Foreword

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The fifteenth Conference of The Samuel Griffith Society, which was held in Adelaide in May, 2003 coincided, as it happened, with the lead-up to the South Australian Constitutional Convention, and it was appropriate, therefore, that the program should mark that fact by the inclusion of four papers having to do with that (at the time of writing, still impending) event. This Volume of the Society's Proceedings, *Upholding the Australian Constitution*, contains those and other papers, as well as Dinner Addresses, delivered to the Conference, together with the usual brief concluding remarks of our President, the Rt Hon Sir Harry Gibbs.

As I said in my Foreword to the preceding Volume in this series, 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 another Justice of that Court, and fellow Queenslander, the Hon Justice Ian Callinan, AC. As noted in my introductory remarks to the Conference on the following morning (see pp. xxix-xxx), it might be stretching things to suggest that being addressed by members of the High Court on two successive occasions (the Chief Justice, the Hon Murray Gleeson, AC having addressed our fourteenth Conference) has now created a tradition. That is, nevertheless, a thought to conjure with.

Be that as it may, Mr Justice Callinan's address, *The Law: Past and Present Tense*, will fully repay close reading. Having noted that the High Court's decision in the *Engineers' Case* was a "revolutionary" one – an opinion to which, needless to say, this Society wholly subscribes – he went on to discuss, in his entertaining parable, two other matters which have also been central to many of our deliberations.

First, there is the question "whether the decision of a bench which itself may have overturned what had for a long time been regarded as settled legal orthodoxy" [such as property rights?] "should have a monopoly on the thinking on the topic in question for all time?". And secondly, there are "the dilemmas that Courts must face in dealing with assertions about changing circumstances". As to that, "the pursuit and identification of public opinion by judges for the purpose of deciding cases are exercises fraught with danger ..... It is not the business of the Court to decide cases on the basis of any judge's perception of it [i.e. public sentiment]".

I would not, of course, seek in any way to put words in His Honour's mouth, but I could not but reflect, reading (and re-reading) the words above-quoted, that they may have formed a useful primer to six High Court Justices had they had them in mind in their legally infamous 1992 decision in *Mabo*. As my square-bracked interpolation above suggests, few areas of the law would have been regarded, prior to that decision, as more "settled legal orthodoxy" than our laws governing land title.

The Conference was also fortunate in being addressed by two of the most competent members of the Howard Government – the Hon Peter Reith, now retired from the Parliament, and the Hon Senator Nick Minchin, Minister for Finance and Administration.

At a time when the Prime Minister was about to suggest a referendum to remove (effectively) the capacity of the Senate to reject Government legislation, it was refreshing to hear one of his most able (ex-) Ministers praising the essential role of that body in holding in check the overweening arrogance of the Executive. Personally, I regard Mr Howard's *ballon d'essai* on that topic as purely a political gambit (or "confected ploy", as I described it at the time). But in any case, it was comforting also to have Mr Reith remind us that:

"The history of referendums in Australia is that the public will nearly always vote 'No' to propositions to advance the power or standing of the central government. Nearly all referendums since 1901 have tried just that and so have failed".

Equally refreshing was Senator Minchin's robust assertion of the case for replacement of Australia's compulsory voting system with one of voluntary voting. As Sir Harry Gibbs said in his summary remarks concluding the Conference, "Senator Minchin put forward an unanswerable case" for doing just that.

Partly because of its prominence in the SA Constitutional Convention context, but also because of its importance in its own right, the topic of Citizen Initiated Referendums (CIR) was the focus of papers by Professor Geoffrey de Q Walker and by Mr Reith. (It was also addressed by the Hon Len King, AC in the course of his more general paper about the Convention). Again, perhaps, the best summing up of the pros and cons of the debate was delivered by Sir Harry Gibbs in his concluding remarks, namely:

"It is hard to oppose a CIR limited to the repeal of existing legislation, and it is attractive to think that CIR would provide a useful balance to the power of the Executive in any State which had a unicameral legislature. The debate on this subject generally could usefully be pursued".

Like its fourteen predecessors, it is to stimulating such debate, on that and other topics dealt with during this Conference, that this Volume is dedicated.