adb.anu.edu.au/biography/conlon-alfred-austin-alf-9804>.

20 Graeme Sligo, *The Backroom Boys: Alfred Conlon and Army's Directorate of Research and Civil Affairs, 1942–46* (Big Sky Publishing, 2013).

> Thomas Blamey,[21] and through him to the Government. This band of academics, lawyers and New Guinea patrol officers formed a unique military unit, the Directorate of Research and Civil Affairs, under the command of an eccentric and masterful string-puller, Alf Conlon; who in his civilian capacity was also Chairman of the Prime Minister's Committee on National Morale. A controversial figure, Conlon emerged as a skilled advisor to Blamey with an ability to relate to men of power.[22]

DORCA's work is handily described in a review by Colonel Marcus Fielding of *The Backroom Boys*, from which I have just quoted:

> What exactly did the Directorate do? The more suspicious saw it as "an intelligence group, an undercover operation which is shrouded in mystery". This was most certainly not the case. It was, in its essence "a policy advice bureau" on a range of politico-military, manpower and scientific issues.
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> According to one of the Directorate's illustrious staff, the poet James McAuley, "Alf's army directorate was, of course, an extraordinary organisation, and it had in it some of the elements of a Renaissance court, with Alf as a Medici prince."
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> The Directorate has been depicted as a haven for underemployed poets or meddlesome soldier-politicians. Based on his wide-ranging research, Sligo reveals a fuller and more fascinating picture. The fierce conflicts in the wartime bureaucracy between public servants and soldiers, in which the Directorate provided critical support to Blamey, went to the heart of military command, accountability and the profession of arms.
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> The Directorate was a pioneer in developing approaches to military government in areas liberated by the combat troops. The Directorate's central effort was for PNG. Work in the first instance centred on the period of military government, following the progressive expulsion of the Japanese forces.[23]

The *Australian Dictionary of Biography* describes Alf Conlon's work at DORCA in these terms:

> One of DORCA's chief roles was to provide policy advice on the military government of Papua and New Guinea. Conlon's imaginative enterprise extended far beyond the needs of day-to-day military exigency and anticipated the country's independence. Work of enduring value was performed: the Territories were placed under one administration; their laws were consolidated and codified; and the LHQ School of Civil Affairs, established in Canberra in 1945 to train service personnel to be colonial

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21 See David Horner, 'Blamey, Sir Thomas Albert (1884–1951)' in *Australian Dictionary of Biography* (Melbourne University Press, 1993) vol 13 <http://adb.anu.edu.au/biography/blamey-sir-thomas-albert-9523>.

22 Marcus Fielding, 'Book Review' (2014) 65(3) *United Service* 31 <http://www.rusinsw.org.au/Papers/2014SP10.pdf>.

23 Ibid.

> administrators, became in peacetime the Sydney-based Australian School of Pacific Administration.[24]

Other members of Alf Conlon's team included Colonel Hubert Murray, who had followed his renowned uncle, Sir Hubert Murray, as administrator of Papua between 1940 and 1942, and Lieutenant Colonel John Kerr,[25] the man well known as the Governor-General who sacked the Whitlam Labor Government in 1975.[26] Sir John Kerr and Sir Harry remained friends during their roughly parallel later careers as barristers and judges. In early 1974, when I was working as Sir Harry's associate while he sat on the Judicial Committee of the Privy Council at Nos 1–9 Downing St, London, I remember looking out over the backyard of No 10 Downing St and wondering to him why Sir John Kerr would want to give up a 'real job' as Chief Justice of New South Wales to become Governor-General. Sir Harry shared my bemusement!

November 1944 was an auspicious month for Sir Harry for another reason, too, as it was when he and Muriel married, he as a 'yellow bridegroom' from taking the anti-malarial drug Atebrin. He was also emaciated from the dysentery he had picked up while in PNG.

While he was in Melbourne, Sir Harry served on a committee appointed to draw up plans for a unified government for PNG when hostilities ceased, and it was while he was off duty from that work that he commenced his thesis.[27] Sir Harry continued working on the unification plan for PNG in DORCA until mid-December 1945, at the same time completing his thesis before recommencing at the Bar early the next year.

B *Dr T P Fry's Role*

Sir Harry's children have told me that, when he was in Melbourne, he worked under Lieutenant Colonel Tom Fry, the same Thomas Penberthy Fry who had been a lecturer at The University of Queensland in the Faculty of Law before and after the war and who taught Sir Harry, one of the Faculty's first graduates. As mentioned earlier, Dr Fry was also one of the examiners for Sir Harry's thesis.[28] When he died prematurely in 1952, Professor Walter Harrison said of Dr Fry in his obituary in the *University of Queensland Law Journal*:

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24 Ryan (n 19).

25 See Peter Edwards, 'Kerr, Sir John Robert (1914–1991)' in *Australian Dictionary of Biograph* (National Centre of Biography, Australian National University, 2017) <http://adb.anu.edu.au/biography/kerr-sir-john-robert-23431>.

26 Priest (n 5) 18.

27 Ibid 16–20.

28 White and Rahemtula (n 3) 45.

> In the early days of the Law School the small teaching staff carried a heavy load of subjects, and Dr Fry was responsible for Constitutional Law, Equity, Criminal Law, Real Property and Conveyancing, Torts, and part of Roman Law. …
>
> As a teacher, Dr Fry took a close personal interest in his pupils as individuals, and was always most concerned to do the best he could for them.[29]

Fry was highly qualified academically, especially for those days, having studied at The University of Queensland (MA, LLM), Oxford University (BCL), The Hague for a diploma in public international law, and Harvard where he obtained an SJD under Professor Frankfurter and Dean Landis. His interests lay in the fields of constitutional law, land law, freehold, and leasehold tenancies in Queensland.

Fry became a legal officer in the Australian Army, having been a prominent citizen soldier before the war, and he was recruited into DORCA during the last part of the war. Earlier he had been a Deputy Judge Advocate General with the rank of Lieutenant Colonel serving in the Middle East. His role in DORCA was to produce an annotated edition of the laws of Papua and New Guinea. He continued with this work, which later was transferred to the Legal Research Section of the Department of External Territories, in a part-time capacity after his return to University duties in 1946. In 1948, he left the University to become officer in charge of the Legal Research Section of the Commonwealth Department of External Territories. Ross Johnston says in his *History of the Queensland Bar*: 'He took a great interest in New Guinea affairs, commenting upon relief and rehabilitation in Australia's New Guinea territories and editing *The Laws of the Territory of Papua* 1888–1945, and a supplement for 1945–1949.'[30]

It is clear from correspondence between Fry and Sir Harry held by the Gibbs family that he was a friend who thought very highly of Sir Harry and encouraged him to come to work for DORCA. It seems to me to be a fair conclusion, therefore, that Dr Fry was one of Sir Harry's principal academic mentors. Sir Harry told David Jackson in an interview for the Supreme Court Library in 2000 that Tom Fry was a very helpful lecturer, although he had a 'rather woolly, uncoordinated mind'. He also described the historian, Alexander CV Melbourne, in the same interview, as one of the best lecturers he had.[31] It was Fry who advised Sir Harry to develop work he had done for DORCA on the constitutional source and basic content of New Guinea's laws into the LLM thesis, which he insisted he complete before Fry signed his demobilisation papers.[32]

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29 WN Harrison, 'Thomas Penberthy Fry' (1952) 2(1) *University of Queensland Law Journal* 86, 87–8.
30 W Ross Johnson, *History of the Queensland Bar* (Bar Association of Queensland, 1979) 140–1.
31 Interview conducted under the Supreme Court's oral history programme, September 2000, 34.
32 Sligo (n 20) 87.

C *Sir Harry's Literary Diversions*

The pastiche of Andrew Marvell's 'To His Coy Mistress' by Sir Harry, which I have reproduced at the end of this article, reminds one that Sir Harry was an accomplished literary scholar. It also suggests that 'Uncle Tom [Fry]' could be a hard taskmaster. Other comments from Professor Harrison's obituary and Graeme Sligo's book lend credence to that possibility and suggest that he could be a difficult work colleague. The original of that poem concludes a document Sir Harry called 'The Most Lamentable Comedy of Errors', which detailed the 'curious vagaries' of the legislation then in place in PNG. It is a nice illustration of the light-hearted good humour that sat easily on Sir Harry's learning.

III The Thesis

The title of Sir Harry's thesis, 'The Laws of the Territory of New Guinea: Their Constitutional Source and Basic Content', is slightly deceptive. Its content examines significant areas of Australian constitutional law and imperial law and illustrates Sir Harry's already great grasp of constitutional principle.

After an introduction dealing with the application of British law to newly acquired territories, Sir Harry covered significant issues about the power of the Commonwealth of Australia to accept a mandate over German New Guinea by an instrument issued by the Council of the League of Nations in 1920. Sir Harry was confident that the external affairs power in s 51(xxix) of the *Australian Constitution* authorised the acceptance of the mandate 'on the most restricted criterion that can properly be applied to determine the meaning' of that section.[33] In reaching that conclusion he relied on *R v Burgess; Ex parte Henry*[34] in what would be, by any view, an orthodox example of the use of the external affairs power.

Sir Harry's later exploration of what he regarded, in dissent, as the impermissible use of the power in *Koowarta v Bjelke-Petersen*[35] and the *Tasmanian Dam Case*[36] shows how his thesis was a useful preparation for his role as a barrister appearing in constitutional matters and as a judge sitting on the High Court. He also pointed out that the defence power in s 51(vi) of the *Constitution* similarly justified the acceptance of the mandate through the *New Guinea Act 1920* (Cth).

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33 HT Gibbs, '*The Laws of the Territory of New Guinea: Their Constitutional Source and Basic Content*' (LLM Thesis, The University of Queensland, 1946) 15, [14].

34 (1936) 55 CLR 608.

35 (1982) 153 CLR 168, 188–203.

36 *Commonwealth v Tasmania*; *The Tasmanian Dam Case* (1983) 158 CLR 1, 96–107.

A *Source of the Commonwealth Parliament's Authority to Make Laws for the Government of New Guinea as a Territory of the Commonwealth*

When Sir Harry examined the source of the Commonwealth Parliament's authority to make laws for the government of New Guinea as a territory of the Commonwealth, he considered that s 122 of the *Constitution* was the relevant section, 'plenary in its nature, self-sufficient (so that the Parliament need have recourse to no other constitutional power in legislating for the territories) and not subject to the restrictions which the Constitution imposes to safeguard State rights or maintain the balance of the federal system'.[37] The reasoning that led him to this conclusion is characteristically confident and persuasive and must have helped lay the foundation for his later decisions examining the limits of s 122 as a source of power to create additional senators to those representing the States in the *Territory Senators' Cases*.[38]

By then, however, he became convinced, again in dissent, that there were restrictions imposed on the power in s 122 to allow the representation of a territory in either House of the Parliament. They arose from the statement in s 7 of the *Constitution* that: 'The Senate shall be composed of senators for each State.' He concluded, therefore, that any representation of a territory in the Senate could not be by a senator and the representative would not be given voting rights.[39]

One thing that comes through fairly clearly from a reading of the thesis is that Sir Harry, even then, had clearly defined and well-articulated views about the powers of the Commonwealth within our federal system. He was willing to express definite ideas about the true meaning of previous High Court decisions such as *R v Bernasconi*.[40] Similarly, he expressed trenchant views about *Mainka v The Custodian of Expropriated Property*.[41] He exhibits similar confidence in his discussion of *Ffrost v Stevenson*.[42]

In concluding that both the external affairs power and s 122 were available as sources of power to make laws for the Territory of New Guinea, Sir Harry took the view that s 122 was preferable to s 51(xxix) because of limitations on the external affairs power applying to all of the powers conferred under s 51 of the *Constitution*.

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37 Gibbs (n 33) 22.

38 *Western Australia v The Commonwealth; The First Territory Senators Case* (1975) 134 CLR 201, 246–9 ('*The First Territory Senators Case*'), and *Commonwealth v Queensland; The Second Territory Senators Case* (1977) 139 CLR 585, 597–601. He famously dissented in the first decision, but applied the majority decision in the second decision as an application of the doctrine of precedent.

39 *The First Territory Senators Case* (n 38) 249.

40 (1915) 19 CLR 629; discussed in Gibbs (n 33) 20–2, [21] in particular.

41 (1924) 34 CLR 297; discussed in Gibbs (n 33) 23–4, [22].

42 (1937) 58 CLR 528; discussed in Gibbs (n 33) 27–31, [25]–[30].

In reaching this conclusion he sought to limit the more expansive view of that subsection, s 51(xxix), then expressed by Evatt J in *R v Burgess; Ex parte Henry*.[43]

His confidence comes through again when he discusses whether the Commonwealth's acceptance of the mandate for the Territory from the League of Nations fell within the description 'otherwise acquired' in s 122 as a valid description of the process. His devotion to the precise meaning of words is shown when he says: '"acquire" does not only mean "to get as one's own", it also means "to come into possession of"'.[44] He saw no reason to read the word 'acquired' in s 122 other than its plain and natural meaning. That meaning was fully wide enough 'to embrace the type of possession and control, falling short of strict dominion, but affording full power of administration and recognised at international law, that is exercised by the Commonwealth in relation to the Territory of New Guinea'.[45]

He summarised his conclusions on this part of the thesis as follows:

> (a) Commonwealth legislation enabling the Governor-general to accept the Mandate was validly made under the powers conferred by either Sec. 51 (XXIX) or Sec. 51 (vi) of the Constitution, and there are no different consequences whether Sec. 51 (XXIX) or Sec. 51 (vi) is the source of power to which resort is made to uphold such legislation;
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> (b) When it accepted the Mandate, the Commonwealth obtained exclusive power to govern the Territory of New Guinea;
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> (c) Laws for the peace, order and good government of the Territory of New Guinea may validly be made by the Commonwealth Parliament under Sec. 122 of the Constitution, since the Territory, although not within the King's dominions, has been acquired by the Commonwealth within the meaning of that Section;
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> (d) The power of legislation which Sec. 122 confers is a plenary one, and complete in itself; Sec. 122 contains all the necessary power to legislate for a territory;
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> (e) "The existence of the States and of the constitutional limitations inherent in the Federal system is ... quite irrelevant in relation to the exercise of any power by the Parliament under Sec. 122";
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> (f) Although there is no conclusive authority on the point, in exercising the power conferred by Sec. 122, the Parliament is free, not only from "the constitutional limitations inherent in the Federal system", but also from all the limitations

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43 See Gibbs (n 33) 33–5, [32]–[33].

44 See ibid 36, [34].

45 Ibid.

which other Sections of the Constitution impose; the power is not qualified by any other Section of the Constitution;[46] and

(g) It is unnecessary to determine whether Parliament may make laws for the Territory of New Guinea under the power conferred by Sec. 51 (XXIX) of the Constitution, for, in exercising that power, the Parliament is subject to the limitations of the Constitution which do not apply to Sec. 122.[47]

B *Application of British Law to the Territory of New Guinea*

The second part of Sir Harry's thesis dealt with the application of British law to the Territory of New Guinea. It, too, shows a confident approach to the legal issues involved but focuses on the limitations of the exercise of power by the Commonwealth Parliament to make ordinances having the force of law in the Territory. The problem he identified was that, whereas the legislatures for the Territory endeavoured to introduce a complete and basic set of laws, they did so by selecting elements from a number of legal systems. When combined as the law of the Territory, the heterogeneous elements did not blend harmoniously, resulting in a 'legal system which, if not absolutely deficient of rules on some matters, was, at least in those matters obscure and confused'.[48]

A solution would have been for the draftsman to introduce into the Territory all the statutes of England, New South Wales and Queensland of general application and force in Queensland on 9 May 1921, together with the principles and rules of common law and equity in force in Queensland on the same date so far as they were applicable to the Territory. The specific Commonwealth Acts, Papuan ordinances and enactments of the British military administration could also have been adopted with paramountcy over the general adopted Queensland law in the case of inconsistency.

Instead, the system of law applied to the Territory had six basic constituents consisting of 14 specified Acts of the Commonwealth Parliament, specified legislative Acts of the authority administering the Territory during the British military occupation during the First World War and subsequently, four specified Queensland Acts and regulations and rules made under them in force on 9 May 1921, those portions of the Acts, statutes and laws of England in force in Queensland on 9 May 1921, and 14 specified Papuan ordinances and regulations and rules that were in force on that date in Papua. To those were added the

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46 One could say, a trifle ironically, that there is now inconclusive authority against the proposition to be found in Sir Harry's dissenting reasons in *The First Territory Senators Case* (n 38) 249, discussed earlier.

47 See Gibbs (n 33) 37–8, [35] (footnotes omitted).

48 See ibid 74–5, [75].

principles and rules of common law and equity in force in England, not Queensland, on 9 May 1921.

Sir Harry's analysis of the problems created by that hotchpotch of legislative provisions is illuminating but less interesting than the earlier discussion about constitutional power to establish laws in respect of New Guinea. That earlier part of the thesis shows the budding constitutional lawyer, already very well-equipped to become the leading constitutional judge of the future.

IV Administration of the Territory of Papua and New Guinea v Daera Guba

The decision in *Administration of Papua and New Guinea v Daera Guba*[49] dealt with claims to ownership of a tract of land in the Newtown area of Port Moresby. There were rival indigenous groups claiming the land that was also claimed by the Administration. The tribal claimants were rivals because, in 1884, when a British protectorate was declared over part of what later became British New Guinea and later still the Territory of Papua, the land in the area of Port Moresby was inhabited principally by two tribes, the Motu and the Koitapu. The claims put forward in evidence were to communal ownership in the land rather than to individual ownership, and so the case can be regarded as an early example of a claim to native title, not in Australian territory, of course, but in PNG.

The main claim of the Administration was that, in 1886, the land was purchased from the indigenous owners by a man called Robert Hunter. The Land Titles Commission in PNG had decided that one of the clans owned the land and had not disposed of it except for two small parcels in 1956 and 1957. The Commission also decided that the other clan had no rights in the land but had purported to sell it to the Administration and declared that the land was native land owned by the clan led by the respondent Daera Guba. That order, having been successfully appealed from in the Supreme Court of the Territory, was restored by an appeal to the Full Court, which in turn was the subject of an appeal to the High Court.

A *History of the Land's Acquisition*

Sir Harry examined the history of the acquisition of the land commencing with the declaration of a protectorate by the British government over the south coast of New Guinea in 1884. On 26 December 1885, after the death of the first Special Commissioner appointed for the protected territory, my great-grandfather, John

[49] *Daera Guba* (n 14).

Douglas, a former Premier of Queensland, and at that stage Government Resident at Thursday Island, was commissioned as the replacement Special Commissioner. His commission gave him wide powers. Information provided to him made it apparent that officers of the protectorate had purported to acquire parcels of land in the relevant area.

John Douglas's attitude was that it was necessary to acquire land for the purpose of settlement. An opposing view was held by a Reverend Lawes, who objected to compulsory acquisition of land for any purpose and to any form of acquisition except for missionary or trading purposes. In his first annual report dated 31 December 1886 to the British government and to the Parliaments of the Australian Colonies, John Douglas dealt with the purchase of land in Port Moresby as having previously occurred and having resulted in the acquisition of a continuous block of land amounting to some 900 acres (the number of acres may have been an error). The judgment then proceeds to examine carefully the history of tenure of the land during the 19th and 20th centuries, including details of an inquiry held in 1954 into claims made by a number of nationals to various lands in the relevant area, which was then called Granville East.

Sir Harry concluded that the land had been acquired in 1886 as reported by Anthony Musgrave, an assistant deputy commissioner at the time to John Douglas, and that it would have been most foolish for Musgrave to attempt to deceive Douglas. If he had tried to do so the probability was that Douglas would have learnt the truth from others. Musgrave's report was accepted as correct not only by Douglas but also by a later commissioner, Sir William McGregor. Accordingly, Sir Harry was satisfied that there had been a purported purchase of about 95 acres at Granville East[50] from the indigenous inhabitants by the officers of the protectorate on behalf of the Crown. He also found that it was within their authority to purchase land for the purposes of a future settlement, saying:

> Douglas' own commission and his instructions empowered him to do all such things in the interests of Her Majesty's service as he might think expedient. Such a power was wide enough to include the acquisition of land. … Neither the requirement in his commission that the natives should be protected in the free enjoyment of their lands, nor the instructions issued in October 1886 forbidding the compulsory acquisition of land except for public purposes, fettered his power to acquire lands from natives who were prepared to dispose of them freely and voluntarily.[51]

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[50] He must have been aware of the early proposal to call Port Moresby 'Granville' from his work in the war. Note the reference to 'Granville West' in the poem by Sir Harry located at the end of this article, and see the discussion by Barwick CJ in *Daera Guba* (n 14) 384–5, and Sir Harry, ibid 409, about the proposed layout of the township.

[51] *Daera Guba* (n 14) 433.

B *The Legal Effect of the Purchases of the Land*

Sir Harry then dealt with the legal effect of the intended purchases made in 1886 and the identification of the lands affected. Having identified the particular land, he then had to consider whether the acquisition of the lands by the officers of the protectorate in 1886 was an act of State the validity of which was not open to question. It was in this section of the judgment that, in my view, Sir Harry's work on his thesis helped inform the conclusions he reached. He pointed out that not every act done by the Crown in relation to Australians abroad is an act of State. In this case the Special Commissioner and his officers did not purport to expropriate the indigenous inhabitants by the exercise of an arbitrary power. They purported to acquire the legal title by voluntary acts of sale and purchase so that the acquisitions did not have the character of acts of State and could be upheld only if they were valid purchases.

The question then was under what law was the validity of the purchases to be tested. The protectorate was not part of the Queen's dominions so that Englishmen who settled there did not carry the law of England with them. At that time, no laws relating to the purchase of land had been made in relation to the Territory by Order in Council so that the purported sales could only be upheld if they were valid in accordance with the indigenous law then in force.

He pointed out that there was very little evidence as to the rules of the customary law governing the ownership and disposition of land by the relevant tribes. The Reverend Lawes apparently believed that indigenous custom recognised the perpetual alienation of land, as did others at the time. The Motuans, in particular, sold land, although not all indigenous inhabitants in other places did so. Sir Harry concluded, therefore, that there was some evidence that sales were recognised by native custom. In the absence of more satisfactory evidence, he said that the evidence was all one way. He also relied upon the findings of the Commission in 1964 that there had been a valid sale of part of the land in circumstances where there was no evidence that native customary law either forbade sales or rendered them subject to the observance of formalities or the fulfilment of conditions that were not observed or fulfilled.

Accordingly, he held that the relevant areas were validly acquired by the Crown by purchase from the native owners in 1886. He went on to consider the validity of a number of later Orders in Council and the effect of a decision of a board given in 1954 that certain of the lands belonged to the government and whether that created an estoppel. He found that there was such an estoppel affecting those parcels of the land.

C *The Decision as an Example of Sir Harry's Judicial Technique*

Apart from the connection with PNG, the decision illustrates Sir Harry's great capacity to marshal complex facts and view them through the prism of the relevant law, itself, in this case, also complex. His ability to do so effectively was heralded by the work he did in his LLM thesis, which also equipped him with much of the historical and legal knowledge relevant to significant parts of the determination of the complex questions of fact and law raised by the case.

My recollection is that he found the decision and the case extremely interesting and challenging. The link with my great-grandfather was merely incidental but ensured that it remained firmly lodged in my memory. Intrinsically, it is of interest as an early excursion by the High Court into the area of native title, although not native title in Australia.

V Conclusion

David Jackson has said that 'one of Sir Harry Gibbs' great skills, both as counsel and jurist, was to identify principle behind instance. This was so whether it be as to matters of legal practice, or as to substantive law.'[52] The confidence to do so was apparent from an early age in his thesis and in his maturity in the *Daera Guba* decision. I suspect that his war service in PNG and elsewhere consolidated those qualities already in evidence from his student days.

One cannot place too much emphasis on this early part of Sir Harry's career in assessing how it affected him as a mature barrister and judge. There was much that happened after this to help shape the man he became. He did, however, have a habit of keeping opinions from his time as a barrister and earlier judgments, meticulously recorded with his own system of catchwords to help him find his earlier consideration of matters that came before him. I remember those volumes sitting on the shelves of my associate's room. He also had a wonderful memory for the law and other matters. I expect he had access to his thesis if he needed to remind himself about the views he expressed in it.

It is unfortunately too late now to discern much more about the influences on his education and development of people such as Tom Fry, Alf Conlon and John Kerr. I suspect that would have been a fruitful inquiry if only we had the wit to make those inquiries while he and they still lived. Sir Harry was always his own man, though, thoroughly equipped with a strong set of principles and well-developed ideas about the law and life. His normal mildness of manner concealed an ability to be thoroughly and firmly judicial when the occasion demanded.

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[52] Address on Sir Harry Gibbs to the Selden Society (17 March 2016) <https://media.sclqld.org.au/documents/lectures-and-exhibitions/2016/David-Jackson-lecture-one.pdf > 17.

I was very privileged to have had the experiences of working for him, appearing before him and enjoyably socialising with him over many years. I am fortunate also to be able to commemorate him with this brief article.

Some doggerel, a long way after Marvell, previously suppressed for security reasons:

> Had we but World enough, and Time,
> This coyness, Sirs, had been no crime
> I could sit down and think which way
> To work, and muse on all ye say.
> Ye by the savage Sepik's brink
> Should Stations found; I by the stink
> Of Yarra would complain. I would
> Labour ten years before the Flood;
> And you should, if you please, confuse
> Till the Conversion of the Jews.
> My vegetable Work should grow
> Vaster than Footnotes, and more slow,
> An hundred years should go to pry
> Into the Birth of Samarai;
> Two hundred go to Granville West,
> And thirty thousand to the rest;
> Till half an Age on Butibum
> At last produced a Maximum.
> For, Sirs, as ye have writ your Screeds,
> No less a Time than this one needs.
>
> But at my back I always hear
> Time's winged Chariot hurrying near,
> And yonder all before me lie
> The Vials of Wrath of Colonel Fry,
> And piles on piles, and sets on sets,
> Mountains of Papuan Gazettes.
>
> Your Works might pleasure Satan well.
> Where damned Souls research in Hell;
> He sets no Deadline to their toil
> Who lingering fry in boiling Oil;
> But Fry, on this our earthly Level,
> Is less complaisant than the Devil
> (Translated more than Bottom, see
> How Uncle Tom can play Legree).
> God knows none read Reports for fun —
> For God's sake, let them read who run.