Foreword

John Stone

The 21st Conference of The Samuel Griffith Society was held in Adelaide on 28-30 August, 2009. The papers delivered there make up this volume of the Society's Proceedings, *Upholding the Australian Constitution*.

Attendance at this Conference was for my wife and me a novel experience. For 17 years (and some 20 Conferences) previously we had always been so involved in the essentially trivial and time-consuming, but none the less necessary, mechanics of ensuring that proceedings ran smoothly, that our own capacity to participate was necessarily diminished. In Adelaide, by contrast, all those responsibilities had been devolved to other, younger and doubtless more capable hands. The Society's new Secretary, Bob Day, and his highly capable personal secretary, Joy Montgomery, now assumed all the duties associated with the actual running of the meeting, while our new Conference Convenor, Julian Leeser, ably attended to the speaking program. Meanwhile, we remained (to coin a phrase) "relaxed and comfortable".

As on all previous occasions, the Conference bill of fare in Adelaide maintained what Professor Dean Jaensch (himself a speaker on this occasion) described some years ago as its "eclectic" quality. Apart from a number of papers on the Bill of Rights issue, to which I shall return, we enjoyed two papers, each excellent in its own way, presenting the arguments for and against some form of Judicial Appointments Commission. I personally own to the view that such a body would not solve any of the perceived problems of political patronage in judicial appointments, but rather simply transfer the exercise of such patronage from the hands of elected Ministers to the hands of unelected appointees to any such Commission.

Experience also strongly suggests that it would not be long before the usual cabal of left-wing lawyers, exercising their well-practised processes of "entryism", would gain control of any such body. One has only to think of the highly politicised record today of the Law Council of Australia, which 20 or more years ago was "captured" in this way, to see the future. As Alan Anderson said when presenting one of the papers on this topic (see Chapter Twelve), that organisation, "which holds itself out as an apolitical participant" in any such judicial appointments body, may readily be seen in its true colours by noting that, in the year 2006, "over two-thirds of its media releases....related to David Hicks, Guantanamo Bay, or alleged abuses of the 'human rights' of illegal immigrants". Accordingly, while the Conference was undoubtedly indebted to the Honourable Bruce Debelle – until recently a Justice of the Supreme Court of South Australia – for so ably presenting the contrary arguments (see Chapter Eleven), I must respectfully demur from them. In doing so, it would be only appropriate to congratulate His Honour on his award (AO) in the Order of Australia, announced in the Australia Day Honours list just as this Foreword was being written.

To return now to the Bill of Rights matter, the Conference was privileged to hear a number of excellent papers on that issue. Apart from those by David Bennett, QC and Miranda Devine, it heard three other papers, two of them by currently serving State Attorneys-General. The Attorney-General of New South Wales, the Hon John Hatzistergos, MLC and the Attorney-General of Western Australia, the Hon Christian Porter, MLA both spoke about the problems created by Bill of Rights advocacy within the domestic legal context, while a further paper, by Emeritus Professor Ivan Shearer, provided a fascinating insight into the latter's experience as a member for some years recently of the Human Rights Committee of the United Nations.

In his paper, *Parliamentary Will v. Statutory Bill* (sub-titled *The Important Role of Legislatures in Progressive Social Change*), Mr Hatzistergos spelled out instance after instance where democratically elected bodies have had to grapple with conflicting claims to "rights" for this versus "rights" for that, and make decisions (involving either a change in the law, or a refusal to change the law) for which they can then be held electorally responsible. He contrasted these processes with the judicial *fiat* exercised, in countries possessing various forms of Bills of Rights, by unelected judges.

Whereas, in a democracy, decisions of the former kind will undoubtedly render one set of partisans or the other decidedly unhappy, there is an acceptance – even by those partisans – of the result. Although that acceptance may be accompanied by a determination to have the decision in question re-contested in the future and overturned, such a response is wholly in accordance with the basic democratic process.

By contrast, judicial *fiat* almost invariably creates feelings of impotence and more or less bitter resentment, to the point where such feelings threaten even to bring the rule of law itself into disrepute. To take but one example, developments in Britain since the European Union's *European Charter of Human Rights* began to debauch British judicial processes have not only led to the UK *Human Rights Act* 1988, but are also continuing to lead to a massive loss of confidence in the courts. The same processes, though less far advanced, are also in train across the Tasman, as the New Zealand courts begin to exercise their new found (rather, newly given) powers under that country's *Bill of Rights Act* 1990.

Mr Porter's paper on *The Brennan Committee*, while wholly consistent with those views of his fellow Attorney, focused on the processes whereby in recent years Bill of Rights advocates (including those making up the whole of that Committee) have sought to con a generally unsuspecting public into accepting – or at any rate, failing to resist – the snares being cast over them. Those who attended the 18th Conference of the Society in 2006 will recall Ben Davies's lively paper, *Who gets the Bill? The Lawyers' Bill of Rights in Victoria*, in which he described how those processes worked so successfully in the case of Victoria's *Charter of Rights and Responsibilities* some years ago. At that time, the Liberal Party Opposition in the Victorian Parliament simply went missing. On the basis of Mr Porter's paper, it seems unlikely that their Western Australian counterparts, now in government there, will be following that egregious example.

As remarked above, Professor Shearer's paper, *The Australian Bill of Rights Debate: The International Law Dimension*, provided fascinating insights. Yet without, I hope, any suggestion of disrespect for Professor Shearer himself – on the contrary, the Society is greatly in his debt – it also raises some basic questions. Reading it (as, in the course of the editorial process, I have recently done three times), one is driven to ask why on earth Australia – and a highly intelligent man representing Australia – is having anything to do with these travesties of judicial processes?

Let us leave aside the fact that, customary international law apart, there is not, and never has been, anything which could rightfully be described as "international law" – that is, statutes produced for the world by some form of democratically elected assembly. The body of bumph masquerading as "law" in this area is, rather, principally the product of the political wheelings and dealings of that most corrupt of bodies, the United Nations. And it shows.

Even within this generally unacceptable body of United Nations *pronunciamentos*, however, an especially depraved place must be accorded to the UN Human Rights Committee. Years ago, then Senator Rod Kemp, in his paper *International Tribunals and the Attack on Australian Democracy*, delivered to the Society's 4th Conference (1994), painted a clear picture of the hypocrisies involved. Since then, it has been downhill all the way.

Two excellent papers, by Professor Scott Prasser and Professor Dean Jaensch, on *The Virtues of Upper Houses* and *The Attack on Australia's Democracy?*, respectively, dealt with the valuable role played by Upper Houses within our system of parliamentary democracy. I personally believe that, at the federal level, voters have a much higher regard for our Senate than they do for the House of Representatives

– notwithstanding that it is in the latter chamber that governments are made and (occasionally) broken, and notwithstanding Paul Keating's personal abuse of Senators as "unrepresentative swill".

Professor Jaensch's paper was of current interest, dealing as it did specifically with proposals by the Rann (Labor) government in South Australia to abolish the Legislative Council in that State. As someone who lived for some years in Queensland, I have some personal experience of how government is carried on in a unicameral environment. It is, only too often, not a pretty sight – whichever side of politics happens to be in office. I had, indeed, formed that view 20 years earlier, when I was for some years (1967-1970) a sort of honorary New Zealander in my then capacity as an Executive Director of the International Monetary Fund and of the World Bank, representing that country – and South Africa – as well as my own. Although government within New Zealand's unicameral system is of a higher order than it is in Queensland, the absence of an Upper House there also has its regrettable consequences, as I had occasion to observe.

A highlight of the Adelaide conference was the paper by Bryan Pape providing members with a brief conspectus of the *Tax Bonus Case* – or, as I think it will always be alternatively known, *Pape's Case*. Readers may recall Mr Pape's paper to the Society in 2005, *The Use and Abuse of the Commonwealth Finance Power*, in which he drew forensic attention to the flagrant manner in which governments in Canberra – of both political persuasions – have for many years now simply ignored s.81 (and the associated s.83) of the Australian Constitution.

As with so many other excrescences on the Australian body politic today, these practices first saw the light of day at the hands of Gough Whitlam, whose Australian Assistance Plan payments to regional bodies, included in the 1974-75 *Appropriations Acts*, had no basis in Commonwealth constitutional power. When this was challenged in the High Court by the State of Victoria, five Justices – including the late Lionel Murphy, the only known criminal ever to have (dis)graced the High Court bench – ruled in Mr Whitlam's favour for a miscellany of disparate reasons. Notably, then Justice Harry Gibbs strongly dissented, as did then Chief Justice Sir Garfield Barwick.

Since then – and not least, I regret to say, under the Howard Government – such practices have become commonplace in Canberra. Commonwealth constitutional arrogance has come to know no bounds.

It was against this background that Bryan Pape, at his own initiative and, importantly, at his own financial risk, brought his High Court action last year to have declared unconstitutional the so-called tax bonus payments (up to \$900 each) that were included in the Rudd Government's second major "stimulus" package in February, 2008. Although narrowly unsuccessful (4 to 3) in that request, the Court's judgments when dealing with the Commonwealth's defences represent major victories for the constitutional proprieties. As such, the Pape Case will come to hold an honoured place in the cause of constitutional federalism.

Having begun this Foreword on a personal note, I must now also end on one. When, prior to the 2008 Annual General Meeting of the Society, I informed the Board of Management of my intention to resign from the offices of Secretary and Conference Convenor, I said that I would nevertheless hope to continue to edit and publish two or three more volumes of these Proceedings. I duly did so in respect of Volume 20, and have now done so in respect of this Volume 21.

I have however now informed the Board that, reluctantly, I must call it a day. One element – although only one – in that decision is that I have realized that, if I were to undertake these duties in respect of Volume 22 (the Proceedings of our next Conference in Perth this August), I should find myself producing a book, a principal feature of which will be a *festschrift* in my own honour (see Julian Leeser's remarks on that matter at p. xxxix). Although I have since tried to persuade the Board to abandon that project, I have been unsuccessful in that regard, and I must accept its decision to proceed.

Of course, I am not saying that I literally could not edit and publish the volume containing such material, merely that I would feel decidedly uncomfortable in doing so. It will be hard enough to

have to sit through the papers on the matter, without having to be responsible subsequently for publishing them to the world.

As noted above, however, this is only one element in my decision. There is a sense in which, having reached its 21st birthday, so to speak, our series *Upholding the Australian Constitution* should now go out into the world without further assistance from its immediate parents (including my wife in that description). Since I have previously had it in mind to relinquish these duties in the near future in any case, I think it better to do so now. Nobody is indispensable, and although, at the time of writing, I have not yet found a successor, I have no doubt that over the next six months a worthy one will be found.

As I have said for many years now at the conclusion of each successive Foreword to these volumes, The Samuel Griffith Society was founded to promote debate about the Australian Constitution from a federalist (i.e., anti-centralist) viewpoint. Our 21st 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.