Concluding Remarks

Rt Hon Sir Harry Gibbs, GCMG, AC, KBE

We were privileged at the outset of the Conference to be addressed by the Chief Justice of Australia, who spoke on the rise and fall of s.74 of the Constitution. Among other things, he pointed out that that section of the Constitution, in allowing appeals to the Privy Council, provided for an important organ of the Government of Australia which was outside Australia and controlled by other than Australians. I hope you will agree, after that opening, that we have had a succession of excellent papers on a number of issues of great public importance. It is not my intention to attempt to summarise them, but I would briefly refer to some of the questions raised.

The two papers on the *Engineers' Case*, by Professor Walker and Dr Aroney, revealed the insubstantial intellectual basis on which that decision rested, and that a number of subsequent decisions are inconsistent with the reasoning in the judgments in that case. It is not suggested that there should be a reversion to the doctrines which that decision over-ruled, but rather that it should be recognised that the Constitution is a federal one and that it should be construed accordingly. Whether the repeated demonstration of the deficiencies of the *Engineers'* approach will have any effect on the law is a matter for the future.

Mr Justice Handley's paper was presented under the title of the Republic but it concerned a broader constitutional issue. His argument was that s.128 of the Constitution, on its proper construction, has the effect that in determining the majorities necessary for a referendum to succeed, it is necessary to take into account informal votes. How this question would be decided is unpredictable, but Mr Justice Handley's argument is a strong one.

Professor Flint detailed, with his usual irony, the proceedings of the conference at Corowa which was designed to stimulate the movement towards a Republic. No signs of stimulation have so far been detected.

One of the most strongly contested issues of public policy today is that of immigration. We had three most informative papers on this question. Professor McMillan clearly explained the reasons for the expansion of the litigation challenging immigration decisions, and made a compelling case that this has been due to such things as inappropriate decisions, over-zealous judicial review, contestable assumptions and generally judicial activism. The Minister for Immigration, Mr Philip Ruddock explained the principles on which the government policies rest, and the pressures on that policy, including the very great cost to the community of unauthorised boat people. He too contended that some judges have gone too far in ignoring the effect of privative clauses in the legislation, and even in criticising the policies of the legislation. Mr Piers Akerman convincingly demonstrated the bias of the media on this issue.

Dr Stephen Hall, in a paper which should concern us all, showed how a movement to establish an imperial system of international law enforced by an unaccountable international bureaucracy, is designed to subvert the sovereignty of liberal democracies such as Australia, and to compel them to accept the standards of civil, political, economic, social and environmental activity which the international bureaucracy prescribes.

Dr Janet Albrechtsen deepened our concern at this trend, and discussed a current example of the tendency – the establishment of an International Criminal Court which she left us in no doubt we ought to reject. Even if one favoured an International Criminal Court, which I do not, the vagueness of the definition of the crimes in the statute creating it would be enough to reject it. General James pointed out that soldiers in the First World War could well have been brought before the International Criminal Court had the statute been enacted at that time, and the same is

true of World War II. No one has yet explained how Australia could validly subject our citizens to the International Criminal Court, since our Constitution vests the judicial power of the Commonwealth in the High Court and the Federal Courts.

We were pleased to have, for the second time, a representative of the New Zealand Parliament to join in our discussions. Mr Stephen Franks gave us a most enlightening address on the effect of the *Treaty of Waitangi* – a document once thought to be inoperative, but which has enjoyed a remarkable renaissance and has important consequences for the New Zealand economy.

This is the 14th Conference which we owe to the vision and dedication of John and Nancy Stone. We again owe them our thanks.