

Introduction

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The Samuel Griffith Society held its 26th Conference in Melbourne in August 2014.

It again had the support of the Australian Public Affairs Channel APAC which has broadcast our last three conferences. As a result of APAC's support, many more Australians learn of the work of the Society than would otherwise be the case.

Proceedings commenced with the Sixth Sir Harry Gibbs Oration. It was delivered on this occasion by the recently retired Judge Advocate General, Major-General Justice Richard Tracey. He gave a thought provoking address, "The Constitution Goes to War," outlining the history and scope of the defence power in the Constitution.

It is a particular honour for our Society to have welcomed Justice Tracey. It is only the second time that the Society has welcomed a Judge of the Federal Court to address our proceedings. As Justice Tracey reminded us, the First World War commenced one hundred years ago in August 1914. It was the first major test of the Constitution in a time of crisis.

The Commonwealth is currently seeking to strengthen counter-terrorism laws in response to the threat posed by Australian citizens going overseas to fight with terrorist forces in Iraq, Syria and elsewhere. These laws present the latest test for the Constitution as governments seek to balance their "first duty to protect" the people with notions of appropriate safeguards. As our first President, the late Sir Harry Gibbs, observed:

the Government must . . . take steps to avert a possible catastrophe of the terrorists' making. . . . Great reliance must therefore be placed on our intelligence services to discover in advance the terrorists' plans so that they may be aborted. The intelligence bodies must accordingly be given the powers necessary to perform their vital functions. This must, however, be done with the minimum detraction from the freedoms which we value. . . . The proper balance is not easy to achieve.¹

It is now nine years since Sir Harry died. Since the 2013 Conference we have lost two lions of our Society: Ray Evans and Bryan Pape.

Ray Evans was held in great affection by all members of the Society. Ray had an organisational and intellectual talent which was admired by so many. An electrical and mechanical engineer, he combined a professional practice at the State Electricity Commission of Victoria, a body whose most famous alumnus was Sir John Monash, with academic work at Deakin University where he became Deputy Dean of the Faculty of Engineering.

But Ray's most important work was not his technical engineering but his cultural and political engineering. He famously worked for Hugh Morgan at Western Mining and it says much about the latter's good judgment that he hired Ray. The two worked together in a professional capacity for twenty years. As one obituarist put it:

Ray devised the quite deliberate strategy of encouraging . . . Morgan not to shy from making provocative statements on mining, the economy, Aboriginal matters and Australia's place in the global scheme of things. These talks were designed to provoke howls of outrage from the various anti-progress lobbies, which they did. Hugh Morgan gained a high media profile and had to be included, as the authorized "voice from the Right," so to speak, in all subsequent controversies in these areas. Ray's great qualities were his intellectual robustness, his intestinal fortitude and his organisational dexterity. Not content to sit on the sidelines, Ray was the moving force behind several societies whose purpose was designed to shift the intellectual debate on a variety of issues. Those groups included the Democratic Labor Alliance, the Galatians, the Australian Council for Educational Standards, the Bennelong Society, The Turks Head Club, the H. R. Nicholls Society and the Lavoisier Group.²

Ray, along with John Stone and Sir Harry Gibbs, was a driving force behind this Society. Over the 22 years of this Society's life Ray delivered five papers on the Kyoto protocol, Senate reform, Indigenous policy and international law. The breadth of those topics indicates, even in the context of our eclectic Society, the breadth of Ray's interests. All of Ray's friends will miss his interventions at meetings of the Society, always delivered with passion and good humour. And I, along with other members of the Board, will miss his contributions to its deliberations.

The other person whom we have lately lost was described by our President, Ian Callinan, as a "hero" of this Society. That word is not used lightly by our President. Like Ray Evans, Bryan Pape combined his work as a legal practitioner with work as an academic specialist in tax law at the University of New England.

Bryan demonstrated that the work of this Society is not only theoretically significant but practically significant as well. Bryan Pape took an idea that he had developed in a paper to the Society, challenged the validity of Commonwealth appropriations and made constitutional history.

The Commonwealth had always taken a broad view of both Federal executive power and the appropriations power. Bryan Pape challenged the constitutional validity of the \$900 cheques that Kevin Rudd proposed to hand out after the Global Financial Crisis hit.

This was an enormously courageous move. Bryan could have faced an award of costs against him. As he revealed in a subsequent paper, such an idea did not make him popular with his wife.

While Bryan ultimately lost the case 4:3, *Pape vs Commission of Taxation (The Pape Case)* [2009] HCA 23, the High Court confined the Commonwealth's appropriations power to matters mentioned in section 51 of the Constitution or subject to Federal executive power. The Court also put some fence posts around the executive power. The Commonwealth's view had been that the power authorised the Commonwealth to spend money on whatever it liked. The *Pape case* set the stage for other challenges to Commonwealth appropriations, in particular, the two *Williams* cases about which Anne Twomey addressed the Society.

Bryan wished to challenge more Commonwealth enactments, many of which he saw as invalid, as a way of confining the powers of the Commonwealth. Frustrated that he could not convince senators, who had the standing that he lacked to bring an action, Bryan unsuccessfully sought election to the Senate in 2010.

On a personal level Bryan Pape was a humble and approachable man of extraordinary talents, great erudition, and serious scholarship. He was perhaps undervalued by colleagues at the Bar and in academia but not by members of this Society. I always appreciated the way in which Bryan took time to talk to the student scholars and ensure they were enjoying the conferences. Other older members of the Society could be forgiven for being jealous that Bryan was always a popular subject for photos with our scholars who had studied the importance of the *Pape case* and found what a generous and engaging spirit the man after whom that case was named was in real life. Bryan Pape was a highly admired member of this Society and a great Australian.

I am delighted that, with his permission, this volume of Society proceedings includes Professor George Williams's Obituary essay, "Bryan Pape and his Legacy to the Law." Professor Williams' article first appeared in the University of Queensland Law Journal and is included in this volume with the ready agreement of the editor, Professor James Allan.

The Society is always delighted to welcome our Mannkal Scholars for the year. Each year, Ron Manners finds us a group of Western Australian students to attend the Samuel Griffith Society Conference. Competition to win a Mannkal Scholarship is fierce. The winners in 2014 were: Anne-Marie O'Neill, Melissa Ferreria, Adrian Hanrahan, Zoe Lim, Nigel Siegart, May Yan, Michael Olds and Penny Bond.

They were joined by two additional groups of scholars.

The Samuel Griffith Scholars are sponsored by members of our Society: Gary Johns, Brian Hurlock, Jerrold Cripps, Gillian Lods, John Stone, Sir David Smith, Paul Collits and Juel Briggs. The 2014 Samuel Griffith Scholars are Charlotte Gray, Hamish Kelly, Tom Hedditch and Madeleine Toohey.

Finally, we acknowledge Gemma Withers, Tom Light, Anthony Spagnola and Sherry Safi, the 2014 Sir Charles Court Scholars.

The 2014 Conference was held almost a year after the election of a new Commonwealth Government. On one view, emanating from sections of the Canberra bureaucracy, the purpose of any Commonwealth government is to accrete more power. This is the Land of Hope and Glory view of centralism – wider still and wider shall its bounds be set! But the fiscal position of the Commonwealth has finally made such a posture unsustainable. For the first time Australia is witnessing a Commonwealth mugged by the reality that it does not have unlimited funds to fix every problem and that greater efficiencies can be achieved through adopting a more federalist posture on issues. The first sign of this was the Commission of Audit. The head of its secretariat, Peter Crone, gave the Conference a first-hand report of its work and its recommendations.

In another instance of the Commonwealth's wings being clipped, Professor Anne Twomey examined the second *Williams case*,³ the challenge to the savings legislation that was passed by the Parliament in the aftermath of the first *Williams case*⁴ – a case involving challenges to the validity of the Commonwealth's allocation of funds for school chaplaincy.

The Senate is a notable federal institution, designed by the framers to protect the rights of the States, but a body that has rarely done so. We are going to look at the perspectives of two cross-bench Senators, Senator Bob Day, a member of the Society's Board, and the NSW Liberal Democratic Senator, David Leyonhjelm, giving their observations about the new Senate.

Earlier in 2014 there had been a re-run of the Senate election in Western Australia, an unprecedented event in Australian history. The Society has the benefit of a paper from one of

the more perceptive commentators on electoral matters generally, the ABC's Election Analyst, Antony Green. He spoke about both the election re-run and proposals for reform of the Senate.

We also heard from the Honourable Michael Mischin, MLC, the Attorney-General of Western Australia, on the role of the Attorney-General: what is the role of the first law officer, the Attorney-General of a State, in being a constitutional litigant? In other words, how does a State, and how do the officers that are in the State, who are responsible for protecting and advancing a federal balance, discharge their particular functions?

In 1992, when the Society was formed, the republic debate was in full swing. Some thought a republic was inevitable but it seems, in the intervening years, that the monarchy is more popular with ordinary Australians than ever. The recent marriage of Prince William to Kate Middleton and the birth of Prince George have undoubtedly helped. It now appears that, whereas it is not safe to say who the next political party leader will be in any political party because of the stability of the Monarchy, we can safely identify the person who will be King of Australia for the next century.

Professor David Flint reviewed the change in attitude to the Crown in Australia and Sir David Smith provided a history of the establishment of the Order of Australia.

Jerrold Cripps, the former Commissioner of the Independent Commission against Corruption, considered the Star Chambers which are Australia's anti-corruption Commissioners. For my own view, I think there are serious deficiencies in a "shaming body," which allows people to admit to unlawful conduct in the knowledge that the evidence cannot be used in subsequent prosecutions. We would be much better served by less public shaming and more prosecutions for corrupt conduct than the current media circus. Indeed, the whole nature of a standing corruption commission is something that needs a serious rethink.

Race discrimination and constitutional recognition of Indigenous people are again in the air. Dr Gary Johns, a minister in the Keating Government, analysed the work of the taxpayer-funded Recognise Campaign, which seems to have been good at generating money for itself but not necessarily public support for specific proposals.

A disconcerting feature of debates about constitutional reform in this country is that they never start with analysing what defects are in the Constitution and looking at specific drafting proposals. That is the hard work that no-one seems to want to do.

The Conference featured a debate on the Racial Discrimination Act by two of the major proponents, Simon Breheny from the Institute of Public Affairs and Peter Wertheim, the Executive Director of the Executive Council of Australian Jewry on the case for and against changing the Racial Discrimination Act, section 18C especially. The question of how to achieve a balance between freedom of speech and the rights of minorities is difficult and one about which reasonable people may disagree. These two expert combatants robustly presented their views about that balance as it currently stands.

As a Society we have much to be thankful for. I wish to place on the record my personal appreciation for three people for whose work in running the Society I am greatly indebted. Our level-headed secretary, Senator Bob Day, manages to be a highly successful businessman and politician and yet is remarkably unencumbered by any semblance of ego. Bob has been secretary since John Stone relinquished this post some years ago and we have been so lucky to have had Bob's service. The nation's demands on his time mean that he is not able to continue in that role

any longer. The Society's loss is the nation's gain and we know Bob will continue to be active in all the affairs of this Society.

Bob brought to the Society the irreplaceable Joy Montgomery who will now be on hand to assist him with his new role as a Senator for South Australia. We thank Joy for all the work she has done to keep the Society working. We are blessed that both of them have been involved in the Society's work.

Let me also acknowledge a third unsung hero of the Society. John Nethercote, the doyen of public policy publishing in this country, who edits our proceedings, *Upholding the Australian Constitution*. It is a thankless task but we have been very fortunate to have the labours of such a fine editor to call upon in the context of our proceedings. He again shouldered the burdens of preparing these papers for publication.

Endnotes

1. H T Gibbs "Australia Day Message 2003" in *Upholding the Australian Constitution* Volume 17 Appendix Two
<http://www.samuelgriffith.org.au/papers/html/volume17/v17appendix2.html>
2. P Morgan, "The Life and Times of Ray Evans" *Quadrant* 19 June 2014
<https://quadrant.org.au/opinion/qed/2014/06/life-times-ray-evans/>
3. *Williams vs Commonwealth of Australia* [2014] HCA 23.
4. *Williams vs Commonwealth of Australia* [2012] HCA 23.