

Concluding Remarks

The Rt Hon Sir Harry Gibbs, GCMG,AC,KBE

Copyright 1994 by The Samuel Griffith Society. All rights reserved.

I think you will agree that the organisers deserve our thanks and congratulations for having organised a very successful conference.

For some years there has been a movement, hardly noticed by the general public, directed towards the achievement of increased Commonwealth power and increased Executive power. Those who are urging that we become a republic are simply the vanguard before the main offensive. This movement would, amongst other things, attempt to destroy the checks and balances for which the present Constitution provides, particularly by reducing the power of the Senate, and would redistribute power by giving constitutional protection to the so-called rights of the Aboriginal people and other favoured groups. It is encouraging to learn that the States are apparently launching a counter attack, and have, only two days ago, committed themselves to establishing a new Australian Federation.

An important aim of this Society is that questions of this kind should be fully and openly debated. The papers delivered at earlier conferences have, I believe, made a useful and influential contribution to the public discussion of these issues. The papers delivered at this conference will make a further contribution to the achievement of that objective.

I should like now to make some brief remarks of my own on some of the matters which we have here discussed during the last two days. I must necessarily be selective. The Aboriginal question is potentially more divisive than any other in Australia today and Dr Partington showed us most convincingly how the work of Dr Henry Reynolds seems to have profoundly influenced the High Court in some of its judgments in Mabo. Some of us have, in the past, tended to decry the practice of the rulers of the U.S.S.R. of rewriting history for the benefit, not only of their ideologies, but also of their political factions. It seems that this technique has been thoroughly mastered in Australia. Dr Forbes has shown how the Parliament, not fully considering, or perhaps not caring, how its legislation would work in practice, has set up a procedure for recognising native title which has the capacity to work inefficiently and unjustly.

Of all the constitutional questions that concern us and there are not a few the operation of the external affairs power, and the subordination of Australian sovereignty to some of the organs of the United Nations, are among the most serious. Senator Kemp and Mr Ray Evans have given us examples of that subordination. It would be a matter of amusement, if it were not so serious, that our Government, after abolishing appeals to the Privy Council, which was usually constituted by eminent and well known lawyers experienced in the common law, should thereafter give Australians the right to appeal to nondescript bodies composed of persons who may have no particular qualifications, and who may be citizens of regimes which pay no respect to human rights or the rule of law. By entering into treaties the Executive can, in effect, expand Commonwealth power so that no sphere of State activity is free from it.

Remedies must be found for these two mischiefs. Two suggest themselves. First, it is desirable that the power of the Executive to enter into treaties should be made subject to parliamentary control. In America, the approval of the Senate is necessary before a binding treaty can be made but in Australia, where the influence of political parties is so strong, it would be preferable to

require the approval of the States as well, at least in matters that impact on the States, although failing that, the approval of the Senate would be an improvement.

Secondly, the power of the Commonwealth Parliament to legislate to give effect to treaties, and other international obligations, must be limited if federation is to survive. I can think of no better way of achieving that result than by a constitutional amendment of the kind suggested by Mr Peter Durack when he was a Senator (the text appears in *Upholding the Australian Constitution*, Volume 2 at page 219). The first of these remedies could be given effect by legislation, but the second would require an amendment to the Constitution.

I cannot agree with the suggestion made by Dr Howard regarding the selection of members of the High Court. A system of public inquiry into the suitability of candidates for judicial office, such as that employed in America, would deter all but the thickest skinned from seeking judicial preferment, and is not likely to work more satisfactorily here than it has in the United States.

Mr Callinan has expressed the real concerns of the Bar regarding the special leave procedures in the High Court. The pressure of litigation makes it a practical necessity that the High Court should take cases, other than constitutional cases, only by special leave, but one hopes that the Court will endeavour to ensure that it does hear all cases which are of real importance, either because of the questions they raise or because of the monetary sums in issue. It would be regrettable if the Court were to confine itself largely to constitutional questions and cases involving human rights.

Mr John Stone has left us in no doubt as to his views concerning the aims of the Constitutional Centenary Foundation. If those views are correct, perhaps the States may review their involvement in the Foundation now that they are committed to a new Federation.

Professor Walker has done us a service by reminding us of the democratic traditions of this country and the democratic origins of our Constitution, and has shown us the need to revive democratic traditions in Australia. With the support of Professor Cooray he has made a persuasive case for the adoption of a procedure for citizens initiated referenda, at least as a means of exercising a power to veto or repeal legislation. I rather incline to the view that if this process were used as a means of introducing legislation, there would be a danger that popular prejudice, perhaps manipulated by a special group, would enact laws harmful to the public, for example, laws providing for an unrealistically low level of taxation, an unduly severe mandatory penalty for a particular offence, or a stringent and unnecessary environmental control perhaps a three coal mines policy. This danger would be the greater if the procedure could be used to amend the Constitution. There is, however, much to be said for allowing a State Parliament to initiate a referendum to amend the Constitution. The whole question obviously merits consideration.

The reference made by Mr David Russell to certain buildings in Canberra reminded me of one of Parkinson's laws, namely that the importance of an institution is inversely proportional to the magnificence of the building in which it is housed. I am not sure whether this is true in Australia. He has raised the question whether the Constitution of a State could be amended, at the initiative of the Commonwealth and against the wishes of the electors of that State, in the way necessary to enable a republic to be established. That question is complex and arguable, and it may in future years be more than purely hypothetical. I completely agree with his suggestion that the quality of government in Queensland has been diminished by reason of the abolition of the Legislative Council and the consequent increase of the power of the Executive vis-a-vis that of the Legislature.

It is not to be expected that all members of this Society will agree with every point of view that is expressed at our gatherings. There is room, within our Society, for differences of opinion on the matters we discuss, for we are a democratic body dedicated to freedom of discussion. We shall

achieve one of our objectives if, to echo the words of Sir Paul Hasluck in the last memorable paper he wrote and it was written for this Society – we ensure that the debate on the Constitution is an intelligent debate, and that any changes that have to be made to the Constitution should be made only after the widest range of thought and opinion has been canvassed.
Thank you for joining our deliberations. I declare this conference closed.