**Inaugural Address**

**Right According to Law**

**The Hon Peter Connolly, CBE, QC**


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From the beginning of the Federation until 1 May 1988 s. 92 of the Constitution had been regarded as conferring a personal right on the people of Australia to conduct interstate trade free of governmental control except such control as might fairly be regarded as regulatory. The provision had played a central role in denying to the Commonwealth the right to nationalise the banking system of the country and it had prevented, to a large extent, the bringing into existence of centralised marketing schemes, whether by the State, or the Commonwealth or by the combined efforts of both. The law on the subject had become well settled although its philosophical underpinning was the subject of some divergence of opinion on the court. There was very little uncertainty about it for as Professor P.H Lane pointed out (62 A.L.J. 604 at p. 605) virtually no situation which could arise under s. 92 posed a problem for which there was not a binding precedent.

This was the state of the law when each of the present Justices, except McHugh J. who was appointed after the date I have mentioned and also Wilson J. who was still then on the court, took office as justices. On 2 May 1988 this state of the law was radically reversed. The notion that the citizen had a personal individual right of freedom in interstate trade was overruled, although it had been recognised as such by Griffith C.J. in New South Wales v. The Commonwealth (1915) 20 C.L.R. 54, by Barton J. in Duncan v. Queensland (1916) 22 C.L.R. at p. 587 and even by Isaacs J. the architect of the Engineers' Case which permanently distorted the Constitution – see James v. South Australia (1927) 40 C.L.R. at p. 32.

The court paid no regard whatever to the views of their predecessors. The view which they have preferred is essentially that of Evatt J. in The King v. Vizzard (1933) 50 C.L.R. 30 at p. 82 which had never been accepted. Indeed two years later Dixon J., Australia's greatest judge, was to say in O. Gilpin Ltd. v. Commissioner for Road Transport (1935) 52 C.L.R. 189 at p. 211 - "It is not easy to appreciate the meaning of a guarantee of freedom of trade and intercourse unless it gives protection to the individual against interference in his commercial relations and movements". The vast body of law which grew up around s. 92 was based on this essential premise.

The court made no attempt to deal with the judgments of their predecessors all of which they were about to overrule and the Solicitor-General of the Commonwealth was discouraged from dealing with the previous case law. The simple fact is that the decision in question Cole v. Whitfield (1988) 165 C.L.R. 360 was one in which the Attorneys-General of the Commonwealth and all the States combined to present more or less the same argument and the result of which was to strip from the people of Australia a constitutionally entrenched right which they had enjoyed before any of the present Justices was born, to remove to a great extent restrictions on the powers of the States and virtually to free the Commonwealth altogether of any constraint arising out of s. 92. When one adds the further fact that the case in hand, Cole v. Whitfield, was a simple case of legislation passed for the conservation of the crayfish fisheries of Tasmania for the future use of man and that there was ample precedent for the validity of such legislation, the decision can only be seen as a deliberate intervention by the court for the benefit of the

governments of Australia at the expense of the governed. Yet such is the lethargy of the Australian people that there has been little criticism of the decision even in academic circles.

This brings me to what you may well have thought to be the somewhat obscure title of my paper "Right According to Law". The phrase derives from the oath taken by justices of the High Court whereby the newly appointed justice swears to "do right to all manner of people according to law." We boast that we live under the rule of law. The Parliaments and executive governments accept the decisions of the court where the Constitution or the general law is seen to impose a restraint upon their respective powers, but it is not merely the people, the Parliaments and the governments who are subject to the law, but the courts themselves.

What occurred in Cole v. Whitfield was in truth extraordinary. The question goes far beyond whether nationalisation of an industry or centralised marketing are desirable or not. The question which was starkly posed was whether the citizens of an allegedly democratic society will tolerate the abrogation of their rights in so cavalier a fashion. It cannot be doubted that if it had been put to the people by referendum that s.92 should be repealed or even amended so as to substitute the formula which the court has invented, the referendum would have been soundly defeated and that probably in New South Wales and Victoria as well as the rest of the country. Yet the answer to the question I have posed would, for Australia at least, appear to be that the people will indeed tolerate such behaviour from their highest court.

What has all of this to do with The Samuel Griffith Society? Well, as all present here are well aware, Griffith was not only one of the political architects of federation, but he played perhaps the most significant part in the drafting of the Constitution. When the High Court was constituted in 1903 Barton, the first Prime Minister, who could well have taken the Chief Justiceship, showed both generosity and good judgment in conceding the prior claim of Griffith. From then on until 1920 the first High Court played a vital role in insisting on the essentially federal nature of the Constitution and applied the American precedents which insisted that the governments of the Union on the one hand and the States on the other must not by their legislation impose burdens upon each other. There are those who describe this period as reflecting the dream of Sir Samuel Griffith. This expression is a masterpiece of faint praise. It suggests, of course, that the first court had their heads in the clouds. Nothing could be further from the truth. They were all of them experienced in the world of affairs. The people had adopted a Constitution modelled on that of the United States and the court naturally applied the constitutional doctrine which had evolved in that country to ensure the maintenance of the federal balance. What occurred was that lawyers, and in particular one Melbourne lawyer Mr Justice Isaacs, perceived that strict legalism which involved treating the Constitution of the country as if it was no more than a Hides and Skins Act, could be used to enlarge the legal authority of the Commonwealth at the ultimate expense of the States. Part of the legalistic approach to the construction of the Constitution was the rejection of the convention debates as an aid to the interpretation of that instrument. Indeed it became "the settled doctrine of the Court that they are not available in the construction of the Constitution": Attorney General (Vict.); ex rel Black v. The Commonwealth (1981) 146 C.L.R. 559 at p. 557 per Barwick C.J. Yet it was an examination of the convention debates in Cole v. Whitfield which identified for the court the formula which they adopted in place of the text of s.92, namely that it is to be confined to legislation which discriminates against interstate trade for the purpose of protecting the domestic trade of a state. So much for settled doctrine when it gets in the way of the interventionist approach!

We are told from time to time that we must abandon the monarchical form of our Constitution so that we may develop a proper sense of self-confidence. It is difficult for the dispassionate observer to see any lack of confidence in Australia's judges. On the contrary, we seem to be blessed with judges who have no false modesty. It is sufficient I think to refer to the recent

decision of the High Court in Mabo v. Queensland, the judgment in which was handed down on 3 June last. The case concerned the possibility that some form of native title to Australian land had existed and had persisted after white settlement in 1788. The settled law on the subject was as stated by Stephen C.J. in Attorney-General v. Brown (1848) 1 Legge 312 at p.316 where it was stated to be

"that the wastelands of this Colony are, and ever have been, from the time of its first settlement in 1788, in the Crown: that they are, and ever have been, from that date (in point of legal intendment), without office found, in the Sovereign's possession; and that, as henceforth her property, have been and may now be effectually granted to subjects of the Crown."

That statement of principle has never been doubted in Australia until 3 June 1992. It was affirmed by Isaacs J. in 1913 in William's case, in 1924 by Lord Dunedin delivering the opinion of the Privy Council in an Indian appeal, by Windeyer J. in 1959 in Randwick Corporation, v. Rutledge, by Barwick C.J. with the concurrence of McTiernan, Menzies and Stephen JJ. in 1973 in Papua New Guinea v. Daera Guba 130 C.L.R. at p.397, by Stephen J. again and by Gibbs J. in 1975 in the Seas and Submerged Lands case and by Dawson J. in 1988 in Mabo v. Queensland, his Honour repeating his opinion in the recent Mabo case. This is the principle on which the lands of the several colonies were administered, Parliamentary approval for the granting of what were called the waste lands of the Crown resulting in grants of freehold and lesser titles over the ensuing two centuries. Now, at last, a good 200 years too late, it has been revealed that this proposition confounds the notion of sovereignty with title to the land. See per Brennan J., Mason C.J. and McHugh J. concurring. No doubt this has sent a shiver through Whitehall. How galling for the British who acquired an empire upon which the sun never set to learn that their lawyers never really understood the principle upon which title to land was to be determined.

We are told, to our astonishment, that in 1788 there was indeed a legal system according to which tribes or other groups of Aboriginal natives moved across the continent taking game and the fruits of the land and that their descendants have thus acquired a "usufructuary title". However, pleasant though this thought may be, it is unlikely that they will derive any material advantage from it. For the court has said that that title is extinguished by inconsistent grants by the Crown or laws of the Parliament. It is suggested in the judgment of Brennan J. that national parks may still be subject to this usufructuary title. How curious! At least in Queensland, national parks are areas in which no-one is permitted to take native flora or fauna and this, at least insofar as Queensland is concerned, would seem to be wholly inconsistent with the notion of bands of usufructuaries moving through the national parks and despoiling them of their protected flora and fauna. Be that as it may, the judgment is likely to engender great expectations and the ultimate result may be cruel disappointment and resentment. An even more revolutionary idea was advanced by Deane, Toohey and Gaudron JJ. that extinguishment of title by Crown grant (an act of sovereignty) gave a claim to compensation. Oh brave new world! I will venture to remind you that I got on to this topic by way of the supposed lack of self-confidence exhibited by Australians while their potentiality for original thought and confident action is stifled by living under a monarchy.

Pleasantries aside, the point which is valid for present purposes is that the distortion of the Constitution from one in which the Commonwealth was to play an important but at the same time minor role, returning its surplus revenues to the States, to one in which the Commonwealth's fingers meddle in every pie has all occurred under the benign eyes of the High Court of Australia. As that court is no longer subject to appeal to the Privy Council, it is becoming apparent that no expedient is too bizarre if the end be thought to justify it. What rational suggestion can be made to bring home to the justices of the High Court that, whatever may be said of their decisions in general, their deliberate social engineering does not command

universal admiration or indeed respect? It is high time that Australians started to speak out on matters of social and constitutional importance.

Against this background it may be useful to remind ourselves that the legislation which established the hegemony of Canberra has its upside if only it is observed. Sir Owen Dixon, on the occasion of his swearing- in as Chief Justice of Australia on 21 April 1952, said that it was the general belief that close adherence to legal reasoning is the only way to maintain the confidence of all parties in federal conflicts. He went on:

"It may be that the court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safeguard to judicial decisions in great conflicts than a strict and complete legalism."

Would that the same could be said today! He concluded by saying:

"There is, I believe, a general respect for the Queen's Courts of Justice which administer justice according to law, and I believe there is a trust in them. But it is because they administer justice according to law."