

Foreword

John Stone

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In composing the program of the Conference whose proceedings form this Volume in The Samuel Griffith Society's series Upholding the Australian Constitution, it was necessary, as always, to reflect upon those constitutional topics which might most appropriately be addressed on this occasion.

At the time of our previous (fourth) Conference in July, 1994, three topics appeared to have taken on, over the then preceding six months or so, enormously enhanced importance: the republic debate; the Aboriginal question (the Mabo Case and all that); and the High Court's continuing distortion of the federal "balance" by, in particular, its interpretation of s.51(xxix) of the Constitution, the external affairs power.

Given the timing of this Sydney Conference, and the likelihood (when its program was being formulated) that the High Court would be delivering at about the same time its judgment on the two major cases then before it concerning the Native Title Act 1993 and Western Australia's Land (Titles and Traditional Usage) Act 1993, it seemed inopportune on this occasion to commission any papers on the second of those three topics. We shall of course return to it in the future.

As to the debate on the republic issue, a combination of, on the one hand, boredom with the topic generally and, on the other hand, a judgment that this Prime Ministerial initiative was in practice going nowhere, led to the decision not to commission, on this occasion, further papers on it. This decision seems, incidentally, to have been a more than usually prescient one; in the aftermath of the Canberra by-election, it might even be said to be shared by the Prime Minister himself.

Of the three major issues forming the core of the Society's fourth Conference, therefore, only that relating to the external affairs power seemed appropriate for further discussion at this time. With a view to lending additional point to that discussion, it was therefore decided to commission a paper on this occasion from Dr Colin Howard putting forward a specific form of words by which the present s.51(xxix) might be amended so as to prevent the Commonwealth Government's current illegitimate use of the treaty-making power. Two further papers were also commissioned, from Professors Winterton and Coper, both of whom were known to be unsympathetic (in varying degrees) to the Society's general view on this matter.

The result, including the interesting brief comments by each of the three participants during the extended discussion period which followed the presentation of their respective papers, provides an excellent resumé, of the external affairs power controversy. Perhaps I may be forgiven if, availing myself of the prerogative of those who pen Forewords of this kind, I express the view that, despite the considerable erudition of Professor Winterton's paper and the more frolicsome flavour of Professor Coper's, Dr Howard (particularly in the course of his final remarks in response), had very much the better of the argument. Readers will, however, judge that question for themselves.

Beyond these remarks about the external affairs power discussion, it would doubtless seem invidious to single out other papers for specific mention. At the risk of that, however, I refer to three other elements of the Conference program, and hence, these Proceedings.

First and foremost I should mention the paper by Sir Garfield Barwick with which the Conference concluded. The presentation of this paper, it is fair to say, partook of the nature of an historic event (as the presence of the numerous media representatives indicated).

One of the sub-themes of Sir Garfield's paper, via which he led up to his major theme about the clash between the legal activism of "an unelected and unrepresentative judiciary" and the role of

a duly elected Parliament, had to do with the malign effect of the party system on the proper working of the latter.

Since I fear that the party system, in some form or another, may be here to stay, it was thus particularly opportune that, just prior to the delivery of Sir Garfield's paper, the Conference should have heard two papers on "direct democracy". The paper by Professor Philip Ayres, in particular, provided a fascinating account of recent developments in the USA and Canada in this area. These developments are designed to render the elected Congressional and parliamentary representatives in those two great democracies more responsive to the real concerns and views of those electing them, rather than to the narrow interest groups which, both in Washington, DC and Ottawa, have come to dominate the legislative agenda over the past two or three decades.

As Sir Garfield's paper indirectly, perhaps, acknowledges (though I certainly have no wish to put such words in his mouth) there are echoes in all this for our own democratic processes. As I said in the Foreword to Volume 4 in this series, "it is likely that discussion of the issues involved in [those] concepts....will be appropriate to this Society in the future".

Finally, at a time when belated attention is beginning to be seriously paid to the misallocation of taxing powers within the federation between the Commonwealth and the States, it would be remiss not to mention the notable contribution to that debate now provided by the paper to this Conference by the Society's own President, Sir Harry Gibbs. His paper on s.90 of the Constitution (the excise power) provides some hope that a way may yet be found out of the legal thickets in that area into which, for almost 90 years, successive High Court Justices (Sir Samuel Griffith himself, incidentally, notably apart) have been wandering.

More generally, these papers again provide highly readable but meaty fare for all those wishing to inform themselves about the debate on constitutional issues now under way in this country. It is to that debate that this Volume, like its four predecessors, is dedicated.