

Concluding Remarks

Sir David Smith, KCVO, AO

This has been yet another great conference and I thank all of our speakers for their contributions.

Our conference was opened by the Hon Ian Callinan, who delivered the second **Sir Harry Gibbs Memorial Oration** on the topic *Superior Courts in the Republic of Australia*.

Ian invited us to consider how a new or an amended Constitution might deal with Australia's judicial system. He pointed out the problems caused by the creation of the Federal Court and the removal of vested jurisdiction from State courts and giving it exclusively to the Federal Court. He outlined the advantages of a single judicial hierarchy, headed by the High Court as the constitutional court and the final court of appeal; and he concluded with an examination of alternative processes of appointment to judicial office.

Our first session on Saturday morning had as its theme **Undermining Australia's Federalism: The High Court at Work**. Professor Nicholas Aroney, in his paper *The Idea of a Federal Commonwealth*, reminded us that the creation of our federation was premised on the consent of the constituent States, who brought with them their self-governing and independent status, and continued to exercise their original powers. The framers of the Constitution intended that the High Court would interpret the limited and specific legislative powers of the Commonwealth Parliament so as to protect the rights of the constituent States.

On the other hand, Professor James Allan, in his paper *Implied Rights and Federalism: Inventing Intentions while Ignoring Them*, showed us how the High Court's discovery of implied rights has allowed unelected judges to ignore the expressed intentions of the framers, while presuming the existence of other, implied, intentions that the framers had failed to express. This heresy is compounded by the High Court's presumption that, in their past rejection of referendum proposals, the people got it wrong, and that it is the role of the High Court to remedy this so-called defect in our democracy.

The theme for the second session was **Bills of Rights**. We heard papers by Paul Sheehan, *The Rule of Lawyers, not Law*, and Peter Faris, QC, *Human Rights Legislation and Australian Sovereignty*. We were presented with a series of disturbing examples of how the human rights industry is subverting the role of Parliament to protect the people, and placing it in the hands of lawyers and judges and unelected tribunals. This has resulted in the supremacy of international law over Australian domestic law, and a diminution of Australian sovereignty.

National Sovereignty and International Commitments was the theme for the third session. Senator George Brandis, SC, in his paper *A Collision Waiting to Happen? The UN Declaration on the Rights of Indigenous Peoples and Australian Domestic Policy*, raised concerns about the UN Declaration. He cited a number of defects in the text of the Declaration, and pointed out that the four dissenting states – Australia, the United States of America, Canada and New Zealand – not only refused to create different classes of citizens, as required by the Declaration, but also had in force laws and policies which protected the rights of indigenous people far better than was the case with many of the signatories to the Declaration.

Alan Oxley's paper, *Global Warming and its Discontents: The Threat to National Sovereignty of Climate Change Populism*, asked the questions why, after a quarter of a century of economic reform that has given Australia such a strong economy, are we now contemplating government interference in market forces; and why are the industrialised economies to have economic restraints imposed on them which will not apply to developing economies? He concluded that currently-proposed carbon emission policies won't work, and will cause harm by restructuring the Australian economy to produce poverty.

In our final session on Saturday, **Europe's Constitutional Muddle**, Dr Matt Harvey spoke to us on *The Treaty of Lisbon: A Federal Constitution that Dares not Speak its Name?* He traced the chequered history of the various constitutional structures operating within the European Union. He pointed to the loss of national sovereignty for the original western members of the Union through the supremacy of EU law over their national law, while the later-joining members of the EU from eastern Europe continue to assert their state rights and their independence.

Professor David Flint's after-dinner address on Saturday night was entitled *Supreme Summit Smashes Creaky Constitution* (Pravda). I won't even attempt to summarise it, other than to say that it was a highly amusing and

extremely perceptive *exposé* of current politics in Australia. If David should decide to give up his day job, a fortune awaits him as a comedy writer. If only he could find a Sullivan to put his Gilbertian prose to music.

This morning's two sessions, **The (US) Federalist Society** and **Australian Federalism Today**, brought us back to the theme with which we had opened this conference.

In the first session, Professor John McGinnis, in his paper *An Opinionated History of the Federalist Society*, presented us with an interesting and fascinating perspective on our kindred spirits in the United States of America. Our Society can but envy the US Federalist Society its penetration into, and its influence on, the study and practice of the law in the United States. We should be so fortunate.

In our final session we heard two papers: Dr Anne Twomey's *Commonwealth Coercion and Cooperation*, and Professor Kenneth Wiltshire's *Chariot Wheels Federation*.

Anne gave us a most informative and insightful overview of a range of formal organisational structures that have been established to strengthen the position of the States *viz-a-viz* the Commonwealth, and she described the Commonwealth's attempts to bring about a greater degree of Commonwealth/State cooperation. These relatively new arrangements are not without their power-structure problems, but overall there are achievements and benefits for the Australian community.

In his paper Ken began by reminding us how prescient Deakin had been more than a century ago in predicting the Commonwealth's dominance over the States. As a consequence, Australia has the greatest degree of vertical fiscal imbalance of any federation in the modern democratic world. True federalism depends on the sovereignty of the constituent States but, as Ken and several of our other speakers this weekend have reminded us, this concept has been largely eroded in Australia in a variety of ways. Ken gave us the whole melancholy list, and concluded that Australia is no longer a federation.

As with every one of the Society's previous conferences, we are again greatly indebted to John and Nancy Stone for a splendid conference. Sadly, this will be the last conference for which these two very special people will be responsible, for they have asked to be allowed to lay down the burden which they have carried so willingly and so competently on our behalf for more than sixteen years.

The Society is fortunate indeed that John has agreed to continue to serve as a member of the Board, and to edit and publish the Proceedings of this conference, and that Bob Day has agreed to take up the duties of Secretary.

The inspiration that led to the establishment of this Society came from its Founder, John Stone. With former Chief Justice of the High Court of Australia, Sir Harry Gibbs, as our first President, Dr Nancy Stone as our first Secretary, and John as a member of the Board and Conference Convenor, this trio created The Samuel Griffith Society with its aim to uphold the Australian Constitution.

In his launching address to our first conference on 24 July 1992, Sir Harry reminded us of the essential characteristics of our Constitution: an indissoluble federal union under the Crown; a bicameral Parliament democratically elected; a system of responsible government with Ministers members of, and responsible to, the legislature; and an independent judiciary. He also exhorted us, as members of this Society, to participate in the process of public education and debate on the Constitution, in the hope that no change would be made to it unless it were clearly seen to be for the good of the Australian people.

In administering the Society's affairs from their home, first in Melbourne and later in Sydney, in organising our conferences and in publishing the Proceedings, John and Nancy have ensured that the Society has lived up to the charge that Sir Harry placed upon us. Together they have given us a Society of which we can be very proud; a series of conferences that have enlightened and inspired; and a set of volumes of our conference Proceedings that will continue the education process for generations to come.

To John and Nancy Stone I extend the Society's grateful thanks for a job well done.

In closing this twentieth Conference I wish you all safe journeys home.