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## One People, One Destiny

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Senate Department *Occasional Lectures*  
to commemorate the centenary of the  
National Australasian Convention 1891

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## NOTE

The papers in this edition of *Papers on Parliament* were given in the first half of 1991 in the Senate Department's *Occasional Lecture* series, under the title, *One People, One Destiny*. The lectures, with an exhibition of the same name, commemorated the centenary of the National Australasian Convention of 1891 at which the Australian constitution was first drafted.

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## 'Is It Not Time?'

### The National Australasian Convention of 1891 A milestone on the road to federation

The Rt Hon. Sir Zelman Cowen

On March 2, 1891, the National Australasian Convention met in Sydney, and on April 9 it adopted the draft of a bill to constitute the Commonwealth of Australia. This done, its work was completed. The delegates to the Convention were representatives of the parliaments of the six colonies and there were three representatives from New Zealand. It was a distinguished body; Bernhard Wise of New South Wales, who was a member of the later constitutional convention of 1897-8, and who somehow had been invited to participate in the drafting work done under Sir Samuel Griffith's leadership for the Constitutional Committee on board the Queensland Government yacht *Lucinda* late in March 1891, characterised the 1891 Convention as

beyond all dispute the most august assembly which Australia had ever seen. The majority of its members were men who yielded to none of their compatriots in their fitness to do the work which had to be done. They had all risen to positions of eminence ... by their own merits and force of character ... their number included all the Prime Ministers of Australia and nine others ... who had held the office of Prime Minister in former Governments. They had been elected by all the Parliaments of the Colonies, and therefore, in a constitutional sense, they represented all the people of Australia.<sup>1</sup>

Alfred Deakin of Victoria who played an important part in this, as in earlier and later meetings and conventions leading to federation and who after federation served three times as Prime Minister of the Commonwealth, spoke of it in like terms. More particularly he spoke about the inner character of the Convention of 1891.

Critics who look to the record of our debates ... will not derive ... a full view of all the circumstances which have been operating upon the minds of hon. members. There is much unstated in that record, because the delegates to this Convention have practically lived together for six weeks in private as well as in public intercourse, and from the natural action and reaction of mind upon mind have been gradually shaping their thoughts upon this great question. The bill which we present is the result of a far more intricate, intellectual process than is exhibited in our debates; unless the atmosphere in which we have lived as well as worked is taken into consideration, the measure as it stands will not be fully understood.<sup>2</sup>

This spirit was not effectively communicated to the colonial legislatures and to the people of Australia. The feelings which animated Deakin were not shared by all of his political contemporaries. So it was that, as Deakin recounted in *The Federal Story*, the 1891 Convention marked only another step in the development of the federal

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<sup>1</sup> Bernhard Ringrose Wise, *The Making of the Australian Commonwealth 1889-1900*, Longmans, Green, and Co., London, 1913, p 116.

<sup>2</sup> *Official Report of the National Australasian Convention and Debates*, Sydney, 1891, reprint Legal Books Pty Ltd, Sydney, 1986, p 914.

principle.<sup>3</sup> It was not until January 1, 1901, almost ten years later, that the Commonwealth of Australia came into being and then with a constitution which was the product of the deliberations and decisions of a later convention which met successively in Adelaide, Sydney and Melbourne in 1897 and 1898. Its draft was ultimately approved by referenda in the six colonies, and, with some amendments, was enacted by the United Kingdom Parliament, whose legislative sovereignty was undisputed, in 1900. When the later Convention addressed its tasks in Adelaide in 1897, it was formally agreed to proceed *de novo*, and not to take the 1891 bill as a starting text. There is no doubt however that, in practical terms, it was taken by the great majority of the members of the later convention as the basic draft, and a reading of the two constitutional texts clearly demonstrates this, although there were, of course, some significant differences and changes.

In its shape and style the 1891 bill owed much to the great skills and authority of one man, Sir Samuel Griffith, then Premier of Queensland. Deakin speaks of 'the simple and sometimes stately language of Sir Samuel Griffith's bill'. By 1893 Griffith had become Chief Justice of Queensland and had withdrawn from active political life and participation. While, therefore, he was not a member of the later and decisive federal Convention, he exercised influence by writings and speech, and by the private expression and communication of views. It was said that his support for the bill influenced the outcome of the referendum in Queensland which approved the bill. It was said, as well, that his influence and his drafting were influential in determining the final provision relating to the Privy Council appeal, an activity which did not please Deakin, Barton and their colleagues who were members of the delegation negotiating the passage of the bill through the United Kingdom Parliament, and locked in dispute with Joseph Chamberlain on this point.

In the course of the present decade we shall mark the centenary of the events of the 1890s which are milestones on the road to federation, and this, the 1891 Convention, is one of them. These commemorations will culminate in the celebration of one hundred years of federation. January 1, 1901 was the birthday of the Commonwealth; the birthday of a whole people, as Deakin proudly and rightly claimed. This has always seemed to me to be a most significant national occasion. I am puzzled by the judgment that there is little 'colour' in the events which produced the constitution. It is, perhaps, too much to look for popular appeal in the text of a legislative instrument, and we have never spoken of our constitutional instrument in terms comparable with those which Thomas Jefferson used in respect of the United States Constitution. He spoke of that instrument as unquestionably the wisest ever yet presented to men, as classic a piece of negotiation as it was possible to imagine. I do not think that there is profit in extended discussion of this matter. I believe however, that we have reason for pride in the skilled handiwork and historic contribution of Griffith and his colleagues in 1891 and in the subsequent work of Barton and Deakin and those who worked with them in 1897-8.

In the course of the Victorian election of 1883, the 'stalwart federalist' James Service posed the issue which I have taken as the title of this lecture. 'Is it not time' he asked 'that we should merge the name of Victorians and of New South Welshmen and South Australians into Australians?' The appropriateness of some form of association between the colonies had been raised in mid-century by imperial authorities who saw intercolonial tariff barriers as undesirable, but at that time there was little interest in such proposals. For the most part, the individual colonies were preoccupied with domestic concerns and, with constitutional progress towards internal self-

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3 Alfred Deakin, *The Federal Story*, ed. J.A. La Nauze, Melbourne University Press, 1963.

government. Sir Robert Garran, whose long life began in Sydney in 1867, wrote in his autobiography *Prosper the Commonwealth*<sup>4</sup> that it is hard for Australians who did not know the pre-federation days to realise how separate were the six colonies. *Australia* was a geographical expression with no political entity behind it. There was little intercolonial travel and that mainly by sea. Colonies set up customs houses against one another and they grew up as a set of stand-offish neighbours. The case of Western Australia was extreme. As a New Zealand delegate to the Melbourne Conference of 1890 put it, the 1200 miles of sea which separated New Zealand from eastern Australia provided 1200 impediments to the inclusion of his country into any project of Australian federation, and Western Australia was farther away still from the major areas of Australian population and settlement in the east. It was difficult to include under a meaningful common defence umbrella. It had its own distinctive problems largely derived from the tyranny of distance.

Be it so, the 1880s saw moves towards some closer association on the part of the colonies. Sir Henry Parkes of New South Wales, at an intercolonial conference in 1880, called for a Federal Council as a prelude to a federal organisation. In 1882 the Victorian Assembly discussed the desirability of calling a conference to explore the possibilities of federal union.

There were external security concerns and anxieties regarding the intentions and activities of European powers in adjacent areas. Action by the Queensland government to forestall German intervention by raising the flag in East New Guinea in 1883 was disallowed by the British government and there were concerns about French activities in the New Hebrides and New Caledonia. Deakin recalled his own exchanges over these matters with the Marquess of Salisbury at the Colonial Conference in London in 1887. Naval defence was a matter of active concern and negotiation; and the report by a British military expert, Major-General Bevan Edwards, late in 1889, which recommended federation of the colonial military forces was the catalyst for action by Sir Henry Parkes calling for federation of the Australian colonies. Earlier, in 1883, the completion of the rail link between Sydney and Melbourne had prompted a further call by James Service, 'We want federation and we want it now', and for a conference which, in the event, met in Sydney. Deakin's distinguished biographer, John La Nauze, describes this as an event 'with which the history of the federal movement as distinct from the federal idea really began.' Out of that meeting emerged the Federal Council of Australasia, backed by imperial legislation, but defective in that it had limited legislative, no executive, and no power to raise revenue. Garran called it a 'mouse'; it suffered from the non-participation of New South Wales, and that colony's leading political figure, Parkes, who took no part in the conference of 1883, regarded it as ineffective, as a 'rickety body' and as an impediment to real federation. In mid-1889 Parkes, having resolved to commit himself to the cause of federation, proposed to Gillies, the Premier of Victoria, that appropriate common action should be taken. The Edwards report fitted this design very well, and, as Deakin with some irony relates in *The Federal Story*, Parkes 'thought it advisable to make his entry upon the Federal stage'.<sup>5</sup> Bernhard Wise writes of the historic speech, keyed to the Edwards' report, which Parkes delivered at Tenterfield some two weeks after the publication of that report.

There, on October 24, 1889, Sir Henry Parkes made the great speech, which, although its significance was not appreciated fully at the time, marks in decisive fashion the beginning of a new era in Australian politics. Others

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4 R.R. Garran, *Prosper the Commonwealth*, Angus & Robertson, Sydney, 1958.

5 Deakin, *op. cit.*, p 26.

before him had advocated Federation; but he was the first who made his appeal directly to the patriotism of the people; so that, from this day forward, the desire for Union, which had floated before men's minds as a vague aspiration for many years, took definite shape.<sup>6</sup>

Parkes' political colleagues in Victoria and elsewhere were more cautious, and perhaps doubtful of his motives. They suggested that it might be a better course for New South Wales to join the Federal Council and so to strengthen the existing body which was debilitated by New South Wales' abstention from membership. Ultimately Parkes' call for action prevailed over the suspicions of his colleagues, and a conference, representative of *governments*, met in Melbourne early in 1890. It was introduced by two historic speeches at the opening banquet, in one of which Parkes made the historic utterance, 'The crimson thread of kinship runs through us all'.<sup>7</sup> The other was by James Service, now at the end of his career, who also coined a word image which has its historic place in our federal history.

Probably the first question, and the most difficult which the conference will have to decide, is that referring to a common tariff, or the question of a common fiscal policy ... I have no hesitation whatever in saying, that this is to me the lion in the way; and I go further and say, that the conference must either kill the lion or the lion will kill it ... I think a national constitution for Australasia, without providing for a uniform fiscal policy, would be a downright absurdity.<sup>8</sup>

So the image of the lion in the path was introduced into our federal history.

At Melbourne, Parkes was subject to some criticism for his attitude to the Federal Council, but his central resolution for an early union 'under one legislative and executive government on principles just to the several colonies' was adopted. Deakin moved the motions which called for steps to be taken to induce the colonial legislatures to appoint delegates to a National Australasian Convention to consider and to report on an adequate scheme for a federal constitution.

So it was that the stage was set for the meeting of the convention of 1891. It was fitting that Parkes should be designated as President of the Convention not only because he was the host Premier, but also, and particularly because his had been the great achievement which had brought it into existence. There can be no doubt of the judgment of Parkes' biographer, Professor Martin, that he had been the major and dominating figure at the Melbourne meeting. As Sir Robert Garran, who as a 'very junior barrister in waiting' observing the proceedings of the 1891 meeting, wrote in *Prosper the Commonwealth* more than sixty years later 'it was Parkes's successful leadership of the movement up to that stage (1891) that gave him the title of the 'Father of Federation'. But he was not destined to live to lead his people into the Promised Land.'<sup>9</sup> Parkes was born in 1815; he was well into his eighth decade when he called for and attended the Melbourne Conference of 1890 and the Sydney Convention of 1891. He failed however to carry the project forward, after giving up on the effort to have the 1891 draft constitution bill considered by the New South Wales Parliament, and fell from office late in the year, though he remained in

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6 Wise, *op. cit.*, p 4.

7 *Argus*, 7 February 1890.

8 *Argus*, 7 February 1890.

9 Garran, *op. cit.*, p 91.



Parliament as a private member until 1894. In 1896 he made a bid for re-election, but in that year he died.

To go back to March 1891, Parkes, having conducted preliminary private meetings to shape the business and particularly the form of the resolutions which provided the basis for the opening debates of the Sydney Convention, introduced them. As Deakin recorded in *The Federal Story*,

In the Convention his contributions were limited to consideration of a few first principles such as many there might have uttered and were certainly surpassed by several of the best speeches. But in Manner he remained from first to last the Chief and leader of the whole Convention.<sup>10</sup>

Deakin, of whom it was justly said that he was always an uninhibited chronicler of his contemporaries' foibles, spread himself in his portrait of Sir Henry, and these pages of *The Federal Story* are highly recommended reading. Parkes did not like competitors. The descriptions of Sir George Grey of New Zealand and Sir Henry competing with and reacting to one another are specially pleasing.

At the end, Deakin's judgement was that Parkes was

cast in the mould of a great man and though he suffered from numerous pettinesses, spites, and failings he was in himself a full-blooded, large-brained, self-educated Titan whose natural field was found in Parliament and whose resources of character and intellect enabled him in his later years to overshadow all his contemporaries, to exercise an immense influence in his own colony and achieve a great reputation outside it.<sup>11</sup>

To this Deakin adds that it was always a problem with Parkes as with Disraeli (and Parkes would not have been averse to the eminent comparison) where the 'actor, posture maker, and would-be sphinx ended or where the actual man underneath began'.

If Parkes was not equipped for constitution-making, he made one important contribution to the instrument; it is he who was responsible for the choice of Commonwealth as the title of the new entity. There was recent acquaintance with the term; James Bryce's *American Commonwealth*<sup>12</sup> had been published in 1888 and must have been known to at least some members of the Convention. Deakin suggests that Parkes' familiarity with English seventeenth century history commended the title to him. To others, this history and the republican connotations of 'Commonwealth' made it unattractive. So John Forrest of Western Australia opposed the proposal on the ground that it referred to a period of English history 'which was not very glorious'. He preferred 'the Federated States of Australia'. In committee, Parkes' original proposal for 'Commonwealth' was rejected in favour of some such title as that suggested by Forrest, and Deakin relates that while he at first was not a supporter of Commonwealth, he changed his mind, seeing the 'rival epithets as barbarous, clumsy and unepithetous'.<sup>13</sup> An energetic canvass carried the day for Parkes' proposal by the narrowest of margins, and the draft which was finally approved on 9 April was

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<sup>10</sup> Deakin, *op. cit.*, p 52.

<sup>11</sup> *Ibid*, p 28.

<sup>12</sup> James Bryce, *The American Commonwealth*, London, 1888.

<sup>13</sup> Deakin, *op. cit.*, p 49.

designated as a Draft Bill to Constitute the Commonwealth of Australia.<sup>14</sup> And so it ultimately survived and prevailed in the 1898 text and in the Constitution as finally enacted.

The course that the Convention took may be briefly related. It fell to Parkes, elected as President, to introduce a series of resolutions on which extended debate followed. Griffith followed Parkes, and from this time on he assumed a leadership role in both plenary session and in committee. In mid-March, three committees were designated and appointed: the Committee on Constitutional Machinery and the Distribution of Functions and Powers; the Committee on Provisions relating to Finance, Taxation, and Trade Regulations; and the Committee on the Establishment of a Federal Judiciary; its Powers and its Functions, the latter two reporting to the Committee on Constitutional Machinery and the Distribution of Functions and Powers. Within the Constitutional Committee there was a sub-committee concerned principally with drafting, which comprised Samuel Walker Griffith, Edmund Barton, Andrew Inglis Clark, Charles Cameron Kingston and for some time, as an invited non-member of the Convention, Bernhard Wise. Some drafting work was carried out on board the Queensland government yacht, *Lucinda*, at times Griffith's base for work and for entertainment. Wise, writing more than twenty years after the work was done, pointed to one distraction arising from the use of the *Lucinda* for these purposes. '... the occasional missing of the happiest turn of phrase by these distinguished draftsmen may have been due to the sea-sickness, which followed the surreptitious heading of the steamer out to sea, and the rise of a wind before she could return to harbour!'<sup>15</sup> At the end of May, the Committee on Constitutional Machinery and the Distribution of Functions and Powers reported to the full Convention and debate was concluded with the adoption of the Constitution on April 9. The whole work was directed with conspicuous skill and great commitment by Griffith whose association with the federal movement had gone back to the Colonial Conference of 1883, and who was, at the time of the 1891 Convention, Chairman of the Federal Council (which covering clause 6 of the draft constitution bill proposed for extinction). Deakin, in company with others, spoke generously and in high praise of Griffith's work. 'In every clause the measure bore the stamp of Sir Samuel Griffith's patient and untiring handiwork, his terse clear style and force of expression. There are few even in the mother country or the United States who could have accomplished such a piece of draftsmanship with the same finish at the same time.' This is just, and it is clear that over the years Griffith had grown in stature and conviction. 'At its close Griffith's influence had become supreme ... No other representative rivalled him.'<sup>16</sup> There was other special expertise which contributed to the work. Andrew Inglis Clark brought to the Convention and to the drafting sub-committee, a special knowledge and an acute observer's experience of the United States and its constitution. Edmund Barton began to acquire the experience which led him to a notable leadership role in the subsequent course of the federal movement, both in the popular movement and in the Convention of 1897-8 and what followed. At the end,<sup>17</sup> Griffith proposed to the Convention the next step: that provision be made by the parliaments of the several colonies for submitting for the approval of the people of the colonies respectively the Constitution as framed by this Convention. This achieved, there was to be an approach to the United Kingdom government for implementing action.

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14 National Australasian Convention, *Official Record of the Proceedings and Debates*, Sydney, 1891, p clxvii.

15 Wise, *op. cit.*, p 126.

16 Deakin, *op. cit.*, p 52.

17 National Australasian Convention, *Official Record of the Proceedings and Debates*, Sydney, 1891, p cxxii.

New Zealand was represented at the Convention, as in the Melbourne Conference of 1890, and in earlier colonial conferences. Deakin gave some account of the role of its representatives and notably the formidable octogenarian, Sir George Grey. Although he, and his colleagues to a lesser extent, intervened in debate in the Convention, it was quickly made clear that New Zealand, for whose membership full provision was made in the draft constitution, would not at this time be part of federal Australia. As Deakin said, she looked forward to an independent policy and separate individuality in the southern seas. In the final negotiations, leading to the enactment of the Constitution Act in 1900, New Zealand had some part and suggested some amendments, but there was no serious intention of joining the federation. A New Zealand Royal Commission in 1901 firmly concluded that 'merely for the doubtful prospect of further trade with the Commonwealth of Australia, or for any advantage which might reasonably be expected to be derived ... from becoming a State ... New Zealand should not sacrifice her independence as a separate colony, but that she should maintain it under the political Constitution she at present enjoys.'<sup>18</sup>

What then was the shape of the Constitution which the Convention of 1891 adopted? The resolutions introduced by Parkes set out the fundamental principles of a federal union - intercolonial free trade, a common tariff, federal defence and the preservation of provincial rights in provincial matters. As machinery for giving effect to such principles, a complete national government equipped with legislative, executive and judicial arms, a legislature of two houses (one representing the nation, the other the states), and the British system of responsible government was provided for.

The debates exposed divisions between small and large state interests, and the small state pressure was for a strong Senate. The outcome was a Senate with equal representation from all States. Senators were to be directly chosen by the State *parliaments*, the proposal, which was lost in 1891 and was adopted in the later constitution of 1897-8, substituted direct popular election for the Senate. The debate on the powers of the two houses was vigorous; what emerged was acceptance of co-equal powers and authority save that appropriation and taxation bills must originate in the lower house; in the Senate they could not be amended but could be rejected. Drawing on South Australian experience, it was agreed that the Senate might return bills 'suggesting' amendments. This structure, strongly debated, and with other provisions relating to such matters as 'tacking' yielded an acceptable compromise which affirmed equality of the two houses while preserving the power of the purse in the lower, popular house.

The issues of responsible government were faced for the first time. All six colonies had achieved this status, Western Australia as recently as 1890. There was a novel question of adapting responsible government to a federal structure with two houses possessed, in the main, of co-ordinate powers. Clark, an admirer of the American system, would have preferred that system's separation of the executive and legislative branches, but his view did not command support. Hackett of Western Australia doubted if it was possible to combine responsible government with a federal system. In a famous statement he forecast that 'either responsible government will kill federation or federation will kill responsible government.' The Convention adopted Griffith's pragmatic view that in this context it was best to allow things to work themselves out. Without making any elaborate written statement about responsible government it should be provided that Ministers *might*, not must, be members of either House of Parliament. The final outcome in 1901 was, again without any

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18 *Report of the Royal Commission on Federation, New Zealand, 1901, p xxiv.*

attempt at an elaboration of the principles of responsible government, to provide that Ministers *must* be, or become, members of either House.

James Service had emphasised in 1890 the need for a common fiscal policy, the task of achieving this was the 'lion in the path'. Parkes set forth in his resolutions the propositions that a common tariff and intercolonial free trade were fundamental principles of a federal union. In giving substance to these propositions the Convention did not appear to have the sense of confronting any formidable lions. So far as intercolonial - interstate - free trade was concerned, it agreed to a formulation that trade and commerce throughout the Commonwealth should be 'absolutely free'. Indeed the words 'absolutely free' appeared in Parkes' proposals from the earliest days of the Convention, and John La Nauze in tracing the history of this 'little bit of layman's language' points out that the words 'absolutely free' were fully and, at that time, without question accepted as appropriate by Griffith and other lawyer members of the Convention.<sup>19</sup> It was only when in the Convention of 1897-8 Isaac Isaacs, who made his way into Australian politics after the 1891 Convention had taken place, warned that the words 'absolutely free' were over-large for the intended purposes, that Griffith began to have doubts. The words survived, and they have given rise to a huge volume of constitutional litigation.

In terms of taxing power, it was accepted that the power to lay duties of customs and excise, then the main sources of governmental revenue, must lie with the federal parliament. There were some concerns about the preservation of state interests in protective tariffs or in free trade, but as Garran says 'the foregone conclusion was that both sides had to "trust the Federal Parliament"',<sup>20</sup> and this was a notable feature of the Convention's approach, affected, no doubt, by confidence in the leadership. There was debate over the formula for the return of surplus revenue to the states; whether it should be on a population or contribution formula, and the latter prevailed.

So far as the judicature branch was concerned, there was provision for the establishment of a 'Supreme Court' of Australia, with a general appellate jurisdiction from federal and state courts. It ultimately emerged as the High Court of Australia, and its first powerful Chief Justice was Griffith himself, from 1903-1919. What was in contention in 1891, as later in 1897-8, and right up to the enactment of the Commonwealth of Australia Constitution Act in 1900, was the ambit and extent of the Privy Council appeal. As already recounted, Griffith from a base outside politics had an influential, if not a popular hand in settling the form of that in 1900.

The formula for amendment differed from that finally adopted, most significantly in providing for the election of conventions elected in the states by the voters to which proposals should be referred. The convention idea was replaced by the referendum in the convention of 1897-8, and in the constitution itself.

The delegates returned to their homes, as Deakin said, full of hope and confidence in the early establishment of an Australian union. Griffith proposed steps to achieve this, but as Garran put it, the 1891 Bill had been brought into the world with no real provision for the next step. It was vaguely contemplated that it should be discussed by the various parliaments, perhaps submitted to a second convention for final touches, and then sent to the British government to be passed into law, but no such programme was specified in advance. The lesson was learned after the 1891 initiative

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19 J.A. La Nauze, 'A Little Bit of Lawyers' Language: The History of "Absolutely Free", 1890-1900' in A.W. Martin, (ed.), *Essays in Australian Federation*, Melbourne University Press, 1969.

20 Garran, *op. cit.*, p 98.

had failed. The later Convention was elected in accordance with the 'Corowa' plan of 1893 which also detailed the steps which were to follow the adoption of a draft Constitution by the Convention.

The end of the story of the 1891 Convention is rather dismal. Victoria took action, and both houses debated and amended the bill. The Tasmanian legislature also considered it, but action lapsed with the prorogation of Parliament. Queensland, South Australia and Western Australia all preferred to wait on New South Wales to give a lead. There, indeed, Parkes moved with a set of procedural proposals, to be met by forestalling and critical action by George Reid. While Reid's manoeuvre failed, Parkes appears to have been thrown out of stride, and, in what Barton later called an 'error of judgement', postponed action on the constitutional bill. Shortly thereafter Parliament was dissolved, and while Parkes retained office after the ensuing election, the balance of power was held by the new Labour Party whose attention was focussed upon a variety of more immediate social and political issues, and viewed federal proposals coolly. Parkes fell late in 1891 when the Labour Party withdrew support. Age was telling on him, and it was of this time that the story is told that Parkes handed over the reins of the federal movement to Edmund Barton - 'You are young and strong - you must take up Federation.' Be it so or not, there were other heavy preoccupations in the Australian colonies. In New South Wales, federation, in Garran's words, went into 'the discard'. In Sir John Robertson's jubilant phrase, it was 'as dead as Julius Caesar'. The reality was that while there had been a great sympathetic surge between 1889 and the completion of the Convention's work in April 1891, the majority of people in the colonies were well satisfied to go on as they had done in the past, and had to be educated to accept and adopt the federal idea.

'Left for dead by the politicians,' wrote Garran in *Prosper the Commonwealth* 'federation was brought to life by the people'.<sup>21</sup> That story takes us beyond our present concerns, though inevitably in this narration, I have referred to later events and decisions. Seventeen members of the Convention of 1891 had places in the later Convention, and they carried the earlier experience into its proceedings.

With this, my story is told, but I add a personal word. I welcome the opportunity to recount to fellow Australians this chapter in our national history. It is a history which I learned surprisingly late. As a student in history and law in the University of Melbourne, I was taught very little about Australian history, certainly about Australian political history and less still of the history of federating and federal Australia. I could have recounted the chronology of the Kings and Queens of England with comfort and certainty. Of their representatives in the Commonwealth of Australia I could have said nothing at all, and of the perhaps more public figures, the Australian political leaders, virtually nothing. It said something about the way in which we valued ourselves and our history, and it was in urgent need of remedy. Things are better now.

There are valuable records. For those who have the wish to go to the sources, there are the records of the proceedings of the Conventions and meetings of the 1890s. There is that remarkable compendium by two men, both of whom had their parts to play - Quick and Garran's *Annotated Constitution of the Commonwealth of Australia*. Sir Robert Garran at the end of a very long life given over to distinguished service to the Commonwealth, wrote an interesting short account of the events we have been following in his autobiography, *Prosper the Commonwealth*. The talented Bernhard Wise, who was among the sea-sick on the *Lucinda*, wrote a lively account, *The*

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21 Garran, *op. cit.*, p 101.

*Making of the Australian Commonwealth*, which he described as 'the record by an eye witness of the making of the Commonwealth during the critical period from 1889 to 1990', which appeared a little more than twenty years after the events of the first Convention. There is that very special record, *The Federal Story* which is Deakin's own account of these and following events, and it happily became available, almost fifty years ago, in 1944.

Then, since the end of the war, we have come out of the shadows with excellent general and specialist histories of Australia, and some outstanding biographical studies of the *dramatis personae* of our story. I have had some of these works at hand in providing this short, and hopefully fair, account of the Convention of 1891. I hope as we move to the commemoration of Federation Day, that there will be successors who will narrate for their fellow Australians here in Canberra and elsewhere in Australia the story of these great events.

## Samuel Griffith: The Great Provincial

Professor Geoffrey Bolton

In dealing with the contribution of Sir Samuel Griffith to the framing of the Federal Constitution at the 1891 National Australasian Convention whose centenary we are now celebrating I can make no claim to originality. Griffith has already been the subject of Roger Joyce's magisterial biography,<sup>1</sup> as well as in two postgraduate theses which have stood the test of time, one by Bishop John Vockler and one by Dr Ross Johnston.<sup>2</sup> Nevertheless, Griffith was a complex and many-sided character, subtle and guarded in his lifetime, elusive for his subsequent biographers. We may be too readily misled by the portraits of his mature years, in which the face is framed in the trappings of high judicial office and the mouth shrouded by a generous white beard. He may have seemed cold and even dull; but he wasn't.

Of course the impression of sobriety is borne out by the major achievements of his public career. He was above all a man of words, whose strength lay in the drafting and interpretation of legalism, so that on his one excursion into the creative arts - his translation of Dante, often mentioned, seldom read - the poetry was somewhat blighted by the restrained hand of the legal draftsman. He can be seen as a man of compromise, who stopped the traffic in Pacific Islanders only to reinstate it under the pressure of economic necessity, and who wrote in praise of the infant labour movement only to strike it down at the first major outbreak of industrial militancy. But there were passions in the man. There was the fascination with Welsh romanticism which led him to christen his eldest son 'Llewellyn' after the 13th century patriot Llewellyn ap Gruffyd with whom Sir Samuel yearned to establish kinship. There was the reluctant sympathy with the outlaw which broke through his stern insistence on justice, so that when he sentenced the Kenniff brothers to death his voice broke, and a court official noted that 'he shook so that the rug covering his knees failed to hide the tremor'.<sup>3</sup> And there was surprisingly often a robust conviviality. I regret that Roger Joyce's biography does not include the story of Griffith's visit to Burketown at a period when he was none too popular in North Queensland. When the usual complimentary dinner was given the locals conspired to drink their distinguished visitor under the table. At daybreak the following morning only two figures remained upright. One was Griffith. The other was a squatter whom Griffith escorted to the street outside, and then thoughtfully watched him as he rode away on a camel which was not his own in a direction which was not the direction of his property. It is as well to remember this side of Griffith as well as the man whom the Sydney *Daily Telegraph* described in 1891 as 'a slave to public duty'<sup>4</sup> and whom John La Nauze, in his fine study *The Making of the Australian Constitution* characterises as 'behaving like many a good teacher' at the 1891 convention.<sup>5</sup>

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<sup>1</sup> R.B. Joyce, *Samuel Walker Griffith*, University of Queensland Press, St Lucia 1984.

<sup>2</sup> J.C. Vockler, 'Sir Samuel Walker Griffith' (BA Hons., University of Queensland, 1953); R. Johnston, 'The role of the legal profession in Queensland in the federation movement, 1890-1900' (MA Qual., University of Queensland, 1963).

<sup>3</sup> Brisbane *Courier*, 8 Aug. 1931, quoted Joyce, *op. cit.*, p 398.

<sup>4</sup> *Daily Telegraph*, 8 April 1891.

<sup>5</sup> J.A. La Nauze, *The Making of the Australian Constitution*, Melbourne University Press, 1972, p 39.

All authorities agree that Griffith was the pivotal figure at the National Australasian Convention of 1891, though in recent years historians have come to differ about the lasting value of his achievement. Alfred Deakin, the chronicler of the federal movement as well as a leading participant, ungrudgingly gave Griffith credit for devising the forms of words which enabled the powerful colonies of Victoria and New South Wales to agree with the outer colonies of Queensland, South Australia, Tasmania and Western Australia on the role of the Senate as against the House of Representatives. Without that compromise, Deakin argued, the federal movement might have fallen at the first hurdle.<sup>6</sup> Later historians, including La Nauze, have tended to echo him. But the veteran political scientist L.F. Crisp, writing in the late 1970s in the aftermath of the dismissal of the Whitlam government, took a much more critical look at what he called 'the narrowly conservative and provincialist federalism of the Griffith-Barton-Turner-Clark-Baker-Forrest school, which urged their constitutional confection on the Australian people on a "now-or-never", "take-it-or-leave it" note at the end of the 1890s'.<sup>7</sup> Crisp suggests that this 'narrowly, conservative and provincialist federalism' triumphed because Deakin and the Victorians were prepared to pay any price for federation as the way out of the financial morass into which the Victorian economy fell in the early 1890s. They rushed into federation where cooler heads of a more genuinely democratic temper, such as George Reid and H.B. Higgins, would have prolonged the negotiations until a more equitable system - i.e. one which gave greatest weight to the greatest centres of population, such as Melbourne and Sydney - could be achieved. Undoubtedly Crisp was influenced by the role which Griffith and the others played in giving the states' House, the Senate, that power to reject or to delay the passage of finance bills which proved so troublesome to the Whitlam government and at length provoked the controversial intervention of Sir John Kerr. Does this justify his epithets: narrow, conservative, provincialist?

Narrow and conservative are not adjectives easily applied to Griffith; certainly not the Griffith of 1891, however much his sympathies may have hardened in later years. Provincialist he undoubtedly was. In so many aspects of his life he began as an outsider, a marginal man distanced from the centres of prestige and authority. It was not just that he was a Queenslander in a continent where wealth and population were concentrated in Victoria and New South Wales. He was Welsh, not English; Congregationalist, not Anglican or Catholic; a colonial, not a metropolitan Briton; and even in the colonial context, he was a product of Maitland and Brisbane, not the cities of Melbourne and Sydney. He could not have been anything else but a provincial. The impressive thing about Griffith is that he grew into a great provincial, ready and able to tackle the challenge of knitting together the colonial provincialisms of his time into the makings of an Australian nation.

We should look a little more closely at Griffith's provincial origins. The significance of his Welsh ancestry lies not so much in his upbringing as in what Wales came to symbolise for him by his middle years when he was engaged in the federal movement. Roger Joyce has pointed out that in his earlier years Griffith was not entirely at home in his Welsh background, and did not even visit Wales during his visit to Britain in 1881. But I think we must make something of the choice of the name 'Merthyr' for the fine new house which he built for his family in 1880. Merthyr Tydfil was, of course, his birthplace, but it was decidedly short on glamour. The ninth edition of the *Encyclopaedia Britannica* published in the 1880s describes Merthyr Tydfil as 'situated in a bleak and hilly region on the river Taff' and adds: 'The town

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6 Alfred Deakin, *The Federal Story*, Melbourne University Press, 1963, p 52.

7 L.F. Crisp, (ed. John Hart), *Federation Fathers*, Melbourne University Press, 1990, p 121.



which consists principally of the homes of workers, is for the most part meanly and irregularly built, and at one time, on account of its defective sanitary arrangements, was frequently subject to epidemics of great severity'.<sup>8</sup> For a rising young lawyer to name his home 'Merthyr' was like calling it 'Wigan' or 'Shoreditch', a gesture of defiance to the conventional. Perhaps Griffith calculated that few Queenslanders had ever visited Merthyr Tydfil. But it is not surprising that by 1887 he was enough of a professional Welshman to be serenaded with 'Men of Harlech' on his departure from Australia, nor that he enjoyed the civic banquets proffered him at Merthyr Tydfil and Cardiff during that visit.<sup>9</sup>

One could not lay claim to Welsh connections without identifying with the successful struggle of the Welsh to maintain their culture, if not their political independence, against the encroaching English; Griffith's loyalties lay with the small battalions against the big. Joyce also argues that Griffith's father was conscious of social hierarchies and critical of the establishment in Britain. He was certainly aware of the importance of social recognition for Congregationalism in Queensland, and this must have had its effect on Samuel. The Congregationalists were one of the smaller Protestant faiths in Queensland - even in 1891 there were only 8,571 of them, barely 2 per cent of the entire population - and it must have been a continuing problem to ensure that their voice was adequately heard. Like many a successful professional man before and since, Griffith eventually drifted into Anglican churchgoing, but his early upbringing would have left him with a knowledge of what it was to belong to a minority. However his successful professional and political career also taught him that it was possible for an outsider to enter the citadels of power, to overcome rebuffs and opposition, and through sheer force of intellect and diligence to exercise effective leadership. He was a confident provincial who would not be intimidated by others who seemed gifted with a more favourable start.

This confidence was immediately apparent at his first encounter with the federal movement in 1883. It was his rival McIlwraith whose annexation of eastern New Guinea in April 1883 stimulated the Victorian premier, James Service, to urge an intercolonial conference to consider federation, and Griffith's early public reactions were cool; but, having won the Queensland elections and become premier early in November, Griffith went almost immediately to the Convention in Sydney, and there assumed a leading role.<sup>10</sup> Neither he nor the other colonial premiers shared Service's enthusiasm for an immediate federation, but it was Griffith's confident draftsmanship which produced the interim proposal for a federal council. Its powers were modest; they included marine defence, Australasian relations with the Pacific islands, the exclusion of criminals (mostly escapees from the French penal colony of New Caledonia) and the regulation of quarantine. As New South Wales and New Zealand stayed out of the Federal Council, its impact was limited, and it eventually faded into oblivion in 1899 with the imminent approach of Federation proper. Yet it was an important step in Griffith's career, since it established the new and largely unknown premier of Queensland as an uncommonly skilful wordsmith whose skills could produce a workable consensus acceptable to political colleagues of greater seniority and experience. Without this successful debut in 1883 it would have been much harder for Griffith to gain acceptance in the wider Australian arena a few years later when the impulse towards federation began to quicken.

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8 *Encyclopaedia Britannica* (9th edition) vol XVI, p 41.

9 Joyce, *op. cit.*, p 139.

10 Joyce, pp 89-90; G. Serle, 'The Victorian Government's Campaign for Federation, 1883-89' in A.W. Martin, (ed.), *Essays in Australian Federation*, Melbourne University Press, 1969, pp 1-11.

Instead, he was seen as indispensable. This emerged towards the end of 1889 when Sir Henry Parkes, capitalising on the defence report of Major-General Bevan Edwards, uttered his Tenterfield speech and called for a national convention on federation. Griffith at that time was in opposition, but Parkes nevertheless wrote to him early in December soliciting his agreement that it was 'time to start moving'<sup>11</sup> on the question of a greater union. By the beginning of 1890 it had been agreed that delegates from each of the colonies represented in the Federal Council would meet Parkes in Melbourne in February 1890. Queensland's two nominees were Griffith himself and his old sparring partner John Murtagh Macrossan, now colonial secretary. It was typical of those easy-going times that no specific instructions were given to either delegate. When the conference met in Melbourne it was inevitably Parkes who opened the proceedings by moving for the 'union of the colonies, under one legislative and executive Government, on principles just to the several Colonies'.<sup>12</sup> But it was by no means inevitable that the following speech should be given by Griffith, who was no more than Leader of the Opposition from one of the smaller colonies, and it would be interesting to know how this was decided. All commentators agree that Griffith performed the essential task of bringing Parkes's splendid but cloudy generalisations down to earth and identifying the main issues which would confront a federal convention. He argued that, although the colonies had evolved through self-government almost into sovereign states, it would be necessary for them to surrender certain rights and powers in the interests of them all: defence, external relations, trade and commerce, immigration, copyright and patents but not necessarily fiscal policy. Where most delegates and most subsequent historians have seen the need for an Australian common market as a major impetus towards federation, Griffith was relatively unworried on this score. A federation without agreement on tariff policy would survive until the absurdity of tariff barriers became overwhelmingly evident. Of greater importance was the preservation of state rights: 'It is not intended to transfer to the Executive Government anything which could be as well done by the separate governments of the colonies'. Griffith thus adroitly ranged himself in the middle ground between stronger advocates of states' rights such as Playford of South Australia and Inglis Clark of Tasmania and enthusiastic federationists such as Parkes and Macrossan.<sup>13</sup>

In July 1890 the Queensland Legislative Assembly voted to send five of its members as delegates to the National Australasian Convention scheduled for Sydney in March 1891; Macrossan and John Donaldson from the ministry, Griffith and Arthur Rutledge from the Opposition, and Sir Thomas McIlwraith, who had quit the ministry in dudgeon several months previously but had not yet decided to change sides. The Legislative Council nominated Andrew Thynne and Thomas Macdonald-Paterson. A month later Griffith joined with McIlwraith to overthrow the Morehead ministry and become premier for the second time at the head of what became known as the Griffs/Wraith coalition. Almost immediately he was confronted with Macrossan's motion in favour of the separation of North Queensland. So it was that, at the moment when the rest of Australia was turning to federation as a device for unifying a fragmented continent, Griffith in Queensland was compelled to seize on federation as a possible means of preventing his community from splitting apart entirely.

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11 Joyce, *op. cit.*, p 154.

12 Australasian Federation Conference, *Official Record of the Proceedings and Debates*, Melbourne, 1890, reprint Legal Books, Sydney, 1990, pp 33.

13 *Ibid.*, pp 29-41.

Macrossan's motion was defeated, but by a margin too close for comfort - 32 votes to 26.<sup>14</sup> It was known that George Silas Curtis and others at Rockhampton were agitating for the territorial separation of Central Queensland, and the Griffith ministry could not be entirely sure of withstanding the combined pressure of North and Central Queensland. On the other hand Queensland's credit on the London money market would be seriously impaired by the loss of territory and resources which would follow any separation. Griffith's solution was to put forward in November 1890 an ingenious scheme for dividing Queensland into three provincial legislatures which would consist of two houses of parliament exercising a defined list of powers. There would also be a General Assembly for the whole of Queensland comprising a House of Representatives elected on a population basis and a Senate equally representing each of the three provinces. The central government would have power to raise money by any system of taxation other than customs duties and to possess overriding power about the immigration of non-Europeans - which of course was the very issue which had stimulated the sugar industry into demanding separation. As Ross Johnston has commented: 'Griffith therefore sought to provide in embryo a type of federal government intended to work until the federation of the whole of Australia was achieved, whereupon the separate provincial Legislatures would take their place in the Australian federation as full colonial members... This task prepared Griffith for the greater strain of drafting the 1891 Constitution'.<sup>15</sup> The experience must also have reinforced his opposition to over-centralisation. National unity was essential, but it must not be achieved at the expense of regional diversity.

The National Australasian Convention assembled in Sydney on 2 March 1891.<sup>16</sup> Parkes, of course, had to be elected president, but it was no empty compliment that Griffith was chosen vice-president. It was Parkes, however, to whom the honour would fall of moving the opening resolutions defining the principles required 'to establish and secure an enduring foundation for the structure of a Federal Government'. These principles on the whole encapsulated the discussions of the Melbourne conference. There would be a federal parliament comprising a Senate representing each state equally and a House of Representatives; a federal Supreme Court; and an executive comprising the Governor-General and ministers. The Federal Government's powers would include trade and commerce, defence, and the imposition of customs duties. Parkes also wanted to include land policy, but was talked out of it by the other premiers before the resolutions became public. At the same time there was discussion on the wording of the resolution about trade between the federated colonies. According to La Nauze it was Griffith who cut the Gordian knot by saying quite simply that trade and intercourse between the colonies would be 'absolutely free'.<sup>17</sup> At the time it seemed an elegant solution, but herein lay the origins of the endless controversy over Section 92 of the Constitution.

After Parkes had introduced his amended resolutions Griffith, as at Melbourne the previous year, followed immediately to bring the debate down to earth. For him, the lion in the path of federation was not the tariff issue which loomed so large for the Victorians. It was the reconciliation of the rights of the smaller colonies with the superior wealth and population of Victoria and New South Wales. It followed for Griffith that the Senate and the House of Representatives must be completely equal in authority. Of course it was necessary to define their spheres of responsibility so as to

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14 *Queensland Parliamentary Debates*, vol LXII, pp 984-98, 1059-92.

15 Johnston, *op. cit.*, pp 7-8.

16 La Nauze, *op. cit.*, chs 3-5.

17 *Ibid*, p 37; J.A. La Nauze, 'A Little Bit of Lawyers' Language: The History of "Absolutely Free", 1890-1900' in A.W. Martin, *op. cit.* pp 57-93.

minimise the possibility of constitutional clashes, but this could be done by providing that the House of Representatives possessed the sole power of originating taxation and appropriating revenue, but the Senate might exercise a veto. In that way, he thought, friction between the two houses could be accommodated without an entire breakdown of the parliamentary system. Griffith was soon pressed on this point by delegates from Victoria and South Australia who remembered crises when their Legislative Councils had shown a disposition to reject financial measures passed by the lower house. Queensland, of course, had experienced no such disputes. Although the Queensland Legislative Council was completely nominee, consisting mainly of elderly gentlemen of strongly conservative opinions, it had never challenged a budget - perhaps precisely because it was aware of the limitations on its authority as an unelected body. In consequence it was easy for Griffith to under-estimate the passions which had been released in Victoria and South Australia by conflicts between the two houses of parliament.

In insisting on the co-equal powers of the Senate Griffith was not necessarily behaving as a conservative. It was true that the Victorian Legislative Council was a somewhat reactionary body who intervened on financial bills only in order to embarrass governments of mildly radical proclivities; but the Legislative Council was elected on a restricted franchise, whereas the federal Senate would be broadly representative of the entire electorate. Nor was it necessarily the case that the smaller states would be more conservative than Victoria and New South Wales. South Australia in particular had a notable tradition of reformism; and Griffith himself was still young enough to identify with the forces of progress, although in those very weeks while he was away from Queensland at the Convention the militancy of the striking shearers and the provocative intransigence of the pastoral lobby was to force him towards the conservative camp. But Griffith had placed his finger on the cardinal issue which had to be resolved before the federal movement could go forward. Should the will of the House of Representatives prevail on money bills, regardless of the financial consequences for the States? Or should the Senate be given not only the power to reject money bills in extreme cases - to which nearly all present were prepared to consent - but also the power to veto details of the budget? Having presented the question, Griffith himself was not to be drawn far into defining his own position, but others were less reticent. By 16 March the question had become what Deakin described as 'the apple of discord'. James Munro, the millionaire premier of Victoria, was understood to say that if there was no compromise the Convention might as well come to an end. Most of his fellow-Victorians thought likewise; so did Sir Henry Parkes and Thomas Playford of South Australia. On the other hand most of the representatives from the smaller colonies were keen to uphold the Senate's powers, and they had the numbers.

Only one man stood aloof to this controversy. John Murtagh Macrossan was a dying man, and during the Convention he had spoken little, husbanding his strength for one or two decisive interventions. On 13 March he had spoken in opposition to Parkes's view that the existing powers, legislative frameworks, and territorial boundaries of the member-colonies of the Australian Federation should remain unchanged. Understandably Macrossan was concerned that North Queensland might still be free to achieve autonomy in a federated Australia. But on 17 March he achieved a more farsighted and prophetic vein, almost like the dying John of Gaunt. While he believed that the Senate should have power to amend money bills, this was not really an issue of great importance. As Harrison Bryan has written: 'Clearheaded to the end, he brought the Conference back to life after it had bogged down in inter-colonial jealousies, by hammering home again the basic idea which was so clear to him but which still eluded other delegates; that this was a completely new legislation they were erecting and that they must take care not to think of it merely as a

collection of large and small states'.<sup>18</sup> Party politics would dominate: 'The influence of party will remain much the same as it is now, and instead of members of the senate voting, as has been suggested, as states, they will vote as members of parties to which they belong. I think, therefore, that the idea of the larger states being overpowered by the voting of the smaller states might very well be abandoned'.<sup>19</sup> These were the words of a man who believed that the new nation would be 'first Australians, and then Queenslanders and South Australians and Victorians'. It was his last contribution; within a fortnight he was dead in his hotel room. Through his intervention, backed by Griffith and others, the Convention decided that a period of cooling off was required for this contentious issue. Following the time-honoured practice of dead locked meetings, they referred the matter to a committee.

In fact there were three committees. One was on finance, taxation, and trade regulation - McIlwraith of course served on that committee - and another on the establishment of a federal judiciary. But the third and most important was the constitutional committee, to which the other two would report. Unlike the two junior committees, which had only one representative from each delegation, the constitutional committee had two. Griffith and Andrew Thynne represented Queensland. It is noteworthy that Thynne should have been chosen rather than Griffith's old henchman, Arthur Rutledge. Thynne was probably the better choice of the two; he was more decisive and shared Griffith's wish to preserve state rights while setting up a federal body with well defined powers. Almost inevitably Griffith was made chairman of the constitutional committee. As Alfred Deakin put it: 'The real drafting of the Bill will rest with Griffith but it is chiefly compilation work rather than original ...'.<sup>20</sup> He must have overlooked the old bureaucratic adage that it is the man who writes the minutes who determines what happens. It would fall to Griffith to pull together the diverse strands of debate and knit them into a coherent, untangled, and acceptable pattern.

By 24 March, the Tuesday before Easter, the finance and judiciary committees had submitted their reports to Griffith. He, however, was clear that drafting could not be completed until after the Easter vacation, and he had selected two of the constitutional committee to work with him on the task - both, as it happened, from the smaller colonies, and both, as it happened, politicians who before coming to Sydney are known to have tried their own hands at drafting. One was Charles Cameron Kingston, not yet premier of South Australia but already twice attorney-general; a stormy, radical product of the Adelaide establishment but a draftsman whose technical skills were second only to Griffith's own. The other was Andrew Inglis Clark of Tasmania, who had made an intensive study of the American constitution, and was inclined to refer to it as a suitable model for adaptation to Australian conditions. Clark was an able and original thinker whose contribution to federal thought has only recently been given recognition, but one somehow senses that although he and Griffith held each other in mutual respect they were never really close. Perhaps it was professional rivalry, perhaps simply the incompatibility of a tall man and a short man.

At any rate Griffith, Kingston, and Clark got to work on the detailed drafting on Monday 23rd, not without interruptions. Griffith knew how to secure the necessary privacy for the final stages of drafting. His party had travelled down from Queensland on the Queensland Government steamer *Lucinda*, and during the weekends of the conference Griffith had made good use of the *Lucinda* by judicious invitations to

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18 H. Bryan, *John Murtagh Macrossan: his Life and Career*, Brisbane 1958, p 52.

19 National Australasian Convention, *Official Record of the Proceedings and Debates*, Sydney, 1891. p 210.

20 La Nauze, *op. cit.*, p 48; quoting Deakin to C.H. Pearson, 25 March 1891.

selected fellow-delegates to come cruising on Sydney Harbour. Now he proposed that the drafting party should spend Easter on the *Lucinda*, running up north to the quiet of the Hawkesbury estuary. Kingston accepted, but Clark at this inconvenient moment had the misfortune to go down with influenza. Griffith then invited Edmund Barton to come in as a replacement, thus initiating a relationship which lasted the rest of their lives. Barton up to this point, while known to be a keen federalist, had not yet won the prominence which would eventually take him to the first prime ministership of Australia. Easy-going and convivial, he had not been a regular attendee at the Convention, although his contributions when present had been cogent and useful. But Griffith recognised his professional quality, which always came to the fore when a great occasion demanded it; and this brought Barton into the inner ring of policy-makers for a federated Australia. Apparently as an afterthought it was also decided to ask Sir Henry Wrixon as a leading Victorian lawyer, Sir John Downer of South Australia, and Queensland's Andrew Thynne. From outside the Convention, Griffith also invited Bernhard Ringrose Wise, an able young lawyer who at 33 had already been attorney-general of New South Wales. But they came along merely for the cruise and as occasional consultants. It was Griffith, Kingston, and Barton who were to have the final drafting of the constitution, joined by Clark on the Sunday morning after he had recovered from the worst of his influenza.

On the first day of the vacation, Good Friday, Griffith may have been regretting his decision to sail on the *Lucinda*. For back in Queensland the strikers' camps and squatters' homesteads of the inland were being deluged by a late summer rain-bearing depression, and the influence of that depression was felt as far south as Sydney. The weather reports for that Friday speak of fresh gusty winds and showers, and Griffith noted in his diary that there was too much swell in the water current, so he didn't work. Some of those present were seasick in the morning, but by evening they had anchored at Refuge Bay. Here, Griffith reported, there was a waterfall in the bush which made a natural showerbath, but 'I did not take it myself. He in his turn was sickening for influenza; but the weather had improved by Saturday morning, and resolutely he led his party to work. They worked from 10 a.m. till 11 p.m. on Saturday, from 11 a.m. to 6 p.m. on Sunday, and for twelve and a half hours on Monday. Writing to his wife a few days afterwards, Griffith complained that he worked too hard on the Constitution. One can appreciate his point.<sup>21</sup>

The final draft of the Constitution was presented to the Convention on Easter Tuesday, 31 March. Unlike the Canadian constitution, which allocated certain powers to the provinces and left whatever remained to the central government, the Australian practice would be the reverse: specific powers would be granted to the central government, and the states kept the remainder. As Ross Johnston has pointed out, the list of powers for the Commonwealth bore a certain similarity to the powers given to the central parliament of the United Provinces of Queensland as drafted by Griffith in 1890.<sup>22</sup> Griffith himself during the debate referred to that list of powers as 'tolerably complete', and he must have used it as a starting point for the Australian federation. One innovation, however, owed nothing to the Queensland precedent. This was the decision to name the new federation 'the Commonwealth of Australia'. Parkes, Deakin, and Winthrop Hackett of Western Australia all claimed to be godfathers who had chosen this name, but it ran into a good deal of opposition from some conservative delegates who associated the term 'commonwealth' with Oliver Cromwell and the republicanism of 17th century England, and feared that Queen Victoria might take

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21 For the *Lucinda* episode, Joyce, *op. cit.*, pp 194-6, La Nauze, *op. cit.*, pp 64-8, Crisp, *op. cit.*, pp 306-7.

22 Johnston, *op. cit.*, pp 5-8.

offence at the term. Griffith was at first dubious, but in time came round to accept 'Commonwealth' and it was approved by a narrow but sufficient majority.

But would there be a Commonwealth of Australia? Munro, the premier of Victoria, had spent the weekend in Melbourne and had given a press conference expressing great gloom about the prospects of the Convention. They would break up, he forecast, over the Senate's powers; Victoria could never let itself be dominated by the smaller members.<sup>23</sup> Some of the Victorian delegates were privately regretting that they had ever let New Zealand and Western Australia into the Convention. Without them, they might have had the numbers to outvote the smaller states. But Griffith's committee had picked up an idea from the South Australians, and its recommendation gave the Senate power to reject a finance bill but not to amend it; at the most it could communicate requests and suggestions to the House of Representatives, but lacked power to veto in detail. Griffith pressed this point of compromise as the only solution acceptable to both points of view, even though not wholly acceptable to either side. Even then the compromise passed by only 22 votes to 16. Nearly all the Victorian and New South Wales delegates were in the majority, and Griffith's arguments persuaded enough from among the more thoughtful of the small-state members - Playford and Kingston from South Australia, Hackett from Western Australia - to carry the day. At this stage it was anticipated that the members of the Senate would be chosen by the parliaments of each state, so that they would be responsive to local interests. It was not until the 1897-98 federal conventions that it was decided to elect Senators by direct popular vote, a move in the direction of democracy which probably hastened the coming of Macrossan's prophecy that the Senate would turn out to be dominated by party politics.

For the rest, the 1891 Constitution was substantially similar to the Constitution which became law in 1900 and which is still the basis of the Australian body politic today. Quick and Garran in their *Annotated Constitution* list the additional powers which were added during the debates of 1897-98: astronomical and meteorological observations, insurance, invalid and old age pensions, conciliation and arbitration, and the acquisition of property for public purposes; state banking, and power to legislate for river navigation.<sup>24</sup> The Supreme, or High Court, had been provided for, and a start made on the vexed question of appeals to the Privy Council; a method of distribution surplus revenue back to the states on a basis of population had been adopted; and Australia was to be a common market, where capital and labour might organise on a nationwide basis.

Some details of the 1891 settlement were not destined to survive. There was an interesting proposal that the states should be free to choose their governors by popular election rather than by royal appointment. Although this idea was endorsed by a narrow margin in 1891 it failed to survive discussions later in the decade. On the other hand Griffith was so convinced of the pivotal importance of the Governor-General that he pushed the 1891 Convention into asserting that the Governor-General must be the only channel of communication between the States and the British sovereign. Provincial rights in this case stood second to the need for clear and logical lines of authority; but this point was likewise discarded subsequently. Other initiatives of Griffith's which failed to survive were mostly those arising from his intellectual elitism, which tended to lead him to mistrust the capacity of the voters. Thus in 1891 he insisted that amendments to the constitution need not be submitted

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<sup>23</sup> *Sydney Morning Herald*, 30 March 1891.

<sup>24</sup> J. Quick and R. Garran, *The Annotated Constitution of the Australian Commonwealth*, Angus & Robertson, Sydney, 1901, p 168.

to the electorate for approval by referendum, but should instead be passed by an absolute majority of both houses of the Commonwealth parliament and then referred to specially elected conventions in each State. This was too complicated for the 1897-98 Convention, and they eventually decided on the referendum process. Griffith might have rested easy, however, since Australian voters have shown a strong tendency to say 'No' to most proposals for the widening of federal powers.

The 1891 Convention dispersed in the expectation that follow-up action in the colonial parliaments would soon ensue. But Parkes in New South Wales was confronted by the rise of a Labor party which soon ousted him from office in favour of the anti-federationist George Dibbs. Victoria plunged into a major financial depression, replete with scandals, and for a time was too preoccupied with schemes of reconstruction to take a lead on federation. Deprived of this encouragement, the other colonies marked time. With the exception of Western Australia they were all more or less affected by economic recession, and federation seemed a lower priority. Griffith stepped out of active politics in 1893 to become Chief Justice of Queensland. By now, however, his ambition was firmly fixed on the hope of a prominent role in a federated Australia. More than once during the federation debates of the remainder of the 1890s his advice, usually sought informally, exercised some influence. Barton generously admired him; others found his counsel valuable because of his non-involvement in day-by-day politics. Griffith's presence must have given heart to the belated federal movement in Queensland, although he felt inhibited as Chief Justice and Lieutenant-Governor from involving himself too openly. Behind the scenes he was certainly active, and prided himself on finding an acceptable formula about appeals to the Privy Council in May 1900, when the Australian delegates to London reached an impasse in their negotiations with the British authorities.<sup>25</sup>

When federation came on 1 January 1901, Griffith's frustrated anxiety to participate in the action led him into uncharacteristic clumsiness. When the first Governor-General, Lord Hopetoun, made his celebrated 'blunder' of asking the New South Wales premier, Sir William Lyne, to form the first federal ministry - rather than Barton, the preferred choice of nearly all the leading federationists - Griffith allowed himself to dally with the prospect of serving as attorney-general under Lyne. Consequently, when Lyne threw in his hand, Griffith was too compromised to be considered for the federal cabinet; and there was a risk that he had damaged his chances of becoming first Australian Chief Justice, the goal which he most coveted. He returned from the federation celebrations in Sydney confiding angrily to his diary that the new Prime Minister, Barton, was a 'fathead'.<sup>26</sup>

But Barton was a generous man; and when the time came in September 1903 for the appointment of the first High Court he waived his own claims to the post of Chief Justice in favour of Griffith. To most contemporaries Griffith was the obvious nominee. He had earned the honour through his crucial role in the 1891 convention, delicately adjusting the balance between the centre and the periphery. He may at bottom have been a provincial; but because of the intense intellectual creativity which he showed at this important moment in Australian history Griffith can be regarded, not as the narrow conservative of Crisp's phrase, but as a great provincial capable of subordinating his local loyalties in the service of wider vision. It was a quality which modern provincial politicians have too often lacked.

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25 Joyce, *op. cit.*, pp 212-15; but cf. Quick and Garran, *op. cit.*, pp 242-47.

26 Joyce, *op. cit.*, p 215.





## Politics or Statesmanship? George Reid and the Failure of the 1891 Federal Bill

Professor W.G. McMinn

'Politics or statesmanship?' It is the kind of rhetorical question that invites a reply - or at least a Socratic rejoinder such as 'What is the difference?' The obvious answer to that, of course, is the cynical epigram: 'A statesman is only a dead politician' - which, oddly enough, seems to have been coined by a man who was in politics himself, and to have been heartily endorsed by at least one other.<sup>1</sup>

To argue the metaphysical right or wrong of this opinion of statesmanship is hardly the task of an historian: it is, rather, a matter for the philosophers. But it certainly does seem, if one looks at the facts empirically, that Australians have tended to accept one obvious implication. They have been notably reluctant to confer the accolade of statesmanship on anyone still living and in the exceptional cases in which there has appeared some willingness to do so it has usually been ill-informed, not to say rash. The same, in sober fact, can be said in most cases of its application to those decently dead. Most Australians, to take an obvious example, tend to see Sir Henry Parkes as both 'the father of public education' and 'the father of federation'. But in reality, Parkes's 1880 Public Instruction Act was the product not of planning but of pique, produced absolute administrative chaos, from which the education system of New South Wales took decades to emerge, and seems to have done nothing - or less than nothing - in over a century to raise the level of basic literacy;<sup>2</sup> while I doubt if any serious historian believes that some sort of federation would not have been established in Australia at about the beginning of this century if Parkes had lived out his life as a labourer in Warwickshire.

But if it is easy to make mistakes about the dead it is still easier to make them about the living, and we probably all feel safer with the idea that a politician ought to die before we accord him the title 'statesman'. Not, of course, that death alone is a qualification: the epigram is not one of which the converse, as Euclid would have said, is also true. No one would suggest that a dead politician is necessarily a statesman. After all John Norton was once a politician, and Paddy Crick, and Billy Hughes, and - but perhaps this is a subject which should not be pursued too far, particularly within these walls.

None of this, of course, answers any questions about the nature of statesmanship - again, perhaps, a matter for the philosophers - or even about the practical meaning of the term in particular circumstances, which may be the proper business of an historian. Obviously such a thing as statesmanship exists. But where do we look for it? We do not look for it in the promotion of run-of-the-mill legislation, even when we are dealing with a period when the mills churned out much less of the stuff than they do now; we hardly seek it in the activities of those who have managed, or more usually mismanaged, the public finances and the economy. Surely, however we ought to find it in the great and enduring works of politics, in the making not just of dog

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1 It is usually attributed to Thomas B. Reed, Speaker of the U.S. House of Representatives 1889-90, 1894-99. Reed did, however, specify that the politician had to be 'successful'. Much later Harry S. Truman scouted this condition but added one of his own, the necessity to be dead 'for ten or fifteen years'.

2 It has been accepted in recent years that between ten and fifteen per cent. of the people in this state cannot read adequately. For an argument that the literacy rate in 1881 was not worse but actually better than this see B.M. Penglase, 'Literacy in Colonial New South Wales', Ph.D. thesis, Univ. of Newcastle, 1986, *passim*.

acts but of constitutions. Surely here, if anywhere, what comes to the top will be the cream, not just the electoral flotsam. Certainly Henry Parkes thought so, when he described the 1891 Federal Convention as 'beyond all dispute the most august assembly which Australia has ever seen'. That he himself was a member goes without saying, as does the fact that not everyone agreed with him. The *Brisbane Courier* commented unkindly on its 'necessarily including so many second-rate politicians'.<sup>3</sup>

Who was right? Now that all the Convention's members have been dead for well over two generations, many of them for more than three, perhaps history can tell us. Now I do not suggest that we can avail ourselves of something cut and dried called 'the Verdict of History', with capital letters on both nouns. History, sometimes personified in this way by propagandists and ideologues, is seen in a rather different light by professional historians, who, even if they do not agree that it is no more than a 'register of the crimes, follies and misfortunes of mankind',<sup>4</sup> recognize its limitations, which are those of any artifact, no matter with how much integrity and care constructed. There is no 'Verdict of History' on this issue, or on any other, but we might reasonably ask a more down-to-earth question: 'Have historians reached anything like a consensus on the matter?'

I think they have, at least informally. I find my evidence for saying so in the *Australian Dictionary of Biography*. Nowhere, I believe, could one find a more representative cross-section of the serious Australian historians who have worked in the past three decades or so than in the membership of the *Dictionary's* Editorial Board and its associated working parties. Their judgments on inclusion and omission and on length of entry, reflect careful and well-informed debate on the significance of the persons considered for admission to its pages. Of course the *Dictionary* deals with all manner of people, not just those who have been in politics, and even in the case of politicians there is obviously much more to the decision than an estimate of the quality of the subject, of his (or her) 'statesmanship': in at least some cases, indeed, sheer notoriety has been the critical factor. But with that *caveat* I would suggest that an examination of the *Dictionary* entries on the members of the 1891 Convention indicates that historians have rather tended to come down on the side of the *Courier*.

The Australian colonies sent forty-two delegates to the Convention.<sup>5</sup> Of these only four, Deakin, John Forrest, Griffith and Parkes himself, have been accorded the maximum length of entry, notionally six thousand words. Two others, Barton and Dibbs (the latter totally hostile to the federal idea and mainly concerned at the Convention, as J.A. La Nauze has pointed out,<sup>6</sup> with making a nuisance of himself), have been given between four and five thousand; and another five, Inglis Clark, Hackett, Kingston, McIlwraith and Alexander Forrest, about three. Of the other thirty-one none has received more than two thousand, most of them a thousand or less, with two<sup>7</sup> failing to gain admission at all. And even among those with substantial entries there are several who owe their prominence to other factors than an estimate of their federal statesmanship: for example Alexander Forrest, who, like Dibbs, was an opponent of federation - if a less troublesome one - and James Munro, whose entry does not even mention his membership of the Convention. The judgment of historians on the potential for statesmanship of this 'most august assembly' seems to have been very reserved indeed.

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3 Cited J.A. La Nauze, *The Making of the Australian Constitution*, Melbourne University Press, 1972, p 29.

4 Edward Gibbon, *The History of the Decline and Fall of the Roman Empire*, London, 1776-88, I, iii.

5 This number is exclusive of three New Zealanders and a temporary substitute from Victoria.

6 La Nauze, *op. cit.*, p 40.

7 Macdonald-Paterson of Queensland and Moore of Tasmania.

I shall come back later to a consideration of whether the work they did between 2 March and 8 April exceeded that potential. Such a consideration is an essential part of any enquiry as to why the optimism that most of them seemed to feel about the prospects of an early union of the Australian colonies was unjustified, why the constitution they drew up found its way very quickly, if not into the wastepaper basket, then certainly into the bottom drawer. But it is far from the only thing to be considered; and before such an enquiry can be pursued there is something else to be done.

Forty-five years ago when I was chatting with an elderly neighbour he remarked that the first vote he ever cast was against federation in the 1899 referendum. I asked him why he had voted 'no': his answer was 'Why not?' Looking back, I realize that his question had more point to it than mine. Not everyone these days would accept literally St Paul's dictum that the powers that be are ordained of God,<sup>8</sup> but we are all more-or-less inclined to act as if in some sense they were: we see the situation in which we have grown up as the natural, the normal one. As far as the governance of Australia is concerned, we see the existence of the Commonwealth as natural - perhaps not divinely ordained, but still natural: we find it hard to come to terms with the fact that, notwithstanding Australia's remarkable level of ethnic homogeneity (much higher than now) people a hundred years ago did not share our views; that as late as 1899, barely a quarter of the New South Wales electorate could be persuaded to give the federal compact approval. We perhaps find it particularly hard in this building, symbolizing as it does in monumental size and ostentatious splendour and extravagance the reality of 'a nation for a continent, and a continent for a nation'.<sup>9</sup> What we forget, of course, is that this is to read history backwards, that what we see as natural people a century ago often saw as novel, unsettling, even eccentric or grotesque.

All this is intended to suggest that if we are to come to useful conclusions about the failure of the Parkes federal initiative we need to understand the men who opposed it - and ultimately destroyed it - on their terms, not on ours; and we have to take into consideration the fact that for ordinary people it looked very much like what its leading critics were fond of calling it, a fad. That is, we have to note that the leading arguments for it were not, for such ordinary people, very appealing. It is easy, but unhistorical, to use pejorative words like 'apathy' to characterize this man-in-the-street attitude: in fact, it was based on a commonsense estimate of what these arguments were actually worth. The blunt fact is that most of them were not worth much.<sup>10</sup>

Let us look at what the supporters of federation represented as its advantages. If we take as a guide the resolutions Parkes moved in the Convention<sup>11</sup> and the subsequent debates upon them, they seem, when we cut away the patriotic rhetoric, to have seen three: first, improved security by combining the various colonial defence forces; secondly, the elimination of border customs duties (and perhaps of an

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8 Romans, XIII:1. Englished in these works it perhaps expresses the 'divine-right' views which the translators knew would appeal to James I as much as Paul's idea that the profession of Christianity did not exempt his converts from the ordinary duties of citizenship.

9 Usually attributed to Barton. R.R. Garran, *Prosper the Commonwealth*, Angus & Robertson, Sydney, 1958, p 101.

10 The same, I am sure, may be said of the arguments for many *successful* movements (not necessarily excepting that which finally produced federation). 'Apathy' does not hinder movements with a weak case - on the contrary. Dozens which have come to fruition in my lifetime spring to mind.

11 *Official Report of the National Australasian Convention Debates*, Sydney, 1891, reprint Legal Books Pty Ltd, Sydney, 1986, p 13.

annoyance connected with them as a manifestation of colonial particularism, the difference in railway gauges); and thirdly, the abolition of Privy Council appeals. A fourth, to be used more frequently later in the decade, was occasionally mentioned in 1890-91: it was suggested that a federated Australia would find it easier to get good terms on overseas money markets than six separate colonies.

If we look at the defence argument, the dominant theme upon which Parkes, with a little underhand assistance from Major-General Edwards,<sup>12</sup> sought to orchestrate the campaign he began in 1889, we will find little evidence that large numbers of Australians saw defence as a serious problem; those who did were hardly supported by the facts, at least as interpreted by the body in the best position to appreciate the real strategic situation, the Imperial Committee on Colonial Defence.<sup>13</sup> When in April 1891 George Reid compared a union between free-trade New South Wales and five protectionist colonies with a housekeeping arrangement between a teetotaler and five drunkards, nothing caused more merriment than his dry remark that one of the abstainer's motives was presumed to be a 'rumoured Chinese attack on the village'.<sup>14</sup> In the 1890s the 'threat from the north' was a politician's bogey man of which few electors were frightened; and had they been absolutely terrified, they would have had little reason to believe that uniting the trivial military forces of the colonies under a federal Department of Defence would have made much difference anyway; they would have seen more hope in trying to persuade the Admiralty to increase the number, size and armament of ships on the Australia Station.

Superficially, the removal of trade barriers may seem likely to have had a stronger appeal. For certain geographical and sectional groups - residents of the Murray valley and the Riverina, businessmen with large interstate interests - there were, no doubt, attractions, but for most people border customs seemed a remote problem. And some of the people inconvenienced by intercolonial tariffs enjoyed compensating concessions which 'absolutely free' interstate trade would be likely to eliminate: the graziers of the Riverina, for example, had their transport costs greatly reduced by the 'positive discrimination' in their favour in the matter of railway rates if they agreed to ship their wool through Melbourne.<sup>15</sup> Border customs, intolerable as they would seem in 1991, did not cause much heart-burning in 1891.

The fact that the final court of appeal for the colonies was the Privy Council caused considerably less concern. To imagine the existence of significant nationalistic objections to this state of affairs a century ago, when most Australians (and even some of those who wrote for the *Bulletin*) still thought and spoke of the United Kingdom as 'home', would be an absurd anachronism.

And there must have been fewer practically inconvenienced by the powers of the Judicial Committee than temperamentally affronted. Only a tiny minority of the electors of Australia could even conceive of themselves as involved in something as remote as a case before the court of last resort: most people then, as now, had their highest ambition in the legal sphere satisfied if they were able to stay out of the police court. That tiny minority was, moreover, made up almost exclusively of people capable of suspecting that, given the need for the proposed federation to be approved

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12 Edwards wrote to Parkes from Hong Kong at about the time of the Melbourne Conference enquiring whether if he arranged a visit from a Chinese naval squadron it would help the federation campaign. *Lord Carrington's Diary* (ML), 17 Feb. 1890.

13 *Sydney Morning Herald*, 26 September 1890.

14 *New South Wales Parliamentary Debates*, 19 May 1891.

15 As late as 1898 the Victorian Railways were transporting wool grown in New South Wales from Echuca to Melbourne for 16s. per ton and charging 44s. for wool grown in Victoria.

in Downing Street, it would not necessarily result in the abolition of Privy Council appeals whatever the Convention might say. As an argument for the establishment of a federal Commonwealth this would have been very, very weak even if the Convention had given it unequivocal support. In fact the relevant clause was written into the draft constitution by the barest possible margin.<sup>16</sup> The fourth, and less frequently used argument - easier borrowing - was no stronger. Again few could be interested, and those few, people with large financial interests, had every reason to be dubious about it.

Let us realize, then, that the case for federation in 1890-91 was almost pitifully weak; and it was not at all strengthened by the fact that even the federal enthusiasts envisaged a very limited sort of federal power. Very few matters on which the individual colonies had effectively legislated in the previous generation were seriously considered at the Convention for transfer to federal authority. Griffith, the real author of the draft constitution which emerged from the Convention's debates, represented the fact that few real powers were actually to be surrendered as one of the arguments in favour of its acceptance:<sup>17</sup> might not the ordinary voter, with the suspicion of his elected representatives which is a national characteristic,<sup>18</sup> have been likely to ask whether in that case the whole business was necessary at all? Might it not appear to him to be just a politician's ramp - and an expensive one? This question of expense was to remain a problem for federalists right up to 1899, when one of them tried to solve it with the memorable assurance that federation would cost the average citizen less per year than a dog licence. As Winston Churchill might have said, with the aid of hindsight, 'Some licence! Some dog!'

Having looked at the fact - so easily overlooked today - that in the 1890s many people could see many reasons for being dubious about the idea of federation, I want now to consider briefly why some of them went beyond mere doubt to express some kind of opposition to the movement which was begun by Parkes in June 1889 and which culminated in the approval by the Convention of a draft constitution in April 1891. In doing this it will be necessary to narrow the focus of the discussion to New South Wales, the colony (as everyone knew) which really had to be convinced. The opponents of the movement were, in the early stages, a heterogeneous group, prompted by widely differing motives. There were those, particularly but not exclusively in the nascent Labour movement, too concerned with bread-and-butter issues to see anything in federation but a distraction, perhaps even a red herring. There were those who, for reasons which may have had little to do with the federal issue itself, saw the whole thing as just another of Parkes's tricks. Obviously these included large numbers of Roman Catholics, whose interests were represented by men like Thomas Slattery; they also included the Leader of the Opposition, Dibbs. And there were others again, who felt that the movement was something even worse than a Parkes stunt - a Victorian plot.

Laughable as it may seem to others, the difficulty which the New South Welsh and the Victorians have in understanding one another was then a very real thing, and some of it still remains with us - showing up occasionally in surprising places.<sup>19</sup> Most of the suspicion which existed was, of course, based on nothing more substantial than

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16 Nineteen to seventeen. See La Nauze, *op. cit.*, pp 71-3 for an account of the debate.

17 *Official Report of the National Australasian Convention Debates, op. cit.*, pp 526-30.

18 See J.B. Hirst, *The Strange Birth of Colonial Democracy*, Allen & Unwin, Sydney, 1988, *passim*, esp. p 273.

19 I was amused to note that in 1989 the first half-dozen reviews of my biography of Reid reflected the phenomenon. My defence of his part in the federal movement against the criticisms of the Victorian Deakin was accepted by three eminent New South Welsh scholars and treated as rather dubious by three equally eminent Victorians.

the idea represented, on the New South Wales side, by old John Robertson's remark about the cabbage garden.<sup>20</sup> But in the period being considered here New South Welshmen had their prejudices reinforced by at least one extraordinary factor, the Melbourne land boom and the shady dealings involved in it which were already coming to light. The *Bulletin's* description of 'Smellboom', the 'city of financial stink',<sup>21</sup> came a few months later, but at the time of the Convention there was already good reason for people in New South Wales to wonder whether their colony would not have its economic problems aggravated rather than solved by association with its southern neighbour. The wild government borrowing programme of the past few years, which had been conducted by the Premier, Duncan Gillies,<sup>22</sup> and for which his Attorney General, Alfred Deakin, shared responsibility, was notorious: these two men were the hosts of the Melbourne Conference and delegates to the Convention. Also a Convention delegate was Gillies's successor as Premier, James Munro, one of the most reckless and dubious speculators with other people's money, and already beginning to come under suspicion at the time the Convention met.<sup>23</sup> Hard-headed Sydney merchants and financiers would obviously see here strong reasons to avoid, at least for the time being, association with a colony which was exhibiting the most obvious features of what would now be called a banana republic. They would be particularly likely to be sceptical when told that the London money market would see a federal Australia which included Victoria as a safer investment than New South Wales.

But over and above all the obstacles in the way of federal enthusiasts in the 'mother colony' which I have been discussing - the belief that it was a distraction from the colony's domestic problems, suspicion of Parkes, suspicion of Victoria - and to some extent mixed up with them all, there was the feeling that free trade was in danger. For this the chief spokesman was the man Parkes was later to characterize as 'the arch plotter against Federation',<sup>24</sup> George Reid. The history of the movement, from June 1889, when Parkes boasted to the Governor that 'he could federate [the] colonies in twelve months',<sup>25</sup> to October 1891, when the Convention's draft Constitution Bill was effectively thrown under the table of the New South Wales Legislative Assembly, was more or less the history of Reid's overthrow of Parkes.<sup>26</sup>

Both men, of course, were identified in politics with the policy of free trade - but it meant different things to them. It would be unfair to Parkes to say that for him it was merely a slogan, a response to the need for something to hold together what was developing from a faction into a party.<sup>27</sup> There is a sense in which he felt deeply about it: it was for him the policy of Cobden, of Gladstone, indeed of England - part of that 'crimson thread of kinship'<sup>28</sup> which he saw running through, not just the Australian colonies, but the Empire. But he had no objection to raising the greater part of the colony's revenue through the customs house; and he saw nothing strange about using

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20 *Australian Dictionary of Biography*, vol 6, p 45.

21 Michael Cannon, *The Land Boomers*, Melbourne, 1966, pp 168-9.

22 *Ibid.*, p 31.

23 *Ibid.*, p 123.

24 Henry Parkes, *Fifty Years in the Making of Australian History*, London, 1892, p 373.

25 *Lord Carrington's Diary* (ML), 15 June 1889.

26 See W.G. McMinn, *George Reid*, Melbourne University Press, 1989, pp 39-70.

27 See P. Loveday and A.W. Martin, *Politics, Factions and Parties*, Melbourne, 1966, pp 121-54.

28 *Sydney Morning Herald*, 7 February 1890. The phrase was probably suggested to him by the red strand woven into Royal Navy cordage as a precaution against theft.

the freetrade cry to win an election and then governing the colony for two years with almost no reference to the policy.<sup>29</sup>

For Reid it was something different.<sup>30</sup> It was a social as well as a political policy, and a positive as well as a negative one. As early as 1875, when he had published *Five Free Trade Essays*,<sup>31</sup> his advocacy had had a missionary quality which Parkes, had he recognized it, would have distrusted; and by April 1889, when he emerged as the dominant figure of the new Free Trade and Liberal Association,<sup>32</sup> he had already begun to formulate a reformist philosophy, based on the idea of public finance through direct taxation, which Parkes could hardly comprehend. Even had Reid not entertained the ambition ultimately to replace Parkes as the free trade leader - and to do so on his own terms, not as a protege stepping into his patron's shoes - Parkes's sudden attempt to make federation the big question of the colony's politics would still have put the two men on a collision course. But he clearly did entertain such an ambition. To speculate on the motives of politicians, and on the role that anything capable of being called statesmanship might have in the formation of such motives, is more entertaining than enlightening. What Parkes was doing was both an affront to his principles, and an opportunity for his ambition. Both: the two are not necessarily or even usually incompatible.

It is quite clear that Reid intended to push his view of free trade - to make that view the policy of what was now emerging as a recognizable free trade party. There could be no question of his succeeding in such a task while Parkes remained the party's leader. He was prepared to bide his time and recognize the political realities, one of which was that displacing Parkes was not going to be easy. It would be wrong to say that Parkes was 'popular', even with most of those who followed him; but his party, and his cabinet, recognized what Bede Nairn has called his 'political mastery',<sup>33</sup> which was based partly on his unrivalled experience of colonial politics, and partly on what William Astley, rather unkindly, was to describe in an obituary as his 'art of seeming great'.<sup>34</sup>

Since the defence of free trade had first become seriously necessary in New South Wales in 1886 Reid had clearly been the 'coming man'. He had, unobtrusively but effectively, encouraged politicians, and the public, to see him in that light, and, while avoiding any suspicion that he was forming a 'cave' in the party, he resolutely refused to allow Parkes to absorb him: he declined office under Sir Henry four times between February 1887 and February 1889, on the last occasion despite the fact that he was offered a free choice of any portfolio he might like.

Parkes's sudden enthusiasm for federation, and the extent to which he allowed it to dominate his thinking in the months following his initially unsuccessful attempt to dramatize the idea at Tenterfield,<sup>35</sup> may perhaps have struck Reid as a golden opportunity to move against a man whom he personally disliked and was coming

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29 McMinn, *op. cit.*, p 46.

30 References to Reid not otherwise documented in the account which follows are from McMinn, *op. cit.*

31 *Five Free Trade Essays, inscribed to the Electors of Victoria*, Sydney, 1875.

32 For his leading role in the formation of this body see N.B. Nairn, 'The Political Mastery of Sir Henry Parkes, New South Wales Politics, 1871-1891', *Journal of the Royal Australian Historical Society*, vol. 53, p 28.

33 *Ibid.*

34 *Bulletin*, 2 May 1896.

35 Contrary to the popular myth the Tenterfield speech fell rather flat. It was more-or-less ignored by the press until Parkes began to publicize it himself. For an account of what a lead balloon the speech was see L.E. Fredman, 'The Tenterfield Oration, Legend and Reality', *Australian Quarterly*, September 1963, pp 59-65.



increasingly to distrust; but it also represented a real threat to his conception of free trade, and as such it was a challenge which he could not have ignored had he had no ambitions at all.

That what really moved him was the danger posed to the colony's fiscal policy, and therefore to the liberal reformist implications the policy had for him, is clear from his first public statement on Parkes's attempt to make federation the principal issue in politics. He made no comment on the subject before the Melbourne Conference: it was not until three months later, when Parkes moved in the Legislative Assembly to appoint delegates to a constitutional Convention, that he said anything. When he spoke on the motion he expressed great scepticism about the defence argument, and gave some attention to the obvious tendency of the Melbourne Conference to play up the supposed advantages of federation and play down the difficulties, mentioning several of the problems which would be very hard to solve. But the emphasis was heavily on one of these, the one which the Victorian Gillies had acknowledged as 'the lion in the way',<sup>36</sup> the conflict of policy between New South Wales and Victoria - and to a lesser but still significant extent other colonies - on tariffs. When, without denying the abstract desirability of federation of some kind at some time, he urged his fellow members not to 'cast [the] priceless fabric of [the colony's] independence into the crucible of federation without some thought, without some care', he left no one in doubt that what he saw endangered was the policy of free trade:

I can look with no satisfaction upon any kind of federation which will drag this country into the mire of protection... I will not federate until I have a better idea - a more rational idea - that my principles will not be sacrificed; and I say that the man who believes that New South Wales handing over [fiscal] powers to a federal parliament of all the Australias will result at once in free trade, is a madman.<sup>37</sup>

He did not vote against the proposal to hold a Convention,<sup>38</sup> but he served notice on Parkes - and on the other colonies - that federal enthusiasm and patriotic speeches would not be enough: there were issues to be faced, and one in particular. He drove the point home at a tumultuous public meeting in his electorate a week before the Convention was to meet a few blocks from where he spoke.<sup>39</sup>

Whether there was ever any practicable answer to the great question of fiscal policy, apart from the Convention's non-answer of leaving it to be resolved in the future, by a federal Parliament, may well be doubtful; and if this issue, which had undoubtedly pushed Reid into his decision to act as he did, had remained the only one, his position would have been weak, and with the drafting of an otherwise acceptable constitution would have become weaker - perhaps, indeed, untenable. But there were other issues, and the Convention did not solve them.

This would be no place for a detailed discussion of the National Australasian Convention of 1891, even if it had not already been carried out so well by J.A. La Nauze.<sup>40</sup> In format, as La Nauze has pointed out,<sup>41</sup> the constitution which the

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36 *Argus*, 7 February 1890.

37 *New South Wales Parliamentary Debates*, 21 May 1890.

38 *Ibid.*, 10 September 1890.

39 *Sydney Morning Herald*, 26 February 1891.

40 *Op. cit.*, pp 20-85.

41 *Ibid.*, p 78.

Convention drew up is essentially that of the constitution we now have; and there is very little difference between the powers of the Commonwealth Parliament as listed in 1891 and 1898. But if the matters on which the two documents differ are apparently minor they are effectively vital: the Constitution of the Commonwealth of Australia, notwithstanding the criticisms to which it has been subjected, and the fact that attempting to amend it seemed, at least before the fiasco of 1985-88,<sup>42</sup> to have become almost a national sport, has worked, on the whole, fairly well; the draft Convention bill of 1891 could hardly have worked at all.

Reid's comments before the Convention met could reasonably have been interpreted by his contemporaries as politically motivated, as smacking more of personal ambition than disinterested statesmanship; and there were some who saw no more in what he did when it had finished its work. Again he had a lot to say about the danger to his colony's free trade policy, but he had a lot to say now on other matters as well, and what he said homed in accurately on the great weaknesses of the Convention bill. Moreover his remarks had an earnestness, even a pertinacity, which they had not had when he was merely warning people about the danger of Parkes's throwing himself into the arms of Victorian protectionists.

The criticisms on which he based his campaign against the bill, which began with rallies on 16 April and 4 May, and culminated in the amendment he moved to the address in reply a fortnight after the second,<sup>43</sup> concentrated on four very serious weaknesses in the draft constitution, all of which were to be substantially if not wholly rectified before federation was finally accomplished. It would be tedious, and I would like to think unnecessary, to go into the detail about them which I have set out elsewhere,<sup>44</sup> but I must make a few comments.

The great question, of course, concerned the composition and powers of the Senate. It would in practical terms, no doubt, have been impossible to negotiate a federal compact on any other basis than equal representation in one of the houses; it is of course true, as at least one Convention delegate foresaw, that members of that house have tended to vote not in state blocs but 'as members of the parties to which they belong'.<sup>45</sup> But neither of these considerations would necessarily impress a liberal democrat of Reid's stamp: given the enormous disparity in the size of the federating states, the latter would simply seem to turn a sort of treaty right into an enormous gerrymander - to make equal representation not more acceptable but less. It is perhaps relevant to note that in the contemporary United States there was considerable criticism of the effects of equal representation, on just this ground. And it has to be seen in the light of four other considerations. The first concerns the Senate's powers, completely co-equal in legislation, and so close to co-equal in finance as hardly to matter. The second is the fact that the amendment provisions of the constitution made later alteration even more difficult than it has been found to be under the much improved version of 1898-99. The third is the complete absence of any provision whatever for resolving deadlocks, a monstrous omission given the history of relations between houses in the various colonies in the preceding forty years. The fourth is the provision that the Senate was to be elected, not directly by the people, but by the Parliaments of the federating states all of which included class-

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42 I refer, of course, to the 'Constitutional Commission' mountain and the still-born mouse it produced, the referendum proposals of 1988.

43 *Sydney Morning Herald*, 17 April, 5 May 1891; *New South Wales Parliamentary Debates*, 19 May 1891.

44 In *George Reid, op. cit.*, and more particularly in 'G.H. Reid and Federation, the Case for the Defence' in *Journal of the Royal Australian Historical Society*, vol. 49, pp 257-73.

45 Macrossan. *Official Report of the National Australasian Convention Debates, op. cit.*, p 434.

dominated Legislative Councils and was to be indissoluble. To oppose equal representation *per se*, and even to oppose giving the Senate power to reject money bills, may have been, in 1891, to reject the very possibility of federation; but to oppose these things in all the circumstances I have mentioned has all the marks of statesmanship.

Closely connected with the Convention's decisions on the composition and powers of the Senate was its failure to provide any sort of definition of the relationship between the legislature and the executive - an explicable failure, but a dangerously pusillanimous one given the need for a federal, as opposed to a unitary constitution to be, as Reid was to emphasize, 'clear, express and unambiguous'. His warning that failure to make it so might 'lead to disputes, ill-feeling and perhaps violence'<sup>46</sup> may seem far-fetched a century after he issued it, but in the context of the time, less than a generation after the blood-bath of the American Civil War, it may well have seemed very wise indeed. The blunt fact, on which Reid shone a bright light, was that the Convention did not know how to solve the problem of fitting an executive government into a scheme for a federal legislature, and just pushed it aside.

The vagueness of the bill on this vital point was reflected in its treatment of other matters, notably interstate trade and commerce, and federal finance. With regard to the former the bill might readily have been interpreted as posing a serious threat to the survival of the New South Wales railway system. The latter was, of course, related to problems of fiscal policy: but for people in the 1890s, who had not yet learned to look upon a government as a financial fairy-godmother with a bottomless money well, but rather had a horror - a very proper horror - of official extravagance, vagueness here was not just undesirable but ominous. It was particularly ominous for the citizens of the colony which would contribute the greatest part of the money, New South Wales. When Reid attacked the finance clauses of the draft constitution he spoke as a free trader; but he also spoke as probably his colony's leading authority on public finance.<sup>47</sup>

I am arguing, as I have elsewhere, that Reid's opposition to the federal scheme embodied in the 1891 bill had something to do with the opportunity it gave him to dish Parkes, and something to do with his view of it as a menace to the policy of free trade; but it had more, much more, to do with a perception of the threat it represented to the real interests of his colony and of the dangers of such a defective constitution to Australia as a whole. The man who led the anti-bill campaign in 1891 was of course a free trader. But he was not just a free trader: he was above all a liberal and a democrat.

It remains to enquire into the significance of this campaign. Would the bill have failed to gain acceptance in New South Wales, and would therefore the issues have had to be rethought in the future, and this time squarely faced, if it had not been for him? It is impossible to be certain, and the weakness of the arguments being used in favour of federation must have counted heavily against it; but it is clear that he provided an analysis of the draft constitution's weaknesses which could never have been provided by the obstreperous Dibbs, or the dying Robertson,<sup>48</sup> or by essentially third-rank politicians like Slattery. What does seem certain is that it was Reid who stopped in its tracks the Convention's almost unbelievably arrogant but quite

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<sup>46</sup> *Sydney Quarterly Magazine*, December 1891, p 274.

<sup>47</sup> He had been a senior officer in the New South Wales Treasury before he was thirty, and was to become in 1894 probably the best Treasurer the colony had ever had.

<sup>48</sup> Robertson died four days after chairing Reid's anti-bill meeting of 4 May.

deliberate attempt to have the colonial Parliaments rubber-stamp without discussion<sup>49</sup> a constitution which its members must have known, if they were not complete fools, was ill-digested, defective in essential areas, and perhaps totally unworkable. Whatever differences of opinion there may be about his motives, there can be no doubt that in this he did 'the coming Commonwealth'<sup>50</sup> an incalculable service.

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49 *Official Report of the National Australasian Convention Debates, op. cit.*, p 932.

50 The title of a series of lectures prepared, but not delivered, by Robert Garran a few years later. Garran, *op. cit.*, p 109.

## What the Courts have done to Australian Federalism

Professor Leslie Zines

The Commonwealth of Australia Constitution Act which first rolled off the presses in 1900, and which came into operation on 1 January 1901, is for the most part the same legal instrument that provides the framework of government in Australia today. The Commonwealth Parliament was, by that Act, given powers with respect to specified subjects, and no others. With two additions (relating to social security and people of the Aboriginal race) the powers then granted to the Commonwealth remain the totality of its powers today.

Yet the Constitution has proved sufficiently adequate to bring the nation through events and circumstances which none of those who framed it could have entirely foreseen or envisaged. Two world wars, the Great Depression, advances in transport, communication and technology, the disappearance of the British Empire and the emergence of Australia as a sovereign nation, the change in the ethnic and cultural composition of the population and the alteration of political and social attitudes throughout the twentieth century have all had a great effect on our perceptions of the role of the Commonwealth and the States, respectively, and the relationship between government and the citizen.

How can one reconcile a ninety-year-old, relatively unchanged, instrument of government with the obvious process of growth and evolution of our system? No objective observer, no matter how keen on constitutional reform and no matter how dissatisfied with our present constitutional arrangements, can deny that our nineteenth century Constitution has proved remarkably adaptable and resilient.

Its survival into a new and different age can be seen, quite rightly, as a tribute to the founders, some of whom have been the subject of earlier lectures in this series. But it would be wrong to attribute to them a superhuman prescience or ability. One should not downgrade the efforts of those who came later and who, by exploring the meaning of the Constitution in the light of the issues and problems of their times, gave it life and vitality.

While the words of the Constitution have ruled us, while they are a major premise in all policy-making and law creation, it was the issues that arose from time to time which provided the testing-ground of meaning and operation. Each new generation kept going back to the document and, of necessity, reading it in the light of their particular social and political problems, expectations and goals. In this process, the High Court of Australia has played a leading role.

It is a characteristic feature of countries with rigid constitutions - particularly federal constitutions - that major issues which elsewhere are purely matters for political debate and resolution appear as questions of law for decision by the courts. Moving across the arena of the High Court - like an historical cavalcade - have appeared many of the great forces and interests whose conflict and resolution have been major themes of our federal history and therefore of the story of twentieth century Australia.

These have included the efforts of Deakin and the Labor Party, in the first decade, to control industrial conditions and to strengthen organised labour, social and

economic controls in wartime, immigration and deportation policies, the clashes between J T Lang and the federal government over how to deal with the depression, organised marketing schemes for primary produce, the attempted nationalisation of airlines and banks under the Chifley Government, social welfare legislation, government borrowing and expenditure, Federal and State taxation policies, attempts by the Menzies Government and earlier governments to deal with Communism and subversion, the struggle for and against aid to church schools, the development of air and road transport, the control of monopolies and restrictive trade practices, marriage and divorce, the dissolution of both Houses of Parliament, electoral redistributions, issues of the environment (including the conservation of Fraser Island, South-West Tasmania and Queensland rainforests), racial discrimination and war crimes. Special mention should be made of the continued and continuing efforts from the beginning of the Commonwealth to deal with an issue that has hag-ridden most Governments: industrial relations and industrial disputes.

Opposing interests in relation to all these issues, and more, have been arrayed before the forum of the High Court of Australia, with the Constitution as the centrepiece of argument.

The result of the High Court's handiwork is that while the Constitution, as words on paper, has remained much the same for ninety years, it has, as an organic instrument of government, changed very much. It will no doubt continue to change even if no formal alterations are made to it.

How has this come about? Does it mean that the unelected judges have exceeded their function of interpreting and applying the existing law, and have usurped the power given, in s 128, only to Parliament and to the electorate to alter the Constitution? Occasionally suggestions are made to that effect. One commentator in 1985 referred to two decisions of the High Court upholding, under the external affairs power, the *Racial Discrimination Act* and the *World Heritage Properties Conservation Act*. He said:

The entire spirit of the Constitution has been undermined and in effect it has been rewritten. It has been rewritten by four judges of the High Court, against the wishes of the three others, under pressure from a Commonwealth government exploiting racial discrimination and the environment. The irresponsibility and arrogance of the four judges of the High Court who permitted this cannot be underestimated, forgiven or condemned too highly. They have permitted in effect a rewriting of the Constitution, contravening Section 128 ... By a cunning conjuring trick, as it were, four judges ... have swept away the restrictions contained in the Constitution.<sup>1</sup>

It seems to me, however, that such a view rests on a misunderstanding of the role of the judiciary and the nature of constitutional interpretation. What I want to briefly discuss is how the Court managed, while keeping to its proper role of constitutional interpretation and application, to produce results that might have startled some of the framers at the time that they completed their handiwork.

The answer lies largely in the general, rather abstract language used in much of the Constitution. We do not find in it the detailed provisions and lengthy definitions one is accustomed to in ordinary legislation, such as the Companies Law or the Income Assessment Act. The coverage of the main commercial power of the

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<sup>1</sup> Cooray, 'Human Rights in Australia', Australians for Consensus, *Freedom and Responsibility*, 1985, quoted in Michael Coper, *Encounters with the Australian Constitution*, CCH Australia Limited, 1987, p 187.

Commonwealth is described in ten words, namely, 'trade and commerce with other countries and among the States'. The power designed to deal with international relations is contained in two words, namely, 'external affairs'. The shorter the phrases and the more general and abstract the terms used, the more scope there is for dispute as to meaning, when it is necessary to apply them to practical situations - and, therefore, the greater is the scope for judicial discretion. Sir Owen Dixon summed this up by referring to the Constitution as 'an instrument of government meant to endure and conferring powers expressed in general propositions wide enough to be capable of flexible application to changing circumstances'.<sup>2</sup>

Two events which occurred in the same week in Sydney in 1934 illustrate some of these issues. Commonwealth law required the owner of a radio (and later television set) to obtain a broadcasting receivers licence - popularly known in the early days as a wireless licence. On 26 September 1934 Mrs Dulcie Williams of Surry Hills in Sydney, while listening to her wireless, was visited by departmental inspectors who demanded to see her licence. She claimed she was not required to have one because the relevant law was invalid. The Commonwealth, she argued, had only the express power given to it by the Constitution.

Nowhere in the Constitution was there any reference to broadcasting, and indeed it was unknown when the Constitution was enacted. The inspectors might have drawn her attention to s 51 (v) of the Constitution which confers power on the Commonwealth to make laws with respect to postal, telegraphic, telephonic and other like services. At any rate her reply was that a broadcasting service was nothing like those named in the Constitution. The dispute went to the High Court. The majority found in favour of the Commonwealth. They said that a broadcasting service was like a telegraphic or telephonic service in that all involved the sending of communications from a distance by electronic means. But Dixon J dissented. He pointed out that the services named in s 51 (v) permitted individuals to communicate with each other. The broadcasting service did not provide for interpersonal communication. For the majority, that feature was *not* essential; for Sir Owen Dixon it was.<sup>3</sup>

This case illustrates a number of aspects of constitutional review of legislation. First, it is useless to consider what the framers intended in relation to broadcasting. They did not know of it. Secondly, no amount of empirical examination of the services involved can ultimately resolve the issue, yet the judges have a duty to come to a decision. Thirdly, there is no way that one can positively affirm that either view was, in any absolute sense, right or wrong.

Assuming that the Constitution leaves the judge with a choice - in the sense that more than one possible interpretation can each be regarded as rational when judged against the words of the Constitution - it is obvious that the choice of meaning cannot be based on the Constitution. One has to look further afield. It is in this area that it is impossible to exclude broader policy considerations or value judgments if one is to give a rational judgment.

Two days after Mrs Williams was discovered illegally listening to her radio, Mr Goya Henry, an aviator, had his aviation licence suspended. Two days after that he nevertheless flew a plane, setting off from Mascot airport and then flying around, over and under Sydney Harbour Bridge. He was convicted of breach of the federal Air

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<sup>2</sup> *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 Commonwealth Law Reports 29 at 81.

<sup>3</sup> *R v Breslan; Ex parte Williams* (1935) 54 Commonwealth Law Reports 262.

Navigation Regulations. He then appealed to the High Court.<sup>4</sup> The Constitution gave no express power to the Commonwealth to regulate aviation, which again did not exist when the Constitution was enacted. The Commonwealth argued that its rules were made in pursuance of an international convention and were, therefore, laws with respect to external affairs. The Court held, however, that the regulations were not consistent with that Convention. The only other power that seemed available was 'trade and commerce with other countries and among the States'. But Mr Henry had not been flying from or to any other state or country. The Commonwealth argued that the commingling in air routes and airports of aircraft proceeding intrastate with those travelling interstate, enabled it to control all aircraft. That submission was summarily dismissed. Mr Henry could not be prevented by the Commonwealth from stunt-flying around Sydney Harbour under the commerce power. The Constitution clearly distinguished between intrastate and interstate commerce, and confined the Commonwealth to the latter. An attempt by the Commonwealth in 1936 to have the Constitution amended to give it power over aviation astoundingly failed to obtain majorities in four states.

Nearly thirty years later, in 1965, the High Court had no difficulty in upholding federal power to license all air navigation on the basis of safety, regularity and efficiency of the operations, including purely intrastate operations.<sup>5</sup> One of the reasons relied on was that, whatever the situation in the 1930s, the safety of interstate and overseas air navigation in the 1960s could only be assured by the Commonwealth regulating the safety aspects of all air navigation in Australia. A law therefore operating on purely intrastate carriage of goods and passengers by air was held to be a law with respect to trade and commerce with other countries and among the states. No doubt, if the Founding Fathers had been asked whether they could conceive of a situation where the power they had given the Commonwealth could be used to control an entire area of domestic trade and commerce within a state, they would have said 'No'. But that is because they were unaware of the hazards, speeds and complexity of modern forms of travel. It is probable that the framers certainly intended that the Commonwealth should be empowered to protect interstate and overseas trade. What has changed since then are simply the facts of the world not the nature or object of the power.

While I imagine that there would be few people today who would disagree with the result of that case, even those in state government, the broad principle invoked can lead to issues that are intractable if we confine our consideration to the text of the Constitution. This is because the principle asserts that in certain circumstances the Commonwealth may control matters that do not come within the subject of a federal power because of the effect they have on that subject. Intrastate air navigation could be licensed because of the consequences to interstate and overseas trade and commerce. But, of course, almost anything can affect interstate or overseas trade and commerce, including birth, marriage and death. Questions of degree and of the intimacy or remoteness of cause and effect are necessarily involved in making judgments in this area. In many cases, a rational conclusion can be arrived at only by having regard to matters that may be described as 'political' or 'social', in a broad, rather than partisan, sense.

For example, in 1973 the Commonwealth Parliament purported to authorise TAA (as it then was) to carry goods and passengers between places in the same state if it was for the purpose of the 'efficient, competitive and profitable conduct' of the

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4 *R v Burgess; Ex parte Henry* (1936) 55 Commonwealth Law Reports 608.

5 *Airlines of NSW Pty Ltd v New South Wales* (No.2) (1965) 113 Commonwealth Law Reports 54.



airline's interstate or overseas services. The court split on the validity of the provision. It was held invalid, but only three judges out of five constituted the majority.<sup>6</sup> The majority declared that while the Commonwealth could regulate intrastate trade in order to ensure the *physical* survival and safety of interstate trade, it could not do so for the purpose of ensuring the economic viability and commercial success of interstate trade. The minority considered that this was unrealistic. The present Chief Justice (who felt he did not have to decide the issue in the circumstances of the case) declared that if one had any regard to practical reality, consideration had to be given to the economics of the operation. Both physical and economic considerations were indispensable elements in determining what was reasonably necessary to achieve the legitimate object of protecting and fostering interstate and overseas trade and commerce. Again, the text of the Constitution does not resolve the issue.

Behind this disagreement loomed the United States' experience. From the time of President Roosevelt's second term, the United States Supreme Court performed a constitutional volte face and permitted Congress, under a commerce power similar to our own, to control all processes of manufacture, agriculture and domestic trade if there was a rational basis for concluding that they had a substantial economic effect on interstate or overseas commerce. The result is that, for over 50 years, no law controlling any aspect of the economic life of that country has been held invalid on the ground that it does not have a sufficient relevance to interstate commerce. For example, it was held that a federal law can prohibit a farmer from growing wheat to feed his own pigs.<sup>7</sup> The rationale was that wheat grown for domestic consumption had nationally an appreciable practical effect on the price of wheat moving in interstate commerce. Therefore wheat locally consumed was subject to federal regulation, although it did not move into commerce at all. Some of our judges are wary of importing American decisions. To accept that the Commonwealth can control activities merely because they have an economic effect on interstate or overseas trade and commerce could, they fear, be to set their feet on a slippery slope. It could lead to the obliteration of the distinction between interstate and intrastate trade and between trade and production. But for those judges, who obviously wish to cleave closely to the terms of the Constitution, it doesn't seem to trouble them that the distinction made between economic and physical effects is nowhere mentioned in the Constitution. It is purely a judicial creation. The dispute and tension between preserving the distinction between the forms of trade and applying realistic criteria goes on.

In Australia, the High Court partially achieved a result of greater federal economic control by a different route. It is one which avoided the court having to examine economic and social facts. The vehicle for this result was s 51 (xx) which confers power on the Commonwealth to make laws with respect to 'foreign corporations and trading and financial corporations formed within the limits of the Commonwealth'. The Commonwealth's early attempt to use this power to control monopolistic and restrictive trade practices by these corporations in relation to intrastate trade failed in 1908. The court, consisting entirely, it should be noted, of Founding Fathers, produced four different interpretations of the power.<sup>8</sup> The resulting confusion meant that the power lay dormant for about 60 years. It was rediscovered in the 1960s, and in 1971 the court unanimously declared that the Commonwealth could, under that provision, control all the trading activities of trading corporations, without regard to the distinction between the forms of trade referred to in the trade and commerce

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6 *Attorney-General (WA); Ex rel Ansett Transport Industries (Operations) Pty Ltd v Australian National Airlines Commission* (1976) 138 Commonwealth Law Reports 492.

7 *Wickard v Filburn* 317 United States Reports 111 (1942).

8 *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 Commonwealth Law Reports 330.

power.<sup>9</sup> In 1983, a majority went further and held the Commonwealth could also control all acts of those corporations done for the purposes of trade, such as manufacture.<sup>10</sup> These decisions have achieved *some* of the results which in the United States was achieved by a broad construction of the commerce power; but in Australia it is limited to activities concerning the kinds of corporations specified. The corporations power has therefore limited scope for federal control of those sectors of the economy not dominated by bodies incorporated under the Companies Law, such as agriculture, stockbroking, pharmaceutical chemists, the professions and so on.

The corporations power has been used to control restrictive trade practices, to provide consumer protection, to penalise industrial boycotts and to prevent the Hydro-Electric Commission of Tasmania from building a dam for the production of electricity. It is available, however, for a wide variety of other purposes, including wage and price control, the law of defamation in relation to the press, newspaper advertisements and the prescribing of manufacturing or packaging standards. But this only applies (as I have said) where corporations carry out the transactions or activities regulated. I should add that no amount of study of the Convention Debates provides a clear answer to the question of original intent.

On one occasion the High Court looked at the Convention Debates to determine another issue arising under the corporations power, namely, whether the Parliament could provide for the creation of trading corporations, and held, by a majority of 6 to 1, that it could not. For many, it was a dubious exercise in historical interpretation, as the court found the historical intention to be clear, whereas it seemed highly ambiguous to others.<sup>11</sup>

There has, for most of our history, been little criticism, from a social or political viewpoint, of the work of the High Court. That was not true of one aspect of the *Franklin Dam* case in 1983.<sup>12</sup> Under our system only the Commonwealth government may enter into treaties, and its executive power extends to treaties on any subject. But the mere existence of a treaty does not, generally speaking, change the law of the land. In so far as the treaty requires Australia to change the domestic law, that can only be accomplished by legislation. In the *Franklin Dam* case it was held by a majority that the Commonwealth Parliament, under its power to make laws with respect to external affairs, could validly enact legislation to give effect to an international treaty obligation, whatever the subject matter of the treaty. In that case the treaty was the World Heritage Convention, and the issue deeply divided the judges of the court - as it did politicians, the press and the public. It had earlier been established that one of the major objects of the external affairs power was to enable the Commonwealth to deal effectively with relations between Australia and other countries. For the majority of the court the existence of an international agreement established that relationship. A law giving effect to it was therefore within the power. To deny the Commonwealth the authority to implement any international agreement, would, in their view, be to cripple Australia in its international relations and prevent it from taking a full part in the burgeoning development of international law and an evolving world order. National need and national concern loomed large in the majority's judgments. The evidence of existing treaties and United Nations activity indicated that there was no subject that could be regarded as being, of its nature, outside the area of international interest. In any case it seemed clear to the majority

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9 *Strickland v Rocla Concrete Pipes Pty Ltd* (1971) 124 Commonwealth Law Reports 468.

10 *Commonwealth v Tasmania* (1983) 158 Commonwealth Law Reports 1.

11 *NSW v Commonwealth* (1990) 169 Commonwealth Law Reports 482.

12 *Op. cit.*, n 10.

that giving effect to an obligation which bound Australia under international law concerned Australia's relations with other countries and, therefore, came within the plain meaning of the words of the Constitution, namely, a law with respect to 'external affairs'.

If the majority concentrated on the place of the nation in the world, the minority emphasised the position of the states in relation to the nation. Those judges declared that, as the Commonwealth government had the clear power to enter into international agreements on any subject, the external affairs power in relation to the legislative implementation of treaties was capable of unlimited expansion. The minority was of the view that the position taken by the majority would enable the Commonwealth to pass a law on any subject dependent only on the decision of the executive to become a party to an international agreement. This threat to the federal system was, they said, reinforced by the fact that in modern times there was no area that might not be the subject of an international treaty. Emphasis was placed on a new notion in constitutional interpretation, namely, 'the federal balance'. What was the point, they said, of carefully delimiting the powers of the Commonwealth if one single power was interpreted so as to embrace everything and so render the others superfluous. The minority would have preferred to confine federal power to the implementation of treaties that concerned only the people, enterprises and governments of other countries. However, an earlier decision in 1982 had upheld, under the external affairs power, the *Racial Discrimination Act* which was primarily concerned with discrimination by and against Australians.<sup>13</sup> They adopted, therefore, the view of one of the majority judges in the earlier case, Sir Ninian Stephen, that to give effect to a treaty under the external affairs power, it had to relate to a matter of sufficient international concern. The minority found that while the subject of racial discrimination had been in that category, the World Heritage Convention, drafted in less mandatory terms and requiring a balancing of interests, was not of sufficient international concern to bring it within the scope of the external affairs power.

For the majority, the principle applied by the dissenting judges would have involved the court in an invidious task. It raised questions of fact and degree which were primarily the function of governments to determine. How was the degree of international concern to be proved? How could a court justifiably declare that the matter was not of international concern when the nations of the world, by entering into a binding international convention, had clearly indicated that, in their view, it was? Mason J pointed out that the court would be substituting its judgment for that of the other branches of government which were in a far better position to arrive at an informed opinion.

It is clear in all the judgments that policy views as to the nature of our federal system played a major part. Mere contemplation of the words of the Constitution, in or out of context, provided no conclusive answer. Nor did contemplation of the framers intention, as distinct, perhaps, from their expectations. In the light of the criticism of the majority's position by some, it should be pointed out that it was not new. Three out of five judges expressed a similar view in the *Goya Henry* case in 1935. Secondly, to say that, as a result of the case, the Commonwealth has unlimited power as to subject matter is a caricature of the true position. The Commonwealth must first find a treaty or convention which deals with the matter in the way it desires. Thirdly, the law must conform to the objects of the treaty. In fact, in the *Franklin Dam* case, various provisions were held invalid because they went beyond the obligations imposed. Nevertheless, while government by treaty may not be as easy

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13 *Koowarta v Bjelke-Petersen* (1987) 153 Commonwealth Law Reports 168.

as some suggest, the interpretation adopted in the *Franklin Dam* case enhanced federal power and made the area of state power more vulnerable to being pre-empted by inconsistent federal law.

Is the decision, as some claim, inconsistent with the federal system that the framers intended? For the minority, it obviously was, because of the increasing interest of the nations of the world and international bodies in an ever-expanding list of matters. This might result in the steady deprivation of state power in areas thought to have been within their exclusive competence. Indeed, as indicated earlier, some critics declared that the majority had illegitimately amended the Constitution. A number of newspaper editorials expressed the same view.

It is clear, however, that whatever the framers intended, they could not, in the circumstances of the 1890s, have regarded a power to implement any treaty as inconsistent with a federal system in which the states had substantial power. They knew nothing of, and could not have predicted, the enormous expansion of international activity in the twentieth century. In their day, treaties were confined to few subjects. The nations saw no need to enter into relations in respect of a large range of matters. For the framers, therefore, the investing of power in the Commonwealth to implement any international agreement did not raise any question of whether the states could be deprived of all or nearly all exclusive legislative power. It was not an issue. On this argument, what has changed is not the object or meaning of the power, but, again, the facts of the world and, therefore, the provision's application to those facts.

To talk of the judges illicitly altering the Constitution, in this or in any other case that the High Court has decided, is little more than propaganda. It would equally be open to those who oppose the minority's approach in the *Franklin Dam* case to say that *they* had attempted to alter the Constitution for political ends. The open-ended texture of the language of the Constitution means that there is brought to bear many considerations in the process of interpretation, including textual and contextual elements, the legal principles of interpretation, and such factors as the judges' view of the object of the provision under review and of the Constitution as a whole. The issue of characterising a federal law in relation to a subject of federal power is as Kitto J once put it, 'to ask a question which is not so precise that different answers may not appeal to different minds.'<sup>14</sup> While the Constitution does not list any state exclusive powers, and although it does not refer to national interest or national need, the policy considerations relied on by the various judges in the *Franklin Dam* case are part of the stuff of constitutional interpretation.

Conflicts of political values and goals involving our federal system have arisen outside the area of distribution of legislative powers. Having regard to the sponsor of these lectures the most appropriate illustration is the *Territories Representation* case in 1975.<sup>15</sup> What was at stake was, in part, the resolution of an apparent inconsistency in the Constitution. Section 7 provides, so far as relevant, that 'the Senate shall be *composed* of Senators for each State, directly chosen by the people of the State ...'. Section 122 provides, so far as relevant, 'that Parliament may make laws for the government of any territory ... and may allow the representation of such territory in either House of Parliament to the extent and on the terms which it thinks fit.' The *Senate (Representation of Territories) Act 1973* provided for the representation in the Senate of the Australian Capital Territory and of the Northern Territory by two

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14 *Airlines of NSW Pty Ltd v New South Wales* (No.2)(1965) 113 Commonwealth Law Reports 54 at 115.

15 *Western Australia v Commonwealth* (1975) 134 Commonwealth Law Reports 201.

Senators for each Territory. The Territory Senators were given all the powers, including voting powers, of state Senators. Queensland and Western Australia challenged the legislation and argued that s 7 and other provisions relating to the Senate constituted the Senate as a States' House. Therefore the representation of the Territories referred to in s 122 must be less than full membership and entail no voting powers. The court upheld the Act, but split four to three. The majority consisted of McTiernan, Mason, Jacobs and Murphy JJ. The dissenters were Barwick CJ, Gibbs and Stephen JJ. While all the judges relied on textual arguments, it is, of course, clear from the disagreement that those reasons were not decisive. Each judge bolstered them by reference to values they regarded as inherent in the Constitution. The dissenters declared that s 122 was, of its nature, incidental to the dominant purpose or character of the Constitution, namely a federal state. It could hardly be intended that this purpose should be undermined by an incidental provision such as s 122. The dissenters took the view that the concept of an upper house representing the states was 'indispensable' to our federal system. To alter the nature of the Senate was to alter 'the essential features of the federation'. For Sir Garfield Barwick, to uphold the legislation would 'be to subvert the Constitution and seriously impair its federal character'. Sir Harry Gibbs declared that the framers obviously intended the Senate to be a means of the states protecting their interests. The fact that the Senate may not have fulfilled that role was irrelevant.

A further consideration was that, if s 122 were given a literal interpretation, the Senate could be swamped by an excessive number of Territory representatives. The minority concluded, therefore, that the only way to reconcile s 7 and s 122 was to interpret the latter to mean that the representatives of the Territories could not have voting rights.

If federalism as a basic value favoured Territories that did not have full representation, the democratic nature of the Constitution led to the opposite result, and to a literal interpretation of s 122. It seemed to the majority judges difficult to believe that the framers intended that the people of the Capital Territory and the other Territories should be permanently disenfranchised in relation to a body that made laws for them and levied taxes on them. In their view, the framers foresaw and made provision for the political evolution of the Territories, in some cases towards full statehood.

The view that Parliament might swamp the Senate was met by the argument that possible abuse of power by Parliament was not a proper judicial consideration. The political checks of our system were designed to deal with abuse. The Founding Fathers, by giving power to a democratic Parliament assumed it would not act in a grossly unreasonably manner, as suggested by the minority. Jacobs J declared that it was a 'preposterous suggestion'. The framers 'trusted a system of parliamentary government in which they were mostly immersed'. In any case there was nothing to stop Parliament doing the same in relation to new states (the representation of which was also left to the Commonwealth). Further, unless there was a joint sitting following a double dissolution, the Senate would have to agree to its own dilution of state representation.

It is clear from these arguments that textual considerations were not decisive. In the judgments taken as a whole, the nature of our system and the competing principles and premises were debated and argued. Each judgment rested finally on what, within the limits prescribed by the terms of the Constitution, was considered by the judge to be the proper framework of our governmental system. No argument or series of arguments could be regarded as 'compelling'. Indeed in a later case, when this decision was unsuccessfully challenged, both Stephen and Mason JJ recognised

that this was a decision that could not be called, in any true sense, right or wrong, but only as persuasive or otherwise.

And so it goes on. Judicial decisions are shaped, of necessity, by clashes of values and policies - but always within the limits of the rather open-ended text of the Constitution. I do not want to give the impression that even in an area of choice the judge is left at large, in the position of a legislator. The terms of the Constitution, the requirements of reasoning, respect for past decisions (which even in constitutional law are not lightly overruled), the need for consistency of argument, as well as legal training and tradition, all distinguish reasoned judicial decisions from those based on personal predilections and from arbitrary pronouncements.

Also I think it is important not to see the judiciary as the only influence in determining the nature of our federal society. Despite, for example, the financial dominance of the Commonwealth and the trend toward greater power for the Commonwealth, the states have not disappeared and are showing no signs of disappearing. Political and social forces have grown around and out of their institutions, designed for independent regions of a federal country. As every government and every governmental adviser knows, for the Commonwealth to have power is one thing, to be able, politically, to exercise it (or to exercise it in a particular way) is another. The federal principle is deeply embedded in Australian society. It permeates all our organisations, whether sporting bodies, trade unions or, most importantly, political parties, where state branches and state parties are strong and influential. The resilience of the states and the great number and variety of inter-governmental bodies engaged in negotiating and discussing Commonwealth and state interests is testimony to the federal nature of our community. To that extent the constitutional framers, and our history before that, have done their work for some time to come, whatever the future of judicial review or formal constitutional amendment.

## Constitutional Reform In Australia

John McMillan

Constitutional reform has never moved far from the political agenda in Australia. In the first twenty years of federation thirteen referendum proposals were submitted to the electorate, and as many as forty-five different bills for constitutional reform were introduced in the Federal Parliament.<sup>1</sup> There has followed a large number of official enquiries, continuing to the present day: the Royal Commission on the Constitution from 1927 to 1929, the Convention of Commonwealth and State Parliamentary Representatives of 1942, the Joint Parliamentary Committee on Constitutional Review from 1956 to 1959, the six plenary sessions of the Australian Constitutional Convention held between 1973 and 1985, the Constitutional Commission from 1985 to 1988, and the Constitutional Centenary Conference of 1991.

The objective is still alive. The Prime Minister's despondent withdrawal from constitutional reform attempts in 1988, has been capped quickly by the ALP National Conference decision in 1991 to push for a republican Australia.

Is there any realistic chance that the Constitution can be changed, particularly in a substantial way? Two issues arise: whether Australia's Constitution contains defects that can be corrected only by formal constitutional amendment; and if so, the approach that should be adopted for achieving reform.

### The Need for Constitutional Reform

It is appropriate to start with the argument that Australia does not currently have a perfect Constitution. We may be a stable democracy, the Constitution may have survived two wars, a depression, and a revolution in technology and ideas, but the document is not ideal or flawless. Constitutional change will not be 'an irrelevant, time wasting and damaging distraction', as David Kemp, one of the perennial opponents, has recently argued.<sup>2</sup>

Nor is the support for constitutional change an isolated or idiosyncratic obsession. The Constitutional Commission in 1988, in an impressive 900 page report, took 30 pages to recommend textual alterations on nearly every subject dealt with in the Constitution.<sup>3</sup> The same assessment has been expressed by another major forum, the Australian Constitutional Convention, which included representatives from Federal, State and local government, and from all major political parties.<sup>4</sup>

The argument for change can be traced briefly by reference to three different subjects of the Constitution: federalism; the institutions of national government; and protection of rights and freedoms.

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1 See the table of referendums at the end of this paper. For a table of Bills proposing alterations, see *Final Report of the Constitutional Commission*, Australian Government Publishing Service, Canberra, 1988, Volume 2, p 1115.

2 *Canberra Times*, 14 April 1991, p 7.

3 *Final Report of the Constitutional Commission, op. cit.*, (hereafter '*Constitutional Commission Report*').

4 The Resolutions of the Convention are contained in the published *Proceedings of the Australian Constitutional Convention 1973; Proceedings 1975; Proceedings 1976; Proceedings 1978; Proceedings 1983; and Proceedings 1985.*

Federalism: Historically it has been the federalism structure that has been the focus for reform. Two thirds of the 42 referenda have proposed a change to this structure. It was of this aspect of the Constitution that Gough Whitlam made his famous criticism in 1957, that the ALP 'has been handicapped ... by a Constitution framed in such a way as to make it difficult to carry out Labor objectives.'<sup>5</sup>

Now of course it is the federalism structure that is the least rigid part of the Constitution. One important agent of change has been High Court interpretation. The broad construction given to a variety of federal powers - external affairs, corporations, executive power, and the appropriations power - has enabled Commonwealth Governments more easily to undertake the programs of national, social and economic reform for which they had earlier sought authority at referendums.<sup>6</sup> The troublesome limitation provisions, like s 92, the guarantee of free interstate trade, have also been reinterpreted.<sup>7</sup> The scope for judicial reform was well captured in the epigram attributed in a recent book to Neville Wran: 'If you want real social change, let me appoint the judges.'<sup>8</sup>

Another recent force for change has been intergovernmental agreement. We now have quite a different federal system, arising from agreements which allow court cases to move more freely between federal and state courts,<sup>9</sup> which have extended state jurisdiction in Australia's coastal zone,<sup>10</sup> and which have established a national corporations law.<sup>11</sup>

These structural developments have been accompanied by a change in political style and objectives. Gone, from both sides of politics, is the 'crash or crash through' thrust of the Whitlam days, that provoked so many constitutional boundary disputes.

Nevertheless, while the pressure for change to the federalism structure has lessened, the need for reform has not disappeared. There has been general agreement on all sides and levels of politics that the taxing powers of state Parliaments should be clarified, so that states do not have to resort to convoluted schemes to tax cigarettes and liquor, and are not dependent on a miscellany of low yield but unpopular taxes. The Federal Parliament, in the view of the Constitutional Commission, would similarly benefit from constitutional amendment which clarified or extended its legislative powers over topics like communications, nuclear development, intellectual property, family law, social welfare, and industrial relations.<sup>12</sup>

The object of most of the proposed reforms would not to be rewrite the federal system in any radically different way, or to make it more centralist. The major purpose would be to confirm a federal arrangement that we already have. As it is argued, if a federal or state Government activity is already established, but

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5 'Chifley Memorial Lecture' (1957), reprinted in E G Whitlam, *On Australia's Constitution* Widescope, 1977, p 16.

6 See Leslie Zines, 'What the Courts have done to Australian Federalism', also published in this volume of *Papers on Parliament*.

7 *Cole v Whitfield* (1988) 165 CLR 360.

8 Fia Cumming, *Mates: Five Champions of the Labor Right*, Allen & Unwin, Sydney 1991.

9 See *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth).

10 See *Coastal Waters (State Powers) Act 1980* (Cth), and *Coastal Waters (State Titles) Act 1980* (Cth).

11 See *Corporations Act 1989* (Cth), and the legislation in each state adopting the Commonwealth law, eg, *Corporations (NSW) Act 1990* (NSW).

12 *Constitutional Commission Report*, Chs 10 and 11.



implemented by a tangled or wobbly scheme, far better to construct a more secure constitutional foundation. In too many examples from the past, federal constitutional difficulties were a factor in costly anachronisms, like settlement of *de facto* marital disputes, food labelling, corporate regulation, the concentration of trucks on the roads, integrated regulation of the electronic and print media, and - the inveterate problem - different railway gauges.

Institutions or machinery of national government: It is in relation to this aspect of the Constitution that much of the dissatisfaction has been expressed in recent times. Some reform proposals in this field are clearly contentious, and support only a partisan argument for constitutional change. A topical example is the ALP initiative to replace the monarchy with a republican form of government. The Prime Minister's desire to extend the maximum term of the House of Representatives is probably contentious too. Equally, while most commentators endorse the desirability of insulating the Governor-General from constitutional controversy by creating a more predictable procedure for responding to a Senate failure to pass a Government's budget, there is sharp partisan disagreement on just what that response should be.

But some other proposals (one would hope) are of more certain merit. Among those must surely be the requirement for simultaneous elections for both Houses of Parliament, coupled perhaps with a requirement for a minimum parliamentary term. There is general agreement too that at least in most respects the Constitution is defective in the wholly misleading description it gives of responsible government, and the role to be played in that system by the Parliament, the Prime Minister and the Governor-General. As David Solomon pointed out in the 1970s in his polemic, *Elect the Governor-General!*, the Constitution does not inhibit the Parliament from converting to an American style presidential government, with an elected Governor-General at the helm.<sup>13</sup> On the other hand, Parliament lacks any explicit power to declare that Australia shall have the same Monarch as the British Monarch - a point of obvious relevance if there is an abdication.<sup>14</sup>

Another curiosity are the antiquated conflict of interest provisions which specify who is eligible to be elected or to sit in the Parliament.<sup>15</sup> A person can, for instance, be disqualified if convicted of a Commonwealth or State offence punishable by imprisonment for one year or longer. It was with good sense rather than faint heart that Commonwealth politicians participating in the famous public assembly marches in Queensland would vanish when the police came in view!

Protection of individual rights and freedoms: In this area too there are many disputed reform proposals - whether, for example, as recommended by the Constitutional Commission, formal constitutional protection should be given to many of the traditional rights and freedoms, such as freedom of thought, belief, opinion, expression, assembly, association, and movement.<sup>16</sup>

Here as well, however, it is possible to move to stronger ground, and to identify constitutional defects that are historical, rather than functional. There are rights which the Constitution currently protects, but the protection has proved to be

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13 David Solomon, *Elect the Governor-General!*, Nelson, 1976.

14 See *Constitutional Commission Report*, paras 2.157 - 2.166.

15 Constitution ss 44 and 45: and see Senate Standing Committee on Constitutional and Legal Affairs, *The Constitutional Qualifications of Members of Parliament*, Parliamentary Paper 131/1981.

16 *Constitutional Commission Report*, Ch 9.

inadequate or partial. The case for attempting to clarify or restore that protection - of religion, property and criminal trials - will be persistent.<sup>17</sup>

There is also the indefensible absence of basic democratic guarantees. As judges of the High Court have confirmed, the right to vote in federal elections can be restricted (as indeed it has been) on grounds of race, sex or lack of property.<sup>18</sup> Electorate sizes can also be randomly set, contrary to the 'one vote, one value' aspiration.<sup>19</sup> Nor is there any explicit guarantee in the Constitution that voting shall be secret, or that the electoral system shall not discriminate unfairly against non-Government parties. There are many examples, including within Australia, of how undemocratic practices can nurture governments corrupted to the point that they fail in any civilized recognition of what is right and what is wrong. In short, some rights are a matter for national constitutional concern.

### The Referendum Record

A more challenging issue is to establish that constitutional change in Australia is a realizable goal. Pessimism takes root at this point. Of forty-two referendum proposals put to the electorate since 1906, only eight have been approved in the manner required by s 128 of the Constitution. The most recent attempt in 1988 struck a devastating blow at the process: all four proposals were rejected in all six states. Many saw the 1988 results as confirming the wisdom expressed many times before - by Professor Geoffrey Sawer, for example, describing Australia, constitutionally, as 'the frozen continent';<sup>20</sup> or Prime Minister Menzies, comparing the referendum process to the labour of Hercules.<sup>21</sup>

Many commentators have sought to explain away the Australian record by arguing that it is not substantially worse than that of kindred federal systems, like Canada and the United States. The particular reason for concern with the Australian record, however, is that so much of our federal history has been spent thinking of ways to amend the Constitution. As the record of inquiries and commissions illustrates, constitutional review functions as a resilient membrane in Australian political culture.

How could the task be undertaken more successfully?

In the first instance, it is necessary to engage in speculation, as there is little evidence to explain why people have rejected referendum proposals with the regularity and punch which they have. Are Australians particularly fond of the Constitution? Do people rely upon it as a protection against malpractice, against centralism, or against rapid change? Do voters simply dislike the particular proposals on which their vote has been sought? Or does it simply feel good to vote 'No'!

It is ironic that there is little information to answer those questions. Many millions of dollars have been spent designing reform proposals and staging referendums, but comparatively little has been spent on articulating a strategy for that objective.

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17 See Constitution ss 51(31), 80 and 116; discussed in *Constitutional Commission Report*, Ch 9.

18 See *Attorney-General (Cth)(ex rel McKinlay) v Commonwealth* (1975) 135 CLR 1 (per Barwick CJ, Gibbs and Stephen JJ).

19 See *Attorney-General (Cth)(ex rel McKinlay) v Commonwealth* (1975) 135 CLR 1.

20 G. Sawer, *Australian Federalism in the Courts*, Melbourne University Press, 1967, p 208.

21 Quoted in L.F. Crisp, *Australian National Government*, Longman Cheshire, 4th ed., 1978, p 40.

The air is thick with inconclusive debate and conflicting opinion about how best to explain or change the reform landscape.<sup>22</sup> But just as we are uncertain whether the results reflect a judgment of ignorance or a declaration of satisfaction, we can only speculate whether the wise strategy is to hold referendums at election time, or independently; whether proposals should be collected together in a package or a theme, or presented separately or specifically; or whether we should dramatize constitutional reform and associate it with a significant date or national landmark, or instead be phlegmatic.

There are, nevertheless, some observations about the referendum record that may be more secure than others. Following are four such observations, on which suggestions for a constitutional reform strategy will later be based.

**Inadequate political management:** The referendum record does not demonstrate unequivocally that the electorate is implacably opposed to constitutional change, or that change is necessarily a labour of Hercules. It is useful here to divide the referendum history into two periods. In the period prior to 1973 only five of the twenty-six proposals were accepted, but a further eleven were approved by at least 49% of the electors and by majorities in three states. Accordingly, during that period the great majority of proposals in fact stood a strong chance of passage.

The dark phase starts in 1973: of the thirteen unsuccessful proposals in this period, eleven were rejected by voters in at least five and usually in six states. There are many possible explanations - some of them to do with the questionable integrity of the opposition case - but what stands out, I would argue, is that the political management of the referendum process during this period has been inadequate.

In 1973 it was clear that a combined referendum on Commonwealth control of prices and incomes would kill both proposals. In 1974, the 'one vote, one value' proposal was unnecessarily distorted in a way that appeared on its face to favour the Labor Party. There was a backwash of accusation and suspicion that possibly drowned three other good proposals.

Was the 1984 attempt premature? In the two years prior to Labor's election to office, a broadly-based project (which culminated in a book co-authored by Gareth Evans, Haddon Storey, and myself)<sup>23</sup> made the central argument that preceding any reform attempt must be a patient, long-term, thought out process of constitutional review. By contrast, 1984 was a rather eager process, preceded by an intense partisan debate about whether the government could allocate more money to the 'Yes' case than the 'No' case.<sup>24</sup>

1988 was the real paradox: the referendum was held before the Constitutional Commission had finally reported, one of the four proposals was framed at variance with the Commission's Interim Report, there had been no real public debate, national and state opposition to the referendums seemed certain, and the Government adopted a low key strategy that the proposals should largely sell themselves.

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22 For further discussion of constitutional reform, see Brian Galligan and J.R. Nethercote, Editors, *The Constitutional Commission and the 1988 Referendums*, Centre for Research on Federal Financial Relations and Royal Australian Institute of Public Administration (ACT Division), Canberra, 1989 and references quoted therein; Enid Campbell, 'Southey Memorial Lecture 1988: Changing the Constitution - Past and Future', (1989) 17 *Melbourne University Law Review* 1.

23 John McMillan, Gareth Evans and Haddon Storey, *Australia's Constitution: Time for Change?* Law Foundation of New South Wales and George Allen & Unwin Australia, 1983.

24 See eg. *Commonwealth Parliamentary Debates, Senate (Hansard)*, 7 December 1983, p 3368; and 7 June 1984.

Rejection of ALP initiatives: Referendum proposals which are identified exclusively as Labor Party initiatives seem certain to encounter vocal opposition and probable rejection. Just as Labor has aroused strong political passions in other areas of government (leading to many supply threats and two dismissals), so in this area it is Labor referendum initiatives that have met sharp opposition, including in 1988 two judicial actions to restrain the referendums.<sup>25</sup>

The voting record is telling. Of twenty-five referendum attempts by Labor, only one was successful - on social services in 1946. The twelve most recent proposals have met rejection in the four least populous states on every occasion. The simultaneous elections proposal, when put to the vote by the Liberal Government in 1977 gained a 62% national approval, but when submitted by Labor on both an earlier and a later occasion gained significantly lower approval. At the risk of a simplistic comparison, it is interesting also to note the 1991 State referendum results, when the Queensland Labor initiative was rejected (to extend the term of the legislature) but the NSW Liberal proposal was approved (to decrease the size of the legislature).

Predictable opposition: It is predictable that all constitutional reform proposals will nowadays meet vigorous opposition. Even when the major political parties are agreed on a reform proposal, other substantial opposition will be voiced. If the Catholic Bishops can oppose the constitutional protection for religion, if some local government sectors can oppose protection of their right to exist, and if the Queensland Liberal Party and the Western Australian Labor Party can be indifferent to a proposal to guarantee fair elections, we can anticipate opposition as a regular phenomenon. There is a strong chance, moreover, that at least some segments of that opposition will choose as a major weapon the politics of exaggeration and distortion.

Negative voter inclination: In a referendum voters are more likely to vote no rather than yes, and most probably from instinct rather than consideration. That tendency has led indeed to the whimsical suggestion that we should harness the inclination to vote 'No', by phrasing all referendum questions as a negative proposition.<sup>26</sup> Here, it is necessary to add, there is quite a sharp disagreement. While the proponents of reform argue that ignorance and apathy are their major enemy, the opponents argue that the regularity of the 'No' vote reflects a considered political judgment.

The truth is speculative, but probably in the middle. On the one hand, voters may be preferring a stance which they perceive as anti-centralist or maintaining the *status quo*, or they may hesitate to approve any proposal which is the subject of political disputation. But what is hard to accept is that the vote is in aggregate terms a considered judgment on the merits of the individual proposals. Public knowledge of the detail of our Constitution, and of the reform proposals, is in fact quite weak - it was indeed put more strongly by Sir Maurice Byers, Chairman of the Constitutional Commission, who called it abysmal.<sup>27</sup> In a 1987 survey nearly 50% of Australians were not even aware that we had a written Constitution; the ignorance figure was as high as 70% in the 18-24 age group - the recent matriculants from the educational system!<sup>28</sup> (I gather too that people were more familiar with American constitutional expressions, like 'pleading the fifth' or 'crossing the State line'.)

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25 See *Reeth v Morling* (1988) 83 ALR 667, and *Boland v Hughes* (1988) 83 ALR 673.

26 Michael Coper, *Encounters with the Australian Constitution*, CCH Australia Limited, 1987, p 377.

27 Sir Maurice Byers, 'What the Constitutional Commission Achieved', in Galligan and Nethercote, *op. cit.*, at p 1.

28 *Constitutional Commission Report*, para 1.56.

## The Approach for Achieving Constitutional Amendment

The orthodox view is that constitutional change should not be attempted unless two conditions exist: there is bipartisan support for a proposal; and the reform does not propose a choice between competing ideologies, such as centralism as opposed to federalism. That advice may well be astute, but it does have a dampening effect. Instinctively followed, it would discourage any significant constitutional change or renewal, and would probably exclude initiatives by the Labor Party - from whence the impetus for reform has come in recent years. With that in mind, the remaining discussion will focus instead on three more encouraging lessons that might be drawn from the preceding analysis of the referendum record.

Detaching the constitutional review process: It is important, so far as possible, that the process of constitutional review and reform be detached from the everyday federal political process. Constitutional reform should not have the vibrant colour of a staged presentation by the Federal Government of the day, particularly if it is a Labor Government. Referendum proposals should not appear as a proximate political selection.

Constitutional review should operate instead as a more regular, long term activity, that gives time for patient consultation, and public education; during which the focus can be partially shifted from Canberra; during which political parties can themselves ensure that their own state and local branches will actively support a referendum; and during which the building of a consensus can at least be attempted, layer by layer.

It may be that such an approach is being put in place,<sup>29</sup> with the recent creation of the Constitutional Centenary Foundation, operating currently from the Centre for Comparative Constitutional Studies in Melbourne University, and with support and funds from Commonwealth and state Governments, and the private sector. That initiative is to be the vanguard of a decade of reform, with the focus on the federal centenary year.

The critical stage, however, is still the referendum process itself - will the people be asked to vote on proposals that have matured from that decade of preparation, or will they vote on a government-chosen package? Will the public advocates for reform include people who have established their commitment during that decade, or will the electorate be addressed mainly by Government and political leaders?

There is here the dilemma of politics. Under s 128 it will be the federal government that initiates a referendum. A government would wish only to sponsor a proposal which it approves, and which it believes will gain public support. There is political kudos in staging a successful referendum, and discredit in failing.

Constitutional reform can never be an apolitical or non-aligned activity, but Governments may have to yield part of their discretion and leadership for the process to succeed. The Australian Constitutional Convention, for example, in which the Commonwealth Government was influential, provided an excellent forum that devised a great many sensible proposals, yet the process lacked a mechanism to ensure action on those proposals. The same fate currently befalls the measured and

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<sup>29</sup> Although compare the selection by the ALP at the 1991 National Conference of republicanism as the pre-eminent objective - a selection that provoked an immediate and predictable opposition.

formidable report of the Constitutional Commission, which has not even been debated in the federal Parliament.

Another abandoned element of the Commission endeavour was the failure to recruit to the referendum campaign the talents of those who formulated the reform proposals. The Commission and its Advisory Committees comprised a widely representative group of distinguished Australians, prominent in the fields of politics, the judiciary, business, the union movement, public administration, community advocacy, universities, law reform, literature ... and rock singing. During the last decade a great many other Australians also identified themselves publicly with the constitutional reform cause. Whether as sponsors or supporters, they are a valuable resource that could be used more publicly.

Other strategies and options might also be considered for distinguishing the constitutional reform process from the regular political process. One promoted by Evans, Storey and myself was a restructured Constitutional Convention which would include, as well as federal and state parliamentarians, a smaller number of popularly elected or appointed delegates.<sup>30</sup> We envisaged that the Convention would meet more regularly, and that the federal government would undertake to put to referendum any proposal passed by at least a two thirds majority vote of the Convention. Reform along those lines, we argued, might invigorate the process, arouse greater public interest, legitimate the proposals differently, and create an apolitical pressure on politicians not to repudiate at referendum time proposals agreed to earlier. It may not be appropriate for a different option of that kind to be chosen at the moment - given the federal government commitment to the Constitutional Centenary Foundation - but the option at least illustrates the range of choices available for the future.

Public education about referendum proposals: A related theme is the need to influence voters to give greater consideration to the merits of the individual referendum proposals. In a practical sense, that probably means influencing people to consider properly whether a proposal really does endanger the federal or democratic system. To stimulate that enquiry in a dispassionate way will not be easy. One of the major reasons why Constitutions are entrenched is to protect the public against the misuse of political power. But constitutional reform will necessarily be initiated and conducted as a political process, and it will be tempting to suspect that politicians are trying to erode the protections which the Constitution presently establishes.<sup>31</sup>

From one perspective, however, this objective of making referendums a more considered or serious exercise should not present great difficulty. Politics is very much the art of selling ideas and a philosophy. As recent election campaigns and results illustrate, political parties, their advisers and consultants have quite a skill at understanding the public mind and persuading people one way or another. Compared to those performances, the techniques that have been used to promote constitutional reform in the past look quite amateurish.

Referendum proposals could never be packaged or glamorized like a soap powder, but they could surely be advocated by a technique more innovative than the quaint nineteenth century device of the 'Yes' and 'No' pamphlets.

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30 McMillan, Evans and Storey, *op. cit.*, pp 364-370.

31 To that extent there is doubtful wisdom in the current political strategy of promoting a longer term Parliament as the most important of the constitutional reform issues.

There is a practical need too for political parties and other supporters of constitutional change to play an active role. Legislation enacted in 1984 restricts federal government expenditure to the preparation of the 'Yes' and 'No' pamphlets.<sup>32</sup> The opponents, and particularly State governments, are under no such limitation. Accordingly, those who favour constitutional reform must simply be prepared to commit considerably greater time, money and effort to their cause.

It may be too that unorthodox solutions should be explored to ensure that voting is a more deliberate activity. One possibility is to make voting at referendums optional, at least where the referendum is held concurrently with a regular election. Arguably, none of the reasons for compulsory voting at elections apply to referendum voting with anything like the same weight. Nobody can predict with certainty just what effect such a change would have - the only people who care to vote may be those who are opposed to reform. It is interesting, nonetheless, to note that most of the thirteen proposals which were considered before the introduction of compulsory voting in 1924 went within a whisker of success. In any case, the purpose is not necessarily to increase the 'Yes' vote, but to make referendum voting a more considered and deliberate activity.

Reforming the referendum process: Close attention must be given to the current machinery for staging referendums.<sup>33</sup> Two of the problems were touched on above. There is firstly the problem of funds - the proponent of reform (the Commonwealth) is limited in the funds it can spend, but the opponents face no such limitation. A second problem is that the form in which the informational pamphlets have often been prepared at public expense bears little credit for the intellectual honesty of their authors - for example, should we adopt the Californian device, supported also by the Australian Constitutional Convention, of having an independent analyst or person write or vet the official pamphlets?<sup>34</sup>

Adoption of measures of that kind could suitably be addressed by a special session of the Commonwealth Parliament, or a convention of Commonwealth and state parliamentarians. Agreement on the procedures for constitutional debate is as important as the proposals themselves. There are many matters, such as expenditure by state governments, on which it may be necessary simply to get agreement on practices or behavioural conventions. We rely heavily on conventions to provide a measure of stability and civility in all other areas of political life where competing forces are at work. Parliament, the executive, the judiciary, and the federal system, could not function as they presently do without the widespread acceptance of conventions of behaviour. Constitutional reform can be no different - yet at present there are virtually no recognized conventions to control debate and proceedings in this field.

## Conclusion

My concluding sentiment is that constitutional reform does matter. It is true that Australia has managed very well with the present Constitution, and that the inability to change it has led to enterprise of other kinds, like intergovernmental co-operation and the development of conventions. But there are problems with the Constitution. While we can rightly celebrate the achievement of those who drafted the Constitution,

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<sup>32</sup> *Referendum (Machinery Provisions) Act 1984* (Cth) s 11(4).

<sup>33</sup> For a comprehensive discussion, see Enid Campbell, 'Southey Memorial Lecture 1988: Changing the Constitution - Past and Future', *op. cit.* See also Colin Howard, *Australian Federal Constitutional Law*, The Law Book Company Limited, 3rd ed., 1985, pp 580-585. For proposals to reform s 128, see *Constitutional Commission Report*, Ch 13.

<sup>34</sup> *Proceedings of the Australian Constitutional Convention 1985*, pp 363, 424.

it is unrealistic to expect that a document drafted in a different century, by people with a different experience and a different world vision, will be a document of timeless foresight and wisdom.

Change will be possible, but only if it is patient, considered, and timely. This lecture series marks an event in 1891 that commenced a decade of preparation and consideration that culminated in the adoption of a new Constitution and system of government. One hundred years later, we can learn an important lesson from that event.



## Constitutional Referendums 1901 to 1988

Year	Proposal	Gov't Submitting	States Approving	% of Electors Approving
1906	<i>Senate elections</i>	* Protectionist	6	82.65
1910	Finance	* Fusion	3 (Qld,WA,Tas)	49.04
	<i>State debts</i>	* Fusion	5 (all exc. NSW)	59.95
1911	Legislative powers	Labor	1 (WA)	39.42
	Monopolies	Labor	1 (WA)	39.89
1913	Trade & commerce	* Labor	3 (QLD,SA,WA)	49.38
	Corporations	* Labor	3 (Qld,SA,WA)	49.33
	Industrial matters	* Labor	3 (Qld,SA,WA)	49.33
	Railway disputes	* Labor	3 (Qld,SA,WA)	49.13
	Trusts	* Labor	3 (Qld,SA,WA)	49.78
	Monopolies	* Labor	3 (Qld,SA,WA)	49.33
1919	Legislative powers	* Nationalist	3 (Vic,Qld,WA)	49.65
	Monopolies	* Nationalist	3 (Vic,Qld,WA)	48.64
1926	Legislative powers	Nat. - C.P.	2 (NSW,Qld)	43.50
	Essential services	Nat. - C.P.	2 (NSW,Qld)	42.79
1928	<i>State debts</i>	* Nat. - C.P.	6	74.30
1936	Aviation	U.A.P.	2 (Vic,Qld)	53.56
	Marketing	* U.A.P.	0	36.26
1944	Post war powers	Labor	2 (SA,WA)	45.99
1946	<i>Social services</i>	* Labor	6	54.39
	Marketing	* Labor	3 (NSW,Vic,WA)	50.57
	Industrial employ't	* Labor	3 (NSW,Vic,WA)	50.30
1948	Rents, prices	Labor	0	40.66
1951	Communists	Liberal/C.P.	3 (Qld,WA,Tas)	49.44
1967	Nexus	Liberal/C.P.	1 (NSW)	40.25
	<i>Aborigines</i>	Liberal/C.P.	6	90.77
1973	Prices	Labor	0	43.81
	Incomes	Labor	0	34.42
1974	Simultaneous elections	* Labor	1 (NSW)	48.32
	Amendment	* Labor	1 (NSW)	48.02
	Democratic elections	* Labor	1 (NSW)	47.23
	Local government	* Labor	1 (NSW)	46.87
1977	Simultaneous elections	Liberal/NCP	3 (NSW,Vic,SA)	62.20
	<i>Casual vacancies</i>	Liberal/NCP	6	73.30
	<i>Territorial Votes</i>	Liberal/NCP	6	77.70
	<i>Retirement of judges</i>	Liberal/NCP	6	80.10
1984	Simultaneous elections	* Labor	2 (NSW,Vic)	50.60
	Inter-change of powers	* Labor	0	47.10
1988	Parliamentary terms	Labor	0	32.92
	Fair elections	Labor	0	37.60
	Local government	Labor	0	33.62
	Rights & Freedoms	Labor	0	30.79

Notes: \*Referendum held at same time as a federal election.

*Italicised* subjects achieved sufficient majorities for alteration to the Constitution.

Source: Brian Galligan and J.R. Nethercote, *The Constitutional Commission and the 1988 Referendums*, Centre for Research on Federal Financial Relations and Royal Australian Institute of Public Administration (ACT Division), Canberra, 1989, p 137.

## Andrew Inglis Clark and Australian Federation

The Hon. Frank Neasey

Andrew Inglis Clark Sr is sometimes thought of as a forgotten federationist; one whose contribution to that pivotal event in Australia's history has been overlooked and underrated. There may be some substance in that, but two observations can be made about it. The first is that it is not surprising that the influence and importance of his role should have passed from public notice after the end of last century. This has been so, not only in comparison with such as Barton, Deakin, Griffith, Isaacs, Higgins, O'Connor and others; but also when measured against Tasmanians such as Fysh and Braddon. There is, after all, no suburb of Canberra named 'Clark', but there is a 'Braddon' and a 'Fyshwick'.

The reason why Clark's name has faded in comparison with theirs is, I suggest, the plain one that he filled no public role in shaping the Constitution during the 1897-98 Convention, and no prominent part, either judicial or political, in the new federation. By contrast, all the others I have mentioned did play such roles. The other figure whose name comes at once to mind as being prominent in the 1891 Convention, but who did not attend the later one, is Samuel Griffith. He had the good excuse of being unable to attend the latter, because at the time of the second Convention he was Chief Justice of Queensland. But in any case Griffith later filled the large role so familiar to us in the new federation. Clark, on the other hand, could have stood for election as a delegate to the 1897-98 Convention, and almost certainly would have been chosen, but did not stand. The reason given at the time was that he had arranged to go on a trip to the United States, mainly in search of ways to improve his persistently poor health. There is no reason not to accept that, but by making that choice, it might be said he lost a chance to consolidate his place as a great federationist. However, I doubt whether that would be true. The reasons I think are connected both with the nature of the second Convention, and Clark's probable view of his own future at that time.

The task of the delegates to the first Convention in 1891 was to mould and shape the basic form of the federation, and the draft Constitution they produced survived to be enacted in its essential form, though it was altered in detail. The delegates who attended the sessions of the later Convention in 1897 and 1898 had the 1891 bill in front of them, and were concerned to re-shape and fine-tune it for imminent working use. Their work was essentially political in nature, whereas the earlier men had been Constitution builders. The delegates to the later Convention too, particularly those from colonies with large populations, were to a substantial degree competing for their places in the sun of the coming federation. It was to be expected that most of the great names in the new federation would be large colony

men who would emerge from the political process of the later Convention. Barton, Deakin, Reid, Isaacs, Higgins, O'Connor, all were from New South Wales or Victoria, and all soon achieved high office under the Commonwealth. Barton and Deakin, of course, were veterans from the earlier Convention, who had held and enhanced their places. Of those who were prominent in 1891 but absent thereafter, only Griffith became one of their peers, as first Chief Justice of the High Court. Even Griffith's place on that court was uncertain for a time, as Deakin informed Clark in a letter written in August 1903, shortly before the Court was established. There was a prejudice on the part of some ministers against the appointment of state judges, Deakin wrote, which might affect Griffith's chances as well as Clark's.<sup>1</sup>

In the same letter, Deakin told Clark that he had always hoped to see a High Court Bench of five justices, with Griffith as Chief and Clark as one of the Associates. And even though the number had now been reduced to three, with Griffith and O'Connor practical certainties, he sought Clark's permission to put his name forward as one of the three. Clark of course agreed, but in the following month Deakin wrote again to say that Barton (who was then Prime Minister) had changed his mind and decided to go to the Bench, and so Clark's chance to achieve what almost certainly was his principal remaining goal was gone. If it had not been that the intended Bench of five was reduced to three, and Barton's change of mind, it seems certain Clark would have had his well-earned place on the court. Four years later, in November 1907, he was dead, in his sixtieth year.

So it is not surprising that public awareness of Inglis Clark as a federationist has been substantially less than that achieved by a number of others. Nevertheless, his contribution to that noble Australian undertaking was fundamental and enduring, and modern scholarship in this field is coming increasingly to recognise that. A number of his contemporaries acknowledged it also. Alfred Deakin, early in his major speech at the opening of the first session of the second Convention at Adelaide in 1897, expressed regret at Clark's absence, saying that his services, both in the 1890 Federal Conference at Melbourne, and at the 1891 Convention, 'were among the greatest helps to the discussion of federal principles'.<sup>2</sup> Another well-qualified observer, Bernhard Ringrose Wise, praised Clark's contribution more specifically. Wise was a brilliant barrister and politician, a close friend of Griffith's,<sup>3</sup> Australian-born but educated at Rugby and Oxford. He was an observer at the 1891 Convention, and a New South Wales delegate at the second. Wise wrote in his book, *The Making of the Australian Commonwealth, 1889-1900*, 'No one in Australia, not even excepting Sir Samuel Griffith, had Mr. Clark's knowledge of the constitutional history of the United States; and, when knowledge of

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1 Deakin to Clark, Clark Papers, Tasmanian University Archives, C4/C41.

2 *Official Report of the of the Australasian Convention Debates*, Adelaide, 1897, reprinted Legal Books Pty. Ltd., Sydney, 1986, p 284.

3 Roger Joyce, *Samuel Walker Griffith*, University of Queensland Press, 1984, p 195.

detail is combined with zeal, its influence on a deliberative body becomes irresistible. That our Constitution so closely resembles that of the United States is due in a very large degree to the influence of Mr. A.I. Clark. His speech at this Conference [1890] ...is interesting as containing the germ of the ideas which dominated the Convention of 1891.<sup>4</sup>

Some constitutional scholars of our own day have analysed Clark's role in more detail; although in fact the first historian in this century to recognise the significance of Clark's part was an American, Erling M. Hunt, in a book published in the United States in 1930, entitled, *American Precedents in Australian Federation*.<sup>5</sup>

In Australia, the late Professor John La Nauze, formerly Professor of History at the Australian National university, in his masterly account entitled, *The Making of the Australian Constitution*,<sup>6</sup> has dealt in a detailed way with the manner in which the 1891 draft Constitution was prepared as a document mainly by Griffith as principal draftsman, assisted by a small drafting sub-committee consisting of Clark and Kingston, and later Barton. A number of the leading delegates had before them at the start of the Convention Clark's original complete draft constitution, and La Nauze has shown by analysis of the available documentary and other material how Griffith almost certainly used this as a first draft, and went on from there with a re-drafting and re-modelling process. La Nauze's conclusion is expressed as follows: 'The draft of 1891 is the Constitution of 1900, not its father or grandfather',<sup>7</sup> and of Griffith's and Clark's part in that draft he writes this:-

Clark and Griffith, though not delegates, could almost be regarded as honorary members of the second Convention....In 1897 the real task of the Convention was not to frame a Constitution but to revise a draft. The fresh start in Adelaide was a procedural fiction: the select committees began with the printed Bill of 1891 and proceeded to confirm, reject or modify it clause by clause. The dominance of a first draft, worrying enough to a single author, is practically overwhelming to a group. After Clark and Griffith had done their work any discussion of a federal constitution for Australia, at least within that political generation, would proceed by way of variation from their blue-print. No one else could again play their roles of 1891, nor could they themselves have repeated them if they had been delegates.<sup>8</sup>

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4 B.R. Wise, *The Making of the Australian Commonwealth, 1889-1900*, Longmans, Green, and Co., London, 1913, p 75.

5 Erling M. Hunt, *American Precedents in Australian Federation*, Columbia University Press, New York, 1930.

6 J.A. La Nauze, *The Making of the Australian Constitution*, Melbourne University Press, 1972, pp 48-60.

7 *Ibid.*, at p 78.

8 *Ibid.*, at pp 276-278.

This assessment is justified. Both Griffith and Clark would undoubtedly have made useful contributions to the work of the 1897-98 Convention, and the communications they did make with it were treated with great respect, but nothing they could have done would have compared with their great roles in preparing the first Draft Constitution.

Two other present-day scholars have directed particular attention to Clark's seminal role in the design of the Constitution and of the place of the High Court of Australia in it. J.M. Bennett, in his *Keystone of the Federal Arch* writes, concerning the appointment of the third Justice to the first High Court in 1903,

The man who best deserved it was Andrew Inglis Clark, then a Judge of the Supreme Court of Tasmania. He had legal ability and constitutional knowledge well suited to the High Court Bench and he had, in effect, 'fathered' that court.<sup>9</sup>

And Dr Brian Galligan, writing in his book, *Politics of the High Court*, after a full examination of the evidence, reaches this conclusion -

Clark's was the predominant influence on the overall design of the Australian constitution, and particularly its judiciary sections. Other men such as the convention leaders Griffith (1891) and Barton (1897-98) made greater practical contributions towards shaping the instrument and having it adopted, but Clark's influence on its general principles and structure was pre-eminent. Of course, in Samuel Griffith's words, the 1891 bill 'was not the work of any one man. It was the work of many men in consultation with one another.' And the 1891 bill was itself only the blueprint for the new beginning that was made in 1897. Moreover, as La Nauze points out, Griffith was technically capable of doing what Clark did. But the honour of drafting the first constitution to federate the Australian colonies belongs to Inglis Clark.<sup>10</sup>

May I now illustrate some of the reasons for those glowing assessments by sketching briefly Clark's principal positions and work in the 1890 Conference and the 1891 Convention.

Historians have rightly stressed the extent to which he brought the forms and structure of American institutions into Australian constitution making. This was not an accident. Clark was a fervent, democratic idealist, with an intense admiration for republican principles and the great figures in United States history. However, his

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9 J.M. Bennett, *Keystone of the Federal Arch: A Historical Memoir of the High Court of Australia to 1980*, Australian Government Publishing Service, Canberra, 1980, p 21.

10 Brian Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia*, University of Queensland Press, St. Lucia, 1987, p 50.

admiration was not limited to American men and institutions. He had even greater veneration for the Italian republican patriot, Guiseppe Mazzini, and actually wrote a long poem containing over one hundred verses, of not entirely negligible quality, after his visit to Mazzini's tomb at Genoa in 1890. The poem is most strongly charged with the emotion which he obviously felt at being physically present at the tomb.

But Clark was anything but a romantic dilettante. He was determined on action to improve the political conditions of his home colony, and he was a fervent Australian nationalist. In pursuit of the first objective he had, by 1890, been actively engaged for over a decade in local political affairs; and by the time he accepted judicial office in 1898 had become easily the outstanding liberal reformer in Tasmania, which needed such change badly enough. By this time his achievements included the Hare-Clark system of voting, which since early in this century has been used successfully in that state. The system, which is Hare's electoral system, modified quite substantially by Clark, is much admired by respected psephologists, including one in this capital, and I think rightly, though others criticise it for working better in aid of perfect democracy than stable government.

It is as an Australian nationalist, however, we are presently interested in Clark. He was born, in 1848, of Scottish parents who emigrated to Van Diemen's Land in 1832. His father, Alexander, trained in Scotland as a wheelwright, became Tasmania's first mechanical engineer of substance, and established successful engineering and timber mill businesses. Young Andrew qualified as a mechanical engineer, and became the business manager of the family engineering works; but at the age of twenty-four years turned his thoughts to law.

It is fully apparent, however, that by the time he reached the middle twenties, he was deeply immersed in the study of political institutions, including federations, and of British and American history and literature, and was already an admirer of republicanism generally. He had also gathered around himself a group of other young men of similar tastes, to whom he was a leader and teacher.

One of the projects of this group was to publish a monthly journal named *The Quadrilateral*, the main theme of which was liberal political reform. It lasted for only the year 1874, but provided a useful forum for Clark's developing political thought. The main article which he published in it, entitled 'Our Australian Constitutions', was a long article in three parts published in separate issues. It made a thorough examination of all the Australian colonial constitutions, and compared them with the British and with federated constitutions. The article showed the extent of study he was giving to these matters, twenty years before he attended the 1890 federal Conference, and also demonstrated that Australian federation was even then very much on his mind. Shortly afterwards, he began to study law. He qualified in 1878, and in the same year was elected to the lower house of

Parliament. He was defeated in 1882, and was without a seat for five years, until 1887, and thereafter remained in Parliament until appointed a judge in 1898. He was Attorney-General, in the Fysh and Braddon administrations, for nine out of those last twelve years. He never became Premier, however.

The evidence indicates that Clark's admiration for American heroes and principles began with the Civil War, which ended when he was seventeen years old. He was passionately attached to the anti-slavery cause, and even in his speech at the 1891 Convention could still speak with feeling of the 'hideous form and likeness' of the institution of slavery.<sup>11</sup> It is also plain that after starting to practice law and entering parliament, Clark made learning in the detail of American constitutional law a special part of the lifelong habit of study he had formed in his early twenties.

So, by the time he came to the 1890 Conference (having previously attended meetings of the Federal Council of Australasia), Clark had made a close comparative study of constitutions both unitary and federal, for upwards of two decades. He had detailed knowledge of the workings of American constitutional law, and a clear idea of the sort of national Australia he wanted to see. By nature and temperament he was a scholar (a self-taught one), a man of ideas and a working politician but not a political leader. The fact that he never became premier of his own small colony shows he was not cut out for political leadership. He was a small, eager, nervy, acerbic man, articulate but jerky in speech, and armed with a detailed knowledge of constitutional theory and law unmatched by any of the other delegates. So in 1890 and 1891 he came ready-made to perform the kind of role he did play - as promulgator and disseminator of structural plans and ideas for a new constitution. In 1891 he was a perfect foil for the patient, extremely able leader of the 1891 Convention, Samuel Griffith, who had the leadership qualities which Clark lacked, and whose broad range of legal and political skills probably exceeded Clark's.

The Australasian Federal Conference of 1890 was a small affair. It was arranged at the instigation of Sir Henry Parkes, and met for the purpose of discussing federation and setting up a constitutional convention. It sat at Melbourne in February 1890, and was attended by two representatives of each of the Australian colonies except Western Australia, which sent one, and two from New Zealand. Three were Premiers - Parkes, Gillies and Cockburn. Sir Samuel Griffith had been a Premier, and soon would be again, but was presently in opposition in Queensland. Alfred Deakin of Victoria was there also; a brilliant young politician, journalist and lawyer, aged 33 only at that time, but Chief Secretary of Victoria. Clark was Attorney-General of Tasmania, and aged 42.

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<sup>11</sup> *Official Report of the National Australasian Convention Debates*, Sydney, 1891, reprinted Legal Books Pty Ltd, Sydney, 1986, p 252.

At this beginning of the official federal movement, Clark of all the delegates seemed most willing to be specific about the kind of federation he had in mind. His speech, as Bernhard Wise later wrote,<sup>12</sup> contained the first sketch of ideas which turned out to be dominant themes throughout the federal conventions. The speeches at the Conference ranged widely over reasons for the timeliness of federal union under the Crown for the Australian colonies, the motivations for federation arising out of common defence needs, the desirability of regulating commerce and tariffs among the colonies, and the difficulties which might be posed by the necessity of adopting a common fiscal policy.

Alfred Deakin and Clark both spoke strongly in favour of the American federal system. Griffith, as usual, had been calm, expository, and magisterial. Deakin, in a very fine speech, emphasised the innovative and essential feature of the United States Constitution, by which the central government by its legislative powers acted directly on every citizen of the Union, and was protected in their exercise by an independent federal judiciary. He was also the first to recommend the recently published book by James Bryce, called *The American Commonwealth*, which from then on became the Bible of the federal Conventions.

Clark, who followed Deakin, stated clearly his preference for the American over the Canadian federal system, saying that he regarded the Canadian as an instance of amalgamation rather than federation.<sup>13</sup> Then he spoke with feeling of the great benefits he saw for the Australian colonies in a United States-style federation, which defines the powers of the central government and reserves everything else for the local legislatures. This he said, by preserving a large part of the local autonomy of the states had been responsible for much of the progress, wealth and prosperity of that country, and Australia with its many similar conditions could benefit in the same way. He addressed himself to a number of the issues about which speakers before him had expressed doubts; such as Griffith's worry about how an Australian federation would finance itself, the pressing need for regulation of inter-colonial commerce, the benefits of having a national court of appeal, and a separate federal judiciary. In relation to all of those matters he cited the relevant American example, and the lessons which the Australian colonies could learn from it.

The 1890 Conference representatives resolved that they should 'take such steps as may be necessary' to persuade their legislatures to appoint delegates to a National Australasian Convention to consider and report upon an adequate scheme for a Federal Constitution.<sup>14</sup> Professor La Nauze concludes that Griffith and Clark, if given the brief, might have been willing to commence at once the task of

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12 B.R. Wise, *op. cit.*, p 75 - see note 3 above.

13 *Official Record of the Proceedings and Debates of the Australasian Federation Conference*, 1890, reprinted Legal Books, Sydney, 1986, p 106.

14 *Ibid.*, p 261.



constitution-making,<sup>15</sup> but of course, much remained to be done before the 1891 Convention convened in Sydney in late February of that year.

Clark himself, between May and mid-November 1890, travelled to England and the United States, and visited his beloved Italy on the way, mainly in order to visit Mazzini's tomb. The main purpose of his voyage was to represent the Tasmanian Government at an appeal before the Privy Council, concerning a long-running dispute between the Government and the company which had built the main railway line between Hobart and Launceston. He managed to settle the appeal, and then on the return journey realised another long-cherished aim by visiting the United States. There he visited many lawyers and others he had corresponded with, at New York and Harvard University and elsewhere. But an outstanding event for him was his meeting with Oliver Wendell Holmes Jr, who was then Chief Justice of Massachusetts, and a well-known figure in the United States, through his Harvard and New England associations, and his Civil War record; though he was not yet the legendary figure he was to become after his appointment to the United States Supreme Court, and many years of notable service there. Clark met Holmes through connections with Unitarian friends of the senior Holmes, who was himself famous as an author and Harvard academic. The younger Holmes and Clark established a correspondence which continued into the early 1900s.

Upon return to Hobart in November 1890, with the Convention only three months away, Clark immediately began to write, or complete, the draft constitution which together with his work at the Convention was to provide a firm basis for his place as a founder. This draft constitution was of course not cut from whole cloth. I have tried elsewhere to analyse the sources of all the clauses of his draft, and the extent to which they or similar clauses found their way into the Australian Constitution.<sup>16</sup> Professor La Nauze has analysed Clark's draft in more descriptive terms.<sup>17</sup>

This draft constitution was designed by Clark basically to bring about that unique feature of Australian federation as it was eventually enacted, namely the meld of the British system of responsible government with the United States federal structure, whereby political power is divided between the central government and constituent states, and the functions of the central government are divided between the three great organs of power - legislature, executive and judiciary. In basic form, of course, as it had to be, Clark's draft statute was prepared as an Act to be passed by the Imperial Parliament.

Formally, the draft constitution and memorandum were prepared for the information of Tasmanian delegates, but obviously they were

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15 La Nauze, *op. cit.*, p 18.

16 F.M. Neasey, 'Andrew Inglis Clark Senior and Australian Federation', *The Australian Journal of Politics and History*, Vol. 15, No. 2, August 1969, pp 1-24.

17 La Nauze, *op. cit.*, pp 24-26.

intended for a wider audience. He sent copies of both documents to Parkes and Barton, and to some South Australian delegates.<sup>18</sup> In a memorandum accompanying the draft constitution, Clark argued fully the reasons for preferring the basic features of the United States Constitution over the Canadian, and pointed out that most of the members of the 1890 Conference had been of that view. He said he had drafted the bill along the lines of the American Constitution, while at the same time, as was inevitable, following the language and framework of the British North America Act in matters relating to the executive power, and whatever else was necessitated by the continuance of the Australasian colonies as dependencies of the British Empire. His draft adopted the American model of a bicameral legislature consisting of a Senate with equal colony representation with a proportion of members retiring in rotation, a representative lower house, and a separate federal judiciary. A South Australian delegate, Charles Cameron Kingston, who was an eminent political figure in that colony, also prepared a draft constitution, which differed from Clark's in some significant respects.<sup>19</sup> On the whole, though, Kingston's draft received little active consideration as a model. The evidence is strong, and detailed accounts have been given of that evidence,<sup>20</sup> that the document Clark prepared served as the first draft of the Australian Constitution, and that the basic structure of it survived into the bill approved by the 1891 Convention, and into the Constitution itself.

For the 1891 Convention, forty-six delegates, middle-class males, mostly solemn and solid, assembled in Sydney on 2nd March 1891. They were all parliamentarians appointed by their legislatures. There were seven from each of the six Australian colonies, three from New Zealand, and one substitute delegate from Victoria. Old Sir Henry Parkes thought they were 'beyond all dispute the most august assembly which Australia had ever seen', but the *Brisbane Courier* editorialised that it was a pity they necessarily included so many second-rate politicians. They were both right, according to Professor La Nauze, but perhaps he found the quip irresistible.<sup>21</sup> Undoubtedly, on the whole they represented about as serious and intelligent a group as the Australian parliamentary system was capable of producing just one hundred years ago. And while Alfred Deakin, for one, had said at the 1890 Conference that any attempt to compare themselves with, as he said, 'men of the exalted moral character and splendid abilities of the founders of the great Republic', would have been 'arrogance indeed',<sup>22</sup> it may be that in any comparison between the two bodies, the Australians would not have come off too badly. It is certain at any rate that they realised they were engaged on an historic undertaking.

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18 La Nauze, *op. cit.*, p 24.

19 The main differences are set out in La Nauze, *op. cit.*, Appendix 3.

20 La Nauze, *op. cit.*, chs 3 and 4; Galligan, *op. cit.*, pp 48-53; Neasey, *op. cit.*; and see, Hunt, *op. cit.*, pp 19, 20, 58, 60.

21 Cited La Nauze, *op. cit.*, p 29.

22 *Official Record of the Proceedings and Debates of the Australasian Federation Conference*, Melbourne, 1890, reprinted Legal Books, Sydney, 1990, p 93.

The Convention spent the first two and a half weeks in general debate. Many delegates made fine contributions. Clark's was an excellent speech made with the object, he said, of making his position known on all the contentious issues which had emerged. His speech showed his extraordinarily detailed knowledge of written constitutions and of American political and constitutional practice. Resolutions were passed and then referred to three committees, constitutional, finance, and judiciary. Clark was a member of the constitutional committee, and was elected chairman of the judiciary committee. In addition, the constitutional committee approved Clark and Kingston (probably because of their draft constitutions) as fellow draftsmen with Griffith to prepare an actual draft bill.<sup>23</sup> The three men spent some days working on the draft, adding matters of substance where they thought necessary, Griffith being undoubtedly the master architect and draftsman.

Then at the Easter week-end, Friday 27th to Sunday 29th March, the work was substantially completed aboard the Queensland Government yacht, *Lucinda*. Unfortunately, Clark was absent with influenza for those three days, Barton being substituted. During that time, in his absence the drafting committee made an alteration of substance to the judiciary clauses, which Clark had to accept, and which caused him considerable heart-burn until the second Convention in 1897-98 corrected it - to his great satisfaction. The *Lucinda* committee took the High Court out of its entrenchment in the Constitution itself, which was Clark's cherished plan, following the American pattern, and which he rightly regarded as fundamental, and they had made that court merely authorised to be established by the Constitution, which of course would have made its establishment dependent on political whim. The later Convention restored the High Court to its proper place in the Constitution, as Clark considered.

Clark made a number of useful contributions to the progress of the federal movement after 1891, but undoubtedly, at the 1890 Conference and the 1891 Convention, his main work was done. In the capacities I have mentioned, namely with his speeches, draft constitution, his work on the constitutional and judiciary committees, and as a member of the drafting sub-committee, Andrew Inglis Clark Sr made his memorable contribution as an Australian constitutional founder, which historians of that period are only in recent years coming to appreciate fully.

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<sup>23</sup> According to *The Argus*, 24 March, 1891, cited La Nauze, *op. cit.*, p 48.