Concluding Remarks

Rt Hon Sir Harry Gibbs, GCMG, AC, KBE

I am sure that you share my view that we have had another useful and stimulating conference.

There have been three important themes which have connected the various papers and addresses which we have heard. The first is federalism. Welcome and eloquent reminders of the importance of the federal system in protecting the subject against arbitrary excesses of governmental power, and in safeguarding democracy, were given to us both by Professor Moens and by Mr John Wheeldon.

Unfortunately, in Australia, we find a serious imbalance in the working of our federal system. Professor Moens and Professor Goldsworthy gave us examples. Professor Moens dealt with appointments to the High Court, a process in which at present the States may have a voice, but no substantive role. Although, as Mr Peter Durack has said, Justices of the High Court have generally enjoyed a merited respect, it surely seems clear in principle that a Court which is called on to decide important controversies between the Commonwealth and the States should not be comprised of judges selected by one of those litigants alone. The remedy supported by Professor Moens, which would require the approval of at least three States to a proposal for appointment by the Commonwealth, would appear to have a great deal to commend it. Professor Goldsworthy discussed another example of imbalance, probably not intended by the framers of the Constitution, namely the fact that the Commonwealth alone can initiate referenda to amend the Constitution. He made a strong case for allowing the States to initiate referenda, although he acknowledged the difficulty of achieving that result.

Mr Harry Evans dealt with one of the institutions most vitally concerned with the protection of federalism, the Senate, and showed that the Senate still fulfils that role, even though it is now dominated by political parties, because it ensures a geographical spread of political representation, and thus prevents the domination of the political process by the representatives of the larger States.

Also germane to the question of federalism was the paper in which Mr John Stone justly criticised the grant of self-government to the Australian Capital Territory, and expressed fear that there might ultimately be a drive to grant Statehood to that Territory. Mr Stone's suggestion that the boundaries of the Territory should be redefined is daring but attractive.

Dr McGrath's paper may also be thought to be relevant to the theme of federalism, since the integrity of the electoral process is important to the survival of any democratic political system, including federalism.

Finally, the expansion of Commonwealth power has owed much to the interpretation given to the Constitution by the High Court, a subject dealt with by Dr Howard and Professor Craven.

The second theme is the republic. My own paper attempted to show the many questions that have to be answered before our Constitution could be made a republican one. We were fortunate to hear Sir David Smith, who effectively rebutted the commonly made but false assertion that Australia has at present no Australian Head of State, and who explained the role of the Governor-General.

The final theme is the Aboriginal question. The relationship between the majority of Australian citizens and those of Aboriginal descent is perhaps the greatest cause of division in Australia today. We have had three notable papers on the subject.

Mr Hulme has given us his usual incisive exposition of the judgments in *Wik* .[1] The results of that decision have clearly been unsatisfactory. The opinion has been vigorously expressed by some of the very able propagandists for the Aboriginal cause that it would be utterly wrong for the Parliament to diminish the rights that flow from the decision in the *Wik* case. It is difficult to support that view. Parliament has frequently legislated to reverse or vary the law as declared by the High Court, as it is entitled to do if the law is not a constitutional one.

There is nothing hallowed or immutable about the rights conferred by native title, which has been recently discovered, and whose present application has depended on a series of decisions reached by the narrowest of majorities. The validity of the *Racial Discrimination Act* was upheld by a majority of 4 to 3 in *Koowarta* .[2] Then in *Mabo No. 1* [3] a different majority of 4 to 3 held that the *Racial Discrimination Act* was inconsistent with, and rendered inoperative, State legislation which would have excluded native title entirely. That decision is the key to the present situation. Then *Wik* was decided by another 4 to 3 majority. This is not to say that each majority was necessarily wrong, but it does show that there has been such a diversity of judicial opinion that Parliament should not hesitate to interfere if it thinks that the public interest demands it.

The problems are exacerbated by the *Native Title Act* . Dr Forbes has clearly shown that the *Native Title Act* leads to inconvenient and unjust results, and I hope that his useful suggestions for amendment are read by our legislators.

Finally, Mr Roger Sandall went to the heart of the problem. The claim made by some that the Aboriginal people should have the best of two irreconcilable worlds, and should have the financial benefits which a developed society can provide, and yet enjoy special privileges because they are Aboriginal people, lies at the base of the conflict that is arising in our society today. The result, as Mr Sandall has said, has given great rewards to some, but it does nothing to help most of the Aboriginal people.

We are indebted to all of those who have given papers at this conference. I thank you all for your support, and indeed everyone concerned in organising this conference.

Endnotes :

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1 . (1996) 71 ALJR 173.
2 . (1982) 153 CLR 168.
. (1988) 166 CLR 186.

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