Foreword

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Important though the periodic Conferences of The Samuel Griffith Society are, the Proceedings of our 17th Conference, held at Coolangatta on 8-10 April last, which are recorded in this volume of our series *Upholding the Australian Constitution*, pale into insignificance compared with the subsequent death of our President, the Right Honourable Sir Harry Gibbs, GCMG, AC, KBE.

I shall not repeat here what I have said in Appendix I, *Tribute to the late Sir Harry Gibbs*, other than to reiterate the respect and affection with which Sir Harry was regarded by all our members, and the sense of tragic loss with which his death has been greeted. *Requiescat in pace.*

As this Foreword is being written, the federal Parliament has just adjourned after the first fortnightly sitting of its Autumn Session. The new Senate, as from 1 July, has been sworn in, and the Canberra press gallery has been hard at work attempting to deprive the government of its Upper House majority by inducing one or other Coalition Senators to defect from key elements of the legislative program.

How successful the press gallery (which now clearly regards itself as, in effect, the Opposition – the other one having, so to speak, gone missing) will be in these endeavours, remains to be seen. In its first test (the sale of the government's remaining shareholding in Telstra), it seems to have been defeated – although even that still remains uncertain.

Be that as it may: Telstra is one thing, the government's proposed industrial relations legislation is another, and one which touches, in one major respect, upon the interests of this Society. I refer, of course, to the government's proclaimed intention to rest its new legislation upon the corporations power of the Constitution. That power (section 51(xx)) endows the federal Parliament with the power "to make laws for the peace, order and good government of the Commonwealth with respect to: (xx) foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth".

Some earlier High Court decisions notwithstanding, it is not clear to me (nor, I suggest, to any plain man's reading of them) how those words would authorise the federal Parliament to make laws purporting to "take over" the industrial relations functions of the States. Nor, as it happens, do I believe it is necessary for the government, in seeking to reform our industrial relations system, to do so.

Lest these comments be misunderstood, I should make it clear that I yield to none in my support for the government's reform objectives in this area. I was, after all, one of four people who, in 1986, founded the H R Nicholls Society to promote debate about our industrial relations system, with a view to its wholesale reform. I therefore fully endorse the government's underlying objectives. As it has argued, those objectives are central not only to furthering the cause of economic reform (and hence to raising national productivity and living standards), but also to ameliorating the position of those many Australians who, today, are locked out of employment by the operation of our present dysfunctional industrial relations system. Nevertheless, I question the government's proposed reliance on a further perversion of our federal

Constitution to achieve those aims. In short, its excellent ends do not justify these dubious means.

As remarked earlier, it is not, in my view, necessary in any case to "take over" the States' industrial relations powers in order to achieve the government's objectives. If, as it argues – and I agree – its proposed new industrial relations system will bring benefits to both employers and employees, then we might confidently expect that, over time, the States' benighted award systems, and their associated legalistic paraphernalia, will simply wither on the vine as a result of competitive forces. Nor can it be ruled out that, even before that happens, some at least of the State governments will follow the example of Victoria and cede their powers in this field to the Commonwealth under the provisions of section 51(xxxvii).

However that may be, there is a second and more important reason for questioning the legislative path on which the government appears to be embarked. That is because I greatly fear that, having laboured in the parliamentary vineyard to have its legislation passed (and having made various undesirable concessions to its opponents in the process), the government may then find that legislation, or large parts of it, overturned by a High Court which, at long last, shows signs of having regard to the *federal* nature of our Constitution.

As to all that, we shall see. What is clear from all this and other related developments is that, to quote Sir Harry Gibbs in his last message to the Society:

> "The cause of federalism needs defenders, since members of all the main political parties in Canberra seem determined to encroach on functions which were obviously intended to belong to the States. It may be true that not all State governments are models of efficiency, but they will not be improved by the Commonwealth's duplication [or, he might have added, usurpation] of their functions; on the contrary……..".

Those words were conveyed to the opening dinner of the Coolangatta Conference which, for health reasons, Sir Harry was unable to attend (see the Introductory Remarks on the following morning at page xxix). Barely had they been uttered on 8 April, and our Conference concluded on 10 April, before the Prime Minister himself, in a speech on 11 April, *Reflections on Australian Federalism*, underlined their truth.

In an address replete with outrageous claims (most blatantly, "with the GST, my government delivered the most important federalist breakthrough since the Commonwealth took over income taxing powers during World War II") and straw men ("I have never been one to genuflect uncritically at the altar of States' rights"), Mr Howard revealed the full extent to which Canberra now regards it as within its powers to control virtually everything within our nation. My personal regard for the Prime Minister notwithstanding, this was nothing short of deplorable (as, in *The Australian* on 18 April, I pointed out at greater length than would now be appropriate here).

Professor Dean Jaensch, of Flinders University, paid the Society a compliment last November in observing, when "launching" Volume 16 of our Proceedings in Adelaide, that our Conferences were nothing if not "eclectic" in both topics and speakers. The Coolangatta Conference fully lived up to Professor Jaensch's encomium.

It began with three papers, plus a dinner address on Saturday evening from

Bob Bottom, under the general rubric "The constitutional state of Queensland". To say that each of these papers cast Queensland in a deplorable constitutional light would be an understatement. That by Professor Suri Ratnapala, *Constitutional Vandalism under Green Cover*, is redolent of a (single Chamber) Parliament that has lost all touch with what most Australians would regard as the rule of law.

If anything, the paper by Mr Kevin Lindeberg, *The Heiner Affair*, goes even further. It tells the sorry story of that episode, beginning with the Goss Government's action in 1990, clearly committing an offence under the Criminal Code of Queensland (drawn up originally by Sir Samuel Griffith, incidentally) by ordering the destruction of official records which it had already been informed were likely to be required for the purpose of legal proceedings.

The list of miscreants in this affair is almost endless: the Cabinet Ministers of the Goss Government itself, Ministers (or at least the Premiers and their Attorneys-General) of all subsequent governments to this time, the Criminal Justice Commission, its latter-day successor the Crime and Misconduct Commission, the relevant public service personnel within the Justice Department – and the list goes on. Even the Crown, in the form of the State Governor, appears to have failed in its duty up to this time.

I defy any disinterested observer, reading this paper, to come away from doing so with anything but a sinking heart as concerns the rule of law in the conduct of affairs in a great State of the Commonwealth (and one for which, next to my own State of Western Australia, I retain the fondest regard).

Mr Lindeberg's paper, as I say, speaks for itself. However, perhaps I may add a footnote. After the Coolangatta Conference I sent Sir Harry Gibbs, at his request, copies of all the papers delivered there. After having read Mr Lindeberg's paper Sir Harry promptly wrote, on 15 April, 2005 a private letter to him. I have seen a copy of that letter, and in view of Sir Harry's subsequent death I now feel free (as, no doubt, will Mr Lindeberg) to reveal its contents so far as they relate to this matter. Sir Harry wrote:

> "I have read your paper with great interest. There can now be no doubt that the advice given to the Queensland Government and the view accepted by the Criminal Justice Commission, that s.129 of the Queensland Criminal Code, read in the light of the definition of "Judicial Proceedings" in s.119 of the Code, applies only when the Judicial Proceeding has actually commenced, was erroneous. That was authoritatively recognized in 2004 by the decision of the Queensland Court of Appeal in *R v. Ensbey*. It follows that if the evidence establishes beyond doubt that the Queensland Cabinet on the 5th March, 1990 knew that legal proceedings were likely, and that the material which it ordered to be shredded might be required in evidence in those proceedings, there is at least a *prima facie* case that those members of the Cabinet who ordered the shredding were in breach of the law".

And still the Queensland Government refuses to take any action in this matter.

While it always verges on the invidious to single out particular papers in the Foreword, I must nevertheless mention two others. First, I refer to Dr John Forbes's paper at Chapter Seven, *Native Title Today*, wherein is set out the doleful story of the Brennan-Deane title from its invention by the Mason High Court in 1992 until the present day. With characteristic wit, urbanity and above all command of his material, Dr Forbes has done any student of this shameful

episode yet another service.

My second reference is to the important paper, *The Use and Abuse of the Commonwealth Finance Power*, by Mr Brian Pape, which appears here as Chapter Nine. In his well-researched and hard-hitting exposé of the constitutional arrogance of federal governments up to and including the present one, Mr Pape not only questions the constitutional validity of a significant body of Commonwealth legislation over the years, but also raises the basic question of how (or even whether) a concerned Australian citizen can obtain standing to raise these issues by way of High Court challenge.

It is ironic, to say the least, that Coalition parties which deplore, quite rightly, the actions of the Whitlam Government, should in this regard prove to be sedulously emulating the constitutional impropriety of that administration. As a commentary upon all that, Mr Pape's paper cannot be too highly recommended.

Like its sixteen predecessors, Volume 17 in this series is once more offered in the hope that it will contribute to debate about our Constitution.