CHALLENGES FOR 21st CENTURY AUSTRALIA: POLITICS, ECONOMICS AND CONSTITUTIONAL REFORM

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Last night we were privileged to hear Professor Geoffrey Bolton's tribute to Sir Samuel Griffith: *Politician, Lawyer, Constitutionalist.* While a product of his times, many ideas can still be pursued by a study of Griffith's approach to issues. His mixture of personal qualities was immensely attractive: a brilliant intellect combined with romanticism, liberalism, humanitarian concern and a capacity to overlook trivia. Liberals are always in a minority and his recognition of that, coupled with his ambition to strive for the public good within the political process, led him to be criticised for opportunism and inconsistency as a politician. Most would judge him to have been a successful politician nonetheless. (In being so, he sometimes betrayed his liberalism, but that is criticism for other conferences).

As a liberal politician, he took strong positions on issues of continuing importance to Australia:

- while he wrongly accepted the widespread belief that Australian Aborigines were likely to die out, he strove to have them given various forms of legal recognition;
- he sought bans on the exploitation of Chinese and Pacific Islanders to the canefields. It was this motivation that led him to oppose the separation movements in the central and northern areas of the then colony, and to seek to encourage pastoral and agricultural industries there to lessen the influence of the canegrowers;

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- he understood the importance of good relations with Papua New Guinea and the emerging Australian nationalism, but saw both, understandably, in an Imperial framework; and
- in 1887 he introduced the Financial Districts Bill which sought a devolution of power and funding, though this was defeated by a colonial Parliament determined to protect its territory. A similar fate awaited his 1890 extension of that idea in which Queensland would be divided into three provinces. He used this, nonetheless, as a basis for discussing the emerging Australian Federation. The time may well be ripe to revisit those concepts throughout Australia on a regional basis and I shall do so shortly.

As a former colonial Premier who led other Premiers in early drafts of the Federal Constitution, he was never a centralist. The first High Court had three such judges, but when their numbers were expanded the Griffith interpretation of the Constitution was overturned - and, quite appropriately, a more centralist approach emerged. A modem, complex economy coming to terms with a global economy cannot have a constitution oriented to the perceived needs of six colonies a century ago.

For reasons of neatness we often identify eras with events or anniversaries. The fact that our first century of Federation coincides with the beginning of a new millennium is now stimulating thought about constitutional reform. Having been invited to make this Opening Address, it seemed to me that I should dare to extend the debate a little further than I believe it might otherwise travel.

The title for this seminar is *Constitutional Challenges for Australia's Second Century of Federalism.* Quite frankly, I do not believe that we should have a second century of federalism. I do not believe it is now relevant for Australia to have State governments based on the accidental boundaries of our colonial history and possessing powers which derive from what was largely a political bargaining process conducted a century ago.

Anyone with any understanding of the issues realises that Britain has been edging inexorably to assuming its place in a uniting Europe, just as Australia has gradually understood the reality of its geo-political position

in the Indian-Pacific region. There should be nothing more certain than that we shall be a republic by the turn of the century. But if we simply substitute a President for the Governor-General, we will accomplish nothing substantial. If State Government Houses are to join the Heritage visits for tourists, so should State Parliament Houses. An Australian President (whether elected popularly or by the joint Houses of Parliament) will do nothing to make the provision of public services more efficient, nor will it ensure our system of government is more accountable, responsible, open and accessible.

There are still some older Australians who wish to retain the Constitutional Monarchy. I hope the debate on the Republic is sensitive to their feelings. I have no doubt, however, when we commemorate the centenary of Federation, that we should be a Republic. For me the important issue is what kind of republic. I have resisted invitations to join the fledgling republican movement, because its focus has been on removing the monarchy. The real issue for me is one of total constitutional reform. And so I welcome this opportunity to place before you what may prove to be an ambit claim.

Most people will say it is not achievable. I would like to concede that only after the fullest discussion. And so I seek to stimulate, not to present a blueprint. With any encouragement I would be pleased to delve further into the complexities.

I propose, therefore, to touch upon some of the problems of federalism and suggest a unitary model. I will then illustrate the problems and a capacity of the community to drive the change by reference to the evolution of our industrial relations system.

The Problems with Federalism

The States are bankrupt and can never now be otherwise. The sale of state assets and the adoption of national infrastructure programs will render the states increasingly irrelevant. Since Federation the gap between the revenue-raising powers of the Commonwealth and the expenditure of the States has widened. The allocation of Commonwealth

revenue is now more a product of deals struck with State governments than the identification and realisation of community preferences. The absence of real public choice stifles incentives for experimentation and flexibility in public service delivery and renders government less effective.

The effect of Federal-State funding arrangements has been to lock out local government and, more importantly, local communities. In these circumstances, the public is justifiably reluctant to co-operate with government in the development and implementation of specific policy measures. Yet for public policy to truly recognise society's needs and aspirations, local communities must be given greater control over those decisions of government which affect their lives.

Despite imaginative interpretations by the High Court, the distribution of powers between federal and State governments is inappropriate for our international, national and local needs now, let alone in the next century.

Co-ordinate federalism has resulted in autonomous systems of public administration performing similar functions. Vital infrastructure such as transport and electricity supply is prevented from moving towards a more efficient scale of operations. The fragmentation of political power prevents the development of coherent and effective policies. Our system of government needs streamlining in order to improve our economy and quality of life. The establishment of Council Of Australian Governments (COAG) is a sensible pressure point pending a constitutional overhaul.

The Fraser and Hawke governments attempted forms of "new federalism". Both failed. The same sterile intransigence remains. Federal bodies have been appointed to co-ordinate micro-economic reform on subjects such as rail, road, the waterfront, water, electricity, agriculture, food standards and occupational health.

Each is burdened by suspicion and rivalry between the federal and State governments. Few are staffed with imaginative and experienced people, and the rate of improvement in the management of such vital resources will be far slower than we need to make our economy more competitive against others in our region of the world. Too many State nominees have a watching brief to retard the rate of change.

The Reports of the Constitutional Commission of 1988 and its Advisory Committees are of great value in identifying what people felt was wrong with federalism. The terms of reference, however, confined that Commission to recommend improvements to our existing Constitution. The most limiting term obliged the Commission to:

> (c) recognise an appropriate division of responsibilities between the Commonwealth, the States, self-governing Territories and local government.

That term severely restricted the previous one which was to:

> (b) provide the most suitable framework for the economic, social and political development of Australia as a federation.

Thus, the Commission stated that:

> From the outset it has been our clear intention not to propose an entirely new Constitution. We have sought to ensure that any proposals for change would preserve the framework and principles contained in the Constitution.
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> In particular, we have been conscious of the need to retain in form and spirit the federal framework of government in Australia, parliamentary government and democratic institutions.
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> There are, however, some significant problems, and we have sought to identify ways in which the Constitution should be improved. [1]

The Commission did the job it was asked to do. But I do not believe that our current Constitution can serve us well in the next century no matter how we tinker at the edges. Despite our languishing economy I do not detect a political will at State government level to refer powers to the Commonwealth or accept some back.

Our present system could no doubt be made to work better if we had enough people of vision and ability prepared to serve in each of the three tiers of government. Thus, many of the scathing criticisms which have

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[1] Final Report of the Constitutional Commission, 1988, Volume One, at 1.

been directed since 1974 by the Australian National University's Centre for Research on Federal Financial Relations have been to the politicians rather than the institutions. But if we can never get people of necessary calibre, we must consider reducing the number of institutions of government. A study of the research of that Centre strengthens the case for change. So does a study of the cumbersome federal mechanisms in place for the various areas of micro-economic reform.

A Model for Regional Government

For reasons which I will illustrate, there is a widespread realisation of the need for change. There is also evidence of a general view that we are over-governed. There is suspicion bordering on hostility towards central government the further one goes from the centre. Tasmania and Queensland are very decentralised States, and as one moves from the State capital, it is evident that people perceive that their State government is less interested in them. This is also true in frontier areas of Western Australia and even in Albury-Wodonga where both towns (but especially Albury) feel remote from their capital. Broken Hill, Mount Isa and many other examples spring to mind. For instance, the Gold Coast feels closer to northern New South Wales as the Daylight Saving issue illustrates.

Griffith was correct in stating that there are at least three natural economic regions in Queensland. Moreover, the people living there feel that. A Queensland Premier can arouse feelings against Canberra, but the feeling of remoteness from Brisbane is no less apparent.

Twenty years in public life have left me in no doubt that, if people really had a choice, a majority of Australians would prefer a strong central government and effective local government with the power to design and provide the services which are needed locally. A glance at the map reveals natural regions for local government on a viable scale. Some cross State boundaries, and I would envisage that State governments would be replaced with regional governments. These would be more akin to larger local governments and would certainly not have the trappings of the States. They should not have parliaments and the expensive, unwieldy and inefficient bureaucracies which characterise our States. They should have a small number of full-time councillors elected every four years and

who compete for election on the basis of the delivery of the most cost-effective services to ratepayers. Ideas for such services would be generated within and between regional governments.

Each council would have clear responsibilities for health, education, child and aged care, the environment and recreational amenities. The rates of residents would fund services, and real debate would occur about priorities and expenditure levels. For reasons of efficiency, each should contract out as much as possible the delivery of services and audit closely the performance of the private deliveries. Regional policies and programs in such areas would augment national policies on those topics. Health, education and environment policies would thus be national, but with variations deemed appropriate by regional government. Some of these issues will also be dealt with on an international basis.

The model I propose prescribes a strong central government. As stated, on some issues local policies would augment those devised by the national government. They should, however, be genuine policies, not merely the delivery of national programs designed in Canberra. My disposition is against grants from Canberra to regional governments. Regional governments should be solely accountable to their taxpayers, just as the national government should be to its taxpayers. National programs should not be delivered through regional government.

This decentralisation of policy formulation and program delivery would stimulate community assessment of needs and how to satisfy them. Creativity and experimentation would thrive at local community level. Success or failure in one region would help galvanise policies elsewhere. Regions would not rely upon Canberra for theories, cumbersome bureaucracy and funds. The massive, unwieldy machinery of federal-state government which has sent our State governments into debt renders the current system of local government liable to a similar fate. The only way to get real tax relief is to get efficiency in government by reducing the functions performed. The elimination of the States, the formation of regional councils, the competition between councillors for election on cost-effective programs would reduce dramatically the cost of government. When local communities are really responsible for their own welfare to a degree far greater than now, funds will be driven further.

The abolition of the States would also lead to efficiencies in the other institutions which were founded in colonial times: the political parties, unions, churches, charities, employer organisations and professional bodies. Our sporting competitions would also be transformed. As a consequence, more people would participate and standards would rise. (Region of origin competitions would replace State of Origin as part of this greater participation).

The introduction of regional government would also provide a welcome opportunity for the restructuring of the judicial system. New regional courts could assume the jurisdiction currently exercised in Victoria by the Magistrates Court and some of the jurisdiction of the County and District Courts. These bodies could also exercise the functions currently performed by tribunals such as the Administrative Appeals Tribunal in areas such as planning and small claims. The jurisdiction of the Supreme Court could be readily transferred to the currently under-utilised Federal Court.

I hope that our Prime Minister is prepared to contemplate such a radical change for our system of government. During the recent election campaign, he spoke of our becoming a federal republic. It would have been suicidal for him to have antagonised Premiers and aspiring Premiers prior to the election, but I hope he will have our constitutional options examined by a committee which is not locked into the federal model. I hope he will, therefore, reject the "minimalist" model advanced by the Australian Republican Movement.

To suggest, as that Movement has done, that a President should have the same ill-defined powers of a Governor-General and that States could retain Governors to represent the Monarch after the Commonwealth is a Republic is to mock reform and insult the Monarch. The Queen would not tolerate such nonsense and would withdraw Commissions from Governors. If minimisation is the best change possible, why bother? Such a debate would be emotional and divisive as it would be symbolic, not sensible. It would confuse rather than reform.

The Transition towards Regional Government

The kind of government which I am proposing could obviously not be introduced without dramatic changes to the existing Constitution. Amongst the problems which this would entail are those stemming from the fact that the Constitution is embodied in an Act of the U.K. Parliament. Other difficulties often raised refer to the possibility that it was never intended that Constitutional provisions for altering the Constitution could be used to abolish the States. Some academics have demonstrated that the provisions of section 51(38) of the Constitution could provide a way in which the Commonwealth Parliament could enact a new Constitution. However the process would require the concurrence of all State governments - an unlikely event.

It would seem that constitutional change of this magnitude could only be achieved by way of referendum pursuant to s.128. It is clear from Convention Debates that section 128 was intended to be the primary means for altering the Constitution and that the scope of this power was not to be limited by subject matter, but by procedural requirements reinforcing the democratic nature of the process.

It is unclear whether the final paragraph of s.128 would require a majority of electors in *each* State to approve a proposed law abolishing the States, although it has been suggested that this special requirement would need to be construed narrowly against the broad general nature of the preceding provisions. If the public debate rests upon divided legal opinion, it will flounder. If consensus (or a clear opinion) emerges, most constitutional bickering will cease.

A question also arises as to whether a law abolishing the States would be in conflict with s.106 of the Constitution which preserves the constitution of each State. Yet this saving clause is expressed to be subject to the Constitution, which includes s.128, such that a proposed law introducing regional government passed under this section would prevail.

Some mechanisms within existing intergovernmental relations may clear the way for these proposed Constitutional changes. The grants powers were used by the Whitlam government to prosecute its declared

policy of creating regional government. However that experience demonstrates the need for the cooperation of the States in developing a regional consciousness within local communities. The use of direct grants under the Australia Assistance Plan pursuant to s.81, failed to foster community pride and identity and translate that into a feeling of ownership within the public sector. I worked closely with AAP groups in my electorate and feel that both they and the electorate were unprepared for the change. While many local councillors were attracted to the benefits, the "crash or crash through" approach of the Whitlam government polarised Councils where party political affiliations were prominent. Progress was, therefore, limited by that and especially where the State government was in the hands of the Coalition.

While local governments talk of change, few make even a tentative gesture towards changing the way they now perform. Even the most fortunate of local governments have wage-related costs which equate with revenue from rates. Such nonsense cannot continue. For years councils have talked of sharing capital items. Now this level of government is being forced to act. Councils are now being forced to examine ways of bulk-purchasing and sharing the use of equipment. Even the once dreaded subject of council mergers is back on the agenda - voluntarily. Economic necessity might lead to some mergers which would have been resisted had State governments sought to impose them. Moreover, the mergers are likely to be sounder because they will have arisen out of mutually perceived local needs, rather than an abstract design devised by another tier of government.

Even so, some regions will be naturally richer than others and a new form of Grants Commission will be needed for the less well endowed regions to augment the revenue they raise from taxes.

Few Australians wish to seek political office. As a consequence, the few of real quality are swamped in a swell of mediocrity and can achieve far less than would be possible in a more streamlined model. Local government has little real power and, while it attracts many volunteers of goodwill, lacks the professionalism needed to design and provide programs at the local level. We need fewer politicians and better quality at both a central and local level.

Regions easily identify themselves. If people were really invited to consider the option of regional government by merging existing councils, having a few full time councillors and a small bureaucracy which contracted out services by a regularly reviewed tender system, they would opt for that change. I am sure of that. In such a regional government, good quality community leaders would serve for a reasonable salary. Ideas would circulate and four yearly elections would be fought on programs which drew upon the experiences of other regional governments.

If the people of Queensland or Western Australia were asked whether we should abolish the States, they would say "no" because they are afraid of giving more power to remote Canberra. If, however, the residents of particular regions in, for example, the North of Queensland or the South-West of Western Australia were asked would they like a strong regional government based in, say, Townsville or Albany, they would probably not shed a tear for Brisbane or Perth.

The key to this change is to actually stimulate discussion in the community at large. Constitutional Commissions comprising representatives of the current institutions cannot bring about meaningful change. Over five hundred years ago, Niccolo Machiavelli recognised that:

> We must bear in mind, then, that there is nothing more difficult and dangerous, or more doubtful of success, than an attempt to introduce a new order of things in any state. For the innovator has for enemies all those who derived advantages from the old order of things, while those who expect to be benefited by the new institutions will be but lukewarm defenders. This indifference arises in part from fear of their adversaries who were favoured by the existing laws, and partly from the incredulity of men who have no faith in anything new that is not the result of well established experience. [2]

However poor his image and that of the Prince he advised, Machiavelli understood human behaviour. Many people will apply his reasoning and

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2 L.G.Crocker (ed.), *The Prince*, Washington Square Press, New York, 1963, 22.

their own experience to dismiss my goal as being unachievable, but I believe they should consider public opinion more carefully at this time on this issue.

The difference now is that people are ready for change and the impending debate upon the Republic will result in Constitutional change. We should, therefore, explore all options. The Old Right will oppose the Republic, but the New Right could hardly oppose the reduction of debt by abolishing the States. The Prime Minister's political opposition, therefore, can easily be divided.

Apart from the imminent debate about changing the Constitution to embrace a Republic, the climate is right for a sweeping analysis of our national identity and institutional needs. Winning the "unwinnable" election has empowered the Keating government to change Australia's social, political and economic structure. Paul Keating is now in an astoundingly powerful position. When the New Right expelled the traditional liberals and derided them as "wets", their supporters made protest votes but, ultimately, had only Labor to vote for. Every conceivable interest group has been alienated by those who now dominate the so-called Liberal Party. Virtually every community group is now firmly behind Labor and will remain so as long as Keating listens to them. If he does that and acts as decisively as he has shown he can, it is likely that we will change our Constitution before we change our national Government.

For the next six years at least, Labor under Keating has the chance to transform Australia. His stunning electoral success has also strengthened dramatically the power of Bill Kelty, Secretary of the ACTU. They can now arm-twist reluctant union leaders to achieve the micro-economic reform needed to get our industries competitive again.

And at the community level there are signs of collective self-help. Parents have despaired of adequate government funding for child-care and modern teaching aids, and are returning to funding activities and volunteer arrangements common in other generations. Meals-on-Wheels and Neighbourhood Watch are proving to be role models for other community groups. The great work of Rotary, Lions, Kiwanis, Church groups and

charities is helping those rendered poor or homeless by the recession and family breakdown

Australians *are* aware of the need to change many of the structures which have been prominent for the last century. It is true that we were protected from some of the harsher forces of economic reform longer than some other countries. But that is no longer true, and we *all* know it. The prolonged economic recession and the shattering legacy of profligate banks and the economic cowboys of the Eighties has made us all sadder but wiser.

The Industrial Relations Example

This is nowhere better illustrated than in the area of industrial relations. This is a field of law and human behaviour which has been hampered by our Constitution, and yet is vital to micro-economic reform. Under the leadership of Bill Kelty and, more recently, Martin Ferguson, union attitudes are being transformed dramatically.

The receptiveness of the workforce to multi-skilling, complex tasks, broadbanded classifications, devolved responsibility, continuous retraining, workplace reform, effective consultative committees and remuneration from productivity at the workplace on the basis of agreed measures, will soon be evident to all. Job security is the paramount objective of each employee, and all in the workforce must now understand that they must embrace those ingredients of change if they are to be employable. Those who do not will lose their jobs. With inflation expected to remain minimal by the standards of the last 20 years, and interest rates static or falling, the principal concern of those wishing employment will be to improve their employability by increasing their skills and the productivity of the workplace to ensure its continued survival.

One of the challenges which must be tackled first at each workplace is the measurement of productivity. Management must take the lead by gathering empirical evidence from similar workplaces (in Australia or overseas). The relevant inputs and outputs must then be weighed by representatives of management and employees in their workplace

consultative committee. Those companies which have survived the recession best are well advanced in this regard. If the others wish to remain in business and ultimately prosper, they must follow one or more of the many role models which exist. Managements are in the mood to share experiences, and are honest about successes and failures. No matter how good management is, it can always be better.

The quality of Australian management is improving, but the overall quality of human resource management has not yet developed consistently. This has been at the expense of the productivity of our workplaces.

On the union side, reform will be continuous over the next five years. It is often said that we have over 300 unions. A glance at the federal structure of those unions reveals a multiplicity which is frightening. Federal Secretaries are often without real authority when defied by State Secretaries or regional organisers. Union power needs to be centralised more in the hands of Federal Secretaries and the ACTU Executive who will play a crucial role in delivering better productivity outcomes at individual workplaces. The regional organisers and shop stewards are often far more conservative than the employees they represent. By contrast, most federal officials have had management education and understand the needs of business, often better than the management with which they deal.

Thus, in order to decentralise industrial activity to the workplace harmoniously, union power needs to be centralised. This is because of the sheer fact that the talent in the union movement has gravitated to the federal level. Unfortunately, the constitutions of their unions have not all been transformed to empower Federal Secretaries with real authority. Where State Secretaries share the progressive views of the federal office, sensible negotiations ensue with management. But where State, regional and workplace delegates are atavistic, productivity-related outcomes will not be reached. This will be so even when we have twenty national unions.

As the amalgamation process continues, over the next few years unions will undergo further change. The ACTU aimed for the rationalisation of union coverage along a more generic industry basis than is now occurring.

Newly amalgamated unions will consolidate their form once they identify their core business and shed some overlapping coverage with other unions.

This centralised approach to decentralisation may not please the economic rationalists but, mercifully, they do not matter any more. The recipe of many workplace unions based on ethnic lines would have led to division and anarchy. Fortunately, people of foresight are increasingly moving into leadership positions in the union movement, and they will help accelerate change, because they understand the structure and culture they are changing. It will work in practice. We do not need to contrive a theory to explain it! The object of workplace reform has been agreed upon for a decade; the means of achieving the objective has been the only issue in dispute. Those who understand the issues will now accelerate the rate of reform. Industrial relations will not be an issue of substance at the next federal election, although slogans are bound to be used again to appeal to prejudice and obscure progress.

Economic necessity and knowledge of the need for change will produce workplace reform which meets mutual needs. Enlightened self-interest, not abstract theory, will triumph. There is a mood for change, and any union official who seeks to obstruct it will be squeezed out of influence by senior officials and the employees themselves.

This progress is being made *in spite* of the Constitution. Had we had only the federal jurisdiction and centrally structured unions, progress would have been infinitely faster. The nature of the industrial relations power in our Constitution has been an impediment to change. Nonetheless, the fact that change is occurring at workplace level illustrates the possibility that, if afforded the appropriate opportunity to debate the issues, public support for a new Constitution might be gained at the time of our becoming a Republic.

This attitudinal change is a sign of our maturity. Just as the sectarianism transferred from Britain has been broken down by migration, the "them" and "us" approach to industrial relations is fading with the upward mobility of children of those who saw themselves as "the working class". This is being aided by education and economic pressures, and the general sophistication of the community. Even so, examples of some

continuation of our adversarial system erupt on occasions and obscure the general progress towards a more co-operative approach. One reason for this lies in the Constitution.

Indeed, the adoption of a system of centralised conciliation and arbitration within a federal framework not only enshrined, but magnified the problem. As a result of our federal Constitution a most complex set of industrial laws has been devised. Ingenious legal fictions and sturdy relationships of trust between adversaries and tribunal members has made the system more flexible than its original structure appeared to allow. But entrenched obstacles and attitudes still bedevil its operation and reputation. Its harshest critics are largely ignorant of its constitutionally induced impotence, and their impatience with its many frustrating aspects often exceeds reasonable bounds.

Those who have called for a jettisoning of, or an opting out from, the system have done so without the benefit of knowledge of its workings, and of both the attitudes enshrined in it and the culture which has developed under it. The most extreme critics are those without the embarrassment of first hand experience or knowledge of the subject matter.

Those critics are, of course, members or fellow travellers of what is called the H.R.Nicholls Society. Their basic objective apparently is to have management determine wages and conditions of employment. For presentational reasons this is softened to suggest that management will somehow consult its employees and engage in some sublime process of mutually beneficial exchange. If employees fail to agree, the management view will somehow prevail. Various common law and statutory rights will provide armoury for the management veto and prescription. In any event, the employees tend to be viewed as a disorganised group, and there is little prescription of the role for unions. Perhaps an independent arbitrator or mediator may have a role, but essentially the employer's view will somehow predominate because the employer will take more notice of the market place than do arbitrators.

This is reminiscent of the cries for freedom of contract a century ago. It was argued that individual employers and employees should be endowed with equal bargaining power to reach an agreed position on terms and conditions of employment. How equal can an employee be with an

employer? A large employer could dominate even an enterprise union. A large national or multi-national company might be equal to a large national union. And a small company might be dominated by one. A regulated system is required to protect the weak in each circumstance. The New Right's notion of freedom of contract was disposed of by Higgins in *A New Province for Law and Order* when he said:

> Settled standards are impossible under what is misnamed 'freedom of contract', when the employer is 'free' to give or not to give employment to the applicant, and the applicant is 'free' to choose between unfair or even dangerous conditions and an empty larder![3]

Those who refer to the market place for resolution of industrial relations issues usually ignore the fact that, as a matter of law and history, tribunals and unions are a major factor in the market place.

And we must remember that the "market place" in each country takes on its own cultural characteristics. The class struggles of Europe were transferred to and transformed on the goldfields and in a variety of rural and urban experiences. Before Griffith and his colleagues had hammered out their federal Constitution, a Royal Commission had recommended a system of conciliation and arbitration.

The Federation fathers, understandably in those horse and buggy days, could not conceive of such a system being national. It was envisaged that most employers would operate intra-state, and that State systems would handle most disputes. In fact, the real outcome has been the paramountcy of the Federal tribunal with the Federal system causing economic dislocation.

For most of our Federation, those seeking industrial harmony have tried to minimise these problems by calling on the States to refer their power to the Commonwealth or have the Commonwealth vacate the field. The latter notion caused the defeat of the Bruce Government and the loss of the Prime Minister's own electorate. The former has always been resisted by the States. Many Premiers won elections campaigning against

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[3] H.B.Higgins, *A New Province of Law and Order*, Dawsons, London, 1922, at 139.

unions whose activities were mostly under federal awards. The effect of the Victorian Government's legislation is for it to vacate the field. Most employees will be under federal awards, the rest will be under what will be, effectively, common law contracts with award minimum preserved by statute.

This situation has arisen because of the electorate's rejection of the Opposition whose policy was, effectively, to allow employers to unilaterally opt out of the federal system. This policy was inspired by the H.R.Nicholls Society, many of whose members have also formed a Society named after Sir Samuel Griffith. That association of names and ideas is unkind to Sir Samuel, but most appropriate for H.R.Nicholls. He was, to state it generously, a marginal figure in Australian history, and the Society which bears his name does so most aptly.

We now know that, when editor of the Hobart *Mercury*, H.R.Nicholls, had a *contretemp* with H.B.Higgins who was then Chief Judge of the Commonwealth Court of Conciliation and Arbitration. But H.R.Nicholls has another footnote in our history.

Let me quote from John Molony in *The Penguin Bicentennial History of Australia*[4] who records how Governor Hotham suppressed the diggers at Eureka. Hotham was convinced that the Diggers' Movement was organised by seditious foreigners. In reality the diggers were not in revolt and were essentially demanding:

> the fundamental right to be treated with respect which, time after time, had been denied them when they were dragged from their damp holes and ordered to produce their licences. Failure to do so resulted in them being forcibly carted off into custody, where they were fined. Apart from the question of taxation without representation, which the licence fee virtually imposed, the diggers wanted a chance to settle on the land, most of which was still held by the squatters.

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4 J.Molony, *The Penguin Bicentennial History of Australia*,Sydney, Penguin,1988.

Molony records how the men of Eureka left behind them "a legacy carried on in prose, poetry and painting, and in the powerful symbol of their flag."[5]

And Molony also tells us that Raffaello Carboni, the chronicler of those events of late 1854, saw:

> the flag, with its white cross and five stars on a blue background denoting the Southern Cross" as "a thing of beauty under which free people could stand upright and proud. The Southern Cross flew briefly for those few days at Eureka, but long and purposefully enough to win its place in the loyalty of many Australians. To them the stand taken by those who had fought beneath it was a promise of lasting democracy.

Molony also records that few of the diggers wanted a Republic. Presumably most would have been gratified to know that the Southern Cross joined the Union Jack in our flag.

But who was the person - the only person - cited by Molony as the apologist for Hotham? Who was the newspaper man who "scorned the diggers as Irish drunkards?" None other than H.R.Nicholls! He was out of touch in 1854, as are the members of the H.R.Nicholls Society today. How they deserve each other!

We do not require conspiracy theories about Irish drunkards or industrial relations clubs. What we need is an understanding of human behaviour and aspirations. Certainly, the behaviour by employers, their organisations, employees and their unions has become stultified from working within a constraining - potentially suffocating - system. But the way to change that system, to make it more flexible, is to understand it and to change it from within.

Talk of "opting out" of the system was always fanciful. The challenge was always to become more involved - not to opt out. To opt out of the federal system was to opt into a State system or a common law system underpinned by federal or State legislation. There was no opting out of a

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5 *Id* at 108.

system. The question was how to make *the* system function more in Australia's interest.

The reality of that is represented by the Business Council of Australia. That body was formed because of the frustration of large companies with the system and dissatisfaction with the service they believed they were getting from employer organisations. The Chief Executives of those large companies were forced to face industrial relations realities in ways which most of them would not have if they had merely continued to send their delegates to the other employer organisations. As a result they have:

- gained a genuine appreciation of the constitutional, institutional and attitudinal realities of our industrial relations system; and
- set up line management responsibilities for all kinds of human resource concerns and reduced the former industrial relations service centres to one of advice to line managers.

In short, they have taken at the workplace level a *total* approach to human resources development and they are giving it real meaning to individual employees.

There are two important points to be made from the experience gained from a federal industrial relations system. First, there were no benefits. On the contrary, the capacity to "leap frog" wage claims from one system to another often worsened the wage-price spiral. And when co-ordination of decisions was reached, the unnecessary replication was at great public cost.

Second, surveys repeatedly show that people have confidence in the security which the tribunal and its award standards offer. People will move towards productivity-related wage outcomes from *within* the system, but will not go outside it unless an alternative mediation and arbitration service is part of the agreement. Even so, registration of the agreement is preferred. As the law now stands, that provides protection from logs of claims from other unions with rights to cover .employees at the place of work. But, equally importantly, it satisfies an emotional need on the part of employees to feel that their agreement is part of the award process and status.

This emotional need is understandable, and is the product of the "them" and "us" years.

What this all amounts to is that "grass roots" opinion is being obtained by progressive employers. They are sometimes working with unions and sometimes dragging the union leaders along with employee opinion. In a continuing working relationship constant two-way communication is an essential ingredient in the process of winning trust to move from an adversarial system to a co-operative model under the security blanket of the system. This is what the New Right ideologies do not understand. The system had to change from within; the Opposition's policy would have been counter-productive.

Critics of the system also seem to overlook the fact that the federal jurisdiction is only available where there is an interstate dispute. These have always been created with or by unions. An employer operating in more than one State could possibly create a "paper" dispute with its own employees to found jurisdiction, but it is hard to see how unions can be otherwise excluded.

The public spoke emphatically at the Ides of March 1993. The portents for change are now present. Sir Samuel Griffith was a lover of Shakespeare, and would have been familiar with an opportunity following an earlier Ides of March:

> There is a tide in the affairs of men
>
> Which, taken at the flood, leads on to fortune;
>
> Omitted, all the voyage of their life
>
> Is bound in shallows and in miseries.
>
> On such a full sea are we now afloat,
>
> And we must take the current when it serves,
>
> Or lose our ventures.[6]

If we are to ride the tide, we must reject the minimalist position on Constitutional change.

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[6] W.Shakespeare, *Julius Caesar*, Act IV, Scene iii.

I believe that we should explore the possibility of fixed four year term elections for regional governments and both Houses of Parliament. The Government should reside in the House of Representatives. There should not be Ministers in the Senate. If the Government loses control of the House., an election for the House would be needed for the balance of the four years. On the same day each four years the electorate would vote for a small group of regional councillors and both Houses of Parliament. The method of election of regional governments could be by single or multi-member constituencies. The Upper House (or Senate) would be elected by proportional representation and would have no more than two Senators. It should be a genuine House of Review and not be empowered to defer supply or delay money bills, any more than can the House of Lords. There would, therefore, not be any need for a President to hold reserve or codified powers to dismiss a Government. The role of President should be purely ceremonial. If a Government falls during a term, the President would be obliged to accept the resignation of the Prime Minister and call fresh elections for the House only, unless that House resolves that it has formed a new Government from amongst its ranks.

Voting should remain preferential - this is indisputably the best way of ascertaining opinion and preferred representation. It should also be compulsory, as this ensures that zealotry and apathy are kept in balance. It is a paradox, but people who have not fought for the right to vote may need compulsion to value and exercise that right. When an optimum vote is cast, tolerance prevails. The special case of Tasmania would, of course, require attention if these ideas are taken further

Thus, Albury-Wodonga might have one member of the House. An Upper House member might cover the broader economic region extending through to Wagga Wagga, Corowa and Wangaratta. This seat may cover three House of Representatives electorates.

Finally, there remains the issue of our central government eventually ceding some sovereignty to supra-national bodies. It is hard to conceive of an Asia-Pacific body like the European Parliament to which our Parliament would cede authority. It is not improbable, however, that a collection of sovereign nations in our region, or even more globally, might eventually decide that the best way of enforcing those international

covenants which the public have identified as important is by ceding specific powers to an international agency, rather than relying upon the domestic law of each country. Technology simply defies national sovereignty in respect to some subject matters, such as trade practices, the environment, product liability, human rights, satellite communications and air traffic control. The development of an Asia-Pacific labour market may even require some supra-national regulation. Anti-terrorism, piracy and some aspects of the law of the sea are other examples.

In the event that that occurred, there would inevitably be some centripetal movement towards the centre at the expense of the States. But why wait? The industrial relations experience shows that change can occur in such a manner, but far slower than is sensible in terms of our economy. Hence my strong belief that we should place total constitutional reform on the same agenda as the Republic. I, therefore, hope that the Foundation chaired by Sir Ninian Stephen will be at the forefront of the debate. The community is ready for change, even if our political leaders are not.