Appendix II

Addresses Launching Upholding The Australian Constitution, Volume 2

1. Sir Walter Campbell

Thank you, Sir Harry, for your words of introduction. I have often told the story of one occasion when I was Governor of Queensland, when the chairman of the particular gathering introduced me with the words:
"Some of you have heard the Governor before, some of you haven't! Those of you who haven't, will be looking forward eagerly to hearing him".
Such an introduction was not as kind as yours, Sir Harry.
I am really very pleased to have been invited to launch Volume 2 of Upholding the Australian Constitution. This book contains the proceedings of the second major conference of The Samuel Griffith Society. The Society was formed as an incorporated association early last year by a group of concerned people, and its objective, broadly speaking, is to defend the existing Australian Constitution.
The Society held its inaugural conference in Melbourne in July 1992, and the papers and addresses delivered at that conference were recorded in a volume Upholding the Australian Constitution which I have read, and as a result of reading that first volume, I am much better informed, if not wiser. As I have already said, this present book has a similar title and is Volume 2, containing two major addresses and ten papers delivered at the second annual conference of the Society held on the weekend of July 30th this year.
In his foreword to the book, Mr John Stone articulates, and I am sure that there is no disagreement among informed persons about what he says, that three areas of the Constitution have taken on enormously increased importance, namely, the republican issue, the implications of the Mabo judgment and thirdly, the way in which the High Court has treated and interpreted the "External Affairs" power [S51 (xxix)].
Incidentally, the foreword to this book poses one simple question:
"Do we, or do we not, wish to see more power being exercised in Canberra?"
I will refer to the individual papers in more detail shortly, but let me say that I have been surprised on many occasions at the way in which more and more power is going to the central government in Canberra. I have no wish to be, and will not be, party political, and I fear that this move to central power has also been going on to an extent during the occupancy of the Treasury benches by non–Labor governments. However, I have no doubt that the policy–makers in the Labor Party are not what can be described as "federalists". Such people, and in that connection I think of former Prime Ministers Whitlam and Hawke, and the present Prime Minister among many others, from their reported statements have made it clear that they believe Australia could be better and more wisely governed from the centre. Further, they may not admit this openly, but they do not want States, and I am left with the clear impression that they favour a unitary system of government, and that they dislike the existence of the Senate.
But let me also say that the increase in central power has been brought about largely by the decisions of the High Court. It has become clear that the drift to centralism of earlier years has now become quite a flood.

I remember that in January 1979 I presented a paper at a judge's conference on the relationship between the Federal Court and the Supreme Courts of the States. Much of that paper is now out of date and I do not wish to rekindle any of the problems and difficulties that may then have existed. The Federal Court is now an accepted and reputable institution in this country, but the emergence of that new court was one of the many institutions stemming from the granting of increased legislative power to the central government. I then expressed the opinion that there was no need to create the Federal Court of Australia and that all matters of federal jurisdiction should have been vested in the State Courts. I said that there is a special expertise in resolving disputes between citizens which should be left to the courts of the States, the "local" courts, and not to the specialist courts. It was my view, and still is, that a specialist court will become divorced from the community, and that its judges will be deprived of the benefits to be gained from trial court experience and from constant contact with the general, conventional and regular judicial system. In short, I expressed the view that a centralised administration is more likely to be out of touch with, and not to be sensitive to, local needs.

I believe that the majority of the Australian people have a desire for separateness, that they want a federation which looks after the separate interests of the State.

For some years in the '70s I was the Academic Salaries Tribunal, and I then became familiar with ways in which the Federal Government had intruded into the Australian system of education. A lot of legislation was passed by the Commonwealth in that field. Much of it I found worrying.

Now, as you all know, the Canberra government has entered the field of education relying on Section 96 of the Constitution, which enables the Federal Parliament to grant financial assistance to any State "on such terms and conditions as the Parliament thinks fit". At the present time, not only have we a Federal Department of Education but we have Federal Departments of Transport and Health and, as Sir Harry Gibbs says in his address which is one of the papers in this Volume, potentially the Commonwealth can invade any field of governmental activity, and it has invaded many, producing a cumbrous and expensive duplication of bureaucracy.

Is not now the time for the Australian people to think about making an attempt to impose limits on "such terms and conditions" which the Canberra Government might impose on the money grants to the States? How that can be done, and how true federalism may be regained, raises problems, but they must be confronted, and indeed they are confronted in the papers in this work.

But I am here to launch this handsome volume of the Society's second major conference, which conference I have been reliably told was an even better one than its inaugural predecessor in July last year. It contains excellent papers from some 12 contributors, from people who have been prominent in Australian affairs and who have made valuable contributions to this country.

The opening address was given by Mr Jeff Kennett, Premier of Victoria, and was entitled "The Crown and the States". Mr Kennett argued very ably the case for the retention of our constitutional monarchy and pointed out that it has served – and continues to serve – Australia well.

May I say for myself on this topic that republicanism, I think, is being used by certain people as a pretext or as a blind or a screen to conceal a deeper purpose or purposes.

Lest it be thought that The Samuel Griffith Society does not canvass both sides of these sorts of questions, another paper was given by John Hirst, a convenor of the Australian Republican Movement, and a member of the Turnbull Committee, who put the opposing case very well. But Mr Hirst fails to persuade me to his point of view.

It was very informative to read the paper presented by Dr Frank Knopfelmacher, a Jewish migrant from Czechoslovakia, who opined that British culture is our heritage. He advocated the non–discriminatory taking, subject to economic considerations, of migrants from places such as China, Indo–China and Hong Kong, and he argued that they would absorb our British culture

and institutions, his theme being that British culture is our heritage and that, for many reasons, it is a good one.

Aboriginal issues, particularly aboriginal values in the Australian cultural environment, were frankly discussed by well–known journalist, Jack Waterford, who has been an adviser on aboriginal affairs to governments and has visited hundreds of aboriginal communities. I urge you all to read this paper because it is such a complex and sensitive issue which cannot be dealt with in a few sentences. The issue was taken up in a paper by Bill Hassell, a former WA Minister and Leader of the Opposition in that State, who warns us that the Mabo judgment would lead to a treaty with aborigines, that it could destroy the legal foundations of federalism and could lead to an independent, sovereign indigenous people's government.

Two papers I found particularly fascinating and thought provoking, one by former Queensland Supreme Court Judge Peter Connolly and the other by S E K Hulme Q.C., a leading barrister and company director in Victoria.

Peter Connolly, in his paper entitled Should Courts Determine Social Policy?, deals with the role and function of the High Court and he answers that question in the negative, because he says that it is not the function of the courts to determine social policy and, he says, they do it so badly. Mr Hulme's paper, The High Court in Mabo is a well–reasoned legal criticism of that judgment – and I might say that the Mabo judgment is also strongly and perceptively criticised by Peter Connolly.

The implications of the Mabo case are topical, and I can see how difficult it has been for anyone to come to grips with them, in view of the politicking which has been done and the coverage by the media with its oft misleading headlines and confrontational attitude. These two very learned and eminently readable papers contain so much thoughtful commentary that it would be idle and probably misleading were I to say much by way of addenda to them.

But, what did that Mabo case decide? In the words of the Chief Justice:

"Six members of the Court agreed that the common law of this country recognises a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands and that, subject to the effect of some particular Crown leases,the land entitlement of the Murray Islanders in accordance with their laws or customs is preserved, as native title under the law of Queensland."

I fail to see, in these papers prepared by Connolly and Hulme, that they contain anything other than reasonably–based critical argument. Peter Connolly puts the case forcibly but rationally against the introduction of a Bill of Rights which would bring the judges into the political process.

His conclusion is that the Mabo decision is an ex post facto reversal of established law, and Mr Hulme clearly opines that the judge who wrote the principal judgment in Mabo proceeded to overrule decided cases in the total absence of argument from interested persons, and in the total absence of evidence as to aborigines generally.

I must say that the arguments put forward by Connolly and Hulme are supported by authority to which they carefully refer.

Peter Connolly further says that what was said in Mabo about native title residing in the indigenous inhabitants of the mainland of Australia is obiter dicta. In other words, the remarks are simply observations on a legal question not arising in such a manner as to require decision, and therefore not binding as a precedent because the case was not about the mainland indigenes, but was concerned with the Murray Islanders who were not nomads, but who were settled on their islands and had been for generations. The Murray Islanders are not of aboriginal descent but

are Melanesians, and are not nomads but are cultivators and, to use Connolly's words: "millennia ahead of the Palaeolithics in terms of social organisation".

It seems to me too that it can be argued that the decision can be said to be one given per incuriam, a legal phrase which means that it is a decision given through want of care, because of the absence of representation and argument by all interested parties, and also because of the lack of evidence as to the facts of the Australian mainland occupants. Therefore, on those grounds it could be said to be not a legally binding decision, and could be overruled or departed from in subsequent cases. Of course, in any event, the High Court is not bound by its own decisions, and it appears that the decision could be reversed by legislation or by constitutional amendments – but such courses, I must say, appear to me unlikely.

I will not deal with those rather emotive words in the joint judgment of Deane and Gaudron JJ, which referred to the fact that the dispossession of the aboriginal people of most of their traditional lands constituted "the darkest aspect of the history of this nation", and another passage wherein it is said that the treatment of aboriginal people over the 19th century leaves "a national legacy of unutterable shame".

Suffice it to say that the comments by Mr Hulme on this so-called "legacy of unutterable shame" are well worth reading. He says that he does not know enough to draw up a balance sheet of moral turpitude or otherwise across people largely unknown. He also says that he is willing to bear responsibility as a citizen to help bring about whatever is proper in this age to repair ills now existing, but that he has no intention of accepting personal responsibility for the acts of others, or marching through the world trying to repair past ills to people now dead.

This part of the judgment, and the comments by Mr Hulme, are matters for you yourselves to think about.

Speaking for myself, I must say that I have always had a great admiration for the early European settlers of this country – our pioneers, who acquired their land titles under what they considered lawful and proper authority. In their new environment, they struggled against the wilderness as they opened vast new areas of settlement, battling against droughts, fires and floods, great distances, the high cost of transport, the lack of communications, and the fluctuations in the price of wool and other produce.

The High Court of Australia fulfils two roles : one is that it is the upholder and the interpreter of the Constitution, and second, that it is the ultimate appellate court within Australia.

As a barrister, judge and a citizen, I have always had a great respect for the High Court. I sincerely trust that the people of Australia will always hold it in the highest regard. The integrity and independence of our judicial system depends greatly on the high regard in which the Court and its members are held. Of course, all judgments of the High Court are open to fair, reasonable and proper criticism.

One of Mr Hulme's conclusions is that the High Court has wounded itself in recent years, and that it has done so again in Mabo.

I can remember the decision being given in the Tasmanian Dams Case, because it was given in the Brisbane Supreme Court building where at the time I was an occupant of Judge's Chambers. I was then most surprised with the result, which was an intervention in the affairs of Tasmania and was hailed in the media as a victory for the Greens. I do not criticise the decision from a legal point of view because, of course, it was justified by the use of the External Affairs power.

I have been going on for too long, but let me say just a few words about the other valuable contributions.

Other papers were given by Dr Colin Howard, a Professor of Law at Melbourne University for a quarter of a century, and now a barrister who is an expert in constitutional law; by Mr John Paul, a political scientist at the University of New South Wales; by a former Senator and a Federal

Attorney General in the Fraser Government, Peter Durack, QC; by Professor Wolfgang Kasper, who holds a Chair in Economics at the University of N.S.W.; and by the President of The Samuel Griffith Society, Sir Harry Gibbs, who, as you all know, is a former Chief Justice of the High Court and needs no introduction.

Colin Howard's paper deals with the External Affairs power and he emphasises, in his own words, the extent to which the High Court in recent years has converted a legislative power to deal with foreign relations and diplomatic representation overseas into a major source of power to control purely domestic issues.

As an expert in constitutional law, he is well qualified to deal with this topic which he asserts weakens our federal structure.

Peter Durack also deals with Section 51(xxix), the External Affairs power, and he asks what is to be done about it as a result of the High Court's current interpretation of it.

Mr Paul analyses in detail the 1944 Referendum. It was one by which the Government sought a transfer of certain powers to the Commonwealth by reference from the States, which it claimed were needed for the immediate post–war tasks of the reinstatement and advancement of servicemen and others displaced from their peace–time occupations, and for the reconstruction of industry. The Referendum was convincingly defeated, and Mr Paul argues that therein lies a cautionary tale for Mr Keating – a warning of the broadening of Commonwealth powers flowing from the Mabo case, and also a warning on his grand design for a referendum to create an Australian republic.

Professor Kasper's paper Making Federalism Flourish reminds us that we must think about injecting new life into State and local government, and he propounds the principles of what he calls "competitive federalism". He puts forward economic arguments for a more decentralised government, and is persuasive in his advocacy that reforms aimed at turning back the trend to centralisation will inspire new life into Australia's ageing democracy.

I refer finally to the address by Sir Harry. His paper, The Threat to Federalism considers the genesis of our federal system and explains in clear words its structure. He points out that the result of the undefined and unlimited scope which the High Court has given to the External Affairs power threatens the very basis of federalism. He also discusses the limited powers of the States to impose taxation, and says that the Court's interpretation of the excise section, Section 90, is an impediment to the rational division of financial powers between the Commonwealth and the States. He also refers to Section 96 and puts forward arguments in favour of the maintenance of the federal system, such as that the competition and diversity which can be provided in a federation can stimulate efficiency, and that politicians and public servants in the States are more likely to keep in touch with local feeling, and to understand local problems, than are those who work in the unpolluted air of Canberra.

He points out that the Constitution does not give the Commonwealth any power with regard to the provision of roads, education, housing or legal aid, but grants are made to the States to be applied for those purposes in accordance with detailed conditions laid down by the Commonwealth.

He also asserts that every increase in Commonwealth powers should not necessarily be opposed, but says that we should support the clear definition of Commonwealth powers so that they do not intrude into State affairs with the duplication of cost and bureaucratic activity.

So there we are.

I hope that I have not wearied you by attempting to comment on every contribution to this very valuable and erudite book. The papers are all of a very high standard and I suggest that they should be read by all politicians, both State and federal, by all senior bureaucrats, by those

persons in the media who seek to reflect upon or to influence the development of public opinion, and by people who are concerned or interested in the well–being of Australia.

In these pages there is much food for thought for any person who wishes to be informed on such basic matters as republicanism, constitutional monarchy, a Bill of Rights, centralism and federalism, and the role of the High Court.

For it is trite to say to such an audience as this that our system of government is a democratic one, and that in a democracy the burden of ruling falls upon every citizen. What is more, we are a federation, a federal union of several former largely self–governing colonies which became States, and if the six Australian colonies had not agreed to federation, they might be separate countries sharing a continent, as is the case now in Europe. I believe that the great majority of Australians take much pride and comfort from a truly federal constitutional structure.

It is now with a great deal of pleasure and genuine enthusiasm that I launch this book, Volume 2 of Upholding the Australian Constitution. It, and The Samuel Griffith Society, deserve every success and I am confident that they will achieve it.