

Foreword

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I should begin this Foreword with an apology. Its predecessor in Volume 19 of the Society's Proceedings began by saying that, "as this Foreword is being written, Australian voters have just decisively dismissed the Howard government". In other words, it was being written some six or seven weeks earlier than this one.

While the conference of which this volume constitutes the Proceedings was a week later than its 2007 counterpart, none the less this means that the production of Volume 20 has fallen about six weeks behind that of Volume 19. There are some valid reasons for that, with which I shall not bore readers, but an apology is, nevertheless, in order. Perhaps I may be allowed to say, however, that the speed of publication even of this somewhat delayed volume compares more than favourably, I am told, with the publication records of comparable conferences in academia.

The 20th Conference of The Samuel Griffith Society was held in Sydney on 22-24 August, 2008. The papers delivered there make up this volume of the Society's Proceedings, *Upholding the Australian Constitution*.

The opening dinner was addressed by the Hon Ian Callinan, AC, former Justice of the High Court of Australia and now, I am glad to say, Vice-President of the Society, who delivered the second Sir Harry Gibbs Memorial Oration. Since I have already expressed, in my Introductory Remarks (see p.xxxiv), my appreciation of that address, I shall not dwell further on it here.

In keeping with our usual practice, the conference did not focus on a single theme, but rather took up a number of issues of relevance to the Society's interests. Under the general rubric, Undermining Australia's Federalism: The High Court at Work, we had two excellent papers – both, incidentally, from Queenslanders. Both papers pointed to the manner in which, over the years, a series of High Court benches have betrayed those who gave us the outstanding Constitution we originally had – so outstanding, in fact, that despite the High Court's serial depredations, it remains among the handful of best Constitutions in the world today.

The undermining of federalism by our High Court will, I fear, continue. During the past twelve months we have seen the appointment of a new Chief Justice who, despite being a Western Australian, comes with the depressing baggage of the National Native Title Tribunal, over whose destructive activities he presided for some years (1994-98). We have also seen the appointment of a new Justice, *vice* Mr Justice Kirby, whose qualifications for the role appear to go little further than the fact that she is a woman, and one whose own "orientation" will serve to replace that of her judicial predecessor. While she is said to be experienced in the criminal law – although even there, to what seems to be dubious effect – so far as can be ascertained she has no legal experience whatsoever, judicial or otherwise, in constitutional matters. In short, neither appointment gives grounds for confidence in the future performance of the nation's highest court.

If that were not depressing enough, the Rudd Government has also established a Committee (ostensibly of Inquiry), under the chairmanship of Father Frank Brennan, SJ, to look into proposals for a Commonwealth Charter of Rights. This Committee bears a strong resemblance to the similar Victorian body whose establishment was so well surveyed by Ben Davies in his paper *Who gets the Bill? The Lawyers' Bill of Rights in Victoria*, to the 18th Conference of the Society in 2006. In what is now increasingly seen to be a hallmark of the Rudd Government, there has been no attempt to produce any element of "balance" in the membership of this Committee. We can therefore confidently expect it to perform the same kind of duplicitous "consultative" function as its Victorian predecessor (under the chairmanship of Professor George Williams) did in 2005.

Although the Brennan Committee had not been established when our conference program was drawn up, it nevertheless contained two papers related to the Bills of Rights topic. A common feature of each of them – and one that appealed greatly to the audience – was their bluntly-spoken Political Incorrectness. Although I shall no longer be responsible – at any rate, not principally – for framing the programs of future Conferences of the Society, I have no doubt that we shall be hearing more such papers on this topic.

One of those two papers, that by Peter Faris, QC not merely addressed the flaws in the whole "human rights" agenda, but also pointed to the threat to Australian sovereignty inherent in that agenda. In that respect it foreshadowed the two following papers, on the general topic of National Sovereignty and International

Commitments. Both those papers addressed specific threats in that regard arising from Rudd Government initiatives. I refer to the reversal of our earlier attitude in the United Nations to the *UN Declaration on the Rights of Indigenous Peoples*, and the throwback to a “command and control” economy that, as Alan Oxley so clearly pointed out, is inherent in the government’s plans for a so-called Emissions Trading Scheme. It is notable, incidentally – and again, characteristic – that Mr Rudd and his Minister for Climate Change and Water, Senator Penny Wong, have chosen to describe this policy, in true Orwellian fashion, as a Carbon Pollution Reduction Scheme. (Some have suggested, by way of modification, that this CPRS should be renamed as a Carbon Reduction Asinine Policy, or other such more truthful description having similar acronymic effect).

While the two concluding papers – each of them informative, albeit more or less depressing – on Australian Federalism Today brought us up to date on otherwise familiar ground, two other papers ventured on to new territory. The first, by Dr Matt Harvey, *The Treaty of Lisbon: A Federal Constitution that Dares not Speak its Name?*, provided an admirably concise and informative account of the development to date of what is now called the European Union. In contrast to the conception, gestation and final birth of the Australian federal Constitution, the EU (strictly speaking, its predecessor institutions) was conceived by a handful of initially high-minded European bureaucrats-cum-politicians; has undergone a long gestation period which has rarely seen the peoples of its constituent states consulted; and – much flowery language about “subsidiarity” notwithstanding – has been born into a world run “top down” from Brussels. On the very few occasions during this process on which nation state populations were given opportunities to express their approval or disapproval of what Brussels put before them on a “take it or leave it” basis, they decisively left it. (The most recent example of this genre was the “No” vote in the Irish referendum last year to approve the *Treaty of Lisbon*). Unlike the Australian constitutional processes, however, the only consequences of such popular rejections – in the very few states where the people have been given any chance at all to express their opinions about what is being foisted upon them – have been subsequent EU decisions that they must vote again – until, so to speak, “they get it right”.

The second of these papers, by Professor John O McGinniss, of Northwestern University, Chicago provided one of the most memorable sessions of the conference. An account of the U S Federalist Society, and Professor McGinniss’s personal involvement with that body almost from its inception in 1982, it was, in my opinion, one of the most inspiring papers ever delivered to the Society. At the risk of expressing a potentially invidious opinion, it constitutes a highlight of this volume.

At our 19th Conference in Melbourne those present for the Saturday evening dinner were treated to an address from Paul Houlihan, *A Constitutional Fairy Tale*. In my Foreword to Volume 19 I ventured the opinion that that address was “unlikely.....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....”. I added that it was, 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”.

I mention that past occasion because, last August, those attending the Saturday evening dinner were treated to a not dissimilar *tour de force* from one of our long-serving Board members, Professor David Flint. *Supreme Summit Smashes Creaky Constitution* (Pravda) consists of a remarkably sustained, tongue-in-cheek spoof involving two central characters, Australia’s Mandarin-speaking Lu Kewen and a member of the Supreme Soviet, Vyacheslav Mikahailovich – both engaged in the important task of stacking the deck for a so-called 2020 Summit, where 1,000 of Australia’s finest minds were to be invited to bloom – so long, that is, as the resulting flowers were Politically (as well as politically) Correct. The purported exchange of emails between the two protagonists, pointing to ways in which the “right” outcomes could be ensured, is not merely very funny (as was Paul Houlihan’s address), but also (as too was his address) very instructive. To adapt my earlier words, its mixture of wit, whimsey and the brutal reality which so marks, and so mars, the performance of the Rudd Government and its assorted spin-doctors reveals, beneath the levity, the nature of governance in Australia, 2008.

If the proposals for a Charter of Rights, referred to earlier, are proceeded with by the Rudd Government, they will involve a statutory Charter rather than a constitutional amendment. This is because even the most zealous advocates of such nonsense will acknowledge, if pressed, that there would be no chance of a constitutional referendum passing the “commonsense test” of the Australian electorate. The only chance, in other words, of getting their own way is to by-pass the people. Nevertheless, several other formally constitutional snakes in the grass are also stirring.

One such is the proposal, formally advanced by Greens Senator Bob Brown, but tacitly endorsed by the Labor Party in the Senate, for a plebiscite on Australia becoming a republic. The proposal, now the subject of a Senate committee of inquiry, is characteristically imprecise, the key word being “a” (republic). The republicans, having been defeated in the 1999 referendum in every State and Territory other than (of course) the ACT, are well aware that their best chance of advancing their cause is by putting forward a goal to which republicans of all varieties can subscribe – that is, one which, by vaguely speaking of “a republic”, conspicuously avoids defining just what form of republic might eventually be proposed. Such a plebiscite – as opposed to a formal referendum question put forward under s.128 of the Constitution – also has the great virtue, from the republican viewpoint, that it avoids the need for approval not only by an overall majority vote, but also by the votes in a majority of the States.

Of course, no republic can actually be brought into being without, in the end, having been approved by referendum. So the only result from a plebiscite in which a majority of electors approve a desire for “a” republic would be to leave our present Constitution seriously undermined, while putting nothing in its place.

Although the Rudd Government is clearly of a republican bent, nevertheless the cooler heads among its ranks are probably fully cognizant of the force of the foregoing arguments. Their support for Senator Brown’s motion therefore almost certainly has as much to do with creating divisions within the Liberal Party (which of course was Paul Keating’s chief motivation when he set this old grey mare running in 1992), as with any belief that the nag can finally get up. Given the quality of the parliamentary Liberal Party ranks today – and particularly what now passes for its leadership – they seem unlikely to be disappointed in that respect.

Other constitutional issues are also now rumoured. Perhaps this should not be surprising. After all, voters have to have something to take their minds off the economic abyss into which the Rudd Government is not only now staring, but also into which it is actively pushing us with both its industrial relations policies and its ridiculous emissions trading scheme. One such issue is the proposal – already sharply rejected by the people in one of the four referendum questions in 1988 – to enshrine the role of local government in our federal Constitution. Another is to revive the battle-scarred old issue of four-year (and fixed) federal parliamentary terms. The former has more to do with the inflated egos of those in charge of local government than with any genuine improvement in our constitutional arrangements. As for the latter, which in one form or another has already been rejected on several past occasions, it has mainly to do with Labor’s desire to neuter the Senate (plus, of course, the desire of politicians of all persuasions to enjoy longer parliamentary terms before having to face, again, the verdict of the voters on their performance).

Earlier, I have made a couple of passing references to a change in my own role – and that of my indispensable helper, my wife Nancy – in the Society. I should now round out those earlier remarks.

Some time ago I had indicated to the Board that I wished to lay down some of my responsibilities in the running of the Society. Specifically, I proposed to cease to be Secretary, and to cease also to be the Conference Convener. The latter role I had held almost from the Society’s inception. The Secretary’s role, which had initially been filled by Nancy for twelve years, I took on in 2004, when she insisted on relinquishing it (and membership of the Board) so as to make way for the appointment of a younger member.

Accordingly, at the Annual General Meeting of the Society held in conjunction with our August conference, my resignation from the Secretary’s position became effective. Those duties are now shouldered by Bob Day, AO, who has for many years been one of our most supportive Board members. I remain, at the request of the Board, a member of it. The precise arrangements for convening future conferences are still, at the time of writing, to be finally settled. While I have shed the ultimate responsibility, I expect none the less to provide some continuing input. I shall, moreover, as this volume – and I hope some future ones – may attest, continue to edit and publish the Proceedings.

There is one other matter I should mention before concluding. I refer to the death on 1 November last of our inaugural Vice-president, the late Sir Bruce Watson, AC. As I have said in my Editor’s Note to Appendix I, while this is not the place for an obituary, suffice to say that he died as he had lived – a good man, a fine Queenslander, and a steadfast supporter, since its 1992 inception, of this Society.

The Samuel Griffith Society was founded to promote debate about the Australian Constitution from a federalist (i.e., anti-centralist) viewpoint. Our 20th 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.