Foreword

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As this Foreword is being written, Australian voters have just decisively dismissed the Howard Government and brought Mr Howard's own political career to an ignominious end with his personal defeat in the seat of Bennelong.

The incoming Labor government, under the "new leadership" of Mr Kevin Rudd, is promising all manner of rapid-fire action under the characteristically unoriginal slogan of "the first 100 days". Meanwhile the Liberal Party, bereft not merely of one leader but also of his long-self-designated successor, Mr Peter Costello, is contemplating both its past and its future. On recent evidence, the latter seems likely to be as error-ridden as, recently, the former has been; but we shall see.

All that may seem to have little to do with the 19th Conference of The Samuel Griffith Society, held in Melbourne on 17-19 August, 2007. The papers delivered there make up this volume of the Society's Proceedings, *Upholding the Australian Constitution*.

Consider, however, the themes running through the recent election campaign. I personally place much less weight on the Work Choices issue, among the reasons for the Coalition's defeat, than do Labor spokesmen and women and their ever-compliant associates in the Canberra Press Gallery. It is none the less ironic that that misguided venture by the Howard Government is perceived to have figured so prominently in its defeat. Two years ago, in the Foreword to Volume 17 of these Proceedings, I said:

> "… the government's proposed industrial relations legislation … 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".
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> "It is not clear to me", I said, "(nor, I suggest, to any plain man's reading of them)", how the words of that power (s. 51 (xx) of the Constitution) would authorise the federal Parliament 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"—a reform objective wholly desirable in itself—"to do so".

It is now a matter of record that, so far as the law of the Constitution is concerned, five Justices of the High Court of Australia said (implicitly) that I was thoroughly wrong. In its November, 2006 judgment the Court upheld the government's *Workplace Relations Amendment (Work Choices) Act* 2005 in its entirety.

Nobody should be under any doubt as to the grave significance of this decision in furthering future expansion of centralist power in Australia. In my judgment it will come to rank with the *Engineer's Case* of 1920 and the *Tasmanian Dams Case* of 1983 in the process of destroying the federal nature of our Constitution and handing ever more power to Canberra.

Two High Court Justices, to their undying credit, discerned these dangers. Mr Justice Callinan (as he then was), in a powerful dissenting judgment whose words will ring down the years, deployed argument after argument as to why what his majority colleagues were doing was in error. In doing so, he addressed squarely a central issue in the process of constitutional interpretation, namely the extent to which precedent must continue to prevail, even when to follow precedent is to produce a constitutional monstrosity.

In a nice touch, at paragraph 748 of his judgment, His Honour quoted in his support none other than Mr Justice Isaacs. Writing in 1913 in support of what became his own subsequent judgment in the *Engineers' Case*, which involved the overturning of a multitude of precedents, Isaacs said :

> "Our sworn loyalty is to the law itself, and to the organic law of the Constitution first of all.
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> "If, then, we find the law to be plainly in conflict with what we or any of our predecessors erroneously thought it to be, we have, as I conceive, no right to choose between giving effect to the law, and maintaining an incorrect interpretation.
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> "It is not, in my opinion, better that the Court should be persistently wrong than that it should be ultimately right".

Such arguments notwithstanding, the *Work Choices Case* majority Justices, once again, prefered to be "persistently wrong"—although, in their defence, see below.

Mr Justice Callinan, of course, has been long marked out in the judiciary as a steadfast federalist. The same cannot be said of his fellow dissenter, Mr Justice Michael Kirby. It is all the more to His Honour's credit, therefore, that he should have judged that the Howard Government's Work Choices folly was a constitutional bridge too far.

In a different capacity, it is true, Mr Justice Kirby has been a life-long upholder of the Australian industrial relations system. It is perhaps therefore not surprising that he should come down against an enactment that sought to overturn, or at least considerably weaken, that system. Nevertheless, it would in my view be too cynical to read His Honour's judgment with only that consideration in mind. Consider, for example, paragraph 558 of his judgment, namely:

> "This court needs to give respect to the federal character of the Constitution, for it is a liberty-enhancing feature. Federalism is a system of government of special value and relevance in contemporary circumstances. It is protective of the freedom of individuals in an age when the pressures of law, economics and technology tend to pull in the opposite direction".

In noting earlier the blind adherence to the precedents set by earlier bad decisions of their predecessors, I acknowledged the possibility that the majority Justices could defend themselves—namely, by pointing to the way in which the plaintiffs ran their case. Clearly, if the States and Territories (as well as the plaintiff trade unions) were to have any hope of succeeding, they would need to address the principal roadblocks in their path. These were, in particular, the *Engineers' Case* itself, and the *Rocla Concrete Pipes Case* (1971), both of which had established precedents that needed to be confronted and, as necessary, either got around or overturned. Yet, as the majority Justices were quick to note in their joint judgment, at no point in their arguments to the Court did any of the plaintiffs seek to do that.

That brings me back to the Society's 19th Conference, which included four papers under the general rubric, Work Choices and the Federation. In the first of these papers, Mr Julian Leeser addressed this very issue of how the plaintiffs ran their case. His paper, *Work Choices: Did the States run dead?*, notes that, ever since Federation, Labor governments have sought to move industrial relations matters more and more to Canberra.

Why then, he asks, would the State and Territory plaintiffs—all of them Labor governments—want to resist, other than purely as a matter of form, the measure which was doing that for them? And why, he might have asked, would the Howard Government have set out to do for its opponents what they had tried to do themselves on so many past occasions?

That last is a topic for a different forum. Meanwhile, however, we should reflect upon the ominous words of Mr Greg Combet, formerly Secretary of the ACTU and now, as the member for Charlton in the new federal Parliament, already appointed a Parliamentary Secretary. In October, 2006, after the *Work Choices Case* had been heard but prior to the Court's decision, Mr Combet said: "If the corporations power is available, I want people to be under no misapprehension at all, we are going to support a future Labor government to use it". Read in conjunction with Mr Combet's earlier remark that the trade unions "used to run this country, and it wouldn't be a bad idea if we did again", it may not be difficult to forecast the shape of things to come.

Be that as it may, the three other papers in this area also addressed the outcome of the *Work Choices Case*. Mr John Gava gave what can be seen as the conventional lawyer's assessment—namely, that all precedents suggested that the government's legislation would be upheld, and that the dissenting judgments of Justices Kirby and Callinan were, for that reason, seriously in error. (I am inclined to think that, in doing so, Mr Gava, even on his own terms, was somewhat less than fair to Mr Callinan's arguments; but then, I would say that, wouldn't I?).

Professor James Allan and Mr Eddy Gisonda, each in his own way, addressed the central issue. *When does Precedent become a Nonsense?*, Professor Allan asked—a question which, on my reading of Mr Justice Kirby's judgment, lies at the heart of its own admirable apostasy (if I may be forgiven for so describing his view that, in effect, the long down-hill road from *Engineers'* has led us to a constitutional precipice from which it is time to turn back—or at least, aside).

Drawing on the delightful examples of A P Herbert's hilarious book, *Uncommon Law*, Professor Allan has pointed out—without ever quite saying so in such intemperate words—that the law, as interpreted by High Court Justices in this case, has plainly become an ass.

Ass or not, the animal needs to be confronted, and it is to the task of doing so that Mr Gisonda's paper, *Work Choices: A Betrayal of Original Meaning?*, is addressed. His widely ranging discussion of the importance of "originalism" (the term that lawyers have coined to describe what you or I would simply see as adherence to

the text of the federal contract as originally drawn up), will give readers of this volume much to think about.

As usual, our 19th Conference was not confined to the single issue of Work Choices, important though that is. Two papers addressed the issue of Federalism in a Centralist Environment. The first, by Dr David Hamill, *W(h)ither Federalism?*, has provided a most valuable account of the nature of the dealings between an increasingly powerful, and increasingly arrogant, federal government—represented in this case by the then Treasurer, Mr Peter Costello—and more and more enfeebled State governments. As Treasurer of Queensland during 1998-2001, Dr Hamill knows a thing or two about the processes of negotiation—make that *diktat*—of the Goods and Services Tax arrangements. Anyone who still labours under the delusion that the GST is a State tax collected by the Commonwealth acting as their agent, will be left in no doubt by Dr Hamill as to the untruth of that "transparent little lie" (as, many years ago, I publicly termed it).

The accompanying paper by Mr Ben Davies (a member of the Board of Management of this Society), *The Politics of Federalism*, approaches these issues from a rather different perspective. Is the strongly flowing tide of Canberra-centred decision-making, he asks, due to the centralist bent of federal governments? Or is it, particularly in recent years, due to the poor, and in only too many cases wretched, performance of State governments (all of them, today, Labor ones)? Is the vacuum created by poor, even wretched, performance at the periphery not merely inviting federal intervention in area after area, but positively demanding it?

To some extent, as I am sure Mr Davies would be the first to acknowledge, there is in this an element of the chicken and the egg debate. Has the poor quality of State governments led to public demands for federal intervention? Yes, undoubtedly. Has the increasing level of federal intervention led to State governments (and hence, those who make them up) being progressively downgraded? Yes, undoubtedly. Moreover, anyone deploring the quality of current Labor administrations in the States and Territories needs also to ask why the Liberal (and in some States, also National) parties at the State level have proved serially incapable of wresting office from the hands of such administrations.

It would be otiose to continue to canvass, one by one, the contents of this volume. Among all the other high quality contributions, however, I cannot fail to single out three for particular mention.

Those attending the conference opening Dinner on Friday evening were treated to a splendid address by Professor Geoffrey Blainey, *What should we say about our Federation?* In his inimitable style, Professor Blainey threw the light of history upon the development both of our Constitution and of our country. Musing on the manner in which, almost entirely via the agency of High Court interpretation, the focus of our Constitution has shifted more and more towards Canberra, he noted that "to present ambiguity [of constitutional wording] to the Justices of the High Court is, at times, like presenting them not only with their legitimate serve of bread and butter but also with a welcome crate of Scotch. They get merry on it". Just so.

Dr Anne Twomey's paper, *The Queen of Australia*, draws upon her outstanding book, published a year or so ago, *The Chameleon Crown: The Queen and her Australian Governors*. Her paper provides an enthralling account of the development of the relationship(s) in Australia between the Crown (originally the British Crown, now the Australian one), British governments, governments of the Commonwealth of Australia, Australian State governments and, not least, the person(s) of the Monarch. Anyone who believes that the Royal prerogative is dead will find Dr Twomey's paper as revealing as it is fascinating.

It is not only for that reason, however, that I describe Dr Twomey's book as "outstanding". It is because that book represents genuine scholarship, of a kind so rarely seen these days in the humanities areas of our universities. The access given her to British Cabinet papers, and to the Palace records, speaks volumes of the esteem in which, researching her book, she must have been held in those quarters. The same was not true of her (non)access to the corresponding Commonwealth government documents—a fact that may not be unrelated to the clearly duplicitous behaviour of that government at the time, both in its dealings with the British and its dealings with our own State governments. In that sorry tale, Mr Hawke, and then Senator Gareth Evans, have much to be secretive about.

My final encomiums must be reserved for Mr Paul Houlihan's address to the Saturday evening conference dinner. *A Constitutional Fairy Tale* is unlikely, I suspect, to be equaled in the annals of our Society for its mixture of wit, whimsey and the brutal reality which so marks, and so mars, the world of industrial relations in this country—a world with whose entrails Paul Houlihan, over a long life, has become so exuberantly familiar. It is, in my respectful opinion, a rare gem—one to be taken out from time to time, turned over and re-examined for what may well prove to be its lessons over the years ahead. But then, as Mr Houlihan has assured us, it is merely a fairy tale. Isn't it?

The Samuel Griffith Society was founded to promote debate about the Australian Constitution from a federalist (i.e., anti-centralist) viewpoint. Our 19th Conference, like all its predecessors, was directed to furthering that objective, and it is in that spirit that this volume of its Proceedings is now offered.