Concluding Remarks

Sir David Smith, KCVO, AO

Our nineteenth conference got off to a flying start with a stirring address by Professor Geoffrey Blainey, Australia's pre-eminent historian, at our opening dinner on Friday night. He reprised the story of our origins as a nation, and our progress since then. He reminded us that our Constitution and the federation which it created might not be perfect, but that they are better than any of the alternatives.

Our first session on Saturday morning dealt with the subject of **Work Choices and the Federation.**

Julian Leeser's paper *Work Choices: Did the States run dead?* reminded us just how important the *Work Choices Case* in the High Court was to the States. He argued for the need to overcome the High Court's reluctance to overturn earlier decisions in the *Engineers'* and *Concrete Pipes Cases*. He suggested that the States, the Territories and the unions could have mounted a much stronger case before the High Court in arguing against the federal government's Work Choices legislation, but they failed to do so because they could see political advantages in the legislation for a future federal Labor Government.

John Gava followed Julian and asked *Can Judges resuscitate Federalism*? He discussed the dissent judgments in Work Choices by Justices Ian Callinan and Michael Kirby, and their views as originalist federalists. He invited us to consider the implications of a High Court comprised of activist originalists or activist federalists, and the consequent decades of constitutional litigation that would ensue. He concluded that federalism is in dire straits in Australia today, but that it is not the role of judges to resuscitate it.

Professor James Allan, in his paper *When Does Precedent become a Nonsense?,* posed the question whether we wanted total certainty in the law, or total flexibility, or something in between. He noted that respect for precedent tended to be stronger in common law systems, and that certainty of outcome was a desirable principle of the common law. Yet the outcome of a century of High Court judgments has been to shift the Commonwealth/State balance of the federation quite drastically. He argued that the time has come, post *Work Choices*, to overturn the accretion of Commonwealth power since the *Engineers' Case*, but his pessimistic view was that this was unlikely.

Eddy Gisonda gave us a "courageous" paper entitled *Work Choices: A Betrayal of Original Meaning?* He suggested that the Constitution should be interpreted in light of the original meaning given to the text by its framers. He conceded that the task of ascertaining original meaning in the minds of the framers was not an easy one, but it certainly was possible. He concluded that industrial relations were very much to the fore in the minds of the framers at the time of federation: they didn't give all of the industrial relations powers to the Commonwealth then, and the principle of original meaning would not have given them to the Commonwealth now.

Saturday afternoon's sessions covered the themes **Federalism in a Centralist Environment** and **Bills of Rights.**

The Hon Dr David Hamill, in his paper *W(h)ither Federalism*?, concentrated on the capacity of the different levels of government to legislate, administer and finance their respective constitutional responsibilities. He suggested that the division of heads of powers was not as clear-cut as some might think, and that the actual allocation of powers today was different from what it was at federation. He placed great emphasis on the shift in fiscal powers towards the centre as the major contributing mechanism in bringing about this change. He felt that the growth of State dependence on Commonwealth grants, with their associated conditions, has substantially limited the capacity of the States and Territories to discharge their powers and functions. He concluded that the process undermined accountability and was contrary to the principle of good government.

Ben Davies spoke to us on *The Politics of Federalism.* He argued that the growth of Commonwealth power and the diminution of State authority has resulted in the States becoming fiscally lazy—happy to tolerate a loss of responsibility so long as they were given the money. He attributed this political ineptitude to a decline in the quality, and range of experience, of State politicians, and their consequent reluctance, or inability, to stand up to the Commonwealth.

The final session on Saturday afternoon was given by Dr Charles Parkinson on the topic *Bills of Rights: Some Reflections on Commonwealth Experience.* He reminded us that the debate on a Bill of Rights usually polarised around competing rhetorical questions. This, he contended, was hardly conducive to informed public debate. He invited us to consider how a citizen's human rights are protected in a liberal democratic society such as Australia, and gave us some powerful examples of competing human rights, and competing public policy roles of Parliament and the judiciary. He concluded that the adoption of bills of rights in the "newer" Commonwealth countries was for political reasons not applicable to Australia. For us the choice is between Parliament having the ability to balance competing human rights, or handing this role to an unelected judiciary. This, he said, was a debate which Australia is yet to have.

Saturday night's dinner audience was treated to a most entertaining *tour de force* by Paul Houlihan, under the title *A Constitutional Fairy Tale, with Apologies to Joseph Jacobs.* With the decline in trade union membership presented to us as a one-man pantomime based on the Henny-Penny children's fairy story, Paul showed us that he is as good a comedian as he is an industrial relations advocate. He certainly has a second career should he decide to give up his day job.

The Sunday morning sessions were devoted to **The Crown in Australia** and **The Aboriginal Question.**

Dr Anne Twomey spoke to us about *The Queen of Australia*. She reminded us of the determination of Sir Samuel Griffith, as one of the founding fathers, to ensure that the Australian States and their Governors did not become subordinate to the federal government and to the Governor-General, as was the case in Canada. She also reminded us of Sir Samuel's role as Chief Justice of the High Court in developing the role of the Crown in Australia, and in identifying the different manifestations of the Crown in Australia. This was later rejected by the High Court in its notorious *Engineers' Case*, when it reinstated the notion of an indivisible Crown. It took the Imperial Conferences of the 1920s and 1930s to restore the notion of a divisible Crown. In exploring the roles of the British government, the Australian government and the State governments in their tortuous progress towards the *Australia Acts* 1986, Anne has exposed yet another, and very disturbing, level of ignorance about our constitutional arrangements on the part of State Premiers, their Attorneys-General and other legal advisers, and the very bureaucrats charged with the responsibility of administering those constitutional arrangements.

Michael Manetta took us back again to the hapless *Engineers' Case* and the High Court's notion of the indivisible Crown in his paper *Sovereignty in the Australian Federation.* He reminded us of the sovereignty of the Queen in Parliament. He argued that today the Crown combines the sovereignty of the federal Parliament and the sovereignty of the State Parliaments in a single sovereignty of the Australian Crown, and he rejected the notion that the Crown could be divided on the basis of different sources of advice to the Monarch. It was reassuring to hear that Australia has one, and not seven, Crowns, and that the authority and sovereignty of the Crown predates Federation and the adoption of the Constitution. His views on s. 128 of the Constitution *viz-a-viz* s. 15 of the *Australia Act* 1986 would be a useful topic for this Society to explore at a future conference.

Our final paper was by Dr. Geoffrey Partington on *Thoughts on Terra Nullius.* He reminded us of the various ways in which English law applied to different kinds of settlements and colonies, particularly in relation to the use of land, and depending on whether the new colony had been previously settled and on how its land had been used by its original inhabitants. He noted that New Holland's original inhabitants, with no recognised form of government or organised use of land, had often been described or referred to in pejorative terms, even by those who were otherwise sympathetic towards them—a practice which often continued today. He reminded us of the policy of Sir Paul Hasluck, as Minister for Territories in the 1950s and early 1960s, of attempting to integrate Aborigines into the Australian mainstream. Regrettably, some anthropologists and historians thought it more important to preserve Aboriginal culture in all its primitive forms, with all its limitations on health, education, housing, and economic advancement. Today we are still reaping the evils resulting from this misguided policy.

I am reminded of the words of the late Neville Bonner, Australia's first Aboriginal member of the federal Parliament, who often said that that the British settlement of Australia, with all of its problems for his people, had dealt much more kindly with them than any of the other colonising contenders would have done.

We are once again indebted to John and Nancy Stone for yet another brilliantly conceived, well-organised and timely conference, and on your behalf I thank them most sincerely.