Foreword

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For its Twenty-Second Conference The Samuel Griffith Society returned to Western Australia for the fourth occasion in its history. It was, for several reasons, a singularly appropriate location for a gathering devoted to keeping the flame of federalism alight in a nation where, so often, the inclination is to yield to the temptations of centralization and a "national approach." A wide-ranging and stimulating program provided manifold opportunities to ponder (and often lament) the direction of federalism in Australia in the context of both present debates and the historical record.

Bryan Pape, hero of the recent case in the High Court concerning the tax bonus, delivered the third in a distinguished series of addresses in memory of the Society's foundation President, the eminent jurist, Sir Harry Gibbs, eighth Chief Justice of the High Court of Australia. Mr Pape not only provided an original *tour d'horizon* of the principal means – the cards of entry – whereby the Commonwealth has interposed itself into State responsibilities, he also furnished a disturbing alert about the extent to which the federal executive government has succeeded in reducing the role of the Parliament itself in scrutinizing federal payments to the States. Not surprisingly, he concluded by asking who now oversees these Commonwealth interventions, taking inspiration from Sir Harry's motto as a Knight Grand Cross of the Distinguished Order of St Michael and St George: *Tenan Propositi* – "Hold to your principles."

Mr Pape's opening lecture was fittingly complemented by the closing address by the Premier of Western Australia, the Honourable Colin Barnett. Mr Barnett gave grim insights into how the federation had actually been working in 2010 with reference to health, and the proposed enlarged role for the Commonwealth, the mining tax controversy, and distribution of revenues from the Goods and Services Tax. Like other speakers he was not impervious to the advantages of commonality but rightly warned against a presumption in favour of "national" approaches.

A major highlight of the Conference – important on personal as well as intellectual grounds – were addresses by Des Moore and Justice Dyson Heydon recognizing the achievements of the Society's founders, John and Nancy Stone, in the evolution of Australia's federation and society. These addresses contain a wealth of material about two significant, shared Australian lives, especially since the middle of the last century, and the diversity of public matters to which they have contributed. There was an added poignancy in having Perth, their home town, as the location for this notable event.

The Conference itself started with instructive papers on a current topic, responsibility for provision of health services in Australia. Andrew Podger, a former secretary of the Commonwealth Health Department, put the case for a larger Commonwealth role, "based in part on Australia's history, but primarily on external factors including changing demands on the health system, changing expectations, and the need for cost controls which promote efficiency and effectiveness and do not undermine equity or quality."

Dr Dan Norton, a former secretary of the Premier's Department in Tasmania, by contrast, strongly urged an approach based on subsidiarity and competitive federalism. "We must," he told the Conference, "harness the power of competition, innovation and entrepreneurship in dealing with problems requiring government intervention and service delivery . . . If we are going to be biased, we should be biased against centralism – the wind usually blows in that direction, and therefore needs to be consistently fought against."

Lorraine Finlay of Murdoch University delivered a comprehensive paper about property rights. This included the workings of the "just terms" provision of the Constitution (section 51 (xxxi)) and extended to the Wild Rivers legislation in Queensland, impact of native vegetation legislation, allocation of water entitlements, environmental regulation, and acquisition of property for purposes of urban redevelopment and heritage listings. Having established in her introduction that there is a close, indeed, intimate connection between property rights and liberty, she warned that unless the public, politicians and bureaucrats are encouraged to respect and value property rights, "we will continue to see the gradual erosion of property rights regardless of any changes that may be made to the surrounding legal framework."

These themes were followed up in depth by Grant Donaldson and Richard Douglas in their paper about the National Broadband Network and the acquisition of property. After traversing the history of various battles occasioned by the NBN, they wryly conclude: "The confinements upon power adopted by the Australian people in the referenda held during 1898 and 1900 retain their capacity to surprise the executive, the legislature and ourselves. It is not beyond the 26 plain words of s. 51 (xxxi) to do so again."

The former Treasurer of Queensland, Keith De Lacy, now chairman of Macarthur Coal, provided an important critique of the failings of public policy-making as revealed in the 2010 attempt by the Rudd Government to introduce a Resource Super Benefits Tax. He combined doubts about the usefulness of focus groups with questions about the role played by the federal Treasury: "As the architect of the review, Ken Henry became its chief advocate, seriously compromising his and the Treasury's independence. Who was left to provide the independent advice – apart from the enlightened adolescents in ministerial offices?"

Professor J. J. Pincus rather laid down the gauntlet to several fixtures of federalism as practiced in Australia in the course of having another look at proposals for a State income tax. His fantasy, as he described it, was a situation where each government funded its own spending, all its own spending, and nothing but its own spending. Special purpose payments under section 96 of the Constitution were a particular target, but he did not exclude fiscal equalization nor the role, methodologies and calculations of the Commonwealth Grants Commission which, he advocated, "should be abolished or reformed." Whilst acknowledging that it may not be immediately practicable, he advanced as a preferred reform that "any grants to the States and territories [should] be made as equal *per capita* payments."

Justice John Gilmour of the Federal Court explored various implications and consequences of the recent *Kirk* case including its impact on the judicial structure of each State: "*Kirk* establishes that State parliaments cannot strip the supreme courts of the power to review for jurisdictional error." Significantly, His Honour observed: "At its core, the question for the[High] Court in *Kirk* was whether the Federal Constitution requires that there be, in each of the States, judicial control of executive decision-making. . . the answer to the question, given in *Kirk*, is yes."

The vexed and growing question of the activities of quasi-judicial international bodies in relation to courts in Australia formed the subject of the address by Christian Porter, Attorney-General of Western Australia. He offered several illustrations of interventions by international bodies, not only affecting Australia, which essentially substituted a different opinion for one arrived at by proper democratic and legislative process in specific local (State) jurisdictions. He went further with questions about the quality and processes of law characterizing these bodies. He had a particular and well-justified concern about whether so-called "non-binding" decisions are really non-binding. His argument was as compelling as it was simple and straightforward: while Australian legislative outcomes or executive and administrative decisions should be the subject of robust judicial review, "this review should be conducted by Australian courts pursuant to Australian precedent and Australian legal standards."

The Society's President, Sir David Smith, AO, brought the Conference to a close with reflections on what he rightly described as "thoughtful and thought-provoking papers." It was, unhappily, the

last occasion on which he will shoulder this responsibility as, after five years, he has stood down as President. His considerable contribution to the Society, especially in the form of a range of erudite papers, long predates his term as President. Fortunately, he plans to remain an active member of the Society and will undoubtedly continue to enhance discussion and debate at conferences.

It is the Society's good fortune that the new President is the Honourable Ian Callinan, AC, a notable justice of the High Court of Australia from 1998 until his retirement in 2007. In addition to his many accomplishments in the law, His Honour has also among other things made his mark in the arts and literature.

This is the first occasion that I have edited the proceedings of a conference of The Samuel Griffith Society. As in all matters, John Stone, in the 21 volumes published under his stewardship, set exacting editorial and publishing standards which I have struggled to emulate. These 21 volumes, as Justice Heydon remarked in his address, constitute a standing and enduring achievement. John said, in his valedictory foreword, that the Society was founded to promote debate about the Australian Constitution from a federalist (that is, anti-centrist) viewpoint. Without the Society, and its published proceedings, it is doubtful that, in Australia, there would be much debate – informed debate, anyway – from a federal perspective. As with the previous 21 volumes, the papers in this volume illustrate not only the need for the Society but the range, diversity and depth of its contributions.