

## Foreword

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As this Foreword is being written, the winter session of the federal Parliament is winding down, and there are even those who suggest that, before this volume is published, Australians will have voted in a federal election.

Be that as it may, what we do know is that, from a constitutional viewpoint, the federal election, whenever it be held, will be more than usually important.

For one thing, the leader of the federal Opposition, Mr Mark Latham, has committed his party to returning to the republic issue via, first, a plebiscite on whether our Constitution should be made over from a constitutional monarchy, as at present, to a republic. If the answer to that general question were in the affirmative, Mr Latham then proposes that there be another plebiscite to choose between several alternative republican models, and then a referendum to vote on the model most favoured.

The Samuel Griffith Society was not established to address the republic issue, which indeed was revived after a century-long slumber, via the agency of Prime Minister Keating, shortly after the Society was set up. Nevertheless, the issue is of such constitutional importance that speakers at a number of earlier conferences of the Society have addressed it. Having in mind that our membership includes some (though not, I think, a high proportion) of republicans of one persuasion or another, I shall content myself here with expressing a *personal* view.

In my opinion, for Australia to embark upon a re-run of the divisiveness which gripped the nation over the years 1992-1999, and so soon after the 1999 referendum proposal was so decisively defeated (in every State of the Commonwealth, and in 72 per cent of all federal electorates), will be little short of disastrous. Anyone interested in an elaboration of those views can find them in my article, *Constitutional Lies, Damned Constitutional Lies and Plebiscites* in the Winter, 2004 issue of *National Observer*.

The republic matter is not the only constitutional issue on which the election will have a bearing. On 1 June, 2004 the Prime Minister tabled in the Parliament the report of the Consultative Group on Constitutional Change, *Resolving Deadlocks: The Public Response*. The Prime Minister said that his government endorsed the Group's recommendation that there be "a wider programme of consultation with the community, and more attention given to educating the public about the Australian Constitution and how it operates in practice".

On the face of it, who could reasonably disagree with that conclusion? Yet at the risk of appearing ungrateful, I wonder what kind of "programme" may be in mind. On the face of it, moreover, it is not so much the public that may need "educating" about our Constitution "and how it operates in practice", but our Government (and Opposition also).

The Prime Minister's statement responded, as noted earlier, to the report of the Consultative Group on Constitutional Change, established last year to undertake a process of public consultation on the government's discussion paper, *Resolving Deadlocks: A Discussion Paper on Section 57 of the Australian Constitution*. The Group found that there was not, in fact, "any substantial measure of support for either of the two options presented in the discussion paper" – a conclusion which suggests that the public had a very clear idea of the likely consequences of adopting either of the two options advanced in that discussion paper.

Concern about those likely consequences was, indeed, such that in organizing the Society's 16th Conference, held in Perth on 12-14 March, 2004, the first three papers on our program were devoted to this issue, under the session heading "The Prime Minister's Attack on the Senate". I note incidentally that the ministerial statement of 1 June, 2004 specifically

claims that “These proposals did not represent an attack on the Senate”, a claim which can only bring to mind the well-known words of Ms Mandy Rice-Davies that “they would say that, wouldn’t they”.

The three papers in question, by the Clerk of the Senate, Mr Harry Evans, Professor Malcolm Mackerras, and Mr Ray Evans, respectively, bear careful reading. The first two, in particular, contain clinical dissections, each in its own way devastating, of the constitutional untruths, sloppy analysis, and prejudicial argument contained in the Government’s original discussion paper on the issue.

In some ways even more devastating is Professor Mackerras’ conclusion that the chief reason – and in practical terms almost the only one that has been significant – for the present Government’s difficulties in shepherding its legislation through the Senate is to be found in its own 1998 election performance.

In 1998 the Coalition went to the electorate on a proposal for the introduction of a major new tax (the Goods and Services Tax, or GST). Although returned to office in the House of Representatives (albeit with the loss of 17 seats), the Government suffered a major reverse in its Senate primary vote which, at 37.7 per cent, was at its lowest on record since the introduction of our present Senate voting practices in 1949. The half-Senate then elected, which took its place on 1 July, 1999, will remain there until 30 June, 2005; and, as Professor Mackerras points out with a logic which is as unrelenting as it is undeniable, it is *that* diminution in Coalition Senate numbers which lies at the heart of the Government’s frustrations. No amount of argy-bargy about “Senate obstructionism” and the like will alter that (which however does not mean that the Labor Party has not been guilty of such obstructionism – it has been).

One final point is also worth making on this issue. As Ray Evans points out in Chapter Three, if a government is convinced of the public desirability of a piece (or pieces) of legislation; has failed to enact it after two successive attempts qualifying it for double dissolution status; but does not wish, for whatever reason, to call a double dissolution, it would be open to it to put that legislation to the Australian people at a referendum to be held at the same time as the succeeding federal election. This would be, in effect, a small exercise in direct democracy and, in my opinion, would have much to commend it on those grounds alone.

The Society’s Perth conference – of which this Volume in our Proceedings, *Upholding the Australian Constitution*, constitutes the record – was not however devoted only to the s.57 question. One of the other papers, *Error Nullius Revisited*, by Dr Michael Connor, was, in my respectful opinion, devastating in the light it has shed on the politicised “history” of Professor Henry Reynolds, and upon the equally notorious performance of those six High Court Justices who determined the *Mabo Case*. Dr Connor’s paper deserves to be – and I am sure it will be – read, and read again, by lawyers, historians and, I hope, ordinary Australians. In its own, more narrowly focused way, it constitutes as important an exercise in setting the record straight as, on a broader canvas, Keith Windschuttle’s work, *The Fabrication of Aboriginal History* – to which, indeed, it has a close link.

Although I have singled out two conference topics for particular attention, it would be invidious to fail to express appreciation of other contributions. One of them, by Professor Bob Catley, *The Northern Territory: Seventh State or Internal Colony?*, also bears upon a major constitutional question which could face Australians in the not distant future, and carries a sobering, and depressing, message in that regard. But all of them helped to make the Society’s third conference in Western Australia memorable, and all of them are deserving of our thanks.

I also include in those thanks one contributor to our conference, Dr Jim Thomson, whose paper, entitled in the Conference Program (see Appendix III) *Federalism as a Structural Bill of Rights* was appreciatively received by the large attendance, but which, nevertheless,

does not appear in this Volume.

Due to the length of the text and Endnotes of Dr Thomson's paper, and because he was not prepared to agree to shorten it or have it published only on the Society's website, neither this volume nor our website includes his paper.

One other matter should be mentioned. Ever since the Society's foundation our President, the Right Honourable Sir Harry Gibbs, has sent to members each year an Australia Day message. These communications have been greatly appreciated by our members and, although they do not form part of any conference Proceedings, they have certainly come to form part of the proceedings of the Society more generally. Accordingly, Appendix I to this Volume records those messages for the years 1993 through 2000, and the remaining messages (to, by that time, 2005) will be included in Volume 17 next year.

Volume 16, meanwhile, is once more tendered in the hope that, like its fifteen predecessors, it will contribute to the debate about Australia's Constitution, past and future.