Appendix I

Address Launching Volume 8 of

Upholding the Australian Constitution

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In this distinguished audience, I have absolutely no doubt that I am the person present who is least conversant with the Australian Constitution.

So the fact that I am standing up here today launching the eighth volume of The Samuel Griffith Society's Proceedings, *Upholding the Constitution* is proof -- if any more were needed --that total ignorance of the subject never stopped a journalist from commenting on anything.

One of the few beliefs I retain from an early grounding in Christianity is that anything made by man is less than perfect, so I have no doubt the Australian Constitution can be improved, but from my rough working knowledge of the subject, I believe our Founding Fathers did a fairly good job in framing the document.

In the corporate world they have a saying: "If it aint broke, don't fix it."

That is roughly my opinion of the Australian Constitution, and I was greatly reinforced on reading past addresses to this Society to see that Sir Paul Hasluck shared that attitude, although he phrased it much more elegantly.

I do not see how anyone can be expected to vote for or against a republic until we know just what sort of Constitution would come with it. However, far too many of the republicans take the attitude that we should turn into a republic immediately and fix the Constitution as an afterthought. Nobody in Australia would buy a used car on that premise, so I don't see why we should buy a republic on it. Especially when you consider who would be selling it to us.

The Samuel Griffith Society has done a praiseworthy job in airing the relevant issues. Certainly this volume greatly improved my knowledge of them.

Even more, the Society should be applauded for keeping alive the freedom of speech and debate in Australia. In my small way, in 43 years in journalism, I have been a seeker after truth. Before writing anything I try to assemble as many facts as I can, apply logic to them and try to reach the most probable conclusion.

Unfortunately, too much political debate in Australia today is commanded by people who have already reached their conclusion and want to bar any examination of facts which might threaten it. All too frequently debate is stifled by abuse. It is almost impossible to start a debate, for example, on what the appropriate levels of immigration should be, or how to make the *Native Title Act* workable, without some clown (or all too often some vested interest) branding the exercise as racist.

It is therefore refreshing to read this volume of essays, in which John Stone does not even take the boundaries of the Australian Capital Territory as being sacrosanct.

On the Constitution, Sir Harry Gibbs gives a truly learned dissertation on the constitutional issues that would need to be tackled before Australia could convert to a republic.

Two other papers I found particularly illuminating were those of Sir David Smith, on the powers of the Governor-General, and Professor Craven on the High Court's role.

But the essay that struck the strongest chord was John Forbes' on amending the *Native Title Act*. As other authors also referred to the *Native Title Act*, and I know a little about the subject, I thought it appropriate to make a few remarks on that vexed subject today.

Going back to the *Mabo* judgments, it is useful to start any discussion by looking at a map and seeing where the Murray Islands are, that were the subject of the *Mabo* claim. They are closer to Papua-New Guinea than to Australia, and many Australians would doubtless be surprised to know that our territory extends that far into the Gulf of Papua.

The Melanesians who lived there unquestionably had a working system of native title. They were a settled community, they had gardens which were cultivated from year to year, they handed down properties from generation to generation, they had recognised boundaries marked by trees and rocks between their properties. They had land which was owned not by the community but by individuals and groups. If any native title claim within the Commonwealth of Australia deserved to succeed, it was that of the Murray Islanders (or Meriams, the chief island in the group being Mer).

The fact is that legally their claim did not deserve to succeed. Mr Justice Dawson's judgment sets out the precedents quite clearly. If the rest of the High Court had taken the same black letter approach, the *Mabo* claim would have been rejected -- doubtless with extreme sympathy -- and the federal Government would have been urged to draft legislation which would give the Murray Islanders native title.

As we all know, that is not what happened. The other Justices of the High Court tacitly acknowledged that the law was as Dawson had said, because they invented new law to achieve the result they wanted.

Mr Justice Brennan's majority judgment acknowledged that precedent was formidably against the Court's creation of native title, but said the law "could be modified to bring it into conformity with contemporary notions of justice and human rights". Brennan also said the law had to be changed to meet "the expectations of the international community".

Now your average simpleton reading the Constitution could have been pardoned for thinking that if anyone has the job of bringing the law into conformity with contemporary notions and meeting the expectations of the international community, it is the 200 politicians we elect to federal Parliament. The simpleton could be further pardoned for wondering: "If that is not their job, why are the politicians there?"

This is not to deny the High Court some law-making function.

As John Forbes says:

> "Ever since *Mabo* was criticised as a judicial legislation, contrary to the separation of powers which the High Court otherwise enforces, there has been a refrain that judicial law-making has always been with us. But surely it is a matter of degree."

When the High Court effectively creates a new form of land title in Australia, and in the process throws doubt over all the property titles that have been granted in the nation since white settlement, the degree of law-making becomes very high.

Heaven knows, our federal politicians are not perfect when it comes to making laws. But the judges who comprise the High Court have now comprehensively proved they're not, either. In the words of Greg Craven:

> "...why should we believe that relatively elderly and cloistered male barristers, sequestered all their lives from making any policy decision larger than that concerned with the purchase

> of office stationery, should upon elevation to the High Court bench become qualified for the taking of the most fundamental political decisions in our society?"

The proposition can be taken a little further. If the High Court judges are going to take it upon themselves to create new laws, then it is fair to expect that they should introduce laws which are comprehensible and workable. To date the Court has done neither.

Going back to *Mabo*, if the Court feels a special form of property title should be created to benefit a particular race of people in Australia, it would have been helpful if the Court had defined who that race were.

The Court did not bother with this sort of detail, but as Colin Howard points out, the *Native Title Act* later defined Aborigines as "peoples of the Aboriginal race of Australia", which doesn't take us very far.

Faced with a similar situation in Alaska in the 1980s, the US defined an Atabascan Indian as anyone of 25 per cent or more native blood. So Alaska, whose handling of native title would have been a model for our Northern Territory, is pretty clear as to who is identified as an Indian and who is not. The description of native Alaskans has, I believe, since been changed from Atabascan to some other term, but the 25 per cent principle remains.

Nor has the Court defined, in any satisfactory manner, what tests are necessary to establish native title, nor what native title actually is in practice. If the Murray Islanders' standards of property title had been those that were set, then it is doubtful whether any mainland Aboriginal group could have passed the test.

And without harping too much on this aspect, we are discussing different races here. The Melanesians are a different people from the Australian Aborigines, and ensured their separate identity by putting the "TSI" (Torres Strait Islanders) into ATSIC at its formation.

Nor do we yet have any workable definition of what native title is. If native title were the right to hunt game across a property and conduct traditional ceremonies every full moon or whatever, then very few mining companies would have trouble with it, although pastoralists might.

And there still remain the formidable problems, as John Forbes has also pointed out, of how access to the land is to be policed, and the fiduciary duties of native title brokers.

It was obvious that the application of native title was going to cause substantial problems to our pastoral and mining industries -- the backbone of our export trade. Brennan's *Mabo* judgment dismissed this problem in just one throwaway line. I will quote it:

> "Where the Crown has validly alienated land by granting an interest that is wholly or partially inconsistent with a right to enjoy native title, native title is extinguished to the extent of the inconsistency. Thus native title has been extinguished by grants of estates or of freehold or of leases *but* (my emphasis) not necessarily by the grant of lesser interests (e. g., authorities to prospect for minerals)."

That was it. No elaboration. Australia's two greatest export industries have been trying ever since to fill in the gaps.

The *Mabo* judgment left such a mess that it was imperative we should have a *Native Title Act*, so we got one. Given that we were trying to settle a two hundred year old problem which went to the core of race relations in Australia, it would have been nice if the legislation had been the intellectual product of our best statesmen, Aboriginals, anthropologists and lawyers.

Instead we got a political compromise cobbled together in the backrooms of Canberra, where no fewer than three groups of professed Aboriginal representatives were arguing with each other. The main motivation of our (then) Prime Minister was not to reconcile the tribes of Australia (he

couldn't even reconcile the three teams of spokesmen), but to build a monument for himself in the Year of the Indigenous People. As the year was fast running out, it was speed rather than justice or statesmanship that prevailed, and the *Native Title Act* was rammed through a tired Senate on Christmas Eve. Against some stiff opposition, it remains the worst Act I have ever read in terms of plain workability.

The one certainty that the Act was supposed to achieve was the extinguishment of native title on pastoral leases, and it didn't even do that.

That particular point was referred back to the High Court, who came down with five *Wik* judgments. The key one, written by Mr Justice Toohey, said that the grant of pastoral leases did not necessarily extinguish native title. Where there was an inconsistency between the rights and interests of native title holders and those of the lessee, the lessee's rights must prevail.

Ah! But how do we know whether native title has been extinguished? What are the tests? Toohey says:

> "Whether there was extinguishment can only be determined by reference to such particular rights and interests as may be asserted and established."

This really is not being very useful. Having invented an entirely new form of property title in Australia, the Court keeps resiling from any definition of what it is.

Taken to its logical extreme, the proposition is that every property title in Australia must remain in limbo while we wait for the High Court to hand down its Delphic decisions at the rate of one property every three years.

To me, the most disturbing thoughts in this volume were those of Roger Sandall on the Ditch between tribalism and civilisation. (As a footnote I must add that I think Karl Popper is a philosopher whose time has come, and I have been particularly persuaded of this by some of the writings of George Soros on the Open Society, but I'll spare members my thoughts on that today.)

Returning to the Ditch between tribalism and civilisation, it has been a policy followed by all complexions of Australian governments over the past two decades that Aboriginals should be re-united with their land. Native title could be regarded as merely the latest manifestation of this philosophy.

We now have a debate raging about native title, generating more heat than light. As Aboriginal land policies have now been pursued for more than 20 years, perhaps it is time we looked at what is actually happening.

I believe we can afford to be brave where Aboriginal policy is concerned, because I do not believe any policy mix could deliver a worse result than we have at present. We have raised the hopes of Aboriginals without delivering much effective benefit to the great bulk of them. Several are frustrated and embittered. Their representatives are becoming strident and encouraging increasing militancy. Billions of dollars have been spent on welfare and advancement programs over the past decade, but any television crew who wants to find a group of Aboriginals living in abject poverty can do so with very little trouble.

On the other side, many rural whites are embittered by what they see as bias in favour of Aboriginals. The policies have resulted in divisiveness and hostility on both sides without markedly improving the lot of Aboriginals.

The chattering classes of Paddington and Carlton may well have expunged their own middle-class guilt by giving a form of land title to Aboriginals. But what happens next? The chattering classes probably imagine that the Aboriginals return to their native land and spend their time

communing with their dreamtime spirits, or carving boomerangs for tourists or acting as tour guides.

In a few cases, this is so. But for the great majority of Aboriginals who adhere to "their" land, they are simply living in rural squalor. By the standards of the rest of Australia, their health is poor, their education is poor, their truancy rates are high and their unemployment rates are high. Of those that are employed, many are on the lowest wages in Australia and are employed merely in looking after the basic needs of their own community. Few have what the rest of Australia would regard as career jobs.

I would defer to Graeme Campbell as a far greater expert than I on this subject, but in my opinion the Aboriginals who live in groups of around a couple of hundred each in communities scattered throughout the remote areas of Australia are not catching up to the rest of Australia, they are falling behind. For them the Ditch is widening. The cost of servicing them is enormous already, and in the absence of any change in the present system, that cost is likely to grow as their numbers increase.

In an era when technology is advancing apace, and when it is more vital than ever for Australians to be better educated and at the cutting edge of global changes, a group of Australians are being left behind and for them the Ditch is widening. Sure, you can give them the Internet, but it's not much use to a kid who's functionally illiterate.

It's only my opinion, but I believe it is high time we questioned the economic *and* social utility of settling small groups of Aboriginals in scattered remote areas. They are costly to maintain, but I for one would be prepared to bear the expense if there were some sign that Aboriginals were benefiting by becoming more self-reliant and economically independent.

I'm a friend of John Moriarty -- probably the most successful Aboriginal businessman in modern Australia. He comes from Borroloola. All year he works at his design business, which used to be based in Adelaide but has recently moved to Sydney. Four times a year he has to attend ceremonies in Borroloola, so he loads his wife and children into the four-wheel drive and off he goes. He stays in touch with all the members of his tribe, his children are fully aware of their culture, ancestry and people. Then he comes back to Sydney and designs fabrics or goes overseas to Tokyo or Paris to sell them.

Maybe that gives us a clue as to where the future should be.

The concept of native title having been established, it cannot be taken away. But should that -- and other land grants to Aboriginals -- always lead to the establishment of mendicant communities? If the land and the culture is valuable, could it not be maintained by small groups of elders or custodians, and the rest of the people be encouraged to take their part in mainstream Australia?

That took me a long way from upholding the Constitution, I'm afraid, but I commend the Society for maintaining intellectual rigour in Australian debate, and I commend (and launch) the book as highly desirable reading.