

## Foreword

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As this Foreword is being written, the Queensland government has just been returned for a fourth term; the High Court's vital decision in the *Work Choices Case* is still awaited; and the nation appears consumed by the cries of those who place the liberty of "Jihad Jack" Thomas before the safety of his fellow citizens. Meanwhile, members of the Howard Government, while uttering palpably obvious statements about the problems attributable to what they call "an extremely small minority" of Australia's Muslim population, nevertheless seem to be *doing* nothing (or nothing effective) to address those problems in the years ahead.

Except for *Work Choices*, all this seems far removed from the topics considered during the 18th conference of The Samuel Griffith Society, held in Canberra on 26-28 May last, the Proceedings of which comprise this Volume 18 in our series, *Upholding the Australian Constitution*.

It is unusual – indeed, previously unknown – for the Society's conferences to focus upon any single theme. Typically, they range across several themes in a manner accurately described by Professor Dean Jaensch some years ago as "eclectic". The 18th Conference constituted a notable exception.

The central theme of the Conference – and hence of these Proceedings – was a celebration of the life and work of the Society's inaugural President, the late and much revered Sir Harry Gibbs, whose untimely death occurred on 25 June last year.

This is not the place to repeat my own feelings about Sir Harry: see, for that, Appendix I to Volume 17 of these Proceedings, *Tribute to the late Sir Harry Gibbs*. However, as that tribute noted:

"At a meeting on 6 July, 2005 the Board of Management discussed, in a preliminary fashion, ways in which the Society might seek to commemorate our former friend and colleague. It resolved that, at the Society's next conference in 2006, arrangements should be made for the delivery of a lecture in his honour, to be known as The Sir Harry Gibbs Memorial Oration, and that this Oration should be given on a regular basis (annually or biannually) at Society conferences thereafter. It also resolved that some part of the 2006 Conference should be set aside for papers constituting a more general *festschrift* in appreciation of Sir Harry's life and achievements".

In line with that resolution, the Canberra Conference therefore began on the Friday evening with the Inaugural Sir Harry Gibbs Memorial Oration, delivered by Mr Justice Dyson Heydon, AC of the High Court of Australia. Justice Heydon's splendid address, *Chief Justice Gibbs: Defending the Rule of Law in a Federal System*, was, in my respectful opinion, a classic of its kind. It alone would render this volume outstanding.

However, in line with that Board of Management resolution, Justice Heydon's address was not alone. The first four papers to the Saturday session of the Conference were specifically designed as "a more general *festschrift* in appreciation of Sir Harry's life and achievements".

The first of those papers was given by Mr Justice Michael Kirby, AC of the High Court of Australia. Delivered by video because of His Honour's unavoidable absence in Fiji over the weekend in question, it was entitled *Sir Harry Gibbs Remembered*. As His Honour noted, he often found himself at variance with Sir Harry on the interpretation of the law; but rarely did he find himself at variance with him in terms of personal relationships. Indeed, Mr Justice Kirby's remarks about their shared experiences in the Australian Academy of the Forensic Sciences, and in the Order of Saint Michael and Saint George (of which Sir Harry was a Knight Grand Cross), will shed new light to Society members, among others, on the personality of our late President.

Our second paper brought to bear upon Sir Harry's life a quite different perspective, through the agency of the Hon Tom Hughes, AO, QC. As Commonwealth Attorney-General in the then Gorton Government, it was Mr Hughes who had the singular honour of recommending to Cabinet, and then to the Governor-General, Sir Harry's initial appointment as a Justice of the High Court of Australia in 1970. Few, if any, better appointments, I suggest, have ever been made in the history of that Court, and Australians will long be in debt to Mr Hughes's good judgment in that respect. His paper, *Sir Harry Gibbs: An Advocate's Perspective*, was as interesting as it was well received.

Mr David Jackson, QC, who was the second person to serve as Sir Harry's Associate during the latter's time as a Justice of the Supreme Court of Queensland, gave us a wide-ranging survey of Sir Harry's judicial attitudes and rulings. A life-long, and in latter years particularly close, friend of Sir Harry's, his paper, *Sir Harry Gibbs and the Constitution*, provided insights not given to less close observers.

The fourth paper in this opening bracket, *Sir Harry Gibbs and Federalism: The Essence of the Australian Constitution*, was delivered by Mr Julian Leaser, one of the Society's most dedicated younger members and now Executive Director of the Menzies Research Centre. His conclusion is worth quoting:

"As a Justice of the High Court Sir Harry did his duty. He interpreted the Constitution with particular regard to its federal character. As his time on the bench drew to a close, and in retirement, .... he became ever more concerned with the state of federalism .....

"The further the interpretation of the Constitution moves from his vision, the harder it may be to return it to a jurisprudence that has regard to its federal character. I believe that the focus of federalism in the future will be less on legal federalism and more on political federalism .....

If the proper balance can be achieved then we will well and truly serve the distinguished memory of Sir Harry Gibbs".

Although these four papers constituted the formal *festschrift* called for by that Board of Management resolution quoted earlier, most of the remainder of the Conference was also devoted to matters dear to Sir Harry's heart. Outstanding in that regard were the two formal papers (Chapters Five and Six), and the Saturday dinner Address (Chapter Eight), devoted to various aspects of the current lawyer-driven "push" for Bills of Rights in Australia's State (and in due course federal) legal paraphernalia.

Professor James Allan's lively paper on the use of *Bills of Rights as Centralising Instruments* by those who regard themselves as knowing best – and to hell with popularly-elected Parliaments in that respect – set the stage in general terms. Speaking from his wide experience in Canada (*Canadian Charter of Rights and Freedoms*), the United Kingdom (*Human Rights Act 1998*) and New Zealand (*New Zealand Bill of Rights Act 1990*), Professor Allan brought to his topic both scholarship and practical knowledge.

In Australia we now have two of these Bills of Rights in being – the ACT *Human Rights Act 2004* in the Australian Capital Territory, and the so-called *Charter of Rights and Responsibilities* in Victoria, which will become effective on 1 January next. The paper on the latter by Mr Ben Davies (another of the Society's most dedicated younger members), *Who gets the Bill? The Lawyers' Bill of Rights in Victoria*, will reward close reading. Not only does it dissect the spurious claims of the Charter's proponents (particularly Victoria's lamentable Attorney-General, Mr Rob Hulls), but it also lays out in detail the fraudulent processes by which those proponents went about their deliberate hoodwinking of Victorians as to its true import. Concern for this Labor government's anti-democratic legislation is matched only by contempt for the Liberal Opposition in failing to oppose it.

The seal was set on these two papers by Dr Janet Albrechtsen's lively address on Saturday evening, *An Australian Bill of Rights by Stealth?* As Sir David Smith later said in his Concluding Remarks:

"On Saturday night Dr Janet Albrechtsen drew this [Bills of Rights] section of our conference to a close by reminding us of the pernicious strategy that has been set in train to slowly give us State and Territory charters of human rights that would induce us to accept the ultimate goal – an entrenched Bill of Rights in the federal Constitution. It is my earnest hope that this Society and its members will respond to this latest threat to our system of parliamentary democracy and to our individual rights as citizens".

Two of Sir Harry Gibbs's other abiding interests during his time as President of the Society were, respectively, the role of the Crown in our Constitution, and what we have termed, from the Society's outset, "the Aboriginal question".

As one of the founders of Australians for Constitutional Monarchy, Sir Harry's view as to the central role of the Crown in our Constitution was never in doubt. In his paper *A Republic: The Issues* (see Volume 8 of *Upholding the Australian Constitution*) he strongly rebutted the sheer nonsense emanating at that time from the republican camp. He would therefore undoubtedly have been delighted by *Head of State*, published last November by Macleay Press, in which his successor as President of the Society, Sir David Smith, KCVO, AO presented in immaculate detail the product of his researches into the constitutional position of the Governor-General in our Constitution.

Those researches, which have put to shame Australia's legal academic fraternity/sorority (or at least that part of it concerned with constitutional law), have however necessarily raised another question. If the Sovereign (presently Queen Elizabeth II of Australia) can no longer be seen as our constitutional Head of State

– a term which of course does not appear in our Constitution in any case – what then is her role in Australia today? That is the question to which Professor David Flint’s paper, *The Role of the Sovereign*, is addressed.

As to the Aboriginal question, Sir Harry Gibbs brought to that question a deep sympathy for the plight of those genuinely disadvantaged Australians of Aboriginal descent. At the same time he also saw through the self-interested endeavours of the Aboriginal industry to use the “victimhood” of those disadvantaged people in order to line their own pockets with the pelf so liberally provided from seemingly inexhaustible governmental sources. He would, therefore, I suggest, have heard with the utmost interest the paper by the Hon Dr Gary Johns (a former Minister in the Keating Government), *Aboriginal Policy at the Turn* (see chapter 10).

Although the two remaining papers, by Stuart Wood and John Roskam respectively, were less directly related to specific issues dear to Sir Harry’s heart, both also dealt, as one would expect from this Society, with the issue of federalism in its various manifestations, and both were equally warmly received. Indeed, it may not be going too far to say that the question and answer session following Stuart Wood’s paper was as “warm” as any that I can remember in the Society’s history!

In his Concluding Remarks drawing the Conference to a close, Sir David Smith said:

“..... Sir Harry left some enormous footprints on this Society, its conferences, and its publications .....

“Each [of our first five speakers] spoke about different aspects of Sir Harry’s life and work as lawyer, barrister, friend, judge and Chief Justice: together they gave us a wonderful word picture of a courteous and gentle man, an exemplar in the law, a judge of high principle, and a stout defender of the nation’s Constitution and its institutions”.

The Samuel Griffith Society was established to promote debate about the Australian Constitution from a federalist (i.e., anti-centralist) point of view. It is my hope that our 18th conference, directed as it was in the main to celebrating the life and works of a great Australian federalist, our former President, may have contributed further to that objective. It is in that spirit that, like its seventeen predecessors, Volume 18 in this series is now offered.