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## **The Constitution Makers**

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## **Towards Federation: the Role of the Smaller Colonies\***

*John Bannon*

As we approach the centenary of the establishment of our nation a number of fundamental questions, not the least of which is whether we should become a republic, are under active debate. But after nearly one hundred years of experience there are some who believe that the most important question is whether our federal system is working and what changes if any should be made to it. The answer to that requires an understanding of how the nation was created, and this paper deals with aspects of that.

I will examine whether federation or indeed any union was inevitable; why the first attempt to enact a constitution failed; and will particularly concentrate on the period of so-called hiatus between the 1891 and 1897 constitutional conventions. I will argue that the federal system is well fitted to balance localism and centralism, to reconcile national and regional interests, and to bind diverse economic and social entities distant from each other into a nation. In the 1890s the chief examples of the system, which had a great influence on the advocates of Australian federation, were Canada, Switzerland, and the United States of America. For many, both now and then, the geography, history, population and different levels of social and economic development of the various colonies on the Australian mainland and the islands to its south and east had made those federations exemplars for the proposed Australian nation.

So the Australian Constitution is federal. It was drafted with the powers of the central government spelt out; one of the Houses of Parliament in place to protect the rights of the states; an independent supreme court to interpret it; and a difficult amendment procedure to

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\* This paper was presented as a lecture in the Department of the Senate Occasional Lecture Series at Parliament House on 21 March 1997. The Hon. John Bannon, a former Premier of South Australia, is currently a post-graduate student at the Flinders University of South Australia.

ensure that it was not altered on a whim, for reasons of passing fashion or enthusiasm, or by manipulation.

It seems to be a logical and inevitable structure. In practice over this century the balance of power has shifted from the states to the centre to a far greater extent than contemplated: the Senate has acted as a partisan rather than states house; and the High Court has had a profound effect on the balance of central and state powers—assuming a function beyond that which could be seen as mere interpretation. But this analysis undersells the achievement of those who founded the nation. The Commonwealth of Australia today retains its basic shape, is still united and the Constitution itself, having resisted significant amendment, remains virtually intact.

For many in the 1890s, federation was seen as neither logical, inevitable nor necessary. With hindsight we would regard the arguments in favour of creating a nation as self-evident and leading inexorably to its creation from the disparate colonies. But this ignores the fact that every argument in favour could be met by equally strong counter forces which suggested quite different outcomes were possible and even desirable.

A uniform electoral system across the nation could be seen as a sensible and desirable outcome of federation. But what if the separate colonies were applying different electoral laws, some of which were seen as far more progressive or overly radical by other colonies? Votes for women was an issue at the top of the list in the 1890s with only one colony, South Australia, having granted such a right at this time.

Intercolonial trade was obviously another strong reason to federate. The annoyance created by the border inspector and the customs duties together with the difficulty of moving around this large country between the various colonies made free and unencumbered trade between the colonies an attractive prospect. But equally, the colonial financial structure was based on the funds the colonies could raise from such barriers. There were major philosophical and policy differences, in particular between New South Wales and Victoria, over the questions of free trade which again suggested that it was not a simple matter of intercolonial trade without the barriers.

There were clear and unequivocal recommendations in various reports on Australia's defence that suggested the country needed to get its defence act together—that the colonies must, in fact, unite to do that. On the other hand, would that mean the removal of the imperial umbrella under which the colonies sheltered? Was there a danger that, if Britain were to protect a united nation rather than a group of colonies, Australia would have to pay a lot more or risk losing the imperial support that it needed? Did it have a capacity to pay for that?

White Australia, or a uniform immigration system, was one of the strong motivating forces for federation—a difficult issue when considering the needs of the different parts of Australia in terms of labour and practice. There were powerful commercial interests in northern Australia, especially in the sugar industry in Queensland, that looked favourably upon the use of indentured islander labour. Such practice, however, was viewed with disfavour by many colonists who advocated a white Australia. Also, Britain was demanding from Australia some support for its imperial obligations, particularly its treaty with Japan, which was causing concern with some, but not all, colonies.

THE HON H.M. NELSON, THE HON G.H. REID, MR J. ANDREWS, SEC., SIR EDWARD BRADDON, THE HON G. TURNER, THE HON C.C. KINGSTON, SIR JOHN FORREST

FEDERAL GATHERING AT HOBART—PREMIERS IN CONFERENCE

*Sydney Mail*, 23 February 1895, p. 387

The Honourable Charles Cameron Kingston, Premier of South Australia from June 1893 to November 1899, was a connecting thread between the colonial leaders.

*Daily Telegraph* (Sydney) 2 March 1891, p. 10

Transport was another matter where a national system could facilitate greater trade, communication and economy. But equally one had the problems of the respective colonies

raising revenue through freights; of the river Murray and the upstream users and their rights, as they saw them, which might be extinguished in a national policy; and so on.

Communications and legal uniformity were also strong linking factors, but again they cut across the provincial concerns and caused differences between the colonies.

And finally agriculture. Rabbits and other pests were no respecters of colonial borders but on the other hand, colonies felt they could do something about enforcing border divisions whether it be with a dog fence or entry restrictions on plants. One notable case concerned the wine industry in South Australia. That colony managed to protect itself from the scourge of the phylloxera disease which had swept not only the vineyards of most of the world, but virtually wiped out those of New South Wales and Victoria. Somehow the Phylloxera Board and the prohibition on moving vine stock between borders enabled South Australia to halt the phylloxera at its border—a good reason not to become part of a united nation, it was argued at the time.

I make these points as a reminder that it was not easy to put the nation of Australia together, no matter how compelling those arguments for federation might look. It is largely forgotten that the concept of Australian federation was extremely fragile and its achievement at the time and in the circumstances was something of a miracle.

Fortunately, there were people imbued with a spirit of nationalism. Among the causes I have noted above, I have not actually listed a national spirit as a motivating force. No doubt a spirit of federation—a spirit of unity—was alive and developing through the nineties. Whether that came on the back of these pragmatic arguments, or whether it led them, is a debate that has not been resolved to this day. It is fair to say that the Australian Constitution was forged not in war or revolution but very much as a sensible compact to try to make something workable which would add to the welfare and prosperity of all living in this part of the world. In that it is probably different from most other constitutions which have tended to arise from crises—the United States Constitution is a classic example of that. That does not mean that national feeling was not around. It is significant that in the nineties the test cricket series of England versus Australia really came into their own. The first modern series was in the summer of 1894–95; a very significant summer for federation as I will explain. It was then that all the colonies united together against a common foe. It is significant, that sport tends to be one of the few unifying factors when Australians look at themselves as a nation. This is true today as we approach the centenary of federation when it seems the chief celebration is going to be the hosting of the Olympic Games and not a celebration of that great achievement—putting this constitution and nation together.

The delegates, who had been elected or appointed by the parliaments of their respective colonies, met together in 1891 at the National Australasian Convention in Sydney. This group of men, all in suits, nearly all with beards, managed to put a draft constitution together; many elements of which we live under today. As well as being prepared for introduction in the colonial legislatures, the draft was forwarded to London to await advice from the colonies so that the measure could be introduced in the Imperial Parliament. Full of resolution, the delegates departed in April 1891 to go back to their separate legislatures to ensure that the draft constitution was given the force of law. Somehow or other, it did not actually happen.

There were major difficulties in each of the legislatures. There were many changes of government and parliamentary personnel in all colonies over the next two years as the great depression of the early 1890s rolled through Australia creating economic and social havoc, particularly in Victoria the prime mover in the federation cause. Unfortunately, despite the optimism of the delegates, the process stalled at this point.

Federation, however, was not only revived but accomplished by 1901. The process was one which included pressure group activity (the popular movement); government and parliamentary leadership; and democratic participation in the ultimate decisions of a kind that no previous constitution in the world had enjoyed. The form was federal, recognising the nature and interests of the vast Australian continent.

Victoria remained strong for federation, in part because of the Depression's exposure of its financial vulnerability. Committed to a protectionist policy to foster domestic manufacturing industry but impatient with the intercolonial trade barriers, it saw the role of federation in part as a counterweight to the economic dominance of New South Wales. Tasmania was keen, in large part because of its relationship with Victoria and its feeling of economic isolation which could only be overcome as part of a federation. Queensland throughout the decade tended to be influenced by the attitude of New South Wales. The most lively question was whether Queensland would be part of a nation as an entity or divided into two or three separate states. Western Australia, having just achieved representative government and then discovered itself to be the repository of vast mineral wealth was a most reluctant partner in discussion. The prevailing mood in New South Wales was now sceptical—federation on its terms which would include the maintenance of a free trade policy, or no federation at all. This left South Australia in a sense at the fulcrum. Its protectionist policy held no fears for Victoria, its size none for New South Wales. Its economic destiny was closely bound to its eastern and western neighbours. It had many reasons to be strongly pro-federation and its leading politicians and public figures, although bitterly divided on other issues, were at one on this. As a smaller colony, not completely in either the New South Wales or Victorian camp and with influence over Western Australia, it could play the honest broker.

In this context Charles Cameron Kingston, Premier of South Australia from June 1893 to November 1899, was a connecting thread between the colonial leaders. A delegate or participant in nearly every crucial meeting or discussion on the issue from 1887, his actions at critical times made sure that the process was revived and kept on the rails from 1894 until 1901. Of particular note is his role in the summer of 1894–95 in re-starting the process; as President of the 1897–98 convention; in the premiers' compromise and second referendum of 1899; and in London representing Australia's interests against those of the Empire in 1900.

Noting that the election manifesto of George Houstoun Reid, who was sworn in as Premier of New South Wales on 3 August 1894, had included a pledge to restore Australian federation 'to its rightful position of large importance and urgency', Kingston opportunistically wired him on 1 August saying that he would be prepared to negotiate on intercolonial free trade 'when your Ministry is formed'. Reid responded on 3 August: 'Just sworn in; hasten to reply ... invite further communication.' Kingston immediately offered to send a ministerial representative to negotiate.

The upshot was a considered and significant letter from Reid on 22 August, to all the colonies, which very soon found its way into the public domain.



In some colonies, if not all, political vicissitudes and the stress of urgent local issues seem for a considerable period to have endangered the continuity of the movement ... the establishment of a federal compact is of commanding interest to every Australian state, for it is clearly impossible that any one of them can have full scope for the development of its resources until the whole continent is freed from provincial trade restriction.<sup>1</sup>

He went on to ask if they would join with him in placing the question of federation once more in the position of practical and urgent importance to which '... it is pre-eminently entitled'.

Not much action followed, and again it was Kingston who arranged for a strong pro-federation resolution to be passed in the South Australian House of Assembly which allowed him to urge his colleagues, and Reid in particular, to ensure the issue did not die again. Further telegrams followed over the months. Sir George Turner of Victoria and Sir Edward Braddon of Tasmania always responded promptly with strong endorsements of co-operation, but Reid, somewhat distracted by conflict with the upper house, was quite unresponsive until the end of the year, when he proposed the premiers meet in Hobart in January 1895 to discuss the matter.

The Federal Council of Australasia, a federal body that New South Wales had never joined and South Australia was prevented from remaining on after 1890 by its Legislative Council, was also scheduled to meet in Hobart at this time. This guaranteed the presence of the less enthusiastic federalists such as Sir John Forrest of Western Australia and Sir Hugh Nelson of Queensland. As it happened it also caused considerable tension, as the Council rightly saw that the premiers were seeking to upstage it and in the long run render it redundant.

In my view, by producing an acceptable and practical proposal for the advancement of federation with the political endorsement of the government leaders, this meeting marked the turning point for Australian federation. The critical meeting was on 31 January 1895. The six colonial premiers were in attendance with the host premier, Braddon of Tasmania, in the Chair. Reid and Kingston proposed that federation was the great and pressing issue and this was carried unanimously. A motion of Reid and Turner was carried, with Forrest dissenting, that a convention of ten delegates from each colony should be directly chosen by the electors. With Forrest and Nelson dissenting, it was resolved that there should be a direct vote of the electors of the colonies on the outcome of the convention. It was agreed unanimously that if three or more colonies adopted the proposals they should be sent to the Queen for assent. Forrest was the only dissenter from the proposition that each parliament should be presented with a bill to give effect to this scheme. Kingston was unable to get a seconder for a proposal that the Imperial Parliament should pass an enabling act prior to the constitution being framed so it would come into effect automatically on being adopted by the voters of the colonies.

It was agreed that Turner and Kingston should immediately draft a bill giving effect to the procedures for submission to the respective parliaments. (Forrest's agreement to this was conditional on a requirement that New South Wales must pass the bill before others were obliged to introduce the measure.) Arthur Searcy, a South Australian official accompanying

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<sup>1</sup> *Sydney Morning Herald*, 25 August 1894.

the Premier to provide secretarial assistance has given an eyewitness account saying that Kingston drafted the bill himself and that Turner, while getting credit for the draft, 'had nothing to do with its preparation'. Kingston began working on it at eight on the evening of 31 January and completed it eight hours later. According to Searcy the only help he had was Dr John Quick's pamphlet. It was adopted by all except Forrest who had left the meeting.

Previous conventions had demonstrated that with the best intentions in the world a group without the 'power of the people' in the form of direct election as delegates could not devise a constitution that would be regarded as an expression of the popular will. Equally, the means to put it into effect could not be found without the commitment and power of entrenched and confident premiers. Hence the need for what I have called the democratic deal, which, however, could only be successfully done by the premiers.

The outcome of the conference was generally well received both in Australia and overseas. There was one major exception—Sir Henry Parkes, who launched a scathing attack on some of the premiers and the enabling bill.

Every sincere friend of federation must see that the mockery of the "Conference of Premiers" is only a device to block the way to union ... What status had the self-constituted "Conference of Premiers" against this great historical Convention [of 1891]? Can the lesser over-rule the greater? Can a coterie of mice claim for itself the mastery over a gathering of lions?<sup>2</sup>

Reid, Kingston and Turner were 'three travelling lawyers'; Reid, a 'babbling lunatic ... having the reputation of never having read a book in his life, not even a law book'; and Kingston 'does not even comprehend the proprieties of the relations of the men in high political life'. The convention would be 'only a mob'. Reid responded more in sorrow than anger: he simply referred to Parkes's 'conceited pomposity'.

The seal of approval in the highest of places, the Imperial Parliament, was given on 12 February. The Hon. W. Redmond asked Under-Secretary for Colonies Buxton in the House of Commons if the Government would introduce an enabling bill arising from any Australian convention, and was told that 'under the circumstances mentioned the Imperial Government would be favourably inclined to assist in bringing the matter to a successful outcome'.

It was significant and critical to the achievement of federation, that five of those six premiers were to remain in office for the next four crucial years covering the convention, the referendums and the premiers' conferences which saw a bill sent to London. Even the odd man out, Nelson of Queensland, held office until April 1898. This could not have been anticipated—the average 'life' of a premiership from the advent of responsible government until 1893–94 ranged from twenty-five months in Queensland to eleven months in South Australia. It was an unprecedented period of governmental stability in the colonies. Even more remarkably, as Professor L.F. Crisp has noted, there was an 'epidemic' demise of premiers between September and December of 1899, with four of the five all leaving office, but by then the die was cast and federation virtually secured. Interestingly, the one who did

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<sup>2</sup> Henry Parkes, *The 'Mandate of the People' and the Reid Fraud*, Turner and Henderson, Sydney, 1895, pp. 15–17.

not survive to 1899 was the Queensland Premier whose colony did not attend the 1897–8 convention. All the others were delegates to the convention, not *ex officio* but, except for Forrest of Western Australia, by popular election. All were together in London for the Queen's Jubilee in 1897 between the Adelaide and Sydney sessions of the convention. All but one were at the critical Premiers' Conference of January–February 1899 which agreed on amendments to be put to a second referendum, thus rescuing the process from disaster again. And finally five of them were destined to be members of the first House of Representatives, four of them becoming federal ministers and one a prime minister.

There were, however, major hitches to be overcome along the way. The key to further progress was to be the introduction and passage of this enabling bill in each parliament. All but the absent Forrest agreed that New South Wales should take the initiative. When the enabling bill had passed the New South Wales Parliament they would take complementary action. With the unsatisfactory outcome of the 1891 convention in mind the premiers, in contrast to the understanding following that conference, made a conscious decision to wait on New South Wales and to insist on it passing the bill. The problem was that the next few months saw New South Wales in political uproar over Reid's fiscal policy. An examination of the correspondence shows that, with almost six months having elapsed since the Hobart Premiers' Conference and the Reid Government having been returned at the election, Kingston again took the initiative. On 2 August 1895, just twelve months after his first round of telegrams to Reid, he advised Reid that in order to speed the process he had given notice of a bill in the South Australian Assembly. While explicitly making clear that he was not seeking to usurp New South Wales's essential role, he was implicitly trying to keep maximum pressure on the senior colony. 'We are still impressed with the importance of New South Wales taking the lead', he told Reid. 'Cannot this be arranged for at an early date or is an almost simultaneous and general federal advance on the Hobart lines more practicable?'

The other premiers were advised at the same time. Turner questioned whether it was desirable to proceed without New South Wales but in his reply Kingston emphasised that while he still believed that New South Wales should take the lead, he was 'not waiting for Victoria but propose[d] to push on with our Bill if early Sydney action cannot be arranged for ... and [we] will be pleased to do everything in reason to bring this about'. It was an interesting choice of words signalling that the South Australian move was really only tactical and aimed at getting action from New South Wales which was to be 'arranged' by Kingston. Nelson of Queensland responded very positively on 7 August. He would like to see South Australia take the initiative if New South Wales was not able to do so. For Forrest it was understandably 'not a pressing question for this colony'. The important endorsement, however, came from Reid who did 'not object to you going on with the Federal Enabling Bill first'.

The South Australian bill was temporarily put on hold when it became apparent that Reid was ready to move. But by December Kingston became concerned that time was running out again. On 11 December he telegraphed Reid asking for a progress report, saying that he was anxious to pass the bill as soon as he had heard from New South Wales and was keeping the parliament in session but could not hold on for much longer. There was a hold-up in New South Wales as an amendment deleting a provision for the payment of representatives was made. Kingston was most concerned about this, seeing it as undermining the principle of payment of members. As well as complaining to Reid, and letting him have the details of the South Australian proposal on payment, he asked for the views of Turner and Braddon. The measure passed the New South Wales Parliament on 12 December 1895, and on 16

December Kingston was able to advise Reid that his bill had passed without amendment and he hastened to bring it into effect. The South Australian bill was the first to receive assent on 20 December 1895, followed by New South Wales on 23 December, Tasmania on 10 January 1896 and, when the Premiers next assembled on 4 March 1896 for their annual conference, assent in Victoria was only a few days away on 7 March.

The next Premiers' Conference, chaired by Reid in Sydney on 4 March 1896, was not the powerfully representative group that had met in Hobart thirteen months before. A number of ongoing matters were on the agenda, including defence, immigration and quarantine—but the most pressing intercolonial matter, federation, was not. It was added by agreement at the instance of Kingston and the following significant resolution carried:

The deliberations of this conference have made the urgent necessity for a federation of the colonies more than ever apparent. Enactment by NSW, Victoria, SA, and Tasmania of the Federal Enabling Bill drafted at the Hobart conference of 1895 constitutes a substantial advance on a satisfactory basis. It is an additional source of satisfaction to learn ... that the Queensland Government intends to introduce a similar Bill after the meeting of the new Parliament.<sup>3</sup>

Voting for the new Queensland Parliament was to take place from 21 March to 11 April 1896 and any further federal action there needed to wait on the result. By June 1896 Kingston's concern about yet another block to the progress towards federation was apparent. On 12 June 1896 he telegraphed his Victorian and Tasmanian colleagues that he 'viewed with great apprehension the vehement probability of Queensland making no attempt to pass the Hobart Enabling Bill', but seeking representation by ministerial or parliamentary nominees. This cut directly across the chief advantage of the Hobart agreement embodying direct consultation by the people in all the colonies and the framing of the constitution by real representatives of the people. He urged his two colleagues to object to Queensland's approach and said he had a real fear that New South Wales would agree to it. It was the opening shot in a campaign which at its end saw Reid reluctantly concede that the convention could be held without Queensland. In its course over the remaining months of 1896 Kingston flattered, pleaded, threatened, postured and did anything else to try to ensure that the convention delegates would not only be representatives of the colonies, but representatives of the people as well.

This would seem an appropriate point to mention a major event involving the popular movement, which saw activity in particular by a number of Federation Leagues in various colonies. The Bathurst People's Convention of November 1896 is often cited as the high point of this activity. Certainly it was conceived with a view to getting some action on the "Hobart Principles". It was given high status at the time—and indeed was a remarkable feat of organising by the journalist and nationalist W. J. Astley (better known under his *nom de plume* as the writer 'Price Warung'), then resident in Bathurst. In his inaugural presidential address to the People's Convention, the local Mayor, Dr Thomas Machattie described those present as 'delegates from all parts of Australasia' and 'representative of the Australian colonies'. This, he declared has resulted:

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<sup>3</sup> Minutes of the Premier's Conference, State Records Office of South Australia, GRG 24 June 1896/280.

in a People's Federal Convention, national in character, whose deliberations will be carefully watched, not only by the hundreds of thousands in these colonies, but by millions of our own blood ... in the dear old motherland.<sup>4</sup>

This was certainly at odds with W.M. Hughes, then a Labor member of the New South Wales Legislative Assembly, who characterised the delegates as being the result of 'the diligent scraping of parochial nobodies from all parts of the colonies,'<sup>5</sup> or Haynes' description in the same debate of them as 'palpable schemers'.<sup>6</sup>

The official proceedings list around two hundred delegates as in attendance, including John Quick and Robert Garran whose presence could be responsible for the prominence given to it in their subsequent definitive description of the federation movement. There was a wide representation of organisations and interests, but almost half of the delegates were representing local government, the next largest group was from the Federal Leagues with fifty representatives. The Australian Natives Association sent fifteen delegates, and there was multiple representation from the Commercial Travellers, chambers of commerce and of manufacturers, progress associations and the Australia National League. The Labor Electoral League, the Republican Union, Single Tax League, Social Democratic League, Mechanics Institute, Citizens Committee, and Australian Order of Industry were there. The large proportion of local government representatives is not surprising as the Committee had made a major effort to attract them either in their own right or as the sponsors of federation leagues. Letters were sent to municipal and district councils in all colonies. The attempt to attract intercolonial delegates included the granting of free passes by the New South Wales railways.

The representation from the other colonies, however, left a lot to be desired, comprising only twenty-nine or less than 15 per cent. Of the twenty-nine, twenty-one or nearly 70 per cent, were from Victoria. The rest were made up of three South Australians, three Queenslanders, one Western Australian, and one Tasmanian. There was no New Zealander to allow the broader description of *Australasian* to be applied to the meeting.

To Quick and Garran there were two factors of more importance than the origin and number of the delegates. One was the widespread public interest in the people's convention. 'Its proceedings were', they claimed, 'reported at length by the press, and followed with interest throughout Australia'.<sup>7</sup> The other was the broad range of interests represented—all, of course, committed to the federal cause, but defining it in different ways. William Lyne, then Leader of the Opposition in the NSW Legislative Assembly, had drawn attention to this in his address to the convention, following Reid, on the fifth day, Friday 20 November. 'Conservatives, Liberals, ultra radicals, and even Republicans' had managed to conduct a 'credible debate', he said.<sup>8</sup> The fact that this disparate group had unanimously agreed to

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<sup>4</sup> Address on morning of Tuesday 17 November, *Proceedings People's Federal Convention, Bathurst, November 1896*, Gordon & Gotch, Sydney, 1897, p. 78.

<sup>5</sup> *New South Wales Parliamentary Debates*, 11 November 1896, pp. 4986–7.

<sup>6</sup> *ibid.*, p. 4989.

<sup>7</sup> John Quick & Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth*, Angus & Robertson, Sydney, 1901, p. 163.

<sup>8</sup> *Proceedings, People's Federal Convention, Bathurst*, 20 November 1896, p. 94.

focus their discussion around the text of the 1891 Commonwealth Bill had, in the view of Quick and Garran, helped ‘to dissipate the atmosphere of suspicion which ... had always hung round the Commonwealth Bill’. It was redolent of “ ‘Toryism’, ‘Imperialism’, ‘Militarism’, and other unpopular qualities”.<sup>9</sup>

This may well be correct, but neither high public interest nor the range of organisations represented support the claim of a truly national gathering. A much greater weight and intercolonial significance was given to the convention by the fortuitous presence of three non-New South Wales Cabinet Ministers, John Gavan Duffy (Victoria), John Alexander Cockburn (South Australia), and Edward Charles Wittenoom (Western Australia), who were in Sydney at that time to attend a pre-arranged meeting of Postal Ministers and officials. The invitation to Bathurst was in effect an opportune move by the organisers. Of them, only Cockburn of South Australia was much identified with the federal cause.

Unfortunately the Queensland and Tasmanian ministers were not with them. There is particular significance in the absence of their Queensland colleague because one of the most pressing issues at the time, as George Reid attested in his address later in the week, was whether Queensland was going to join a federal convention on the Hobart lines. The fact that a minister from that colony did not think it worthwhile to go to Bathurst highlighted the already very meagre Queensland representation which consisted of two members of a local government board in Gympie and another from Croydon Council. Andrew Joseph Thynne was the Queensland Postmaster-General and had an interest in federation stemming from his membership of the Queensland delegation to the 1891 Convention. He had also represented Queensland at the Ottawa Colonial Conference of 1894.<sup>10</sup> But on this occasion he could not be induced to go to Bathurst. Not only did he think that ‘Federation is not a burning question in Queensland’, but, more ominously, that ‘ill-will has been created [there] by telegrams published to the effect that pressure was being put on Queensland by the other colonies’.<sup>11</sup>

At the convention, as well as in committee discussion, a set piece series of speeches were delivered on states rights, but the only speakers were from Sydney. Cardinal Moran was followed by Edmund Barton, Richard O’Connor, Reid, Lyne, Patrick Jennings, John See, and Daniel O’Connor before the convention adjourned to a garden party given by the Ladies Committee. The final day of the convention saw a flurry of motions put to the vote, again dominated by the New South Wales delegates. Delegate Wilkinson from Sydney spoke on behalf of the people of Queensland and it only remained for the vote of thanks to Barton and O’Connor to be carried to underline that, good intentions notwithstanding, the people of the Bathurst People’s Convention were really the people of New South Wales.

Nevertheless, with the participation of the first colony being critical to progress, its effect there was probably important, including the impression that it was truly intercolonial in composition.

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<sup>9</sup> Quick & Garran, *op. cit.*, p. 163.

<sup>10</sup> See article on Thynne, *Australian Dictionary of Biography*, v.12.

<sup>11</sup> *Adelaide Observer*, 21 November 1896, p. 11.

The pressure on Queensland mounted. The day after Kingston had communicated with Braddon and Turner—using a trademark tactic of ‘consulting’ in advance but not leaving enough time to be deterred from a course he had already decided on—he sent a confidential telegram to Nelson, Premier of Queensland, saying he was much alarmed.

If anything other than direct popular election of members of the convention is provided ... it will to our mind damn the whole thing, and South Australia for one will probably have nothing to do with the hybrid gathering which must result ... The fatal fault of previous federal efforts was the omission to consult the people in the first instance.<sup>12</sup>

This message was also sent to Turner and Braddon to reinforce his words of the previous day. The Queensland action, he told them, would be a fatal mistake.

There is no doubt that the contemplated departure from the Hobart agreement results from an appreciation of the fact that the popular choice might differ from the ministerial or Parliamentary selection.<sup>13</sup>

Kingston was prepared to contemplate a convention without Queensland although that ran the risk, if Western Australia did not attend, of the small colonies being dominated by the big two. In fact it is unlikely that he would have been so bold if Western Australia had not made a commitment, however half-heartedly, to attend. Forrest had secured the passage of a bill in October, which provided for parliamentary selection of delegates. Kingston’s failure to insist on the same conditions applying to them as to Queensland and his major effort to make sure Forrest would attend suggests that he was realistic enough to know that it was futile to try to get Western Australian participation on any other terms. As long as the western colony sent delegates, the small colonies would have the numbers, and whether the West eventually joined the Federation was not immediately critical. (The Western Australian bill provided that Parliament would decide afterwards whether a draft bill would go to the people.) Bearing in mind that at the 1895 Conference Nelson had joined Forrest in preferring parliaments to decide on how delegates should be chosen, Kingston’s strictures seem unfair, particularly in the light of his absolute rejection of any ‘hybrid gathering’. Kingston, however, believed that agreement to the bill, which he had drafted was the crucial decision and this allowed him to distinguish between Nelson and Forrest.

Forrest proved difficult indeed. On 23 December he wired the South Australian Premier through whom he dealt on such matters, that the days proposed were ‘most inconvenient as [a] general election will be going on in April/May’. He queried whether it would be possible to hold off until the end of the year, and suggested that the matter could be discussed in Hobart meetings scheduled for January 1897. All of the premiers would have been aware of the other constraint that year—the Queen’s Diamond Jubilee celebrations in London in June, to which they were invited. Forrest was prevailed on to agree to the original time table.

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<sup>12</sup> SA State Records Office.

<sup>13</sup> SA State Records Office.

It was assumed that such a prestigious event would take place in Sydney or possibly Melbourne, but on the last day of 1896 Kingston had cabled all his colleagues saying that the 'claims of Adelaide at which no federal gathering has yet been held should not be overlooked'. This was the first step in a clever campaign to be the host of the vital convention. And as with its eventual reluctant entry into the federation itself, the special if uneasy relationship geographically, economically, and politically between Western Australia and South Australia was the key. Although it had taken over two years, the convention did finally assemble in Adelaide in 1897.

The successful outcome of the convention, following its three sessions held respectively in Adelaide, Sydney and Melbourne in 1897–98 did not guarantee ultimate success. The referendum gained a majority in all four colonies, but in New South Wales did not achieve a legislatively imposed threshold and consequently was declared lost. Reid was accused of saying he would vote for the measure while giving reasons why it should be defeated, earning himself the nickname 'Yes-No' Reid which he carried for the rest of his career. All the old suspicions of New South Wales; Victorian–New South Wales rivalries; and the fears of the small colonies were revived. The movement was in tatters again.

After a lot of negotiation and posturing the premiers, including the new Premier of Queensland, assembled again in Hobart in January 1899, and agreed to some amendments to meet the needs of New South Wales. A second referendum in all colonies gained even greater majorities. Western Australia did not participate.

The next task was to get the measure passed by the Imperial Parliament. Kingston joined Barton, Alfred Deakin, and Sir Philip Fysh in London for the crucial negotiations which nearly came unstuck. Pressure from the Colonial Office on the reluctant Forrest to ensure that Western Australia joined as an original member resulted in a referendum there which was carried in 1900. Attitudes on the goldfields, much fermented and encouraged from South Australia, were the key to Western Australia joining.

This brief summary of the period from 1897 to 1900 does not do justice to the drama and intricacies of the process. I have not tackled the great debates in the constitutional convention itself. The story will be told—but more importantly it should be taught and understood by all Australia as we try to make sensible decisions about the future, which can only be effective if they are based on an understanding of where we have come from. We ignore the state tradition and identity of the nation at our peril.

Any change to our constitution, which must be voted on by the people as it was in the 1890s, must also be carried by a majority of the states. So it is not a simple matter of saying let us argue a case through and as long as the eastern seaboard is in favour of it then it is right for Australia. Let us think seriously about the whole country and the balance of the nation in getting consensus and support for changes that a proposed people's convention at the end of this year might make. And in that context, let us learn that we ought to elect as many of the delegates as possible, if they are going to have credibility; and that we should ensure that there is balance between the respective components of the federation and not a huge weighting on a per capita basis if we are going to get it accepted in the smaller states and regions. Finally let us remember that anything that is decided there must ultimately be subjected to the wills and wishes of the people of Australia.



**Questioner** — I think the history of the federation movement and particularly of South Australia with the strong support given to federation by the intellectual and political calibre of the delegates from that colony is extremely interesting. Do you see something similar happening in the constitutional debate ahead of us, especially in relation to the republican movement? How would you see that blend of radicalism and conservatism that is so attractive in South Australia being expressed in the debates ahead of us?

**Mr Bannon** — It is probably true to say that the current debate has lacked, I think, a lot of the substance of the debate of the nineties. The people debating these issues then were extremely well read and were looking very actively at what we would now call overseas experience. A number of treatises and manuals and so on were circulated amongst delegates to ensure that they were familiar with what others had done in similar circumstances so that when they put together their model they could draw on the best of those experiences and avoid some of the mistakes. There was, in other words, a consciousness that in making the Australian nation we were basing it on an international context and experience.

I think our debate around these issues in contemporary times has lacked that context. It has been very much inward looking: far too much navel gazing. I suppose that is partly because a lot of the impetus for the republican cause comes from what you might call a nationalist feeling, but that does not explain it fully. I think we ought to be examining more closely, and familiarising ourselves with working federal systems; looking at those that have not worked, and there are a number, and seeing how we can apply those lessons here. That is point one. The second point is that the republican issue has dominated and the subplot of that is that it has tended to break into partisan argument. When any of these issues become polarised in terms of strict party lines, there is no real way of resolving them adequately as was done in the 1890s. Admittedly, the party system was not in place then in the way that it is today. The demarcation lines were not as clearly drawn so that made it easier. But there was nonetheless a real attempt to seek consensus across the political spectrum and not to allow the debate to become too polarised by either factional or political division. In a way we need to step back and do a bit of that in Australia today. There is no point in advocates saying that if one or other of the great parties adopts one or other of these attitudes that is good and that it is the end of it. Far better that the great parties actually talk between themselves and, as much as a people's convention can do something, I think a very good inter-party conference between party leaders whether public, private or whatever could aid this process enormously. One hopes that as the dust settles a bit this may indeed happen.

**Questioner** — This is a question on the viability of the small states such as South Australia and Tasmania in light of the squeeze by the Eastern seaboard states and the decadent wealth of the west. Because South Australia's population is relatively static and in another twenty years Queensland will be larger than the population of Victoria, where do you see the future of such states?

**Mr Bannon** — You have got to accept that there are considerable disparities in the system and to some extent they have increased, but that is part of the reason why we have a federal system. The concept behind it being, that without a nationally distributed mechanism amongst the entities, which in our case happen to be the states, we are not going to have any kind of orderly national development. It is all very well to see the growth of the west at the moment, which has been huge and fed by the mineral boom and so on, but that would not have happened without Western Australia being part of a federal system that redistributed

resources and installed infrastructure. The Northern Territory is another case in point. It has great potential to deliver for Australia. Interestingly, one of the reasons South Australia wanted federation was so it could rid itself of the Northern Territory which it saw as a financial incubus. The Territorians wanted federation in turn to rid themselves of South Australia and its neglect and to be part of the national entity. But, the argument for federation and for the acceptance of small as well as large states instead of some incredibly rational bureaucratic reworking of the map to balance the country is that it does ensure some decent regional development. The logic of not having a redistributive mechanism through a federation is that you will starve the poorer states, they will get poorer, and the population will actually decrease and Australians will abandon large tracts of the country over time, and concentrate in particular economic centres. This will invite those with perhaps not so much space, resources or whatever, to actually come in and squat down as well. In other words, the federal approach ensures that we have regard to all parts of the country and not just those with particular power in terms of population or wealth.

**Questioner** — What is your view on the legitimacy of the federal government engaging the external affairs power in regards to human rights chiefly in respect to the human rights sexual conduct legislation which overrides the laws of Tasmania?

**Mr Bannon** — My view is that one must not gainsay the Commonwealth government's right to operate for the whole nation at the international level, and you cannot put fetters on that. The Constitution makes it clear that foreign affairs is the prerogative of the federal government and that is one reason we came together. But equally, in a federation, there are certain powers that do reside with the states, and have done so traditionally. This is one of our strengths. Certain progressive or important developments in Australia have only taken place because they were able to take place within one or two state entities. If we had waited for the whole nation to act then it might never have done so—that is a question to one side. Where the foreign affairs treaty directly affects those constitutional state rights in some way, I believe the federal government has an obligation to ensure there is a mechanism for the states to be properly consulted and to be part of the decision-making process. Now there are many in Canberra who would say that is nonsense, 'foreign affairs is ours, the states can keep their noses out of it and these international treaties can override state laws'. I do not agree with that. While reserving the prerogative and right of the Commonwealth, at the end of the day, if the federal arrangements are being affected, if indeed our constitution, in a sense, is being overridden by this device, then there must be a mechanism to involve the states in the decision-making process. For people who say that is impossible, it will not work, I cite the International Labour Organisation. For some fifty years or more, Australia has been a leading member of that organisation. It has worked in it fulfilling international obligations, setting standards for the workforce in various areas by a tripartite mechanism, which not only involved consultation with employers and union representatives but ensured that the states sat side by side with the Commonwealth government in determining the direction and shape of those conventions. And it worked because there was a dual authority over industrial relations. The Commonwealth rightly said, fifty or sixty years ago, to be effective at the ILO we need the states with us as well. Now that worked very well. It may be outdated in contemporary practice—all I am saying is there are good precedents for states being involved in a consultation process where their powers will be affected by an international treaty and it ought to be instituted.

**Questioner** —To what degree was the issue of the navigation of the Murray River a catalyst for the people of South Australia, Victoria and New South Wales toward federation?

**Mr Bannon** — It was certainly one of the strongest forces that propelled South Australia into that area. South Australian delegates such as Patrick Glynn and Richard Baker had a particular interest in river navigation because as an end user of the river, South Australia felt particularly vulnerable to what happened upstream and they saw that the only way to deal satisfactorily with the matter was to put it under a national umbrella. The River Murray Commission firstly dealing just with the supply of water and now dealing with its quality has been an important commonwealth/state initiative. We needed a Commonwealth government to ensure that happened. The irony of the 1890s debate of course is that it concentrated mainly on navigability rather than the use of water for other purposes such as irrigation or indeed potable water in cities such as Adelaide and Whyalla where today the Murray water is essential to the size and viability of those cities. In large part because we were still in the era when there was river traffic, it was competing with the railways. Victoria and South Australia both felt they could get benefits from that and so navigability was very high on the agenda. In retrospect the argument should have been about irrigation, about quality, about conservation but that came much later in the period.

**Questioner** —You placed great emphasis on the People's Convention at Bathurst and what was involved at that convention. Do you discount the conference held in Corowa in 1893 completely? It seems to have been a very important event, together with the subsequent drafting of the enabling bill, reflected in the current popular ownership of John Quick as the father of federation by Bendigo itself. Quick representing the Australian Natives Association and Robert Garran who was a member of the Australasian Federation League, both of whom were not strictly political figures in the sense that the state premiers were, became very highly involved in the federation process. How important is Corowa?

**Mr Bannon** — That is a valid point and in not mentioning it I guess I am not according it the place that it is due. Not so much because of its size but most importantly because the concept of the democratically elected convention was raised at the Corowa conference and the election and referendum process was in fact put into a format there by Quick. Indeed in 1894, at the time Kingston in particular was trying to goad Reid into getting something off the ground and at about the same time as he eventually consented to call the premiers together in Hobart early the following year, Quick and New South Wales delegates from Corowa had actually called on Reid and put their proposal before him. So he was being assailed, if you like, from both sides with a very similar solution. In that regard Corowa does certainly deserve status and recognition in the story.



## **A Federal Commonwealth, an Australian Citizenship\***

*Stuart Macintyre*

An ardent Australian citizen who looks for inspiration in the history of federation will not easily find it. Not in the process of federation, which might have had its rhetorical flights, its moments of drama and grandeur, but was from first to last a complex, drawn out story of calculations and compromises ill suited to civic celebration. Not in the Constitution it produced, which is in the form of a statute and gives the ordinary reader little sense of how the government of the Commonwealth of Australia was to be conducted, still less of the principles it embodies. Not in the present preparations to mark the centenary of the Commonwealth, which were long delayed by partisan and parochial considerations and seem all too likely to brush impatiently past the history they are meant to commemorate. And not in the mimicry of the Federal Convention foreshadowed by the present government with its recent confirmation of a people's convention to reconsider the present constitutional arrangements, that very term confusing the official with the unofficial gatherings of the 1890s and falling well short of the level of popular participation achieved a hundred years ago. We seem to have a national genius for botching the past that cramps and stultifies the civic consciousness.

No-one knew better the vagaries of the federal movement than Alfred Deakin. Writing between the final passage of the Commonwealth Bill through the British Parliament in June 1900 and its proclamation in September, he observed that its fortunes had visibly trembled in the balance twenty times in the ten years after the colonial premiers had gathered in Melbourne to declare their support for a federal union. Again and again it had been made the

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\* This paper was presented as a lecture in the Department of the Senate Occasional Lecture Series at Parliament House on 14 February 1997. Stuart Macintyre is the Ernest Scott Professor of History at the University of Melbourne.

sport of ministries and parliaments. Few made genuine sacrifices to the cause without thought or hope of gain. Deakin believed that genuine enthusiasm for national union was restricted to the young and the imaginative patriots. The chief stimulus to the electors was the prospect of financial gain; the desire for fame motivated their representatives. For Deakin the realisation of the Commonwealth was a providential event, one for which he worked and prayed. Thus the final sentence of his inner history: 'To those who watched its inner workings, followed its fortunes as if their own, and lived the life of devotion to it day by day, its actual accomplishment must always appear to have been secured by a series of miracles.'<sup>1</sup>

Few present-day Australians share Deakin's sense of an immanent presence in public life and few scholars subscribe to his providential theory of historical causation. Deakin's *Federal Story* works in a mode that is nowadays quite out of favour, one that restricts its attention to a handful of leading men who lead and shape the national destiny. Each of the principal participants in the federal conventions is the subject of a pen-portrait, which reads appearance, bearing, speech and gesture as marks of character. The process of federation proceeds through the interplay of these powerful personalities, who in their ambitions and vanities articulate the inchoate impulses of the nation that is to be. He was not alone in this way of writing history. It was then the established method, handed down from Thucydides and Herodotus to Macaulay and Carlyle, and only just beginning to yield to the new idea of an objective study based on archival research. The textbooks that served to instruct Australian schoolchildren in their civic duty made stories of governors and explorers serve a similar exemplary purpose as the tales of forgetful Alfred, patient Robert the Bruce, Richard the Lionheart and his scheming brother John, Bluff King Hal and Good Queen Bess. American schoolchildren learned similar lessons from homilies on their federal fathers.

Deakin's portraits of the Australian federal fathers are mostly unflattering. A recurrent pattern of his *Federal Story* is the victory of the ruthless, practical man over the more educated and cultivated one. A similar pessimism hangs over his perfunctory treatment of the people. They are fickle, restless, short-sighted, gullible. 'In young communities', he writes, 'political decorum and even decency is too often sacrificed to what is called Democracy but is in fact only the intrusiveness of interests and individuals pursuing their own ends at the expense of the public interest'.<sup>2</sup> That the people could rise to their national duty on this occasion, that their elected representatives could align personal ambition with public duty, and that such an idealist as Deakin could play a leading role only emphasised the miracle.

No subsequent commentator has managed quite the same intensity of fervour for Australian federation as Deakin. Even during the 1890s there were advanced nationalists, democrats and radicals who argued that the concessions made to secure agreement were too great. A number of later commentators regarded the limitation of federal powers as a conservative brake; the events of 1975 revived criticism of the powers vested in a house of review composed of senators drawn from numerically unequal electorates, as well as the extent of reserve powers left with the Governor-General. Historians and political scientists turned from federation as a story of miraculous providence or heroic endeavour to the methodological scepticism of the social sciences in studies that revealed the political actor as an acquisitive, calculating, utility-maximising individual. An article published in 1949 by R.S. Parker in an early number of

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<sup>1</sup> 'And be one people': *Alfred Deakin's Federal Story*, Melbourne University Press, Melbourne, 1995, p. 173.

<sup>2</sup> *ibid.*, p. 166.

*Historical Studies*, which analysed the voting patterns of the federal referenda according to the economic interests of the voters, set the pattern.<sup>3</sup> As the individuals who led the federal movement disappeared from public life, knowledge and appreciation of them fell away, despite the efforts of notable scholars such as John La Nauze to keep their work alive. What resident of the ham of Lyne or the wick of Fysh knows of the careers of Sir William Lyne and Sir Philip Fysh?<sup>4</sup>

Deakin had understood nationhood as the highest expression of a political community, a loyalty that united its members and called forth their best instincts. A later generation of critics was struck more by the exclusions from the Commonwealth of Australia, the absence of women from the conventions of the 1890s, the discrimination against Aborigines and Torres Strait Islanders in the Constitution, its inscription of a white male supremacy, the failure to include a bill of rights, the lack of reference to Australian citizenship.

More recently there has been an attempt to revive Australian citizenship. The High Court, which once insisted that the Commonwealth Constitution was no more than a statute and the national government simply institutions established by law, now lays emphasis on the people as the moving force.<sup>5</sup> This new understanding draws force from a new awareness of the moral and legal status of the indigenous people, a greater appreciation of cultural diversity, and an apprehension that the capacity to live together in mutual respect is among the more precious benefits in a world beset by murderous animosities. The interest in citizenship has grown with the constitutional evolution towards complete national autonomy, and an associated enthusiasm for an Australian republic. It is served by the approaching centenary of federation. In 1994 I chaired an inquiry that was charged with reviving civics and citizenship education. We found a low level of understanding and awareness of the Australian system of government, the federal system and the Commonwealth constitution, but a higher level of interest in civic issues and an appreciation of the amenities of citizenship.

How is that aspiration to be connected to knowledge and understanding? How might we promote the civic capacity? The inquiry I chaired made a number of recommendations, mostly concerned with school education, which were accepted in 1995 by the Keating government and are being implemented by the Coalition ministry. I believe that a determined effort to include civics in the school curriculum, backed by suitable materials and informed, enthusiastic teachers, is of major significance. Civics has been attenuated in the school timetable along with the study of history, geography, politics and other branches of the humanities and social sciences. In our report we argued that the teaching of civics should be grounded in these studies and especially history. If I were rewriting the report of the inquiry today, I would strengthen that argument. I am more than ever convinced that an understanding of the history of citizenship holds the key.

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<sup>3</sup> R.S. Parker, 'Australian Federation: the influence of economic interests and political pressures', *Historical Studies Australia and New Zealand*, vol. 4, no. 13, November 1949, pp. 1–24.

<sup>4</sup> Two suburbs of Canberra, Lyneham and Fyshwick, were named in honour of these founding fathers.

<sup>5</sup> Keith Mason, 'Citizenship', in Cheryl Saunders (ed.), *Courts of Final Jurisdiction: The Mason Court in Australia*, Federation Press, Sydney, 1996, pp. 35–46.

Furthermore, I would return to an emphasis on the figures who led the process whereby the Australian colonies federated into a Commonwealth, who drafted its Constitution and formulated the principles of national citizenship. I do not suggest that the federal fathers should be invested with reverential awe. They were men of their time, with assumptions and prejudices that are now quite alien. There were idealists among them, to be sure, but rather than treating them as antipodean George Washingtons, I prefer to regard them much as Alfred Deakin did, as still prone to wield the hatchet in their adulthood. A proper appreciation of their aims and methods would help us to understand how so much has changed and so much remains the same. I shall offer two examples of how the federal fathers conceived Australian citizenship.

Two of the more attractive federalists were John Quick and Robert Garran. Quick was a Bendigo lawyer, a Victorian and later a federal parliamentarian. He is best known for his initiative at the unofficial Corowa conference in 1893, which hit upon the method of popular participation that rescued the federal movement from paralysis, and is accordingly promoted by some Bendigonians as the true father of federation. Garran was a Sydney lawyer, and later a senior Canberra public servant, who attended the Corowa conference. Both were prominent at the Federal Convention of 1897–98, Quick as a delegate and an active member of the constitutional committee, Garran as secretary to the New South Wales premier and secretary of the committee that drafted the Constitution. In 1901 the two men published *The Annotated Constitution of the Australian Commonwealth*, which is at once a legal commentary, a history of the federal movement and an expression of their own enthusiasms.

They believed that the new Commonwealth created entitlements and duties that amounted to national citizenship. The problem was that the Constitution nowhere recognised such citizenship. Rather, it retained the accepted form of a ‘subject of the Queen’. The term citizen was reserved for foreign citizens. Section 44 of the Constitution disqualifies from membership of the Commonwealth Parliament any person who ‘is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power’. In expounding this provision Quick and Garran provided a note on the phrase ‘A Subject or a Citizen’. ‘A subject’, they explained, ‘is one who, from his birth or oath, owes lawful obedience or allegiance to his liege lord or sovereign. “Citizen” is the term usually employed, under a republican form of government, as the equivalent of “subject” in monarchies of feudal origin.’<sup>6</sup>

To emphasise the point, they then quoted from the English historian, E.A. Freeman, that stern champion of Teutonic liberties. The ancient Greek member of the city-state, from which the concept of citizenship derived, ‘would have deemed himself degraded by the name of “subject”’, wrote Freeman, but the members of Greater Britain used the word ‘without any feeling of being lowered by it’. Freeman explained the contrast as one of convenience: even the citizens of republics referred to themselves as subjects for ease of usage.

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<sup>6</sup> John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth*, Angus and Robertson, Sydney, 1901, p. 491.



*Sydney Mail*, 20 March 1897, p. 607

This explanation is surely a little ingenuous. If the subject was merely the formal equivalent of a citizen, and the first term substituted for the second for convenience, why did Quick himself seek at the Melbourne session of the Federal Convention to include a definition of citizenship in the Constitution? He observes that he did so in a subsequent note to Section 117, which specifies that 'A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to

him if he were a subject of the Crown resident in such other State'. As Quick and Garran observe, this formulation was a drastically reduced substitution for a clause in the earlier draft constitution which referred to citizens of the states.<sup>7</sup>

During the debate on that original clause several delegates objected that it would interfere with the independence of the states, and specifically that it would prevent a state from discriminating against aliens. Others objected that without a definition of citizenship, it was meaningless. Richard O'Connor proposed an amendment that would give some substance to citizenship by specifying certain rights of citizenship. He wanted to add a stipulation, along the lines of the United States Constitution, that 'A state shall not deprive any person of life, liberty, or property without due process of law ...', but delegates were offended by the imputation that such a guarantee was necessary and rejected it by 23 votes to 19.<sup>8</sup>

John Quick made two further attempts to inscribe citizenship in the Constitution. First he proposed to add to the list of Commonwealth powers set down in Section 51 a provision for the Commonwealth Parliament to make laws with respect to Commonwealth citizenship. He thought that without such a provision the Constitution would not be complete, for although the preamble referred to the people of the various colonies agreeing to unite in a Commonwealth, there was no indication of who the people were. Without some test of citizenship, he warned that 'all the people within the jurisdiction of the Commonwealth of all races, black or white, or aliens, will be considered members of this new political community'. Here already it was apparent that the argument for citizenship was motivated both by a desire to augment and to diminish, to spell out and secure the rights of citizenship and to restrict them on racially exclusive lines. There was already a power to exclude foreign races, but that left existing residents and Quick wanted a definition of citizenship and power to make laws about it in order to 'empower the Federal Parliament to exclude from the enjoyment of and participation in the privileges of federal citizenship people of any undesirable race or of undesirable antecedents'.<sup>9</sup>

The ensuing debate does not make pleasant reading. Some delegates agreed with Quick, others felt his discriminatory purpose was better secured without any reference to citizenship and anticipated all sorts of unnecessary difficulties that might arise once this novel status of citizen, unknown to British law, was created. Quick was amazed by the force of the technical objections against all attempts to 'improve and popularize' the Constitution. 'One would imagine', he lamented, 'that this was to be a mere lawyers' Constitution, and that everything that seems to go beyond mere legal literalism must be rejected.' He lamented in vain and his proposal to amend Section 51 was defeated by 21 votes to 15.<sup>10</sup>

Still he persisted with his argument that a definition of citizenship was necessary. The reference to 'citizens of the States' in the draft of Section 117 did not say 'whether a citizen is a ratepayer of a state, an adult male, or any member of the population of a state—men,

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<sup>7</sup> *ibid.*, pp. 953–9.

<sup>8</sup> Australasian Federal Convention *Debates*, Melbourne, 8 February 1898, pp. 664–90.

<sup>9</sup> *ibid.*, 2 March 1898, pp. 1750, 1752.

<sup>10</sup> *ibid.*, 2 March 1898, pp. 1767, 1768.

women, children, Chinamen, Japanese, Hindoos, and other barbarians'. Charles Kingston agreed with him. The existing assumption that a citizen 'was a man who had the rights of citizenship' reminded him of the definition of an archdeacon as a reverend gentleman who performed archdiaconal functions. Quick proposed a definition that would define citizens as 'All persons resident within the Commonwealth, being natural-born or naturalized subjects of the Queen, and not under any disability imposed by Parliament ...', but this alarmed other delegates who thought it might include Chinese, Lascars and others who happened to be British subjects. In the end the convention fell back upon the final form of Section 117, which referred to 'a subject of the Queen, resident in any State'. As O'Connor observed, 'it means the same thing'.<sup>11</sup>

Quick and Garran appreciated that it did not. In their commentary, they rehearsed the historical distinction between a subject and a citizen, and suggested that the convention believed 'there might have been an impropriety in discarding the time-honoured word "subject" and in adopting a nomenclature unobjectionable in itself but associated with a different system of political government'. The nearest approach to citizenship they could discern in the Constitution was the wretched Clause 127, which read (until it was repealed in 1967): 'In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.' Here in the specification of the people, its special significance was established. Quick and Garran therefore concluded that the creation of the Commonwealth had created three gradations of political status, subjects of the Queen, people of the Commonwealth and people of a state.<sup>12</sup> If it was impossible to include citizenship in the creation of the Commonwealth because it revealed the lie of racial purity, then the alternative designation of the people allowed for the discrimination its creators codified.

My second example of how the federal fathers invoked the people comes from the popular movement outside the convention. In 1891, representatives of the colonial parliaments met in the first Federal Convention in Sydney and prepared a draft constitution for adoption by the colonies. The draft constitution was taken back to the colonial legislatures where it was criticised, amended, put off or rejected. Then came the formation of an Australasian Federation League, and the decision of its branches along the river-border of New South Wales and Victoria to convene a meeting of parties interested in federation. At that Conference in Corowa in 1893, John Quick hit upon the device that would break the deadlock. He suggested that the preparation of a new Bill for a Federal Constitution of Australia should be entrusted to popular representatives elected specifically for this purpose and that this bill should then be submitted for acceptance or rejection by a general vote of the people of each colony. The Corowa Conference having adopted his scheme, he drafted an enabling Australian Federal Congress Bill that the Federation League embraced and publicised. The premiers met in conference at Hobart in January 1895 and accepted the substance of Quick's proposal. The passage of enabling legislation led to the election of the delegates to the Federal Convention of 1897-98, and eventually to the popular endorsement of its work, which was enacted in 1900 and came into operation on the first day of January 1901.

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<sup>11</sup> *ibid.*, 3 March 1898, pp. 1784, 1788, 1795, 1797.

<sup>12</sup> Quick and Garran, *op. cit.*, pp. 954-7.

In this, the popular heroic version of Australian federation, it was the people who rescued the cause. The High Court now makes this history the basis of the citizenship rights it finds in constitutional cases. My academic colleague and friend, John Hirst, takes the striking novelty of the procedure to involve the people, quite contrary to British tradition, as an affirmation of our civic capacity. He has drawn attention also to the way that the meeting to establish the Australasian Federal League employed the language of citizens, not subjects. 'These subjects of the Queen were clearly citizens,' he has written. 'They were described as such, they called themselves such, they acted as such in believing they could shape the polity in which they lived.' He argues that when Australia becomes a republic, and the constitution catches up with the reality of citizenship, it will be 'our tribute to what I still call the popular movement for Federation'.<sup>13</sup>

This usage of the people, however, has another aspect. It sets the people against the politicians, indeed it defines the two terms as mutually exclusive. Thus John Quick ascribed the genesis of the Australasian Federal League to the spontaneous ardour of nationalists 'animated by patriotic impulse and interest in the common cause of federation, who thought the time had arrived when national unity should be made a people's cause and should be no longer dependent on the battledore and shuttlecock of colonial Parliamentary parties'.<sup>14</sup> The meeting in the Sydney Town Hall that established the League resolved 'That it is expedient to advance the cause of Australian federation by an organisation of citizens owning no class distinction or party influence ...'.<sup>15</sup> Its rules stipulated that no more than two-fifths of its Council could be politicians.

In fact the Australasian Federal League was initiated by Edmund Barton, with the assistance of Garran and other federalists. Its proscription of 'class distinction or party influence' was intended to exclude the republicans and socialists who disrupted its foundation meeting. The delegates to the Corowa Conference were carefully selected to avoid a repetition of such unwelcome participants. At the Conference Quick insisted that 'The main principle was that the cause should be advocated by the citizens and not merely by politicians. The time was gone by when it should be merely a political question.'<sup>16</sup> But the organisers invited leading colonial statesmen and Quick himself was a quondam and future parliamentarian. So too were the other delegates to the subsequent Federal Convention.<sup>17</sup>

Rather than breaking with the conventional procedures of Australian politics, the makers of federation merely extended them. The politicians, having impugned their own calling, called forth a voice that could restore its legitimacy: they reinstated the people as a disembodied presence capable of an altruism that they themselves could not achieve. The people were

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<sup>13</sup> John Hirst, 'Can subjects be citizens?', in David Headon et al. (eds), *Crown or Country? The Traditions of Australian Republicanism*, Allen and Unwin, Sydney, 1994, pp. 119, 123.

<sup>14</sup> L.E. Fredman (ed.), *Sir John Quick's Notebook*, Reg C. Pogonski, Newcastle, NSW, 1965, p. 40.

<sup>15</sup> *Sydney Morning Herald*, 4 July 1893, p. 3.

<sup>16</sup> *Sydney Morning Herald*, 2 August 1893, p. 8.

<sup>17</sup> Stuart Macintyre, 'Corowa and the voice of the people', *Canberra Historical Journal*, n.s. no. 33, March, 1994, pp. 2–8; and Brian de Garis, 'How popular was the popular federation movement?' Senate Occasional Lecture, Canberra, 21 June 1993, reproduced in *Papers on Parliament*, no. 21, December 1993, pp. 101–118.

inscribed as citizens, owning no class distinction or party loyalty, gender, race or other potentially divisive identity: they gave legitimacy to the work of the next federal convention by electing its members, and completed that work by endorsing the Constitution in the referenda that followed. They spoke at the command of the politicians and then fell silent as the business of government was subsumed into the Commonwealth that this act of ventriloquism brought into being.

Some might detect a resemblance between these events and the proposals for a people's convention later this year. Once again we see a suggestion that the politicians have to be excluded, or at least restricted, in favour of the people. Once again there is a suggestion that politics is an obstacle to popular participation. Once again there is shrinking from argument as divisive, a failure to see that we are all politicians when we engage in the political debate that is inseparable from democracy. The depreciation of politics and the validation of the popular, the juxtaposition of the self-serving dissembler and his long-suffering victims, are prejudices so deeply embedded in the public discourse that we seldom notice their historical formation.

This is hardly a comforting conclusion. I have suggested that the people were written into the Constitution as subjects of the Crown in preference to citizenship because of deep fears and prejudices. I have also suggested that the role of the people was based on a profound distaste for the necessary business of politics, the free expression of opinion and playing out of differences. But there is surely a lesson to be learned. The narrow, discriminatory and prescriptive definition of Australian citizenship effected in the Constitution during the 1890s has yielded to a far more generous and open one. We have opened membership of the Australian community to people of different racial and cultural identities, and we have enlarged the content of that citizenship. Our Constitution has proved a far more adaptable instrument than its creators can have anticipated, and has allowed it to respond to changing needs and aspirations. The sort of civic education and civic awareness that I hope to see develop is one that would enable us to appreciate better this history and to continue it. We might hope that by the centenary of federation we shall be able to complete what an earlier generation began and to finally secure a full Australian citizenship.

**Questioner** — Do you think that the issues concerning us today in establishing an Australian republic after 2001 are more or less difficult than the issues faced by the founding fathers a hundred years ago?

## **The Father of His Country.**

*George Washington Reid.*—“I CANNOT TELL A LIE.  
ALONE I DID IT, WITH MY LITTLE HATCHET.”

*Melbourne Punch*, 22 June 1899, p. 588

**Professor Macintyre** — The issues or problems confronting the federal fathers, I think, were more difficult. I am at least half persuaded by John Hirst’s argument that there is a form of republican citizenship that is inherent in the way in which the Constitution was developed and that the present task is partly one of aligning our institutions with the way in which our public life now operates and completing a process that has begun. It is fairly clear that whatever happens between now and 2001 is likely to be less divisive, and not likely to generate the same level of debate as in the 1890s. I think the making of the federal Constitution was a contested process in which the substance of contestation was much greater.

**Questioner** — When we look at the development of America, there is something that is identifiable to most people as an American dream. Would you comment on whether such an ideal exists in Australia, and if so, what it might be?

**Professor Macintyre** — You have drawn attention to a striking aspect of our understanding of Australian citizenship. In some of the research that has been conducted, particularly over

the past decade, concerned with understandings of citizenship and civic awareness, it is fairly clear that many Australians are more familiar with what they think of as the United States Constitution than they are with an Australian one. This is because of the way in which the United States Constitution enters into American popular expectations as played out on television especially. When someone says ‘I’m taking the fifth amendment’, there is a reference there that people find more intelligible in Australia than they do any notion of appealing to an Australian Constitution as the basis of their own civic status. And the differences can be seen at different levels; they can be seen in the language of the documents and they can be seen in the historical process, whereby the citizenship that was created in the United States required them to throw off the older status of being a subject of the Crown. No similar process was necessary in Australia. There was not the same awareness of having created a new constitutional and civic status. And I think it sometimes has to do with the disinclination of Australians for waving flags and for grandiosity. It seems to me that citizenship, by its very nature, has to have both local and international meaning. But, having said that, there is a striking difference in levels of awareness. A further difference, I suppose, would be that there is much greater attention to civics in American schools than in Australian schools.

**Questioner** — Would you agree that the politicians of the 1890s were, by their use of the people, trying to avoid the problems of the six separate colonies; to escape the local limitations that had been imposed on the first constitution by the narrower, sectional interests of the six colonial parliaments?

**Professor Macintyre** — Yes, I suppose that is true. The preamble talks about the people and then it elaborates by referring to the colonies except for Western Australia. It is the people who are agreeing to unite in an indissoluble Commonwealth. But it is true to say that when one reads through the federation debates, the states-righters are the ones most uneasy with notions of citizenship and probably uneasy also with notions of the people except, as I have suggested, in so far as ‘the people’ are then given a particular meaning which excludes the racial minorities. The two colonies most reluctant to become part of the Commonwealth were Western Australia and Queensland. They were then both relatively small; they were also colonies with very large populations of indigenous people; and they were colonies in which race relations were poor. So they were suspicious of a Commonwealth on a number of levels and in most cases they were fairly suspicious of the language of citizenship and the people.

**Questioner** — Today it is more and more difficult to divorce the idea of politics and party politics, so that party is almost the public definition of politician. This contributes greatly to the disparagement of politicians which we see also in the question of who will be the head of state and how he or she will be elected. This question of how we might take the party out of the politician without leaving the politician out altogether relates to the 1890s—was Quick’s scheme intended to separate colonial party politics or to get the politicians out of their separate colonial contexts?

**Professor Macintyre** — Essentially, I think that the Quick device relied on the realisation that federalists had gone to Sydney and prepared a constitution, and once they took it back to six legislatures, every one of them took a different attitude towards it. The project quickly bogged down in a series of arguments that were very difficult to correlate, much less resolve. Quick’s idea was that if you started the process anew and elected delegates, as opposed to having them appointed by the Parliament, then they would have a greater mandate, and if the

colonial parliaments agreed in advance that they would submit the work of that convention to a referendum, then federalists could maintain a momentum that would enable them to overcome the uncooperativeness of the colonial legislatures. It was not a process, obviously, in which politicians disappeared. They were there at Corowa, they were there at the conventions, they were there on the hustings when the referenda were being argued—but they were speaking with an enlarged authority of the people.

And I agree with you that there is that deep fear of party now, as then. In the tradition of civic discourse that people used in the nineteenth century, in so far as they used it in Australia in the nineteenth century, citizenship was seen to involve setting aside your particular identity in order to be able to meet with others in the public sphere—that distinction between the public and the private was vital. You had to cast off potentially divisive things such as your denominational adherence in order that you could perform your duty as a citizen. In that same terminology, party was seen as one of the sectional identities that interfered with the playing out of citizenship. There was a great suspicion of party, at a time when the very recognition of parties was still occurring.

The story for me is that the Australian colonists having rapidly achieved self-government in the 1850s, having created a very advanced system of democracy, and having thought about the extension of suffrage and payment of members of Parliament, regular elections and so on, were not at all happy with the results. Very quickly they moved from thinking of an unresponsive governor or administration as the source of their problems to thinking about those ratbags they sent off to Macquarie Street or Spring Street, and so that became thought of as a process of politics. There were some people who resisted it. George Higinbotham, that idealistic nineteenth century liberal, when he went to the Supreme Court of Victoria, at one stage said that just because a man becomes a judge, he does not become a political eunuch. He recognised that the various arms of government were all performing political work. ‘Why do you deprecate politics?’ was the question he asked fellow colonists. Politics is necessary; if you deprecate it then your expectations of it will be low. But, as I say, it became fixed very rapidly with the advent of self-government, even before the federal process.

**Questioner** — If you look at the 1890s, the popular reaction to the process of federation, by both anti-federationists and pro-federationists, is expressed in some quite extraordinary ways. At Corowa in 1893, there are one or two poems in circulation about the efficacy of federation. By 1896 and the Bathurst Convention, and even a little later, the *Sydney Morning Herald* is getting dozens every week, both for and against the process of federation. It is interesting that we have a much more ‘ho hum’ attitude towards the republic. It is hard enough to write a letter to the editor, let alone a sonnet or an ode on the subject of republicanism. We don’t see that popular engagement with the idea, so there is an interesting difference there that might be instructive. My question is about the Aboriginal people who, of course, were able to vote in the referenda, but in fact lost that right under the Constitution. Did Quick and Garran reflect on that in any sort of moral sense?

**Professor Macintyre** — No, there was almost no discussion of that and, as I have suggested, both Quick and Garran thought of the idea of racial purity as necessary, a precondition of the particular sort of liberal civic ideals they professed. There was a long debate at the federal convention about the likely outcome of the electoral arrangements whereby people who had the vote in states would keep it in the Commonwealth, and that meant that a number of Aboriginal voters, a large number of them on the rolls in South Australia, but a significant



number in Victoria and New South Wales as well, would vote but their children would not vote. I am not aware of any recognition of the implications of that.

I think verse is interesting. Verse of course is a cultural form which had a different meaning then than it does now. The 1890s was a period when recitations and so on were forms of both domestic and public activity. I suppose verse is a medium rather equivalent to what the TV advertisements are likely to be once we embark on our elections for the people's convention with the important difference that verse is more democratic: all you have to do is write it and get a paper to print it and you are in business. I suppose we shrink from that sort of verse because we find it comic now. I am not sure. There are members of the Australian republican movement, such as Tom Keneally, who use considerable eloquence, but rhyming couplets are no longer the way in which this is done.

THE REAL REASON WHY QUEENSLAND WAS NOT ALLOWED TO TAKE PART IN THE  
FEDERAL CONVENTION

*Worker* (Brisbane) 24 July 1897

## **The Art of Consensus: Edmund Barton and the 1897 Federal Convention\***

*Geoffrey Bolton*

Edmund Barton first entered my life at the Port Hotel, Derby on the evening of Saturday, 13 September 1952. As a very young postgraduate I was spending three months in the Kimberley district of Western Australia researching the history of the pastoral industry. Being at a loose end that evening I went to the bar to see if I could find some old-timer with an interesting store of yarns. I soon found my old-timer. He was a leathery, weather-beaten station cook, seventy-three years of age; Russel Ward would have been proud of him. I sipped my beer, and he drained his creme-de-menthe from five-ounce glasses, and presently he said: 'Do you know what was the greatest moment of my life?' 'No', I said, 'but I'd like to hear'; I expected to hear some epic of droving, or possibly an anecdote of Gallipoli or the Somme. But he answered: 'When I was eighteen years old I was kitchen-boy at Petty's Hotel in Sydney when the federal convention was on. And every evening Edmund Barton would bring some of the delegates around to have dinner and talk about things. I seen them all: Deakin, Reid, Forrest, I seen them all. But the prince of them all was Edmund Barton.' It struck me then as remarkable that such an archetypal bushie, should be so admiring of an essentially urban, middle-class lawyer such as Barton. I resolved that one day I would find out more, and that is an important reason for me to be writing Barton's biography many years later.

Not many Australians share my curiosity about Barton. Asked to nominate a hero of federation, most people would identify Alfred Deakin, and perhaps Kingston or Forrest if they live in the appropriate state, and then lapse into silence. A schoolteacher friend of mine twenty years ago tried the experiment of asking a class of Year 11 students to name the first president of the United States and the first prime minister of Australia. Most had heard of George Washington, none of Edmund Barton. He repeated the experiment in 1995, and was able to report a different outcome. Hardly anyone knew about Washington either.

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\* This paper was presented as a lecture in the Department of the Senate Occasional Lecture Series at Parliament House on 23 May 1997. Geoffrey Bolton is Emeritus Professor of History at Edith Cowan University, WA.

Now this contrasts with the prominence given to Washington in the United States, or Nehru in India, or even Sir John A. Macdonald in Canada, and it invites the question: was Barton really important? Hailed in his lifetime as 'Australia's noblest son', and cut down to size by John Norton in *Truth* as 'Tosspot Toby', Barton remains an ambiguous figure, partly because nearly all his surviving portraits show him in the public persona of an Edwardian statesman. In historical memory he lacks the picturesque flourishes of a Reid or a Kingston, and shows no signs of being troubled, as Alfred Deakin was, by a deep and complex spiritual life. Could it be that he was an affable, easy-going Sydney lawyer on whom more active and thus more controversial figures could agree as a figurehead, behind whom more purposeful statesmen such as Deakin and Forrest could devise and execute policy? To ask such a question is to enter the debate about the value and importance of biography. Most of us would agree with Berthold Brecht that 'Happy is the land that has no need of heroes', and it is certainly not my purpose to resurrect Barton as a Great Man in History. Barton suffers the disadvantages of having been an unashamedly Anglophile, white middle-class overweight male, and it is against the fashion to argue that such characters have anything to say to modern Australia. Yet he and his contemporaries achieved what most would agree was the constructive feat of knitting the six Australian colonies into a single political unit; and at the other end of the 20th century, contemplating the ease and speed with which divisions grow up in a community, the achievement of federation looks increasingly like a minor miracle. It is worth exploring the generation who worked this miracle and the individual whose leadership was acknowledged.

As yet the only full-length biography of Barton is nearly half-a-century old. Published in 1948 by John Reynolds, it has the advantage of access to sources who knew Barton personally, including Sir Robert Garran; but not all the members of Barton's family co-operated with the project, and many sources unavailable to Reynolds have since become accessible. Reynolds presented a favourable portrait of Barton, but depicted his performance as leader of the federal movement as sustaining a higher quality than the rest of his career. This sense of a quantum leap induced by the challenge of the federal movement is endorsed by Martha Rutledge in her admirable article in the *Australian Dictionary of Biography*, and by John La Nauze. It's an interpretation which goes back to Sir Robert Garran, who in old age wrote of Barton as '... a field kept fallow for a particular harvest ... he was set aside, dedicated for a special task. He devoted to that task all his pent-up energies; he completed it. What more can we ask of any man?'<sup>1</sup>

I would not seriously challenge this view. Yet it is difficult to leave it there, and the more closely one inspects Barton's career the more difficult it becomes to give a completely satisfactory explanation of this sudden lift in performance. What follows is accordingly to be taken as something of a work in progress report. In the completed biography I may possibly change my mind.

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<sup>1</sup> Sir Robert Garran to John Reynolds, 4 November 1940, Garran papers, MS2001/5/125, National Library of Australia.

## THE CONVENTION COLOSSUS

(“*Mr Barton is not only leader of the Convention—he IS the Convention.*”)

*ISAACS (sadly)—*

“Why, man, he doth bestride the narrow world  
Like a Colossus; and we petty men

Walk under his huge legs, and peep about  
To find ourselves of no account at all.”

—*Shakespeare Revised*

*Melbourne Punch*, 8 April 1897, p. 271

Let us recollect the outlines of Barton’s career. He was born at Glebe on 18 January 1849, the son of Sydney’s first stockbroker and a mother who juggled a career as a schoolteacher with the rearing of eleven children. A brilliant student at the Sydney Grammar School and the University of Sydney, he graduated MA in 1870, qualified as a lawyer, married in 1877, and in 1879 was elected to the New South Wales parliament. He served in the legislature until 1894, and again from 1897 to 1900, representing several constituencies in the Legislative

Assembly as well as two spells of nomination to the Upper House. Originally a Free Trader, he was Speaker from 1883 to 1887, shifted to the emerging Protectionist Party, and served two terms as attorney-general under (Sir) George Dibbs, once for a few weeks in 1889 and again from 1891 to 1893. He was acting premier for four months in 1892, and earned the mistrust of the labour movement for his handling of the Broken Hill strike. By this time he was becoming identified with the federal movement, but there was an element of luck in this, according to the conventional account. Elected a New South Wales delegate to the 1891 federal convention as one of the few sufficiently youthful lawyers in the Legislative Council, Barton was included at the last minute in the crucial drafting committee which during the Easter weekend fashioned the essentials of the federal constitution on Sir Samuel Griffith's steam-yacht, the *Lucinda*. He replaced Andrew Inglis Clark, laid low with an untimely influenza. A few months after Barton's good work on this committee there followed the famous episode when the weary Titan, Sir Henry Parkes, solemnly informed Barton that he must take up the leadership of the federal movement. To a generation familiar with the Old Testament, and no doubt to Sir Henry himself, there was more than an echo of the aged Moses, within sight of the Promised Land which he was not destined to enter, anointing the vigorous young Joshua as his successor; although, unlike Moses, Sir Henry later had undignified second thoughts. Thus fortified, Barton devoted himself to the cause, formed the Federal League in 1893, and by the beginning of 1897 was so widely perceived in the public mind as the apostle of federation that he handsomely topped the poll at the election to choose New South Wales delegates to the second federal convention.

Of course it wasn't as simple as that. Barton's family background, his education, his political career, even his recreations all shaped his particular talents not as an originator of policy initiatives, but as a superbly skilful mediator, able through temperament and experience to maximise consensus, to broker agreement, to reconcile conflicting opinions into a workable basis for the future. This mediating role was essential in steering the 1897–98 convention to a successful outcome, and it was once again essential in 1901 when a stable ministry was needed to launch the Commonwealth government. Rather than follow La Nauze, and Quick and Garran before him, in tracing the debates over the clauses of the constitution, I shall indulge in the biographer's privilege of exploring the influences which moulded Barton.

Let us begin with his family. His father William Barton—'the Governor' as Edmund called him—was fifty-three when Edmund was born. Emigrating to New South Wales as the newly-wed secretary of the Australian Agricultural Company in 1827, he soon quarrelled with his employers and spent the rest of his life in Sydney in a series of optimistic commercial and mining speculations, surviving one bankruptcy, never quite ruined and never prosperous. Mr Micawber comes irresistibly to mind, for William Barton shared some of Micawber's edgy gentility, as well as that air of being a Georgian survivor in an early Victorian ambience. Thirteen years younger, Mary Louisa Barton was a well educated woman not easily overwhelmed by her prolific domesticity; many years later hers was remembered as 'one of the most cultivated households in Sydney'.<sup>2</sup> Edmund was the youngest of four sons and seven daughters, a position which in itself must have been a schooling in diplomacy. Charm would have come easily to an intelligent little boy with several elder sisters. Perhaps also it was as the youngest in a large family that he developed that enthusiasm for his food and drink which was to be the most conspicuous weakness of the adult Edmund Barton. The family imprint also revealed itself in Edmund Barton's brand of nationalism. Unlike his father, who took

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<sup>2</sup> *Bulletin* (Sydney), 2 December 1882.

many years to accept that he would never return to England, Edmund Barton had not the slightest doubt of himself as Australian. Australia was his native environment, Sydney Harbour was his playground. As a young politician he laid emphasis while campaigning on his Australian credentials. But his ageing English father was always to be shown deference and respect, even though in practical matters he need not be taken too seriously. Here was foreshadowed the adult Edmund Barton's combination of rhetorical deference to the British connection with a tenacious but politely expressed insistence on Australia's separate interests.

At the University of Sydney the major intellectual influence on Barton was the classicist, Professor Charles Badham. Badham was an authority of international standing on Plato and Aristotle, the founders of European political thought. His particular strength was textual criticism, that searching analysis of nuances of language which has so much in common with the techniques of judicial interpretation and the drafting of laws and constitutions. Beyond his native Australia Edmund Barton carried with him for the rest of his life the resonances of Greek and Roman civilisation, just as a hundred years earlier the Virginians and New Englanders who framed the American constitution came to their task with a self-conscious awareness of classical precedent. Because of their tertiary education Barton and others of his generation such as Griffith and Deakin were enabled to act as Australians without becoming in any sense provincial.

To judge by the diary which he kept intermittently during 1869 and 1870, the twenty-year-old Barton, while an able and very successful student, gave much attention to his outdoor activities; fishing—one of his regular companions was George Reid—rowing, and above all cricket. Cricket had a profound effect on his life, for it was on a visit by the Sydney University team to Newcastle that in April 1870 he met Jeanie Ross and immediately fell in love with her, although it was to be seven years before they could afford to marry. It was also as a member of the cricket team that he made his first journey outside New South Wales, a match with Melbourne University which led the *Argus* to comment prophetically that such sporting events must in time lead to closer links between the Australian colonies. Barton must have read this editorial. Although only a moderately useful middle-order batsman and a poor fielder, Barton was a devoted official of the cricket club. In 1876 when the graduates of Sydney University received the right of electing their own member of the Legislative Assembly, the younger generation objected to William Windeyer's assumption that he would be their representative, and the stalwarts of the cricket club led the push to nominate a candidate in opposition, Barton was their immediate choice. He polled 43 votes to 49 for Windeyer. It was a respectable debut, and cricket soon brought him further into the public eye. For in February 1879 he was one of the umpires when a visiting team of Gentlemen of England, captained by Lord Harris, played a notable match against New South Wales. At a critical point in the second innings Murdoch, the star New South Wales batsman, was declared run out by the other umpire, an inexperienced Victorian. A spectacular riot ensued. The New South Wales eleven refused to play while the offending umpire remained, and it took all Barton's diplomacy to persuade them that they might forfeit the match if they did not resume play; but the crowd took possession of the pitch, and the game had to be abandoned for the day. A few months later Windeyer was appointed to the Supreme Court. Barton again stood for the University seat, and this time secured an easy victory.

Although Barton did not take a very prominent part in parliamentary debate, within little more than three years he was Speaker at the unprecedentedly early age of thirty-four. For this he had to thank his streetwise friend and political ally George Reid. At a general election late

in 1882 Sir Henry Parkes, having been premier for over four years, lost ground. He resigned just before parliament resumed in January 1883 in the expectation that the opposition would not be coherent enough to form a new ministry. It was Reid who, overriding more cautious seniors, saw that the election of the Speaker provided an early opportunity for mobilising the Opposition. Within a few hours one morning Barton found himself nominated and elected by a four-vote margin over the incumbent, Sir George Wigram Allen. The *Bulletin* acclaimed his election as the first triumph of Young Australia coming forward to take the political helm. In a period of shifting political alignments the Legislative Assembly was going through one of its more turbulent phases, and required a vigorous presiding officer with skills honed in the management of Sydney sporting crowds. Barton was widely praised as a successful and impartial Speaker, mindful of the interests of the parliamentary staff. Again he was the umpire, the mediator. Eventually after a 56-hour sitting in 1886 he managed to antagonise Parkes, and resigned as Speaker when Parkes returned to office in January 1887. The strain of the position was affecting Barton's health, and Parkes in the event at once nominated him to the Legislative Council, and offered him a place in his cabinet, which Barton refused.

One aspect of Barton's speakership provokes speculation. Adolphus George Taylor, the rowdy, alcoholic, but well informed young member for Mudgee was, out of a wide field, probably the major trouble-maker in the Assembly. Barton, relying on standing orders inherited from his predecessor, suspended Taylor for a week; Taylor successfully challenged the ruling in the Supreme Court, then when the New South Wales government laid an appeal with the Privy Council Taylor travelled to London to argue the case himself, accompanied by his wife and mother-in-law and financing the journey by the sale of his stamp collection. Although an unknown colonial less than thirty years of age, Taylor was congratulated by the law lords for his presentation and the Privy Council upheld his complaint—whereupon Taylor declined to seek damages, as these would eventually have to be met by the taxpayer. This must have cooled Barton's respect for the Privy Council as a court of appeal, and a second case would have reinforced this coolness. When old William Barton died in 1881 it was found that some years earlier he had made over a large area of suburban land to the Bank of New South Wales in recognition of a debt. It was unclear whether he had transferred the land to the bank or merely lodged it as security, and in the meantime the land was increasing rapidly in value. Edmund as the legally qualified member of the family brought the matter to court, and a New South Wales judge found in the family's favour. Subsequently, however, the Supreme Court reversed the decision in favour of the bank, citing as its grounds a recent decision by the Privy Council; and when the family appealed to the Privy Council their plea was rejected without even a hearing. It should have come as no surprise that when the Commonwealth of Australia Act was before the British parliament in 1900 Barton was among the most determined opponents of appeals to the Privy Council.

Even by the undemanding standards of the Legislative Council Barton was a fairly inactive member between 1887 and 1890. Critics were already beginning to say that he was lazy. The truth seems to be a little more complex. Garran put it charitably but fairly: 'Barton's indolence was a disinclination to exert himself over things which did not inspire him with a passionate interest. It was coupled with a capacity for intense concentration upon things which did so inspire him':<sup>3</sup> in other words, a good sense of priorities. As early as 1876, during his first parliamentary campaign, Barton had to refute charges of indolence, which he indignantly denied. He was not a frequent debater during his early years in parliament, but

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<sup>3</sup> Garran to Reynolds, op. cit.



once Speaker, showed himself diligent and well prepared. After he resigned as Speaker he moved his growing family from Macquarie Street to an idyllic but relatively inaccessible address on a hillside west of Manly. He seems to have given priority to his family, to his practice, and increasingly to evenings at the Athenaeum Club. The company at the Club was agreeably civilised, and its visitors in those years included Mark Twain, Robert Louis Stevenson, and Rudyard Kipling; but it would seem that Barton spent more time in its dining-room than was good for him. The rowing man's stomach muscles turned to overweight. From the trim sixty kilograms of his student days he was now not far short of double that weight. As he was tall and his hair was prematurely grey, this portliness did not look undistinguished, but it could easily be seen as an index of easy living. Despite his devotion to the Club, all the evidence suggests that he was also remembered as a good family man. Something had to give, and it seems to have been his political activity. It would require a new challenge to galvanise his interest.

That interest was stimulated by the federal movement, but it is surprisingly hard to trace the evolution of Barton's commitment. He sat in on several of the meetings of the Sydney conference in December 1883 which decided on the creation of a Federal Council, but when the New South Wales Legislative Assembly rejected the scheme in August 1884 by one vote, Barton's opinion went unrecorded because he was in the Speaker's chair. However while campaigning in the 1885 elections he criticised the Federal Council as inadequate. So far I have found no sign of zeal for the federal cause during the next few years, but he must have been known as a sympathiser because early in 1889 Andrew Inglis Clark wrote to him from Tasmania, apparently out of the blue, discussing ways of revitalising the federal cause. When Parkes made his Tenterfield speech in October 1889, Barton was among the first to congratulate him, and there followed at least two meetings in which Parkes confided to Barton his hopes of achieving federation within the next few years, with Barton as ally, although they were by now on opposite sides in politics. After the 1891 federal convention, Parkes failed to secure the necessary resolutions of support from the New South Wales legislature before his fall later in 1891. Barton became attorney-general in the Dibbs protectionist ministry, with a free hand to promote federation despite his premier's doubts about the plan. But by the autumn of 1893 little had been achieved, and the onset of a major banking crisis confronted the governments of eastern Australia with problems more urgent than federation.

The next few years represent a critical period in Barton's life, and one which I have not yet succeeded in unravelling entirely to my satisfaction. It appears that he suffered through the financial crisis. After a period of relatively stable affluence between 1886 and 1892 his resources suddenly became more straitened for reasons not yet ascertained. Many years later, in making a will and setting a sum aside to provide his widow with an annual income, he stipulated that none of the money should be invested in mining shares, which suggests that he burned his fingers badly during the 1890s. His family had to move from their North Shore home and settled at Randwick. Financial need probably explains his rather inept decision to retain, while in the Dibbs ministry, a brief from a firm of contractors in a lawsuit against the railway commissioners. Acceptance of this brief could be attacked as incompatible with his duty as attorney-general and counsel for government instrumentalities. It was in vain that he argued that in eighteen months as attorney-general he had taken no new private practice, although entitled to do so. In December 1893 he and his friend and colleague Richard O'Connor, who was also involved, had to resign office after the Dibbs government was defeated on a motion censuring this conflict of interest. He returned to private practice but the

briefs came slowly. At the 1894 general election he stood for the Legislative Assembly seat of Randwick and lost, so that for the next three years he had not even his parliamentary salary. For a period in 1895 the family had to move to a terrace house in working-class Newtown. Barton still kept up appearances, installing a telephone in his office and retaining his membership of the Athenaeum Club, but it is from this period that the stories come of unpaid tradesmen and desperate financial expedients. A.G. Stephens in 1896 recorded a story of Henry Lawson entering the Athenaeum to seek subscribers for his latest book of verse. Barton promised ten pounds; but when he and Lawson had departed, George Robertson the publisher snorted that Barton was so deep in debt it had taken him two years to settle a bookseller's bill for three shillings and sixpence. Barton managed to avoid bankruptcy, but a man about whom such tales were rife must have seemed an unlikely leader for a great national movement.

In mid-1893 also Barton's health collapsed. Dibbs, with rough candour, attributed the breakdown to too much attention to his knife and fork and the good things which went with them. Yet it was in June 1893 that Barton at last moved on launching the Federal League, a body designed to muster public support for a cause which the politicians were laggardly in promoting. He may have been prompted by the realisation that the Australian Natives Association in Victoria, stirred by among others Dr John Quick, were turning in the direction of a popular movement, but he knew himself incapable of stumping the country in support of the cause, and his timing remains problematic. Jealousy prevented Parkes from participating, and the first meeting in Sydney was almost taken over by radical republicans, but by July 1893 the Federal League was launched. Shortly afterwards, Barton departed on his first overseas voyage, a sea trip to Canada ostensibly on official business, but in reality to recruit his health. He returned in September but missed the Corowa conference, which urged the election of delegates to a second federal convention, where the draft constitution might be reviewed before submission to referenda in each colony. Possibly the formation of the Federal League helped to strengthen the New South Wales presence there. But I have found little reason to challenge D.I. Wright's finding that the Federal League in its early years was an ineffectual body, and Barton's resignation of office at the end of 1893, and subsequent parliamentary defeat, left him without a power base in active politics. Presumably because of his straitened means he did not stand at the 1895 general elections, but, once more reconciled with Parkes, supported the veteran in his ill-fated challenge for George Reid's constituency. This was an ill-judged gesture suggesting a certain desperation on Barton's part, for Parkes was a broken reed. The last episode in their relationship followed a few months later, when Parkes authorised Barton to deny that he was intending to marry a third wife, only to take to his octogenarian bosom a twenty-three-year-old bride.

So at the end of 1895 it must have seemed that Barton's star was in the eclipse. A failure in politics, financially in deep water, vulnerable to gossip, and presumably under some domestic strain, he was no longer a figure of promise. And yet in little more than twelve months he was to be returned in triumph at the top of the poll for the New South Wales delegates to the second federal convention. He was unanimously to be chosen leader of that convention, and used that opportunity admirably. What came right for him?

One part of the answer lies in the magnanimity of George Reid. Although since 1889 Reid and Barton had been on opposite sides in politics and had assailed each other at the hustings with considerable robustness, they had known each other for many years, and their long-term goals on the federation issue were closer than appeared on the surface. At the premiers' conference of January 1895 Reid committed New South Wales to the Corowa formula. He also extended patronage to Barton which must have been financially sustaining, appointing

him an acting judge for a few months in 1895, and finding him a long-running secondment as arbitrator in the McSharry case, a complex affair involving railway contracts and returning a stipend of twenty-five pounds a day. It was tedious work, but it probably explains how the Bartons were able to move from their Newtown terrace house to a spacious residence in Kirribilli.

It is as yet less easy to trace how it was that in those years Barton built up a national reputation as the indispensable advocate of federation. Whereas in 1894 the *Bulletin* was caricaturing his apathy in the cause, by the end of 1896, after the Bathurst conference, it was taken for granted that Barton would be one of the ten delegates from New South Wales, and he received about 10 000 votes more than the next candidate, Reid. Nor was his recognition confined to New South Wales. On the other side of the continent the *West Australian* reminded its readers that ‘Mr BARTON has been for many years among the most trusted and popular politicians in the mother colony ... is noted for the moderation of his views and the conciliatory policy in which those views are embodied, and above all is one of the leading exponents and advocates of the federation cause.’ In the hot and dusty goldfields of the interior the *Murchison Times* wrote: ‘It is a distinct tribute to sterling worth and ability that “Toby” Barton should have received nearly 10 000 votes more than any other candidate.’ He had become a national figure. Probably it was a blessing in disguise that he had been out of office for the preceding three years. Of all the colonies it was New South Wales, even more than Western Australia or Queensland, which had potentially most to lose by entering a federation. It was not just that it was the only free-trade colony among protectionist neighbours, so that as George Reid put it, federation would be like one sober character setting up house with five drunkards. New South Wales had been less hard hit by economic recession than Victoria, Tasmania, or South Australia, and felt the need to enter a common market less urgently. But it also fell to Reid to undertake the often devious practical negotiations required to keep the federation idea alive and practicable, so that in time he was to be known to posterity as ‘Yes-No’ Reid. Freed of these responsibilities, Barton could concentrate on the big picture, and could win recognition as the consistent advocate of the cause.

His pre-eminence at the 1897 convention was also helped because, more by accident than design, he was the sole survivor of the original group involved in drafting the 1891 constitution. Andrew Inglis Clark, possibly more than any other individual its original draftsman, for reasons never adequately explained, declined to nominate for the 1897 convention and instead took his family off for a trip to the United States. Sir Samuel Griffith, having eased himself into the post of chief justice of Queensland with an increased salary, had debarred himself from the political process. Throughout the 1897 convention he sat impatiently on the sidelines, willingly responding to every request for advice or information. Kingston, the other senior member of the *Lucinda* drafting party, realised that as the very active premier of South Australia he could not be seen as possessing the necessary impartiality to lead the convention, and consistently supported Barton’s claims. Of the more marginal participants in the 1891 drafting process, Sir Henry Wrixon of Victoria failed to secure election to the 1897 convention and Andrew Thynne of Queensland missed out because in twelve months of debate the Queensland parliament failed to agree on a method of selecting delegates, and thus took no part in the proceedings. This left Barton as clearly the most senior and experienced appointee to chair the drafting committee for 1897, and Barton chose as his two colleagues his staunch ally Richard O’Connor and Sir John Downer of South Australia, in whose North Adelaide residence most of the work of revision was accomplished. There was also little resistance to Barton’s appointment as leader of the convention with

responsibility for the management of day-to-day business. After Barton's death in 1920 a story was published claiming that George Reid wanted the position as premier of the senior colony, but this was sharply refuted by Sir Josiah Symon and there seems to be no evidence whatever to support the story.

My audience will be relieved to know that I do not propose to traverse the detailed process by which, during three sessions over the ensuing twelve months, Barton shepherded clause after clause of the draft constitution past the fifty delegates of the convention until, by the end of the Melbourne sitting in early 1898, the completed work was ready for presentation to the voters of the six Australian colonies. John La Nauze has already told that story.<sup>4</sup> It is, however, worth dwelling on one or two features of his performance. La Nauze argues convincingly that the critical moment of the convention came at its first session in Adelaide, when Sir John Forrest of Western Australia led a push to overturn the compromise reached in 1891, limiting the power of the Senate to amend financial bills passed by the House of Representatives. With Queensland absent, it seemed that Western Australia, South Australia, and Tasmania would have the numbers to gang up on New South Wales and Victoria to force through a formula which might irretrievably frighten the taxpayers of the two south-eastern colonies, and thus scuttle federation. When it seemed that the vote might be put late one evening, Barton reminded the convention that as its leader he should close the debate, but was unable to speak because of a bad cold; could the vote be adjourned until the following day? This 'providential catarrh' as Quick and Garran termed it, provided a breathing-space overnight during which enough delegates could be worked on to ensure the rejection of Forrest's motion by the narrowest of margins. Barton's reputation as a canny tactician was enhanced by this episode.

For the most part Barton's contribution lay in the unglamorous, often subtle, sometimes petty business of securing the maximum of agreement on the text of the constitution. His approach to the task blended the alert sense of textual precision instilled by Professor Badham's classical education with the skills of the umpire and the mediator in reconciling divergent viewpoints and persuading colleagues to accept modifications in their concepts of the acceptable. Sometimes this process led him to impatience with fine and perceptive intellects such as Isaac Isaacs. Sometimes it resulted in oversimplifications, which have since proved troublesome, such as the notorious Section 92. And by its deliberate avoidance of rhetoric, the constitution remains open to the charge that it is disappointingly short of those fine statements of principle which embellish the constitution of the United States—as well as those of some less obviously democratic nations. When all this is admitted, it remains the case that what emerged was a document open to change over time through thoughtful judicial interpretation, or—at least as important in the eyes of Barton and his colleagues—through majority vote at a popular referendum; but durable enough not to require frequent and sweeping alteration. If Griffith and Inglis Clark should claim the major credit as designers of that constitution, it was Barton who took the lead in making it a workable construction capable of lasting the 20th century.

Barton's performance at the 1897 convention transformed him from a New South Wales politician to a figure of national stature, and was the essential factor in determining that he would become the first prime minister of the federated Australian Commonwealth. Not that the road was plain and direct. After the convention, the immediate task was to ensure the

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<sup>4</sup> John La Nauze, *The Making of the Australian Constitution*, MUP, Carlton, Vic., 1972.

acceptance of the constitution by all six colonies. Victoria, Tasmania, and South Australia returned large 'Yes' majorities in 1898. But in New South Wales the margin of victory was too slender to meet a pre-condition calling for support by at least 80 000 voters. It would fall to the premier of New South Wales to undertake further negotiations with the other colonies to secure at least the cosmetic modifications to the constitution which would enable the New South Wales electorate to vote 'Yes' at a second referendum. Barton succumbed to the temptation of believing that he, rather than Reid, could steer these negotiations to a satisfactory conclusion. At the 1898 elections in New South Wales, he abandoned his candidature for a safe rural seat in order to challenge Reid in his own constituency. It was a hard-fought election, but Reid won, and his Free Trade party, although reduced in numbers, continued to hold office with the support of the Labor members. An obliging backbencher resigned the seat of Hastings and Macleay in order that Barton might contest the by-election and take over the leadership of the opposition and the protectionist party from William Lyne. Once back in parliament, Barton launched a motion of no confidence in the Reid ministry. Had it succeeded, Barton would have become premier of New South Wales and, if all went well, having secured acceptance of federation, occupied the obvious position of leadership when the time came for the choice of the first Commonwealth prime minister.

But the motion of no confidence failed. It was Reid's task in January 1899 to negotiate the necessary compromises with his fellow-premiers. A tougher and more seasoned bargainer than Barton, he was the right man for this kind of haggling. During 1899 it became increasingly clear that Barton was not sufficiently one-eyed to make a really aggressive Leader of the Opposition. Moreover, the Labor party, still resentful of the 1892 Broken Hill strike, was unwilling to change sides while Barton remained leader of the Protectionist party. In August 1899 he resigned in favour of Lyne, who almost immediately won the support of Labor and ousted Reid as premier. Meanwhile New South Wales and Queensland had both voted in favour of federation. It would be Lyne who sat in the Premier's office in Sydney when the day came to find a prime minister for the Australian Commonwealth.

Barton was uncertain of his next move. If the youthful governor of New South Wales, Lord Beauchamp, is to be believed, Barton thought of becoming agent-general in London so as to secure first-hand experience of a Britain which he had never visited. Instead it fell to Barton, together with Deakin, Kingston, and the unreliable Dickson from Queensland, to form the delegation who went to London early in 1900 to be on hand while the Commonwealth of Australia Bill passed through the British parliament. There they fought their battle with the redoubtable Joseph Chamberlain over Section 74 of the constitution restricting appeals to the Privy Council. Their task was impeded by the almost unanimous opposition of the anglocentric legal profession in Australia, and by some behind-the-scenes undermining by Sir Samuel Griffith, but the eventual compromise was seen as a minor triumph for Australian nationalism and enhanced the reputations of Barton, Deakin, and Kingston as effective spokesmen for that nationalism. Once again Barton's reputation was strengthened rather than weakened by being out of office.

After his return to Australia, many took it for granted that Barton would be the first prime minister. Barton himself was sufficiently confident to sound out one or two colleagues about their readiness to take office in the first federal cabinet. But Lord Beauchamp—who, in the useful phrase of a 19th century novelist, was an ass without being a fool—recommended to Whitehall that the incoming governor-general, Lord Hopetoun, should as a matter of courtesy offer the prime ministership to Sir William Lyne, as premier of the senior Australian colony.

Lyne, according to Beauchamp, would decline the compliment and in a gentlemanly manner recommend that Barton should be commissioned. Here lay the genesis of the Hopetoun blunder. Hopetoun, as is well known, found that Lyne's sense of professional courtesy was not strong enough to withstand the prospect of becoming Australia's first prime minister; and it was only after a good deal of frenetic manoeuvring that Lyne was induced to stand down in favour of Barton. Lyne, Deakin wrote afterwards, was too narrow, too provincial, too lukewarm about federation for the statesmen of other colonies to accept him. But in those crowded days in December 1900, even Deakin at one moment was prepared to urge Barton to accept office under Lyne. Lyne's shortcomings were not the decisive factor so much as the knowledge held by the other potential members of the first federal cabinet—by Turner, by Kingston, by Forrest—that Barton had proved himself by his conduct of the 1897 convention to possess the positive virtues required in their leader. These were the public reputation and the public presence to appear a convincing national leader for the whole of Australia, and the private skills of conciliation and the creation of consensus required in a cabinet largely consisting of men who had themselves exercised authority as colonial premiers. It was this capacity to inspire trust which in the last resort persuaded his colleagues that Barton was the essential prime minister for Australia. Those qualities helped the Barton ministry to survive intact for the first two and a half years of the Commonwealth's existence, and thus provided the necessary stability while the machinery of federal government was put in place. The capacity to inspire trust, both among parliamentary colleagues and in the nation as a whole, remains the essential quality for an Australian prime minister.

Whatever his other shortcomings, Barton possessed that quality. He should not be forgotten.

**Questioner** — How different was the 1897 constitution from that of 1891?

**Professor Bolton** — Essentially the 1891 document is the one we still have. There were things added in 1897, such as old age pensions, and there were some reasonably noticeable shifts in detail, but the remarkable thing is that in that Easter weekend on the Hawkesbury River, Griffith and Kingston and Barton and Inglis Clark *in absentia* got it fairly right first time.

**Questioner** — My understanding is that Sir Samuel Griffith is regarded as being the man who really wrote the constitution. Do I take it that you are saying that Andrew Inglis Clark really wrote the 1891 constitution? If that is the case then the constitution was written by two men, neither of whom actually attended the 1897 convention.

**Professor Bolton** — Well certainly I would give Clark and Griffith the lion's share of the credit for what happened. In 1891 three or four people, notably Clark, Griffith, and Kingston, turned up at Sydney with draft constitutions of their own, and these had to be cobbled together. Griffith was the chairman of the drafting committee and it took place on his boat, and to that extent he imposed quite a lot of his thinking on it. In particular, although he had read Bryce's *American Commonwealth*, he would have steered it more in the direction of the main-stream of British tradition than perhaps Clark, who was greatly affected by the American federation. I think you are quite right, that by an irony those two were not present in 1897, and that is why Barton had the carriage of it.

**Questioner** — You mentioned that as state politician Barton left something to be desired, and as a prime minister he inspired trust. Can you elaborate a little bit more about his performance as prime minister?

**Professor Bolton** — Well, it is quite interesting. When he is appointed he has a full head of steam for the first I would say nine or ten months of 1901. He fights the election campaign and gets the numbers to form a government with Labor support. He presides over the Duke of York's opening of Parliament, they get through the legislation about immigration policy and the Pacific, he always remains interested in Australia's role in the South West Pacific, and then there is a period late 1901, early 1902, when he runs out of steam. It is the classic Barton pattern. He works eighteen hours a day and then just relaxes and goes off to the club and it is not much good trying to business with him after dinner. There is a fascinating diary by his secretary, Atlee Hunt, who worshipped the Chief but who was increasingly irritated by his unbusiness-like habits, and the fact that if he did come in he was likely to pick up the first piece of paper and deal with that, rather than take things seriously. So they shot him off to Edward VII's coronation and that was recuperative; moving among the great and the good from all over the British Empire had a good effect on Barton.

From that journey, I just want to say in parenthesis, there emerged what is going to be my favourite photograph of the whole book. It shows the Bartons and the Forrests in Venice, on a canal, in a gondola, and the gondolier with a face of profound melancholy that clearly says, 'Dear me, oh how did I get two such heavy-weights in the boat?'

On his return from the Empire Conference, he was back on form in 1902 early 1903, but I think the essential role is very much the rather Bob Hawke-like role of being the good chief of cabinet and the good public relations man, the person who is able to get all these prima donnas to agree on something and to communicate that to the public. Oddly enough, when the High Court is set up, right up to the last moment he is having what seem to be real uncertainties; should he quit politics and go on to the High Court, or is this deserting the cause? By this time Alfred Deakin has found that he can do the job and enjoys it and his colleagues persuade him that yes, Edmund, it would be alright if you quit now, and off he goes with this final magnanimous gesture of saying 'Well Sam Griffith is a better lawyer than I am, he should be the Chief Justice, I will be the number two'. But also, with that characteristic Barton thing of making sure that his mate, Richard O'Connor, was the number three.

I think it is a matter of being in a situation where his particular range of skills could be deployed to good effect. He was a good speaker, he was not a bad attorney general but as acting premier, he disliked conflict situations. He was not happy handling the Broken Hill strike. He did certainly, quite consciously, avoid some of the excessive force that was used by the Queensland Government against the shearers the year before, but it still did not make him any friends in the labor movement and I think that one has to read him as somebody who disliked too much confrontation, who did not have a lot of original policies that he himself wanted to push. His performance on women's suffrage is a case in point; he was in a paternalistic way not very keen on it, but if it was less trouble to pass it than to oppose it then by all means let us pass it. But when it was a matter of actually getting the show to work and arriving at a conclusion with which people could live happily, and which would be acceptable as policy, that was his particular skill. How you translate that into a hero for Australia I am not quite sure.

**Questioner** — Was his performance on the High Court bench in character with his earlier history?

**Professor Bolton** — Well again, it shows this very uneven application of effort. In the early years he is content very often just to assent, and agree, to whatever Griffith has said. This, some of my friends in the law tell me, is very sensible of him as it is a bad idea to confuse judicial interpretation by having more than one judge deliver the verdict. Others say, well, this is the old indolence asserting itself again, and certainly, there is a graphic description about how Griffith always had his judgements meticulously prepared whereas Barton often sat up all hours the night before getting his completed. The way I am reading it at the moment, and this is the bit that I have not concentrated on so much, in 1913, Barton had a spell as acting Chief Justice, and he decided that he enjoyed the job and that he could provide effective leadership for the team. That was the first thing. The second was, that with the coming of the First World War, there was a gradual divergence between Griffith and Barton. Up until that time they had seen themselves as the two original stalwarts who knew what the federal constitution was all about and had to resist innovating Victorians like Higgins and Isaacs, still more newcomers like Powers and Gavan Duffy. They were the old pros who had made the constitution. But during the war there is a divergence, with Griffith more and more wanting to go as they had been going before, and stick to the letter of the constitution and to resist change; and Barton coming to see that the pressures of the First World War do need to tilt things a bit in the direction of the Commonwealth and that maybe things should change. What we do not know is how he would have voted in 1920 in the *Engineers'* case when the tilt really went towards the Commonwealth.

At the end of the day, when Griffith retired, Barton very much hoped that he would have a short spell as Chief Justice and Griffith knifed him. Griffith was fearful that if Barton became Chief Justice and then died shortly afterwards, there might be a Labor government in power and they might invite, at best, Isaacs and possibly some completely radical upstart from outside. So, Griffith made sure that he was to be succeeded not by any member of the bench, but by an outsider, Adrian Knox, who was considerably younger. Ironically, when Knox resigned, he did so the next time a Labor government was in power, and Isaacs finally got his



**HON. EDMUND BARTON.**

“Gentlemen, I will yet carry Federation through.”

*Melbourne Punch*, 23 June 1898, p. 561

opportunity. Barton behaved very well; he greeted Knox, welcomed him on the bench, but that took the stuffing out of him and he was ill after that and then died within two or three months, in January 1920.

**Questioner** — John Norton was a major player at Bathurst. The image of ‘Tosspot Toby’ which he creates, is that from a period of the nineties or later?

**Professor Bolton** — It would certainly be from the period of the nineties. What we have to remember about Barton’s capacity for alcohol, which was pretty considerable, was that he was not a boozier in the sense of a man who would go to the pub just to drink. He drank with his meals; he drank the wine, called for another bottle, as Manning Clark says somewhere, he never replaced the cork. There is a lovely story from his High Court days of a dinner in Melbourne which in the end found Barton and Randolph Bedford walking home together. As they parted Barton turned to Bedford and said, ‘Ah, Randolph, dynasties rise and fall, civilizations crumble, but for us tonight there is only one tragedy, there is no more Chateau d’Yquem’. I think that Norton, at first, was on the same side as Barton, but Norton had this tremendous resentment at being incorrigibly out of office himself. He rather envied those who were getting the kudos and the adulation and he hated Barton for being all that he could never be and played up the ‘Tosspot Toby’ story, and had graphic tales of Barton appearing drunk on oratorical platforms. I think against that you have to put the testimony of Atlee Hunt, in his private diary, that he had often seen the Chief the worse for liquor but only once incapable.

**Questioner** — Were Griffith and Barton contemporaries at university?

**Professor Bolton** — They overlapped. Griffith was a couple of years older, and in fact the University of Sydney was very proud of the fact that the first three Justices of the High Court were all Sydney law graduates. They had an interesting relationship because it is quite clear that Barton admired Griffith’s intellect. It is also clear that Sir Samuel Griffith surely acted out of principle. As Munro Ferguson put it when he was trying to console Barton about not becoming Chief Justice, ‘he has as much regard for you as he is capable of having for any man.’ The differences are between, I think, a fairly cold personality, the disappointed idealist, and a fairly warmhearted and gregarious personality. On the whole they worked well together, but on two or three occasions Griffith’s conduct towards Barton was a bit sneaky, underhand.

## Sir Richard Chaffey Baker—the Senate’s First Republican\*

*Mark McKenna*

Late last year I received a phone call from Sue Rickard, then Senior Research Officer in the Department of the Senate. Sue had seen my book *The Captive Republic* and expressed her surprise at the reference in the book to Richard Chaffey Baker in the chapter on federation and republicanism.<sup>1</sup> I had claimed Baker as a republican—a description which I decided would provide an apt if not slightly mischievous title for today’s lecture. Sue asked if I would be interested in delivering a lecture on Baker—the first President of the Senate and perhaps explaining along the way how it was that one of South Australia’s most conservative politicians—a member of the Adelaide Club and a man who frequently boasted of his loyalty to the crown, could be a republican. I had little idea when I agreed to Sue’s request just how useful and interesting a lens Baker’s political life would prove to be. As we progress tentatively towards an explicitly republican form of government, it seems appropriate to reflect on the views of one of Australia’s forgotten founders.

It is typical of Australia’s political history that one of the most pivotal figures in the federation period is a relatively unknown figure. In the United States, a person of similar political stature to Baker would have received far more attention. This brings to mind a comment recently made by Humphrey McQueen in his book *Suspect History*. Australian political history, says McQueen, is not being rewritten so much as written for the first time.<sup>2</sup>

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\* This paper was presented as a lecture in the Department of the Senate Occasional Lecture Series at Parliament House on 20 June 1997. Dr Mark McKenna is a Research Fellow in the Political Science Program, Research School of Social Sciences, Australian National University.

<sup>1</sup> Mark McKenna, *The Captive Republic: a History of Republicanism in Australia 1788–1996*, Cambridge University Press, Melbourne, 1996.

<sup>2</sup> Humphrey McQueen, *Suspect History*, Wakefield Press, Kent Town, SA, 1997, p. 205.

In Canberra, we seem to have found a means to acknowledge the role of Kingston, Barton, Downer, Griffith and others in the process of federation but Richard Chaffey Baker is left without a suburb, bridge, office block or park bench to his name. All we have is Baker Gardens and Baker Street, both of which are in Ainslie. Perhaps the recently created federation fund will find room in its heart to throw a few pennies in Baker's direction.<sup>3</sup>

Since the occasion of the Bicentenary in 1988, Australian history has taken on new meanings for many Australians. We look more readily to the past to provide the rationale for current political initiatives. Living through a decade which has demanded our focus on the contact history of black and white Australians, as well as the commemoration of European settlement and the federation of the colonies, we have become accustomed to looking to history for reassurance, guidance and support. As we call up the ghosts of federation, it would be tempting to conscript our founding fathers to the cause of our contemporary political designs. There is indeed a story attached to Australian federation which has yet to be told—but it is not always a story that is pleasant to the ear. Like the other founders of Australia's constitution, Richard Baker's political legacy is ambiguous and elusive. In this lecture, I am not about to claim Baker as the direct antecedent of our present day republicans or monarchists. Instead, I want to suggest that an examination of Baker's views on the Constitution offers an opportunity to reflect on the current republican debate in the context of the intentions of one of our most original and independently minded framers.

Richard Baker was born in Adelaide on 22 June 1841, the eldest son of Somersetshire-born John and Isabella Baker. Like his father, Baker was to be both pastoralist and politician, speculator and racing enthusiast. Educated at Eton and Trinity College Cambridge, he possessed the necessary background for the inculcation of conservative values. Shortly after his return home to South Australia in 1864, he set up his legal practice in Adelaide only one year before becoming the first locally-born member of the South Australian legislature. In subsequent years he served as Attorney General and later moved to the Legislative Council in 1877, where he would remain until he took up his election to the federal Senate in 1901.<sup>4</sup>

Baker had grown up in a family environment which groomed him for a public life. A committed Anglican, Baker was also President of the Royal Agricultural Society, a trustee of the Savings Bank and a leading investor in the wool and mining industries. His conservative instincts lead him to form the National Defence League in 1891, a body of wealthy South Australian pastoralists and businessmen intent on countering the influence of the newly-formed Labor party. The League spoke of the great virtues of individualism and the evils of the levelling philosophy of socialism which would bring an end to civilisation. All undue class interests in parliament were to be opposed, except of course, those of the members of the National Defence League. In the best traditions of British conservatism, Baker was wealthy, politically active and blessed with a healthy dose of *noblesse oblige*. In his public life—especially the years he spent involved in the federal conventions of 1891 and 1897–8 and as first president of the Senate from 1901–1906, Baker displayed a talent for the management of divisive political debate. His most significant contribution to federation

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<sup>3</sup> The most useful discussion of Baker is R. van den Hoorn, 'Richard Chaffey Baker: A South Australian Conservative and the Federal Conventions of 1891 and 1897–8' *Journal of the Historical Society of South Australia* Number 7, 1980, pp. 24–45.

<sup>4</sup> See John Playford's entry on Baker in *ADB*, vol. 7, MUP, Carlton, Vic., 1979.

occurred at the Adelaide and Sydney conventions of 1897–98 when as Chair of Committees, Baker was widely praised for his knowledge of parliamentary law and strict impartiality. Similar epithets accompanied his performance as president of the Senate.<sup>5</sup> Baker's keen eye for the virtues of compromise had been in evidence since the mid 1880s when he conceived the idea of forming a Postal Union between Great Britain and the Australian colonies as a means of overcoming the bitter inter-colonial jealousies which had existed in Australia over the payment of tariffs to steamship companies.<sup>6</sup> The so-called Baker agreement demonstrated at an early stage that Richard Baker would be attracted to the concept of federation for its practical benefits—for above all else, Baker was a pragmatist. In the future, he would be willing to sacrifice his own political preferences in the hope of securing the federation of the Australian colonies.

There are few keys to Baker's appearance and personality, but we can discern a considerable amount from the available portraits and photographs and the little that was said about him. He was relatively short—probably around five feet seven and his features were soft and fine. He spurned the fashionable long beard and balding pate sported by many of the founding fathers—favouring the turned up curls of a snake-like moustache and a full head of hair instead. In 1888, he was described as having passed the prime of his life yet as someone who still managed to display a visible vigour and spring of youth which was not normally perceptible among the colonial born.<sup>7</sup> His good breeding apparently protected him from a descent into alcoholism and an early decline. He married once at the age of twenty-three to Katherine Colley, and together they raised one son and two daughters.

Writing in *The Federal Story*, Alfred Deakin went to great lengths to describe the various peculiarities associated with the appearance and personal characteristics of the South Australian delegates to the Adelaide Convention in 1897. Howe was tall, heavy and lumbering, Solomon—dark, well whiskered and portly, Glynn, the little Irishman—large-nosed and florid, yet when it came to Baker, Deakin merely remarked on his knowledge of federal constitutions.<sup>8</sup> Deakin was an astute observer and his reticence to note any of Baker's idiosyncrasies indicates that Baker was not a man who lent himself easily to tabloid caricature. One observation of Baker which seems particularly revealing was made by the Melbourne correspondent to the *South Australian Register* in 1902. Having watched Baker perform in the Senate from the public gallery, he noted in some detail—

The President is always in his place, is ever punctual and never forgets the dignity due to the high position he occupies ... In the chair bewigged and begowned, the President dominates the Senate, and is keen to perceive any disposition to depart from the ordinary and usual practice. He is much disposed to stand by the old landmarks and does not like innovations ... The President is recognised as a

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<sup>5</sup> George C. Morphet (ed.), *The Bakers of Morialta*, Pioneers' Association of South Australia, Adelaide, 1946; also Baker Papers, PRG 38, Vol. 6, [National Defence League], State Library of South Australia.

<sup>6</sup> John Playford, *ADB*, op. cit.

<sup>7</sup> *ibid.*

<sup>8</sup> Alfred Deakin, *The Federal Story*, 2nd ed., MUP, Parkville, Vic., 1963, p. 61 & p. 38.

constitutional authority ... and he loves power ... Taken all in all the President is a success and has won the goodwill of the house over which he presides.<sup>9</sup>

Although Baker was not given to overly demonstrative gestures, he was by all reports firm, courteous and possessed of considerable determination. This tenacity earned him the title Bully Baker from his enemies in South Australian politics.<sup>10</sup> And it was in this arena that one of the most colourful and perhaps telling events in Baker's life occurred. Throughout his political career, the opponent who managed to arouse the most violent passions and bitter emotions in Baker was Charles Cameron Kingston, the radical liberal Premier of South Australia from 1893 to 1899 and leading federationist. It was a credit to Kingston's political skills that he was able to stir the normally reserved Baker into vituperative harangues in parliament. After a particular incident in December of 1892, Baker was to pursue a personal vendetta against Kingston for the remainder of his public life.

In the midst of a dispute over Baker's role in regard to the collection of funds from legislators for the purposes of erecting a Trade's Hall, Kingston described Baker in the house as a 'public defaulter'. In the Legislative Council, Baker responded with a volley of personal abuse, referring to Kingston as a 'coward', a 'bully', a 'perjurer' and a 'disgrace to the legal profession'. Not to be outdone, Kingston quipped in reply that Baker was 'false as a friend, treacherous as a colleague, mendacious as a man and utterly untrustworthy in every relationship of public life'.<sup>11</sup> Even by contemporary standards this exchange of personal abuse would be considered excessive. Kingston must have thought so too, for on the following day he sent a most extraordinary parcel to Baker's offices in Victoria Square. Hand delivered by a 'lad,' it contained a letter in Kingston's handwriting and one English bulldog revolver with cartridges. In the letter, Kingston challenged Baker to a pistol duel on the same day—Friday December 23, in Victoria Square at 1.30pm. This would be a test of courage, said Kingston, and far preferable to a messy brawl or the elaborate rituals of a lengthy sword duel as the French were sometimes disposed to. Baker would not have to walk very far.<sup>12</sup>

When the appointed hour arrived, Kingston stood in Victoria Square with his bulldog revolver loaded, patiently awaiting Baker's appearance. Baker, of course, had no intention of taking up Kingston's challenge. He had lunched at the Adelaide Club and arrived in a horse-drawn cab just in time to see the police he had called for arrest Kingston. As the police lead Kingston away, Baker taunted him by asking him if he still had a pistol in his possession. Kingston quickly replied that he would soon get one if that was what Baker desired. Afterwards, Baker loitered in King William Street with the horn handle of Kingston's revolver protruding from his pocket—no doubt intent on employing the bush telegraph to put his side of the story.

At the court hearing on Thursday December 29, Kingston appeared 'charged with having incited Baker to a serious breach of the peace—perhaps to murder or manslaughter'.

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<sup>9</sup> Baker Papers, Series I, vol. 1 [Judges].

<sup>10</sup> van den Hoorn, *op. cit.*, p. 25.

<sup>11</sup> *South Australian Register*, 24 December 1892.

<sup>12</sup> *ibid.*

Mysteriously, Kingston’s letter to Baker—the most crucial piece of evidence, had somehow managed to be waylaid between the Police Commissioner, the Attorney General and the Crown solicitor, all of whom had taken an inordinate amount of time in proceeding with the prosecution.<sup>13</sup> Newspaper editorials had already conducted Kingston’s trial—the *Register*, for example, suggested that the first presumption was that Kingston was willing to kill Baker if he could shoot straight enough. Moreover, he intended to commit his crime in front of a large lunch-time crowd. A packed court room heard the judge let Kingston off with a warning—he was to keep the peace for twelve months. Baker alleged that the decision had been pre-arranged. In an interview conducted outside the court room, he claimed the verdict as a farce and suggested that the authorities had hushed up Kingston’s crime.<sup>14</sup>

Baker would never forgive Kingston for this incident. For the rest of his life he refused to meet or speak with Kingston except on official occasions. At the Adelaide convention in 1897, Baker, together with Downer, Symon, Howe and Solomon, tried unsuccessfully to stop Kingston’s election as President. They did manage, however, to derail Kingston’s nomination for the drafting committee—a position for which he was ‘obviously designated,’ according to Alfred Deakin. Deakin remarked on the ‘bitter enmity’ which Baker displayed towards Kingston and the unedifying spectacle of the cabal which Baker conducted against him at Adelaide. Forgiveness was not a word which found its way easily into Baker’s lexicon.<sup>15</sup>

Turning away from Baker’s personal life, I want to look now at his political philosophy. This does not mean a chronological overview of his contribution to the federal conventions of the 1890s, nor of his role as first President of the Senate. Instead I intend to take a broad view of Baker’s political views and relate them to our contemporary situation.

The best place to begin is with Baker’s republicanism. After all, from a contemporary perspective, the thought of a knight of the realm as a republican does seem slightly contradictory. Today we seem to have a fixed idea as to the meaning of a republic in Australia. Since the republican debate began in 1991, we have been told by our patriotic minimalists that an Australian republic involves nothing more than an Australian head of state and the absence of the monarchy from Australia’s constitution. We have heard this message so often that we now believe it. This brand of republicanism is one strand in our political history, but it is not the only one. Shortly after the American and French revolutions forged the democratic, nationalist and anti-monarchical model of a republic in the late eighteenth century, there was a growing awareness in Britain that the gradual ascendancy of parliamentary sovereignty at Westminster would effectively render England a republic in disguise. Both at home and in the colonies, the natural counter-argument to those who advocated the abolition of monarchy in the nineteenth century was to point to the fact that the British monarchy was no longer an obstacle to the advance of democratic freedoms. The basis of the disguised republic thesis was straight forward. The true essence of republican government did not lay in the absence of monarchy, but in the rule of law, the separation of powers, balanced government, and the sovereignty of the people. This argument had its roots in the republics of ancient Rome, renaissance Italy and the English bill of rights of 1689.

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<sup>13</sup> *South Australian Register*, 24 & 30 December 1892.

<sup>14</sup> *South Australian Register*, 30 December 1892.

<sup>15</sup> Deakin, *op. cit.*, p. 81.

Monarchy was not necessarily antithetical to republican government so long as its powers were either curbed or completely removed.

For Richard Baker, republican government had little to do with the issue of the head of state or the monarchical connection. In the South Australian Legislative Council and in his public speeches on the federal constitution, Baker proudly proclaimed his loyalty to the Queen in the same breath as he declared himself a republican. Anyone living under the British system of government could not help being a republican, said Baker, after all, Australian colonists possessed the very essence of republican government—government for the people by the people and in sight of the people.<sup>16</sup> It is interesting to note that Baker invoked Lincoln's maxim with one important omission. Baker had no trouble with the patrician notion of government for the people and he was pragmatic enough to accept the natural logic of universal manhood suffrage—hence government by the people, yet he was reluctant to endorse government 'of' the people. His image of a republic was fundamentally conservative. The people should be considered and consulted but they should not be trusted with the reigns of government. They should merely be allowed to observe the process of government in complete openness if they so desired. And it was precisely this form of government which Baker believed had been enshrined in the Federal constitution of 1901—a powerful executive, a strong upper house and judiciary, the separation of powers, an appointed Head of State and a constitution which would be difficult to amend—all under the secure umbrella of the Imperial connection. The Australian constitution thus had the advantages of a conservative republic without the dangers which might have been associated with a more radical, independent and democratic republic. Finally, we know that Baker subscribed to the important republican principle of respect for the rule of law. When he was asked why he did not engage Charles Kingston in the pistol duel in 1892, he replied, with much bravado, that he was not afraid of Kingston or of being shot, 'I was afraid', said Baker, 'of breaking the law'. It seemed Baker was so committed to republican principles that he possessed a greater fear of breaking the law than being shot.<sup>17</sup>

Although Richard Baker was a natural antecedent of the crowned republic argument which we hear so often in today's republican debate, I am reluctant to claim Baker's views as a tidy summation of the political philosophy of either republicans or monarchists. While he remained loyal to the crown he also believed that the constitution should accurately reflect the spirit and character of the people.<sup>18</sup> Baker was a progressive conservative and he had no way of knowing the way in which his political descendants in the twentieth century would cling to the monarchical connection as the linchpin of the Australian constitution. He may well have been surprised by the argument that the constitution would grind to a halt once the monarchical element was removed. In the 1890s, he frequently argued against the election of a popularly elected Governor General on the grounds that it would erect an alternative power base and endanger the smooth functioning of the constitution.<sup>19</sup> The logical outcome of this

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<sup>16</sup> *South Australian Register*, 1 March 1901 and *South Australian Parliamentary Debates*, Legislative Council, 15 September 1891, pp. 1132–1134 and 'Australian federation', a speech by Baker in the *Advertiser* (Adelaide) 15 April 1891. Also see Baker's *Manual of Reference to Authorities for the Use of the Members of the National Australasian Convention*, W.K. Thomas & Co., Adelaide, 1891.

<sup>17</sup> *South Australian Register*, 30 December 1892.

<sup>18</sup> *Australasian Federal Convention Debates*, Adelaide, 23 March 1897, p. 31.

<sup>19</sup> *Advertiser* (Adelaide), 15 April 1891.



argument is that the conservative character of the constitution would be preserved by the continued appointment of the head of state—either by a two-thirds majority of both houses of parliament or the current procedure of appointment by the Prime Minister. The issue of the Head of State's nationality—British or Australian, is really of secondary importance in a constitutional sense. So long as the Head of State is not elected by the people the conservative republican element in the constitution would remain unchanged. It is unlikely that the question of an Australian Head of State would have been a threatening concept to a progressive conservative such as Baker. When he was asked by Lady Tennyson to explain his allegiance, he stated that he was not an Englishman but a colonial.<sup>20</sup> In the same way that constitutions should reflect the changing character of the people, national identity would also shift gradually away from its British source.

I will return to Baker's relevance to the current debate on a republic later, but before I do it would be helpful to understand Baker's political beliefs in a broader context. We know that Baker was definitely one of the most respected constitutional authorities in the federation period from the observations of his peers. Deakin remarked that Baker was in advance of all his federal colleagues in federal knowledge and spirit during the 1891 convention in Sydney.<sup>21</sup> Baker had published a manual for the benefit of delegates which briefly outlined the features of the American, Canadian, Swiss and South African constitutions. In the eyes of John Quick, Baker's manual assisted in providing delegates with a valuable summary of federal principles—Baker was thus one of the 'pioneers' of federation.<sup>22</sup> In 1897, Baker published another pamphlet on the various forms of executive government in federations, which was equally acclaimed. According to John La Nauze, Baker, though precluded from debate in 1897 in his role as chairman of committees, was still powerful in private sessions and deserved to be seen as one of the most significant founders.<sup>23</sup>

One question which seems to arise most clearly when we listen to the kudos accorded to Baker is why he has never been elevated to a more respectable status as a founding father? The answer seems to lie in Baker's failure to see many of his more crucial suggestions incorporated into the final document. While Baker was successful in securing the passage of minor alterations, his views on the two most significant issues, the powers of the Senate, and the model of executive government, were defeated. In a similar sense, his dream of a Senate as a house with roughly co-equal powers to the House of Representatives, which would in turn act as a council of states rather than a house dominated by political parties, was soundly dashed by the time he departed the Senate in 1906. Baker fought tenaciously for his political beliefs, but he saw few of them enshrined as founding principles of the constitution.

Baker's concept of the role of the Senate betrayed his preference for a conservative document which would ensure—in his words, that 'South Australia would not become a mere appendage to Collingwood or Richmond'.<sup>24</sup> His staunch advocacy of state rights and his

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<sup>20</sup> van den Hoorn, op. cit., p. 26.

<sup>21</sup> Deakin, op. cit., p. 38.

<sup>22</sup> van den Hoorn, op. cit., p. 29.

<sup>23</sup> J.A. La Nauze, *The Making of the Australian Constitution*, MUP, Carlton, Vic., 1972, p. 278.

<sup>24</sup> Baker Papers, vol. 9, Australian Federation [ Mount Gambier 1898 ].

suspicion of the tyranny of the mob lead him to advance an interesting mix of proposals for the structure of the Senate. He proposed property qualifications for members and their electors. The Senate would preferably be elected by state parliaments—a measure which would guarantee that only the most talented men were successful. In his rough notes in preparation for a speech on the federation bill in 1898, Baker stressed that in all modern republics there were two legislative bodies. The Senate was fundamental to the notion of dual citizenship which existed in federal republics. The citizen in the federal republic bore a dual allegiance to both state and nation—Senate and House of Representatives.<sup>25</sup> Consequently, for Baker, the Senate was the sheet anchor of the smaller states and the pivot on which the whole constitution turned.<sup>26</sup> It was the most important and naked republican element in the constitution because of its role in balancing and checking the power of the lower house. This division of power was the most fundamental insurance of liberty for the citizen.<sup>27</sup> Baker demanded a Senate with equal powers—especially powers to initiate and alter money bills. The possibility of deadlock between the two houses was rationalised by Baker as the price to be paid for liberty. In addition, he desired a Swiss model of executive government whereby ministers would be chosen by both houses and responsible to both houses.<sup>28</sup> The British system of responsible government was not suitable to a federation such as Australia, in Baker's view, largely because cabinet government would be dominated by the lower house to the detriment of the Senate. In the opinion of Quick and Garran, Baker's position on responsible government which was also held by the likes of Samuel Griffith and Inglis Clark, was best summarised as follows:

... the ... principle of State approval as well as popular approval should apply to Executive action, as well as to legislative action ... State should not be forced to support Executive policy ... merely because ministers enjoyed the confidence of the popular Chamber ... the State House could [therefore] ... enforce its want of confidence by refusing to provide the necessary supplies ... the introduction of the Cabinet system of Responsible Government into ... [ a federation with co-equal powers would mean] ... either Responsible Government [would] kill the federation and change it into a unified State or [that] the Federation [would] kill Responsible Government and substitute a new form of Executive more compatible with Federal theory.<sup>29</sup>

As we now know, the federal constitution of 1901 did not provide for a federation of co-equal houses, and the system of responsible government—much to Baker's undoubted chagrin, is well and truly alive. The compromise of 1891, which was narrowly upheld in 1897, ensured that although ministers could sit in either chamber, the most important bills appropriating money or taxation could not originate in the Senate. Equally, supply bills could not be

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<sup>25</sup> Baker Papers, vol. 7, & vol. 9, Australian Federation 1897–1898.

<sup>26</sup> *ibid.* Also see Richard Baker, *Federation*, Adelaide, 1897, pp. 1–5.

<sup>27</sup> *ibid.* Baker quoted US authorities such as Heame.

<sup>28</sup> Richard Baker, *The Executive in a Federation*, C.E. Bristow, Adelaide, 1897, p. 18. See also *Debates of the National Australasian Convention*, Adelaide, 18 March 1891, p. 466.

<sup>29</sup> John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth*, Angus & Robertson, Sydney, 1901, p. 706.

amended by the Senate although the Senate could reject the bill, or request the lower house to amend it.

Baker had wanted the Senate to be far more powerful, yet he was well aware that the powers granted to the Senate in the federal constitution made it one of the most powerful upper chambers in the western world. When he addressed his local electors in South Australia in 1901 as a candidate for the Senate, he admitted that while he didn't agree with every word of the constitution he was willing to endorse it as one of the most liberal documents ever framed.<sup>30</sup> Baker intended that the first sessions of the new federal parliament in Melbourne would see the Senate 'assert and maintain its position and powers' as a States' house.<sup>31</sup> As first President of the Senate, Baker was instrumental in initiating a process whereby the Senate developed its own rules and orders for debate. These procedural standing orders would be different from both the House of Representatives and those found in comparable countries.<sup>32</sup> Unfortunately, at least from Baker's point of view, it was clear as early as 1903 that the Senate's vulnerability to the dictates of party government would severely undermine Baker's image of a the Senate as a states' house, not to mention the possibility of the Senate having the power to amend money bills.<sup>33</sup> By the time he retired as Senate president in 1906, Baker must have been disappointed with the Senate's subservience to the lower house. Given Baker's talent for accepting the pragmatic realities born of political compromise, he probably found a way to reconcile his dissatisfaction—after all, he could still bed himself down at night as a founding father of the conservative republic. Even without coequal powers, as watchdog, house of review, and alternative chamber, the Senate was still one of the most critical components in the system of checks and balances which Baker saw as crucial to true republican government.

When we look back on Baker's life we can identify the desire for a national community as the most fundamental and guiding passion of his political career. So determined was Baker to be included as one of the founders of the constitution, he was willing to conform to the political outcome which would most surely guarantee the success of federation. He found a way to accommodate a weaker Senate than he had desired, responsible government, protection, payment of members, and a popularly-elected parliament, all of which were measures which he had opposed at some stage of his life. Perhaps the best example of his basically pragmatic nature can be found in his attitude to women's franchise. Baker had not been in favour of women's franchise when it was introduced in South Australia in 1894, but in 1901 was willing to support it in principle because of his desire for uniformity. Giving women the vote had 'not done much good but it had certainly done no harm', said Baker, 'we should have the same franchise in all parts of the dominion'. Just as he desired a uniform railway gauge, so too he demanded uniformity in the franchise.<sup>34</sup>

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<sup>30</sup> *South Australian Register*, 1 March 1901.

<sup>31</sup> *ibid.*

<sup>32</sup> G.S. Reid & Martyn Forrest, *Australia's Commonwealth Parliament 1901–1988*, MUP, Carlton, Vic., 1989, pp. 142–145, 479.

<sup>33</sup> Ronald Norris, *The Emergent Commonwealth*, MUP, Carlton, Vic., 1975, p. 205.

<sup>34</sup> *South Australian Register*, 1 March 1901.

Naturally, there were issues on which Baker was not out of step with his colleagues. True to his time, he saw White Australia as the defining feature of the new Commonwealth's national identity. In 1901 he spoke of the need to keep the white Australian race free of contamination from Chinese, Negroes, or other coloured races. Directing his gaze north to the federal government's future responsibility for the Northern Territory, Baker remarked that at least the Commonwealth would not have similar problems to those which existed in India, because in the Northern Territory, there was 'no native population to govern'. For Baker, Australia's indigenous inhabitants were a doomed race—destined to play no part in the future Commonwealth other than obliging their white masters by their polite disappearance.<sup>35</sup> If we wish to look to Baker for inspiration, we do not look in this direction, but to his attitude to constitutional change. It is in this area that his ideas offer the most useful stimulus for reflection on our current predicament.

Richard Baker stated frequently that he was not one to rush in and 'kiss the lips of unexperienced change,' yet nor was he one to possess an unrealistic view of the constitution's capacity for reform.<sup>36</sup> Speaking at the Sydney convention in 1891, Baker reminded delegates that it didn't matter how they framed the constitution because the people of Australia would 'mould and modify it in accordance with their ideas and sentiments for the moment'.<sup>37</sup> As a senator, Baker often told his colleagues that there was little point in Australia having a constitution if its legislators were merely going to ape the conventions of Westminster.<sup>38</sup> Political experimentation did not come naturally to Baker yet he was able to yield to the necessity of change because he understood his responsibilities to the electorate. In 1891 he put it in republican terms when addressing an audience in Adelaide:

The republican system demands that the deliberate sense of the community should govern the conduct of those to whom they entrust the management of their affairs.<sup>39</sup>

There are a couple of points worth making here. First, Baker was not a constitutional fundamentalist, rather he was a conservative enamoured of traditional institutions who appreciated that constitutions would evolve naturally over time. The constitution and the monarchical connection were not tablets of stone or pieces of royal china handed down from on high, to be wrapped in cotton wool and locked away in the display case as heritage items. Instead, the constitution was the natural embodiment of the people's values, aspirations and sentiments. To function efficiently it needed to be seen as a work in progress rather than a sacred work of art. Second, the basis of a republican community for Baker was the preparedness of those in power to be attuned to the people's wishes.

Considering the present turmoil over the republican convention, I cannot help but ask whether there is a sincere attempt on the part of our representatives to involve the people in the

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<sup>35</sup> *ibid.*

<sup>36</sup> *South Australian Register*, 15 April 1885.

<sup>37</sup> National Australasian Convention *Debates*, Sydney, 1 April 1891, p. 545.

<sup>38</sup> *ibid* pp. 438–441 & *Commonwealth Parliamentary Debates*, 1 August 1901, pp. 3363–3365, 2374–2376.

<sup>39</sup> *Advertiser* (Adelaide), 15 April 1891.

process of the change. At the moment, it seems that they are more intent on keeping the people as far removed from the debate as possible. It does seem odd for example, that one of the arguments most commonly used against a plebiscite or convention which involves the standard procedure of the compulsory vote is that these measures would afford the convention too much status. Yet there seems to be little point in proceeding with a convention if its *raison d'être* is to avoid democratic legitimacy. Richard Baker was aware of the potentially shallow theatrics of conventions, indeed he warned that they assembled people with 'all their prejudices, their local feelings, their jealousies and their self interests'.<sup>40</sup> The important difference, however, between the federal period and the present, is that Baker and his fellow federationists were willing to compromise and put their political enmities aside in the national interest. In sharp contrast, our current republican debate is still a captive of partisan politics, and it is unlikely to be resolved until our political parties can find a way to place the national interest above their own self interest.

It is interesting to reflect on another attitudinal difference between the federation period and the present day. Reading the federation debates and the associated discussions in colonial parliaments, it strikes me that Australians in the 1890s were far more open to political and constitutional change than we are today. They were not content to leave things as they were. For Australians in the 1990s, the desire to cling to constitutional stasis and even to the monarchical connection, can be a comforting thought when so many aspects of culture and society are subject to rapid change which is largely beyond their control. I suspect that this desire to close the eyes and wish that the forces of late twentieth century globalisation would simply vanish, motivates much of the support for the One Nation party. Yet when we examine our constitution we must remember to ask the same question which Richard Baker asked. Does our constitution adequately reflect the sentiments and democratic values of our people? Furthermore, is the republican debate, as it is currently being conducted, seeking to address these issues, or is it merely a discussion about the nationality of our Head of State?

Richard Baker's image of republican government went to the heart of our system of government. It was concerned with protecting citizens from the abuses of power by emphasising the dispersal of power. It emphasised responsible citizenship and was characterised by a conservative model of political participation. Most of all, Richard Baker saw the constitution and federal parliament as the 'palace of national life'. Baker claimed that the test of any republican form of government was its protection of minorities—majorities, he said, would always look after themselves.<sup>41</sup> Of course, the minorities of which Baker spoke were the citizens of the smaller states, but if we remember his advice concerning the natural evolution of constitutions, we might ask the same question of our own constitution and its protection of present day minorities. This might be an educative process for some, in so far as it would demonstrate that the mainstream are not the victims of noisy minorities but on occasions their nemesis.

Perhaps the most important message we can gain from Richard Baker's beliefs concerning republican government is that they involved much more than the

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<sup>40</sup> *ibid.*

<sup>41</sup> Richard Baker, *The Executive in a Federation*, op. cit., p. 17, also Baker Papers, vol. 9, Australian Federation.

nationality of the head of state. At present, we have not managed to connect our republican debate with the issues which define us as a national community—issues such as reconciliation, human rights, the equality of men and women, and a new preamble which would attempt to articulate our shared values. We might not all agree about the relevance or merit of these proposals, but we would certainly be engaged in a more interesting and potentially rewarding republican discussion.

*Daily Telegraph* (Sydney), 2 March 1891, p. 10

**Questioner** — Mark, in my mind you have partly answered this question already in your very clear assessment and understanding of the type of politician that Baker was, a very interesting mixture. But would you like to speculate upon the future, which is not quite a fair question to an historian who has been looking at the past, but as you have led us in that direction at the end of your lecture, what kind of a position do you think he would have been in today, had he been President of the Senate in 1997? Where would he have stood in the political debate, at least in the Party room, if not in public?

**Dr McKenna** — As a historian I am very reluctant to words into people's mouths. I think that is a very difficult question. I think, as I said in the lecture, as a progressive, as a pragmatist, he would have been open to the question of changing, for example, the nationality of the head of state. As to whether he would have been open to other constitutional reforms I am not sure. He probably would have been interested in strengthening the Senate's role as a house of review. And he probably would have been interested, he actually said, that one of the greatest problems about Australian federation was the bickering over finances between states and federal governments, so I am sure he would have wanted to reform that.

**Questioner** — If Baker did not really like the model of responsible government which we have now where there is really no significant separation between executive and legislative branches, what was his model, what would he have liked?

**Dr McKenna** — He wanted, as in the Swiss model, ministers elected by both houses of parliament and responsible to both houses of parliament, to avoid that system where cabinet government is concentrated in the lower house. He wanted the power dispersed, so that cabinet members were responsible to the Senate and to the House of Representatives.

**Questioner** — What did he want as a head of state?

**Dr McKenna** — The Queen. He wrote quite a lot about the issue of the Governor-General's powers. He believed, for example, that the powers of the Governor-General should be codified in the Constitution, all of the powers, especially the most significant ones. He was very much against the popular election of a Governor-General and he would have been against the popular election of a president based on what he said about the election of the Governor-General. And of course, as I said, he was a loyalist, so at the time there was no

question of him questioning his allegiance to the Queen, but he was, in that conservative tradition, very insistent that the conservative republican element of the constitution would be maintained if you ensured that the Governor-General was not elected. That was one of the things which he insisted on.

**Questioner** — You mentioned that Richard Baker saw no natives in the Northern Territory for the Commonwealth to administer. He obviously was aware of the indigenous population—but I was wondering what, other than the pillow theory, he did propose?

**Dr McKenna** — Well it is quite interesting to note that the issue of a coloured labour force in Queensland, for example, was a vexed one for Baker. On the one hand you can find Baker saying, well it is no good trying to develop the Northern Territory with a white labour force because, I think he said, the women become all hot and bothered and they can not manage to look after the family, and the men find it too exhausting, so therefore it would be good to have a coloured labour force for that purpose. But on the other hand, he did not want to have a coloured labour force because he knew that would mean a hybrid race, and that is what he was very afraid of.

**Questioner** — I am just thinking about the points that you are making about how he may cast light on today's republican convention. But I wonder whether, as a conservative, Baker represents conservatism having gone as far as it needed to go in terms of thinking about republicanism. If he is seeing it as a republic, and still in the loyalist tradition, then perhaps conservatives feel as though that was the achievement and even one hundred years on what else is there to be achieved on that front really, and isn't republicanism really just about more, as you were putting it, minority issues and so on?

**Dr McKenna** — Yes, well that is a good question. I think there is one crucial difference, and that is that, for the majority of Australians of Baker's generation, the issue of continued allegiance to the British monarchy was not an issue, was not an open question. You could not say that that is still the case today, and that explains why you have within our current conservative parties, many republicans, because there are many Australian conservatives who believe that it is possible to retain the essence, the essential basis of our constitution, but that the time to shift, to clearly designate as an Australian head of state etc, has come. So that, I think, is the difference. That, yes, conservatives still have that view, that the constitution is essentially a republican document, but they are probably willing to admit that the allegiance to Britain is no longer what it was.

**Questioner** — I take it that people like the Prime Minister are still of the view that we can maintain that allegiance and that it still has an ongoing authority and purpose. Is that how you see it?

**Dr McKenna** — I think it is somehow almost the opposite, that the continued allegiance is a good idea because it has no authority. It is not resident here, it is tucked away over in London, it does not have any power, it is safe because it is really so detached and removed. There is an argument for that, and I think they see it that way.

**Questioner** — Could I just comment briefly on three different issues you have raised, not in any order. You talked about the people of the 1890s as being more open to change than the people of today. The reason was that they had, in my view, a lot of other things forcing them to take an interest in it. They wanted access, they wanted some of the action, they wanted

some of the wealth of New South Wales. They were all bankrupt, basically, except New South Wales, and they needed New South Wales to get rid of their bankruptcies, that is what was driving the change at that stage, plus a number of other things and people of idealism. So I think it is fair enough to make the point that they were more interested in change then than they are today. We do not have that kind of issue driving us, we have our money spread right across the nation. The second point you made that was a bit odd, was that he was a republican with a knighthood. Richard Chaffey Baker was not the only republican with a knighthood around Australia at that stage, there were others, and they saw absolutely no disparity in that.

**Dr McKenna** — What I meant was that we might imagine from a contemporary perspective that that combination is odd. I did not mean to suggest that it was an oddity at the time. There of course were many others.

**Questioner** — That is one of the biggest curses that we face today, that people are attempting to make judgements, or comment about things that happened 100 years ago in our skin today, instead of getting into the skin of the people who thought about it. You know, it is a similar thing in the stolen generation issue, that people of good faith and good practice made decisions which we find obnoxious today. So with republicans with a knighthood you have to understand the context of the time, as you are suggesting. George Dibbs in New South Wales was a classic case in point. The third point you made was that he argued against an elected Governor-General. He was not unique in that, either, because Edmund Barton very, very strongly argued the same point in November '93, if my memory is right; call him what you will, a President or a Governor-General, if he is elected, he will have, or potentially will have, far more power than we believe he ought. So, Baker was not unique.

**Dr McKenna** — Thank you.

**Questioner** — A comment on that would be that Barton and Deakin were in favour of responsible government whereas you say that Baker was not.

**Dr McKenna** — Yes. That is an important difference.



## **The High Court and the Founders: an Unfaithful Servant\***

*Greg Craven*

### **1 Introduction**

As will be apparent from its title, this paper is highly critical of the performance of the High Court. As those familiar with biblical metaphors quickly will realise, the unfaithful servant was invariably the unhappy menial who eventually would be transported to the place where there would be weeping and gnashing of teeth as a just reward for his unsatisfactory service. The application of this unflattering label to the High Court, together with the implication of the appropriate destination in a constitutional afterlife for most of its judges, is entirely intentional.

Perhaps the most crucial point to be made here is a preliminary one, and that is that the performance of the High Court is fundamentally a fit subject for academic and legal scrutiny. The High Court is the highest court of our federation, and its decisions carry profound constitutional implications. Consequently, academics should feel not only free but obligated to discuss these decisions in the frankest terms, and to disagree publicly, forcefully and at length if they believe them to be wrong. In doing so, they would have before them the immensely healthy example of the United States, where all decisions of the Supreme Court are minutely scrutinised from both ends of the constitutional spectrum, thus ensuring that no new direction on the part of the Court can be adopted without full intellectual accountability being exacted through vigorous, and sometimes frenetic debate.

The need for such critical debate in Australia has never been greater than at the present time, when the Court is asserting for itself a far wider role than it previously had claimed. Thus, justices of the High Court are cheerfully asserting that they do and they should make law, and

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\* This paper was presented as a lecture in the Department of the Senate Occasional Lecture Series at Parliament House on 11 April 1997. Professor Greg Craven is Dean of the College of Law at the University of Notre Dame Australia in Fremantle.

that the Court is routinely in the business of making policy decisions. Putting aside for the moment—but only for the moment—the propriety of such claims, it certainly is clear beyond doubt that it would be entirely inappropriate for such a cheerfully policy-orientated court to claim the public deference and immunity from question due to a more conservative, exclusively interpretative judicial body. If the Court does indeed believe that it can maintain both an overtly political role, and the traditional deference due to an apolitical court, it is in for bitter disappointment.

Thus, it is nothing more than common sense that if the High Court wishes to make political decisions, and accompany their making with essentially political statements, it must be expected to be treated like the robust political creature that it claims to be, and not like some judicial maiden aunt. In particular, if the Court chooses, for whatever reason, to adopt a course of constitutional interpretation which to many appears to be a wilful distortion of the Court's constitutional role, and profoundly intellectually dishonest, then the High Court must expect to be called for precisely what these persons believe it to be.

Moreover, it is the duty of both lawyers and academics, but especially of those who are both academics and lawyers, to say so loudly and often where they believe the Court to be wilfully distorting the Constitution. Certainly, there could be nothing more antithetical to the duty of a constitutional lawyer within a society committed to the rule of law, than to acquiesce passively in a process of constitutional interpretation which he or she believed to be a conscious subversion of the democratic constitutional will of their society. On the contrary, such a person would be bound as a matter of intellectual morality to point prominently to the Court's dereliction of duty, to explain in precise terms the nature of that dereliction and to encourage the Court, with such brutality as may prove necessary, to revert to the path of righteousness.

Thus, as the Dean of Australia's only Catholic law school, which has a unique commitment to the teaching of law in an ethical context, I am sometimes asked how I can fail to support an interpretation of the Constitution which fosters the creation of judicially enforceable guarantees of rights, if only on the grounds that the creation of such rights must surely follow along the paths of ethics. To this, my answer is that if legal ethics mean anything, they must mean more than achieving the arguably correct result by unarguably improper means. The fundamental ethic in a constitutional society such as ours, at least from the point of view of lawyers, must be that the judges themselves abide by the rule of law, and do not usurp the democratic powers of constitutional amendment invested in the Australian electorate under the Constitution. Thus, from my own point of view, just as timely trains did not render Mussolini's fascism ethical, neither does the commitment of Sir William Deane to freedom of political speech excuse his rather more subtle and undoubtedly well-meant undermining of Australian constitutional democracy.

Clearly, then, it is out of considerations such as these that the title of this lecture has been born. I firmly believe that the High Court has been the unfaithful servant of that title, and that it has consciously and wilfully failed to fulfil the constitutional role envisaged for it by Australia's founding fathers. Consistently with what has been said before, I further believe that this failure has been entirely illegitimate, in that it has been wholly inconsistent with conventional concepts of constitutional democracy. Just as consistently with the comments made above, I believe that these truths—which I hold to be self-evident—should be loudly and painfully proclaimed whenever the Court and its allies are to be heard publicly

congratulating themselves on their contribution to a guided constitutional democracy in this country.

Thus, the chief object of this paper will be to demonstrate that the High Court, over the course of the years since federation, has laboured not to implement but to frustrate the founders' constitutional vision, and that this effort has been entirely conscious. Indeed, a theme of this paper will be that the High Court has been one of the most, if not *the* most, destructive force in bringing the vision of the men of 1897 to substantial ruin. Within these wider parameters, this paper seeks to do a number of things. First, it will consider the nature of the founders' constitutional vision for Australia. Next, it will outline the part to be played within that vision by the High Court, as foreseen by the founders themselves. By way of contrast, it will isolate certain activities which were definitively not regarded by the authors of the Australian Constitution as falling in any manner within the province of the Court. The paper will go on to assess the extent to which the High Court has discharged the role assigned to it and, correspondingly, the extent to which it has usurped functions for which it had received no constitutional authority. Finally, taking as its starting point that the High Court has utterly failed to implement the intentions of the founding fathers, the paper will consider the basic question of whether the intentions of the founders—the views of those men of 1897 who fashioned the Constitution—really matter within the context of contemporary Australian constitutional interpretation.

## **2 The Nature of the Founders' Vision**

The essence of the vision of the founding fathers did not vary materially between 1891 and 1898. That constitutional essence was one of transcendent federalism, of a nation state where central power was strictly circumscribed by reference to the powers and interests of its component regions.<sup>1</sup> This transcendent federalism pervades the Australian Constitution in a manner that is all but over-powering, and this is a matter we should keep very clearly in mind when one or other of today's constitutional necromancers tells us that the essence of the Constitution is 'Democracy', 'Respect for Individuals', or any other fashionable constitutional anachronism. As with any other commodity, there is only one essence of Australian constitutionalism, and that is federalism.

One reason that we may have difficulty in appreciating this fact is that we tend to be excessively impressed by the Constitution as a vehicle for the achievement of Australia's incipient nationalism. It certainly is true that the Constitution was, and to a very large extent was intended to be, the means of Australia attaining national status, at least in politico-historical, as opposed to legal, terms. However, the nationalist vision of the founders was utterly qualified by an over-riding commitment to federalism and it would not be unfair to say—as they often indicated themselves—that nationalism would only be suffered to exist within the framework of the Australian constitutional settlement to the extent that it was consistent with the attainment of a true federalism. Thus, to say that the Constitution is suffused by nationalism would be a little like saying that Catholicism is suffused by the papacy; this is entirely true, but the centrality of the papacy to Catholicism is itself subsumed

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<sup>1</sup> I have considered this matter before—see Gregory Craven, 'The States—Decline, Fall or What' in Gregory Craven (ed.), *Australian Federation: Towards the Second Century*, Melbourne University Press, Carlton, Vic., 1992.

within Catholicism's fundamental commitment to Christianity. The analogy is perhaps more apt than it appears, for the slightest consultation of historical materials will show that federalism was the Messiah of our Constitution and its authors, and nothing else. Indeed, one does not even require any particular historical knowledge to reach such a conclusion, as the conclusion is manifest upon the text of the Constitution itself. All that will be done here, is to briefly examine four of the more obvious illustrations of this point.

The most obvious textual embodiment of federalism, and thus in the present context one of the most interesting, is the Senate. It is, of course, hard to recognise the intention of the founders behind the Senate in its modern, and in many ways depressing, reality. Nevertheless, it can hardly be denied that the prominent existence of the Senate on the very face of the Constitution operates to introduce a basic federal element into the central structures of the Commonwealth legislature itself. Much has been made from time to time of the limits upon the Senate's powers in financial terms, but the reality remains that the envisaged states' house was to be co-equal with the House of Representatives in respect of all other potential exercises of the Commonwealth's legislative capacity. The result was that at the very heart of the Commonwealth legislature, a controlling federal element was implanted by Australia's federalist constitutional engineers.

Far less appreciated is the fact that the so-called 'national house', the House of Representatives, itself has its national character savagely qualified by a commitment to federalism. It is true that under section 24 of the Constitution, representatives are elected in proportion to the populations of the different states, and not on any basis of state equality, as is the case with the Senate. This is where those who wish to dwell upon the character of the House of Representatives as an embodiment of nationalist sentiment tend to stop. But when one examines the constitution of the lower house more closely, the position which emerges is profoundly different. Thus, members of the House of Representatives are chosen on a state by state basis, and not nationally.<sup>2</sup> The divisions in respect of which they are elected must be entirely contained within the borders of one state.<sup>3</sup> Original states, regardless of their paucity of population remain entitled to their minimum representation of five members.<sup>4</sup> The conclusion must be, therefore, that even the 'national' house of the Commonwealth Parliament is almost as federal in character as it is reflective of purely central concerns.

Bizarrely enough in view of the consistent course of Australian constitutional history, a further revelation of the intrinsically federal character of the Constitution is to be found in the limited nature of the legislative powers of the Commonwealth. Years of amplification of these powers by the High Court have tended to make us believe that the capacities delineated in section 51 are broad and untrammelled. Thus, we tend to talk about 'the corporations power' contained in section 51(20) as if it is a general power to make laws with respect to all corporations, as in many senses it has indeed become. In fact, however, a consultation of the actual text of section 51(20) quickly reveals it to be a minutely delineated power with respect to specific classes of corporations, namely, trading, foreign and financial corporations, and

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<sup>2</sup> Section 24.

<sup>3</sup> Section 29.

<sup>4</sup> Section 24.

even these must have been formed within the limits of the Commonwealth. This is no more a corporations' power than a power with respect to 'budgerigars' is a power over 'birds'.

Other placita of section 51 reveal a similarly niggardly approach on the part of the founding fathers towards the expression of the powers of the Commonwealth: nowhere is to be found the words of generous grant that one might expect having regard to the decisions of Australia's highest court. Thus, the so-called trade and commerce power in section 51(1) is in fact a power over trade and commerce with other countries and among the states. The vital tax power contained in section 51(2) is subject to the internal stipulation that it may not be exercised so as to discriminate between states and parts of states. Section 51(5), the communications power, is most often cited for its concluding words 'and other like services', but its textual character is set by the careful specification of the types of service forming the heart of the power, namely, postal, telegraphic and telephonic communications. The point to be appreciated is that the unbiased reader of section 51 quickly will appreciate that its words are not those of unrestrained trust towards a privileged favourite, but rather those of real and pervading caution. They are, in short, richly redolent of a desire to confine the power of the Commonwealth strictly within its sphere, and in favour of the states.

Finally, and most importantly in a federalist context, one must consider the process of constitutional amendment provided for by section 128. The basic federal message of section 128 could not be more brutally clear: there is to be no constitutional amendment within the Australian federation unless the populations of a majority of the states can be persuaded to agree, regardless of any stupendous national majority which might in any event exist. Indeed, in certain cases (such as the alteration to the limits of a state), the population of the state particularly affected also must agree. Consequently, in its most fundamental aspect—the provisions regarding its own amendment—the Australian Constitution ensures that the federal principle over-rides the national, clearly and beyond all question.

Thus far, the federal character of the Australian Constitution and polity has been demonstrated merely by a reading of the Constitution's text, unaided by history or any understanding of the course of events leading to its creation. Indeed, so much could be gleaned by the average intelligent Martian, new on Earth, but capable of reading the English language. However, this literal impression of pervading federalism is greatly reinforced when the Constitution is placed within the context of the intensely federal impetus which brought it into being.

This is not the time to commence an intensive study of the federal movement of the 1890s, nor the place which federal thought as such held within that movement. Suffice to say, therefore, that it is simply beyond question that to the vast majority of the founders, the achievement of whatever degree of nationhood was embodied within the concept of federation was absolutely subject to a satisfactory safe-guarding of the positions of the states.<sup>5</sup> To put the matter in terms highly unpalatable to many modern historical revisionists, but nevertheless perfectly accurately, the vast majority of the founding fathers, if asked to choose between federation and sacrificing the positions of the states, would unhesitatingly have consigned federation to the rubbish bin of history. Anyone who doubts this inconvenient conclusion has only to read the debates of the 1891 and 1897 Conventions, almost at random,

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<sup>5</sup> A reading of the classic work by Professor John La Nauze, *The Making of the Australian Constitution*, Melbourne University Press, Carlton, Vic., 1972 will leave little doubt on this point.

to appreciate the intensity of the federalist and state-protective feeling of the average founder.<sup>6</sup> In light of this conclusion, it is hardly surprising that the documentary Constitution is absolutely reflective of this historical genesis. The federalism of its provisions does nothing more than reflect the federalism of its authors.

There is a further crucial point to be made here. The founding fathers did not favour just any federalism. In these post-Whitlam days, it is now fashionable to assert that one believes in federalism, but that the form of federalism to which one is committed happens not to accord any identifiable power to the states. This federalism *manque* is not federalism of the founding fathers, nor the federalism which suffuses the Australian Constitution. That federalism was a very particular type of de-centralised government, strongly disaggregated, and with the balance of power lying decidedly and consistently with the states. This is the potent federalism that is reflected in the amendment provisions of section 128, as it is in the critical position of the Senate, and which for so long has been dismissively labelled as that unworkable contraption ‘co-ordinate federalism’. It is this powerfully federal vision, and not some pale apology for a geographic separation of powers, that was at the heart of the thinking of the founders, as it is at the heart of the Constitution that they devised.

Of course, while federalism overwhelmingly is the dominant theme of the Australian Constitution, none of this goes to deny that the Constitution also embodies other extremely significant concepts. The most obvious of these is parliamentary government, in which it is entirely evident that the founders had the most profound belief.<sup>7</sup> By parliamentary government is meant a constitutional system which displays, in a broad sense, a number of closely-linked characteristics. Within a system of parliamentary government, the executive government will be responsible to Parliament, in the sense in that it will rely upon the confidence of Parliament to hold office; that Parliament will be elected on a franchise which is, at least according to contemporary standards, wide and inclusive; and elections to the Parliament will be regular and free. One could argue, although the point is not pressed here, that parliamentary government also would involve some element of bicameralism.

As readily will be seen, the notion of parliamentary government is wider than the concept of responsible government, in the sense that it does not merely concern itself with the relationship between Parliament and the executive, but rather has regard also to considerations relating to the electoral system itself. Correspondingly, however, parliamentary government is vastly narrower than any concept of ‘democracy’, let alone some notion of ‘popular democracy’. In particular, parliamentary government posits no over-arching, abstract belief in any theoretical notion of equality, or a philosophical commitment to what might be termed ‘democratic rights’. Parliamentary government is not, in fact, an abstract concept at all. Rather, as embraced by the founding fathers, it is a highly practical, experiential and passionate belief in a loose amalgam of practices, traditions and down-right constitutional superstitions which historically had and have been seen as safeguarding that curious endangered species, ‘British liberty’.

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<sup>6</sup> See for example the comments of Trenwith, Australasian Federal Convention *Debates*, Adelaide, 19 April 1897, p. 940.

<sup>7</sup> See La Nauze, *op. cit.*, pp. 227–31.

In this sense, the founding fathers' commitment to parliamentary government could probably be best approximated as constituting a belief in some 'British constitutional genius' as the very best means of guaranteeing the liberty of the subject. Consequently, to say that the founders believed simply that the Constitution embodied in any abstract sense the principles of 'democracy' is wildly inaccurate, and to say that they felt that it encapsulated 'representative democracy' is only a little better. What the founders actually believed in, and what they believed to be embedded within Australia's constitutional system, was no vague constitutional nebula along the lines of 'democracy' or its representative variant, but a highly specific British tradition of parliamentary government. To the extent that this could be regarded as a sub-set of some wider concept, well and good, but it was the sub-set and not any broader extrapolation from that sub-set which mattered to the founders.

Of course, this commitment to parliamentary government is not so directly reflected in the Constitution's text as federalism, given that much of its crucial machinery was to operate via convention, rather than through constitutional law. It may nevertheless be discerned textually in the vestigial references of the Constitution to responsible government,<sup>8</sup> but also very explicitly in those provisions concerning the holding of elections and the duration of Parliament. Quite aside from the Constitution's text, however, any reading of contemporary material, and particularly of the Convention debates, quickly will reveal the attachment of the founders to parliamentary government to have been both profound and unshakeable.

In the present context, it must be understood that this commitment to parliamentary government carries with it profound implications as to the role of the courts within the Australian constitutional system. This is because the notion of parliamentary government gives rise to a whole series of understandings and subsidiary understandings concerning the relative roles of the different arms of government. These understandings are broadly reflective of the well-known doctrine of the separation of powers, but are better understood as constitutional-political realities, rather than rigid legal classifications. Loosely speaking, then, within a British understanding of parliamentary government, it is the role of Parliament to make the laws, but not to interfere with the administration of justice. The courts will administer justice, but typically will not make law, in the sense that they will not consciously develop new legal policy. They might, of course, in the context of the common law cautiously develop that branch of the law, which in any event owes its existence to the endeavours of the judges. Finally, the executive will administer the laws made by Parliament, but is subject in its administration to both the parliamentary, and the common law.

Crucially, within the vision of British parliamentary government to which the founders were so profoundly committed, there was no role for the courts in striking down acts of either the legislature or the executive as being contrary to *a priori* concepts of human rights. On the contrary, the protection of rights was located with the elected Parliament to which the founders and their British contemporaries were so intellectually attached, on the basis that history had proven that it could be relied upon to act as a safe harbour for the legitimate aspirations of both majorities and minorities. Of course, the courts could be expected to hold the executive within the law, and in the application of a written constitution, even to contain the Parliament within that document's limits. But both these limitations were derived from

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<sup>8</sup> For example, sections 61 to 64.

the containing effect of a superior legislative will which merely was enforced by the courts, and not from any application by the courts of their own supervening vision of human rights.

All of this, which as a matter of simple intellectual honesty can be deduced from the merest understanding of the context in which the Constitution was written, can be readily confirmed by the most jaundiced eye from the slightest study of the Convention debates. There, it can be discerned in general terms in the recurrently expressed vision of Parliament as the systemic bastion of liberty and determiner of policy within the constitutional construct created by the founders. Indeed, doting references to the historical role and responsibility of Parliament are almost as frequent in the debates as calls for the protection of federalism and the states.

More specifically, this vision of a polity in which Parliament was to be the ultimate recourse of the oppressed and dissatisfied, rather than the courts, is quite explicit in the rejection by the founders of any need for a constitutional Bill of Rights. This rejection is well detailed by Professor La Nauze in his excellent book *The Making of the Australian Constitution*,<sup>9</sup> and will not be rehashed here. The fundamental reason that the founders rejected the prominent American precedent was that they trusted Parliament to achieve the appropriate balance between the protection of human rights and the furtherance of other legitimate interests within the Australian polity.

Here, it sometimes is said that the true reason for the exclusion of a Bill of Rights was the desire of the founders not to invalidate certain anti-Asian laws in the fields of immigration, industry and labour. In fact, unlovely though the example may be, it is merely an illustration of the general attitude of the founders to issues of human rights. To them, the balance to be achieved between the interests of Asian immigrants and the aspirations and desires of other Australian subjects was a matter for Parliament, and not for the courts. Right or wrong, the fact that the founders held this view is not a matter of surmise. Rather, we know from the historical record that this was indeed the case, in exactly the same sense as we know that Charles I lost his head to Oliver Cromwell.

It is appropriate that we should pause here to summarise the nature of the constitutional vision of the Australian founders as it emerged from the Conventions of the 1890s. First and foremost, that vision was one of federalism; federalism transcendent throughout the Constitution, and ascendant over any other constitutional construct. Secondly, the founders enjoyed a profound belief in a highly specific, culturally constructed notion of British parliamentary government. Within that vision, questions of human rights were in the final analysis questions for Parliament, and not for the courts. Equally, on the basis of the preceding discussion, we can summarily dismiss certain things as not having been part of the founders' vision, and correspondingly as not having been embodied in the Constitution which they produced. First, the founders had no truck with an absolute nationalism which threatened the existence of federalism. Secondly, they had little if any interest in abstract concepts of 'democracy', let alone any desire substantively to embody so nebulous a concept within the Constitution. Finally, they utterly rejected any notion that generalised guarantees of human rights should be enforceable against the executive and legislature through the process of judicial review, consigning the vindication of such rights instead to Parliament itself.

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<sup>9</sup> op. cit., note 5.



### **3 The High Court and the Founders' Vision**

It is a relatively simple matter to outline the role which the founders envisaged would be played by the High Court under the Constitution: indeed, until recently, the general outlines of that role were widely understood, even if they were not in practice adhered to by the High Court. Essentially, the High Court was to have two functions. First, it was to be the final court of appeal within the federation. Secondly, it was to be the ultimate arbiter of constitutional interpretation. Both of these functions were important, but clearly it was the constitutional function that would be fundamental, not only to the Court's own future, but to the future of the Constitution itself.

The role of the High Court as a supreme court of appeal has been relatively uncontroversial. This function is, in fact, something of an example of national integration in the Australian Constitution, in the sense that a national court is placed at the apex of the judicial hierarchy. Unsurprisingly, it is also an example of the pervading federalism of the Australian constitutional system, in the sense that the High Court is placed at the head of an existing state hierarchy, which is not replaced by a substitute system of federal courts, although Parliament is given the power to create additional federal courts. For present purposes there is nothing more that needs to be said about the High Court as a court of appeal.

As regards the Court as a constitutional arbiter, its general role was to interpret the provisions of the Commonwealth of Australia Constitution Act. The Court's more particular role, however, was to maintain through that process of interpretation the federal balance between the Commonwealth and the states which was struck by the Constitution. In other words, like some politician-proof fence, the High Court was to keep the Commonwealth and the states within their respective constitutional spheres.<sup>10</sup> This was the key function of the High Court, and was one constantly referred to by the founders. It was for this reason that the Court was referred to more than once during the conventions as the 'key-stone of the federal arch'. The remainder of the court's constitutional duties, though important, undoubtedly were considered to be subsidiary when set next to this critical function of maintaining the truly federal character of the Constitution.

It is important to understand that this truly federal role of the High Court was in fact a component of a sophisticated three-part scheme devised by the founders, and clearly evident in the Constitution itself, for the protection of federalism.<sup>11</sup> The first part of that scheme was to confer upon the Commonwealth strictly limited powers, so that it enjoyed no capacity to invade state spheres of responsibility. This aspect of the founders' scheme has already been considered. Secondly, the Constitution inserted a monolithic federal element into the

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<sup>10</sup> See for example the comments of Symon, Australasian Federal Convention *Debates*, Adelaide, 20 April 1897, p. 950; and Higgins, 20 April 1897, p. 953.

<sup>11</sup> See Craven, 'The states', *op. cit.*, pp. 58–60.

Commonwealth Parliament itself in the form of the Senate, so that even if the popularly elected House of Representatives was tempted to act in a manner contrary to the interests of the states, the Senate could be relied upon to frustrate any such attempt. The third step was the creation of an independent constitutional court. The intended effect here was that even if the Commonwealth strained against the limits of its powers, and even in the event that the Senate failed to contain any such attempt, the federal balance of the Constitution would nevertheless be preserved by a process of independent constitutional interpretation. Of this tripartite plan, evident from the earliest incarnation of the Constitution in 1891, perhaps the kindest thing to say in light of subsequent history to the vengeful ghost of Sir Samuel Griffith would be 'three strikes and you're out'.

#### **4 What the Founders did not Envisage for the High Court**

What is being considered here is the mirror image of the previous discussion of the intended role of the High Court. From that discussion emerged the straightforward proposition that the High Court was intended to fulfil the dual function of a final, federal court of appeal, and as the chief interpreter of the Australian Constitution. This is, and always has been, the conventional view of the Court's role.

Now, however, a revisionist view has emerged, which assigns new fields of judicial conquest to the High Court. The first, and probably the most important of these, is that it is the duty of the Court consciously to revise the meaning of the Constitution in accordance with the perceived needs and desires of the contemporary Australian populace. This tendency is probably best referred to as 'progressivism', in that its essence is that the Constitution should be progressively altered by the Court in line with what it perceives to be contemporary standards of constitutional acceptability. The second suggested role, which really is merely an illustration of the first, is that the Court should institute wide-ranging constitutional guarantees of abstract human rights by striking down legislative or executive action which it sees as being inconsistent with a minimum respect for certain aspects of human dignity. In other words, the Court should insert into the Constitution at least some elements of a Bill of Rights. Clearly, this posited human rights role is merely one element of a progressivist approach to constitutional interpretation. The object of this section of the paper is to illustrate that both these activities, progressivism and the development of human rights guarantees based upon progressivism, are utterly opposed to the founders' vision for the High Court.

To take the general phenomenon of progressivism first, its essence is that the High Court should operate as a constitutional court, law reform commission and Parliament all rolled into one.<sup>12</sup> First, it should identify alleged constitutional deficiencies by reference to the contemporary aspirations of the Australian people, but perhaps more accurately, by reference to some notion of constitutional 'best practice', as enunciated by the world of fashionable constitutional taste. Then, the Court should so interpret the Constitution as to interpellate these features into the unpromising text of the Australian Constitution. Of course, it may be noted at this point that this process does not truly answer the description of 'interpretation' at

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<sup>12</sup> See generally, Gregory Craven, 'The Crisis of Constitutional Literalism in Australia' in George Winterton and H.P. Lee (eds) *Australian Constitutional Perspectives*, Law Book Co., Sydney, 1992.

all, given that—in reality—no interpretation of constitutional language is involved, nor is any attempt at the discernment of constitutional intention being made. Rather, the Constitution is in effect being altered or amended by the Court to achieve the extra-constitutional end in question.

It should be entirely obvious from the outset that this understanding of the Court's role is entirely at variance with the founders' vision. Indeed, the point is so historically obvious that further elaboration should be unnecessary. However, in view of certain at least half-hearted suggestions that the founders did in fact envisage some such role of constitutional renovation for the Court, it is appropriate to set out in some detail the reasons why such a conclusion is rather less plausible than the existence of the Loch Ness monster.

In the first place, such a pro-active role for the High Court would have been utterly inconsistent with a conventional British understanding of the function of a court in 1897. In line with our previous discussion of the notion of British parliamentary government, it was a given in the deliberations of the founding fathers that courts did not engage in the amendment of statutes, let alone constitutions. Such amendments were solely within the province of Parliament in the case of enactments, and in the case of the Constitution, were confined to the amending entity created under section 128. Certainly, the founders were not naive, and would have expected that the Court would be required to interpret the Constitution, and in certain circumstances of ambiguity, to discern meaning from the vantage point of a wing and a prayer. However, they would have been united by the view that in whatever circumstances of uncertainty the Court might find itself, the issue of constitutional interpretation always would be one of discerning the intention behind words, rather than of consciously amending the effect of those words in line with a perceived deficiency of the Constitution.

This view would have been consistent with the understanding of the founding fathers concerning the process by which statutes were interpreted.<sup>13</sup> Once again, a court might find itself cast very much upon its own resources in the circumstances of ambiguity, but it would always be the quest for parliamentary intent that would be paramount. Within that search, there could be no legitimate place for conscious innovation by a court dissatisfied with the effect of the statute concerned. Doubtless, as men of affairs, the founders realised that this nevertheless occasionally occurred, and might even have applauded on a practical level this or that particular result of dereliction of judicial duty. However, on the fundamental constitutional question of the proper role of a court in interpreting a statute, they would have been without doubt that the relevant obligation was to search for the intent, and that no scope existed for conscious deviation.

All this is made profoundly clear in a constitutional context by the existence of section 128 in the Constitution. It is thereby apparent beyond all doubt that the exclusive means of amending the Constitution is comprised in the body created under that section. Indeed, the founders went to great lengths to ensure that the only means by which the Constitution could be amended was through resort to the undeniably cumbersome, but equally undeniably popular and federal process represented by section 128. Moreover, the most striking feature

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<sup>13</sup> See J. Goldsworthy, 'Implications in Language the Law and the Constitution' in Geoffrey Lindell (ed.), *Future Directions in Australian Constitutional Law*, Federation Press, Sydney, 1994, pp. 150, 162–6.

of that section is precisely its insistence that the amendment of the fundamental document of the Australian federation is to be preserved to the people themselves, acting through intrinsically federal forms. Within this process, those over-mighty servants, the legislature, the executive and the judiciary, are all precluded from the alteration of the document which creates the Australian polity. In this sense, maligned as it may be by those who have found its results uncongenial, the Australian Constitution's mechanism for amendment is profoundly popular, federal, and democratic.

This is hardly surprising, in that section 128 reflects precisely the process by which the Constitution was created and adopted in the first place. Thus, after 1891 (and with the exception of Western Australia), the delegates who debated and drafted the Constitution were popularly elected. Thereafter, the Constitution was accepted in each of the Australian colonies only after the conduct of a successful referendum. Nothing could be more inconsistent with this overwhelmingly democratic and popular constitutional pedigree than the amendment of the Constitution in defiance of section 128 by judicial sleight of hand.

The final evidence that the founders envisaged no role for the High Court in the conscious and wholesale adaptation of the Constitution to the perceived needs of the present is revealed by their utter failure (in contemporary utterances and in the conventions themselves) to discuss any such thing. Had the founders intended the Court to discharge so novel a role, in defiance of everything which they understood to be an essential part of the British system of parliamentary government, dramatic evidence of so fundamental a departure from historical principle would be littered through the contemporary records. In fact, no such evidence appears. The attempts to elevate isolated and Delphic utterances by particular founding fathers into clear indications of a progressive role for the High Court are as pathetic for their inability to convince as they are for their paucity of support.<sup>14</sup> Correspondingly, the reason that the Convention debates do not ring with denunciations of the Court presuming to take a hand in the amendment of the Constitution, is that not one of the founders could have conceived that any argument so bizarre could ever seriously have been put. Were one of the delegates of 1897 to have stood on the floor of the Convention in Adelaide and posited some of the views unblushingly put forward by certain recent justices of the High Court in their extracurial writings, and rather more maniacally advanced by various academics, they would have been regarded less as constitutional traitors than as madmen.

This is why the whole of the Convention debates as they touch upon the question of amendment are concerned with section 128, and not with the High Court. Not one of the delegates would have seen the courts as the means by which the Australian Constitution was to be adapted consciously and cohesively to changing circumstances. Once again, the isolated comments that have been pressed into service to try and support so spurious a conclusion are readily explicable as being no more than references to the accepted role of a court in the resolution of documentary ambiguity, and in the discharge of the normal interpretative process. If the founding fathers, parliamentarians to a man, would not accord to any Australian Parliament the power to amend the Constitution, but rather reserved it to the people of the states, why would they confer such a power on the federal judiciary? In short,

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<sup>14</sup> For example, the attempt of Justice Deane to elevate the unfortunate Andrew Inglis Clark into a form of constitutional Mahatma in *Theophanous v. Herald and Weekly Times Limited*, 182 CLR, 1994, pp. 171–4.

this is not a matter for intelligent argument. We all know that the founding fathers had no intention that the High Court should play any role in the progressive amendment of the Constitution to meet future needs, and this fact is as well known to those who advance such a proposition as to those who negate it.

To take the narrower question of whether the High Court was intended to have a role in the formulation and protection of abstract guarantees of human rights, we may respond similarly in the negative. Put simply, the Australian Constitution is not a 'rights' constitution. True, it does contain certain specific guarantees: section 92 guarantees freedom of interstate trade, section 80 safeguards the right to trial by jury; while section 116 confers a certain freedom of religion. But all these guarantees are essentially scattered and internally limited, and do not go to deny the proposition that the Constitution was not centrally concerned with the direct protection of individual rights. This is not surprising. As has been argued throughout this paper, the founders consciously rejected the idea of pervasive, judicially enforceable human rights. They did so, not because they were opposed to human rights as such—for who is—but rather because they placed their faith in the British parliamentary system. Again, this is not a matter of surmise. We know it to be a matter of historical fact.

Indeed, we can go further in this context, to note that there is no 'rights discourse' within the Constitution in the sense that we would understand the phrase today. That is, there is no consciousness within the debates of the founders, or within the parameters of the document which they produced, of a wide range of indefeasible rights which are beyond the reach of elected parliaments, and which the courts constitutionally must protect. The vast majority of the founding fathers would not even have understood such a discourse, because it was not only in the nature of Parliament that its was the role to protect rights, but it was the nature of legitimate rights that they were such objects as the Parliament had chosen to protect. Within the British constitutional genius, therefore, if Parliament chose to infringe what some would call a right, in circumstances which some would regard as disputable, then Parliament must have had a good reason for so doing. Within its unfathomable reasoning, the right decision had always been made, as it would when repealing legislation was at last enacted.

The crucial point to understand about this constitutional settlement, is that regardless of how repugnant it is to modern legal and constitutional fashion, there is nothing intrinsically illogical about it. In days when we rightly contemplate a multiplicity of options in questions of culture and civilisation, it is nothing less than appropriate to understand that in constitutions, as in many other things, there ordinarily will be a variety of ways of achieving similar objects. In the particular case of the protection of human rights, one perfectly legitimate system of protection is to be found in the reliance upon the operations of democratically elected parliaments. One may argue about the efficacy of such a system, and about its merits compared to a regime based upon some notion of the judicial enforceability of rights, but this is not a debate which will ever objectively be won or lost. The truth is, that as a matter of logic, it was as open to the founders to conclude that parliaments were the best protectors of rights as it is for some (though not all) of us to conclude that this title must lie with the courts. What is beyond all question, is that the founders opted for Parliament.

## 5 The High Court's Fulfilment of its Intended Roles

We may begin with an assessment of the High Court's discharge of its role as a court of appeal. This has been relatively uncontroversial. Under Sir Owen Dixon, the Court undoubtedly rose to world status as an exponent of common law technique. In this connection, it may be noted that the New Zealand judge who recently told a dotting academic conference convened to honour the former Chief Justice, Sir Anthony Mason, that His Honour was a greater legal mind than Sir Owen, probably had an ancestor who did enthusiastic, if ineffective, service to the late King Canute.

Recently, it has been possible to raise an argument as to whether the High Court is now dealing with cases satisfactorily according to the classic methodology of the common law: that is, developing the law slowly, incrementally, cautiously and in deference to precedent. In particular, decisions concerning native title in *Mabo* and *Wik* have led some commentators to believe that the common law is being sharply wrenched by the Court in this direction or that to fulfil perceived policy needs, and is suffering serious strain in the process. Others argue that these decisions have represented the common law's finest hour in Australia. However, these are issues which do not concern the constitutional function of the High Court, and need not be further considered here.

As regards the constitutional role of the Court, it is simplest to say at the outset that the Court has almost entirely failed to discharge the chief aspects of that role. It has failed in the sense that, rather than having protected the federal character of the Constitution, it has in fact been one of Australian federalism's greatest antagonists. This conclusion may be stated with such baldness, simply because it is an almost universally accepted common-place in Australian constitutional law. The only thing remarkable, is that so shameful a verdict upon a nation's constitutional court can be so readily and complacently accepted. By way of a necessarily brief examination of the Court's dereliction of its duty, it is worth posing three questions about its fall from grace. Those questions concern the context in which this fall has occurred; the means by which the Court has approached its self-imposed task of undermining federalism; and the reasons why the Court has felt itself impelled in this direction.

As regards the fields of battle upon which the Court's banner of centralism has been displayed, these classically have concerned the interpretation of the powers of the Commonwealth contained in section 51. In recent times, it is notorious that the Court has adopted particularly anti-federal positions in relation to the interpretation of the corporations power, section 51(20), and the external affairs power, section 51(29). This is not the occasion for a minute dissection of the relevant cases, but in relation to each of these powers alternative, pro-federal interpretations which were entirely acceptable in logic were readily available to the Court. Thus, for example, there would be nothing illogical in holding that the external affairs power was confined to legislation with respect to matters which are intrinsically international in character; nor with determining that a 'trading corporation' within the meaning of section 51(20) is a corporation which has, at the centre of its character, the notion of trade. Yet in both cases, the Court chose to interpret the relevant constitutional provisions in a manner as conducive as possible to the expansion of Commonwealth power. A similar process may be observed in relation to the interpretation of section 90, which confers upon the Commonwealth Parliament an exclusive competence in relation to the levying of duties of excise. For many years, the Court has consistently adopted an extraordinarily wide view of the term 'excise', thus extending the Commonwealth's

monopoly over a wide range of indirect taxation. Such examples could be multiplied almost endlessly.

The interpretive means by which the Court has pursued this expansion of Commonwealth power essentially has two aspects. The first is literalism, which was established by the *Engineers'* case in 1920. Literalism as a methodology of interpretation within an Australian constitutional context is intrinsically anti-federal, in that by relying exclusively upon the written words of the Constitution, it enhances the specific textual powers of the Commonwealth contained in section 51, at the expense of the unexpressed state residue of legislative competence. Moreover, by privileging the textual powers of the Commonwealth Parliament, it ignores the wider federal context within which—as we have seen—those powers were intended to operate.

The second means by which the Court has facilitated the expansion of Commonwealth power has been through a gloss on literalism. This is comprised in the rule that not only are Commonwealth powers to be interpreted literally and without regard to any residue of state competence, but they are to be so construed as to give to the Commonwealth the largest possible field of legislative action which is consistent with the bare words of the text. This rule, which goes well beyond an insistence upon the natural meaning of the text, is best described as 'ultra-literalism', and is so bizarrely inconsistent with the historical intentions of the founders as to the nature of the Australian federation as to constitute a major interpretative fraud on the Constitution.

The crucial thing to understand about both literalism and ultra-literalism is that they are consciously directed towards divorcing the interpretation of the Constitution from the federal context which surrounds and suffuses it. In this sense, the central theme of the High Court's interpretation of the Constitution for the past seventy years has been a determined avoidance of the profoundly federalist intentions of those who wrote the document that the Court purports to be construing.

Once again, this is not the time for an extended theoretical criticism of literalism, but a few brief points may be made. First, it is indeed fundamentally anti-intentional, in that it privileges the text absolutely over the historical intentions of those who wrote it. Thus, if one believes that the interpretation of constitutions is about finding the intent of those who wrote them, literalism is entirely invalid. Second, literalism is profoundly anti-intellectual, since the idea that one can interpret the Constitution purely by reference to its words and divorced from subjective and historical context is quite implausible. Thus, as a constitutional methodology, literalism deals at best uneasily, and more often incompetently with such everyday interpretative issues as implications and ambiguity, which necessarily require extratextual input for their resolution. Third, ultra-literalism is less palatable, intellectually and otherwise, than literalism. It does not possess even the lonely virtue of being based on the words of the Constitution, and constitutes little more than an unprincipled assertion of anti-federalist bias in defiance of the essential character of the Constitution. Fourth, it is worth noting that there is no evidence that the founders intended that the Constitution which they wrote should be interpreted according to a ruthless literalism, let alone a literalism expanded by ultra-literalism. On the contrary, there is a good deal to suggest that they believed that the interpretation of the Constitution would be suffused by the same respect for federalism that the document itself in general terms displays. Finally, it is clear beyond all question that literalism is essentially a device, rather than an intellectually-held position. Its great virtue is

not that it is logically compelling as a methodology of constitutional interpretation, but rather that it produces that praiseworthy result that power within the Australian federation is centralised in the hands of the Commonwealth. This is a conclusion that is rarely disputed, and its every-day acceptance tends to blind us to its cynicism and lack of principle as a matter of constitutional law.

The final issue which may briefly be considered concerns the reasons why the High Court has so determinedly interpreted the Constitution in such a way as to undermine the federal character which its authors intended it to possess. This is a large question, which may only briefly be touched upon here. One point which must be kept in mind, is that there has always been a strong strand of centralism in British constitutional thought. Thus, Imperial constitutional authorities from Dicey down had always stressed the incomparable advantages of untrammelled central power. This is undoubtedly a culturally-generated tendency in Australian constitutional thought which has borne bitter fruit for Australian federalism. The irony is, of course, that rabid centralism is a particular preserve of the left, which presumably would be horrified to realise that it was thus placing itself firmly in the constitutional company of such radical figures as Edward I and every Tory prime minister who ever tore up an agreement for Home Rule.

Nevertheless, the tendency of many Australian constitutional thinkers to incipient centralism undoubtedly was reinforced by the experience of the First World War and the Depression, to which one feasible reaction was a hankering for strong central government, a desire which found expression in forms as various as the *Engineers* case, and the novel *Kangaroo* by D.H. Lawrence. Indeed, generations of Australians have reacted to a whole range of economic, social and other crises with the implausible cry that if only power could be centralised in a small country town not far from the Murrumbidgee, all would be well. Added to such considerations has been the undeniable fact that the central government of the Commonwealth has been the natural beneficiary of the rising tide of national sentiment that has been generated by participation in everything from two World Wars, to international sport.

Correspondingly, the economic and political decline of the states serves as an illustration that just as nothing succeeds like success, nothing fails like failure. The states have looked so seedy and so pathetic for so long, that championing their constitutional cause is very much like being the supporter of a football club which last made the finals in 1906. (Naturally, this says little for the judgement of the author of this paper.) Nor can it be ignored that the High Court is a body appointed by the central government, with the result that not only are appointments to that body made from among lawyers more likely than not to sympathise with a centralist point of view, but that the Court itself as a matter of simple psychology is likely to identify with the centre, rather than the periphery of Australian constitutional arrangements. Finally, it is worth mentioning that there can be little surprise in the highest court of a federation favouring central over state government, when the wider intellectual milieu of which that court forms part does precisely the same thing. Thus, just as it has been fashionable for many years for academics, bureaucrats and business people to denigrate federalism, it would if anything be remarkable were their intellectual compatriots on the Bench to behave in a different manner. Indeed, the standard of debate on issues of federalism in Australia is so abysmally low by international standards, that it might be thought that a High Court desirous of remaining in touch with fashionable intellectual opinion would have little choice.



## **6 The High Court's Assumption of an Unintended Role**

It is, perhaps, no particular insight to observe that it is one of the most fundamental rules of nature that if something does not do what it was supposed to do, it almost certainly will do something which it definitively was not intended to do. This is why a cat purchased for the purpose of catching mice certainly will demonstrate a profound aversion to rodents, but will cheerfully deposit dead lyrebirds on its home hearth. This rule applies equally in a constitutional context, and just as the High Court has failed to fulfil its intended role as protector of federalism, so it is now enthusiastically adopting roles from which it was absolutely precluded.

The most fundamental aspect of this tendency may be observed in the phenomenon of 'progressivism'. This concept, which has been referred to previously in this paper, essentially embodies the idea that it is the function of the High Court to adapt the Constitution to modern needs in line with the popular expectations. As we have seen, this was never part of the intended role of the judiciary, and was in fact antithetical to the founders' conception of the Court. However, the prevalent tendency of the Court to embrace progressivism may be marked in a variety of contexts.

Historically, the High Court's consistent centralising agenda was—in essence—pure progressivism, although it was achieved via the constitutional and interpretative device of literalism. The Court's reasoning was simple, if not simplistic: the needs of modern Australia are such as to necessitate a more centralised government; the Constitution does not accommodate such a government; therefore, the High Court will adjust the Constitution appropriately. This progressivist-centralist agenda was not often explicitly acknowledged by the Court, although the famous dictum of Windeyer in the *Pay Roll Tax* case came close, and even closer were certain of the extra-curial comments of Sir Anthony Mason.

Of course, two intrusive notes of reality should be sounded in relation to the High Court's progressive centralisation of power under the Australian Constitution. The first, is that it is highly dubious whether the centralisation of power reflects an objective imperative for the survival of the Australian federation. It is, at best, merely one view of on-going national needs. Indeed, Australia's economic decline, which to some extent parallels its increasing centralisation, might be said to argue against the wisdom of the High Court's political economy. Secondly, it is highly unlikely that the High Court's vision of an Australian populace clamouring for the greater centralisation of power is matched by the reality of public opinion. This is illustrated by the fact that, throughout the period during which the Court vigorously pursued a program of centralisation, the people themselves tended to vote consistently in the negative at referenda concerning the extension of Commonwealth power.

However, centralism is no longer the leading example of progressivist thinking by the High Court. That place has now been taken by the so-called 'implied rights' cases. The relevant reasoning here, is that the High Court believes that the Constitution should contain judicially enforceable guarantees of certain basic human rights. This belief is in line with much modern legal thinking on bills of rights, and certainly with legal academic opinion, heavily influenced as it is by United States and United Nations precedents. Accordingly, the Court is proceeding to insert such rights into the shrinking flesh of the Australian Constitution in accordance with what it apparently regards as 'world's best constitutional practice'. This is essentially what

occurred when the Court invented the implied right of freedom of political communication in such cases as *Theophanous* and *Stephen*. Some judges, such as Sir William Deane, would have gone further in cases like *Leeth* to create a similarly based right to coequality.

Of course, as we have seen, there was absolutely no intention on the part of the founders that any such generally-enforceable guarantees of human rights should exist within the framework of the Constitution. As was demonstrated, their intention was exactly opposite in character, with the founders firmly committed to a system of parliamentary protection and adjustment of human rights. Thus, as with *Engineers'*-style centralisation, the High Court through its jurisprudence of implied rights is acting in a manner directly contrary to the intentions of the founders. It is worth stressing the point once again that this is not a matter of surmise, but of the most elementary constitutional history.

It is appropriate to pause here and consider the exact nature of the so-called implied rights, if only because their utter lack of logical plausibility should be firmly and regularly exposed whenever matters of Australian constitutional theory are addressed. The starting point must be to note that these rights are, by definition, said to be 'implied'. Ordinarily, something will be implied from a document if it represents a real but unexpressed intention on the part of the authors of that document. Thus, if I say to a gathering 'All women remain seated', it is perfectly proper to say that I have implied that all men in that room should stand. This implication is based on the listeners' understanding of my intent as revealed by a consideration of my words in the context in which they were uttered.

Just such an intentional understanding of implications invariably has been adopted in relevant legal contexts. Thus, in the case of the interpretation of statutes, implications are drawn on the basis of parliamentary intent. Again, as regards our own Constitution, such implications as have historically been drawn relating to federalism and the separation of powers likewise have been based upon a presumed intent on the part of the founding fathers. Yet in relation to the suggested 'implied rights', it already has been demonstrated that there is absolutely no intentional support whatsoever for their existence. Indeed, it has shown that the intentions of the founding fathers were diametrically opposed to the subsistence of such rights. It follows inexorably from this that the so-called implied rights are on their own tenets entirely bogus, and do not answer to the description of 'implications' in any meaningful sense. The fitful attempts of some judges of the Court, notably Sir William Deane, to cobble together a sketchy intentional basis for the new rights only serve by their pitiful thinness to underline the profoundly ahistorical nature of those constitutional excursions.

So if the 'implied' rights are not in fact implications, what are they? It is not uncommon for the High Court to claim that these rights are 'structural' in character, in the sense that the 'implications' upon which they are said to be based arise from the structure of the Constitution considered as an integral whole. But what does this mean? Clearly, the notion of structure can have nothing to do with the question of founders' intent, for as we have seen, the founders definitively did not intend the creation of the posited rights. Apparently, what the Court means by a right based upon structure is that it believes the right in question to emerge from the Constitution when that document is read as a whole, in much the same way as an individual reader may receive a 'message' when reading a novel or a poem.

Consequently, just as Jane Austen's *Pride and Prejudice* may be about 'pride', 'prejudice' or 'forgiveness', depending upon the sensibility (or sense) of the reader, so the Constitution may

be about ‘democracy’, ‘respect for individuals’ or ‘free enterprise’, depending upon the predilections of the particular judge, and corresponding ‘implied’ rights may be based upon those predilections. The problem with what might be termed the ‘literary’ theory of constitutional interpretation is that the Constitution is not, on any intelligent analysis, a book or a poem. The Constitution is not a work of art intended primarily to evoke a subjective response on the part of the reader, but rather a determinate (if often generalised) set of instructions, developed through a democratic process, which are intended to be implemented by executive, legislature and judiciary alike.

The unprincipled character of this form of constitutional interpretation cannot be overstressed. If each individual judge is to interpret the Constitution according to that judge’s own subjective extrapolation of its values, then the Constitution can mean anything, depending upon which judge is interpreting it. Thus, just as to one judge the Constitution will be a charter of representative democracy, to a more conservative judge it may conceivably represent a regime for the protection of private property and the repulsion of socialism. Moreover, as has been said, such an approach utterly misconceives the intrinsic nature of a constitution. A constitution is not, like a book, about the generation of generalised responses, but about the achievement of intended legal results. Not only the founding fathers, but any modern-day parliamentarian certainly would be astonished to learn that the legislative will was nothing more in the hands of the judges than the sort of provocative reading material issued to English students at examinations.

A final but fundamental point must relate to the sheer intellectual dishonesty of the Court’s implied rights reasoning. If the Court really wishes to re-write the Constitution in a manner contrary to the directions laid down by the founders and without further recourse to the Australian people, and if this is an entirely legitimate approach to constitutional interpretation, why does it not simply say so? Why does it feel impelled to clothe its constitutional inventions in the intensely intentional language of implication? The only possible answer is that the Court does so in a spurious attempt to acquire respectability for what is, at heart, a thoroughly disreputable constitutional activity. The general conclusion in relation to implied rights theory must be, therefore, that it is entirely bogus. It is nothing more than a thinly disguised variant of progressivism according to which the Constitution will be furnished with judicially enforceable human rights which it was never intended to contain.

It may be noticed that, even on progressivism’s own terms, it is extremely difficult to justify the particular constitutional end of a judicially created Bill of Rights. The first difficulty here is general in character, and turns upon something of an internal contradiction within the rhetoric of progressivism. Almost invariably, overt or covert progressivism seeks to draw legitimacy from the desire for change on the part of a population trapped in Geoffrey Sawer’s constitutionally frozen continent. Thus, progressivism prefers to present itself as a force essentially popular in nature, drawing upon the needs and desires of the people at large. Yet in practice, progressivism is highly non-popular in character, given that it is directed to subverting the intrinsically popular and democratic referendum process of section 128. This somewhat embarrassing difficulty is strikingly reinforced in the context of human rights by recent Australian constitutional history. The last proposal to entrench a right into the Constitution—an extended freedom of religion—was massively defeated at referendum in 1988. Thus, the claim of progressivism to represent some monolithic national consensus on the constitutional protection of human rights is dubious, to say the least.

Indeed, the embarrassing reality is that progressivism, as represented in the implied rights theory of the High Court, is anti-popular and highly oligarchic in character. It is quite consciously aimed at subverting the inexplicable and obnoxious habit of the people in voting 'No' at referendum. Stripped of its popular rhetoric, the argument essentially is that the High Court will save us from democracy, and that if the people do not have the brains to amend the Constitution in the appropriate manner, then the Court will do it for them. This will all be achieved with the enthusiastic support of the tiny band of judicial and academic supporters which has egged the Court on in its course. The one thing which such a process cannot conceivably claim is any sort of popular basis. However, it should be noted, that what the 'progressivism of rights' lacks in terms of democratic theory, it certainly makes up in terms of benefits for its practitioners and their supporters. The practical effect of the application of such an approach is that lawyers and judges are transformed from the dusty denizens of the law volumes, to something very close to philosopher kings. It is extremely difficult, in reading many of the shrill protestations of the proponents of implied rights theory, not to detect the squeak of triumph of someone who never would have condescended to face popular election, but has nevertheless found themselves in possession of enormous social power.

A final point to be made concerning implied rights discourse relates to its extraordinarily impoverished intellectual character. In general terms, putting aside its spurious claims to a popular pedigree, that discourse tends to turn upon the explicit or implicit assumption that it is perfectly acceptable for the Court to amend the Constitution, at least so long as it is only doing so to create further enforceable human rights. After all, the argument goes, who could object to being the recipient of another human right? There are two basic problems with this point of view.

The first, is that this justifiably might be referred to as the Mr Justice Mussolini theory of constitutional interpretation. Thus, if the particular constitutional result is unobjectionable, it hardly matters whether the process by which it was reached was legitimate or not. Of course, this has all the ethical plausibility of saying that as long as Mussolini made the trains run on time, what was fascism between friends? The truth is that if the enhancement of rights is achieved at the cost of the subversion of that most fundamental of civic rights, the right to participate meaningfully in a constitutional democracy, then all that has been accomplished is a grave diminution of Australian political culture.

Secondly, the constitutional equation usually is nowhere near as simple as saying that an extra right hurts no-one. Ordinarily, the recognition or extended recognition of a particular human right necessarily will be achieved at the expense of the limitation of some other posited right. Thus, in the instant case of freedom of political speech, added protection for this right meant diminished respect for the right to reputation and privacy on the part of so-called public figures. Consequently, the High Court's entrenchment of particular rights hardly constitutes a constitutional win-win situation, with which no sane person could argue. On the contrary, what is involved is the making of highly political decisions as to the relative values to be attached to particular human aspirations and interests. This is precisely the role which the founders never intended that the High Court should discharge.

## **7 Conclusion: Why the Intentions of the Founders Matter**

Obviously, the implicit assumption throughout this paper has been that the intentions of the men of 1897 do indeed matter in interpreting our Constitution, and that they matter profoundly. Equally clearly, it has been the contention of the paper that the High Court ought, so far as possible, act in conformity with those intentions. Quite explicit has been the assertion that the High Court has not exhibited any such degree of constitutional faithfulness. Yet all this begs the fundamental question of whether the High Court should indeed be attempting to discern the intention of the founders, and to give effect to that intention in the interpretation of the Constitution. The answer to this question must be, in general terms, an unequivocal 'yes', and what is detailed here are just a few of the theoretical, constitutional, legal and political reasons supporting that conclusion.

The first reason for what might be termed constitutional fidelity lies in the profoundly democratic pedigree of our Constitution. After 1891, the framers of that Constitution were elected by the colonial populations, while the Constitution which they drew up was submitted to popular referendum before ever it was enacted by the British Parliament. In fact, this is the most democratic process for the creation of a constitution in the history of the great Anglo-Saxon democracies. In light of this profoundly democratic genesis, it would be profoundly incongruous for an unelected court to modify the Constitution according to its whims and perceptions of the Australian constitutional climate. Against this view, it is sometimes urged that those voting at the federal referenda in the 1890's voted merely upon the words of the Constitution, and not upon the intent underlying those words. This seems a curiously formalist, legalistic argument to emanate from those who typically are fully initiated adepts in implied rights mysticism. In any event, as a matter of simple historical reality, the best view of the affirmation comprised in the referenda would be that it involved not only (and perhaps not even primarily) the documentary Constitution, but rather what the founders themselves frequently referred to as the 'federal compact'. That compact comprised not only the written words of the Constitution, but the fundamental character of the polity which the founders understood that document to create, and which had been 'sold' by them to the population at large. At an even more basic level of common sense, it is hard to accept that the populations of the Australian colonies voted in favour of the words of the Constitution divorced from the intent which underlay that Constitution, rather than for the words as embodying the intention.

A second argument in favour of faithfulness to the founders, is that in saying that the search for intention is fundamental to the interpretation of the Constitution, one is saying no more than that the Constitution fails to be understood in the same way as other uses of language, including legal usage of language in such fields as statute and contract. In this sense, intentionalism as a method of constitutional interpretation accords with the basic principle of human relations that, in trying to understand words, we seek to comprehend them as instruments by which the human mind is expressed, not as random groupings of words to be construed according to the personal prejudice of the hearer or reader. Thus, it is worth noting that even the original claim of literalism to a privileged interpretative position was that the natural meaning of the words was the best path to finding the relevant intent. Moreover, it similarly is worth recalling that even implied rights theory, so anti-intentional in its genesis and effect, nevertheless resorts to a spurious claim of intentional validity by the very use of the word 'implication'.

Against this, it sometimes improbably is urged that the relevant intention in relation to the Constitution was that of adopting colonial populations themselves, rather than that of the founders. The essential silliness of this argument is readily appreciated when it is recalled that

no-one has ever yet suggested that the intention to be sought in relation to parliamentary enactments is that of the electorate, rather than the Parliament which passed the statute. The reality of the position of the men of 1897 is that they were 'delegates': that is, their actions and deliberations were carried on behalf of the people, and in a constitutional sense are generally attributable to them. Moreover, as a matter of simple common sense, it is hardly likely that any attempt to ascertain in a meaningful way a collective public mind upon the minutiae of meaning to be ascribed to this or that constitutional provision would prove successful. Indeed, the argument in favour of some 'popular intention' may readily be seen for what it is, a not particularly subtle attempt to avoid any significant recourse to intention in the interpretation of the Constitution.

A third reason for pursuing the intentions of the founders lies in the nature of constitutions as such. As has been stressed throughout this paper, constitutions typically are not evocative documents like books or poetry. They are highly instructional in nature, setting a blueprint for a polity, and seeking to exact obedience from future arms of government in operating within the stipulations of that blueprint. There have been occasional attempts to show that constitutions (and the Australian Constitution in particular) are 'non-communicative', or more accurately non-instructional, and really are merely provocative starting places for the creative labours of the judiciary. Such arguments are, frankly, laughable. Imagine the furore were the judiciary to determine that any other legal instrument, for example, the Income Tax Assessment Act, were not a series of specific statutory stipulations but rather a mere statement of basic principle from which they should extrapolate novel general themes for application to the circumstances of citizens. Historically, of course, the slightest examination of the Convention debates and of the history surrounding the framing of the Constitution makes it pellucidly clear that the document is highly instructional and directive in character, and this is no better exemplified than in the restrictive provisions of section 128 concerning its amendment.

The fourth consideration justifying a search for intention is what could be referred to as the 'comparative democracy factor'. The starting point here is to note that, in a constitutional context, issues revolving around democratic legitimacy are characteristically complex. Almost no institution within a constitutional construct can claim to be perfectly democratic in character. Consequently, when issues of democratic legitimacy arise under a constitution, the real question must be not whether the body or institution in question is perfectly democratic in character, but rather whether it is more democratic than any potential rival. Applying this dictum to the founders, it is quickly apparent that their democratic claims are strong indeed. As has been noted, they owed their position to popular election, and the outcome of their labours was popularly ratified. It is, of course, true that women, Aborigines and Asian immigrants did not enjoy the opportunity to vote for the founders, and these are, by any modern standard, grave electoral deficiencies. But applying the dictum of comparative democracy, the question is not whether the collective founders were absolutely democratic in character, but rather how they compare to their most proximate rival for the determination of Australia's constitutional dispositions, in this case, the High Court.

Here, it may quickly be observed that whatever the democratic deficiencies of the founding fathers, they pale into insignificance when compared with those of the High Court. Thus, whereas women, Aborigines and Asians could not vote for the founders, no one can vote for the High Court. This is a miserable difficulty for the Court in terms of maintaining any democratic claim to modify the Constitution, and one which it is impossible to manoeuvre

around. Within this context of constitutional democracy, it should be remembered that no-one is arguing that the intentions of the founding fathers should endure forever. Rather, the issue is whether those intentions should be respected until such time as the Constitution is modified in a contrary direction according to the undeniably democratic machinery contained in section 128, rather than through the undeniably undemocratic operations of the High Court. It is now appropriate to briefly address some of the main arguments urged against a position of faithfulness to the intentions of the fathers.

The first, and possibly the most ritualistic, is what is often referred to as the 'dead hand of the past'. This is the argument that unless the High Court progressively modifies the Constitution, Australia will be trapped within a constitutional paralysis of the founders' making. Regrettably, this position is self-evidently incorrect. The presence of section 128 within the Constitution has the effect that any outdated concept contained within that document can, as a matter of law, be deleted by recourse to that provision. Thus, the idea that the Constitution is locked within an historical coma is quite misleading, even on the face of the document. Whenever this embarrassing difficulty is raised, progressivists tend to reply that section 128 is useful only in theory, and that in practice, the refusal of voters to respond in the affirmative to questions posed at referendum does indeed render the Constitution immune from change. This, however, is a radically different argument, and is one that has little to do with the dead hand of the past, and a great deal to do with the live hand of the present. If the argument is that progressivism is in reality required to overcome the negative effect of Australian constitutional democracy, then that argument, unpalatable as it is, should be plainly put. The difficulty is that it is the essence of democracy that the demos are allowed to be arguably wrong as well as arguably right, in the context of constitutional referenda, as in any other. To argue that the High Court must amend the Constitution precisely because the people have decided that no such thing should occur is to scale new heights of rhetorical unpalatability.

A third argument is that it is practically impossible to discover the intentions of the founding fathers behind constitutional provisions, at least in a form that will assist in their interpretation. Usually, what is meant by this is not that the intentions themselves are impossible to discern, but rather that the commentator in question does not wish to discern them. Very often, it is perfectly possible to ascertain with considerable accuracy the historical intention behind a particular provision or set of provisions contained within the Constitution. Indeed, the entire process is vastly simpler in Australia than in the United States, owing to the existence of comprehensive printed records of the founding fathers' deliberations. The irony, of course, is that in the case of the most controversial aspects of the Constitution, we do in fact know the relevant intention with a considerable degree of certainty. Thus, in the case of the implied rights recently discerned in the Constitution, there is no need for any particularly sophisticated historical analysis before we can come to the conclusion that the founders intended no such result. Likewise, one does not have to be the reincarnation of Herodotus or Lord Macaulay to know that the founders did intend that the Constitution should be interpreted federally. In any event, difficulty in ascertaining the relevant intention is no excuse for not making the attempt. It may be that, in particular circumstances, it is not possible to discern with certainty the intention behind a particular provision, or where two equally plausible potential intentions appear. In such circumstances, a court will simply have to make the best fist of the constitutional text and the available historical evidence that it can. But this is not really an argument as to whether the court should engage in a search for

intention, but merely as to the difficulties which may have to be encountered or surmounted as part of that search.

A final argument against any method of constitutional interpretation which centres upon the intentions of the founders concerns what are sometimes called ‘levels’ of intent. Thus, the question is posed, at what level of intention on the part of the founders should we interpret a particular constitutional provision? Thus, to take the example of the external affairs power contained in section 51(20), are we to discern in the words ‘external affairs’ a very specific intent that it should comprise those matters falling within the ambit of those words in 1900? Or should we attribute an intent of medium scope, that the provision deals with matters falling within those terms as they are understood at the time when they are interpreted? Or, at the widest level, do the words evince an intent on the part of the founding fathers that the Commonwealth Parliament should have a power to legislate with respect with to all matters which it believes possess some element of internationality?

These are thorny questions, but the general answer is relatively straightforward. The level of intent to be attributed to particular constitutional language will depend upon the historical evidence available as to the framing of that language. Thus, it sometimes will be very clear that the founders ascribed to a provision an extremely narrow and specific meaning. For example, in relation to section 51(20), the founders obviously intended that the particular types of constitutional corporation delineated in that provision should be narrowly confined to the understanding of the relevant terms as they existed at the time of the Constitution’s framing. To take the matter one step further, the rule of constitutional thumb should be that, when in doubt, the most specific or lower level of intent should be regarded as being embodied in specific constitutional language. There are a number of reasons for this. The first, is that the discernment of a very general intention behind a provision will too often represent an attempt to re-state the effect of that provision in such a way to permit a judge to extrapolate out of the relevant constitutional language his or her interpretative preference. Secondly, it obviously will be the case that the more specific the intention discerned behind a provision, the greater the confidence that this intention can in fact be attached to the historic intent of the founders. Thirdly, such an approach is consistent with the interpretation of statutes, where courts do not seek to generalise the effect of sections and apply them to new situations, but rather to isolate the specific parliamentary intent underlying their enactment. Finally, a determined attempt to identify the specific intention behind constitutional provisions will produce, particularly in the case of the Commonwealth heads of power contained in section 51, a result which limits federal power consistently with the generally federalist assumptions of the founders.

It may be noted that the assertion of one form of constitutional ‘intent’ is intellectually unacceptable in this context. The question occasionally is asked ‘what would the founders say about this or that subject had they thought about it?’, with the interlocutor going on to supply the mute answer of Australia’s constitutional progenitors, and to advocate its inclusion in the Constitution accordingly. This is logical nonsense. Such an approach turns not upon any intention of the founders, but mere speculation. It is nothing more than a convenient historical stalking-horse for the subjective constitutional solution preferred by the questioner.

This entire discussion raises the fundamental question of how should the High Court interpret the Constitution on the assumption that it proposes to do so in fidelity to the founders? This is a large question, which merely will be touched upon here. First, any court proposing to accept



the burden of fidelity to the intentions of the framers of the Australian Constitution would do well to recognise at the outset the truly democratic and popular nature of that Constitution, with the consequent obligations of deference and respect which this involves. Thus, the Australian Constitution is popular by origin and ratification, and is democratically novated on an on-going basis by the presence of section 128. Given these considerations, the High Court should recognise that, in the interpretation of the Constitution, it is under a duty of utmost good faith towards those who wrote it and towards those for whom it was written. In short, the Constitution has never belonged to the Court, but rather is both the creature and the encapsulation of the Australian people. As such, it is theirs to do with as they will.

Secondly, the court should accept that the search for constitutional intention is absolutely basic to the process of constitutional construction. In other words, the inarticulate premise of Australian constitutional interpretation is that the Court is searching for the intention of the founders.

Thirdly, it would do no harm for the court to accept that if the words of the Constitution are utterly clear on any given point, then that is the end of the matter: those words should be given their face value. This concession can be made, not on the literalistic basis that constitutional interpretation consists of nothing more than giving words their natural meaning, but on the grounds that unambiguous words ordinarily will be a sound guide to the intention behind them. However, this minimal commitment to literal interpretation would be made within a pervasive acceptance that the words of the Constitution typically cannot be understood in isolation from their context, and that much if not all of the Constitution will need to be understood in documentary and historical context before its ambiguities may be resolved and its implications unravelled.

Consistently with this, the Court should accept that where the words themselves are not abundantly clear in revealing the relevant constitutional intention, it must look to other sources by way of seeking supplementary intentional evidence. Here, the Court would have recourse primarily to the Convention debates and draft constitution bills, but also to other contemporary writings. It should be stressed that in this process, the Court will always be searching for actual intent, and not for a convenient basis upon which to ground extrapolations of supposed intention.

Within this process of interpretation, there will always be room for the making of implications. However, these will be real implications, and not the variety improperly drawn in the implied rights cases. Thus, a real implication will be consistent with the text of the Constitution, at least to the extent that it does not flatly contradict some express provision. More fundamentally, it will be based upon a demonstrable intention on the part of the founders: without this, no true implication can exist. Finally, an implication will be 'necessary', in the sense that strong evidence of supporting constitutional intention will be required. In this context, it will be necessary not only to show an historic intention supporting some generalised implication ( for example, representative democracy), but also an inevitable connection between that intention and any suggested specific result ( for example, a judicially enforceable freedom of political speech).

Finally, to the extent that interpretation of the Constitution is to be controlled by any considerations as to its general character, these too must be based upon the actual intentions of those who formed it. Thus, where the 'theme of the Constitution' is to be called to aid in

resolving a division of power question, the relevant theme will be one of transcendent federalism. Where the issue is one of rights, it will be notions of British parliamentary government that will come to the fore. There can be no role within Australian constitutional interpretation for what the High Court and its admirers would have liked the founding fathers to have believed.

As the title of this paper makes clear, the High Court has been an unfaithful servant. It has been unfaithful in the sense that it has wilfully betrayed the vision of Australia's constitutional founders: and it is indeed a servant, in the sense that it was bound to give effect to that vision. My recollection is that the unfaithful servant in the Bible invariably also is branded as 'wicked'. This is a term which one would be reluctant to apply to the highest court of our federation, but speaking of the Court as a constitutional creation, rather than of the personal character of any of its particular judges, if the wig fits, wear it.

Perhaps the most troubling thing to emerge from this analysis concerns the future position of the Court in Australian society. Recently, there has been considerable public criticism of the Court's performance of its constitutional role. Some of this criticism has been, if vigorous, informed and accurate. Some has been politically motivated and unhelpful. However, clearly observable in both cases has been a tendency by the Court's supporters to brand virtually all criticism as being in some way disloyal to the principle of judicial independence. For the reasons outlined in the opening section of the paper, this reaction is nonsensical.

However, the question which must be asked is why the Court is now the subject of such exceptionally focused attacks? Putting aside the obvious range of reasons such as the practical difficulties occasioned by the Mabo decision, and the increasing willingness of some judges to embroil themselves in public controversy, it has occurred to me for the first time in writing this paper that at least some of the High Court's public difficulties may stem from what could be called its own 'moral exhaustion'. By this is meant that the Court has, at least since the *Engineers'* case, pursued a constitutional methodology which both the Court and every intelligent observer knows to be motivated primarily by considerations of constitutional politics, rather than those of constitutional law. Since 1992, the Court has compounded this legal realpolitik by developing a divergent constitutional methodology to deal with questions of rights, which is equally bereft of principle. The sad result is that virtually every intelligent contemporary observer of the Court must appreciate that, however much they may approve the outcomes of the Court's jurisprudence, those outcomes have been achieved by ethically and intellectually unsustainable means.

Is it too much to ponder whether seven decades of this type of institutionalized constitutional cynicism has not left its mark upon Australian constitutional culture? Perhaps it is the case that both friend and foe alike have ceased to respect the High Court as the impartial mediator of the intentions of those who wrote the Constitution, and rather assess it on the purely self-interested basis of whether its current pragmatics happen to agree with their own. If we have indeed reached this point, it follows that the Court routinely will be buffeted by the winds of outrageous politics whenever it produces a decision unacceptable to one political interest or other. After all, in the cynical world of politics, this is how one group of politicians treats another hostile group of politicians, whether that group happens to be comprised of judges or not. Of course, in these battles, there is little doubt that the professional party politicians will triumph over their amateur judicial brethren, but the cost of such imbroglios to notions of

judicial independence may be high indeed. Perhaps the High Court would have been better off with the founders, after all.

**Questioner** — Would you like to comment on the fact that the founding fathers and the Constitution do not recognise Aboriginals as citizens of their own country. Was it a tragic mistake or was it intentional?

**Professor Craven** — I think it can be both a tragic mistake and it can be intentional. In the contemporary context in which they were writing the Constitution, that was undoubtedly an inevitable historical result. In objective terms it was wrong then, as it is wrong now. In contemporary terms it was contemporary then, as it is not contemporary now. It was changed under the amendment process of section 128 and therefore to that extent represents an illustration of the capacity of the Constitution to change over time.

**Questioner** — There are fine words in your address; it is impossible to tackle each one of them. Someone said, I think it was a cleric, ‘fine words butter no parsnips’. What changes would you like to see in our Constitution?

**Professor Craven** — I think there are two changes. What you are talking about here in one sense is a cultural and a psychological change. I mean, how do you psychologically change the High Court—it is complicated. I would do two things; one is change the method of appointment. I have no great confidence that it would work well, but I would require that each judge appointed by His Excellency the Governor-General have the support of three state governments. I think that would just open up the process. It would at least potentially limit the capacity of the Commonwealth to appoint judges who will certainly run straight, as in straight to Canberra. I think that would be a good start.

The second thing, and probably the more important one from my own point of view, would be to change the amendment process. I think that one of the limitations of section 128, which I have certainly praised today but I am not by any means saying is perfect, is that you have a situation where only the Commonwealth Parliament can initiate an amendment. It would be highly desirable to have four state parliaments being able to initiate amendments, the so-called state initiative option, and that would mean that you would have amendments coming from a far wider range of perspectives. This procedure would open up Australian constitutional democracy. On balance, I am not in favour of popular initiative, which is allowing people to take up a petition and if obtaining the required number of signatures, for example, one hundred thousand signatures, initiating an amendment. It seems to me that that might be too unstable. But if you had both state and commonwealth initiative it would probably give you the best of both worlds and stability. So they are probably the two things I would like to do.

**Questioner** — Professor, the sins of the High Court, as you see them, began, I think you are at least implying, many many years ago. Would you trace the historical developments of those sins, lest we go away with the feeling that this is something purely within the last few years.

**Professor Craven** — I have talked about two major deficiencies of the Court from my own point of view, one of which was a highly centralist, literalist interpretation, of which the implied rights cases was one. Literalism came into the Australian High Court in 1920 with the *Engineers’* case. You could say that the Court has been anti-federal from the 1920s. Now that

has waxed and waned, so that obviously you have had situations where, for example, Sir Owen Dixon was a great deal more federal than Sir John Latham, different Chief Justices of the Court. It has been a long process and it does go back to that question of why the Court is like that, what are the influences that have operated on the Court. I do not think that has ever really been searched through. But I suppose the great disappointment from my own very private point of view is that watching the Court with *Engineers'* and literalism and watching it grow more bankrupt and more threadbare year by year by year, this idea that we can interpret the Constitution without any real recourse to its history, just by looking at the words, and by Heaven also, interpreting them in the widest possible way. By the late 90s I think that was looking so threadbare, it was embarrassing, and I had some vague, and doubtless utterly stupid hope, that the Court would modify it and go back and say, 'Well, we have made a mistake and we are going to go into a scheme of interpretation that does acknowledge a great deal more historical intent'. It is very disappointing then, to have the Court come up with probably the only constitutional theory that could be more intellectually threadbare than *Engineers'* literalism.

So, it is true, the Court has been on the downward road to constitutional hell for a very long time, with occasional rallies and fitful pauses. I guess over the past seven or eight years it has added a new string to its bow and that was what I was meaning by that reference.

**Questioner** — My question concerns your contention that the High Court basically rejected the founders' vision of federalism by putting it in two contexts. First, you stated that the new progressivist interpretation with rights are different from the current implications concerning federalism in the Constitution. On that point, is not the federalist basis of those implications just as structuralist as the criticisms you have made of the rights-based interpretations that have come up? Secondly, you seem to be saying that the *Engineers'* case was a landmark which turned the Court away from federalism, and historically that is quite true, but how sustainable were the interpretive procedures that the High Court was using up to *Engineers'*? For example, up to that point the High Court had flirted with the idea of what was called dual characterisation—the idea that if the Commonwealth passed a law with respect to taxation, it could not also be a law with respect to criminalising something or penalising something. It seems to me that that is a very difficult kind of interpretive strategy to sustain. And perhaps that was one of the reasons the High Court departed from federalism rather than a conscious attempt to modify the Constitution in favour of the Commonwealth.

**Professor Craven** — I love questions with which I can profoundly disagree. The first one is there is a basic difference between the federal implications and the implied rights implications, and that is, at the most simple level, we know that the founders intended a profoundly federal constitution and constitutional construct. We know that to be their intent. We know, with equal certitude, that they had no intention for implied constitutional judicially enforceable rights. There can be no greater distinction in fact, law, or principle than those two things. They are the basic difference.

As regards the *Engineers'* case, and whether the pre-existing interpretation could have been sustained, I suppose the central plank of that was reserved powers. I would not want to commit myself to say that if I suddenly became the god of the Australian High Court I would reinstate Sir Samuel Griffith's reserved powers. I would say this though, reserved powers which for years was denigrated as subjective and anti-textual and uncertain, fits remarkably well with the judgements of Sir Anthony Mason on implied rights, which are more anti-

textual, far vaguer, equally impossible or more impossible to apply and have the only difference, that whereas reserved powers was true, implied rights is false.

THE FIRST SESSION OF THE HIGH COURT;  
MR JUSTICE BARTON, MR JUSTICE GRIFFITH AND MR JUSTICE O'CONNOR



## **The 1897 Federal Convention Election: a Success or Failure?\***

*Kathleen Dermody*

*Federation for years past had been like a water-logged hulk; it could not make headway, but it still lay in the offing, watching and longing for the pilot and the tug. The people are the tug, to fetch it into the harbour of victory.<sup>1</sup>*

### **Federation—a Question for the People**

Throughout the early 1890s politicians used federation as a plaything, picking it up and putting it down according to political whim and personal ambition: the people, tired with such toying, shrugged their shoulders at the prospect of Australian union and turned their attention elsewhere. To give the movement vigour, the friends of federation constantly referred to the need to involve the people. This paper will look at the popular election of delegates from New South Wales, Victoria, South Australia and Tasmania to the Australasian Federal Convention of 1897–98 and the attempts made during the campaign to arouse people to the importance of federation. The Western Australian Parliament decided that members of Parliament, not the people, would have the responsibility for electing delegates to the convention and so Western Australia is not considered in this paper; nor is Queensland which shunned the Convention.

One of the main reasons for opening the doors of the 1891 federal convention to the public was the desire of the delegates to win over the confidence of the people and to cultivate their sympathies for federation. This convention, consisting of delegates appointed by the Parliament of each of the six Australian colonies and New Zealand, succeeded in adopting a draft constitution in the form of a Draft of a Bill to Constitute the Commonwealth of

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<sup>1</sup> James Henderson Howe, from a speech delivered on 17 February 1897, *Advertiser* (Adelaide), 18 February 1897, p. 6.

Australia. This document brought the concept of federation from the clouds of lofty rhetoric and converted it into a written document that detailed a scheme of union. It brought a flurry of excitement and anticipation that federation was within the colonies' grasp. But interest, while it flickered for a while, was short-lived. The delegates returned to their respective colonies where the bill gathered dust and enthusiasm for federation waned.

A leading federalist, Edmund Barton, stepped forward to keep the movement alive. In December 1892 he visited the Corowa-Albury district where he urged the people to establish an organized citizens' movement that would promote the union of the Australian colonies. By early January 1893 federation leagues had formed in both districts and in Sydney in July 1893 a central body of the Australasian Federation League was inaugurated. Its object was to 'advance the cause of Australian Federation by an organization of citizens owning no class distinction or party influence'. In Victoria the Australian Natives Association, whose members were born in Australia, became a major force in agitating for Australian union. Despite their efforts, citizens' organizations seemed unable to stir the spirit of the Australian people.

In 1893, Dr John Quick, a member of the Bendigo branch of the Australian Natives Association, took a more decisive step toward involving people in the federation movement. He proposed that the legislatures of each colony pass legislation providing for the popular election of representatives to attend a convention that would consider, draft and adopt a bill to establish a federal constitution. The adopted bill was then to be submitted to the people for their approval or rejection. The idea was to place in the hands of the people the responsibility for choosing those who would draft the constitution and to give the people the final say in its determination. Quick hoped that the involvement of Australians from the start of the process to the finish would put an end to the political games over federation. The friends of federation applauded Quick's scheme and the premiers of New South Wales, Victoria, South Australia and Tasmania gave it close attention. In January 1895, the premiers agreed to introduce legislation based on Quick's plan into their respective parliaments.

By late 1895 the federation movement had again foundered. The *Commonwealth*, a journal which had been established to cultivate in the community a general appreciation of federation, was forced to cease publication after only twelve months production because of 'very indifferent support'. It wrote in its final issue 'Federation had been dangled before the people so long that mere words spoken or written are at a discount'.<sup>2</sup>

Between December 1895 and March 1896 the four colonies finally passed enabling acts based on Quick's formula.<sup>3</sup> But even the passing of this legislation could not lift federation from the doldrums. The *Ballarat Courier* remarked that federation 'drags its inert mass along, like the fabled bunyip, slowly through the slime of political life'.<sup>4</sup> At the end of 1896, with no election yet called, the outlook for a federated Australia was still uncertain. Alfred Deakin

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<sup>2</sup> *Commonwealth*, 7 September 1895.

<sup>3</sup> See *An Act to enable South Australia to take part in the framing, acceptance and enactment of a Federal Constitution for Australasia*, assented to 20 December 1895. New South Wales, Tasmania and Victoria passed similar acts which were assented to 23 December 1895, 10 January 1896 and 7 March 1896 respectively.

<sup>4</sup> *Ballarat Courier*, 3 February 1896.



thought it probable that the federal cause was about to record another failure. He could see that a weak national sentiment debilitated the movement.<sup>5</sup>

### **New Hope—Old Rhetoric**

The announcement by the premiers of New South Wales, Victoria, South Australia and Tasmania that the enabling acts were finally to come into force and the writs for the election of candidates to a federal convention would be issued on Foundation Day, 26 January 1897, brought new hope. The elections were to be held on 4 March in New South Wales, Victoria and Tasmania and on the 6th in South Australia. The direct involvement of people in voting for delegates to represent them at a federal convention was a chance to rekindle an interest in federation and to arouse a genuine enthusiasm for the cause. The election campaign would provide an opportunity to further guide, educate and shape public opinion and would also encourage candidates to look closely at the proposed federation. During the campaign, candidates and electors would come together, exchange ideas, develop and reassess their opinions as the debate on Australian unity opened up. They could mark out common ground on which to build a federal constitution.

Although, at this time, there was no great enthusiasm for federation, there was no fierce opposition either. On the positive side no member of Parliament who stepped forward as a serious contender for the election dared speak against federation. But without any pressing or imminent danger to shake the community out of its lethargy, the labourers in the cause of a federated Australia faced a real problem in galvanising the public into action.

The Melbourne *Argus* declared, ‘What is needed is not so much arduous stumping tours of the colony, as seems to be imagined in certain quarters, but a swift and real awakening by the electors of every class to the magnitude of the business in hand’.<sup>6</sup> Those keen to give federation a boost would have agreed but to this stage they had been unable to find the right tonic.

To spark an interest in federation, candidates resorted to familiar means during the election campaign. In their speeches and addresses, they often appealed to patriotism or the desire for material gain. John Henry, a merchant from Devonport in Tasmania, assured the people that a united Australia could look forward to a grand future with enormous possibilities. He told his audience that ‘Separated as they were now by hostile tariffs they could not grow as one people ...’<sup>7</sup> Quick told his audience that he could see the Australian colonies going either in the direction of a continuation and intensification of their separate needs ‘leading to fatal antagonism’, or toward their ‘integration of union into one people, with one destiny’.<sup>8</sup> Looking more specifically at material benefits, John Gordon, a member of the South Australian Legislative Council, felt confident that when the trade of the continent ‘flowed

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<sup>5</sup> Alfred Deakin, ‘The Present Federal Crisis’, *Proceedings People’s Federal Convention, Bathurst*, Gordon & Gotch, Sydney, 1897.

<sup>6</sup> *Argus* (Melbourne), 20 January 1897, p. 4.

<sup>7</sup> *Examiner* (Launceston), 1 March 1897, p. 6.

<sup>8</sup> *Age* (Melbourne), 9 February 1897, p. 5.

through its natural channels a great tide of commerce would come to South Australia ... Adelaide would gain immensely as a commercial centre'.<sup>9</sup> His colleague from the lower house Dr John Cockburn suggested that nothing would create a national sentiment more surely than the jingle of Australian coin in the pocket.<sup>10</sup> Victoria's Attorney-General, Isaac Isaacs, proud that for the first time in Australia's history the cause of federation had at last to be decided by the people, declared that a call had been sounded that had awakened a 'national sentiment that would disdain the petty confines of province and be satisfied with no limits of greatness short of the ocean around our shore'.<sup>11</sup> The Premier of New South Wales, George Reid, matched such patriotic fervour:

The present is a golden opportunity ... Young Australia stands at the parting of the ways. Will you guide her along the path of union, which leads to safety and success, or let her wander into other paths sown with seeds of discord and disaster?<sup>12</sup>

To further quicken the pulse of the people, candidates would often sound an alarm—the menacing Chinese or Japanese, or the troubles in Europe or even the threat of civil war. Josiah Symon, President of the South Australian Federation League and a polished speaker who could attract large crowds, told his audience that they must have federation to defend their great coastline, adding 'it would not be done by simply singing the "Song of Australia"'.<sup>13</sup> More specifically, James Howe from South Australia urged his countrymen not to allow their land to be over-run by Asians nor face the type of racial danger that threatened the American nation.<sup>14</sup> Also looking to Asia, Richard O'Connor pointed out that the Australian colonies stood in great peril because of their proximity to China and Japan. He warned that at any moment the Chinese and Japanese might become emigrating peoples. He asked, 'Supposing 5,000 of those people settled in the Northern Territory what was there to prevent their infiltration into the several Australian colonies?'<sup>15</sup> Reid turned his attention further north. Seeing the great powers of Europe scrambling for a chance to land on some barren bit of Africa, he pointed out that 'if the ironclads of England were out of the way you would perhaps find foreign settlements, and if Frenchmen and Germans got settled in some corner of Australia it would be a hard job to get them out'.<sup>16</sup> For William Trenwith there was an ever-lurking danger that some powerful and antagonistic nation would take possession of the Pacific Islands, exposing Australia's vulnerability.<sup>17</sup> On the other hand, Richard Baker

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<sup>9</sup> *South Australian Register*, 4 March 1897, p. 6.

<sup>10</sup> *Advertiser* (Adelaide), 18 February 1897, p. 5.

<sup>11</sup> *Age* (Melbourne), 24 February 1897, p. 5.

<sup>12</sup> G. Reid, 'Address to the electors of New South Wales', *SMH*, 26 January 1897.

<sup>13</sup> *Advertiser* (Adelaide), 7 February 1897, p. 7.

<sup>14</sup> *Advertiser* (Adelaide), 18 February 1897, p. 6.

<sup>15</sup> *SMH*, 18 February 1897.

<sup>16</sup> *Daily Telegraph* (Sydney), 19 February 1897, p. 5.

<sup>17</sup> *Age* (Melbourne), 18 February 1897, p. 6.

foretold of trouble on the home front. He looked at the relationship between the separate colonies and suggested that history and experience had shown that neighbouring states over time either ‘drift into open enmity with each other—actual war alternating with armed preparation for war—or form Federations’. He predicted that when Australia becomes a federation there would be ‘for the first time in the history of the world a continent for a nation and a nation for a continent, freed from any prospect of internecine war ...’<sup>18</sup>

Having established the notion that union would bring advantages and prevent dire happenings, candidates also wanted to reassure people that the proposed changes would not disturb their daily lives; candidates wanted to inspire their countrymen with the idea of promise but without the apprehension of uncertainty. Although encouraged to think of themselves as being Australians in a united Australia, candidates were quick to give an assurance that each colony would retain its autonomy and control over its own affairs.

Henry Parkes, the grand old man of New South Wales, had been very aware of the anxiety of the people over the future of their respective provinces under federation. During his opening address at the 1891 convention, he spoke of the need to reassure the colonies of their independence under a central government and to make plain that there was no intention to cripple their powers, corrode their rights or undermine their authority. The convention accepted from the outset that the sovereignty of the states must be the bedrock of the constitution. In 1897, candidates readily gave the same assurance. Cockburn explained that the object of union was to safeguard and not supplant the right to local self government; that federation would not jeopardise but rather enhance their autonomy.<sup>19</sup> Edward Millen, a promising but unsuccessful candidate, overcame this difficulty of reconciling the sovereign rights of the states as separate entities with the sovereign rights of the people as a nation by cleverly melding national and provincial interests. He said that federation was a means of securing ‘the strength of union, while retaining the freedom of independence’.<sup>20</sup>

To reinforce this message that federation would not disrupt their world, many candidates spoke of their intention to ensure that as the architects of a new nation they would honour their history and tradition and stay true to the fundamental principles that underpinned their political institutions. They relied heavily on the argument that the constitution would be anchored in the past but that experience and the passage of time would guide its growth.

Sir Samuel Griffith had laid down this central tenet in 1891 when he said, ‘Surely we shall be far safer in adhering as much as possible to the Constitution with which we are all familiar, and grafting upon it as little as possible that is new’.<sup>21</sup> This cautious approach carried through the years. Robert Garran, although not a candidate, produced an influential book of reference on the federal constitution which greatly assisted candidates and electors. He suggested that the constitution to be drafted was ‘already half designed and half built, its foundations are

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<sup>18</sup> R.C. Baker, ‘Federation—What is it?’, Supplement to the *South Australian Register*, 2 March 1897.

<sup>19</sup> *Advertiser* (Adelaide), 18 February 1897, p. 5.

<sup>20</sup> *Daily Telegraph* (Sydney), 25 January 1897, p. 3.

<sup>21</sup> *Official Report of the National Australasian Convention Debates*, Sydney, 2 March to 9 April 1891, Legal Books Pty Ltd., Sydney, 1986, p. 84.

irrevocably laid by our history, our habits and our circumstances'.<sup>22</sup> This notion that the constitution must stem from the established customs and ingrained ideas of the people and that originality or innovation was not desirable dominated the speeches and addresses during the election campaign.

While the idea of replicating institutions that had stood the test of time and had proven themselves acceptable to the people offered security and peace of mind to Australians faced with change, it was hardly inspiring. It was a prospect without imagination or challenge.

Beyond the immediate impact of federation, candidates also looked to a future that offered the same security and steady progress. William McMillan summed up the sentiments of most when he contended that the constitution to be framed by the convention, while meeting the needs of the moment, should be made sufficiently flexible to be able to respond to the demands of the future. He stated, 'It was no use attempting to federate unless we federated on principles which would ensure continuity of our national life, which would take deep root in the hearts and affections of the people, and which would be capable of meeting every emergency as it arose'.<sup>23</sup> And who could disagree? Cockburn certainly endorsed this point by insisting that a constitution as far as possible should be a growth and not a manufacture, and 'the slower the growth the more durable the product'.<sup>24</sup> Put simply by Henry Bournes Higgins, 'Constitutions were not made, but grew' and he would endeavour to do 'the best with the least change possible'.<sup>25</sup> To these men there would be no upheavals, no ructions in this new nation continent.

The 'one people, one destiny' type of language was general, appealing and all-embracing. But it pre-dated the 1891 convention and had shown that while it could stir emotions in favour of federation it could not sustain interest. As long as federation remained an ill-defined concept, people could not embrace it as a practical scheme nor commit themselves fully to the cause. Reassuring as it was, the talk of framing a constitution that had deep roots in the habits of the people and that would evolve slowly and take shape as the nation matured did not spell out the specifics of federation. The idea lacked definite form and had a romantic and indistinct resonance. It was difficult for people to become enthusiastic about proposals that lacked immediacy and substance—they needed to be able to see and understand the actual application of this concept to their world.

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<sup>22</sup> Robert Randolph Garran, *The Coming Commonwealth*, Angus and Robertson, Sydney, 1897. This book was reviewed in many newspapers during the early weeks of February 1897.

<sup>23</sup> *Daily Telegraph* (Sydney), 4 February 1897, p. 5.

<sup>24</sup> *Advertiser* (Adelaide), 18 February 1897, p. 5.

<sup>25</sup> *Ballarat Star*, 13 February 1897; *Hamilton Spectator*, 20 February 1897.

“THE REFERENDUM” AT WORK

The Usual Experience of an Appeal to the Electors of Victoria.

*Melbourne Punch*, 11 March 1897, p. 183

### **Constitutional Theory, Clause by Clause**

Some sections of the press became irritated with the vagueness of the addresses and pointed out that the cause had passed the stage of platitudes and now required explanations as to the kind of constitution which was desired. The *Age* complained that some generalities uttered were even a little absurd. It argued, 'There would be no great objection to cheap expressions of loyalty, even when they were mere surplusage, if there were no danger of their being employed to cover poverty of thought as to what a federal constitution should be, or even designed to cover reticence on important points'.<sup>26</sup>

Bernhard Wise, a former New South Wales Attorney-General, was one of the first candidates to take to the platform but was chided by the press for not tackling the very stuff of federation. The *Daily Telegraph* conceded that a candidate must be an advocate of union but insisted that he must explain the terms and conditions under which the federal partnership should be arranged. It noted, 'Mr Wise has put all the seasoning into his soup, leaving nothing to be desired in that way, but he has unfortunately forgotten the meat'.<sup>27</sup>

Among the candidates there was also criticism about the paucity of information. Higgins maintained that before people would shout for federation they needed to know the kind of union into which they were being led. He believed that they must be given concrete details and that the electors looked to the candidates to provide that information.<sup>28</sup> He wanted candidates actively to canvass their ideas and proposals, arguing that, 'It was not fair to the electors to expect them to vote for candidates unless the candidates boldly faced the terrors of the platform and indicated the general principles on which they were prepared to act'.<sup>29</sup>

Richard Baker concurred. He spoke early in the campaign and stated that he did not underrate the sentimental aspects of federation, but he had left them alone because he wanted to place the matter soberly and practically before the people.<sup>30</sup> Reid also agreed heartily. He wrote in January 1897 that he would be the last to disparage the allure of patriotic sentiment but felt that the time for eloquent perorations had been exhausted and the moment had arrived for 'serious, anxious deliberation upon the principles of the proposed Constitution ...'. He compiled a list of thirty-six points he considered important and which candidates should address in seeking the people's suffrage. Reid hoped that in discussing these points the minds of candidates and electors would concentrate on matters that the coming convention would have to debate and decide upon. The list included questions such as whether the Senate should have the power to amend or reject bills, especially taxation, appropriation and loan bills, or whether there should be provisions against dead-locks, and, if so, what those provisions should be (see Appendix I).

And here was the crux of the problem for candidates who wanted to engender enthusiasm for the cause but then found they had to douse that sentiment with lashings of practical business

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<sup>26</sup> *Age* (Melbourne), 15 February 1897, p. 4.

<sup>27</sup> *Daily Telegraph* (Sydney), 7 January 1897, p. 4.

<sup>28</sup> *Ballarat Star*, 13 February 1897.

<sup>29</sup> *Age* (Melbourne), 10 February 1897, p. 5.

<sup>30</sup> *Advertiser* (Adelaide), 20 January 1897, p. 6.

talk heavily fortified with constitutional theory and political history. It is little wonder that the organisers of a large election meeting in the Hobart Temperance Hall needed to lure an audience with the promise of music, songs and recitations. Adye Douglas, President of the Tasmanian Legislative Council, was obliged to resume his seat before he could start his address because of a deafening roar for an encore of 'Australia' and Mr Stacey had to return to the stage to continue singing.<sup>31</sup>

The prospect of weighing down their message with talk of bicameralism, responsible government, the Privy Council, equal representation and deadlocks, did not deter many of the prominent candidates such as Carruthers, O'Connor, Quick and Symon, as well as Baker, Higgins and Reid, from elaborating on the specific provisions of their preferred constitution.

Most candidates used the Commonwealth Bill of 1891, described by Garran as the classical standard document, as their text. They accepted it as required reading and borrowed heavily from it in explaining their proposed federation. Based on thorough research, thoughtful deliberation and bearing the imprimatur of such highly respected men as Sir Samuel Griffith and Andrew Inglis Clark, the Bill set down the fundamental principles that should underpin an Australian constitution and detailed the structures that would shape the machinery of government. Although, since 1891, it had come under fierce scrutiny and was found wanting, candidates saw it as a solid platform from which they could build a new and improved constitution.

Symon was not alone when he said that in spite of its defects, the Bill was in the main a successful effort to grapple with the problem of federating the Australian colonies, while the Premier of Tasmania, Edward Braddon, said it would give them 'light and leading'.<sup>32</sup> More emphatically, Baker noted the sheer durability of the Commonwealth Bill. He stated that, 'Notwithstanding that hostile critics have for six years endeavoured to find fault with that Bill, and notwithstanding that it has run the gauntlet of nearly every Australian Parliament, no one has ventured to propound a new scheme'.<sup>33</sup> Even George Reid, one of the most forthright critics of the Bill, used it as a starting point. The *Freeman's Journal* unkindly observed that had the Bill never been drafted Reid would have been 'as bare of ideas as a plucked goose'.<sup>34</sup> He would not have been alone.

Thus in looking to the Commonwealth Bill and also using texts such as Garran's book, candidates reproduced much of what had been said and discussed since 1891. In many cases matters decided in 1891 remained unchallenged. Most Australians, who over generations had grown accustomed to a bicameral system of government, accepted that there would be two houses of Parliament. In his manual, prepared for the delegates to the 1891 convention and rewritten soon afterwards, Baker stated categorically that all experience, both ancient and modern, proved beyond doubt that there must be two houses of Parliament.<sup>35</sup> Six years later,

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<sup>31</sup> *Mercury* (Hobart), 27 February 1897.

<sup>32</sup> *Daily Telegraph* (Sydney), 21 January 1897; *Mercury* (Hobart), 3 March 1897.

<sup>33</sup> Baker, 'Federation—what is it?' op. cit.

<sup>34</sup> *Freeman's Journal* (Sydney), 30 January 1897, p. 13.

<sup>35</sup> R.C. Baker, *A Manual of Reference to Authorities for the Use of the Members of the National Australasian Convention*, W.K. Thomas & Co., Adelaide, 1891, p. 47.

O'Connor spoke for most Australians when he stated simply, 'The form of constitution proposed in the Draft Bill of 1891 seems to me, with some modifications, the best that could be devised'.<sup>36</sup> The upper house not only had a long tradition but was seen by the smaller colonies as the means of securing their rights by giving them equal representation in one chamber at least. The press recognised and accepted that although a few might object to a two-chambered legislature, it was a system to which Australians had become so thoroughly accustomed that it was certain to be adopted.<sup>37</sup> Even the *Melbourne Age*, which lambasted its own Legislative Council in Victoria, maintained that 'two chambers become a logical necessity'.<sup>38</sup> More pointedly, Trenwith, despite his claim that history tended to show upper houses to be either mischievous or useless, thought that there would be two houses. He believed that Australia could be well governed and indeed better governed with the one house, nevertheless, he acknowledged that it would be foolhardy 'to make experiments unless the necessity was great and success indisputable'.<sup>39</sup>

There were some candidates, such as the ten from the New South Wales Political Labour League who advocated a unicameral system but they were brushed aside by both the more prominent candidates and the major newspapers as 'faddists' or 'mad-brained experimentalists' or 'cranks'.

The Australian community, for the most part, also accepted that federation would be under the Crown, and indeed the enabling acts stipulated that this should be so. Candidates often tapped into the emerging sense of Australian nationalism and the growing attachment to 'the land we live in' to arouse enthusiasm for federation.<sup>40</sup> This appeal in itself did not create a problem but for some it underlined the tension between an independent nation taking absolute control of its affairs and one still attached to its parent. Ties with the mother country remained strong; most Australians were loyal to Britain and felt a genuine allegiance to the Crown but the question remained of how strong or how tight the bonds should be. There was a small section of the population, especially vocal in New South Wales, who thought it was time to 'cut the painter'. Mr J.U. Hennessy, at a meeting held under the auspices of the Constitutional Republican League, told his audience that Australia had all the essential elements for supporting itself and for building up a race and he asked why should they 'remain connected with a country 16,000 miles away, and be tied down to all its laws and regulations?'.<sup>41</sup> Few Australians, though, would have quibbled with Sir Henry Wrixon, a member of the Victorian Legislative Council, who maintained that 'There was plenty of room for ever so great a dominion under the ancient and venerable Crown of Britain'.<sup>42</sup>

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<sup>36</sup> *Daily Telegraph* (Sydney), 21 January 1897, p. 4.

<sup>37</sup> For example see *Hamilton Spectator*, 30 January 1897.

<sup>38</sup> *Age* (Melbourne), 8 February 1897, p. 4.

<sup>39</sup> *Age* (Melbourne), 18 February 1897, p. 6.

<sup>40</sup> H. Willoughby, *Australian Federation; Its Aims and Its Possibilities*, Sands & McDougall Ltd., Melbourne, 1891, p. 16.

<sup>41</sup> Reported in *SMH*, 5 February 1897, p. 6.

<sup>42</sup> *Argus* (Melbourne), 18 February 1897, p. 5.



This same tension between those who wanted complete independence and those wanting to preserve close ties with Britain entered the debate about the Governor-General. But the weight of public opinion was against those calling for Australians to appoint their own Governor-General. The *Age* assumed that Australia would follow Canada, 'in having a Governor-General appointed by the Queen as the one visible link with the British Empire' and most people had no difficulty in accepting this proposition.<sup>43</sup>

Those who sought election to the convention and harboured republican sympathies or did not want to alienate republicans gave a sympathetic nod to Australian independence but insisted that the moment was not ripe for a republic. Henry Copeland, a member of the New South Wales Legislative Assembly and an unsuccessful candidate, admitted that in his mind there was very little doubt that Australia must become a republic, but the time had not yet arrived. 'The word republic did not frighten him', he said.<sup>44</sup> Although Barton did not hold republican views, he acknowledged that some men did have such views and though they might disagree with him on that matter he would not say they were thoughtless.<sup>45</sup>

When it came to balancing national sentiment with loyalty to the mother country, most of the successful candidates walked the safe middle ground. They offered hope to reformers that greater independence would come to the young nation in time and placated staunch loyalists with assurances that important links to Great Britain would be retained.

As with the mode for selecting a Governor-General, the issue of appeals to the Privy Council brought conflict. There was the tension between those who felt Australia could and should assume responsibility for establishing her own final court of appeal and those who wanted to keep the Privy Council as a tangible link to Britain. In this case, however, the sentiment for Australia to exert its independence was strong. Symon, who was to become Chairman of the Judiciary Committee in the forthcoming convention, played on that sense of patriotism in advocating the establishment of a final court of appeal in Australia. It appeared to him 'that if a people of some three or four millions is not equal to the task of constituting for itself a Final Court of Appeal adequate to all the necessities of the administration of justice, it is really unworthy of being the nation it aspires to be'.<sup>46</sup> He acknowledged that the Privy Council forged a link which bound Australia to the mother country and he shared the admiration for its renown and distinction. Howe echoed the same sentiments. He considered that Australians had advanced to such a stage of national life that they might be allowed to settle their own national affairs within the nation. Although this matter generated debate, it did not go much beyond the legal fraternity; the public were unlikely to become excited about a matter that did not directly affect their daily lives.

People are moulded by their society and see the world through a mind's eye trained by their history and experience. In setting about formulating a new constitution Australians had before them their own history and the histories of other nations, such as the United States of

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<sup>43</sup> *Age* (Melbourne), 8 February 1897.

<sup>44</sup> *SMH*, 2 February 1897, p. 5.

<sup>45</sup> *SMH*, 5 February 1897, p. 6.

<sup>46</sup> Supplement to the *Adelaide Observer*, 30 February 1897.

America, Canada, Switzerland and Germany. They were naturally drawn to their own form of government and many regarded responsible government as a part of their heritage. Higgins stated that in framing their constitution Australians should benefit from the experience already gained in the colonies. He maintained that because of their history, they should insist on adhering in the constitution to the system of responsible government in preference to that of the American system where 'all Ministers were kept out of Parliament'.<sup>47</sup> Deakin also thought that the future national Government should 'be the closest copy of our own local Government, consistently with being adaptable to federal needs'. He wanted to adopt the cabinet system from Canada and the state system from America.<sup>48</sup>

Others could see difficulties in transplanting the cabinet system into the Australian federal structure. Baker in 1890 felt that the responsible-ministry system would work in a federation. After considering the matter further he changed his mind and by 1897 felt that 'federation would either kill the responsible-Ministry system or the responsible-Ministry system would kill federation'. He explained that a responsible ministry was not a necessary corollary to free political institutions or representative government and that the system had come into being as a consequence of the predominant power of the House of Commons. Indeed, he argued that the system was only an accidental result of representative government in Great Britain. Baker insisted that it would be unworkable with two houses of co-equal power and further that it had not been adopted by any federation.<sup>49</sup> Garran acknowledged that responsible government was a new and changing thing and that it depended largely upon unwritten rules that were growing and developing. But he was sceptical of schemes untried in Australia and drawing on the theme of constancy and familiarity, asserted that 'a nation's cradle is not the place for any more experiment than is absolutely necessary'.<sup>50</sup> He endorsed Griffith's answer to this problem which was: 'the rule should be to so frame the Constitution that Responsible Government may—not that it must—find a place in it'.<sup>51</sup>

Clearly the matter of the form of the federal Government to be adopted was not straightforward. On the surface, it appeared a simple process of copying the cabinet system already working in the colonies, in Canada and Britain. Those who had studied constitutions closely, however, could see problems in transferring the cabinet system across to a federal structure where the upper house, with equal or practically equal powers and representing the interests of separate states, was very different from the House of Lords or the colonial Legislative Councils. Nevertheless, the natural inclination to stay with a system known and proven and the desire to reassure the electors that there would be no unnecessary experimentation meant the form of government to be adopted would be that already in place in the colonies. Again most candidates were wary and even when speaking about specific provisions in the constitution they kept, wherever possible, within safe and familiar bounds—an approach that well might have fed public complacency.

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<sup>47</sup> *Hamilton Spectator*, 20 February 1897.

<sup>48</sup> *Age* (Melbourne), 19 February 1897, p. 6.

<sup>49</sup> Baker, 'Federation—What is it?' op. cit.

<sup>50</sup> Garran, op. cit, p. 148.

<sup>51</sup> S.W. Griffith, *Some Notes on Australian Federation: Its Nature and Probable Effects*, Paper Presented to the Government of Queensland, Government Printer, Brisbane, 1896, p. 7; Garran, op. cit., p. 151.

Federal finance was a different matter, however, and most likely to engage the attention of the Australian people because not only would it impact on their daily lives but it required the creation of a new system to deal with both federal and state finances. Most federalists had come to accept that the federal government should have its own revenue and power to raise it; that there should be a common tariff policy; and that the central Government should take over customs and excise to fund its activities.

The scheme put forward in 1891 had been received without enthusiasm or conviction and over the years criticism remained constant. Reid, in particular, disapproved of the financial provisions in the draft Commonwealth Bill which he maintained would give rise to an impossible situation. In brief, statisticians estimated that the Commonwealth revenue would exceed eight million pounds but its expenditure would not go beyond three million. The Premier had no doubt that unless a better and more definite scheme could be devised the whole project must be abandoned. Reid stated that 'We must either construct the Federal machine upon a more economical basis, or we must greatly enlarge its powers to make its work adequate to the money it will collect'. He was prepared to consider 'any proposal in the latter direction upon its merits'.<sup>52</sup> The Premier of Victoria, George Turner, asserted that 'any financial scheme which was adopted by the Federal Convention would have to be fair to all the colonies both in the present and in the future'. He said he would endeavour to find some scheme for dealing with the surplus in a way not injurious to the Commonwealth or the States.<sup>53</sup> The candidates accepted that this issue would test the best financial minds both in and outside the convention. O'Connor maintained that the question of finance was 'a matter hardly capable of being dealt with in a political address to the masses, and its intricacies will require unravelling by expert hands at a later stage of the proceedings'.<sup>54</sup>

He was probably right, and although his approach was sensible and responsible it gave little incentive to electors to go to the ballot-box. James Walker, a banker, did put forward a scheme, but as with Reid's thirty-six points the detail and the complexity of the proposal, which Walker himself modified, would have removed it from the realm of practical politics. Deakin also brought forward a plan but again that element of caution, while reassuring on the one hand, robbed the proposal of substance. He suggested, 'In federation we should walk before we run and, above all things, we should not run into debt. We should not in federating produce any violent dislocation of affairs or any remarkable change.'<sup>55</sup> Once again on an issue that demanded straight answers and certain solution, candidates equivocated.

To a lesser extent the Commonwealth Bill of 1891 had come under criticism for its undemocratic spirit. But by 1897, with a larger section of the population accepting the drift in favour of democracy as natural, progressive and necessary, the call for provisions such as the broadening of the franchise was becoming more insistent.

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<sup>52</sup> Reid, *SMH*, op. cit.

<sup>53</sup> *Age* (Melbourne), 20 February 1897, p. 10.

<sup>54</sup> *Daily Telegraph* (Sydney), 21 January 1897, p. 3.

<sup>55</sup> *Age* (Melbourne), 19 February 1897, p. 6.

The demand for senators to be elected directly by the people reflected the growing trend in favour of greater democracy. The 1891 Bill provided that senators should be chosen by the houses of Parliament in the several states. Since then, however, there had been an unmistakable move in favour of having senators elected directly by the people. This shift in opinion showed up clearly at the Bathurst People's Convention in November 1896 and carried into the election campaign under catch phrases such as 'direct election, direct responsibility'. Aside from a core of conservatives, most candidates had come to accept this recent but strong trend as compatible with the notion of growth and maturity.

Universal adult franchise, although part of this drift in the direction of greater democracy, had not the same measure of support as a fully elected Senate. The South Australian democrats, Kingston and Cockburn in particular, insisted that adult suffrage should be provided for in the constitution. Kingston, who took great pride in his colony's achievements, claimed that South Australia, by legislation through a long course of years, had established 'her constitution on broader democratic lines than those of any other colony in the Australian continent'.<sup>56</sup> Moreover, Cockburn did not want South Australians to have to mingle 'the clear crystal cup of their democratic franchise with the muddy pool of plural, proxy, or property votes'.<sup>57</sup> At this time, the Legislative Councils of New South Wales and Queensland were nominee bodies, and Victoria, Tasmania and Western Australia still had property qualifications for members of their Legislative Councils.

As a matter of tactical statesmanship, the more pragmatic federalists urged the South Australian democrats to compromise on this issue. Fellow South Australian Howe, the voice of reason on this matter, stated that however desirable it was for the other colonies whose franchise was not so liberal as South Australia's to come into line, it was scarcely 'fair for a small colony ... to say to the people that we shall not come into the union until they assimilate their franchise to ours'.<sup>58</sup>

Prominent candidates, apart from the South Australian democrats, indicated that, while they would take cognizance of such trends, they would wait for more definite and widespread support before travelling further down the path of electoral reform and providing for universal adult suffrage. Isaacs voiced the popular liberal opinion when he stated that the time had arrived when the broadest franchise should be recognised. He would bend a little though and, while he would insist on one man one vote, if the matter came to a choice between setting aside women's franchise or federation he would tell the women to be patient. Turner also maintained that he would vote for the women's franchise only if it would not jeopardise the larger movement.<sup>59</sup>

The candidates who did venture into detail sought to instil confidence in the electors. They wanted to appear knowledgeable and competent; to show that they had a grasp of the constitutional issues, and were willing to listen and modify their views in light of discussion.

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<sup>56</sup> Charles Cameron Kingston, *The Democratic Element in Australian Federation*, L. Bonython & Co., Adelaide, 1897, pp. 8–9.

<sup>57</sup> *Advertiser* (Adelaide), 18 February 1897, p. 5.

<sup>58</sup> *ibid.*, p. 6.

<sup>59</sup> *Ballarat Star*, 25 February 1897; *Age* (Melbourne), 20 February 1897, p. 10.

At times they appeared reticent and accommodating, even vacillating, especially on the problem of federal finance and the surplus. Both O'Connor and Wise insisted that they would not go to the convention with cut-and-dried opinions.<sup>60</sup> Even Reid stated that he would 'be prepared up to the last moment to weigh every argument that is advanced in support of different conclusions; because in my estimation plain and straightforward expressions of opinion now should not prevent an honest change of judgment later on'.<sup>61</sup> His colleague, Carruthers, was of like mind. He indicated that he was prepared to approach the task of framing a constitution with trust in federation but with prudence and caution that would see federation in its infancy 'not over-burthened with conditions and responsibilities which may detract from its successful growth, and which may breed only a popular intolerance of its existence'.<sup>62</sup> This conciliatory attitude lauded by some as a prerequisite to drafting a successful constitution was seen by others as equivocation or timidity.

The *Age* noted that Deakin had said that he would not bind himself to any particular pattern of federation. But it was concerned that although this was an admirable frame of mind with which to 'enter a deliberative assembly where the spirit of compromise must govern if business is to be done ... it has its dangers. One may easily, in a great national interest like this, lose the substance in grasping at the shadow.'<sup>63</sup> Despite their reluctance to take a clear and determined stand on the detailed provisions of a federal constitution, most candidates were certainly coming to terms with the complexities of drafting a constitution and with the responsibilities of being constitution makers. The candidates in New South Wales, Victoria, South Australia and Tasmania stood out against those from Western Australia, to be elected by members of Parliament, in their knowledge and understanding of the task that would confront delegates to the convention.

In Western Australia, the public debate on federation was arid in comparison to the eastern colonies. George Leake, a member of the Western Australian Legislative Assembly and a candidate for election, admitted in a letter to Symon that he had not studied the question in all its varied phases but thought he was capable of sufficiently appreciating arguments.<sup>64</sup> The Western Australian candidates had not been compelled to canvass their ideas in public; they had not faced 'the terrors of the platform'; nor had a critical press picked over their proposals. They had homework to do.

Other matters raised by candidates, such as the control of railways, public debt and the procedures for amending the constitution, have not been discussed in this paper. Nevertheless, the candidates generally approached these matters with the same caution, and showed the same readiness to listen, take counsel and to compromise. On the matter of state rights, however, opinions were more definite, attitudes more entrenched, language less conciliatory, and the mood at times militant.

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<sup>60</sup> *SMH*, 1 February 1897, p. 5; *SMH*, 17 February 1897, p. 10.

<sup>61</sup> Reid, *SMH*, op. cit.

<sup>62</sup> *SMH*, 26 January 1897, p. 8.

<sup>63</sup> *Age* (Melbourne), 19 February 1897, p. 4.

<sup>64</sup> G. Leake to J. Symon, 1 March 1897, Symon Papers, Box 46, Series 9, Federation 1897–1900, MS1736, NLA.

### **Fighting Words—‘The Rock on which Federation May Split is States Rights’**

Concern about states rights and provincial interests had the potential to rouse electors from their lassitude. Candidates could make a direct appeal to the immediate concerns of the people and also play on provincial jealousies and pride. While there was general agreement that the states would retain autonomy over their own affairs, some Australians were worried that in the federal sphere the less populous states would have difficulty matching their voice with that of the larger states. The smaller colonies, fully aware that their representation in the lower house would be dwarfed by that of the larger colonies, sought protection in the upper house.

There was talk in Tasmania that under a federal flag the colony would dwindle into a mere municipality. The less populous states, South Australia and Tasmania, therefore had a keen interest in obtaining equal representation in the Senate and securing to this house as much power as they could wrangle from the larger states. The Senate, modelled on the United States system, was put forward as a bulwark against the absorption of the smaller colonies by the larger; it was to be the sheet anchor of the states.

The Tasmanian candidates were united as one in their commitment to equal representation. Henry told his audience that it would not be safe unless each colony had equal representation in the Senate which must be armed with very full powers. He declared, ‘The Senate was the safeguard of the rights and liberties of the various states, and they must necessarily keep it strong’.<sup>65</sup> The Premier, Edward Braddon, thought that the Senate should have a larger amount of power than was proposed by the 1891 convention.<sup>66</sup> For some this included financial powers. Adye Douglas insisted that, ‘The Senate must have power to deal with finance, if not it were better for Tasmania to be without Federal Government’.<sup>67</sup> The press demanded vigilance on this matter. The Hobart *Mercury* warned that delegates would have to be on their guard against certain specious arguments. It insisted that the Senate must have ‘clear and unassailable financial powers’; that Tasmanian delegates should stand together on certain fundamental questions; and that the electors should not vote for anyone who wavered.<sup>68</sup> More pointedly it maintained that a proposition such as graduated representation if insisted upon ‘means that there is to be no Federation, and the sooner this is understood the better, in order to prevent a waste of time and temper’.<sup>69</sup>

South Australia shared Tasmania’s desire to join the federation but also had apprehensions about being swallowed up and like Tasmania stood resolute. The South Australian Treasurer, Frederick Holder, would not see the smaller colonies bound hand and foot to the power of the

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<sup>65</sup> *Examiner* (Launceston), 1 March 1897, p. 6.

<sup>66</sup> *Mercury* (Hobart), 3 March 1897.

<sup>67</sup> *Mercury* (Hobart), 4 March 1897.

<sup>68</sup> *Mercury* (Hobart), 22 February 1897.

<sup>69</sup> *Mercury* (Hobart), 17 February 1897.

larger ones.<sup>70</sup> To this colony the question of equal representation in the upper house was beyond debate; it was a fundamental condition of the Senate.

Clearly a number of candidates from the smaller colonies wanted to take the issue beyond equal representation. Baker took a very determined stand on the matter of states rights and said that if ‘the smaller colonies did not wish to become provinces of Victoria and New South Wales, the Senate must be made strong and powerful’. He argued further that a Senate with at least co-equal power with the House of Representatives was intrinsic to a federal form of government. He maintained that it held the balance between the national and the provincial governments, and was ‘the characteristic federal pivot on which the whole system revolves’.<sup>71</sup> He wanted South Australians to insist on their representatives making the Senate at least as powerful as the House of Representatives.<sup>72</sup>

Symon expressed the opinion of many of his colleagues when he stated that the Senate should have the power to amend as well as reject money bills.<sup>73</sup> The *Advertiser* could see that, by itself, equal representation in the Senate would not fully secure states rights and warned of the danger should the more populous states refuse to agree to the principle of co-equal power for the two houses. It insisted that South Australians could not imperil state rights by allowing an inferior legislative status for the Senate and that they must have the substance not the shadow.<sup>74</sup>

Generally the candidates from the larger colonies were prepared to concede equal representation to the Senate but were seeking ways to ensure that the upper house would not become the preponderant power. Reid in his written address to the electors stated that he would give way to the principle of equal representation in the Senate because he recognised it was impossible to obtain federation without it; but he would make that concession upon one condition only—‘the Constitution embrace provisions which ensure the predominance in the last resort of the federal electors, who most truly represent the colonies themselves’.<sup>75</sup> He was particularly concerned about money bills arguing that the Senate should not have the power to amend such bills. Reid pointed out that ‘to give the representatives of the 120,000 people in Tasmania an equal power over the revenue contributed by the 1,300,000 people of New South Wales or Victoria, as a fair exchange for the equal right of the representatives of the latter Colonies over the revenue contributed by the 120,000 of Tasmania, is by no means a fair political exchange’.<sup>76</sup>

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<sup>70</sup> *Advertiser* (Adelaide), 3 February 1897, p. 5.

<sup>71</sup> Baker, ‘Federation—What is it?’, op. cit; see also ‘How it Strikes a Stranger’, *Argus* (Melbourne), 3 March 1897, p. 5.

<sup>72</sup> *Advertiser* (Adelaide), 20 January 1897, p. 7.

<sup>73</sup> *Advertiser* (Adelaide), 9 February 1897, p. 7

<sup>74</sup> *Advertiser* (Adelaide), 12 February 1897, p. 4.

<sup>75</sup> Reid, *SMH*, op. cit.

<sup>76</sup> *Daily Telegraph* (Sydney), 26 January 1897.

In addition, Reid wanted a provision in the constitution that would put an end to deadlocks between the upper and lower houses. He proposed that in the case of money bills, the Senate should have the power of rejecting them. But if they rejected a money bill in one session and rejected it again in the next session then the two houses should decide whether the bill was to become law or not at a joint sitting. A similar process, but allowing more latitude, would be followed with less urgent bills not money bills. Reid also favoured the principle of the referendum.<sup>77</sup>

Similarly Turner, who argued that the people must be supreme, regarded the referendum as the simplest and best means of settling a dispute between the houses. He admitted that it was novel, and he would not insist on it if a better answer could be found. In looking at the proposal to dissolve one house as a means of settling a deadlock, he emphasised that they should not penalise one house when the other might be at fault—both should be sent to the country if that method were adopted.<sup>78</sup> Isaacs when speaking on deadlocks saw the matter plainly; ‘There were only two courses open—either a dissolution of both Houses or the referendum. He and his colleagues unhesitatingly declared for the latter.’<sup>79</sup>

The smaller colonies put a different interpretation on the argument. Both South Australia and Tasmania rejected the need for any mechanical device, such as the referendum or a joint sitting, to settle a deadlock between the two houses. The Tasmanian press thought that the larger colonies were trying by subterfuge, under the axiom of majority rule, to sweep aside their rights. The *Mercury*, which denounced the deadlock as a ‘constitutional bogey’, stated that if the delegates from the smaller colonies ‘should be so foolish as to listen to the voice of the charmers who will sing to them about finality, the referendum and the Norwegian System, then we may be sure that the new Constitution will not be accepted by the people of these colonies, or if it should be by any accident, it will not be passed by the Legislatures’.<sup>80</sup> The *Launceston Examiner*, equally strident, added that if the lower house were given power to override the wishes of the Senate by allowing it a majority through a mass vote, then it ‘is unification not federation that is aimed at, and the smaller colonies will never enter into any compact of that sort’. It told the electors of Tasmania that their delegates, as representatives of a small colony, would need to go further than insisting on equal representation, they would have to set their faces strongly against any proposal touching a mass vote by means of a referendum.

During the election campaign, this issue of preventing deadlocks produced a range of proposals but no concrete solutions. Candidates appeared to be thinking on their feet. Meanwhile, the electors looked on as the debate opened up, producing heat and novel ideas.

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<sup>77</sup> *Daily Telegraph* (Sydney), 19 February 1897, p. 5. Garran had also looked at this problem and dismissed the proposal to use the referendum as an arbiter between the chambers. He asserted that it had not been adopted in provincial politics and that in a federal situation, which he reminded the reader was notoriously hard to alter, was not the place for experiments. He advised that the referendum as a cure for deadlocks promised well, but suggested that it ought to be tried on a provincial scale before being deemed worthy to rank as a federal institution.

<sup>78</sup> *Age* (Melbourne), 20 February 1897, p. 10.

<sup>79</sup> *Ballarat Star*, 25 February 1897.

<sup>80</sup> *Mercury* (Hobart), 17 February 1897.



Although candidates produced no certain proposal, it was clear that the smaller colonies would stand firm in protecting the Senate and that the larger ones, equally resolute, would seek ways to wrest some of that power from the upper house.

But even the debate generated by this intense colonial rivalry and the exhortations of the press for the public to become involved in the campaign could not stir people out of their complacency. The South Australian *Register* complained, ‘In this province there have been mayoral elections which have been watched from Port Augusta to Mt Gambier with more concern than has been evinced by the people regarding the choice of their national architects and builders’.<sup>81</sup>

This general lack of enthusiasm for federation was common to the four colonies. Indeed the number of electors who voted was small. In Tasmania only one in four electors went to the ballot box, in South Australia nearly one in every three voted, in Victoria three in every seven and in New South Wales just over half the electors recorded their vote.

### Distractions—Party Politics and Religion

Party politics also came into play during the election campaign in Victoria and South Australia. Victoria divided into conservative and liberal camps as rival newspapers inflamed the conflict. Conservatives, such as Frederick Sargood, Nicholas Fitzgerald, and Sir Henry Wrixon, supported by the *Argus*, were keen to uphold the privileges and authority of the federal upper house. They were chary of broadening the franchise for this house and of the proposals for solving a deadlock between the two houses. The *Argus* looked upon the referendum or mass vote of the people and the joint sitting proposals as an indirect assault on the Senate—‘tantamount to abolishing the Upper House’. It claimed that such action was ‘concealed under an anti-deadlock or “will of the people” agitation’. From the other side of politics, the *Age* accused the conservatives of being obstructionists to every effort of liberal politics and of having ‘set up the pretensions of a class chamber to dominate the voice of Democracy’.<sup>82</sup>

### Representatives to the Australasian Federal Convention, March 1897

Name (in order of selection)	Parliamentary Status in 1897	Attendance: 1890 Conference, 1891 Convention
<i>New South Wales</i>		
Edmund BARTON	former M.L.A., M.L.C.	1891
George Houstoun REID	M.L.A., Premier	
Joseph Hector McNeil CARRUTHERS	M.L.A., Secretary for Lands	
William MCMILLAN	M.L.A.	1890, 1891
William John LYNE	M.L.A.	
James Nixon BRUNKER	M.L.A., Colonial Secretary	
Richard Edward O’CONNOR	M.L.C.	
Sir Joseph Palmer ABBOTT	Speaker of the Legislative Assembly	
James Thomas WALKER	(Banker; no political experience)	
Bernhard Ringrose WISE	former M.L.A.	

#### *Victoria*

<sup>81</sup> *South Australian Register*, 12 February 1897.

<sup>82</sup> *Age* (Melbourne), 25 February 1897, p. 4.

Sir George TURNER	M.L.A., Premier	
John QUICK	former M.L.A.	
Alfred DEAKIN	M.L.A.	1890, 1891
Alexander James PEACOCK	M.L.A., Chief Secretary	
Isaac Alfred ISAACS	M.L.A., Attorney-General	
William Arthur TRENWITH	M.L.A.	
Sir Graham BERRY	Speaker of the Legislative Assembly, former Premier	
Simon FRASER	M.L.C.	
Sir William Austin ZEAL	President of the Legislative Council	
Henry Bournes HIGGINS	M.L.A.	
<b><i>South Australia</i></b>		
Charles Cameron KINGSTON	M.H.A., Premier	1891
Frederick William HOLDER	M.H.A., Treasurer	
John Alexander COCKBURN	M.H.A., Minister of Agriculture and Education, former Premier	1890, 1891
Sir Richard Chaffey BAKER	President of the Legislative Council	1891
John Hannah GORDON	M.L.C.	1891
Josiah Henry SYMON	former M.H.A.	
Sir John William DOWNER	M.H.A., former Premier	1891
Patrick McMahon GLYNN	M.H.A.	
James Henderson HOWE	M.L.C.	
Vaiben Louis SOLOMON	M.H.A.	
<b><i>Tasmania</i></b>		
Sir Philip Oakley FYSH	M.H.A., Treasurer, former Premier	1891
Sir Edward Nicholas Coventry BRADDON	M.H.A., Premier	
Henry DOBSON	M.H.A., former Premier	
John HENRY	M.H.A.	
Neil Elliott LEWIS	M.H.A.	
Nicholas John BROWN	M.H.A.	1891
Charles Henry GRANT	M.L.C.	
Adye DOUGLAS	President of the Legislative Council	
William MOORE	M.L.C., Chief Secretary	1891
Matthew John CLARKE	M.H.A.	1891
<b><i>Western Australia</i></b>		
Sir John FORREST	M.L.A., Premier, Colonial Sec. and Treasurer	1891
Sir James George LEE STEERE	Speaker, Legislative Assembly	1890, 1891
George LEAKE	M.L.A.	
Fredrick Henry PIESSE	M.L.A., Commissioner for Railways	
John Winthrop HACKETT	M.L.C.	1891
William Thorley LOTON	M.L.A.	1891
Walter Hartwell JAMES	M.L.A.	
Albert Young HASSELL	M.L.A.	
Robert Frederick SHOLL	M.L.A.	
John Howard TAYLOR	M.L.C.	

Unlike Tasmanian and South Australian conservatives, their Victorian counterparts were talking to a constituency unimpressed with its own Legislative Council and more concerned with protecting the status of Victoria as one of the more populous states and thus ensuring the primacy of the House of Representatives. The conservative candidates did not fare well in the election.

A similar political division occurred in South Australia where the 'liberal ticket' championed by Kingston opposed a conservative ticket with names such as Baker, Downer and Symon on its list. Bitingly, Kingston asked the people of South Australia about their prospects of getting liberal legislation from Tories—'Do men gather grapes from thorns or figs from thistles?' In fiery language he warned the electors that if they wanted a federal constitution drafted along democratic, progressive lines they must look to him and his colleagues.<sup>83</sup> Despite Kingston's

<sup>83</sup> *Advertiser* (Adelaide), 16 February 1897, p. 7.

hard political stance, the electors gave the conservatives a fair hearing and both sides of politics were to be represented at the convention.

In New South Wales, candidates avoided party politics but Cardinal Moran's candidacy injected a keen sectarian flavour into the campaign. Although this religious flare-up may have aroused interest in the campaign, the prominent candidates distanced themselves from this development and concentrated on discussing federation and the proposed federal constitution. The campaign in Tasmania followed a general election and was conducted quietly.

### **To the Ballot Box**

The system of voting may well have dampened the readiness of electors to vote. The writs for the elections of candidates were issued on 26 January, which gave candidates not quite six weeks to campaign. Each colony voted as one electorate and was to select ten delegates. Candidates faced the difficulty of traversing the countryside, especially in New South Wales and South Australia. They also had the expense of transport, accommodation, advertising and the hiring of halls, as well as the incidental loss of income from being away from work. Thus, people living in the scattered electorates were less likely to be visited by candidates than city dwellers, and without postal voting, were likely to experience greater inconvenience in reaching a polling booth.

Quick highlighted this problem in his written address to the electors of Victoria. He pointed out that, 'Owing to the largeness of the constituency to which I now appeal, as well as the limited time and means at my disposal, I shall be unable to engage in a personal canvass, but I shall endeavour to address public meetings in several of the large centres, when I hope to have the opportunity of more fully expounding my views.'<sup>84</sup>

Candidates admired and respected in their local community, unless well known on the broader colonial stage, had little chance of mustering support throughout the colony. The *Newcastle Herald* interpreted this handicap as an intention to limit the choice of delegates to 'the political giants of the community and to form a kind of legislative aristocracy from the outset'.<sup>85</sup> Put simply the biggest names would stand a better chance of securing the largest number of votes and securing a seat at the convention, especially with the first-past-the-post voting system being used.

A minority of candidates must have believed this statement to be true. Sir Joseph Abbott informed the electors of New South Wales that he 'did not think that those seeking to become members of the convention should take any active steps in canvassing the electors of New South Wales for their votes, and I shall therefore abstain from doing it'. He submitted his appeal for election, which was successful, on his record as a member of Parliament for seventeen years.<sup>86</sup> This notion that only prominent politicians would secure seats at the convention must surely have encouraged public complacency and deterred people from voting. Indeed, all delegates to the convention were or had been parliamentarians except for

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<sup>84</sup> J. Quick, 'To The Federal Electors of Victoria', *Bulletin* (Sydney), election notices, 6 February 1897.

<sup>85</sup> *Newcastle Morning Herald and Miners' Advocate*, 20 January 1897, p. 4.

<sup>86</sup> *SMH*, 30 January 1897.

James Walker. Having earned a reputation as a financial expert at the Bathurst convention, Walker, wealthy and with the support of the New South Wales commercial and banking world, secured ninth place in the New South Wales polls. His success, together with Abbott's, strengthens the argument that people needed to be well known throughout the colony or have the resources at hand to promote widely their candidacy to be elected to the convention.

There was to be no plumping—an elector was to choose ten names, no more and no less, otherwise his vote would be invalid. Each of the ten votes carried the same value. This created a problem for a voter who might find that he had to vote for ten candidates even though he may have agreed with only four or five of them. This requirement may also have been a disincentive to vote.

The number of candidates may also have confused and discouraged people from voting. In New South Wales electors had to choose from 49 candidates; in Victoria 29; in South Australia 33, including one candidate who had died before election day but nonetheless still received 744 votes; and in Tasmania 32. Even so, these inconveniences and difficulties would not have stopped a people fired with enthusiasm for the cause and keen to have a voice in shaping their constitution.

### **Elections Results**

<b>Colony</b>	<b>Electors who voted</b>	<b>Percentage of electors on the rolls</b>
Victoria	103 932	43.50
New South Wales	142 667	51.25
South Australia	42 738	30.90
Tasmania	7 582	25.00

*Victorian Year-Book, 1895–98, p. 27*

### **The Campaign—Success or Failure?**

On the whole candidates approached the election endeavouring seriously and earnestly to place before the people the elements of a constitution that would bring about the federation of the colonies and lay the foundations of the nation. In spite of their speech making, addresses, written appeals to the electors, articles and pamphleteering, candidates failed to ignite enthusiasm for the cause of federation. As the *Advertiser* observed, 'There has been no end of piping to the people, but it seems they will not dance'.<sup>87</sup>

Despite the disappointing number of voters, the campaign cannot be seen as a failure. While the people held back, the candidates, especially those elected to the convention, had gained both knowledge and experience that would prove invaluable in drafting the constitution. They were men with minds sharpened by debate and the 'terrors of the platform'; men ready to defend their opinions and to challenge the opinions of others; men in touch with their communities but able to see beyond their provincial boundaries; and men ready to listen and

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<sup>87</sup> *Advertiser* (Adelaide), 9 March 1897.

to compromise. Foremost, they were men now publicly committed to formulating a constitution that would bring the separate colonies together as a nation. The campaign had primed these men, intellectually and emotionally, for the task ahead. The people, who remained unmoved by the rhetoric and constitutional theorising, would over the coming years continue to test those seeking to drive federation forward.

**Points to be considered by candidates and electors,  
by George Reid, Premier of New South Wales.**

I.—GOVERNOR-GENERAL.

1. Powers and Salary?
2. Shall communications with the Imperial Government all pass through his hands, or shall the respective colonies have their independent channels of communication?

II.—THE FEDERAL PARLIAMENT.

Shall it consist of two chambers or one?

III.—PRIVILEGES OF PARLIAMENT.

Shall the Federal Parliament have the power to proclaim its own privileges, or shall they be defined within the Constitution?

IV.—THE SENATE.

1. The number of Senators?
2. Shall they be paid?
3. Shall representation in the Senate be based on the principle of equality, i.e., an equal number of Senators for each colony, or on population, or on the number of electors in each colony?
4. Term of office?
5. Shall Senators be elected by the provincial Parliaments, by the electors of each province, or by the Federal electors? Or shall the provincial Parliaments be left to deal with the whole question?

V.—HOUSE OF REPRESENTATIVES.

1. Number—term—payment?
2. Franchise to be Federal, i.e., uniform, or according to the electoral law of each colony?
3. If Federal, to be prescribed in the Constitution or determined by the Federal Parliament?

VI.—POWERS OF THE PARLIAMENT.

1. To regulate Trade and Commerce, Customs and Excise, with supreme undivided control?
2. Power to raise taxation by other means?
3. Power to borrow money?
4. Transfer of all powers and services connected with Military and Naval Defence with free transport over all railways?
5. Transfer of Railways, or not?
6. Banking, currency, coinage, and legal tender laws?
7. Power over colored races, and immigration thereof?

VII.—MONEY BILLS.

1. Financial measures to originate in House of Representatives?
2. Shall the Senate have power to amend, especially Taxation, Appropriation and Loan Bills?
3. Or reject? And, if so, repeatedly? And, if so, should there not be provision against dead-locks? And, if so, what provision?

VIII.—THE EXECUTIVE GOVERNMENT.

1. Shall the principles of responsible Government, as known in the British Constitution, and practised in the colonies, be part of the written law of the Federal Constitution, or be left open to choice equally with other systems?
2. Shall members of the Federal Government go for re-election on acceptance of office?

IX.—FEDERAL JUDICATURE.

1. Shall the Supreme Court of the Federation be established by the Constitution itself, as in the United States, or by Act of the Federal Parliament, as in Canada?
2. Shall such Supreme Court be the final Court of Appeal for the colonies?

X.—FINANCE.

1. Shall the Federal Parliament have complete control of the Customs and Excise revenues, taking therefrom as much as that Parliament appropriates for Federal purposes, and distributing any available balance; or shall the colonies receive their full proportions of such revenues, less an assessment upon a definite basis towards the expenses of the Federal Government?
2. Shall the Railways be taken over by the Federation?
3. If the Railways are not taken over, should the Federal Parliament have any right to interfere with their management; and, if so, for what purposes?
4. Shall the public debts of the colonies be taken over and consolidated?

XI.—GENERAL.

1. Shall the Federation be limited to the powers expressly given to the Federal body by the Federal Constitution, or should the Federation be deemed to possess all powers not expressly reserved to the individual colonies?
2. Shall the Governors of the colonies be appointed by the Federal Executive?
3. Shall there be a power to enable alterations to be made by Federal legislation in the boundaries of the respective colonies; if so, for what purpose, and should every colony affected have a right to approve or prevent such alterations?
4. Shall the seat of government be named in the Constitution, or left to the decision of the Federal Parliament; and, if so, should there be a provision postponing a final settlement of the question for a specified period?
5. What should be the process for an amendment of the Constitution?
6. Should a period be stated in the Federal Constitution within which intercolonial Free-trade and a uniform Customs tariff shall become law?

*Review of Reviews*, 20 January 1897, pp. 37–8.





A well-known and self-  
confident candidate from Victoria  
candidate from New South Wales

**TO THE FEDERAL ELECTORS OF VICTORIA.**

I have the honour to offer myself as a CANDIDATE for your suffrages.

I have been connected with the Parliament of Victoria—in the Assembly and the Council—since 1864—and I refer you to the votes I have given, and the measures I have supported, to show I have done my duty.

I strongly advocate the continuance of those cordial relations at present existing between the Imperial Government and the states of Australia, which I hope will be more developed under federation.

If elected by you I will support—

1. The appointment of the Governor-General of Australia by the Crown.
2. The creation of an Elective Senate, chosen by the ratepayers of the provinces of each state.
3. The enrolment of a House of Representatives, elected by the people on a broad liberal basis.

The terms for which the members of the Senate and House of Representatives are to serve to be six years and three years respectively.

4. Intercolonial Free Trade.
5. The consolidation of the debts of the Australasian States, under the Federal Executive.
6. Exclusive control of the revenue from Railways, Customs, Excise, Stamps, and the Post-office, and the Direction of the Defence Forces by the Federal Parliament.
7. The Powers of the Federal Parliament to be clearly defined and not to trench upon those of the State Parliaments.

As to the minor details of the Constitution, I shall, if elected, consider them with an unbiased mind, prepared (for the general good) to give and take; my desire being to enact just laws for every class of the community.

I deeply regret the withdrawal of Queensland and Western Australia from the Convention, but hope those important States will yet come in.

I trust nothing will be said during the elections or at the Convention which may retard a union we all so much desire.

Should the efforts of the forthcoming Convention result in a Federated Australia, it will prove one of the most brilliant episodes in the longest and most glorious reign in English history.

W.A. ZEAL.

**TO THE ELECTORS OF NEW SOUTH WALES.**

Gentlemen,—The date having being fixed, under the Australasian Federal Enabling Act 1895, for the Federal Convention provided for by that Act, an obligation is cast upon you at the present time to elect 10 members to form a portion of the Convention, to whom will be delegated the duty of framing a Constitution for a Federal Australia.

I do not think that those seeking to become members of the Convention should take any active steps in canvassing the electors of New South Wales for their votes, and I shall therefore abstain from doing so.

It is desirable that electors should bear in mind at this stage that they are only choosing representatives to a Convention to frame a Constitution. The Convention will have no powers by which any burden can be placed upon the people, and the result of their work must be finally referred to the people for their approval under the Referendum, and even then the local Parliament will have to present an address to her Majesty praying that the Constitution may be passed into law by the Imperial Parliament, so that the checks on hasty Constitution-framing are very complete, and practically in the hands of the people themselves.

I submit this my appeal for election to the important and honourable position of a representative on the grounds that I have represented the people of New South Wales in the Parliament of my country continuously for 17 years, having during that long period sat for two constituencies only. I have held office in the government of the colony and for the last seven years have occupied the position of Speaker, to which Parliament has been pleased to elect me, so that my whole public life has been continuously before the people of this colony, to whose consideration and judgment I now submit the offer of my services in assisting to frame a Constitution for the permanent good government of these colonies.

The vote which you are called upon to give is of enormous importance, not only to this colony, but to the whole of Australasia, and it is my desire that every man who is entitled to vote shall do so at whatever inconvenience it may be to himself. I regard the privilege of voting for representatives to the Convention as a very great one, the more so as it has been conferred upon the people by themselves.

I entirely discountenance anything like an attempt to bring any party considerations into this election. It should be absolutely free from such, as it matters little to you, for this purpose, whether a candidate is a freetrader or a protectionist.

You should choose those whom you can best trust to do the work which they will be called upon to perform.

J.P. ABBOTT.

Sydney, 26th January, 1897

## The New South Wales Political Labor League

### FEDERAL ELECTIONS.

#### THE LABOR MANIFESTO

The following is the manifesto of the Labor candidates, which has been issued to the electors of New South Wales;—

FELLOW CITIZENS—Having been selected by the Political Labor League of New South Wales to contest the Federal Convention election, it is our duty to place before you the grounds upon which we seek your suffrages. We believe that on a really democratic basis a Federal Constitution will prove a lasting benefit to the people of Australia; on other lines there is the greatest possible danger of its proving permanently inimical to their prosperity and progress. We therefore insist upon the following principles, which we regard as essential to secure to the citizens of the coming Australian Commonwealth a Constitution under which they will be in reality as well as in name a self-governing people:—

1. That the Federation be known as the Australian Commonwealth.
2. That the Federal Legislature shall consist of one Chamber only, to be elected upon a population basis.
3. That the Federal franchise shall be one adult one vote.
4. That members of the Federal Legislature shall be paid.
5. That in place of government by party methods, Ministers in the Federal Parliament shall be elective.
6. That the Initiative and Referendum shall be part of the Federal Constitution; the latter to be used when demanded by a certain proportion of the electors or by a majority of representatives from a majority of provinces.

Under a Constitution such as here outlined, Government of the People, for the People, by the People would be secured to the Australian Commonwealth, and you would be safe in giving into the hands of the Federal Legislature the control of your most valued interests, such as would make Federation a reality and not a sham. We would be in favour—if such a Constitution can be obtained, but not otherwise—of handing over to the Federal Parliament complete legislative and administrative control of—

1. The Customs and Excise.
2. Immigration, with full power of exclusion of undesirable immigrants.
3. The railways.
4. The public debts.
5. Posts and telegraphs.
6. Interprovincial rivers.
7. A Federal Judiciary as a Court of Final Appeal.
8. Laws relating to marriage and divorce, probate and succession.
9. Quarantine.
10. Patents, trade marks, and copyright laws.

State rights we regard as only to be safeguarded by the defining and consolidating of the powers of the provincial legislature, in whom we propose to vest Crown lands, irrigation, State banking, mining laws, public health, education, factory legislation, and all other matters not specified as coming under Federal control.

In conclusion we wish to emphasise the fact that we are prepared to clothe the Federal Legislature with these colossal powers only on the condition of its Constitution being such as will ensure its being a true reflex of the will of the Australian people.

Under any other conditions we are opposed to Federation.

J.S.T. MCGOWEN  
ARTHUR GRIFFITH  
W.M. HUGHES  
J.C. WATSON  
W.A. HOLMAN  
RICHARD SLEATH  
W.J. FERGUSON  
W.G. SPENCE  
GEORGE BLACK  
FRED FLOWERS

*Worker*, 13 February 1897

## **Federation Through the Eyes of a South Australian Model Parliament\***

*Derek Drinkwater*

The following article, which derives from research for the Department of the Senate's centenary of federation publication 'A Biographical Dictionary of the Australian Senate', examines the contribution made to the federation debate by South Australia's leading turn-of-the-century model parliament.

Late nineteenth and early twentieth century South Australia was characterized by an impressive amount of civic activity. Among the many unusual, and still largely unexplored, manifestations of such activity were model parliaments. Regarded as much more than amateur debating societies (and different in nature from assemblies like Adelaide's Parliamentary Club of the early 1870s), mock parliaments were widely acknowledged as providing essential training for aspiring politicians. They were also valuable forums for the expression of opinion on major political, economic and social issues of the day. Few such institutions exemplified the model parliament ideal better than the 'Union Parliament' of the South Australian Literary Societies' Union, one of many mock parliaments in South Australia at that time.

The origins of the Union Parliament lay in the ideals and activities of the South Australian Literary Societies' Union which had been formed in 1883 following a public speaking competition in the Adelaide Town Hall between the members of city and suburban literary societies. So successful was the event that nineteen of the twenty-seven societies in the metropolis (with a total membership of 1334 eager young men), agreed on 21 August 1883 to form the South Australian Literary Societies' Union. The Union went on to broaden the scope of its activities, by publishing monthly *The Literary Societies' Journal*; by pioneering educational reforms such as the introduction of evening classes at the University of Adelaide; by organizing literary competitions, debating tournaments and reading clubs for men and women who were members of

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\* Derek Drinkwater is Assistant Editor, 'A Biographical Dictionary of the Australian Senate'.

associated societies; and by presiding over its most influential brainchild, the Union Parliament. Oddly, in a colony in the vanguard of women's suffrage, women were never admitted to membership of the Union Parliament.

The Union represented 'a connecting-bond ... of a thoroughly practical character' that made possible 'mutual intercourse by means of which "iron sharpeneth iron" through the promotion of debate and short-paper tournaments'.<sup>1</sup> 'In literary societies,' as the Union's 1899 Year Book emphasized, 'education in South Australia has a valuable ally, for while our schools, colleges, and university furnish to the young life the valuable dowry of knowledge, it remains for literary societies to provide the opportunity for the development of this endowment'.<sup>2</sup> Literary Society members clearly regarded competition as the mainspring of human advancement and, with a commendable morality, also thought of it as a check 'to the complacency that prevails where self-satisfaction is indulged, which produces stagnation or worse'.<sup>3</sup>

The Union's emphasis on the importance of education and a competitive spirit was fully realized in the proceedings of its Union Parliament. The Parliament met for the first time on 17 April 1884 'to debate the political ideas of the day' and with the aim of becoming 'not only an exercising ground for rhetorical practice, but a real factor in moulding public opinion on questions of national importance'.<sup>4</sup> This assembly of young enthusiasts keen to understand the rites of democracy consisted of one hundred members, the Union's twenty-one societies each electing one member of Parliament for every ten of its members.<sup>5</sup> Eighty-three members attended its inaugural meeting, at which a six-man Ministry and a Speaker<sup>6</sup> were elected, a Clerk of the Parliament appointed, a Constitution devised, and sitting times determined (the second and fourth Thursdays of each month, commencing in April and concluding no later than December). A six-member 'House Committee' was also formed to manage parliamentary business. The Standing Orders of South Australia's House of Assembly governed the operations of the Parliament, which met for most of its life in the Oddfellows' Hall in central Adelaide. A Hansard record of proceedings was kept, albeit in summary and not verbatim form, along with comprehensive and well-designed Notice Papers, Votes and Proceedings, Gazettes and Ministerial Policy Statements.<sup>7</sup> The

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<sup>1</sup> H.T. Burgess (ed.) *The Cyclopaedia of South Australia*, Vol. II, The Cyclopaedia Company, Adelaide, 1909, p. 161.

<sup>2</sup> *The South Australian Literary Societies' Union Year Book, 1899*, p. 5 (henceforth *Year Book*).

<sup>3</sup> Burgess, *op. cit.*, p. 161.

<sup>4</sup> *Year Book 1884*, pp. 7, 42.

<sup>5</sup> They were a colourful, broadly representative group, which included the Adelphian Society, the North Adelaide Baptist Young Men's Society, and the Unitarian Mutual Improvement Association.

<sup>6</sup> UP (Union Parliament) Rule No 12 stated: 'The Speaker need not be a member of the House, but must be a member of one of the associated Societies.' Such was the case with W.C. Calder (1825–1905), Speaker, 1884–94, and initially also with G.F. Hussey (1852–1935), the first Clerk of the UP, its Speaker, 1894–1918, later an MUP (Member of the Union Parliament).

<sup>7</sup> The records of the Union Parliament are held in the Mortlock Library, State Library of South Australia.

parliamentary machinery also included, at various times, a Leader and Deputy Leader of the Opposition, Government and Opposition Whips, and a Deputy Speaker and Chairman of Committees. Its modest place of meeting and the youth of most of its members aside, the Union Parliament might easily have passed for the real thing. The citizens of Adelaide who attended Union Parliament debates as onlookers seemed to take at least part of the proceedings seriously, but perhaps not as seriously as the Union Parliamentarians took themselves.

As the *Cyclopedia of South Australia* later pointed out, ‘the cultivation of debating power, familiarity with Parliamentary forms and usages, and acquaintance with the Parliamentary Standing Orders [were] of immense service’<sup>8</sup> to Union Parliamentarians, many of whom later entered colonial, state or federal politics. Ten members of the first Union Parliament were destined for colonial or state political careers, nine in South Australia and one in New South Wales. Three out of the ten also entered federal politics, one as a senator, the other two serving in the House of Representatives.<sup>9</sup> The Union Parliament’s first Premier, John Greeley Jenkins, dubbed a ‘political acrobat’ by one of his critics, was to become Premier of South Australia. Union Parliament attendance during 1884 averaged sixty members over sixteen meetings, eleven seats were declared vacant for non-attendance, eleven members resigned, two being re-elected, and five bills were introduced.

The subject of federation figured in Union Parliament proceedings from the start. No issue, not even the much debated ones of women’s suffrage and the payment of members of Parliament, was discussed as vigorously or at such length by these keen and serious (albeit bogus) members of Parliament as was the federation of Australia’s six colonies. Since the idea was first mooted in the mid-nineteenth century, most South Australians had favoured some form of federal compact. Uneasy about recent regional activity by Germany and France, representatives of Australia’s six colonies met in Sydney in late 1883 to devise means of dealing with important matters of common concern such as defence, an initiative which resulted in the establishment of the Federal Council of Australasia in 1885. At the opening of the Union Parliament on 8 May 1884, the Rev. W. Roby Fletcher, who, as Vice-President of the South Australian Literary Societies’ Union acted as ‘Governor’, told ‘Honorable Gentlemen of the Union Parliament’ that ‘it is a matter for regret that the labors of the recent convention, held in Sydney, in reference to federation have as yet resulted in no direct benefit. My Government will use every opportunity to work in harmony with the Governments of the other colonies, with the aim of arriving at a compact and federal union’.<sup>10</sup>

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<sup>8</sup> Burgess, op. cit., p. 162.

<sup>9</sup> T.H. Brooker, D.J. (later Sir David) Gordon, E.W. Hawker, J.G. Jenkins, E. (later Sir Edward) Lucas, C.R. Morris, W.D. Ponder, T.H. Smeaton, J. Vardon and H. Willis.

<sup>10</sup> *Year Book 1885*, p. 66. Each issue of the South Australian Literary Societies’ Union *Year Book* contained a detailed summary of the previous year’s Union Parliament proceedings.

The forms and subjects of Union Parliament debate closely mirrored those of ‘real’  
Parliaments as this extract from its Hansard illustrates.

*Union Parliament Hansard*, 17 July 1890 (looseleaf)  
Mortlock Library, State Library of South Australia

On 22 May 1884, T.H. Smeaton (Caledonian Literary Club: Yatala),<sup>11</sup> indicated his intention to ask the ‘Premier’, J.G. Jenkins (Adelaide Literary Society: Sturt), to ‘inform the House if any definite policy has been formed on the question of a Federation of Australian colonies?’<sup>12</sup> Jenkins, perhaps unsure of the mood of the House, and because he disagreed with recent developments, prevaricated and the debate was stalled. A.W. Piper (Adelaide Literary Society: Albert), remained unimpressed by Jenkins’s hesitancy, stressing that ‘the secret diplomacy of the Government respecting the Federation policy was unnecessary, and only an excuse’.<sup>13</sup> Jenkins was sceptical of the decisions of the Sydney meeting, arguing that ‘the popular will would be overruled by the proposed tribunal [Federal Council] of ten members’. He considered also that it had failed to address the major obstacle to a federal union, ‘the assimilation of the tariffs’.<sup>14</sup> In an attempt to steal a march on the champions of the Federal Council, Jenkins successfully moved a motion ‘that an address be presented to Her Most Gracious Majesty the Queen, praying Her Majesty to cause to be introduced into the Imperial Parliament a “Colonial Enabling Federation Bill”’.<sup>15</sup>

Support for federation at this time was strong, but usually qualified. J.C. Genders (Adelaide Literary Society: Gladstone), although he believed that ‘we should be stirring in this matter at once’, nevertheless favoured a gradual approach whereby ‘federation in our defences and other matters would pave the way for complete federation’.<sup>16</sup> On 23 October 1884, Genders successfully moved ‘that in the opinion of this House it is desirable that the Governments of the other colonies should be immediately communicated with upon the necessity for a Federal Defence Force’.<sup>17</sup> Encouraged by the example of the United States and Canada, several members also favoured the adoption of ‘a more comprehensive constitution’<sup>18</sup> to underpin the federal union. Most members supported the approach taken by the Federal Council. By 1888, when South Australia at last joined the Federal Council—she was to remain a member until 1890—most Union Parliament members favoured federation, although differences of opinion persisted about the detail. The ‘Governor’, Dr Allan Campbell,<sup>19</sup> had made clear in his opening speech to the Union Parliament on 26 April 1888 that ‘my Government will take the necessary steps to have this colony represented in the Federal Council of Australasia’.<sup>20</sup> On 2 August 1888, Union Parliamentarians voted that members of

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<sup>11</sup> ‘Caledonian Literary Club’ refers to the literary society which had elected Smeaton and ‘Yatala’ to the district he represented.

<sup>12</sup> *UP Notice Paper*, 22 May 1884, p. 1.

<sup>13</sup> *UP Hansard*, 22 May 1884, p. 3.

<sup>14</sup> *UP Hansard*, 13 November 1884, p. 2.

<sup>15</sup> *Year Book 1885*, p. 69.

<sup>16</sup> *UP Hansard*, 23 October 1884, p. 1.

<sup>17</sup> *Year Book 1885*, p. 69.

<sup>18</sup> *UP Hansard*, 13 November 1884, p. 2.

<sup>19</sup> Dr A. Campbell (1836–1898); a SA MLC (Member of the Legislative Council), 1878–98.

<sup>20</sup> *Year Book 1889*, p. 75.

Parliament, not the electors, should choose Federal Council representatives.<sup>21</sup> Opening the sixth Union Parliament on 25 April 1889, Dr Campbell was able to report that ‘at the Federal Council, held in Hobart early this year ... the deliberations ... were characterised by an increased amount of united feeling and federal sentiment’.<sup>22</sup>

A resolution advocating an early federal union was adopted at the Australasian Federation Conference held in Melbourne in February 1890. Later that year the South Australian Literary Societies’ Union expressed its support for this developing ‘Federal Sentiment’, which was reflected in ‘a growing desire for uniformity, if not unification’ on the part of the Australian colonies, by agreeing to participate in an ‘Intercolonial Debate Tournament’.<sup>23</sup> Three members of the Union Parliament represented South Australia at the first debating tournament, held in Melbourne in June 1891. The New South Wales team, led by W.A. Holman, later Premier of New South Wales, argued that proposals for federation were ‘at the present juncture out of place and premature’. South Australia’s representatives, however, ‘maintained that in all essentials of the body politic ... Australians were already one, and federation was the desire of the people’.<sup>24</sup> On 24 April 1890, Dr Campbell told Union Parliamentarians that ‘my Government notes with satisfaction the greatly increased interest now being taken in the question of Federation ... and will do their utmost to bring about this, which they consider a most desirable and beneficial state of things’.<sup>25</sup>

In a major debate on ‘Australian Federation’ in July 1890, the ‘Premier’, J.C. Hamp (St Andrew’s Literary Association: West Torrens), moved a successful motion that the Union Parliament elect by ballot seven of its members to attend a ‘National Australasian Convention’ to consider and report upon a scheme for a ‘Federal Constitution of the Australian Colonies’. Hamp feared that ‘unless federation came we would have civil war sooner or later,’ considering that ‘the jealousy between Victoria and New South Wales did not require much kindling to result in this’. He insisted on ‘the federal compact’ being ‘a rigid one’ that would be difficult to tamper with let alone reconstitute. While not ruling out Privy Council appeals, Hamp was a strong advocate of ‘a Supreme Federal Court’. W. Guthrie (Unley Mutual Improvement Society: Barossa), convinced that federation was too important a subject to be a party matter, favoured a federal union on the grounds that it would strengthen the English-speaking peoples in this part of the globe. He was also alarmed by German and French colonisation in the region, a threat considered by Hamp to be a ‘myth’. For Guthrie, the greatest obstacle to federation remained ‘the unreliability of the New South Wales Premier [Sir Henry Parkes]’. Guthrie was certain that ‘there was intelligence enough now in the colonies to mark out a satisfactory plan of federation. There was ample reason for us to unite, and to rise and strive to bring it about’. The ‘Chief Secretary’, A.E. Norman (Hindmarsh Young Men’s

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<sup>21</sup> *ibid.*, p. 78.

<sup>22</sup> *Year Book 1890*, p. 71.

<sup>23</sup> *ibid.*, pp. 5, 6.

<sup>24</sup> *Year Book 1891*, pp. 79, 80.

<sup>25</sup> *ibid.*, p. 67.



Society: Gumeracha), saw an important potential role for the Union Parliament in fostering greater informal discussion of federation, one similar to that performed by the Federal Council of Australasia, which was itself ‘something like an Australian Union Parliament’. An opponent of parochialism in the federation debate, he argued that ‘we must go to this [1891] convention untrammelled, and with a true federal spirit’. In a more concrete vein, Norman advocated, for the new Australia, the appointment of governments by the Parliament or the Governor-General; the nomination of Governors by the Crown, the method of electing Lieutenant-Governors to be decided upon by the colonies. Norman concluded with a flourish that ‘we enjoy the fullest liberty of any nation under the sun, and have escaped the license, to a certain extent, of the Americans’. He was convinced that if the colonies federated, ‘we shall call forth the admiration of the civilized world ... May we not be proud to say, “I am an Australian”’.<sup>26</sup>

The decision by the National Australasian Convention, which met in Sydney in March and April 1891, to adopt a draft bill to constitute a Commonwealth of Australia, provided a further opportunity for spirited debate on the federal cause in the make-believe political arena of the Union Parliament. On 4 June 1891, W. Guthrie, now ‘Premier’, proposed that a consultative process be instituted in the colony to divine South Australians’ views of the Bill, one designed to take greater account of public opinion than the machinery of the Sydney Convention had permitted. He argued that the province of South Australia should be divided into four electoral districts, each to return five members, who would then consider the Bill in detail, and determine whether or not South Australia ought to join the federal union. H.J. Milne (Hindmarsh Young Men’s Society: Wallaroo), recommended that another ‘intercolonial convention’ be held, to allow colonial Parliaments to put forward fresh amendments to the Bill. He also moved, unsuccessfully, ‘that with a view of obtaining public opinion on this Bill, the Chamber of Commerce, the Chamber of Manufactures, the Employers’ Union, the Trades and Labour Council, and the Farmers’ Association, be asked to give evidence before a [Union Parliament] select committee’. Following impassioned discussion and complex deliberations focussing on the representativeness of existing convention arrangements, the Parliament finally endorsed the idea of a convention to examine the Bill. It also agreed that each convention delegate should receive thirty pounds for his services. On 16 July 1891, the Union Parliament resolved ‘that this House approves generally of the proposed Bill for the constitution of the Commonwealth of Australia’.<sup>27</sup>

One matter raised in June and July 1891 during the Union Parliament debates on the resolutions of the Sydney Convention was to become a central and recurring subject of parliamentary discussion. It concerned the role of the proposed Senate, which G. Jenkins (Parkside Literary Society: Stanley), believed should have co-ordinate powers with the House of Representatives, to allow the smaller colonies, handicapped by inadequate representation in the ‘Lower House’, an effective voice in the governance of the federal union.<sup>28</sup> At the Melbourne intercolonial debate tournament the previous month, Union Parliamentarians had expressed their concern that, although ‘each colony would be

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<sup>26</sup> *UP Hansard*, 17 July 1890, pp. 29, 31.

<sup>27</sup> *Year Book 1892*, pp. 91–93.

<sup>28</sup> *UP Hansard*, 2 July 1891, p. 47.

represented on the population basis in the House of Representatives ... if the representation on the Senate were not equal there would be a danger of the separate States losing their individuality and sovereignty'.<sup>29</sup> By now the Presidents, as well as the Vice-Presidents, of the South Australian Literary Societies' Union performed the role of Governor and opened parliamentary proceedings. On 21 April 1892, the task fell to the Union President, J.G. Jenkins, then a minister in the SA government, who declared in his opening speech that 'as the Parliament of this province has not yet decided in what manner the Draft Bill for the establishment of the Commonwealth of Australia should be dealt with, you will be asked to reaffirm the resolution passed by the last Union Parliament, referring the Bill to a local convention for consideration'.<sup>30</sup>

There was clearly disquiet in the Union Parliament and the community about what was perceived as the unrepresentative nature of convention arrangements. A gathering of colonial Premiers in Hobart in January and February 1895 may have relieved this concern. It approved a draft enabling bill which gave stronger emphasis to the popular election of Federal Convention members than had hitherto been the case. Two of the ten South Australian delegates elected in March 1897 to another national convention to devise a Federal constitution were the prominent South Australian lawyer-politicians, Patrick McMahon Glynn and Josiah Symon, Presidents of the South Australian Literary Societies' Union in 1895 and 1898 respectively.

Opening the twelfth Union Parliament as 'Governor' on 2 May 1895, Glynn made it clear that 'believing Federation of the Australasian Colonies to be desirable, resolutions bearing thereon will be placed before you at an early date'. The Union Parliament, after what was perhaps a token delay to indicate its independence of the Crown, at last took the vice-regal hint on 13 June, and resolved that 'steps should be at once taken to deal with the question [of federation] on the lines of the draft Bill prepared at the Hobart Conference of Premiers'.<sup>31</sup> Throughout the 1890s the question of federation was also debated keenly by the colony's other model parliaments, particularly those at Mount Gambier (fifty-two members) and Gawler.

Serving South Australian politicians always attended, and, true to form, made speeches at the opening of each Union Parliament. C.C. Kingston, Premier of South Australia, 1893–99, and South Australia's leading federationist, 'regretted that in his political training he had not [had] the advantages which [Union Parliamentarians] possessed'.<sup>32</sup> J.H. Gordon<sup>33</sup> was impressed by the 'sham-fighting and manoeuvring ... earnestness and method' displayed by Union Parliamentarians. T.H. Brooker, a member of the first Union Parliament, 'felt like a schoolboy returning to the schoolhouse'. J.V. O'Loghlin<sup>34</sup>

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<sup>29</sup> *Year Book 1891*, p. 80.

<sup>30</sup> *Year Book 1893*, p. 69.

<sup>31</sup> *Year Book 1897*, p. 123.

<sup>32</sup> *Year Book 1892*, p. 89.

<sup>33</sup> J.H. (later Sir John) Gordon (1850–1923); a SA MLC, 1888–92, 1893–1903.

<sup>34</sup> J.V. O'Loghlin (1852–1925); a SA MLC, 1888–1902, MHA (Member of the House of Assembly), 1910–12. A senator for SA 1907, 1913–20 and 1923–25.

praised institutions like the Union Parliament, not only as ‘splendid training grounds’ for would-be politicians, but because ‘they also exerted an educational influence upon constituencies, which was very important, as an intelligent Parliament could only be a reflex of intelligent constituencies’.<sup>35</sup> A number of Union Parliamentarians later made names for themselves in public life.<sup>36</sup>

At the first session of the Australasian Federal Convention which took place in Adelaide in March and April 1897, members adopted a draft constitution for the proposed federal union based on that of 1891. It was amended at the second session held in Sydney in September 1897. The Union Parliament followed events closely and debated the ‘Commonwealth Bill’ at considerable length. On 10 June 1897, a motion by the ‘Premier’, W.G. Auld (Rose Park Literary Society), that a nine-member committee be appointed to examine the Bill, was agreed to.<sup>37</sup> Few substantive recommendations appeared in the two reports of this ‘Drafting Committee’, a committee clearly inspired by those which had played an integral part in the deliberations of the Adelaide Convention. Patrick McMahon Glynn and J.H. (later Sir Josiah) Symon, presidents of the South Australian Literary Societies Union in 1895 and 1898, were among the SA representatives at the Convention, Symon serving as Chairman of the Judiciary Committee. Both were later members of the first federal parliament. The most interesting Union Parliament intervention in relation to the ‘Commonwealth Bill’ was made by S.B. Hunt (Rose Park Literary Society). Hunt’s proposal, similar to one put forward by Glynn at the Adelaide Convention, was that the words ‘invoking Divine guidance’ be inserted in the Bill’s preamble. Hunt’s words were accepted and his motion successful.<sup>38</sup> Although the spirit of Glynn’s proposal was taken up, his form of words—‘invoking Divine Providence’—was rejected after robust debate in favour of ‘humbly relying on the blessing of Almighty God’.<sup>39</sup>

In Melbourne from January to March 1898, at the Federal Convention’s third session, a ‘Draft of a Bill to Constitute the Commonwealth of Australia’ was adopted for enactment by the British Parliament. It was also decided to allow a popular vote on the decision. On 28 April 1898, Symon, as ‘Governor’ of the Union Parliament, assured members in his opening speech that ‘no effort will be spared to ensure an intelligent vote being given’. Union Parliamentarians signalled their approval of the ‘Commonwealth Bill’ on the voices on 26 May 1898.<sup>40</sup>

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<sup>35</sup> *Year Book 1893*, pp. 71–72. Kingston spoke on 23 April 1891. Gordon, Brooker and O’Loghlin’s comments were made on 21 April 1892.

<sup>36</sup> For example, E.A. Anstey, E.L. Batchelor, B. Benny, E.E. Cleland, W.J. Denny, H.R. Homburg, R. Homburg, A. Poynton and J.H. Vaughan.

<sup>37</sup> *Year Book 1898*, pp. 57–58.

<sup>38</sup> *Year Book 1898*, pp. 59–60.

<sup>39</sup> *Official Record of the Debates of the Australasian Federal Convention*, 22 April 1897, pp. 1184–86, 1188–89; Sir Robert Garran, *Prosper the Commonwealth*, Angus and Robertson, Sydney, 1958, p. 113. As Garran put it: ‘The Convention was sympathetic in principle with Glynn’s appeal, but critical of his form of words.’

<sup>40</sup> *Year Book 1899*, pp. 68–69.

Voting for the Bill at popular referenda later that year was strong, especially in South Australia, although progress was delayed by insufficient support in New South Wales. The impasse created by the uncertainty of New South Wales electors was resolved at a Premiers' Conference and by the further amendment of the Bill in January and February 1899. Sir Charles Todd, 'Governor' in 1899, told Union Parliamentarians on 27 April that the Bill, soon to be re-submitted, this time successfully, to a referendum, enjoyed 'the cordial and active support of my Ministers, [who] trust that Federation will shortly be accomplished,' while on 31 August 1899, the Union Parliament resolved 'that an address be forwarded for presentation to Her Most Gracious Majesty the Queen, praying that Her Majesty may be pleased to cause a measure to be submitted to the Imperial Parliament to give effect to the Federal Constitution of Australasia'.<sup>41</sup> Like most such addresses devised by Union Parliamentarians this was almost certainly consigned to the wastepaper basket. In the event, the 'Commonwealth Bill' creating Australia received the Royal Assent on 9 July 1900, and the new nation came into being on 1 January 1901.

The issue of federation had provided a great fillip to Union Parliament membership, which stood at 104 in 1899, the highest number since 1893. This ensured that there were many voices to debate an issue which came to assume great importance to the Union and state parliaments: future South Australian electoral and voting arrangements under the new Commonwealth. The opening shot was fired by the ubiquitous J.G. Jenkins, now South Australia's Chief Secretary. As acting 'Governor', in the absence through illness of the 'Governor', Dr E.C. Stirling, Jenkins told members on 10 May 1900 that 'on the accomplishment of Federation you will be asked to consider the advisability of altering the electoral districts for both Houses, with a view of reducing the number of representatives. In that event you will be asked to reduce the salaries of [Union Parliament] Ministers and members'.<sup>42</sup> The first part of this proposal was more welcome to Union Parliamentarians than the second. In July and August 1900 Union Parliament members debated several measures initiated by the 'Premier', F.W. Richards (Maughan Church Literary Society), regarding South Australia's electoral and voting arrangements as a state of the approaching Commonwealth. Most controversial of these was the proposal 'that the whole of the Province be one electorate for the election of members of the Federal House of Representatives, and that the Hare-Spence system of effective proportional voting be adopted in elections for both Federal Houses of Parliament'.<sup>43</sup> Union Parliamentarians debated the proposal keenly on this occasion, and, as in the state Parliament, controversy continued for years over 'Hare-Spence', the South Australian reformer Catherine Helen Spence's modified version of Thomas Hare's proportional representation system, which was aimed at securing better representation for minorities. Miss Spence, an unsuccessful Federal Convention candidate in 1897, campaigned in vain in 1899 and 1900 for the introduction of 'effective voting' (a form of proportional representation) in federal elections. Her supporters persisted, most notably the former Union Parliament member, Howard

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<sup>41</sup> *Year Book 1900*, pp. 69, 74.

<sup>42</sup> *Year Book 1901*, p. 67.

<sup>43</sup> *Year Book 1901*, pp. 69–74.

Vaughan, who drafted South Australia's first proportional representation bill in 1902. It was rejected annually by South Australia's Parliament eight times.

On 9 May 1901, the Duke of York (later King George V) opened the first Commonwealth Parliament in Melbourne. That evening in Adelaide, at its first meeting for the month, the Union Parliament's House Committee presented its report on future parliamentary discussion of 'Federal legislation'. The Committee recommended that the Union Parliament be conducted as a 'State House', on the grounds that the Parliament was better able to deal with state concerns than federal ones. W.L. (later Sir Lennon) Raws (Flinders Street Baptist Literary Society), dissented, arguing that the Union Parliament should be conducted as a 'Federal House', the discussion of federal matters being of 'supreme importance'. Perhaps emboldened by the achievement of federation, J.T. Kirkman (Pirie Street Literary Society), took the opportunity to move 'that an address be presented to His Majesty King Edward VII, praying His Majesty to allow the Constitution of the State of South Australia to be so amended as to give its people the power of electing their own Governor'.<sup>44</sup>

Federation had come to pass and the great attention accorded the subject by the Union Parliament over the preceding seventeen years reflected well on its members. There was clearly considerable interest in and support for federation among Union Parliamentarians. Did they see themselves, however, as contributing very much that was original to the federation debate, or were they content with merely reaffirming the persuasive and widely-accepted pro-federation sentiments of leading colonial advocates of a federal union, particularly those such as Symon and Glynn, who were powers in the Literary Societies' Union? Did most of them agree with J.C. Hamp, who was convinced that 'the wisdom of statesmen', rather than the vision of electors, was the main force behind federation? Or, like W. Guthrie, did they believe that voters were much more interested in, and informed about, the subject than Hamp would concede?<sup>45</sup> Union Parliament records, notably its Hansards, suggest that the majority of Union Parliamentarians, who came from all stations in life, favoured federation well before the mass enthusiasm for a federal compact began gathering final momentum. In this, rather than just repeating or echoing the opinions of the colony's leading pro-federation public men, they were assuredly representative of the majority of South Australian voters, who, as early as the mid-1880s, strongly supported moves towards federation. From the early 1890s Union Parliamentarians were also intent on securing greater public involvement in the federation process.

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<sup>44</sup> *UP Votes and Proceedings*, 9 May 1901, p. 7–8.

<sup>45</sup> *UP Hansard*, 17 July 1890, pp. 29, 31.

On 9 May 1901, the Duke of York opened the first Commonwealth Parliament in Melbourne. That evening, at its first meeting for the month, the Union Parliament House Committee presented its report—reproduced in the above *Votes and Proceedings*—on whether the Parliament should conduct itself in future as a ‘Federal’ or a ‘State’ House.

The matter was listed for debate in the above *Notice Paper* a fortnight later.

*Union Parliament Votes and Proceedings*, 9 May 1901 and *Notice Paper*, 23 May 1901 (looseleaf)  
Mortlock Library, State Library of South Australia

The fortunes of the Union Parliament continued to prosper after federation. On 14 July 1904, one hundred and sixty-three past and present members of the Union Parliament celebrated its coming of age at a dinner in the banqueting room of the Adelaide Town Hall, in the presence of South Australia's Governor, Sir George Le Hunte. His Excellency presided over a gathering which included most of the luminaries of Union Parliament history. Among those present were J.G. Jenkins, Premier of South Australia since 1901, and W.B. Propsting, a Member of the Union Parliament in the mid-1880s, who had resigned three days before as Premier of Tasmania. Despite some setbacks, such as a serious decline in membership in the mid-1910s, the institution appeared to adapt inventively to new times. Constitutional arrangements and electoral matters remained of great interest to Union Parliament members. The 'Ministerial Policy' statement of the thirty-second Union Parliament's reformist ministry listed the following legislative proposals under the heading 'Constitutional Reform': (a) Elective Ministries, (b) Dual Vote for Legislative Council, (c) Compulsory Enrolment, (d) One Electoral Roll for Commonwealth and State.<sup>46</sup> There is no evidence that its members regretted the creation of an Australian Commonwealth.

The proceedings of the Union Parliament, which until the First World War had resembled those of a colonial Parliament during the heyday of responsible government, were increasingly characterized by over-serious debates between conservatives and reformers. The days of Union Parliament smoking socials, Torrens River cruises, billiards tournaments and card evenings were long past. A Labor Government, led by C.S. McHugh,<sup>47</sup> took office for the first time in the Union Parliament on 25 September 1918. Its more radical policies—'to democratise the Upper House with a view to its ultimate abolition'<sup>48</sup>—were much criticised by, among other conservative members, the young George McLeay<sup>49</sup> (St Andrew's Literary Association). The end for the Union Parliament came very suddenly. Whether this was caused by the social changes resulting from the First World War, or by a conservative boycott of the now Labor-dominated Parliament, is unclear. Only eleven members, representing eight societies, attended its final meeting on 30 October 1918. The last Union Parliament Notice Paper, dated 20 November 1918, had already been printed, but its contents were never debated. An admirable example of participative democracy, which flourished during a period when civic pride and public virtue were valued more highly than they are today, an institution very much of its time thus passed into history.

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<sup>46</sup> *UP, Ministerial Policy Statement*, 17 June 1915, p. 13.

<sup>47</sup> C.S. McHugh (1887–1927); a Senator for SA, 1923–27. McHugh was one of a number of members elected by Union Parliamentarians, rather than by literary societies, a practice introduced in the early 1910s.

<sup>48</sup> *UP Votes and Proceedings*, 25 September 1918, p. 21.

<sup>49</sup> G. McLeay (1894–1955); a Senator for SA, 1935–47, 1950–55.