Concluding Remarks

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

I have been accorded the privilege of making a few remarks on our proceedings. It would serve no useful purpose if I were to summarise, still less if I were to repeat, what has already been said. Thus I shall not attempt to reproduce the valuable remarks made by the Honourable Dean Brown on his experience of the working of the federal system, although I should, I think, mention one question of basic principle which he raised, namely, whether the end (the attainment of a desirable uniformity of legislation) justifies the means (the subversion of the process of parliamentary democracy). Nor could I hope to recapture the wit with which Mr Christopher Pearson excoriated the practitioners of political correctness, although I cannot forbear to notice how one of those practitioners used the words of Jeremy Bentham ("nonsense on stilts") in a context which would have excited Bentham's scathing ridicule.

We have been promised a Peoples' Constitutional Convention in 1997. One wonders how it will be convened and what it will achieve. One hopes that no centralist or republican lobby will be allowed to get control of its proceedings. No doubt the idea of the Convention was a response to the clamour of those who would convert Australia to a republic. However, if the Convention meets, there are other constitutional issues, of great practical significance, that would warrant urgent attention. One of these is the question how one can inhibit the intrusion of Commonwealth legislative power into areas of power which were obviously intended to be entrusted to the States.

One important reason for the unwarranted expansion of Commonwealth legislative power is, as we all know, the wide effect that has been given to the power to legislate with respect to external affairs. Professor Howard has suggested an amendment to the relevant paragraph of the Constitution which might well serve as a basis for discussion at the Convention. I must confess to a certain attachment to Senator Durack's draft, since it echoes the words of a judgment of my own, but I can see the force of some of Professor Howard's criticisms of that.

However, at this stage, it would be idle to commit ourselves to one draft or the other. A person would need to be optimistic to suppose that any particular draft would survive, unamended, the scrutiny of a Constitutional Convention, that is, supposing that the Convention was favourably disposed to recommend an amendment to the external affairs power. For our purpose it would surely be enough that either, or both, of these drafts should be taken as the starting point of a serious attempt to confine the external affairs power within proper limits.

Another grave defect of our present Constitution is that it results in an overlap or duplication of bureaucratic effort, when Commonwealth and State officials operate in the same field. The ability of the Commonwealth to intrude into State affairs in this way is largely due to its power to make special purpose payments under section 96 of the Constitution. Dr Trebeck's paper showed that there are very considerable indirect costs as well as direct expenses resulting from this situation. The Constitutional Convention would perform a useful function if it could produce an acceptable definition of the respective roles of State and Commonwealth Governments, if it could attempt to remove the vertical fiscal imbalance that presently exists in

Commonwealth/State relations, and if it could solve the very difficult question of how the power to impose conditions on Commonwealth grants could be sensibly limited.

If the Constitutional Convention comes to consider the republican issue, I hope that it will heed Professor Howell's recommendation that what should be put to the people is the entirety of the constitutional amendment that would be necessary to bring a republic about. To put only the question, do you want a republic, or, even more disingenuous, do you want an Australian Head of State, would be to disguise the true nature of the issues from the public.

For the purpose of changing Australia from a constitutional monarchy to a republic, it would be necessary to decide a number of difficult questions - for example, how can one devise a method of appointment and dismissal of the Head of State that will preserve the political impartiality of the holder of that office, should one codify the reserve powers, and if so, in what form, and what should be the position of the Governors of the States? It may be that the complications of any necessary amendment would deter most voters from supporting it, but to place before the voters anything less would be tantamount to fraud.

The question whether the flag should be given constitutional protection should be considered by the Convention. An amendment to the Constitution, entrenching the position of the flag, would be easy to draft, simple to understand, and likely to be acceptable to the public. Until the Constitution is amended in that way the statutory provision proposed by Mr David Jull has much to commend it. True it is that such a statute would not bind a future Parliament, but a statutory requirement that the national flag should not be altered except in accordance with the wishes of the people expressed at a plebiscite would have considerable moral force.

Dr Craven's paper on the appointment of High Court Justices reminded me that when Lord Halsbury was Lord Chancellor he was widely rumoured to have made judicial appointments as a reward for political allegiance rather than because of legal merit. Before I go on I should perhaps mention, for the benefit of those whose Latin may be a little rusty, that the phrase I am about to use, *ceteris paribus*, means "other things being equal". A loyal supporter who could not accept the truth of these rumours once asked Lord Halsbury whether, *ceteris paribus*, the best man would be appointed to the position. Lord Halsbury is said to have replied, "*Ceteris paribus* be damned; I'm going to appoint my nephew". I really do not think that the Commonwealth Attorney-General in response to a similar enquiry would reply, "I'm going to appoint a progressive".

Sometimes judges may be appointed because of their perceived views, but more often it is not until they have assumed office that their political or legal philosophy, if any, becomes apparent. My own, perhaps naive, view is that the sole criterion for judicial appointment should be merit, a term which of course includes character and disposition, as well as legal experience and ability.

The suggestion that persons other than experienced lawyers should be appointed is seen to be quite ludicrous when one considers that the Court is often called on to decide complex questions in abstruse areas of law. I incline to the view that a proper attitude on the part of the Attorney-General (and possibly also of the Prime Minister) and his knowledge and insight, are much more likely to be effectual in ensuring that the best person is appointed to the bench than any procedural safeguards are likely to be.

If the Convention does consider possible restraints on the power of the Executive to make judicial appointments, I hope that it will not allow any House of Parliament to play a part in the process. The involvement of Parliament would be likely to lead committees of one House or another to conduct inquisitions of candidates along American lines, and so to deter from seeking appointment many of the persons best suited for the position. I share Dr Craven's views as to the

doubtful value of a judicial commission in the selection of judges, for the reasons he has given. If it is thought necessary to alter the present system, perhaps the idea that three States should concur in any appointment to the High Court has a good deal to commend it.

Finally, I would mention one question which threatens to divide Australian society and to shake the foundations of the nation. The question what rights should be accorded the Aboriginal people involves issues of history and ethics which are usually bitterly disputed although not always properly understood. Discussion of these questions is clouded by passion and sometimes distorted by self-interest.

The papers given at this Conference by Dr Forbes, Mr Humphry and Mr Ray Evans showed beyond any doubt that the *Native Title Act* is not merely unworkable; it also produces inconvenience and injustice, not only as between Aboriginal people and others, but also within Aboriginal society itself. The interests of the nation demand an entirely new approach, and demand it urgently.

May I conclude by thanking those responsible for their efforts in organising the Conference, in particular Mr Bob Day for the special help he gave to enable the Conference to be held in Adelaide, and you all for your attendance.