



FEDERAL COURT OF AUSTRALIA

**Eulogy in respect of the late John Owen Gierke Esq
Barrister-at-law, servant of the Commonwealth
(1927-2024)**

Delivered at his funeral.

**Sherwood Uniting Church, 706 Sherwood Road, Sherwood
Brisbane Australia
Friday, 2 August 2024**

The Honourable Justice John Logan RFD¹

John Owen Gierke was admitted to the Queensland Bar on 27 June 1950.² He was then about three weeks shy of his 23rd birthday.

John spent his entire career in the Law in the service of the Crown in right of the Commonwealth and thus in the service of our Nation and its people. He served within the Attorney-General's Department in the Brisbane Office of the Commonwealth Crown Solicitor, later known as the Australian Government Solicitor, for some 42 years, from 1950 until his retirement in 1992.³

At the time of his retirement, John held the senior local appointment in that office, Director, Queensland Office of the Office of the Australian Government Solicitor, a position formerly known as Deputy Commonwealth Crown Solicitor, Queensland. A Commonwealth Crown Solicitor was first appointed in July 1903.⁴ A Brisbane office was not established until the massive increase in Commonwealth legal work occasioned by the Second World War dictated

¹ Judge of the Federal Court of Australia and of the Supreme and National Courts of Justice of Papua New Guinea; President, Defence Force Discipline Appeal Tribunal.

² Admission note, (1950) 24 ALJ 117.

³ Advice to the author from the Brisbane office of the Australian Government Solicitor, 31 July 2024.

⁴ Colin Forster, 'Powers, Sir Charles (1853–1939)', Australian Dictionary of Biography, National Centre of Biography, Australian National University, <https://adb.anu.edu.au/biography/powers-sir-charles-8092/text14123>, published first in hardcopy 1988, accessed online 31 July 2024.

that.⁵ Thus, as at the time of his retirement, John had served for almost half of the period of existence of the AGS office and almost all the period in which there had been a Brisbane office. It may be doubted whether anyone, before or since, has exceeded his period of service.

Including a lengthy period when he had acted in that appointment, John was local leader of the office for most of the decade preceding his retirement. That was in a period prior to the establishment of large, interstate and then international law firms in the private practising profession. The Queensland Bar and the solicitors' branch was each much smaller in number, and by a large margin, than today. In that period, the Brisbane office had within it more lawyers than most local law firms.⁶ It was responsible for all the Commonwealth's legal business, civil and criminal, in Queensland. There was no tendering out to private law firms. There was also then a subordinate office in Townsville. In combination, and even more so than today, this meant that, forty plus years ago, the head of the Brisbane office was a significant local legal figure. The local leader also then represented the Commonwealth Attorney-General in Queensland on bodies such as the Legal Aid Commission.⁷

Given John's lengthy period of service, it is fitting that that the AGS office is represented here today by John's present successor, Mr Alexander Tate. By serendipitous chance, nay Act of God, Alex is one of my past Associates. That coincidence would have been a source of great satisfaction to John, as was his attendance as a then 80-year-old special guest, both in my chambers and in court, when I was sworn in as a judge of the Federal Court of Australia in 2007.

I spent my formative years in the profession in that same Brisbane office. It was there in 1980, only slightly older than he was in 1950, that I first met John when he decided to offer me an appointment as a junior legal officer, my very first job in the Law. So Alex is a legatee of a legacy conferred by John on me, which he conferred on so many others during his lengthy service. That legacy is an understanding of the subtleties in law and in practice that attend the exercise of federal jurisdiction, of the diligence necessary to master the

⁵ Author's personal knowledge, acquired on appointment to the Brisbane office in 1980.

⁶ Author's direct, personal knowledge, acquired on appointment to the Brisbane office in 1980.

⁷ Enhancing Access to Justice, A History of Legal Aid Queensland 1979-2004, p 22.

applicable law and facts of the case to hand, of the need for absolute independence when advising officers and agencies of the Commonwealth and, above all, of adhering by word and deed to the ethos of a model litigant when acting for such clients in and out of court, what Sir Samuel Griffith described as “the old-fashioned, traditional and almost instinctive standard of fair play to be observed by the Crown in dealing with subjects”.⁸ John Gierke personified that ethos and each of those other qualities.

Before serving as Director, John had been second in charge of the Brisbane office, on promotion from being the Principal Legal Officer (PLO) in charge of the Prosecutions Section. That was in an era prior to the establishment of the Commonwealth Director of Public Prosecutions Office. In that PLO role, John was, effectively, the Chief Commonwealth Crown Prosecutor in Queensland.

Before John took up that PLO role, the practice of the Commonwealth Crown Solicitor’s office in Queensland, in keeping with the practice of the larger offices in New South Wales and Victoria, was to brief out most appearance work to the private Bar, except the more routine cases in the Magistrates Court. Legal officers within the office acted as instructing solicitors, not as counsel. This practice was in contradistinction with that of the Queensland State Crown Law Office of the day. The practice of that office was to undertake virtually all appearance work in criminal trials in the District and Supreme Courts, and in appeals including in the High Court, as well as in a vast range of prosecutions under State legislation in the Magistrates Courts.⁹

As John gained increased seniority within the Prosecutions Section, he aligned the practice of the Commonwealth Crown Solicitor in Queensland with respect to Commonwealth criminal and quasi-criminal cases with that of the State Crown Law Office in relation to appearance work.

By the time John came to head the Prosecutions Section, he was well into his 40’s. This was late in a professional life to start undertaking the role of counsel in the higher courts. It took genuine courage, commitment, and innate ability to take on this more demanding role at that age, instead of sitting beside someone doing that. Many of his opponents were at the peak of their

⁸ *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333, at 342 per Griffith CJ.

⁹ The exception was that, in the Magistrates Courts, State police prosecutors appeared in most cases in respect of traffic offences and offences against the Criminal Code heard summarily.

attainment in private practice at the Bar and later became judges. John was good at undertaking the role of counsel and he kept getting better. The briefing out which thereafter occurred was to Queen's Counsel, junior by a member of the Brisbane office, and then only in cases of such difficulty and importance that senior and junior counsel were truly needed.

A survey of the reported cases throughout the 1970's shows John appeared across the full range of the federal criminal and civil penalty cases at trial and appellate level which arose in Queensland, including in the High Court:

- Customs civil penalty proceedings.¹⁰
- Major narcotics importation trials and appeals.¹¹
- Unlawful fishing on the Great Barrier Reef by Taiwanese fishing trawlers.¹²
- "Medifraud" prosecutions under the Health Insurance Act.¹³
- Professional disciplinary proceedings.¹⁴
- Hijacking of aircraft.¹⁵
- Trade practices prosecutions.¹⁶

These reported cases are but the tip of an iceberg of many other Federal cases in such fields and beyond. The later fate of the judicial pronouncements in some of these cases in no way detracts from the high level of professional ability displayed by John in his appearances.

Unlike State criminal proceedings where the large volume of cases means there exist many precedents, Federal proceedings are, even now, but certainly then, less frequently encountered, often thereby presenting novel and difficult questions of law and practice. Further, for most of John's active time as counsel, much more so than these days,¹⁷ the Commonwealth availed itself of what in the *Boilermaker's Case* Sir Owen Dixon, writing for the majority,

¹⁰ *Murphy v Koninklijke-Java-China-Paketaart Lijnen BV* (1975) 49 ALJR 230.

¹¹ *R v Howarth* [1973] Qd R 431; *R v Gardiner* [1981] Qd R 394.

¹² *R v Joice; Ex parte Tsay Wann Fure* [1981] Qd R 550.

¹³ *R & Walpole v White* [1979] Qd R 249.

¹⁴ *Re Lister & Minister for Health* (1978) 1 ALD 130; *Re Adams & Tax Agents' Board* (1976) 1 ALD 251.

¹⁵ *R v Sillery* [1980] Qd R 374.

¹⁶ *Guthrie v Doyle Dane & Bernbach Pty Ltd* (1977) 30 FLR 116; *Universal Telecasters (Qld) Ltd v Guthrie* (1978) 32 FLR 360; *Trade Practices Commission v Madad Pty Ltd* (1979) 40 FLR 453.

¹⁷ Even though the Federal Court of Australia was established in late 1976 by the Federal Court of Australia Act 1976 (Cth) with the appointment of The Honourable Sir Nigel Bowen KBE as first Chief Judge (as the office was originally known), no Queensland resident judge was appointed until the then Mr G E Fitzgerald QC was appointed in late 1981 as the then sole, Queensland resident, judge of that court.

famously termed the “autochthonous expedient”¹⁸ of investing State courts with federal jurisdiction.¹⁹ In practice in Queensland, that meant that the Commonwealth was perceived as something of an unsettling interloper in the State system, unsettling of judges and court officials often unfamiliar with the law and practice attending an exercise of federal jurisdiction.

John was superb in researching federal jurisdictional issues and assisting judges with related submissions at both trial and appellate level. He was likewise superb in the necessary public administrative diplomacy occasioned by the perception of the Commonwealth as an interloper. His work in the then newly established Federal Court of Australia in the early trade practices cases was truly pioneering in this branch of the law. He was also a good jury advocate but always conscious of the role of a prosecutor as a minister of justice.

John’s further promotion in the Brisbane office into the most senior legal managerial ranks meant that he had to wind down and then cease his appearance work. I know he missed that but his lengthy experience as counsel meant that his leadership of the office was informed by deep knowledge of how the law was applied in practice in the courts. His lengthy service in the office also meant that he was known to and well-respected by the local senior judiciary and by the heads in Queensland of most Commonwealth departments and agencies. As I have cause to know, in combination, this also meant that he was an understanding and supportive mentor for the next generation serving in the Brisbane office.

Many of the alumni of the Brisbane office from John’s era in charge of it, who include a Chief Justice of Queensland,²⁰ a Judge of Appeal of the Queensland Supreme Court²¹ and yours truly gained their formative experience as advocates because John Gierke had showed by example that the private Bar was not the sole repository of high-quality advocacy in federal jurisdiction.

John came from a generation that grew up in the Great Depression and when the memory of that time was strong. For those of that era, a government

¹⁸ The “Boilermaker’s Case” - R v Kirby; Ex parte Boilermakers’ Society of Australia (1956) 94 CLR 254, at 268 per Dixon CJ, McTiernan, Fullagar and Kitto JJ. As emerges from Philip Ayres’ biography of Dixon, P Ayres, Sir Owen Dixon, Miegunyah Press, 2003, at 255-8, Dixon was the author of the majority judgment.

“Autochthonous” is derived from “autochthon”. It means “indigenous, or native to the soil”.

¹⁹ Pursuant to s 77(iii) of the Constitution.

²⁰ The Honourable C E Holmes AC.

²¹ The Honourable P Flanagan.

position, especially one in the then much locally smaller Commonwealth public service, was highly prized. To have progressed further in the Attorney-General's Department, John would have had to move to Canberra. There were incentives to do that in terms of the related higher pay. And there needed to be. As I well remember, as an invariably accurate rule of thumb, we used to deduct two levels from officeholders in Canberra to ascertain the equivalent position they would hold in Brisbane. Family ties to Queensland strongly inhibited John's seeking any such transfer. Further, to my certain knowledge flowing from his mentoring of me, family responsibilities also inhibited any move by John into private practice at the Bar. However, the government of our Commonwealth in Queensland according to law was the great beneficiary of his lengthy local service in the Commonwealth Attorney-General's Department.

Rest in peace, good and faithful servant.