

Foreword

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The thirteenth Conference of The Samuel Griffith Society was held in Melbourne in August-September, 2001, the Centenary year of Australia's coming into being, on 1 January, 1901, as "one indissoluble federal Commonwealth under the Crown".

It seemed fitting therefore that this Conference should have as its principal (though as always, not sole) theme the commemoration, and as appropriate celebration, of 100 years of successful constitutional democracy in this country – "one nation for a continent, and one continent for a nation", as Edmund Barton so fittingly described it more than a century ago.

This Volume of the Society's Proceedings, *Upholding the Australian Constitution*, contains the papers, and Dinner Addresses, delivered to that Conference, together with, as usual, the brief concluding remarks of our President, the Rt Hon Sir Harry Gibbs.

Appropriately in these circumstances, Sir Harry's opening Dinner Address, *The Constitution: 100 Years on*, focused particularly on the extent to which the objectives of the Founding Fathers (as he said, they were all men) had been realized. He noted in that context their incontrovertible intention to create a *federal* Commonwealth – defined at the time by Sir Robert Garran as "a form of government in which sovereignty or political power is divided between the central and the local [i.e., State] governments, so that each of them within its own sphere is independent of the other". Sir Harry concluded however that, regrettably, "Federation in Australia is no longer what Griffith and Barton intended".

Aided and abetted (since the *Engineers' Case* in 1920) by a predominantly centralist High Court, Canberra has so abused both its power to impose conditions on financial grants to the States (s.96 of the Constitution), and the external affairs power (s.51(xxix)), that "the States are no longer supreme and independent within their own spheres".

Against that background it was highly appropriate that the first Conference paper following Sir Harry's address should have been that by the Hon Dr Frank McGrath. Dr McGrath drew attention to the strange (and to "the ordinary man", well-nigh incomprehensible) attitude taken by the High Court over the years to the *intentions* of those who formed our Constitution. In particular, he underlined the reluctance, or downright refusal, of the Court to draw upon the rich mine of information contained in the Hansard records of the Convention Debates.

Dr Bob Birrell's paper remarked upon the extraordinary achievement of the Founders. They, as he said, were the representatives of six proudly independent British Colonies, coming together voluntarily, and agreeing peaceably on a draft Constitution which they then put to the people of their separate jurisdictions for their approval. That approval having been duly given (after a small hitch initially in New South Wales), they took the document to the Imperial Government in London, where, with the most marginal alterations, it was fully accepted. "Forelock tuggers" indeed!

After a lapse of some little time, this Conference returned to one of the Society's recurring themes, "the Aboriginal question", with a fascinating paper by Keith Windschuttle exploding the Henry Reynolds (*et al*) myths about the Aboriginal/European relationship in the early days of settlement of Tasmania.

Dr John Forbes, in his scintillating paper, *Native Title Now*, not only brought us up to date with the present state of legal play in this sorry episode, but also, in the process, provided much worrying material as to the state of our Federal Court. The judicial activism indulged in there by a significant number of what can only be called “rogue Judges” was also the subject of extensive remark in Des Moore’s paper, *Judicial Intervention: The Old Province for Law and Order*. As Sir Harry Gibbs said in his concluding remarks:

“It is disturbing that ... there is a perception that some Federal Judges decide according to their ideological biases rather than according to law. It tends to destroy respect for the law in general and the Federal Court in particular ... This should be a matter of concern to those many Federal Court Judges whose reputation is beyond reproach”.

One matter of some interest at this juncture in our constitutional history is the possibility of reviving the Founders’ original provision for New Zealand to become part of the Australian federation. Professor Catley’s lively paper, *The New Zealand Connection*, examined the pros and cons of such a development, concluding that the prospects for it were not hopeful.

As this foreword is written, during the last week of October, Australia is mid-way through a federal election campaign. One of the key aspects of that campaign is the issue of national sovereignty, which, as I said in my introductory remarks to the Conference (see p.xxiii), had during the week preceding the Conference “been more forcefully drawn to the attention of Australians generally than at any time ... since World War II”.

Yet another key aspect – though not, up till this moment, one which has received any public attention from either side of the campaign – is the republic question. Professor Flint’s Dinner Address, *Mr Beazley and his Plebiscites*, eloquently warns us of the dangers in adopting this Napoleonic device; while two other papers, by John Paul and Sir David Smith, address, from different vantage points, aspects of the role of our Head of State, the Governor-General.

All of these papers deserve to be widely read and widely debated. Like its twelve predecessors, it is to that end that this Volume is dedicated.