Concluding Remarks

Rt Hon Sir Harry Gibbs, GCMG, AC, KBE

We have again cause to be grateful to the contributors of the papers delivered at this Conference; they have as usual made a significant contribution to the discussion of some of the most important constitutional issues of the day. I would not do justice to the speakers if I were to attempt to recapitulate or summarise what they have said, but I shall allow myself the indulgence of commenting very briefly on some of the main issues that have been discussed.

The first of those issues — the question of the possible conversion to a republic — is an unrewarding one. Our constitutional system requires reform in many respects — some of which have been pointed out at this Conference — but the change to a republic is not one of them. It is quite unnecessary to make that change and therefore, as has been well said, it is necessary not to make it.

One aspect, which is sometimes overlooked or discounted, is that it is impossible to foresee all the consequences of change. Two clear examples of that truth have been mentioned at this Conference — the disruptive effect of the attempted constitutional reform in Canada, and the apparent surprise of some judges at the effects given in *Wik* to their judgments in *Mabo*. Indeed, it is not mere fantasy to suppose that some of our present social discontents and discord may be traced, at least in part, to the decision in *Mabo*.

The legislation designed to modify the legal consequences of *Wik* has been wrongly stigmatised as a racially discriminatory interference with fundamental native rights, whereas in truth some amending legislation was necessary to rectify the anomalies, injustices and uncertainty caused by the *Native Title Act* 1993, particularly after the decision in *Wik*. Only time will tell whether the amending legislation recently passed will achieve its aims.

Another issue which, unlike the first, is of critical importance, is the question of preserving and strengthening the Federation. The arguments in favour of maintaining a federal system in Australia put to us by Professor Walker are overwhelming, but they are little understood by the general public, and are apparently incomprehensible to many of the bureaucrats and politicians in Canberra.

A number of speakers have pointed out the way in which our federal system has been grievously weakened, in particular, by the effect given to the external affairs power, which, as presently construed, enables the Commonwealth Parliament to legislate about anything if it can find an international instrument to support the legislation, and by the growing erosion of the taxing power of the States and their increasing need to rely on conditional Commonwealth grants. We must surely agree with the statement of Mr Alan Wood that the need to reinvigorate the Federation is overwhelming.

One of the many incidental symptoms of the decline of the federal system has been the accretion to the Federal Court of jurisdiction that could equally well, or perhaps in some cases better, be exercised by the Supreme Courts of the States.

A further question of principle discussed was the disposition shown by some judges, at least until recently, to give free rein to their reformist tendencies, and to develop the law in reliance on what they conceive to be the fundamental standards acceptable in modern society rather than on legal principles. One of the many examples of this tendency was the way in which some judges have ignored the plain and unambiguous words of the race power, and the history of that power, which shows that the words mean exactly what they say, and have written into the paragraph the unusual and inconvenient qualification that the power can be used only beneficially.

The difficulty about giving effect to the standards accepted by right thinking people is that there is often violent disagreement as to what those standards are. The undemocratic suggestion

that judges should remedy the omissions of the legislatures can be answered best in the words of that very distinguished judge Lord Reid, who said, "Where Parliaments fear to tread, it is not for the courts to rush in".[1] The judicial role is not a legislative one.

It remains for me to thank all those who have written papers, or otherwise have contributed to the debate, to thank again those responsible for organising the conference, and thank you all for attending.

Endnote:

1. *Shaw v. Director of Public Prosecutions* (1962) AC 220 at 275.