Appendix II

Addresses Launching Upholding The Australian Constitution, Volume 2

2. The Hon. Ian Medcalf, QC

The proceedings of the Second Conference of The Samuel Griffith Society held in Melbourne in July last have now been published in book form as Volume 2 under the title Upholding the Australian Constitution.

It is my pleasant duty to launch the second volume in this State.

The book contains a dozen or so important addresses or papers delivered at the Second Conference on matters of principal importance to The Samuel Griffith Society such as the external affairs power, the position of the Crown, the High Court on Mabo, Federalism, Aborigines, and Republicanism.

Speeches delivered at the conference by Mr S E K Hulme and the Honourable Peter Connolly have already been printed separately and have been widely circulated in the community.

I do not propose to quote at length from any of the addresses or papers which members may read for themselves. Suffice it to say that all of the papers are intensely interesting, stimulating and thought- provoking.

I do propose however to make a few comments on some of the issues which arise out of the papers and which seem to me to be important for the future.

At the outset may I say that all the lessons I have learned about government not getting too far ahead of its people have been upset by the High Court's Mabo judgment. Since appeals to the Privy Council were abolished or disappeared by one device or another, the High Court is the unfettered arbiter on the matters which come before it in Australia. There were precious few matters left for the Privy Council when the Australia Acts were passed, finally abolishing these appeals, in 1986.

Of course the High Court can be overruled by the Commonwealth Parliament but that is unlikely to occur unless political pressures are sufficient to motivate the Parliament.

Sir Robert Menzies said that constitutional law was "half philosophy, half law". This applies to a number of other topics when there is no-one to gainsay the arbiter.

I was of course, along with a number of other people, surprised at the Mabo decision, having lectured and practised in the area of land law for many years.

As an interested reader of medieval history, I could not help making a mental comparison between the power of the High Court and the power of Holy Church before its decay in the Middle Ages.

Holy Church was the sole interpreter of canonical law and also had the custody of the moral law, which included most of the laws affecting ordinary citizens (even more than those administered by the King's Court) and could decide issues as they chose according to the beliefs of the times.

So powerful was Holy Church that after King Henry the Second had Thomas Beckett murdered in Canterbury Cathedral, he had to make atonement by walking barefoot and wearing sackcloth to Beckett's tomb, there to prostrate himself in front of a great multitude, and be scourged by the monks.

There may be something to be said for this form of punishment. If one were to adopt it in this country then, by analogy with ecclesiastical law, it could be prescribed for a new crime of constitutional heresy.
The objective of The Samuel Griffith Society has been succinctly stated by John Stone in his Foreword to the Second Volume, namely "The growing need not only to contain the further expansion of power in Canberra, but also to restore a balance between States and Commonwealth much more akin to that which the Australian people established in the 1890s."
Last weekend I attended a ceremony at the Princess Royal Fortress in Albany.
In 1893 four six inch guns were installed at the Albany Forts to defend the western half of Australia against the Russians. The eastern half I gather was to be defended by similar weapons installed at Sydney Heads.
The installation of these guns took place at much the same time as the Constitutional Conventions on the other side of the Continent leading to the formation of the Commonwealth.
It was of course significant that the colonists of east and west had come together to establish these forts out of their mutual need for protection.
I could not help wondering whether the people who were living at that time had the same feeling of apathy towards government that one detects today.
I have noticed that most members of the public today expect to have little or no say in government at all. They expect political grandstanding and confidence tricks, even corruption. Perhaps there were similar expectations in the 1890s but I do not think so. Whilst even then the average citizen may have had no time for politicians, I think he was not so apathetic, and was more inclined to feel that he might have some influence on the future of the country.
Public apathy is perhaps one of the most serious problems we face in Australia today. This gives governments the impression that they may do as they please without being brought to account. The bitter lesson is that you do not only lose one freedom or institution. As soon as you lose one, you are likely to lose another.
Hence the importance of organisations such as this Society and others seeking to redress the imbalance of these times.
In his address The Threat to Federalism, Sir Harry Gibbs makes the comment that while Australia remains a federation, its constitutional mechanism should be made to work effectively.
It is of course constitutionally correct when making suggestions for constitutional change to point to the referendum power as the means whereby such change can be effected. But as has been pointed out by numerous commentators, the likelihood of succeeding in a referendum where there is anything contentious or any substantial divergence of views is minimal. Indeed, there is no hope of success in an atmosphere of hidebound opinions, or where protagonists hold views of extreme dogma or philosophy.
This became apparent to me very early in my career as a Minister in the Western Australian Government. It was quite clear that if one wanted to succeed in making worthwhile changes, one had to devise a workable solution.
There were a number of issues in which we had success by adopting a practical formula. Peter Durack in his paper on the external affairs power in Chapter 10 has given two examples of these: the Off-shore Settlement and the formation of the National Companies and Securities Commission.
The effect of the High Court judgment in the Seas and Submerged Lands Case in 1975 was that the Commonwealth Parliament was held to have sovereignty over the territorial sea from high water mark outwards. But by putting the interests of the governed over those of government, a way was found through the problems created by this judgment in respect of all the areas affected

by it; petroleum and mineral exploration and exploitation, fisheries, environmental matters and even the criminal law.

Agreement in relation to a uniform companies law throughout Australia was achieved following a meeting in Melbourne and a subsequent meeting with the Commonwealth Minister in Sydney. There was some strong opposition, but following a three day conference behind closed doors at Maroochydore in Queensland, essential compromises were reached even by those holding extreme views, and a way through was found for uniform law.

Perhaps an even more significant matter was what had come to be known as the "residual links" exercise. This was the project whereby the remaining constitutional links between the States and the United Kingdom which had been specifically preserved in the Statute of Westminster in 1931 were under consideration.

Discussions on this matter had been going on for years, and although there was general agreement that some of the links were overdue for extinction, particularly the application of the Colonial Laws Validity Act of 1865, there were still areas of severe contention. One of the main objections was from the Commonwealth refusing to accept the fact that the United Kingdom Parliament might still have jurisdiction to enact legislation affecting Australia. Indeed there was a meeting in Adelaide when it appeared that the matter would be dropped indefinitely. However, we persisted, and by dint of finding arguments which were logical and appealing through being politically incontrovertible, agreement was finally reached between all the States and the Commonwealth.

However, at a special meeting of the Premiers and the Prime Minister (Mr Fraser), the matter foundered in 1982 simply because the Prime Minister believed the Queen would never agree to allow direct access by the State Premiers, and the States were not prepared to adopt the Prime Minister's suggestion that access should be via the Governor General. It was left to Mr Hawke to complete the exercise some two or three years later, and the result was the passage of the Australia Acts (in identical terms) by the United Kingdom, the Commonwealth and all State Parliaments.

The depth of the significance of this legislation has I believe yet to be plumbed.

All the above initiatives occurred as a result of co-operation and they all involved governments of different political colours.

I mention these matters as it is not generally understood how the wheels of federal government can work, and can be made to mesh, even where there are profound differences of political opinion and philosophy. Perhaps there are some lessons in it for government today.

There may also be some pointers for The Samuel Griffith Society.

This Society has now held two major conferences. I have not personally had the pleasure of attending either but I have read most of the papers. The subjects chosen have been appropriate and dealt with in scholarly fashion.

But I revert to the comments of Sir Harry Gibbs that as a federation our constitutional mechanism should be made to work effectively.

Perhaps The Samuel Griffith Society could, in addition to the learned papers, devote some time to some of the pragmatic possibilities which have been canvassed by some of the speakers.

Could we point the way with practical workable solutions? Should we be sitting around the table periodically ourselves to put forward solutions after evaluating the pitfalls? Is it worth holding an experimental session "in committee"?

Two subjects which would lend themselves to this sort of consideration are:

Firstly, the serious feature of our current practice which allows treaties to be adopted by executive action – unlike some other federations, including the United States.

The International Covenant on Civil and Political Rights was adopted by an Executive comprising Mr Whitlam and Mr Barnard in 1972. I doubt that many people were aware of it.
Why should such treaties, which have the potential for far-reaching effects on our domestic laws, not be afforded the courtesy of ratification by Parliament or the Senate?
One major benefit would be publicity, as at present treaties may be adopted almost in secret unless the media has some specific reason to be on the lookout.
Secondly, should not the appointment of High Court judges require some form of ratification?
It was only in 1977, following the Constitutional Convention, that some provision was made for consultation by the Commonwealth Government with the States on the appointment of High Court judges. The motion originally put forward by Victoria at this Convention was withdrawn because it contained the phrase "recognising the need for the restoration of the federal balance". When this phrase was removed by request of the Federal Opposition, a motion providing for consultation on appointments was agreed almost, but not quite, unanimously.
But this was really only a beginning, and consideration should I believe be given to whether there should be ratification of appointments by the Senate or the Parliament or the States or a majority of States or in some other fashion.
Certainly I believe this Society could make a very worthwhile contribution of a practical kind by offering workable solutions to our political parties, and the public. Ever the optimist.
I congratulate the Society on producing another excellent volume and, in launching this work in Western Australia, I commend it to all our members and others who may read it.