

## **Dinner Address**

### ***The Future of the Federation***

**Hon Jan Wade, MLA**

*Copyright 1996 by The Samuel Griffith Society. All Rights Reserved*

---

If successive Commonwealth Governments had not spent the last 90 or so years increasing their power at the expense of the States, substantially imbalancing the Australian federation, we would not be here tonight. The energy and intellect directed to The Samuel Griffith Society would have sought other outlets.

That push for power has continued inexorably, whether by constitutional means or otherwise. The Samuel Griffith Society grew out of the resultant concern and a recognition of the need to redress the federal balance in favour of the States.

So we are here tonight.

I agree whole-heartedly with the aims of the Society and have been a member from the beginning. Tonight I wish to examine the proposition contained in the Statement of Purpose of the Society:

"The Australian people have voted many times against proposed amendments. We must presume that they regard the Constitution, on the whole, with approval."

In terms of achieving the aims of the Society this proposition is pivotal, but what it implies is not, in my view, as obvious as we might think. Nevertheless, while the proposition itself needs further examination, the results of that examination will not detract from the purposes of the society. Indeed, they may well enhance the effectiveness of those purposes.

It may, of course, be that no general inference at all can be drawn from the long record of failure of referenda to alter the Constitution. Perhaps the electorate simply did not like the particular propositions put to them, but that is not the point I wish to make.

The point I wish to make is that the proposition which I have quoted has to be seen in a particular context. That context is the present day, which means contemporary perceptions and attitudes.

In that perspective, it seems to me that in general terms, Australians are not too disturbed by the steady increase in power of the Commonwealth Government. It follows that the aims of the Society and, indeed, of the States, must be promoted in that context.

There can be no doubt that the emphasis in the 19th Century Convention debates was on a federation with a central government which would take over responsibility for defence, customs, external affairs (as then understood) and communications, leaving the bulk of governmental responsibilities to the States. The dominant partners in the federation were to be the States, not the Commonwealth.

The Founding Fathers would be astonished by the present distribution of powers and the overlapping responsibilities between the Commonwealth and the States. No doubt the great majority of those who voted for federation would be similarly astonished.

If today's Australians are satisfied with our present arrangements, how did this come about?

Many speakers at your conferences have enumerated the advantages of decentralised decision-making and, indeed, many of those advantages would have been well known to those participating in the Convention debates. Nevertheless, we must continually remind ourselves that

those who framed our Constitution did so in a particular environment which is quite different from that which exists today, and it was that environment which formed the basis for the Constitution.

The changes to the federation which have taken place since 1901 have taken place in a constantly changing Australia, and they will have been perceived by the Australian people in the context of the environment in which they occurred.

It was not until the 1920s that it was possible to travel by train from Northern Queensland to Western Australia and, even then, the different gauges meant at least five changes of train.

In my own childhood, the border between New South Wales and Victoria was marked each Christmas by a walk in the early hours of the morning down the length of the Albury station—there apparently being some rule of railway management that the compartment you were leaving must be as far as possible from the one you were joining. Now air travel makes it possible to have breakfast in Sydney, lunch in Melbourne and dinner in Adelaide.

Just as the nineteenth Century saw the major newspapers move to the colonial capital cities, so the second half of the twentieth Century has seen the move to national media concentrations. The 30 second grab on television transmitted nationwide from one central studio has replaced, for the majority of people, the once thoughtful newspaper articles and editorials. Who would have thought the former VFL would be a national league including Sydney and Brisbane?

With the huge development in computing and multi-media, it is quite likely that our present systems of receiving and sending information will be again fundamentally changed by the early part of the next century.

Throughout its history Australia has been a country of migrants—voluntary and otherwise. Our early settlers often had no choice as to the colony which was to become their home. For our later migrants, and particularly refugee migrants after the second World War, their destination was often a matter of chance. They were coming to Australia rather than to any particular State.

Perhaps most significant of all, our Founding Fathers endorsed a Constitution which entrusted maintaining the balance between the States and the Commonwealth to various office holders who are all part of the Commonwealth team, whether they be in the Parliament, the High Court or the Commonwealth bureaucracy.

They then compounded this error by establishing a home ground for the team in Canberra, and that home ground has gone from strength to strength in terms of numbers of team members and of resources.

In view of these changes, it would be surprising if the notion of federation acceptable to those who voted to adopt our Constitution was the expectation of today's Australians.

To say that expectations have changed does not mean that every aspect of the federation has changed. We are still all agreed about the desirability of free trade. No-one questions the continued responsibility of the Commonwealth for external defence and security, and as yet, no-one has seriously questioned the States' responsibility for internal security through our various police forces.

However, I would suggest that, despite the history of the Commonwealth and the arguments that have been put forward by the States over the last 50 years, very few Australians now query the imposition of income tax by the Commonwealth.

It is likely that the great majority would now oppose the imposition of a State income tax and, indeed, the imposition of any other major new tax (the GST has shown us that major changes to our tax system do not have popular support).

It is not unusual to find general agreement about the need for greater uniformity in school education, and last week when I was asked to accept Ned Kelly's pistol from the Dowsett family in the Old Melbourne Goal, it was patently obvious that, without exception, the audience would have preferred me to say that I accepted it on behalf of the people of Australia rather than saying (as I did) that I was receiving it on behalf of the people of Victoria.

We must remember that the founders of our Constitution set about establishing the concept of "Australia" in a legal as well as a geographic sense. They succeeded perhaps even more than they may have anticipated at the time. Perhaps having to land the Australians at Gallipoli only fourteen years after federation was a significant impetus.

The sentiments I have expressed must be recognised if we are to be successful in regaining a better balance in our federation.

For this reason, I believe that, rather than talk only in abstract terms about such reforms as the limitation of the external affairs power or a better system of appointments to the High Court, we must also identify the issues which are causing anxiety and uncertainty in the community, and focus our reform endeavours on them in specifics, not generics.

Firstly, and notwithstanding a strong desire for uniformity in many areas, there is anxiety about the inability of individuals to influence events.

The opportunity for choice between decisions being made in Canberra, in a State capital, or by local government must be made clear. It should be understood that the ability to influence a decision will vary depending upon where the decision is to be made. It is no use marching up Bourke Street if the decision is to be made in Canberra or Sydney.

The importance of the place of decision-making became clear to me some 25 years ago when I saw the impact on the Bolte Government of demonstrations against the subdivision of the Little Desert. Those demonstrations resulted in the establishment of the Land Conservation Council and a system of management of Crown lands that has served us well. There could have been no outcome as satisfactory to Victoria if the decision had been one for Canberra.

Our motto should be taken from the floor of the vestibule in this Parliament House:

"In the multitude of counsellors there is safety."

Secondly, the use of Commonwealth powers or money in a way that breaches the concept that the Commonwealth will treat the States in an even-handed way is creating uncertainty and unease. The fact that such incursions are often made for party political advantage can create hostility.

There are numerous examples, and I will mention only a few recent ones :

- Distribution of funding to arts organisations which appears to unduly favour Sydney-with the Victorian College of the Arts School of Film and Television getting Commonwealth funding of about \$2 million in 1994-95, compared with \$15.5 million which went to Sydney's Australian Film, Television and Radio School. Student enrolments in the two schools are about the same.
- Disproportionately large capital expenditure on Sydney airport against other airports around Australia.
- Recent threats by some members of the Commonwealth Government to refuse to classify the infrastructure bonds to be issued for the City Link project as bonds eligible for concessional tax treatment under the Commonwealth infrastructure development policy.

Going slightly further back :

- The payment by the Commonwealth to the then Victorian Government in connection with the sale of the State Bank of Victoria to the Commonwealth Bank had an interesting political twist.

The payment was in recognition of the increased company tax receipts that would flow to the Commonwealth. However, the Commonwealth was prepared to make a larger payment to the State if the State Bank of Victoria were sold to the Commonwealth Bank rather than to Westpac, thereby sparing the then State Government the political embarrassment of having to sell the State Bank of Victoria to the private sector.

In instances such as these, it is important that we focus on and articulate the underlying principle of the Constitution that States and their citizens were to and should receive even-handed treatment from the Commonwealth Government.

Thirdly, the intrusion of the Commonwealth into areas where the States have traditionally supplied major services has the potential to cause confusion and distress. The duplication of functions does not seem to be a major issue, and public response to such incursions appears to depend to a large extent on the outcome.

I have not detected any significant public concern about the effective takeover of universities by the Commonwealth 20 years ago.

However, the hospital system is the prime example of an area where political commitment, in this case to a national health system, formed the basis for Commonwealth entry into a State responsibility.

It has resulted in political point-scoring to the detriment of the system itself and the patients it is supposed to serve. The public are unable to apportion responsibility to either government.

The Commonwealth has taken over funding responsibility for nursing homes and has established monitoring teams to maintain standards and investigate complaints. Victoria has, as a result, repealed regulations which duplicated the Commonwealth system. This has caused considerable distress to people who believe that, as a result, there is no oversight of nursing homes.

It is in areas of concern such as the health system that an organisation such as The Samuel Griffith Society can play a significant role by explaining the issues in such a way that the alternatives can be clearly understood, and the advantages and disadvantages of particular structures are made clear.

Conferences which spell out the different ways in which health, education and transport could be dealt with in the federation would be an invaluable aid to public understanding-not the least in explaining that the incursion of the Commonwealth into these areas via section 96 grants has not always been to the overall benefit of the area.

As well as reacting to Commonwealth incursions into State areas of responsibility, we should be proactive in looking to ways within our present system to meet the challenges of the changing society without depending on constitutional or other structural change, and without moving further towards central concentration of power. There are areas in which either the States or the Commonwealth can make the running, and in many ways the Victorian Government is setting the pace.

Notwithstanding the appalling financial situation which it inherited, the Victorian Government has moved from a recurrent deficit in the State budget to a surplus this year in both the current account and in the budget overall.

Other States, although not facing such dire straits, are also producing balanced or surplus budgets despite the fact that since the late 1980s at least half Commonwealth budget savings came from squeezing the States.

States are high-lighting the contrast between responsible State Governments and a self-indulgent Commonwealth Government.

The privatisation programme being carried out in Victoria is, in part, a response to a situation where the previous government has burdened the State with enormous government guaranteed debt. In a number of States, including Victoria, statutory monopolies have over-invested in infrastructure, passing on the cost of borrowings to their customers.

A combination of out-sourcing, privatisation and corporatisation in all areas of government will, we believe, demonstrate that the retreat to smaller government can result in better services to citizens and at lower cost.

Again, there is a contrast with the Commonwealth Government which advances towards these reforms and then retreats.

The States have, for many years, been involved in various uniform and mutual recognition schemes. These schemes have widespread support. There is no need for the Commonwealth to institute a national response to a problem if the States have already dealt with it in this way.

We can drive from one State to another with a State licence. Our educational qualifications are recognised Australia-wide. The States have now agreed with the Commonwealth to extend this mutual recognition scheme to the recognition of trade and professional licensing schemes and to the sale of goods.

In devising Australia-wide schemes, the States must realise that compromise is essential. Simply put, it is usually better to compromise on issues than have a Commonwealth scheme imposed without input from State Parliaments, thus further distancing our citizens from decision making.

When, as Minister for Fair Trading, I inherited the Uniform Credit Bill, the States had been negotiating its contents for at least ten years.

As a result of a determined effort by New South Wales and Victoria, it will now come into operation next year, although it is being held up at present by a somewhat parochial approach of the Tasmanian Upper House, which wants to exempt a number of smaller Tasmanian credit providers. If the States want to remain in a particular area of government, which has a nationwide impact, such an approach is not appropriate.

Despite its long gestation, I believe that the uniform credit scheme provides a better outcome for both financial institutions and consumers than would have been the case if the legislation had been handed over to the Commonwealth—the reason being the input to State and Territory ministers and Parliaments from all the interest groups and a practical approach not dominated by any particular philosophy.

However, States cannot expect to remain in areas where uniformity is essential unless issues can be dealt with more expeditiously. Having read this morning's news I consider that, so far as credit is concerned, Tasmania must be regarded as no longer part of Australia.

The corporations law (which is now largely the responsibility of the Commonwealth, and is a piece of legislation requiring virtually full-time commitment from those who seek to understand it) replaced a uniform State scheme which was originally the initiative of my predecessor as Attorney-General and Member for Kew, Sir Arthur Rylah. It was updated and improved in the 1970s by another Victorian Attorney-General, The Honourable Vernon Wilcox.

The 1962 Victorian Companies Act was virtually uniform throughout Australia and was adopted by Malaya. Most of it is still in operation in Malaysia and Singapore. It is not clear to me that Malaysia and Singapore have been disadvantaged in the international community by remaining with this legislation, or that Australia has been advantaged by the continually amended Corporations Act.

I am, however, of the view that the regulation of small intra-state businesses would have been better left with the States. Why should a corner milk bar in Broome have its annual return transported by mail to Traralgon for processing, and why should its legal adviser have to make his or her way through some of the most complicated legislation in the world, when the business has no interstate or international component at all?

Variation between States in the regulation of small business may well have produced different trading environments, some of which may have been better than that currently existing for small business.

There is certainly room for improvement, and competition between States could well produce that improvement.

Police ministers are currently endeavouring to agree on uniform gun laws, and Australians will be looking to a successful outcome. If they do not succeed, there may well be a call for the Commonwealth Government to step in.

In many ways, it is up to the States themselves to find their place in the federation at the end of the twentieth Century and the beginning of the twenty-first Century.

There is a case for handing over genuine national issues to Canberra, but the fact that all States are involved in an issue does not make it a national issue.

Whatever decision States make on a particular issue, they still have to contend with such externalities as the High Court and the external affairs power. However, the successful creation of prosperous, efficient and fiscally responsible States, together with logical decision-making on Australia-wide issues, will make it more difficult for centralist solutions to prevail. There is intense interest in State Government activities and in State elections, and this interest, of itself, brings with it significant strengths.

Finally, there may be an opportunity for the States to compete successfully with the Commonwealth where the Commonwealth has intruded into a State area.

Although the folklore favours the Commonwealth as the founder of equal opportunity in Australia, equal opportunity is an area in which the States led the way. South Australia acted first to introduce anti-discrimination legislation applying to racial discrimination, in 1976. Victoria followed with sex discrimination in 1977.

Earlier this year, at the fifth Conference of The Samuel Griffith Society, Professor Winterton suggested that if States protected human rights then the Commonwealth's political case for using the external affairs power would be greatly diminished, and that public opinion would move against the use of the Commonwealth external affairs power in this area.

Victoria now has the most extensive and (in my view) the best equal opportunity legislation in Australia. It provides wider protection to disadvantaged groups and better remedies than the equivalent Commonwealth legislation. All States, except Tasmania, now have equal opportunity legislation in place.

I do not see the Commonwealth willingly withdrawing from this jurisdiction. However, I do see the probability in an area such as this for a State to provide a better service and, over time, to force the Commonwealth out through lack of customers. The Commonwealth is disadvantaged by the strict separation of administrative and judicial powers and a slower response to community concerns.

In conclusion, I would stress that what I have been talking about are strategies not outcomes. They are strategies designed to achieve, in part, what could be far better achieved by all or any of:

- Amendments to the Constitution or inter-Government agreements which eliminate vertical fiscal imbalance;
- The elimination of all duplication of Government functions;
- Limitation of the external affairs power; or
- A dream team on the High Court.

They are strategies based on the proposition that change is more likely to be achieved, at least initially, in the context of particular problems and issues rather than as a result of historical study or theoretical principle. Let us, therefore, identify those problems and issues, and let us support those States which have the courage to look for innovative solutions, whether or not they are solutions which we would have espoused ourselves.

A greater understanding of the basis of a federal system of government is crucial to further reforms. This must also include a greater public awareness of the history of our Constitution and of the constitutional positions of the States within Australia's federal system.

The States must accept a large part of the responsibility for advancing such understanding, and I would like to see Victoria lead the way. I would refer you to the words of Viscount Bolingbroke in 1733 :

"By constitution, we mean, whenever we speak with propriety and exactness, that assembly of laws, institutions and customs, derived from certain fixed principles of reason ... that compose the general system, according to which the community has agreed to be governed."

The written Constitution is only part of the compact between the Government or Governments and the people. The understanding of that compact by the people, whether it has any basis in law or history or not, will affect the operation of the Constitution.

If we wish to change either the Constitution itself or its operation, those changes must have the support of the Australian people. That support cannot be assumed, it must be won.