

Introductory Remarks

John Stone

Ladies and Gentlemen, welcome to this, the ninth Conference of The Samuel Griffith Society. As Western Australians, it is a particular pleasure for both Nancy and myself to be meeting again in this State, almost four years since we first met here in Fremantle.

On that occasion, as last night also, the Society's opening Dinner was honoured by the presence of the Premier, the Honourable Richard Court, and we were privileged to be addressed by him.

Without, I hope, venturing too far into political partisanship, perhaps I may say that, in these days of such electoral volatility, it is rather a comfort to return to a State after an absence of almost four years and find the Government, and even the Premier, unchanged.

I may add that, when the Premier in question has himself been a member of this Society almost since its inception, it is doubly pleasurable. It would be going too far, of course, to imply any causal connection between those two circumstances, but

In his address to us last night the Premier referred to the developments now occurring in two areas of interest to this Society -- the native title question, and the Federal-State financial imbalance.

As Mr Court said, it is sobering to reflect that, since we met in Fremantle, one of the main topics then discussed -- native title -- has gone from bad to worse. Shortly after that meeting, the Keating Government's *Native Title Act* 1993 was passed by the Parliament to the accompaniment of wild scenes of jubilation in the Press Gallery of the Senate. Almost four years later, the Native Title Tribunal established by that Act -- and provided with powers which the High Court, in the *Brandy Case*, has subsequently found it constitutionally unable to exercise -- has so far resulted in the determination of some 10 native titles (most of which are still not even finalised).

To render confusion worse confounded, the High Court, in its *Wik* judgment delivered two days before Christmas last year, decreed that pastoral leases did not (or not necessarily) extinguish native title, and that the only way to determine whether, in any particular case, that did result would be to, in effect, have a court decide the matter. That, at any rate, seemed to be the outcome, although since all four Justices who found along those general lines delivered different judgments, differing markedly in their particulars, it was more than usually difficult to be certain. Some of you with long memories will recall that, when the *Mabo* decision was first delivered in June, 1992, the lead judgment was written by Justice Sir Gerard Brennan, who has since become the Chief Justice. Sir Gerard's son, and noted Aboriginal affairs activist, Father Frank Brennan, later acknowledged, in an interview with Cameron Forbes of *The Australian* (20-21 February, 1993) that he had discussed Aboriginal affairs with his father from time to time "over a barbecue and a cleansing ale and that sort of thing", and said that he thought his father's "judgment was very good" and that "it took things as far as they could be at this stage".

Since it was of course the *Mabo* judgment which was the initial source of all our difficulties in this area, it therefore seems somewhat ironical that, in the *Wik* judgment, not only was Sir Gerard Brennan in the minority of three Justices who held that pastoral leases *did* extinguish native title, but that in his personal judgment the Chief Justice now went further, saying (in implicit criticism of the majority Justices' views):

"If the grant of a pastoral lease conferred merely a bundle of statutory rights exercisable by the lessee over land subject to native title in which the Crown ... had only the radical title, the

rights of the lessee would be rights in another's property. And, if leases were of that character, an estate in fee simple [ie. freehold] would be no different."

Does anyone remember the ridicule to which, after the *Mabo* judgment, one or two people were subjected (Mr Richard Court was one of them) when they suggested that, before we were much older, people would be facing claims over the freeholds of their back yards? Only a few years later, the Chief Justice of the High Court and chief author of that *Mabo* decision is, in effect, agreeing with them.

After much shilly-shallying, the Government now has legislation before the federal Parliament which, if enacted, will at least dispose of that particular problem, and which is designed to deal more generally with the native title question. The Government has said -- and I think that for once it may actually mean it in this case -- that there will be no further compromise on this matter, and that if necessary it will fight a double dissolution election next year on it. The more I think about it, the more I conclude that that would be no bad thing.

Mr Court also referred last night to the Federal-State financial imbalance, a matter on which, in part, Professor Grewal will address us later today. Here too the High Court has recently exercised a malevolent influence through its regrettable decision on State franchise fees.

Mr Court has rightly said that the basic solution to this problem is for the States to resume the use of their State income taxing powers -- which, legally speaking, they have never lost -- so that the Commonwealth would significantly reduce its own income tax levies (and the massive grants to the States which go with them) and the States would each add their own individual surcharges, quite possibly at different rates.

Again, this matter -- and the associated possibility of the States' participation in a broadly based consumption tax -- are questions to be pursued in the months ahead, in conjunction with the Commonwealth Government's proposals, earlier this year, for major tax reform. Without in any way wishing to play the role of wet blanket, I shall only say that I am not noticeably holding my breath.

Next February we shall see the long-awaited meeting of the Constitutional Convention, to discuss now *only* the republic issue. Already the 76 appointed delegates to that Convention have been named, and next month we shall be voting in each State for the 76 elected delegates. In a spirit of full disclosure -- as the Australian Securities Commission says, whenever it says anything at all -- I should mention that I have personally nominated in Victoria. At a nomination fee of \$500, the experience seemed cheap at the price.

It is a matter of some regret to this Society that next February's Convention will concern itself solely with the republic issue -- not merely because that issue has become rather boring, but also because there are quite a number of issues about our Constitution (such as the abuse of the "external affairs" power) which would genuinely repay wider public discussion. The Prime Minister has said that other steps will be taken to facilitate an airing of such other issues, but again, I am not holding my breath.

Ladies and gentlemen, today and tomorrow morning we have ahead of us eleven papers combining both depth and diversity. We shall begin this morning with a bracket of four papers on widely differing aspects of what we have from the outset called "The Aboriginal Question". The first of those papers will be given by our old friend Mr S. E. K. Hulme, QC, who will speak to us on *The Racial Discrimination Act 1975*. To chair that and other papers this morning I shall therefore now hand over to the Hon. Peter Howson who, as most of you would recall, was himself at one time Minister for Aboriginal Affairs, and who brings to this whole area a wealth of knowledge, an abiding regard for Aboriginal Australians, and a strong vein of practical

common sense in approaching the problems from which so many of them so unfortunately suffer. Please welcome Peter Howson.