Appendix II

Addresses Launching *Upholding The Australian Constitution*, Volume 4

2. Judith Sloan

Thank you very much for inviting me here today to launch *Upholding the Australian Constitution*, the Proceedings of the Fourth Conference of The Samuel Griffith Society held in July, 1994. I must admit to feeling somewhat uncertain about this task, being anything but an expert on things constitutional. There was a certain irony as I began to think yesterday about what I would say today - I was travelling on a plane returning from Canberra. At least, I was returning *from* Canberra.

Notwithstanding a liberal schooling with no time for cooking or sewing (much to my longer term disadvantage), I am not sure I recall the Australian Constitution being much mentioned or discussed. And notwithstanding three university degrees, my knowledge of the Australian Constitution was little progressed.

To be sure, through my study of economics, I gained an appreciation of what economists arcanely call "institutions", which is a clumsy term for the rule of law, the establishment and protection of property rights, the separation of powers and the minimisation of sovereign risk. It is only with stable and credible "institutions" that economies can prosper and societies flourish. A very important aspect of "institutions" in Australia is the Constitution.

I have also developed a different perspective on where States fit in from my time living in South Australia. While a Melburnian, the omnipotence of Canberra is much less evident than from the purview of St Vincent's Gulf. Canberra basically responds to Victoria and New South Wales, with scant regard for the other States.

There also seems to be an increasing tendency to confuse *national* policy with good policy. They are of course not the same thing. A case in point is the recent discussion of national competition policy. While there are many fine propositions in the Hilmer Report, the watering down of some policies and the complete failure to proceed on other policy fronts are now such that the overall policy thrust is looking quite inferior. Yet still the advocacy for having a national policy may outweigh the case for having a good policy.

Let me turn to the handsome volume which is the subject of our attention today. It is a very impressive list of contributors to say the least, including SEK Hulme, QC, John Stone, Dr Colin Howard, Senator Rod Kemp, Professor Geoffrey Walker and Sir Harry Gibbs. I was pleased also to see my friend and colleague Dr Geoffrey Partington, writing about the historical basis of *Mabo*.

The volume addresses some key Constitutional issues. These include:

***** International treaties and tribunals;

***** The activism of the High Court;

***** *Mabo*; and

***** The Republic.

I am sure you will agree that these topics are extremely pertinent in terms of current debate.

As far as my own interests are concerned, the first of these - international treaties and tribunals - is in fact an issue about which I know something in the context of industrial relations. I was therefore very interested to read Rod Kemp's chapter, *International Tribunals and the Attack on Australian Democracy*, which deals with both ILO and UN conventions and tribunals/committees.

Take industrial relations. The Constitution is very clear on this matter. Under section 51(xxxv), the power to make industrial relations laws vested with the States save for those involving interstate industrial disputes. In any case, the Federal Government can only enact laws in respect to conciliation and arbitration. In other words, the intention of the Constitution-makers was to carve out a small niche for the Federal Government (in reality, to cover the maritime industry, shearing and coalmining), with the vast bulk of law-making in this area reserved for the States. It is also interesting to note that the Constitution-makers passed this section by the barest of margins (with Henry Bournes Higgins holding the crucial vote); but in any case, the system of conciliation and arbitration was intended to be voluntary, rather than compulsory, as the Second Reading Speech of the Conciliation and Arbitration Act 1904 will bear out.

Industrial relations is an area where High Court activism has been very important. A series of decisions over the years expanded the scope of the federal tribunal, to the point that the State tribunals became mere sheep, following the trail of what is now known as the Australian Industrial Relations Commission.

Even so, probably the most radical development in legislative relations in Australia since 1904 was the reliance on powers other than the conciliation and arbitration power in the new *Industrial Relations Reform Act* 1993. The two new powers are the corporations power and the external affairs power. It is because of our being signatory to a number of International Labour Organisation (ILO) Conventions that the external affairs power has been invoked.

In point of fact, Australia has been signatory to many ILO Conventions for many years. (Cynically, however, the federal Government rammed through our signature to the ILO *Termination of Employment Convention* just prior to the March, 1993 election). It is not clear that we were violating any of them (apart perhaps from the *Freedom of Association Convention*, which the federal Government conveniently ignored, other than when backing away on the minimum membership size for registered trade unions). In other words, resort to the external affairs power (section 51(xxix)) in the *Industrial Relations Reform Act* 1993 was a cynical attempt to override States' authority in this area (particularly that of Victoria, which had abandoned compulsory arbitration) and to concentrate authority in the federal tribunal.

There is a lot more I could say about industrial relations and the Constitution. But this Volume's coverage is very broad and exciting. The papers are well-written and extremely clear, even to the non-expert. Most particularly, they are important, authoritative material for our debate.

The basis of our Constitution was to have strong State Governments and a weaker but supportive federal Government. The reverse has, of course, occurred. Moreover, we increasingly have a federal Executive that has only scant regard for parliamentary processes. It is this concentration of power and decision-making that should make us feel very uneasy.

It therefore gives me great pleasure to formally launch *Upholding the Australian Constitution*, the Proceedings of the Fourth Conference of The Samuel Griffith Society.

Adelaide

25 November, 1994