

Foreword

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The fourteenth Conference of The Samuel Griffith Society, which was held in Sydney in June, 2002, was more than usually notable, for several reasons. This Volume of the Society's Proceedings, *Upholding the Australian Constitution*, contains the papers, and Dinner Addresses, delivered to that Conference, together with the usual brief concluding remarks of our President, the Rt Hon Sir Harry Gibbs.

It is one thing to conclude with those remarks by a former, and greatly respected, Chief Justice of the High Court of Australia. It is another thing to begin, as this Conference did, with an address to its opening dinner by the present, and also greatly respected, Chief Justice, the Hon Murray Gleeson, AC. As noted in my introductory remarks to the Conference on the following morning (see below), it is a measure of how far, in its own small way, the Society has come in the brief ten years of its existence that such a signal honour should be paid to it.

In his scholarly address, *The Birth, Life and Death of Section 74*, His Honour surveyed the history of that section of our Constitution, dealing with access by Australians to a court of appeal beyond our own High Court – namely, the Judicial Committee of the Privy Council. Such access, which was limited from the outset, was successively further diminished over the years until, in 1986, it was finally terminated by the *Australia Acts* of that year.

In the course of his remarks, Mr Justice Gleeson rightly observed that:

“... it is hard to imagine that the Australian people would now accept any tribunal other than a completely Australian court as the final interpreter of their Constitution”.

The same, he said, “may be said of judicial review of administrative action”. Thus:

“Some Australian legislators and administrators may not be enamoured of judicial review, but it may be doubted that they would be enthusiastic about judicial review by a tribunal outside Australia”.

It is, I think, undoubted that almost all Australians, and not merely some of our legislators and administrators, would share that sentiment.

If that be so, how then can we explain the federal Government's recent decision that Australia should ratify the *Statute of the International Criminal Court*? For, despite all the untruths, half-truths and evasions to the contrary which were voiced by various Ministers, departmental officers, and others during the months and years leading up to that decision, there is no doubt that Article 17(1)(b) of the *Statute* gives that “tribunal outside Australia” the power to decide whether, in its view (and *its* view alone), Australia has “genuinely” carried out the investigation or prosecution of any of its citizens against whom allegations within the ICC's jurisdiction may have been made.

In concluding his address, the Chief Justice remarked that:

“It was not until 1986 that the judicial power by which Australian citizens are governed was vested completely in Australian institutions”.

It is ironic that, within a week or so of those words being spoken, our Government in Canberra should have chosen to turn back the clock of our national sovereignty in this manner. (I say nothing of whether it be constitutionally possible for it to do so in terms of Chapter III – The Judicature – of our Constitution.)

As it happens, the Conference program had already provided for some further examination of this matter of national sovereignty, including encroachment upon it from the international legal activists. (“Further”, because the topic was also examined in some detail at our twelfth

Conference in 2000.) Dr Janet Albrechtsen's paper on *The International Criminal Court* spelled out at length the criticisms of that new international political institution, while Dr Stephen Hall's paper *September 11 and International Law* succinctly summarized the dangers not merely to Australia, but to all Western liberal democracies, from the rise of the new "top down" international legal authoritarians. From this viewpoint, the onslaught on the United States on 11 September last year, tragic though it was, has at least provided us with a douche of cold reality. It has brought home to us, in particular, the contrast between real democratic nations, on the one hand, and unreal international institutions ("unreal" because, among other things, of possessing no democratic legitimisation), from the United Nations downwards, on the other.

Under the segment of the Conference program entitled "Immigration and Judicial Activism", three speakers, including the Minister for Immigration and Multicultural Affairs, the Hon Philip Ruddock, MHR presented papers addressing that general topic from varying standpoints. Professor John McMillan pointed to the failings of certain judges of the Federal Court, in particular, who have persistently sought to impose their personal ideologies upon the administrative decision-making of the Department of Immigration by, in effect, reviewing the "merits" of departmental decisions rather than simply their legality. Mr Ruddock, who, in the face of inexplicable obstruction from the Labor Opposition in the Senate, has sought to deal with the problems thereby created, spelled out the pass to which such judicial activism has brought us. Finally, Piers Akerman, with chapter and verse, arraigned many of his own colleagues in the media on the charge of manifest bias in the reporting of these and other immigration matters.

These Proceedings are notable also for containing both the longest paper to have been published by the Society, and the shortest. The latter, by Mr Justice Kenneth Handley of the NSW Court of Appeal, deals with the interpretation to be placed upon the words "a majority of the electors voting" in s.128 of the Constitution, governing the approval of constitutional referendums. According to Mr Justice Handley, "electors voting" must comprehend all votes cast, including those cast informally; whereas the practice of the Australian Electoral Commission has been to ignore informal votes in ascertaining whether the relevant referendum majorities have been achieved. As Sir Harry Gibbs said in his Conference concluding remarks, "How this question would be decided is unpredictable, but Mr Justice Handley's argument is a strong one".

The longest paper, by Professor Geoffrey de Q Walker, deals with the *Engineers' Case* (1920), the High Court case which, more than any other (with the possible exception of *Tasmanian Dams* in 1983), has robbed the Australian people of the *federal* Constitution which they believed they had enacted – and which any detached observer would concede that they *had* enacted – in the 1890s. (The accompanying paper by Dr Nicholas Aroney, *The Ghost in the Machine: Exorcising Engineers*, wholly corroborates that judgment.) But gross as the 1920 judgment was in *Engineers'*, and worse than gross as clearly were the motives of its main author, Mr Justice Isaacs, it has to be said that it was not merely that High Court, but the High Court considered institutionally as a whole, which over the subsequent 75 years or so has persistently betrayed the trust reposed in it by the Australian people.

Carefully, logically, and in the end overwhelmingly, Professor Walker's paper, *The Seven Pillars of Centralism: Federalism and the Engineers' Case* sets out the course, and the causes, of this betrayal, whose nature can be best summarized in his own words:

"*Engineers* inaugurated a method of one-sided interpretation that reversed the polarity of the Commonwealth Constitution in a way that contradicted the document's plain intention and ignored the first principles of legal interpretation. It has violated the wishes of the Australian people as consistently expressed in constitutional referendums, and mocked the sovereign power recognized in them by s.128 ... It has denied the people the advantages of competitive federalism and increased the burden, cost and remoteness of government. Since the 1970s especially [and particularly during the tenure of what Professor Walker calls the Murphy-Mason Court], it has pushed the constitutional order to the brink of breakdown".

It may not be too much to say that Australians reading Professor Walker's account would be moved to anger, mixed with despair, in the face of this betrayal by the very institution (the High Court of Australia) charged with the duty to avoid it. How, in the face of Professor Walker's account, can the Australia people continue to respect, and hence trust, our highest legal institution? I am again reminded of the words of our President in concluding our 13th Conference, when, speaking then of the Federal Court, he said:

"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 ... that perceptions of this kind should exist, and it would indicate a most serious departure from judicial probity if the perceptions are well founded ... This should be a matter of concern to those many ... judges whose reputations are beyond reproach".

Like all its companions in this Volume, Professor Walker's paper deserves to be widely read, and widely debated. Like its thirteen predecessors, it is to stimulating such debate that this Volume is dedicated.