

Launch of "***The Great Constitutional Swindle***", Professor Peter Botsman
The Hon Paul de Jersey Chief Justice of Queensland

14 December 1999, The Brisbane Institute, Customs House

It is with great pleasure and some delicious irony that I launch Professor Peter Botsman's most interesting book, "*The Great Constitutional Swindle*". I suspect the irony involved in my launching the book has been thoroughly pre-meditated. You may recall, through an article recently published in the *Courier Mail*, and at other times, my "apparently" bold claim that it is Sir Samuel Griffith who takes the prize for the major authorship of what became our Australian Constitution. Professor Botsman asks us to believe otherwise: and encourages me to promote his views. Well that is no burden! His views are most interestingly, indeed compellingly expressed, and my own contribution this evening may be seen as another example of that great, indeed invariable judicial quality, intellectual flexibility!

The charge? Peter Botsman claims our Constitution, and the Australian story of federation, amount to nothing less than a "swindle": the Australian people's belief that they were "at the heart of a triumphant history and a new national democracy" was misconceived. Our author provides these, at first blush startling, particulars of his charge: "in reality the Constitution was never approved by a majority of Australians; it was in large part written by a man whose ideas and principles were never acknowledged or articulated; its imperfections were glossed over; and, worst of all, it could only be changed with the greatest of difficulty." He reassures us, I immediately confirm, that we are nevertheless left with some remnant of hope: though we must work at it. I will return to this.

I am sad to have to acknowledge, immediately, that I readily accept his claims of an Australian society ignorant of its own Constitution and system of government. But is this the result of a swindle, a "sting", patronizingly engineered by a detached elite determined, while promoting a federation, to protect its own patch? That is for the reader to assess.

I also at once commend our author for his positive admonition, and really his ultimate message: Australians must not remain ignorant, but must engage in "popular and organic dialogue" to understand the strengths and weaknesses of our system. They certainly must, and are showing increasing interest in doing so.

Let me however revert for a moment to the riddle of the draftsman: is Griffith support merely a reflection of chimerical sentimentality on the part of loyal Queenslanders? It is *not* the illustrious Sir Samuel Griffith, but Tasmania's Attorney-General, the republican Andrew Inglis Clark, whom Professor Botsman credits with the substantial drafting of the Constitution. Inglis Clark, he says, wrote most of his

draft during a year's travel to England and the United States, adopting the positive aspects of the constitutional systems of both. He then confidentially supplied a copy to selected delegates at the 1891 federation convention, one of whom was Sir Samuel Griffith, or "Sam Griffith" as he is called throughout the book. (Our author has by the way shown commendable restraint in eschewing the irreverent "oily Sam" tag.) It was, according to Peter Botsman, this Inglis Clark draft which was edited by Griffith's group during the rather romanticised excursion aboard the *Lucinda*. The credit the author allows Sir Samuel Griffith is limited to turning "Clark's draft into a strong, tightly worded and well-structured first draft of the Australian Constitution which would survive": essentially for polishing up the draft. Well, maybe; and I am sure our author's limitation, or relegation of the epic Queenslander Griffith's role has nothing to do with his having himself been born in Melbourne!

These are of course playful remarks. I do tonight launch a careful, serious while entertainingly written analysis, one deserving substantial consideration. Our author is the champion of Inglis Clark, this little-known man from Tasmania, who he says chose to remain out of the public spotlight, and whose fine ideals including Australian independence, an autonomous judiciary, wider franchise and the promotion of human rights he rightly applauds.

Similarly, our author embellishes what he sees as the limited picture of the federation story recorded in conventional history books, including in his compelling account the contributions of some generally little-known players. He tells interestingly of the somewhat equivocal Edmund Barton, who carried the Clark/Griffith draft forward to the federation conventions; the commanding Alfred Deakin, the "spellbinder" of federation; Higgins, Dibbs and Reid who criticised the draft and attempted to improve it despite the simple, for-or-against-federation climate; and of a division within the then "feminist" society Vida Goldstein supporting federation as a means to gain votes for women, while Rose Scott criticised the concept, choosing to promote a "socialism of love and unselfishness". Professor Botsman is indeed the champion of the little-known, asserting that we Australians owe thanks to the critics of federation for forgoing a desire to be written into the history books, instead pursuing the best interests of the Australian people.

But for all that, the central and very important theme underlying our author's account of federation is its distance from average Australia. He evocatively describes the constitutional draftsmen as the "bearded men": lawyers, liberal politicians and land-owning conservatives, the Victorian, William Trenwith, being the only delegate at federation conventions who represented working men and women. He reminds us with a jolt that only about 15.9% of Australian people voted for federation. For those not falling within the myriad of classes excluded from voting including then of course Aborigines and, save in South Australia, women, voting was voluntary. Interestingly, to encourage a good turn-out, the Victorian government promised, as a memento of federation, a "gay picture card" in modern

terminology a rather controversial prospect! It was, in the result, truly an Australian minority whose votes brought about federation.

The author reminds us of Isaac Isaacs' caution that ours should be a people's, not a lawyers', constitution; but that largely it was lawyers who dragged the populace to federation, and who now delineate constitutional bounds. More irony) and the generosity of spirit of our author in having a lawyer launch his book today is brought home by what he records of the Brisbane "Worker"'s description of lawyers of 1901 and this really plumbs the depths of derision:

"In Barton's Ministry) the whole Federal show) is in the hands of these bounders the lawyers) these rotten sharks) these humbugs (who) live in luxury) these artists in political fraud) Among all classes of men this side of eternity there are no greater octopuses than lawyers, who prey and exist at the expense and to the detriment of their fellow men) these parasites)"

The final segment of the "swindle" our author discerns, and probably his strongest theme, is the rigidity of our seminal charter - what he calls a "frozen" Constitution we should consider "defrosting": bringing "a horse and buggy constitution up to the standards of the twenty-first century". Amendment is, he says, practically nigh-impossible, with so few referenda ever passing both a majority of Australians and a majority of States - save thankfully, especially, for that relating to Aborigines. It has, therefore, Professor Botsman asserts, fallen to the High Court to give working effect to the provisions of the Constitution through a progressive interpretation over time, often having to apply the Constitution to situations not envisaged at Federation. There has been some) "mild" criticism of the way that court has gone about that task! I will not, you will understand, add fuel to that particular fire. Our author sees this as undemocratic: the nation's polity being moulded, not by the people, but by what he styles an elite few, and lawyers at that! Professor Botsman offers, among other things, the "vertical fiscal imbalance that has come to exist in Australia's federal system of government", as a result of the *Uniform Tax Cases*, to point up a problem in the High Court's role as constitutional interpreter. Yet on the other hand, he applauds the role played by Justice Lionel Murphy in favouring a policy-based approach to constitutional interpretation. He also applauds cases like *Australian Communist Party v Commonwealth*, *Koowarta v Bjelke-Petersen* and *Mabo*, decisions he sees as "right", although not necessarily reflecting majority attitude within the democracy. Maybe, on an overall objective assessment, his "quarrel" in this regard is a quibble: but that again is for the reader to judge.

Finally, Peter Botsman challengingly explores some major, serious issues facing Australian society: nuclear disarmament, human rights, national recognition of our obligations under international covenants, social welfare, the production of an agreement or Makarrata between the indigenous Australian people and the federal government and the enshrining of such a treaty and a concept of citizenship, into the Constitution. In addressing these issues, our author stresses the need for all

Australians to discuss and debate them, as a foundation for national action. And then we are given ten practical ways our nation might venture forth after celebrating the Centenary of Federation, from swearing an Australian president into office on 1 January 2001, a goal obviously now unattainable, to the inauguration on the same day of a seventh state of Australia, *Namitjira*.

The book is styled a "Citizen's View of the Australian Constitution", and so it is, the view albeit of a particularly well informed and reflective citizen : and, I note, beardless! It is entertaining, diverting : I will candidly concede it benefits through not having been written by a lawyer! But more than being entertaining, it is interesting and challenging. It is significant. The essential message is this : "wake up Australians and think carefully about the roots of your constitutional democracy"! Oh that the message be heeded!

Speaking of authorship, may I presume to note, penultimately, a design similarity between the book's cover, and that of the cover of the Sex Pistols CD, "The Great Rock n Roll Swindle". The first track on that CD, by the way, is what the Sex Pistols called a symphony , and its title is "God Save the Queen". The Queen is pictured on the front cover of this book, with the word "swindle" sealing her lips. I leave you to ponder these apparent coincidences! "Bearded men", the Sex Pistols and the Queen: irony is indeed the spice of life!

Warm congratulations to the author, and may this excellent book, significant especially for its balance, be widely read. I also warmly commend Peter Botsman, in conclusion, for dedicating the royalties to the "Andrew Inglis Clark Society", established to foster grass-roots debate about the meaning of our Australian democracy: a most worthy altruistic goal.