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THE INTENTIONS OF THE FRAMERS OF THE  
COMMONWEALTH OF AUSTRALIA CONSTITUTION  
IN THE CONTEXT OF THE DEBATES AT THE  
AUSTRALASIAN FEDERATION CONFERENCE OF 1890,  
AND THE AUSTRALASIAN FEDERAL CONVENTIONS  
OF 1891 AND 1897-8.

THE UNDERSTANDING OF THE FRAMERS OF THE  
CONSTITUTION AS TO THE MEANING AND PURPOSE  
OF THE PROVISIONS OF THE CONSTITUTION WHICH  
THEY DEBATED AT THESE ASSEMBLIES.

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## ABSTRACT

The thesis examines the speeches and debates in the Australasian Federation Conference of 1890, and the Australasian Federal Conventions of 1891 and 1897-8 for the purpose of establishing what the framers of the Commonwealth Constitution understood to be the meaning and purpose of the individual sections of the Constitution upon which they were called upon either to support or oppose.

The particular matters involved in the examination are the manner and form in which the principles of responsible government were incorporated into the constitution, and the relationship of these principles to the powers of the Senate; the crisis in the 1891 Convention in relation to the powers of the Senate over money bills; the significance of the difference in composition of the Convention of 1891 compared with that of 1897-8; the significance of the classification of the Constitution as an indissoluble federation under the Crown; the principles of responsible government and the provisions of s.57 in the context of the deadlock over Supply in 1975; the meaning and purpose of s.41 preserving the rights of voters qualified to vote in State elections for the lower Houses, and the misconceptions in relation thereto; the position of aborigines under the Constitution; the meaning and purpose of the “special laws power” in the light of the 1967 Constitutional referendum, and its interpretation by the High Court in the *Hindmarsh Island Bridge case*; the relationship of the intentions of the framers of the Constitution to the interpretation by the High Court of the Financial Clauses of the Constitution, and the provisions of s.92; and the meaning and purpose of the “external affairs” power, and the “corporations power” as understood by the framers of the Constitution.

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## DECLARATION

I hereby declare that this submission is my own work and that, to the best of my knowledge and belief, it contains no material previously published or written by another person nor material which to a substantial extent has been accepted for the award of any other degree or diploma of a university or other institute of higher learning, except where due acknowledgment is made in the text.

SIGNED \_\_\_\_\_

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# TABLE OF CONTENTS

	<i>Pages</i>
<b>Introduction</b>	
The significance of the intentions of the framers of the Commonwealth Constitution.	1
 <b>PART I</b>	
<b>Responsible government and the powers of the Senate</b>	
 <b>Chapter 1</b>	
The Australasian Federation Conference 1890.	10
 <b>Chapter 2</b>	
Responsible Government and the Powers of the Senate.	33
 <b>Chapter 3</b>	
The Crisis which almost wrecked the 1891 Convention.	57
 <b>Chapter 4</b>	
Responsible Government in the Convention of 1897-8.	80
 <b>Chapter 5</b>	
The crisis of 1975 and the relation of the principles of responsible government to deadlocks over Supply. The meaning and purpose of s.57.	117
 <b>PART II</b>	
<b>The intentions of the framers in relation to particular sections of the Constitution</b>	
 <b>Chapter 6</b>	
Misconceptions of the intentions of the framers of the Constitution in relation to Section 41 of the Constitution.	149
 <b>Chapter 7</b>	
Aborigines under the Constitution. The Special Laws power (s.51(xxvi)), and the purpose of s. 127.	171
 <b>Chapter 8</b>	
The Hindmarsh Bridge controversy and the Special Laws power.	188

## **PART III**

The intentions of the framers in respect of the financial powers of the Commonwealth and the provision of the freedom of interstate trade, commerce and intercourse

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### **Chapter 9**

The power of the Commonwealth under the Financial Clauses. 219

### **Chapter 10**

The use of the Convention Debates in aid of the interpretation of s.92 of the Constitution. 244

## **PART IV**

The sections upon which the Tasmanian Dam Case was based. The expansion of Commonwealth power by the use of the “external affairs” power, and the corporations power

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### **Chapter 11**

The “external affairs” power. 264

### **Chapter 12**

The Corporations Power. 293

## **PART V**

### **Conclusions**

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### **Chapter 13**

Conclusions. 308

### **Appendix**

Report on the conditions of the Chinese population of Victoria (17/9/1868).

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# ABBREVIATIONS

<b>ALJ</b>	<b>The Australian Law Journal</b>
<b>CLR</b>	<b>Commonwealth Law Reports</b>
<b>UNSWLJ</b>	<b>University of New South Wales Law Journal</b>
<b>ANL</b>	<b>Australian National Library.</b>
<b>ALJR</b>	<b>The Australian Law Journal Reports.</b>
<b>C.O.</b>	<b>Colonial Office, Kew, London.</b>
<b>UNSWLR</b>	<b>The University of New south Wales Law Review.</b>
<b>HCA</b>	<b>The High Court of Australia On Line.</b>

Federation Conference Debates, 1890. Official Record of the Proceedings and Debates of the Australasian Federation conference, 1890.

Convention Debates, 1891. Official Report of the National Australasian Convention Debates, Sydney 2 March to 9 April 1891.

Convention Debates, 1897-8. Official Report of the National Australasian Convention Debates, Adelaide, March 22 to May 5, 1897. Adelaide 1897. Reprinted Sydney 1986.

Official Record of the debates of the Australasian Federal Convention Sydney, 2<sup>nd</sup> to 24<sup>th</sup> September, 1897, Sydney, 1897. Reprinted Sydney 1896.

Official Record of the Debates of the Australasian Federal Convention, Third Session, Melbourne 22<sup>nd</sup> February to 17 March 1898. Reprinted Sydney 1986.

Official Record of the Debates of the Australasian Federal Convention. Third Session. Melbourne, 20<sup>th</sup> January to 17<sup>th</sup> March, 1898. Reprinted Sydney 1986.

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# INTRODUCTION

The purpose of this thesis is to examine the debates in the Australasian Federation Conference of 1890, and the Australasian Federal Conventions of 1891 and 1897-8, which led to the framing of the Commonwealth Constitution in 1900, in order to ascertain what the participants in those debates understood to be the meaning and purpose of the specific provisions for which they were called upon to support or oppose. Such an attempt to ascertain the intentions of the framers of the Constitution needs no justification from an historical point of view. However, it is otherwise in the legal field. Both Justices of the High Court and legal academics have asserted that such an inquiry seeks to discover the subjective intentions of the framers, which are either non-existent or impossible to ascertain, and, in any case, are irrelevant to the interpretation of the Constitution. Until recent times the use of the Convention debates in matters before the Court has been rejected by the High Court.

In 1904, O'Connor J., who had attended the 1897-8 Convention as a delegate, summarised the then position of the Court in relation to the use of the Debates in matters before the Court:

We are only concerned here with what was agreed to, not with what was said by the parties in the course of coming to an agreement.<sup>1</sup>

Barton J. also issued a caution in relation to the use of the Debates:

Individual opinions are not material except to show the reasoning upon which the Convention formed certain decisions. The opinion of one member could not be a guide as to the opinion of the whole. ...You could get opinions on each side from the speeches in debate.<sup>2</sup>

Despite the rejection of the use of the Convention Debates, Griffith C.J., Barton and O'Connor J.J., gave full weight to the overwhelming federalist intentions of the framers. In doing so they advanced the theory of “reserved powers,” and the immunity of State instrumentalities. They understood the nature of the concessions made to induce the smaller colonies to enter the federation, and to allay their fears of encroachment by the central government into their domestic affairs.

The *Engineers' case*<sup>3</sup> constituted a watershed in constitutional interpretation, and has occupied a position of central importance ever since. The intention and meaning of any

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<sup>1</sup> *The Municipality of Sydney v The Commonwealth* (1904) 1 CLR, 208.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Amalgamated Society of Engineers v Adelaide Steamship Co. Ltd.* (1920) 28 CLR 456.

provision of the Constitution was to be ascertained solely by the use of legal methods of construction, inherited from British jurisprudence, applied to the text of the constitution document. This method, as developed by Sir Owen Dixon, has been described as “literalism,” or “legalism.” It has been criticised as having distorted the federal structure of the Constitution, and, contrary to the specific intentions of the framers of the Constitution, has been responsible for a significant enhancement of the powers of the central government. In more recent years, the High Court has been attacked for using even more radical methods of interpretation to develop a theory of implied rights as a substitute for the absence of a formal Bill of Rights in the Constitution. During the Convention Debates the framers specifically rejected the incorporation of a Bill of Rights into the Constitution. The incorporation of such a schedule of rights, when put to the people in a referendum under s.128 of the Constitution in 1944 was rejected.<sup>4</sup>

## CHANGED CIRCUMSTANCES

That circumstances beyond the contemplation of the framers of the Constitution have arisen in the modern world has been the basic motivation of the High Court in refraining from considering as relevant the actual intentions of the framers. As expressed by Sir Anthony Mason, a former Chief Justice of the High Court, the responsibility of the Court is:

to develop the law in a way that will lead to decisions that are humane, practical and just

it is unrealistic to interpret any instrument, whether it be a constitution, a statute or a contract, without any regard to fundamental values.<sup>5</sup>

Those of the Justices of the Court who adopt Sir Anthony’s approach appear to subscribe to the “living force” theory of interpretation attributed to Andrew Inglis Clark. This approach is the complete opposite of the principle of interpreting the Constitution in the light of the intentions of the framers, leaving to the people the task of adjusting the Constitution under s.128 where changed circumstances render it ineffective. The contrast between the “living force” theory and the “original intent” theory has been argued in legal academic circles. In an article in 1990<sup>6</sup>, Professor Greg Craven reviewed the arguments for

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<sup>4</sup> It is true that the guarantees of religious freedom and freedom of the Press put to the people by the referendum were not the sole subjects of “*The Constitution Alteration (Post-War Reconstruction) Bill* of 1944. The Bill incorporated “Fourteen Powers” which attracted powerful opposition because of the attempt to transfer from the States to the Commonwealth a whole raft of important powers.

<sup>5</sup> Sir Anthony Mason “Future Directions in Australian Law,” *Monash University Law Review*, (1987) 147 at p.157.

<sup>6</sup> *Original intent and the Australian Constitution—coming soon to a Court near you*: Greg Craven. (1990) 1 PLR, pp.166 et seq.



and against the adoption of the “original intent” approach. He noted that some commentators had criticised the High Court:

accusing it of adopting methods of constitutional interpretation which have subverted the intentions of the Founding Fathers for a strongly federal nation, and instead delivered the States bound hand and foot into the crushing embrace of the Commonwealth.<sup>7</sup>

He suggested that, behind the trend towards the “progressive” interpretation of the Constitution, there is the view that the Constitution is out of date, and is ill suited to provide an effective mechanism for the development of a national government in the modern era. Stress is laid upon the difficulty of achieving constitutional change by referenda under s.128. Sir Anthony Mason in 1986 dealt with the argument of those who oppose “progressive” interpretation that the Constitution provides for alteration by s.128 and not by judicial interpretation:

The sting in the reminder is that the electorate has been notoriously unsympathetic to the expansion of federal powers, approving only two out of twenty-five such proposals placed before the people.

And they overlook the fact that the process of amendment is so exceptional, so cumbersome and so inconvenient that governments cannot set it in motions regularly to ensure that the Constitution is continuously updated.<sup>8</sup>

Any attempt to restrict the flexibility of the High Court in its interpretive role has been strongly criticised by Sir Daryl Dawson and Michael Coper. Sir Daryl pointed out that when interpreting a statute it is usual to describe the activity of a court as:

an attempt to ascertain the intention of the legislature. Although it is spoken of in this way we all know that it is not an attempt to ascertain the actual intention of the legislature because no such intention really exists.<sup>9</sup>

In the sense that a constitution should be capable of application to conditions which were not foreseen at the time of its creation, it should be seen as an adaptable instrument:

But we nevertheless speak in terms of intent, and original intent at that, albeit an intent which is to be determined objectively and largely from the words of the Constitution itself.<sup>10</sup>

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<sup>7</sup> *Ibid.*, G.Craven p.159.

<sup>8</sup> “The role of a constitutional court in a federation,” Sir Anthony Mason (1986) 16 *FLR* 1, at p.22.

<sup>9</sup> “Intention and the Constitution – Whose Intent?,” Sir Daryl Dawson, (1990) 6 *Australian Bar Review* p.93.

<sup>10</sup> *Ibid.*, Dawson, p.94.

He concedes that:

The accumulation of precedent not necessarily as the result of judicial activism but as the product of ordinary evolution has produced a constitutional result which would be unrecognisable by the founding fathers, and in some respects quite clearly contrary to their intentions.<sup>11</sup>

In a negative sense he paid some heed to the intentions of the framers:

I do not think that it has ever been overtly suggested here, as it has in the United States, that it is permissible to adopt a construction which demonstrably is one which those who framed the document did not intend.<sup>12</sup>

He referred to the anomalous contrast between the *First Territories Senators case* with that of the *Second Territories Senators case*. By reason of a refusal to overrule the first case, the Senators from the Territories were confirmed in their right to seats in the Senate but :

The undeniable effect of the *Second Territories Senators case* is that the High Court adopted a construction of s.122 which the majority at the time did not believe was ever intended.<sup>13</sup>

Michael Coper, whilst arguing the impossibility of application of any “original intent” theory, suggests that, if there is any common ground between the competing theories of interpretation:

It is that history is one of many relevant factors in the task of interpretation.

He suggests that:

If history is relevant at all it should be as complete as is practicable, not the kind of half-hearted history which the High Court has indulged in over the years. It is absurd for the Court to consult Quick and Garran but not the Convention Debates themselves especially if Murphy J was correct recently in *Re Pearson; Ex parte Sipka* in asserting that Quick and Garran’s preferred interpretation of section 41 of the Constitution, and their summary of the debate in relation to that section, is at odds with the interpretation supported by the debates themselves.

It is submitted that there should be an end to any suggestion that the Convention Debates are inadmissible.<sup>14</sup>

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<sup>11</sup> *Ibid.*, Dawson, p.97

<sup>12</sup> *Ibid.*, Dawson, p.100

<sup>13</sup> *Ibid.*, Dawson, p.99

<sup>14</sup> “The place of history in constitutional interpretation,” Michael Coper, in the *Commentaries to the reprint of the Convention Debates*, Sydney, 1986.

A major change in the attitude of the High Court to the use of the Convention Debates occurred with the decision in *Cole v Whitfield*.<sup>15</sup>

Despite its detailed consideration of the Convention Debates in this case, the High Court specifically denied that it was seeking, or applying, the actual intentions of the framers of the Constitution. It denied that there was any relevance in elucidating what the Court called the “subjective intentions” of the framers. Paul Schoff<sup>16</sup> has convincingly argued that this denial, and disavowal is completely illusory. He examines many of the statements of individual Justices in subsequent cases to show that the new rule of interpretation, formulated in *Cole v Whitfield*, is indistinguishable from an application of a form of “original intent” theory. He certainly does not support the adoption of any such principle of interpretation, and quotes with approval the words of Deane J., expressed during argument in the *Capital Duplicators (No 2)* case, when he questioned the search for the intentions of the framers, rather than to seek out “what the people of the country meant when they adopted the Constitution.” It might be asked that, if it is legitimate to seek out what the people meant when they adopted the Constitution, surely it is just as legitimate to ask what the framers understood to be the meaning and purpose of the clauses when they were either adopted or opposed.

Professor Craven argued that it is timely to:

scrutinise the basic approach of the Court to constitutional interpretation, and to consider the role that original intent does or does not, and should or should not play.<sup>17</sup>

It will be argued that it is relevant, in the context of the contemporary dispute amongst legal academics and politicians as to the alleged “activism” of the High Court, to give detailed consideration to the intentions of the framers of the Constitution. The Constitution is not an ordinary document or statute. It is as much a political as a legal document. It sets out the fundamental laws and rules under which the Commonwealth is to function as a political organism. Its meaning is highly relevant to the role of Parliament in framing new laws, and it is equally relevant to the electorates under s.128 when constitutional amendment is sought. In the latter case, informed participation of the people can only be achieved when the electorates are fully informed as to the meaning and purpose of any sections which are proposed to be altered. If the original meaning and purpose of the various parts of the Constitution are misunderstood, distortion can only result in both the

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<sup>15</sup> *Cole v whitfield* (1988) 165 CLR 360.

<sup>16</sup> *The High Court and History. It still hasn't found(ed) what it's looking for*: Paul Schoff, ( 1994) 5 PLR p.253.

<sup>17</sup> *Op. Cit.*, Craven, p.169.

legislative and constitutional field. The Convention Debates are an essential aid to a full understanding of the meaning of the constitutional provisions.

The Convention Debates are replete with evidence of the existence, at times, of extreme tensions between the delegates representing the different colonies. In the early stages of the development of federation, there were vocal forces strongly opposed to federation, particularly in the upper houses of the colonies. The emerging Labor Party opposed federation because it feared that it was a step in the direction of Imperial Federation, and, by distracting attention from the need of social and industrial reform, it would further entrench the power of the conservative forces. Opposition to federation except in republican form was advocated by some leading figures such as George Dibbs, who attended the 1891 Convention as leader of the Opposition in New South Wales. Reference to the competing forces which can be seen in the Debates of the Conventions of the 1890s throws a great deal of light on present day forces competing for supremacy in the constitutional field, some of which are mirror images of the forces which were in contention in those years. The present position of important sections of the Labor Party goes back to the early policies of that party, and the trade union movement which gave it birth. Unification in republican form, the ultimate abolition of the States, the reluctance of being involved in foreign wars because of continuing connection with Britain (or more recently the United States), are not particularly modern political policies.

To understand the final compromise reached in the text of the Constitution, it is essential to understand the competing and opposing forces, which made the compromise inevitable if federation was to be achieved at all. Some of the delegates to the Conventions showed considerable foresight in anticipating many of the serious conflicts and events that have arisen in later times. The effect of the emergence of strong disciplined political parties, concerned with social and economic matters, was well recognised, as were the problems facing the federal polity in the event of the Senate refusing Supply to a government which retained the confidence of the House of Representatives. Even the possibility of a Japanese invasion of Port Darwin was anticipated!<sup>18</sup>

It should not be thought that the meetings of the Conventions were all sweetness and light, marked with fulsome and colourful speeches of self-congratulation. Speeches of this type were plentiful, but the meetings were those essentially of politicians and practising lawyers, whose rivalries and jealousies frequently came to the surface. During the 1891

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<sup>18</sup> Sir William Zeal at the Adelaide Session of the Convention in 1897, p 317, asked; "How could you prevent the Japanese from taking Port Darwin?"

Convention their differences were so great, in relation to the powers of the Senate, that the Convention almost broke up in complete deadlock. Personal jealousies were not unknown. Some of the delegates to the 1891 Convention considered that Sir Henry Parkes, in pressing for federation at that time, was motivated solely by personal political reasons, and was using the federal cause to recover his failing control of the Free Trade Party in New South Wales. In the 1897-8 Convention many delegates bridled at the superior attitude of Isaac Isaacs, who was ever ready to deliver a lecture on matters in respect of which he claimed particular expertise, not always accepted by others who also could claim special knowledge.

The framers of the Constitution did not come to the two Conventions of 1891 and 1897-8 totally divorced from the real world of politics and law. They had not been chosen in a vacuum to attend some esoteric conclave. In 1891 all the delegates were sitting politicians being chosen by their respective colonial parliaments. Those of the 1897 Convention, apart from the Western Australian delegation, were all elected by popular vote after a formal election campaign. However, with few exceptions they were all well-known, well-respected and experienced politicians, and most of the leading members were also senior practising lawyers of eminence. In dealing with the minutiae of constitutional drafting, the Convention members had before them many learned constitutional materials dealing with the development of the American Constitution, together with detailed information in relation to the Constitutions of Canada and Switzerland. Familiar to the lawyer members were the latest most authoritative writings of constitutional experts relating to the British law of the constitution, and similar authoritative works on the American Constitution. At the 1891 Convention, Andrew Inglis Clark (Tasmania) was well versed in American history and constitutional development. He had visited the United States frequently, and was in constant correspondence with eminent and learned persons in that country. The Members of the Conventions brought to the deliberations constitutional and political views and beliefs that ranged from the extremely conservative to the most liberal and radical. L.F. Crisp<sup>19</sup> attempted to classify and define the groupings into which the members of the Conventions fell. On the basis of pre-formed views, he classified them as Provincialists, Conservatives, Liberals and Democrats. Such classification is helpful in highlighting some of the varied trends of opinion which surfaced at the Conventions, but it cannot be pursued too rigidly. The members of the 1897-8 Convention were acutely aware of what they believed to be the

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<sup>19</sup> *Federation Founders*, J.H.Hart (Ed), Articles by L.F. Crisp, Melbourne 1990, p.186.

expectations of the electors who had sent them to the Convention to draft a federal constitution under the Crown. This general external pressure was not such a factor in 1891 because the delegates to that Convention were only responsible to their particular colonial parliament, and had not the pressure of public opinion so directly focused upon them. The awareness of public opinion in 1897-8 was an important influence in forcing members to depart from strong opinions, sometimes rigidly and robustly held, to ensure that a final constitution was achieved. Being largely politicians, they were well versed in the art of the possible, practiced through compromise.

It will be argued that a clear understanding of the intended meaning and purpose of the major parts of the Constitution can be discerned in the Convention Debates of the 1890s, and that the High Court should not only consider these debates as historical background to the Constitution, but should allow their use as a direct aid to its interpretation.

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# PART I



Responsible government and  
the powers of the Senate

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## THE AUSTRALASIAN FEDERATION CONFERENCE 1890

The final Constitution of the Commonwealth of Australia was not completed until after the Australasian Federation Convention of 1897-8. However, some consideration of the Australasian Federation Conference of 1890, and the Australasian Federal Convention of 1891 is relevant in coming to an understanding of the issues addressed by the framers of the Commonwealth Constitution. The 1890 Conference was organised as a result of the actions of Sir Henry Parkes who set the process in motion. The events leading up to the calling of this conference have been fully covered by Professor La Nauze.<sup>1</sup> The conference was an informal meeting between official representatives from New South Wales, Victoria, South Australia, Queensland, Western Australia, Tasmania and New Zealand, all of whom with the exception of Parkes and William McMillan, and the New Zealand representatives, The Hon. Captain William Russell, and The Hon. Sir John Hall, were members of the Federal Council. Professor La Nauze points out that, with the exception of Alfred Deakin and Andrew Inglis Clark who were native-born, all representatives were English, Irish or Scots who, “had grown into being Australian or New Zealanders.”<sup>2</sup> The average age was 53 years, Deakin, aged 33, and Clark, aged 42, being the youngest:

The hosts were Duncan Gillies, Premier of Victoria, and Alfred Deakin, Chief Secretary, leaders of ‘conservative’ and ‘liberal’ wings of a coalition government which had presided over the unexampled boom of the later 1880s.<sup>3</sup>

Gillies had been a professional politician for thirty years, and Deakin was a journalist and barrister. Sir Henry Parkes had come into prominence in 1848 during the movement to prevent transportation being resumed. He had Chartist leanings, and had been involved in a number of failed enterprises, including ownership of the *Empire* newspaper. He had been bankrupt on a number of occasions and, like many other prominent men, such as Charles Cameron Kingston and Edmund Barton, his passion for politics caused him to neglect his means of livelihood. Ordinary members at that period were not paid, and the urge to seek Ministerial Office was spurred by the need to find an alternative to private means. William McMillan had migrated with his parents in 1869, and after varied training in the firm of

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<sup>1</sup> J.A. La Nauze, *The Making of the Australian Constitution*, Melbourne, 1972, pp. 6-10.

<sup>2</sup> J.A. La Nauze, *Ibid.*, p.12.

<sup>3</sup> J.A. La Nauze, *Ibid.*, p.12.



A. McArthur & Co, had become its Australian Managing Partner at the age of 27. He had prospered in business, was prominent in the Sydney Chamber of Commerce, and had formed the Free Trade Association as a counter to the parliamentary forces of Protection. He entered the New South Wales Parliament in 1887 as a Free Trader, and Member for East Sydney, and was a strong supporter of federation. Sir Samuel Griffith was both politician and skilled lawyer. John Murtagh Macrossan was not a lawyer but was self-educated, with a mining background. His untimely death, during the Convention of 1891, deprived the federation movement of one of its most practical and incisive minds. Dr Cockburn was a medical practitioner from London, and was under 40 years of age. Thomas Playford was a seasoned politician with an agricultural background. Andrew Inglis Clark was a skilled lawyer, as well as being well informed on constitutional matters, particularly those related to America and the Constitution of the United States. His fellow representative, Bolton Stafford Bird, had once been a Methodist Minister. James Lee Steere from Western Australia was a former sea captain and a large landowner, who achieved fame for his description of the problem of border tariffs as “the lion in the way” of federation. His expression was thereafter referred to as “the lion in the path.”<sup>4</sup> But for illness, he would have been a member of the later 1891 Convention. Many of the participants in the 1890 Conference were prominent members of the 1891 Convention.

One of the important matters which should be noted in relation to the 1890 Conference is that the form and pattern of proceedings adopted was later to be used as the format for the Constitutional Conventions of 1891 and 1897-8. This form involved the presentation of a series of Broad Resolutions, as a preliminary to more detailed discussion of draft constitutional provisions.

With many laudatory and conciliatory remarks, Parkes proposed Duncan Gillies (Premier of Victoria) as President of the Conference, which commenced on Thursday 6 February 1890. In the course of a preliminary discussion of the question of whether, or not, the public and the Press should be admitted to the proceedings, Sir Samuel Griffith suggested that the Conference could not:

arrive at any definite resolutions as to a definite form of Federation.<sup>5</sup>

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<sup>4</sup> J.A. La Nauze, *Ibid.*, p.11.

<sup>5</sup> *Ibid.*, p.11.

Thomas Playford (South Australia), characteristically, took a more full-blooded approach to the Conference:

If we just pass a bald resolution to the effect that we are ripe for Federation, one may think that by Federation we will be going along the lines of the United States, another that we are going along the lines of the Dominion of Canada, another the Swiss Republic, another along the lines of the States of Holland. Nobody would know what we meant. We should talk a lot of platitudes, and the people throughout the colonies would not understand what we were driving at.<sup>6</sup>

He did concede that the conference could not build a constitution in the form of a completed draft bill. However, he insisted that some positive result should be achieved:

I contend that the people of these colonies expect us to do more than pass a bald resolution. We must show the limits within which we can go in regard to Federation.<sup>7</sup>

Even at this early stage, the Australian politicians of all persuasions were aware of the varied constitutions of Canada, Switzerland, and the United States of America. The American Civil War was a relatively recent phenomenon, which was present to their minds. It was recognised that constitutional change was being discussed in an environment of peace, unlike that of America. The proposed Constitution was not being forced upon the colonies by such a disaster as the American Civil War. However, the aspect of the war that involved the issue of secession from the first American confederation was an important one in the proposals for an Australian federation. The knowledge of events surrounding the American Civil War ensured that the discussions at this and the subsequent 1891 Convention were of high calibre, and not shallow or superficial.

During the Conference debates, many of the difficulties in the way of federation were discussed, as were detailed matters relating to the general form of the new Constitution. One of the central matters was whether the new federation would result in a complete union of all the colonies, presided over by a single central government, or whether a true federation was contemplated with a division, and distribution, of some of the powers formerly possessed by each of the colonies between the Central Government and the future States. Sir Henry Parkes, who moved the principal resolution, spoke with the most fulsome and full-blown oratory of which he was capable. He clearly sought a powerful central government heading a united and powerful nation. In stressing the benefits which would

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<sup>6</sup> *Proceedings and Debates of the Federation Conference*, 1890, p.11.

<sup>7</sup> *Ibid.*, p.11.

flow from “Federal Government,” he used words and phrases of a most powerful and centralist connotation:

what we really want, from my point of view, is a complete form of government, a Legislature with full power to make laws for the whole country, and an Executive with full power to administer those laws and conduct the affairs of the Country; and it seems to me that the founding of the United States affords us this one warning against anything short of a complete Constitution.<sup>8</sup>

It should be remembered that one of the main arguments used by Parkes to justify the abstention of New South Wales from the Federal Council was that that Council lacked executive power. He contrasted the difference between the performance of the American colonies, when they were joined only in a confederation, with their performance under the Constitution ultimately adopted. He attempted to balance his plea for strong central government with an assurance that the existing rights and powers of the colonies would not be reduced. He argued that the new Federal government:

must be a government of power. It must be a Government especially armed with plenary power for the defence of the country. It must be a Government armed with plenary power for the performance of all other functions pertaining to a National Government, such as the building of ships, the enlistment of soldiers, and the carrying out of many works in the industrial world which may be necessary for the advancement of a nation. It may possibly be a very wise thing indeed that some of these powers should come into force with the concurrence of the State Legislatures or Provincial Legislatures. It may, perhaps, be a wise thing that some condition of gradation should be stipulated for in completing the machinery of this Federal Government, or in consummating its full power; but that it should be in design, from the very first, a complete legislative and executive government, suited to perform the grandest and the highest functions of nation, cannot, I think, be a matter of doubt.<sup>9</sup>

Parkes, initially, thought of federation in the light of the British North America Act, where the central government of Canada had the major power, and the Provinces more restricted and specified powers. Despite his conciliatory statements in relation to the preservation of the powers of the several colonies, it is difficult to see how he could reconcile full blown advocacy of the power and importance of the Federal Government with equally strong support for the continued sovereignty of the former colonies. The paradox in his argument, which begged the whole question, was clear when he said that he came to the Conference

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<sup>8</sup> *Proceedings and Debates of the Federation Conference*, 1890, Melbourne, p.44.

<sup>9</sup> *Ibid.*, p.47.

with the one great object of resolving ourselves into a nation before us, and that alone moderated and controlled by a jealous regard for the separate rights of our individual colonies. It would be impossible for any Federal government to expect to give satisfaction unless its high powers, which I still contend must be sufficient for its high purposes, were in harmony with what is justly due to the several colonies.<sup>10</sup>

The only real sanction for the preservation of the integrity of the States was his belief, and trust, that the Federal Government would be composed of wise and just men, who would, in fact, have due regard to the aspirations and rights of the founding States. If this was the only real sanction provided by the founding fathers, it has proved of little protection against the expansionist activities of subsequent central governments.

Sir Samuel Griffith realistically addressed the problem of fiscal union, which James Service had referred to as “the lion in the way.”

It is of no use disguising the fact that the protective duties in many of the colonies are designed quite as much with a view to protect them against their neighbours as to protect them against the outside world—indeed a great deal more so.<sup>11</sup>

He pointed out that, in some of the colonies, the customs revenue raised by tariffs imposed on imports from other colonies, formed a large proportion of their total revenue:

And when the great question of *cui bono* comes to be asked in the Parliaments these colonies will require a satisfactory answer as to what they are going to gain by surrendering their protective duties.<sup>12</sup>

He had a very clear idea of the appropriate division of powers, as between a Federal Government and the participating future States. He referred to the subjects mentioned in “the great Act of British North America,” and provided a list of twenty-five subjects which, under that Act, were the exclusive business of the general legislature, to which he also added the question of the regulation of the admission and exclusion of undesirable immigrants, and the establishment of a Court of Appeal. As to the powers left to the future States he said:

The work left for provincial parliaments would still be large and important, and it would be work which, in the main, could not be so well accomplished by a general government.<sup>13</sup>

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<sup>10</sup> *Ibid.*, p.47.

<sup>11</sup> *Ibid.*, p.56.

<sup>12</sup> *Ibid.*, p.56.

<sup>13</sup> *Ibid.*, p.58.

However, like Parkes, he did envisage the creation of an Australian nation:

Let us endeavour to distinguish, as far as possible, between means and ends. The end we have in view is the establishment of a great Australian nation. Matters such as those of fiscal policy are, after all, only means, and not ends, in themselves. Whatever conclusion may be arrived at in regard to such matters, it is our business not to lose sight of the one great end in view — the establishment of a nation. The moral effect upon the people of Australia of the accomplishment of such an object would be very great indeed. Look how much wider will be the field for the legitimate and noble ambition of those who desire to take part in the affairs of a great nation — as it will be — a nation practically commanding the Southern Seas.<sup>14</sup>

In a later speech he argued that Australia:

ought to be mistress of the Southern Seas. The trade, the commerce, and the intercourse of those groups of rich islands ought to centre in our ports, and with these advantages we ought to hold the mastery of the hemisphere.<sup>15</sup>

An equally expansive view was put by Bolton Stafford Bird, Treasurer of Tasmania, who hoped to be united in a great Empire, which would sway the destinies of countless millions of generations to come. He wanted to see the foundation of a:

great Empire in these Southern Seas laid broad and deep that I desire the constitution of this proposed Confederation to be such that all British possessions which cluster around Australia, and all those which are in proximity to her in the Pacific, should eventually be drawn in as members of the Dominion of Australasia.<sup>16</sup>

He also hoped that the coming “Confederation of Australasia:”

should very soon be in a position to exercise such influence upon the Imperial Government as to secure the early and amicable removal both of the French prisoners and the French people from a country that lies so near to our shores; and that, obtained by England in exchange, perhaps, for some slice of territory elsewhere, or for some other fair equivalent, that land might come into our possession, so that it, together with the New Hebrides, Fiji, and the rest of the islands which are the natural adjuncts of an Australasian Empire, might be joined to the group, and have flying over it the flag of a United Australasia.<sup>17</sup>

It is doubtful if the most expansive of twentieth century Australian politicians would be prepared to embrace such a widespread and imperialist charter. Bird regretted the refusal of New Zealand to join the proposed Federation. Notwithstanding his expansive

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<sup>14</sup> *Federation Conference Debates, 1890*, p.58.

<sup>15</sup> *Ibid.*, pp.223-4.

<sup>16</sup> *Ibid.*, p.164.

<sup>17</sup> *Ibid.*, p.165.

Australasian imperial aspirations, he still felt it necessary to join his colleagues in stating, positively, that only powers that were absolutely necessary for the conduct of the Federation should be granted to the central government:

In regard to all matters like this, the self-governing colonies will certainly be most jealous of the loss of any of their existing rights, powers, and privileges, and we must be prepared to show them that while they are going to lose so much they are going to gain more. Nothing whatever should be taken away from the control of the local governments but such things as can be best administered in the interests of the individual colonies and of the whole group by the Federal Government.<sup>18</sup>

In contrast to these expansionist speeches, a discordant note was introduced by Thomas Playford (MLA South Australia). He raked over the coals of the failure of New South Wales to participate in the Federal Council, and made bitter remarks about the fact that Victoria, after utilising protective tariffs to build great prosperity, was belatedly advocating the abolition of the customs duties. He also took issue on the question of using the Canadian model for any proposed federal Constitution:

I am quite certain that if we are to build up a Federation on the Canadian lines, the colony of South Australia will never agree to it... Although unity is a grand thing, it is not everything. As far as the local legislatures are concerned, I contend that it will be the wiser course to adopt to leave to them all the powers we possibly can, apart from such powers as they cannot exercise individually. After looking through the Constitution of the dominion of Canada and the Acts passed under it, I say unhesitatingly that, so far as the Colony I represent is concerned, we will have to go upon exactly the opposite basis, and instead of giving the whole of the powers not specified to the general parliament, we must give the whole of the powers not specified to the local parliaments.<sup>19</sup>

When referring to the grant of residual power to the central government of Canada, he continued:

I do not believe in the powers of the local parliaments being curtailed, and in South Australia the people will not give up any of them except such as can be better exercised by the general parliament. —We do not require a great dominion parliament, such as exists in Canada, regulating, as it does, all local legislatures into mere parish vestries. We require something in the shape of the government of the United States, where clearly defined powers are given to the senate and the house of representatives, and where all other powers not specified, are left to be exercised by the local States and constituencies.<sup>20</sup>

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<sup>18</sup> *Ibid.*, p.169.

<sup>19</sup> *Ibid.*, p.71.

<sup>20</sup> *Ibid.*, pp.72-73.

The matters specified and the tone of his remarks, have been frequently re-echoed down to the present time by those who have become uneasy at the degree to which the powers of the States have been reduced in favour of an increase in Commonwealth power.

Support for Playford's approach was given by Andrew Inglis Clark (Attorney General for Tasmania), who was to play a significant role in the drafting of the first Draft Constitution in 1891, and who was convinced of the virtues of the American Constitution as against those of the Dominion of Canada. He made much of the fact that the American Constitution had succeeded in welding the needs of an American Government with the greatest degree of power and authority left to the States.

Readers of American history must have been frequently struck with the merits of the American system, in preserving that local public life of the various States which is so dear to the native American of every State. So far from the local life of the States being the cause of political irritation, controversy, and dissension, I firmly believe that if the American Union were now constructed on the lines of those of Canada, there would be far more danger, dissension, irritation, and disunion in the future than exist at the present time. In fact the opinion of many of the most eminent publicists of Europe is that the salvation in the future of America as a united nation is the large amount of the local autonomy of the States.<sup>21</sup>

Another member who objected to the Canadian model, and pressed for more specific detail, was Sir James George Lee Steere, Speaker of the Legislative Council and Member of the Executive Council of Western Australia:

There is a good deal of self interest being displayed by some of the colonies in this question of Federation. There is no doubt that Federation will be of very great advantage to the larger colonies, but I am not sure that we will be able to show that the smaller colonies will get equal advantage from it. I am quite certain that Western Australia will not if the Federal Constitution is based upon that of Canada.<sup>22</sup>

These reservations were echoed by Dr Cockburn (South Australia):

I don't think that we wish to see a homogeneous National union. We want to see a union of strong colonies, each with its own local traditions, each with its own local affections, each with its own peculiarities. I think that such a union, such a brotherhood of infinite diversity would be much better than a homogeneous union of colonies without a proper amount of differentiation.<sup>23</sup>

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<sup>21</sup> *Ibid.*, pp.106-107.

<sup>22</sup> *Ibid.*, p.121.

<sup>23</sup> *Ibid.*, pp.133-134.

There would be many Tasmanians who would find themselves in agreement with these sentiments, particularly since the decision of the High Court in the *Tasmanian Dam case*.<sup>24</sup>

Dr Cockburn analysed the particular reasons for the centralist type of Constitution adopted in Canada. He argued that it was a coercive union, the object of which was to “denationalise the French inhabitants of Quebec.” No such reason existed in Australia for any coercion into a union, where it was desired to preserve the individuality of every province, and every colony, which then formed the Australian group. He expressed his hopes for the harmonious combination of central powers with local autonomy. He hoped that nothing would be done to unduly sacrifice the individuality of the various colonies:

To attempt to secure anything like uniformity would be most disastrous. Such union as we have must be the union of various elements. Our Australian concert is not to be one of unison, but of harmony, in which the difference of each part blend together in forming the concord as a whole... We can certainly look forward to the consummation of Australian unity as a confederation, not as a crushing national union. We can look forward to the consideration of such Australian unity as will preserve our individuality, as an occurrence which is likely to take place before the lapse of many years, and very much earlier than even the most sanguine of us at present are capable of hoping.<sup>25</sup>

It would be oversimplistic to categorise views such as these as provincialist, or as the narrow view of a “States’ Right” interest. They were a valid approach to a federal compact by the Premier of a virtually sovereign colony, coming into agreement with other such colonies for what were regarded as common ends. At the time they were neither liberal, conservative, or essentially provincial. In his use of the word “confederation,” Dr Cockburn was espousing quite a different concept to that espoused by Sir Henry Parkes, when he emphasised the weakness of the American Union at the time it was a mere “confederation.”

The general expression of hope that the Constitution would not “unduly sacrifice” the individuality of the various colonies would not necessarily mean the same things to later generations, or to judicial interpreters of the written words of the Constitution itself. The real problem in the framing of a written constitution was in deciding what can best be administered by the central government, and making provisions that would clearly convey the specific intentions of the framers of the document. John Murtagh Macrossan analysed this central problem:

Centralisation has no terror for anyone who thinks upon the subject, if sufficient local autonomy is left to the local legislatures. If we were to have a Legislative Union it would

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<sup>24</sup> *The Commonwealth v Tasmania*, (The Tasmanian Dam Case), (1983) 158 CLR.1.

<sup>25</sup> Federation Conference 1890 p.144.



be a different matter; but if we leave sufficient authority, as we ought to do to local legislatures, Federal Government or centralisation can only have the effect of making men believe that which we wish them to believe. — that they are first Australians, and then Queenslanders, South Australians, or Victorians.<sup>26</sup>

The ultimate question, of course, would be what would constitute “sufficient local autonomy” to restrain centralisation, and to induce the self-governing colonies to federate. Macrossan also addressed the crucial issue of the structure of the Senate. He rejected any suggestion of copying the British North America Act:

The Canadian Senate is a body appointed by the Governor in Council for life, and I would be utterly opposed to the adoption of that plan here. I think the Senate ought to be a representative body, and that to allay the fears of the smaller States, such as Western Australia and Tasmania, the second chamber should in some way represent the colonies themselves as separate sovereignties.<sup>27</sup>

He eulogised the Senate of the United States as being “one of the grandest representative bodies in existence,” which was, “equal to, if it does not surpass the British House of Lords.” He considered that too much power was given to the Federal Government of Canada, and argued for a happy medium between the Canadian system and that which obtained in the United States.

Like many other members of the conference, he passed over the real difficulty of reconciling an effective central government with minimal interference with the former sovereignty of the different colonies, by espousing, what might be considered, pious hopes:

We have no fear of tyranny in these colonies, or that a Federal Government will not act honestly within the limited sphere of its jurisdiction.<sup>28</sup>

There is no doubt that Macrossan would be surprised to see the degree to which the electorates in Australia have begun to distrust the regular politicians of the major parties, and have begun to return independents to the parliaments of both State and Commonwealth, to say nothing of the spectacular rise of the One Nation Party in the Queensland elections of 1998. It would be surprising, also, if he would continue to place so great a trust in the Federal Government in the light of the interference with the power of the local legislatures made possible through the modern interpretation of the trade and commerce power, the corporations power, the appropriations power, and the external affairs power.

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<sup>26</sup> *Ibid.*, p.195.

<sup>27</sup> *Ibid.*, pp.198.

<sup>28</sup> *Ibid.*, pp.199-200.

Sir Henry Parkes, dealt with his belief that central power could be achieved without destroying the vigour and the rights of the States, and attempted to erect a bridge between the views of John Macrossan and the more restricted ones of Thomas Playford:

I think I agree in the main with Mr Macrossan's view as to the necessity of giving power, all power necessary, to this government, if we assent to create it. I also agree with Mr Playford, and it affords me unspeakable happiness to do so, that it will be the duty of the convention, if it is called into existence, to jealously watch the rights and privileges of the provincial governments. I agree entirely, I say, in not stripping the colonial governments of any power which they can hold, consistently with due power being given to the government which represents them all.<sup>29</sup>

The debate has continued ever since on the very question of what is “due power.” The President, Duncan Gillies, after defusing some of the heat that was generated on a personal basis during the course of the speech of Sir Henry Parkes, brought the debate back to earth:

Then the question arises; On what is the Federal Constitution to be based? What form shall it take? I venture to think that that will be a question that will ultimately present the greatest difficulties. That we should federate is agreed. That we should federate as soon as possible is also agreed. But what is not agreed upon, and that which we cannot possibly now determine, is the exact terms upon which we should federate.<sup>30</sup>

As to his own views of the appropriate form of a future Constitution, he supported those who wanted a strong central government:

I venture to think that, simply to create a Federal Parliament with little or no powers—that is to say, only such powers as the local parliaments cannot exercise would be a great mistake. I believe that we can leave to the local parliaments vast powers, giving them the whole internal administration, and everything required to secure the progress and prosperity of their respective colonies, and at the same time be in a position to grant great and varied powers to the new Federal Parliaments which we shall bring into existence.<sup>31</sup>

This debate clearly delineated the two major views, which emerged from the Conference, as to what should be the proper approach to the division of powers between the prospective States and the central government. The first view was that the only powers that should be given to the central government were those which each of the colonies could not, satisfactorily, or at all, administer as separate sovereign entities. The most obvious example

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<sup>29</sup> *Ibid.*, p.224.

<sup>30</sup> *Ibid.*, pp.238-239.

<sup>31</sup> *Ibid.*, p.241.

was the question of defence of the whole continent. The second view was that the Federal Government should be vested with a wide range of major powers befitting a coming world power, at least in the Southern Hemisphere. However, even on this view, it was assumed that such an approach would not be inconsistent with the proposition that each of the former colonies would not be hampered in the control and direction of their own domestic affairs.

The Conference was brought to a close after Alfred Deakin, Chief Secretary of Victoria, moved the formal Resolution calling on the delegates to persuade their respective colonial parliaments to appoint delegates to a National Australasian Convention empowered to consider and report upon an adequate scheme for a Federal Constitution.

In speaking to the Resolution, he pointed out that the American Constitution provided in detail for the separation of powers, but that it did not incorporate the principle of responsible government, as did the Canadian Constitution. However, as distinct from Canada, the central government of the United States had its powers limited. He argued that the model of the United States:

preserving State rights with the most jealous caution, might commend itself to the people of these colonies.<sup>32</sup>

In conclusion, Deakin had a word to say on the question of altering the Constitution to meet changing needs in the future. **He had no reservations in supporting provisions for alterations to be dealt with by the people themselves, who would be asked to approve of the Constitution in the first place.** The main advantage that he saw was that a proposal for change could be considered without the complications involving a relationship between the change proposed, and the fate of individual representatives. His approach to this question was consistent with his general position as a liberal and democrat:

I trust that members of the Convention will shape the Constitution they propose for an Australian Dominion in such a way as will not only allow it to answer to the needs and necessities of our time but render it capable of answering to all our future needs, sufficiently pliant to adapt itself to the course of circumstances, related to our national characteristics and capacities so that it may unfold with their unfoldment, expand with our expansion, and develop with our destiny. They can accomplish this by **making, in all things, the nation the sole judge and the sole arbiter of legal forms which may confine but should sustain our national life.**<sup>33</sup>

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<sup>32</sup> *Ibid.*, p.252.

<sup>33</sup> *Ibid.*, p.253. Emphasis added.

It is incongruous that many modern day academics and commentators,<sup>34</sup> who are impatient for change, and who regard themselves as liberals, and democrats, should complain bitterly that the requirement that Constitutional change must be approved by the people in referenda is the major factor impeding progress. Professor Geoffrey Sawer had crystallised this kind of criticism when he stated:

Constitutionally speaking Australia is the frozen continent<sup>35</sup>

It should be remembered that an even more restrictive provision was devised by the 1891 Convention where, after being passed by an absolute majority of both Houses of the Commonwealth Parliament, a constitutional proposal for amendment had to be submitted to Conventions to be held in each and every State. The alteration then had to be approved by the Conventions in a majority of States. A final requirement was that the people of the States whose Conventions approved of the amendment had to constitute a majority of the people of the Commonwealth.

An extraordinary example of the contempt held by some journalists for the constitutional safeguard of s.128 of the final Constitution, and for the whole basis of the federal compact, appeared in the “Melba” column of *The Australian* newspaper on 14 August 1999, in a comment by that Columnist in relation to the 1999 referendum on the question of an Australian Republic:

Since the Senate and the House of Representatives have agreed to put the republic before the people, Melba is prepared to argue that Australia is now a de facto republic. **The people must rubber stamp the parliament’s clear decision because of a tiresome constitutional requirement.** But our elected representatives have, in effect, already approved a republic.

This is an extraordinary assertion, which replaces the specific provision for constitutional amendment with a suggestion that it is the function of parliament, not the people themselves, to alter the Constitution. This is precisely the type of amending procedure which the framers of the Constitution specifically rejected and intentionally avoided. It was recognised that under the Constitution the Parliament was not a constituent assembly and had no power to make alterations to the Constitution.

Many of the issues raised at the 1890 Conference were to surface again during the 1891 Convention, and the later Convention in 1897-8. The traversing of these questions, crucial to a rigorous preparation of a workable constitution, ensured that the 1891

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<sup>34</sup> Complaints of this kind are reviewed by Brian Galligan in *A Federal Republic*, Cambridge, 1995, pp.116 et seq.

<sup>35</sup> G.Sawer *Australian Federalism in the Courts*, Melbourne, 1967, p.206.

Convention which followed would squarely face up to the fundamental tasks facing the delegates, difficult though they may have been.

The central question at the 1890 Conference was how the future States of the federation could be protected against undue intrusion of the central government into their domestic affairs, without destroying the need for effective central government in matters which affected the country as a whole. This issue remained a live one throughout the 1891 Convention and received its final consideration at the Convention of 1897-8.

All the other issues raised at the 1890 Conference also became part of the agenda for the later Conventions.

The Conference resolved that the best interests of the Australian Colonies would be promoted by an early union under the Crown. It further resolved that the members of the Conference should endeavour to induce the parliament of their respective colonies to appoint delegates to a National Australasian Convention empowered to consider and report upon an adequate scheme for a Federal Constitution. Not more than seven members should be appointed from each of the colonies and not more than four from each of the Crown colonies.

In May of 1890 protracted debates took place on the proposal for a Convention in the parliaments of New South Wales and South Australia. The proposal was more expeditiously dealt with by the parliaments of Victoria, Queensland, Tasmania and New Zealand. In Western Australia no action was taken until the Convention was about to assemble in early 1891.

In New South Wales Sir Henry Parkes came under personal attack by the Leader of the Opposition George Dibbs. He claimed that Parkes was not *bona fide* in his advocacy of federation at that time. He alleged that Sir Henry had taken up the cause of federation to:

throw dust in the eyes of the electors of New South Wales to stop the time of protection which was rolling against the Government.<sup>36</sup>

He claimed that Parkes was using his advocacy of federation to postpone a vote by the electorate on the question of Free Trade or Protection.

The debates in both Houses covered a wide range of related matters: how much of their independence would the colonies have to give up to the central government; would the debts of the colonies be taken over and, if so, would the assets also be taken over, in particular the railways; what would happen to the unalienated wastelands; would the federal parliament

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<sup>36</sup> *New South Wales Parliamentary Debates*, 1890, Legislative Assembly, Vol. XLIV, p.408.

have power to break up the existing colonies into smaller ones? Also debated were republicanism and separation in various forms, and the suggestion that New South Wales itself should constitute Australia, and that the other colonies should be federated with or under it.

A more partisan squabble arose from the refusal of Parkes to nominate George Dibbs as a member of the proposed Convention, on the grounds that, as a republican, he could not take part in a Convention charged with the duty of framing a Constitution under the Crown. This type of dispute was curiously duplicated in the controversy in 1995 over whether or not Professor Blainey should be appointed to the Federal government's Advisory Committee on the Republic in the light of his expressed opposition to the change.

An unexpected note of hilarity came into the debate when Sir Henry Parkes sought to illustrate the benefits of the proposed federation by reference to Broken Hill:

There is one affliction to which humanity everywhere is subject, which is greater than any other human affliction, that this affliction comes upon men more frequently who are engaged in pursuits similar to those of the larger population at Broken Hill; I allude to the unhappy fellow-creatures of ours who become afflicted with insanity. What a blessing it would be if we could, without trouble, send all the victims of this terrible disease to an asylum close at hand in South Australia, instead of necessarily driving them through the indescribable cruelty of a long and heavy journey to Sydney.<sup>37</sup>

Mr Jacob, a member of the Opposition in the legislative Council on 11 June 1890, seized upon this statement to deprecate the arguments Parkes had advanced in support of the need for federation. He likened the Broken Hill argument to the old woman who took her cow onto her roof to feed on a tuft of grass instead of taking the grass to the cow:

Surely it was not necessary to propose the federation of the colonies to remedy such an evil, when an asylum built at Broken Hill would be more effectual to remedy it.<sup>38</sup>

After 100 years of federation there is still no asylum at Broken Hill, if such were necessary.

Sir Henry Parkes and government speakers who supported him all sought to assuage the fear that the central government would damage the autonomy of the future States. They claimed that there would be no sacrifice of independence because the federal government would only have power in areas where the colonial parliaments did not have jurisdiction. Parkes argued that each colony would be better off by retaining their existing power as well as participating in a larger power namely, a:

full share of power over the whole of Australia, and over the whole seas of Australia.<sup>39</sup>

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<sup>37</sup> *NSW Parliamentary Debates*, Vol. XLIV, 1890, p.204.

<sup>38</sup> *Ibid.*, *NSW Parliamentary Debates*, vol. XLIV, 1890, p.1220.

<sup>39</sup> *NSW Parliamentary Debates*, Vol. XLIV, 1890, p.204.

Parkes was supported by Joseph Carruthers in this precise line of argument in the Assembly on 15 May 1890. He claimed that:

Every colony becoming a constituent part of that union must possess every advantage which it now possesses standing alone; and, in addition to that must possess a large number of advantages from the union which, separately, it cannot have.<sup>40</sup>

What is apparent in these statements is that there is a concealed misuse of two of the operative terms. There is no doubt that the colonial governments would lose some of their powers. Consequently, it could not be said that those same colonial governments would have an additional power to share in the government of Australia as a whole. It can be said that the colonies, as distinct from the colonial governments, would have two areas of power: a colonial area and a federal area. But this formulation was being consciously obscured by the implication that the local colonial governments would not only not lose power but would share in additional power. To overcome the illogicality of these statements, both Parkes and Carruthers asserted that the federal powers were those that previously could not have been exercised by the colonial governments in any case.

Arguments similar to the Parkes-Carruthers line were advanced in the Legislative Council. On 22 May 1890, Mr Waddell illustrated the contention that there were certain areas where the individual colonies either could not, or could not effectively, act and legislate by referring to the question of continental defence. He then extended this approach generally:

Let us simply say that if we are going to have federation, we will only relegate to the federal parliament duties and functions which as individual states we cannot ourselves efficiently discharge.<sup>41</sup>

In less optimistic terms, he suggested that there should be a gradual development of federal powers only when it became clear that they were needed:

It would be much pleasanter by-and-by to find that it was necessary to add fresh powers to the federal constitution than to take some of its powers away. If the colonial parliaments act wisely, they will be very careful indeed of the powers they delegate to the federal government. Better to give it too little power than too much.<sup>42</sup>

The second major theme of Sir Henry Parkes, was his flamboyant prediction of the glories of the Nation he saw being created:

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<sup>40</sup> *Ibid.*, Vol. XLIV, p.666.

<sup>41</sup> *Ibid.*, Vol. XLIV, p.668.

<sup>42</sup> *Ibid.*, Vol. XLIV, p.204.

The moment we become a united people, we should have a corresponding public influence in the affairs of the World. We should be listened to with respect by every power on the face of the earth, and however influential Victoria or New South Wales might be in appearing before Europe in the person of the Agent General, the united Australia would conceivably be immeasurably superior in their influence upon the World.<sup>43</sup>

The notion that the “eyes of the world” are upon Australia is frequently heard in many contexts in modern times. Its validity is as doubtful now as it was in the 1890s.

Some of the avowed Republicans were as flamboyant as Parkes in depicting the glorious future of an Australian Nation (but, of course, in republican form). The Leader of the Opposition, George Dibbs, claimed:

The difference between the Premier and myself is, that he believes in a federation which I believe will be incomplete, and which will never work, for the reasons which I will mention presently. I believe in the union of Australia, and in the founding of an Australian nation. I speak as an Australian, and as a native born in this land; and I say that if we are to depart from our present Constitution at all, let it be that we may have a flag of our own, let it be that the Australian colonies shall be bound together, and that we shall have a united states of Australia.

The notion of the creation of an Australian Nation by federation is an important one. It has been used by the High Court to support additional Commonwealth powers, over and above those powers specified in s.51, by implication from this notion of nationhood.

Many members of the New South Wales Legislative Assembly were concerned to have a clear idea of the nature of the federation proposed. Mr O’Sullivan, on 15 May 1890, addressed the question:

In federation there must be first an indissoluble union of all the colonies under the federal government; secondly, the safety of the colonies must be assured; thirdly, there must be a national militia and navy; and fourthly, the people of the various colonies must sacrifice some local interests for the commonweal. Federation under the Crown does not mean imperial federation. Canada has federation under the Crown, and I think that such federation should be a stepping-stone to our future independence.<sup>44</sup>

Like some members of the Assembly, he was far from complimentary to Sir Henry Parkes:

The Premier’s policy will be Parkes, and Parkes alone. If there is an earldom of Parramatta or dukedom of Woolloomooloo about that will be enough to fix the Premier in favour of imperial federation.<sup>45</sup>

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<sup>43</sup> *Ibid.*, Vol. XLIV, p.469.

<sup>44</sup> *Ibid.*, Vol. XLI, p.478.

<sup>45</sup> *Ibid.*, Vol. XLIV, p.434.



Many opposition members were not persuaded that what was to be given up was more than compensated for by what the colonies would receive in return. Mr Brown, a Labor man and the member for Newcastle, forthrightly avowed his republican aspirations when opposing the proposals:

Unless, however, we are to get something beyond what the Premier aims at, I do not think the game is worth the candle. I think that what we have to surrender and give up, is not at all equivalent to what we are to receive. Are we to give up all our advantages, are we to give up our railways, our state lands, and a large portion of our commerce? Is the postal department to be surrendered? Are we to give up all our advantages and become worse off than we are now? I have always maintained that we are little better than a municipality, because we have no diplomatic arrangements to deal with. If we are to give up all the matters I have referred to, a federal parliament will do the whole of our business, it is no use the Premier telling Hon. members that it will not make any difference to them, and that Parliament will be the same as it is now. We shall not, as a matter of fact, be as we are now, but something a little better than a large municipality. We shall give up all our large responsibilities; they will have been passed to the federal parliament.<sup>46</sup>

The one government member who was under no illusions that part of the power of the colonial parliaments would be given up was Dr Garran, who made the most forthright, and realistic, contribution to the debate in the New South Wales Legislative Council on 11 June 1890:

Whilst upon this subject of legislative and executive government, I should like to point out that expressions have been used by some persons to the effect that we can accept federation without in any way diminishing the powers and prerogatives of the local Parliament. I will not pretend to say that that is a fact. It would only be misleading to do so.<sup>47</sup>

After referring to the fact that the Federal Council could only deal with subjects outside the scope of the several governments, he asserted that:

we are not going to form a federation which would exclusively deal with subjects outside the competency of the present colonial governments. It is misleading to say that a federal dominion will not take away part of what is now the prerogative of this colony.<sup>48</sup>

He referred to the fact that the several colonies would give up their power to set their own customs tariff, but he argued that in consideration for this surrender he argued that:

There is no doubt about that; but we get something in return. We get a fractional power in the settlement of the tariff of Victoria, of the tariff of Queensland, and the

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<sup>46</sup> *NSW Legislative Council Debates, 1890*, Vol. XLIV, p.1229.

<sup>47</sup> *Ibid.*, p.1229.

<sup>48</sup> *Ibid.*, p.1229.

tariff of South Australia. What we give away with the right hand we get back with the left hand. We give up some provincial power, and we get some larger Australasian power in return. To say that we give up nothing whatever is to say that which is not correct. In proportion to our population, we shall have our share of power, and we have no right to ask for more. At present we have no power to prevent our neighbours from legislating against us to any extent, but we shall have that power then.<sup>49</sup>

There is a certain logical sleight of hand even in this approach. What was concerning the Opposition was the fear of intrusion by the central government into the independent sphere of power presently occupied by the colonial legislatures. It would have been logical to reply that this invasion in the terms proposed was a good thing. However, it was just as misleading to apologise for this invasion by reference to the new and additional power that “we” would gain. By “we” Dr Garran meant the people of New South Wales voting in a federal election. This entity was not the same as the entity of the people of New South Wales in relation to their own Constitution, and the powers of their local parliament. Some people of New South Wales could well take the view that a mere vote in a federal election would not be a sufficient protection for New South Wales interests in a Parliament of superior force, wherein the people of New South Wales did not have as strong a representation of those interests, when faced with strong opposition from representatives from other colonies.

Mr Copeland put a similar point of view in quite practical terms:

It is very well for members to say that we will lose no independence; that we shall lose nothing and gain everything. We cannot gain the benefits of federation without losing a certain modicum of our independence. We cannot get a share in the management of other people’s territory without allowing those other people to get a share in the management of our territory.<sup>50</sup>

The strands of opinion discernible from the speeches of members of the Opposition were both general, and parochial. The parochial views were mainly concerned with protecting local control over crown lands and railways. Fears were expressed because of the views espoused particularly by John Murtagh Macrossan at the 1890 Conference, where he supported the idea that the large colonies should be reduced in size, whereby the Riverina might go to Victoria, the Broken Hill area to South Australia, and large segments of northern New South Wales might go to Queensland.

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<sup>49</sup> *Ibid.*, Vol. XLIV, p.495.

<sup>50</sup> South Australian *Parliamentary Debates*, 1890, p.266.

On broader issues, many of the Opposition declared themselves in favour of a Constitution which would involve separation from the United Kingdom. These views varied from extreme Republicanism to the view that federation under the Crown could be supported as an interim measure, which would be a first step to ultimate separation. The relative poor support shown in the general community for such views led the Federationists to assert that propounding such views was a mere concealed excuse to oppose federation altogether.

The only other lengthy debate on the resolutions to appoint delegates to a Convention in 1891 was that in the South Australian Parliament. In the South Australian Assembly, the resolutions were moved by Dr Cockburn (Premier and Chief Secretary) in the Assembly on 26th June 1890, and were supported by Thomas Playford (Leader of the Opposition).

Dr Cockburn traced the history of the movement for federation back to 1853 in New South Wales, and 1856 in Victoria. He stated that the actions of the Federal Council over the years clearly showed that it considered itself a halfway house to federation. The colonies were well aware of the problems of defence, but Major General Edwards:

stirred them up by the way in which he dealt with the absolute necessity of federation as far as defence was concerned.<sup>51</sup>

He agreed that the debate in New South Wales, unfortunately, had proceeded on party lines. He contrasted the Constitution of the United Kingdom, as a legislative Union, with the Constitution of the United States of America, as a Federal Union, and that of Canada, which was midway between the two. He argued that Canadian model would be a disaster for Australia:

A number of strong individual colonies cooperating for the good of all was a much stronger combination than a uniform Legislative Union.<sup>52</sup>

He stressed the importance of the Crown in providing a bond between the colonies which did not exist in the United States, but insisted that:

What was wanted was union not unity.<sup>53</sup>

Representatives would have to be very careful to hold the balance between the central government and the local governments:

The genius of the British race did not at present lean towards central government but autonomy.<sup>54</sup>

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<sup>51</sup> *Ibid.*, p.266.

<sup>52</sup> *Ibid.*, p.270.

<sup>53</sup> *Ibid.*, p.270.

<sup>54</sup> *Ibid.*, p.270.

He commented that it was somewhat contradictory that agitation for union should be going on at the same time as there were agitation for further sub-division. In this he had in mind the agitation in Queensland for separation from New South Wales:

This afforded an example of the fact that in the process of evolution there were two apparently contrary forces always at work making for integration and for separation. The nice adjustment of these two forces constituted the whole problem of federation.<sup>55</sup>

In supporting the resolution moved by Dr Cockburn, Thomas Playford (Leader of the Opposition) referred to some agitation by the *Sydney Bulletin* newspaper to the effect that federation would lead to separation from the United Kingdom. He brushed this aside with the comment that these ideas did not constitute a general or important force. He asserted that the colonies would not give up any of their rights or privileges, and that the proposed federation was really a pact of mutual assistance. Certain general principles must be accepted. First, that within the sphere of the federal government the federal powers must be sovereign. Second, that the central government should only have powers that could not be exercised by the colonies alone. Powers which could be exercised by the colonial legislatures should not be handed over to the central government:

They should take away as little as possible from the local parliaments, having due regard to the powers necessary for the Sovereign authority of the federal Parliament. Let them not centralise too much.<sup>56</sup>

He quoted De Tocqueville in support of his contention that centralisation should be resisted and that they should :

as far as possible curtail all unnecessary powers to the central government.<sup>57</sup>

He had no hesitation in saying that the Commonwealth should govern the Northern Territory, a task which South Australia should never have undertaken.

The debate in the Legislative Council of South Australia commenced on 24 June 1890, when resolutions to carry out the decision of the 1890 Conference were moved by John H. Gordon (Minister of Education). He took the opportunity of deflating some of the more fulsome pronouncements of Sir Henry Parkes.

His speeches were full of the power and glory that would follow the Australian flag. Even in his calmer deliverances this vision of greatness dazzled him.

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<sup>55</sup> *Ibid.*, p.274.

<sup>56</sup> *Ibid.*, p.274.

<sup>57</sup> *Ibid.*, p.200.

He cautioned against the creation of a:

great central power which might dwarf our legislative power, our public men, and our Press. The power they surrendered to the Federal Government, once surrendered, could never be regained. There could be no going back except by Revolution. It would be better to surrender power slowly and to test the effect of a partial surrender than to abandon too much and too fast the legislative freedom under which they had build up in South Australia so prosperous and happy a people and to chafe eventually under limitations they had themselves agreed to.<sup>58</sup>

He suggested that consideration should be given to the Swiss Constitution, particularly in relation to the appointment of the Executive:

Under our system of party government, Parliament became a mere theatre for the ambition of the cleverest men, who too often made the public business subservient to the question of "outs" and "ins." Indeed party politics had been described as a system under which a dozen of the ablest men tried to carry on the business of the country, and another dozen of the ablest men tried to hinder them from doing so.<sup>59</sup>

Dr Campbell pointed out that the colonies had before them the experience of Canada and the United States. He argued that the colonies had the advantage of being part of the constitutional development of the United Kingdom since the separation of the American Colonies. He claimed that the American Constitution was based on the worst period of English history— the reign of George III:

it retained the worst feature of that period of the English Constitution, viz, the arbitrary power of the King in the irresponsible and personal veto of the President, while the Constitution from which it was copied had, by its elasticity, since the reign of Queen Anne, left this power behind. ...As a matter of fact the President of the United States at this hour was more despotic than any sovereign in Europe.<sup>60</sup>

A note of caution was sounded by Sir John Downer:

They must thoroughly understand what liberties were to be given away, because in every instance of federation some liberty, as well as other things, had to be surrendered.<sup>61</sup>

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<sup>58</sup> *Ibid.*, p.201.

<sup>59</sup> *Ibid.*, p.234.

<sup>60</sup> *Ibid.*, p.359.

<sup>61</sup> *Ibid.*, p.360.

He concluded on a more emotional note when, whilst conceding that separation from the United Kingdom might come at some time, he:

hoped that Australia would remain the brightest gem in the Crown of England and that once again it might be said that in her time of trouble England was capable of calling into existence a new world to redress the balance of the old.<sup>62</sup>

The resolutions were finally carried in the Legislative Council after this lengthy debate on 2 July 1890, and on 22 July in the Assembly. Five delegates were appointed by the Assembly and two by the Council.

All colonies finally selected their seven delegates. No great interest was expressed in New Zealand. However, three delegates were appointed to attend the Convention, but it was stipulated:

that the delegates so appointed shall not be authorised to bind this Colony in any way.<sup>63</sup>

It is illuminating that, so early in the discussions in relation to the proposal to set up a Constitutional Convention, so many of the views that were canvassed later formed part of lengthy discussion, and sometimes bitter debate, in both the 1891 Convention, and in the Convention of 1897-8. As foreshadowed in the debates at the 1890 Conference, one of the major problems which was to face the 1891 Convention was the consequence of endeavouring to adapt to a federation the principle of responsible government, which had been adopted in all the constitutions of the Australian colonies from the “Westminster” model. The lengthy wrangling over the question of responsible government and the powers of the Senate led to a crisis at the 1891 Convention, which almost wrecked its deliberations.

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<sup>62</sup> Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, Sydney 1900, 1996, p.123.

## RESPONSIBLE GOVERNMENT AND THE POWERS OF THE SENATE

The Convention of 1891 commenced in Sydney on Monday 2 March 1891. After a formal reading by James Munro, Premier of Victoria, of the resolutions of the 1890 conference, the last of which requested him to act as Convenor of the Convention, Sir Henry Parkes was elected as President, and Sir Samuel Griffith as Vice President of the Convention. The first substantive business of the Convention was carried out on 4 March 1891, when Sir Samuel Griffith took the chair to enable the President Sir Henry Parkes to move a series of four resolutions, followed by three consequential stipulations upon which a federal Constitution could be framed.

Parkes had prepared a series of resolutions in advance of a meeting of Premiers, which took place at his private house on 2 March 1891. In addition to the Premiers, Andrew Inglis Clark of Tasmania, Duncan Gillies, former Premier of Victoria, and Charles Cameron Kingston of South Australia, were also present. Clark and Kingston had been invited to the meeting because they had already prepared drafts of a federal constitution.<sup>1</sup> At the instance of Kingston, Clark, and Griffith, what became Resolution 1 was added to Parkes Original Draft. This provided:

That the powers and privileges and territorial rights of the several existing colonies shall remain intact, except in respect to such surrenders as may be agreed upon as necessary and incidental to the power and authority of the National Federal Government.<sup>2</sup>

This resolution illustrated the major concern, particularly of the smaller colonies, that it should be a basic axiom that what was proposed was a true federation and not a complete Union. The principle embodied in the resolution found strong support amongst the smaller colonies, and was never really disputed by the larger colonies of New South Wales and Victoria. A second fundamental principle, enunciated by Parkes, was that the system of responsible government, inherited from the United Kingdom, must form part of the federal structure. The delegates were all familiar with this system, which had been incorporated into the constitutions of the colonies, as representative government developed into responsible government after 1856. No such system had formed any part of the American Constitution, and there was practical difficulty in merging it into a federal constitution.

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<sup>1</sup> La Nauze, *The Making of the Australian Constitution*, Melbourne, 1972, p.16.

<sup>2</sup> *Official Record of the Australasian Federal Convention*, Sydney, 1891, p.24.

Responsible Government, as practised in the United Kingdom, involved the acceptance of the supremacy of the Lower House (The Commons) over the Upper House (The House of Lords). This supremacy was based upon the fact that the House of Commons had wrested control from the House of Lords of the Supply of money for the purposes of running the government. The denial of this power to the Upper House had not been universally adopted in the colonies. The history of the Victorian parliament produced many examples of extreme conflict between the two Houses in relation to money bills. Despite this, it could be said that the colonies generally adopted the principle of responsible government on the British pattern.

Apart from the supremacy of the Lower House, the principle was characterised by Cabinet Government. Executive power was vested in the Crown, but responsibility for its exercise was taken by Ministers who continued to hold office so long as they possessed the confidence of the Lower House, the members of which were elected by the people.

The form of responsible government proposed by Sir Henry Parkes was contained in the first and second of his ancillary stipulations:

(1) A parliament, to consist of a senate and a house of representatives, the former consisting of **an equal number of members from each province**, to be elected by a system which shall provide for the retirement of one third of the members every years, so securing to the body itself a perpetual existence combined with definite **responsibility to the electors**, the latter to be elected by districts formed on a population basis, and to possess the **sole power of originating and amending all bills appropriating or imposing taxation**.<sup>3</sup>

The second ancillary stipulation provided the second arm of the principle of responsible government:

An executive consisting of a governor-general and such persons as may from time to time be appointed as **his advisers, such persons sitting in Parliament**, and whose term of office shall depend upon their possessing the confidence of the house of representatives, expressed by the support of the majority.<sup>4</sup>

It was the location of the Executive in the Parliament which distinguished the Australian Constitution from that of the United States, where the Executive was not located in the Parliament, and was not responsible to it. It was this aspect of the principle of responsible government which met with opposition from delegates like Sir Samuel Griffith and others, who were impressed with the American Constitution, and who were not persuaded of either

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<sup>3</sup> *Convention Debates*, Sydney, 1891, p.26.

<sup>4</sup> *Ibid.*, p.26.



the necessity, or the possibility, of incorporating the principle of responsible government into the constitution of a federation, as distinct from a Union or complete amalgamation of the former colonies into a single polity.

The division of opinion at the Convention as to whether Ministers should be required to sit in Parliament was paralleled by the contrast between the two draft Constitutions which were in existence at the time the crisis in the Convention occurred.

The draft prepared by Andrew Inglis Clark<sup>5</sup> of Tasmania was completely silent upon the question of whether Ministers should be members of the Parliament. Clause 8 of his draft under Division III, Federal Executive Power, provided:

There shall be a Council to aid and advise the Governor-General in the Government of the Federal Dominion of Australia, and such Council shall be styled "The Executive Council for the Federal Dominion of Australasia"; and the persons who are to be Members of that Council shall be from time to time chosen and summoned by the Governor-General and sworn in as Executive Councillors, and Members thereof may be from time to time removed by the Governor-General.<sup>6</sup>

Andrew Inglis Clark was better informed about the provisions of the American Constitution, and the whole field of American politics, than any other member of the Convention. He was an ardent admirer of the American Constitution, and much of the structure, and detail, of the ultimate Constitution derives from this admiration. The omission from his draft of any requirement that Ministers must be drawn from Members of either of the two Houses of the Parliament was deliberate, and stems from American practice, where the principle of responsible government was not incorporated into the American Constitution. In this, he supported Sir Samuel Griffith in his proposal to make membership of either house optional rather than mandatory, in order that the question of the adoption of the principle of responsible government could be considered by the new Federal Parliament in the light of subsequent experience, rather than making it a mandatory provision of the Constitution.

In contrast to this, the draft prepared by Charles Cameron Kingston,<sup>7</sup> a member of the Lower House of South Australia provided, in Clause 1, the following:

The requirement of 'responsible government'. No person could be a member of the Queen's Privy Council for United Australia for more than three months unless he should also be a member of the Federal Parliament.<sup>8</sup>

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<sup>5</sup> See Griffith '*Successive Stages of the Constitution of the Commonwealth of Australia*.' Dixon Library Sydney. DL MS Q 198.

<sup>6</sup> *Ibid.*, Document 5, clause 8.

<sup>7</sup> J.A. La Nauze, *The Making of the Australian Constitution*, Appendix 3, p.295.

As noted therein the draft was dated 26/2/91 and printed in Adelaide by the Government Printer.

It is also included in Griffith's volume '*Successive Stages*' Add 501 Dixon Library, Sydney. Now DL MS Q 198.

<sup>8</sup> J.A. La Nauze, *Op.Cit.* Appendix 3, p.295.

This was consistent with the terms of the Resolutions proposed by Sir Henry Parkes. It is important to note, in relation to these quite different provisions, that both Clark and Kingston came from what were termed “smaller states”. Like so many other matters which were hotly contested as matters of basic principle, the battle lines were drawn on the basis of personal conviction rather than along State lines, or on lines of small States against large States.

The existence of these two drafts was clearly known to the members of the Convention, not solely to the Constitutional Committee. Sir Samuel Griffith had access to them, particularly during the Easter Weekend of 1891, when he, and other members of the constitutional Committee, spent the weekend aboard the Queensland Government’s vessel “Lucinda” in Broken Bay, to enable drafting to take place without outside distraction. Clark’s draft in the Dixon Library collection<sup>9</sup> contains many alterations and notations in Griffith’s own handwriting.

Griffith had argued that the matter should be left open, so that the hands of the future parliament should not be tied by this stipulation. At the end of the 1891 Convention, the views of Sir Samuel Griffith prevailed, and the Draft Constitution bill, which emerged, reflected this fact. Clause 4 of Chapter II, The Executive Government, did not make it mandatory that Ministers, appointed by the Governor-General, should be members of Parliament. It merely provided that such Ministers:

shall be capable of being chosen and of sitting as Members of either House of the Parliament. (Emphasis added.)

In contradistinction to this provision, the final Constitution adopted by the Convention of 1897-8 provided, in Section 64, that:

After the first general election no Minister of State shall hold office for a longer period than three months **unless he is or becomes a senator or a member of the House of Representatives.** (Emphasis added.)

Bitter debate surrounded the second essential feature of responsible government, so far as it is derived from the practices of the Parliament of Westminster. Under this no government, which possessed the confidence of the Lower House, could be forced to resign; the Lower House was supreme. Many years before the 1891 Convention the House of

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<sup>9</sup> *Ibid* ‘Successive Stages,’ Document 5.

Lords, which had never been an elected Chamber, had virtually lost any power to refuse Supply to a government which held the confidence of the House of Commons:

Between 1625 and 1860 the House of Commons has asserted the power to independently control appropriations on at least four occasions. At no time between these two dates or subsequently has the House of Lords ever challenged that assertion by rejecting a supply bill. It is therefore not surprising to find the *Exchequer and Audit Departments Act* of 1866 according formal recognition to the existence of this power although qualified by the Ways and Means procedure. Certainly it must be conceded that the possession of this power protects and reinforces the authority of the Commons under the principles of responsible government. It is for this very reason that the Commons has so vigorously asserted this power.<sup>10</sup>

Even if this were not so, any recalcitrance on the part of the House of Lords in blocking Supply could be overcome by the government of the day flooding, or threatening to flood, the House of Lords with newly created Peers.

Sir Samuel Griffith raised directly the question of whether the principle of responsible government should be entrenched in the Constitution at all. Indeed, many doubts were expressed as to whether the principle of responsible government could be incorporated into a federation. The major example of a recent federation which the convention had before it was that of the United States, where responsible government was not a feature of its provisions.

Parkes anticipated that pressure would be mounted to give the Senate equal power in relation to money Bills. In his opening exposition of his resolutions, he supported the necessity of the specific provision that the Lower House should have the sole power in relation to money bills, because he anticipated that a strong Upper Chamber would seek equal authority with the Lower House:

I contend that it will be absolutely necessary not to trust to derivations to be drawn from principles and practice in other countries, but to expressly provide that all money bills shall originate and undergo amendment only in the house of representatives.<sup>11</sup>

Parkes did not succeed in having this principle unequivocally transported into the 1891 Draft Constitution. The Convention did support the provision in s.54, that:

Laws appropriating any part of the public revenue, or imposing any tax or impost shall **originate** in the House of Representatives. (Emphasis added.)<sup>12</sup>

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<sup>10</sup> B.M. O'Brien. "The power of the House of Representatives over Supply," *Monash University Law Review*, Vol. 3, 1976-7, p.20.

<sup>11</sup> *Convention Debates*, Sydney, 1891, p.26.

<sup>12</sup> *Ibid.*, p.953.

However, Parkes could not prevent the gloss on this principle, which appeared in s.55, which provided that:

The Senate shall have equal power with the House of Representatives in respect of all proposed Laws, except Laws imposing taxation and **Laws appropriating the necessary supplies for the ordinary services of the Government, which the Senate may affirm or reject, but may not amend.** But the Senate may not amend any proposed Law in such a manner as to increase any proposed charge or burden on the people. (Emphasis added)<sup>13</sup>

In the controversial aftermath of the crisis of 1975, occasioned by the dismissal of the Whitlam government by the Governor-General Sir John Kerr, when the Senate refused to pass the Annual Appropriation bills, many commentators, and academics, argued that the Senate had no power to block Supply, having regard to the conventions derived from the ‘Westminster system’ of responsible government.<sup>14</sup> Additionally, it was argued that it was never intended by the framers of the Constitution that it should have such power.<sup>15</sup> Some, who accepted the theoretical right of the Senate to block Supply, argued that such power should not be used to force a Government which had the confidence of the Lower House to go to the electors. A further argument advanced was that the Senate no longer had the power to block Supply, because the power to reject Supply was given by the framers of the Constitution to the Senate considered as a States’ House, and that the Senate had ceased to be a States’ House, by reason of the development of party politics, which:

made that Chamber representative of party rather than of State.<sup>16</sup>

It is important to be clear on what was involved in the notion of a “States’ House.” There is no doubt that the framers of the Constitution did not regard the States solely as entities which were distinct from the electors who constituted them. Alfred Deakin, who may be regarded as one of the most liberal and democratic of the delegates attending the 1891 Convention, was at pains to make this important distinction at a very early stage in the proceedings of that Convention. Sir Samuel Griffith had said that the Senators would represent the States. Deakin gave a forthright denial to this proposition:

I cannot conceive of an entity called the state apart from the people whose interests it embodies; nor can I conceive anything within the state which can claim an equal

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<sup>13</sup> *Ibid.*, p.953.

<sup>14</sup> Sir Richard Eggleston. *Constitutional Seminar*. University of New South Wales. 1977. And in a letter to newspapers 1 December 1975 referred to by Colin Howard and Cheryl Saunders in “The Blocking of Supply and the Dismissal of the Government,” Essay 8, *Labor and the Constitution, 1972-1975*, Gareth Evans(Ed), Melbourne, 1977, p.263.

<sup>15</sup> Sir Richard Eggleston in his commentary on the paper by Howard and Saunders in, *Labor and the Constitution* Gareth Evans(Ed), Melbourne 1977, p.298.

<sup>16</sup> Howard and Saunders, *Op.Cit.*, p.261.

authority with the final verdict, after solemn consideration, of the majority of its citizens. If the hon.gentleman has any metaphysical entity in his mind which can be placed above this, I shall be glad to learn of its nature<sup>17</sup>

As to the structure and character of the proposed Senate, Deakin said that he had no desire to see the Senate created as a “mere replica of the Canadian Upper House,” which was inadequate for the position which it occupied. He stated that he had no fear of the “cyclonic fury” of the popular mind, evinced by the New Zealand representative Captain Russell. He had in mind that the Senate:

would be a chamber speaking with weight, and acting with authority, able to amend or reject all measures other than financial—**able to absolutely reject financial measures,** though not to amend them, and able by this means to challenge the verdict of the country whenever and however it pleased, as often as it might please.<sup>18</sup>

Deakin did not consider that this power, of what he called, continuing “*veto*,” should be an irresponsible one. Sir Samuel Griffith had argued in favour of granting the widest power of veto to the Senate; a “*veto in general*,” and a “*veto in detail*” in the sense that it could reject, and amend, the detailed provisions of any bill. This had been advocated on the basis that a true federation required the consent of the people as a whole, and also the people of the several constituent parts. If the Senate were an elected body rather than an appointed one, Deakin particularly asked whether the Senate would also go to the polls in the event of a clash with the House of Representatives:

If elected by the people, will they undertake, in the event of dispute, to face their electors in order to discover which side the people are?... If one chamber is to be compelled to undergo what is known as a penal dissolution—if we are called upon to undergo that trial at the pleasure of the upper chamber, let the upper chamber also enjoy the sweets of a similar appeal, and be bound by the same verdict.<sup>19</sup>

This was one of the most difficult issues which the Convention had to resolve, if it could. He claimed that the elevation of the Senate in the American Constitution had:

seriously injured the popular body and rendered it less fit to discharge some of its most solemn duties.<sup>20</sup>

However, there is no doubt that there was to be no restriction upon whatever power was given to the Senate. Deakin had no doubts on this point:

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<sup>17</sup> *Convention Debates*, 1891, pp.74-5.

<sup>18</sup> *Ibid.*, p.75. Emphasis added.

<sup>19</sup> *Ibid.*, p.77.

<sup>20</sup> *Ibid.*, p.77.

If we endow the second chamber with special powers, we endow them for the purpose of their exercising them; if not, why endow them at all? If we endow them with an absolute veto, we must mean them to exercise it. If not, we must say with what degree of veto we endow them.<sup>21</sup>

He called on Sir Samuel Griffith to clarify his views as to whom, or to what entity, the Senators were responsible. Griffith stated that the Senate was representative “of separate states, as aggregations of their own people!”<sup>22</sup>

He added that:

The majorities of the separate states might be of a different opinion from the majority of the people of Australia taken as one!<sup>23</sup>

Deakin said that it was crucial to know the method of election of the Senate before vesting it with such widespread powers. However, he conceded that the Senate should not be a subordinate body:

I do not wish to see a second chamber existing at the pleasure or acting under the control of the popular chamber. What I wish the second chamber to do is to act under the control, and only by the authority of the people—acting under the direction not of the electors of the country; and provided this be granted, I would never seek to aggrandise the popular chamber at the expense of the upper house, any more than I would reverse the process.<sup>24</sup>

He referred to the clear admission by Sir Samuel Griffith that he was dealing with the federal Senate in a manner different from that in which he would deal with any second chamber in the colonies. He pressed his argument that the Senate should be an elected body, so that any power to control matters of taxation would be coupled with a responsibility to the people:

The senate is a body which unless it be elected by direct vote of the people and can be sent at(sic) an emergency to its constituents, will not have a direct responsibility to those people whose taxation it is about to govern, and whose expenditure it is about to direct.<sup>25</sup>

Sir Samuel Griffith, in reply, stressed that he was not suggesting that the principles of responsible government should be abandoned, but that he:

doubted the wisdom of insisting upon its continuance in its present form.<sup>26</sup>

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<sup>21</sup> *Ibid.*, p.77-8.

<sup>22</sup> *Ibid.*, p.78.

<sup>23</sup> *Ibid.*, p.78.

<sup>24</sup> *Ibid.*, p.787.

<sup>25</sup> *Ibid.*, pp. 80-81.

<sup>26</sup> *Ibid.*, p.83.

The central issue was how to harmonise the principle of responsible government, that responsible Ministers should either, “obtain the sanction of Parliament for their acts or vacate office,” with the existence of a second chamber, equally an elected one, albeit on the basis of a different electorate, which had the power to deprive an elected government of Supply, and thereby bring the process of government to a standstill, even though the government still had the confidence of the Lower House. In reply to Deakin’s concern that the will of the whole people expressed in the election of the Lower House should not be frustrated by the power of veto of the Senate, Edmund Barton stressed the need to protect State rights in the sense of State interests:

If those state rights or interests are threatened in any legislative proposal, whether or not it is contained in a money bill, they will be under the especial care of the federal senate; and if state rights are threatened, whether in a money bill or not, it seems to me that it is not good argument to fall back upon the representative principle to the extent of saying that there is only one representative legislature, and, therefore, only one which can deal freely with question of money and taxation if the very spirit upon which federation rests is threatened by any scheme in a money or taxation bill.<sup>27</sup>

He commented on Deakin’s positive assertion that the representative principle was the only safeguard of federation, and claimed that Deakin had ignored the fact that the representative principle could be preserved in two chambers as well as in one:

The organ by which the will of the people is expressed is not necessarily the house of representatives alone.<sup>28</sup>

He argued that just because one House was called the House of Representatives, it did not follow that:

we cannot make another house of representatives, which will represent not only the states themselves, but also, as Mr Deakin put it, cannot represent those states without representing their people.<sup>29</sup>

He asked pertinently:

Is it because we are simply accustomed to have the representative power placed in one body that we cannot conceive of the idea of there being a form of federation, or union of states, in which there cannot be any thorough representation unless we have two such bodies.<sup>30</sup>

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<sup>27</sup> *Ibid.*, p.90.

<sup>28</sup> *Ibid.*, p.91.

<sup>29</sup> *Ibid.*, p.91.

<sup>30</sup> *Ibid.*, p.91.

He argued that, where they were forming not a unitarian constitution, but a legislative union of a federal nature, unless the principle of representation were maintained in the second chamber, “you are not forming a federal constitution at all.”:

I venture to say, therefore, that if you once admit the principle of the custody of state interests in a representative chamber, resting not upon mere locality, but upon the individualism of the states— representing through the states their people just as the other house represents the people through a locally elected assembly— you can no more deny the right of veto in detail on questions of money and taxation than you can deny it in respect of anything else.<sup>31</sup>

Barton saw the need to protect the people as citizens of a federated State, and also for the protection of their state of individuality. He saw future Australians as possessing a “double citizenship.” It is illuminating to realise the clarity with which the delegates to the 1891 Convention analysed these concepts. The notions of “States’ Rights” have often been regarded as expressions of reactionary, and non-progressive ideas. The framers of the Constitution saw such expressions in a quite a different light:

The Fathers of the Australian Constitution had given many years to the public life of their respective colonies; they did not desire to denude or cripple their familiar and trusted institutions for the sake of the proposed but untested authority for which as yet they could feel no comparable allegiance or affection.<sup>32</sup>

They did not look upon the States as disembodied institutional structures, separate from the citizens who made them up. Alfred Deakin stated that experience had strengthened the opinion that no union was possible in Australasia:

which did not preserve in the fullest form the power and dignity of the several communities which compose it.<sup>33</sup>

Edmund Barton expressed the view that none of the delegates desired to place too much power in the hands of the Union, to the detriment of the rights of the less populous, and less wealthy, communities, which rest on the federal principle:

It must not be forgotten that there is to be a **double citizenship** conferred by this constitution upon every citizen of these states and of the great nation we hope to found. If there is that **double citizenship** and there is not in all essentials due representation of it even in questions of money, then the friction of which my Hon. and learned friend sees so much danger in the relations between the senate and the house of representatives on occasions in other places, say in America, would be merely a

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<sup>31</sup> *Ibid.*, pp.91-2.

<sup>32</sup> L.F. Crisp “The fathers and their Constitution,” *Australian National Government*, Croydon, Victoria, 1965, p.17.

<sup>33</sup> *Convention Debates*, Sydney, 1891, p.71.



surface indication of deep-seated irritation, which any negation of proper rights will evoke within the states which are parties to the compact.<sup>34</sup>

All these considerations were bound up with the proposed structure and powers of the Senate, its relationship to the House of Representatives, and the principle of responsible government. Sir Samuel Griffith raised the issue of whether, or not, as a matter of positive stipulation, Ministers should be Members of Parliament, in the light of the provisions of other constitutions, such as that of America, where such a relationship was not necessary. He claimed that there was nothing inconsistent with the principle of responsible government if the government had the power to appoint non-members of Parliament to the Cabinet, contrary to the practices adopted by the Parliament at Westminster. Consequently, he proposed that there should be no provision in the proposed Constitution which stipulated that Ministers of the Crown must be members of either House of the Parliament. In relation to Money bills, he raised the issue of “tacking,” as being totally inconsistent with the theory of the equal authority of the Senate and the Lower House. The practice of “tacking” was designed to inhibit an Upper House from dealing with a particular matter of legislation, proposed by the Lower House, by “tacking” it onto a Money Bill, in relation to which the Upper House had no power.

In the colonial parliaments, the Westminster system had been easy to adopt, because each colony was a union unto itself, and was sovereign within the scope of the powers granted to it by the Imperial Parliament. Federation raised totally different problems to those experienced by the separate colonies.

Sir Samuel Griffith foresaw the distinct possibility of deadlock occurring between the Lower House of Representatives, elected by the Australia-wide electorate, and the Senate, elected directly or appointed indirectly by the same electors, but divided into groups delineated by the colonial boundaries:

We must take into consideration the existence of these two forces possibly hostile, even probably hostile, before, say, fifty or a hundred years are over, and we must frame our constitution in such a way that it will work if that friction does arise.<sup>35</sup>

He saw difficulty in adapting the principle of responsible government to a federation, and expressed the opinion that, if the delegates insisted that members of the executive must be members of the legislature, and also that the executive must command always a majority in the one House, the system, as a probability would not work.

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<sup>34</sup> *Ibid.*, *Convention Debates*, Sydney, 1891, p.94. Emphasis added.

<sup>35</sup> *Ibid.*, p.36.

Whilst accepting the principle that ministers should not be dissociated from parliament, he felt obliged to point out, what he considered to be:

the apparent inconsistency, to my mind, of the system of giving equal powers to the States as represented in one house, and of making the executive government depend for its existence upon the other house.<sup>36</sup>

The doubts as to the possibility of incorporating the principle of responsible government into a federation were graphically expressed by John Winthrop Hackett, a Member of the Legislative Council of Western Australia, in a passage which has become famous. He was stressing the importance for delegates to keep in mind, what he called, the “federal will” in welding the separate colonies into a nation. He argued that if it was intended to incorporate responsible government in exactly the same form as it existed in the United Kingdom:

there will be one of two alternatives—either responsible government will kill federation, or federation in the form in which we shall, I hope, be prepared to accept it, will kill responsible government.<sup>37</sup>

The point he was making in this cryptic statement was that responsible government, on the “Westminster” pattern, could only exist where the Upper House was subordinate to the Lower House, and that the only basis which the separate colonies, particularly the smaller ones, would accept the new Constitution was that the Senate should have almost co-ordinate powers with the House of Representatives, and be able to reject Supply. If the Lower House triumphed, that would be the end of federation, and if the Senate was all powerful that would be the end of responsible government.

Hackett, as a young politician of the youngest colony, was keen to defend his colony against the suggestion that it was seeking special privileges by seeking great powers for the Senate. He argued that “The senate is the hinge of federation.” He sought to distinguish between “unification,” a system of “confederacy,” and that of “federation.” He criticised the way the constitution of the United Kingdom had developed where:

Having won the victory over the Crown, the Commons and the Lords joined issue, and another state in unification was reached. The Lords practically disappeared, and the Commons mostly in legislation and wholly in finance reign supreme. We go one step further, and we find that, having defeated the Crown and the Lords, it is now insisted that the executive government shall form simply one of the departments of the House

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<sup>36</sup> *Ibid.*, p.36.

<sup>37</sup> *Constitutional Convention Debates*, 1891 p 280.

of Commons; they treat the executive body in every sense as the committee hardly of both houses, but mainly of the first house, and in every sense responsible to the first house.<sup>38</sup>

After asserting that the American Constitution was a deliberate copy of the state of affairs that it was believed existed in the English Constitution at the time of the separation of the American colonies from England, he concluded that:

the most dangerous point about this proposal to engraft the present system of England upon our federal constitution, is that it seeks to fix the changeable, and to make the unalterable the alterable.<sup>39</sup>

The key question in relation to the principle of responsible government was, “responsible to whom?” In the United Kingdom, as Hackett pointed out, it meant responsible to the House of Commons, not to the House of Lords or to both Houses.

James Munro, Premier of Victoria, challenged Sir Samuel Griffith by asking:

Where does the responsibility lie?” ...if the senate vetoes the government’s financial measures approved by the Lower House, the result is that the Senate is supreme.<sup>40</sup>

He concluded that:

if we are simply going to form a republic, and to establish an institution in which the executive will not be in parliament, and will not be responsible, the state of affairs will be totally different.<sup>41</sup>

Thomas Playford, of South Australia, saw the impossibility of grafting the principle of responsible government onto a system modelled largely on the American constitution because:

directly you graft on to it responsible government, you take away at one stroke some of the power the senate possesses. —You cannot carry on responsible government and give to the senate the powers which it possesses in America at the present time.<sup>42</sup>

It is clear that the principle of responsible government, as understood by some delegates, involved the proposition that the Lower House must be supreme. The House which had the power of the purse had the power to govern. No upper chamber could frustrate a government, which had the confidence of the Lower House, by depriving it of the money to carry out its programme. On the other hand, members, particularly from the smaller

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<sup>38</sup> *Ibid.*, p.278.

<sup>39</sup> *Ibid.*, p.279.

<sup>40</sup> *Ibid Convention Debates, Sydney, 1891*, p.49.

<sup>41</sup> *Ibid.*, p.50.

<sup>42</sup> *Ibid.*, p.58.

colonies, saw the Senate as a protection for their colonies against the “brutal” majority represented by the House of Representatives. They did not see the principle of responsible government, as applied to the federal constitution, as solely resting on the power of the Lower House to protect the government, where the Senate decided to reject money bills, or to refuse normal Supply. They rested their argument on the basis that the principle of responsible government involved the proposition that a government which could not obtain Supply must resign and go to the electors. In the United Kingdom this rejection could only be made by the House of Commons, so that the collateral proposition, involved in the principle of responsible government, was that no government could be forced to resign where it had the confidence of the House of Commons. In a federal system, however, where the Senate had the power to reject Supply, it must follow that the government would be forced to go to the people. This conflict of view has continued ever since, and resurfaced, in acute form, in the crisis of 1975.

Those who were prominent in the debates of the Nineties were well aware of the problem, which was created by the attempt to superimpose the “Westminster” system upon a federal scheme. Sir Samuel Griffith, in arguing for leaving open the question of whether responsible ministers should be compelled to be drawn only from parliament, wanted to introduce a degree of flexibility into the Constitution.

Sir Samuel Griffith indicated that the problem that was bedevilling the Convention did not arise in the Canadian Constitution, because of the fact that it was not a truly federal one.<sup>43</sup> He stressed that:

the relative constitution and powers of the two houses of legislature underlie the whole of what we have to do.<sup>44</sup>

He was concerned to see that the delegates realised that they were trying to do something that had never been tried before, namely, the attempted marriage of responsible government to a federal structure. He had no doubt that the Senate should have the power to block Supply.

The other major issue, which caused a great deal of dissension in the 1891 Convention, was the question of the propriety of having the colonies equally represented in the Senate. Sir Samuel’s view was that whether or not it was self-evident that equal representation of the States in the Senate was desirable, it was:

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<sup>43</sup> See also Sir Samuel Griffith *Notes on Australian Federation*. A paper presented to the government of Queensland when he was Chief Justice of Queensland 1896, National Library Manuscript Room, Literature on Federation, MS 5911, p.2.

<sup>44</sup> Ibid., *Convention Debates*, Sydney, p.38.

at least certain that such representation is an essential condition of the establishment of Australian federation at the present time. The practical result would be that **no law could be passed**, that is to say no change in the existing law could be made, nor any future law passed, **by the Federal Parliament, without the consent both of a majority of representatives of the people and of a majority of states.**

And this I shall assume as a fundamental principle so far as regards federal legislation. How far it will apply to the executive branch of the Government will require further inquiry.<sup>45</sup>

Alfred Deakin was not persuaded of this broad principle. Whilst voicing concern for the protection of the rights of the people of the separate colonies, he considered that the real protection for these communities was to be found in the division of powers between the central government and the constituent States.

Edmund Barton countered this optimism by pointing out that, in any delineation of powers, however carefully done, there was always the possibility of overlap in the two areas. He warned the members of the Convention that:

unless we conserve to the states not a mockery of their rights, but an effective assertion of them in case of such overlap, **we shall soon find many who will regret their compact, and if it is a compact that they find indissoluble, then so much the worse for the union.**<sup>46</sup>

These remarks and foresights would have been seen as immediately relevant by the people of the State of Western Australia when, in the 1930s, they sought to secede from the Commonwealth. They might also have been conveniently adopted by the legal representatives for the State of Tasmania in the *Tasmanian Dam Case*.<sup>47</sup> They certainly embody sentiments which find ready acceptance by those members of the High Court who, from time to time, have stressed the federal nature of the Constitution. They also offer a balance to the overemphasis on the function of the Constitution in creating a nation. The nation that emerged was not to be a nation governed by a Union. The last thing that the framers of the Constitution contemplated was that the Constitution they were framing represented a Union of the type existing in the United Kingdom. If the Constitution did create a nation, it created a Federal Nation, where the peoples of the constituent communities retained significant self-government, along with their political and cultural independence. In the dual citizenship, postulated by Edmund Barton, Australianism did not obliterate the emotional, and political, attachment of the citizens to their own local

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<sup>45</sup> *Ibid.*, p.23. Emphasis added.

<sup>46</sup> *Ibid.*, p.94. Emphasis added.

<sup>47</sup> *The Commonwealth v Tasmania, (The Tasmanian Dam Case)*, (1983) 158 CLR 99.1.

community, and its organs of government. It was a true duality, not a complete unity. A powerful Senate was essential, in Barton's view, to give effect to the rights of the separate federating communities, which should be fully protected:

It is incumbent upon those who represent the large states, while taking care that neither they nor anybody else shall make too large a surrender, to see that no form of government is established which may place states weaker in population at the mercy of others. And ...that which is today the least populous may in fifty years be the most populous; ...let us take the utmost care to introduce those protective provisions which after all will be the protection of ourselves— the protection of ourselves as citizens of a federated state in all our relations as such citizens, and our protection for the future in respect of our state individuality.<sup>48</sup>

The population growth and shifts in modern times have made these words both prophetic and relevant today.

Despite these cautionary remarks, Barton supported the view that it would be the wisest course to make the executive responsible only to the Lower House. In so far as the principle of responsible government, derived from the "Westminster system" of government, was to be married to the federation, it should be adopted on the basis that only a defeat in the Lower House could force a government to the people. It would also involve the proposition that, even a refusal of Supply by the Senate could not force the government to the people, so long as it had the confidence of the Lower House. This approach had the support of most of the representatives of the larger colonies, such as New South Wales and Victoria. It did not have the universal support of all delegates.

Sir John Downer, representing South Australia, pointed to the history of parliamentary government to show that, over the years, the powers of the upper houses had been whittled away. Because of the need, in a federation, to give due weight to, and protection for, the component States, he did not support any provision which would ultimately lead to the same result:

my strong opinion, at present at all events, is that it will be absolutely impossible to preserve the rights and privileges of the house representing the colonies, if the government is solely responsible to the house which represents the individual electors.<sup>49</sup>

In order to secure a voice for the smaller colonies in the government of the federation, he offered a solution, derived from the Swiss Constitution, whereby the two houses should

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<sup>48</sup> *Ibid.*, p.94. Emphasis added.

<sup>49</sup> *Ibid.*, p.102. Emphasis added.

meet as one and choose the ministry, which should remain in office for a set period. Such an arrangement would ensure that the government had the confidence of the parliament not in the ordinary sense, and in a somewhat different way to the English system, but would be more consistent with a federation.

Andrew Joseph Thynne, MLC, Queensland, referred to Deakin's concern for the "danger of want of popular power in the new state." He argued that Deakin's style of democracy would be "insecure and unsteady," and without those safeguards against the tyrannic exercise of power of temporary majorities, which are necessary for the peaceful government and continuance of every state in the world. He argued that the democracy, which was feared by many of the conservative delegates, was a democracy where the will of the majority of the people should at all times be paramount over any other claims, either claims of good sense, or the rights of minorities to be considered in the exercise of temperate power. It was associated with notions of the "brutal majority" of fifty plus one percent of the population, which conservatives feared, and required to be subject to the supervisory process of an Upper Chamber with a longer tenure. In supporting the proposal to invest the Senate with power co-ordinate with the House of Representatives, he concluded:

Unless the senate be charged with sufficient power to protect the people of the federation against hasty and ill-considered legislation, the union consummated will be a weak and vacillating one, which will not inspire confidence among our own subjects or among the peoples of the world with whom our government will have to deal.<sup>50</sup>

Richard Chaffey Baker, MLC, South Australia, followed the opinion of Edmund Barton in relation to the nature of States' Rights. He asserted that the Senate represented the people as much as did the House of Representatives, the only difference being that "the constituents are grouped in a different way."

He said that the name "senate" was not as descriptive of the role of that chamber as the Swiss name "Council of the States." He contended that the proposed Senate was in no way analogous to an ordinary Upper House. It represented the people quite as much as the House of Representatives:

The House of Representatives is elected by the people grouped in electoral constituencies containing probably an equal number of voters, and the council of the states is elected by the people grouped in states.<sup>51</sup>

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<sup>50</sup> *Ibid.*, p.106.

<sup>51</sup> *Ibid.*, p.111.

He saw the federation as a structure in which the people of the States could preserve their individuality, and exercise their powers freely and in an untrammelled manner. In relation to money bills, Baker argued that power should be given to the Senate to alter such bills, or, at least, to reject them in detail, rather than *in toto*. In the course of an interjection, Alfred Deakin challenged him to face the issue of whether, or not, he would make the Senate go to the people in circumstances where the Senate defeated the government by rejecting Supply, and thereby forced the Lower House to go to the people. Baker never directly answered this question, but conceded that, if they were trying to establish responsible government with two co-equal, and co-ordinate houses, they were trying an experiment which might, or might not, succeed. He saw responsible government as a system where one branch of the legislature had usurped all power. He said that two of the colonies had Upper Houses with co-ordinate power, except so far as the initiation of money bills was concerned, and in those cases the legislatures had somehow succeeded in carrying on, not without some degree of friction.

Bolton Stafford Bird, MHA, Tasmania, took up the question that had been directed by Deakin to Richard Baker, as to whether the Senate would also be sent to the people, if the Lower House was sent to the people as a result of the action of the Senate in refusing to pass legislation, or grant Supply. He argued that the Senate should be an elected body. If such a Senate:

refused once or twice to pass measures which the house of representatives had agreed by a large majority, they should be sent to their constituents, so that we should have a new and best expression of opinion from the states as a whole. I do think it would be better to fix a term, as is fixed for the representatives of the lower house, during which they should hold office, and that they should be under similar conditions to those which I have indicated—liable to dissolution, so that the people's will may be ascertained, and they informed as to the course they ought to pursue.<sup>52</sup>

He was even more outspoken in his opposition to the views of Alfred Deakin, in relation to the major power residing in the Lower House. He suggested that the smaller colonies would not consent to surrender the power that they then possessed to control the amount of money which will be raised by taxation, or spent for any purpose whatsoever under the Constitution. Deakin, he said, was really seeking “government by one chamber.” He referred to Richard Chaffey Baker's suggestion that they might have to try experiments in regard to the Executive:

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<sup>52</sup> *Ibid.*, p.123.



If we are going to have a council which is empowered to deal with money bills, we possibly may find that we will need an executive that will be responsible to both houses, and that the resolution, as you, sir, have moved it, would in that particular require amplifying, so that ministers should not hold office solely at the will of the majority of one house... If our senate is to be representative of the people as I have indicated, there would be a propriety in requiring the senate to be dissolved after one or two attempts to pass through it a measure that had passed the house of representatives.”<sup>53</sup>

After quoting extensively from Bryce on the working of the American system, Arthur Rutledge, of Queensland, argued that America had 100 years of experience in the working of such a system as that advocated by Sir Samuel Griffith, and, during that period, the Senate had grown in the affections of the people. He conceded that there was a good deal in the contention that it was difficult to graft the American system, which had no executive responsible to the legislature, upon a system which is to combine a Senate with co-ordinate powers with a system of responsibility to a House of Representatives. However, he suggested that, in the course of time, developments would occur which would combine the ideas of responsible government with the existence of a second chamber with powers such as were not possessed by existing upper chambers. In conclusion he stated:

I do contend, however, that a great mistake will be made if we proceed to the creation of a senate, or second chamber, in the federal constitution, which shall be deprived of those powers which we enjoy, or a great proportion of the powers that are now enjoyed by the Senate of the United States.<sup>54</sup>

Charles Cameron Kingston QC, of South Australia, who was later appointed to the Committee on the Judiciary, reaffirmed strongly the fact that the delegates were dealing with:

autonomous states, who have long enjoyed the blessing of self-government, and who should not be asked— and who, if asked, would not be likely to accede to the request— to sacrifice any of their existing powers other than those which it is absolutely necessary should be surrendered in the national interest.<sup>55</sup>

He emphasised the fact that the constitution of the Senate was one of the most important issues before the Convention. He did not anticipate any collision of a serious nature between the two Houses, because they were responsible to the same people:

The sole distinction is that while the electors are the same, the electorates are different.<sup>56</sup>

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<sup>53</sup> *Ibid.*, p.122.

<sup>54</sup> *Ibid.*, p.149.

<sup>55</sup> *Ibid.*, p.153.

<sup>56</sup> *Ibid.*, p.159.

He strongly asserted that state rights needed special protection. However, he looked forward to a time when:

it may be found advisable to alter the constitution of the federation in such a way as to obviate the necessity of special provision for the protection of state rights.<sup>57</sup>

He did not think that it was necessary to make the two houses of exactly co-ordinate jurisdiction, nor did he agree with Sir Samuel Griffith's suggestion that the Senate should have the power of *veto in detail* in respect of money bills. On the other hand, so long as "State Rights" were recognised, he considered that it would be desirable to confer on the Senate real and important, not simply nominal, powers. He did not follow the argument that, if a *veto in detail* were given to the Senate, it would be equally necessary to give the Senate control over the executive. If this occurred, it would raise the whole question of whether, or not, it was essential to the establishment of a federation that there should be a system of responsible government in the federal sphere. He pointed out that, in Switzerland, the rights of the people were conserved, and "State Rights" were recognised to their fullest, and yet no system of responsible government prevailed. If it were found by the delegates that responsible government was not compatible with a federal system consisting of two Houses of co-ordinate jurisdiction, then they should consider whether it was essential that responsible government should prevail. He disputed the strict view, propounded by Alfred Deakin, that any Senate veto on money bills could only be exercised where "State Rights" were affected, and that, because of the strict distribution of powers between the Commonwealth and the States, there could be no federal matter which could affect "State Rights," because there could be no "State Rights" in any strictly federal matter, which was allocated to the Federal parliament. In the absence of a definition, or the possibility of arriving at a satisfactory definition of "State Rights," he felt obliged to retain the provisions as proposed for an absolute right of veto in the hands of the Senate.

Nicholas Fitzgerald MLC, of Victoria, expressed positive support for a strong Senate. He was angry at the attempt being made by some of the delegates to demand powers for the new House of Representatives which would place the whole power of the country in that branch of the legislature. After dealing with, what he called, the restraining role of the Senate, he asked:

What is the use of offering to the senate co-ordinate power in legislation, and denying it to them in regards money? Why, look at the list of measures which is put forward as

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<sup>57</sup> *Ibid.*, p.160.

the alpha and omega of the powers that the federal parliament is to be entrusted with...The list, if hon. members will take the trouble to look at it, contains no measure of any consequence of which money is not the keystone. There is not one single measure which could not, by the deft turn of a draftsman's pen, be converted into a money bill.<sup>58</sup>

As to the proposition that the principle of responsible government demanded that real power should reside with the Lower House, he urged that:

Concentrating the whole power of government in one house is nothing else but despotism<sup>59</sup>

The varied views emerging from the debate illustrate the great difficulty that was being experienced by the delegates in satisfactorily marrying the concept of responsible government with the structure of a federation. Responsible government, as practised in the "Westminster system," involved the twin propositions that the government derived Supply from the Lower House, and could not be forced to resign so long as it could obtain Supply by reason of retaining the confidence of that House. The upper Chamber had no power to deny Supply to the Lower House. Such a system was infinitely suited to the unified system of government that existed in the United Kingdom and New Zealand. The real problem arose when the form of government, which was essential to induce the separate colonies to come together, was that of a federation, in which certain crucial elements of the British system of responsible government were not to operate. These elements were that the upper Chamber was to be an elected one, and not in any way comparable to the House of Lords, whose members were either hereditary, or appointed. Further, unlike the House of Lords, the Senate was to be more than a House of review. It was to have real legislative powers, almost equal with the Lower House. The only restriction on this co-ordinate jurisdiction was that the Senate could not originate money bills. Notwithstanding this restriction, the Senate was to have power to reject, if not amend, money bills. This involved the proposition that the Senate, which had a different electorate, could refuse to grant Supply to the government of the day. Under the British system of responsible government, the House which alone could refuse Supply to the government, was the only House which could force that government to go to the people. Because the House which could do this was the House from which the government was elected, a refusal of Supply meant that the government had lost the confidence of that House. Where Supply was refused by the Senate, it did not

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<sup>58</sup> *Ibid.*, p.171.

<sup>59</sup> *Ibid.*, p.173.

mean that the government had lost the confidence of the House which elected it. Theoretically, this might be the case in the unlikely event that the whole of the Ministry consisted of Ministers who were members of the Senate. Even then the government, in the sense of the Ministers, who could initiate money bills, would only derive their power so to do from the Lower House, because the Senate would have no power to initiate money bills. To gain support for any initiation of money bills, such a Ministry would need the confidence of the Lower House in any case.

What the delegates were groping for was an answer to the question, raised by Alfred Deakin, namely, what would flow from the refusal of the Senate to grant supply to a government which had the confidence of the Lower House. Some delegates felt that the government would have to go to the people, but there was much difference of opinion over whether the Senate would also have to go to the people. Some considered that the Senate would have to go to the people to ascertain whether it still had the confidence of its electorate, in the same way as the Lower House would have to consult its electorate. The difference in the electorates would not necessarily mean that a solution to the difference of opinion would result. Both electorates might reassert their respective confidences in the bodies which they had the right to elect. Some delegates took the view that the Senate would not have to go to the people, because it was intended that the Senate should have a semipermanent existence, because of the provision for the separate retirement of one half of its numbers.

Dr Cockburn, representing South Australia, and a member of its Lower House, took up the suggestion by Sir Samuel Griffith that the Constitution had to be flexible:

The hon. member, Sir Samuel Griffith, very properly spoke in favour of that elasticity of constitution which we may not notice changing from day to day; but when we look back, after ten or eleven years, it is easy to see that we have, to a large extent, changed that constitution. Now, it is impossible, unfortunately, that this elasticity, which has so much to recommend it, and whose advantages were pointed out by Sir Samuel Griffith, can be retained to the fullest extent when we make this compromise of federation.<sup>60</sup>

Contrary to the contention of Sir Samuel Griffith, that they could retain elasticity in the working of the federal Constitution, Dr Cockburn claimed that “the essence of federation is rigidity.” He pointed out that all their prior experience had been with parliamentary sovereignty. Under federation, no parliament could be a constituent body capable of

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<sup>60</sup> *Ibid.*, p.197.

altering its own Constitution, as distinct from the colonial parliaments, which were both legislative and constituent bodies:

Again, instead of parliament being supreme, the parliaments of a federation are co-ordinate bodies — the main power is split up, instead of being vested in one body. More than all that, there is this difference: When parliamentary sovereignty is dispensed with, instead of there being one high court of parliament, you bring into existence a powerful judiciary which towers above all powers, legislative and executive, and which is the sole arbiter and interpreter of the constitution.<sup>61</sup>

He realistically stated that federation would essentially be a compromise, and a bargain. He anticipated that the final bargain was likely to be a “one sided contract.” He claimed that the colonies came to federation, not because they were dissatisfied with their past history, but:

we are so proud of our progress, and love so much those colonies with which our progress has been associated, that we look to federation not to destroy, but to protect and shield those institutions under which we have so far obtained our rights and privileges; and we look upon federation as a cover, a powerful cover, under which we can advance to a still greater development of our freedom.<sup>62</sup>

Dr Cockburn’s words echoed the terms of Sir Henry Parkes’ first resolution, which was placed before the Convention for acceptance:

That the powers and privileges and territorial rights of the several existing colonies shall remain intact, except in respect to such surrenders as may be agreed upon as necessary and incidental to the power and authority of the National Federal Government.<sup>63</sup>

These words, coming from the “Father of Federation,” show the strength of the local loyalty of the delegates to their own colonies, and their own heritage. They also stress that agreement, or compact, by and between the peoples of the separate colonies, underlay the amount of power to be conceded to the new central government. Such central power was conceived as being confined in such a way as to prevent its intrusion into the domestic area of the individual federating colonies.

Like so many of the speakers, Dr Cockburn stressed the difference between the Senate and the Upper Houses of the colonies, and cautioned against drawing false analogies from the Upper Houses with which they were all familiar. The concept of an august Senate, drawing on the best of the political talents of the country, is in strong contrast to the

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<sup>61</sup> *Ibid.*, p.198.

<sup>62</sup> *Ibid.*, p.199.

<sup>63</sup> *Ibid.*, p.23.

deprecatory description of the members of the Senate by the former Prime Minister Paul Keating, when he referred to them as “unrepresentative swill.”

Nicholas John Brown, a member of the Lower House of the Tasmanian parliament, supported Dr Cockburn’s distinction between the Senate and colonial Upper Houses:

I have been very much surprised to find that, on the part of many who have discussed the question, such a disposition to confuse the nature and constitution of the upper houses, as we know them in the colonies. It appears to me that nothing could be further from the truth than to represent the senate, as we contemplate it, as representing only a section of the people.<sup>64</sup>

The main division of opinion, surrounding the incorporation of the principle of responsible government into the Constitution, centred around the contention of Alfred Deakin, that the Lower House must be supreme, as against the views of Edmund Barton, Dr Cockburn, Mr Brown and others, that a strong Senate with co-ordinate powers was essential, and that, if necessary, the familiar doctrine of responsible government should, at least, be left open, as recommended by Sir Samuel Griffith, or substantially modified to accord with the federal structure, or completely abandoned as suggested by some others. The extreme divergence of opinion in relation to the constitution of the Senate and its powers led to a crisis in the proceedings of the 1891 Convention which almost wrecked the deliberations.

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<sup>64</sup> *Ibid.*, p.209.

## THE CRISIS WHICH ALMOST WRECKED THE 1891 CONVENTION

Apart from the attempt by George Dibbs, the Leader of the Opposition in the New South Wales Parliament, to stir up dissension in the 1891 Convention by throwing, what he called, three bombshells, which proved to be nothing more than “fizzers,” the atmosphere did not become unduly heated until Sir John Downer, QC, a member of the Lower House in South Australia, attempted to bring the debate on the Senate issue to finality by moving:

That the resolution be amended by adding the following words: “The senate to have the power of rejecting in whole or in part any such last mentioned bills.”

The “last mentioned bills,” of course, were the money bills.

Sir Henry Parkes was the first to react to this motion, and recorded his “extremely strong” opposition to it. Anxious as he was to achieve federation, he indicated a reluctance to agree to:

two houses of parliament having co-equal powers in dealing with money bills.

(However) I am at a loss to conceive how any hon. gentleman can calmly reason and come to the conclusion that their representative character will be equal. One will not represent the people at all, except indirectly; it will represent in fact the states, and we should have a good definition of what the meaning of state is before we could say to what extent the members of this senate—or call it what you will—would have a representative character.<sup>1</sup>

At this stage, it should be remembered that it was contemplated, in the 1891 draft Federation Bill, that the Senate should be elected, not by direct vote of the people of the various colonies, but by the several parliaments.<sup>2</sup>

Sir Henry Parkes was prepared for equal representation of the States in the Senate, and for a power of veto by the Senate, but only in respect of the general legislation of the country, not otherwise:

Some one authority must decide as to how the people are to be taxed, and as to how the product of taxes is to be appropriated in the interest of the people.<sup>3</sup>

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<sup>1</sup> *Convention Debates*, Sydney, 1891, p.380.

<sup>2</sup> s.9 of the draft Constitution provided: “The Senate shall be composed of eight members for each State, directly chosen by the Houses of the Parliament of the several States during a Session thereof, and each Senator shall have one vote.”

<sup>3</sup> *Ibid.*, p.381.

Henry Wrixon QC, a member of the Lower House of the Victorian parliament, then moved an amendment to Sir John Downer's motion, whereby he sought to provide that the equal power of the Senate should not extend to money bills, bills dealing with duties of customs and excise, and, particularly, the annual appropriation bill. The Senate would be entitled to reject these bills but not amend them. He also added a prohibition against "tacking" any matter not connected with the subject of money on to the provision for annual Supply.

At this point, the debate exploded. Dr Cockburn reacted immediately in sheer frustration:

I would remind hon. members that we are now in the third week of our sitting, and we have had ample time to consider the issue. The whole issue before us is whether we shall or shall not have federation.<sup>4</sup>

It should be remembered that all the delegates were full-time members of the several colonial houses of parliament, many of whom had come long distances, mostly by sea, to attend the Convention. The presence of the Premiers and Senior Ministers of the colonies at the Convention meant that the essential business of the several colonies was virtually at a standstill until the conclusion of the Convention. James Munro, the Premier of Victoria, added his plea for expedition. Dr Cockburn laid the issue on the line in very forthright terms:

Unless something in the form of the amendment moved by the hon. member, Sir John Downer, is agreed to, there will be no federation.<sup>5</sup>

In answer to this Munro retorted:

And if it is carried there will be no federation.<sup>6</sup>

Dr Cockburn carried on his argument by asserting that the whole principle of federation was to recognise both the co-ordinate power of the Australia-wide population and that of the States. There could be no federation if all power was given to the popular assembly. Sir Henry Parkes then rejoined the debate, saying that, if Sir John Downer's amendment was carried, there would only be a federation of South Australia and Western Australia, but if the amendment was rejected, there would only be a federation between New South Wales, Victoria, Queensland, and Tasmania. Dr Cockburn persisted in his argument that it was

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<sup>4</sup> *Ibid.*, p.382.

<sup>5</sup> *Ibid.*, p.382.

<sup>6</sup> *Ibid.*, p.382.



not in the spirit of federation to assert that the only federation was that of a federation of the people of Australia as a whole, and replied to Sir Henry Parkes' assertion by saying that:

It would have been well if we had discussed a fortnight ago whether we should have federation or unification. It is no use giving representation to the states house if you emasculate that house by placing all power in the other house. That is not federation; and those who argue that that is what should be done are not arguing in favour of federation but in favour of unification. **But we had been sent here to discuss federation—not unification;** and unless the amendment of the hon. Sir John Downer, or something to the same effect, giving the council of states, or call it what name you will, some sort of power of *veto in detail*, as well as in whole, is carried, you place the whole power of the purse in the house which represents population, and you can have no federation whatever.<sup>7</sup>

Dr Cockburn was facing the issue squarely in arguing that, whilst in a complete union it was consistent that the power of the purse should reside in the Lower House, there was no justification for importing that principle into a federation. In his view, the power of the purse in a federation must rest in both Houses.

A crucial matter of principle was directly raised in this debate. It showed that, so far as those who supported Dr Cockburn were concerned, responsible government, in the sense of the supremacy of the Lower House, had to be modified in a federation. This central issue of how responsible government could possibly be married to a federal structure, without modification, opened up a huge division of opinion on matters of fundamental principle. What might be called the “democrats” were all for the principle of majority rule on a population basis at all costs. This, of necessity, involved the adoption of that part of the principle of responsible government on the “Westminster” pattern which made the Lower House supreme in money matters, and where a government possessing the confidence of the Lower House could not be forced to go to the people by a recalcitrant Upper House. Such an Upper House should not have the power to refuse Supply. Some of the strongest voices in the 1891 Convention staked all on the supremacy of the majority of the Australia-wide electorate, represented in the House of Representatives. The other contending electorate of the people of Australia considered as the sum of the separate electorates delineated by the State boundaries, represented in the Senate, should not be able to bring

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<sup>7</sup> *Ibid.*, p.382. Emphasis added.

down a government which held the confidence of the House of Representatives. To the “democrats,” responsible government could only be achieved by incorporating into the federal Constitution the same system as existed in the United Kingdom, where the fate of governments could only be determined by the confidence of the House of Commons. To those who opposed this view, such incorporation would destroy federation, because such incorporation would only be possible if the whole country had been amalgamated into a single polity as in the United Kingdom. Those who stressed the interests of the separate State electorates demanded that, if the principle of responsible government was to be engrafted onto the federal Constitution, it had to be modified to the extent of making the government responsible to both Houses.

This precise difference of approach was polarised in the aftermath of the dismissal of the Whitlam government in 1975. The opponents of the action of the Governor-General rested their case on the principle that no government which held the confidence of the House of Representatives could be dismissed, or sent to the people by any action of the Senate. Those who supported the dismissal relied on the collateral principle that a government which could not obtain Supply had no option but resign, or seek a dissolution. The question that has never been satisfactorily answered is whether the final compromise, which formed the text of the Constitution, unequivocally incorporated into it that part of the principle of responsible government which secured the total supremacy of the Lower House. The notion of responsible government is not explicitly written into the Constitution, any more than specific provision is made for the position of Prime Minister and the Cabinet. The only section that has relevance to the principle at all is s.64, adopted after the 1897-8 Convention, which provides that Ministers of State must be either Senators or Members of the House of Representatives. As has been noted already, the 1891 Draft Constitution Bill left this matter optional and not compulsory.

There is no doubt that, in the convention of 1891, those who pressed particularly for federation, and not unification, consciously expressed the need for the variation of the notion of responsible government. Such variation would recognise the fact that federation should involve, not only the government of the country by the will of the majority represented by the House of Representatives electorate, but also by the will of the State electorates represented in the Senate by Senators chosen by the State Parliaments which, themselves, were elected by the people of the several States. The issue was to become more

clearly posed in the 1897-8 Convention, when it was agreed that Senators should be elected directly by the people of the States. In 1891 it was the preliminary stage of this battle which almost wrecked the Convention of that year.

Alfred Deakin re-entered the fray, which had exploded with the Downer amendment. He contended that, whilst the colonies certainly rejected the notion of amalgamation, they conceded that, on certain subjects, there were no longer State interests in the matters assigned to the Federal Parliament, “but only national interests.” Whatever State interests remained were fully protected by the division of powers, which were specified in the proposed Constitution. He threw down the gauntlet to those who sought to give the Senate power over money bills:

Are we to say that while we are here for union, and to declare for union, we shall never have more union than can be obtained by the maintenance of our separate state rights in every particular; so that it shall not be possible for the union to deal with any question, except by means of the states, and through the states of which the union is composed? <sup>8</sup>

This approach seems to assume that those who sought co-ordinate power in relation to the purse were advocating confederation, and not federation.

Deakin argued that the concept of co-ordinate power was possible in America because the executive was separated from the legislature, and because the people looked to the executive to carry out their wishes, because the executive was directly answerable to them. Whilst conceding the principle of equal representation of the States in the Senate, he said that, in order to give adequate protection to the States, it was not necessary to endow the Senate with the power to amend money bills. He claimed that he, and his fellow Victorian representatives, would be false to their obligations if they had not warned honourable members of “the rocks upon which we have been nearly shipwrecked.” He posed the dilemma as follows:

Therefore, if we are to create a house, with all the traditions, so far as responsible government and its authority is concerned, of representative chambers, which exist in these colonies and the mother country, and are then to introduce on the other side clothed with equal power, a body entirely foreign to the British Constitution, and to which there is not sufficient parallel in the Australian colonies, we shall be creating at the outset certain conflict and inevitable deadlock.

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<sup>8</sup> *Ibid.*, p.383.

If you want the Swiss Constitution, take the Swiss Constitution; if you want the American Constitution, take the American Constitution; but do not attempt to mix them with the British Constitution.<sup>9</sup>

He claimed that, if it was proposed to take some things from the Swiss Constitution and some things from the American Constitution, the result would be a hybrid, and would produce irreconcilable elements that could not be made to work harmoniously in the Australian environment. The introduction of the American Senate into the British Constitution would destroy both.

Final crisis and breakdown of the Convention seemed imminent, when James Munro said:

I feel that if there is to be no compromise there must be a dissolution. There must be an absolute break if there is no compromise.<sup>10</sup>

Notwithstanding his membership of the powerful colony of Victoria, he had strong views as to the restrictions which should be placed on the central government. He did not believe that the central government should have the power to tax the land. He wanted to limit the power of the federal government to certain classes of taxation, and not to allow it to intrude upon the various colonies, and take away their means of taxation. In an attempt at conciliation he said:

I am as anxious as any hon. member to preserve the state rights. I want federation only for the purposes which we cannot carry on as well separately as we can combined.<sup>11</sup>

However, there was a limit beyond which he would not go:

Although I came to New South Wales most enthusiastically in favour of federation, I am not going to sacrifice the interests of the community even for federation, and if this Convention is not prepared to act fairly and justly to the whole community then we had better remain as we are... We are here, as well as in Victoria, the guardian of the rights of the people, and we are prepared to stand by them against every senate or legislative council.<sup>12</sup>

Notwithstanding his stated concern that the rights of the people should not be trampled on by the central government, his real fear was that a powerful Senate would enable the small States to dominate the larger. This was a fear shared by many of the delegates from the larger colonies. On the other hand, the delegates from the small colonies were equally

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<sup>9</sup> *Ibid.*, p.386.

<sup>10</sup> *Ibid.*, p.389.

<sup>11</sup> *Ibid.*, p.391.

<sup>12</sup> *Ibid.*, p.391.

fearful that, without a strong Senate, the larger colonies would dominate the smaller. The collision of these two mutual fears appeared to have produced an insoluble state of deadlock in the Convention. Hope was expressed by Sir John Bray, representing South Australia, that some middle course would be found by leaving the matter to the committee. Richard Chaffey Baker, a member of the South Australian Upper House, compared the situation to that in the Philadelphia Convention in America, which had been on the point of breaking up. In that case, the difficulty had been met by the appointment of a Committee of Compromise. In the Australian case, Sir Thomas McIlwraith, of the Queensland Lower House, could not be smoothed over:

We might as well dissolve at once, and go back to our houses, if we are going to decide that we shall create a body to override the representatives of the people.<sup>13</sup>

In this he was strongly backed by Lieutenant Colonel Smith of the Victorian Lower House. Not to be outdone, Adye Douglas, a very conservative member of the Tasmanian Upper House, added a strong plea on behalf of the small colonies:

But why do you call that body the house of representatives? The word is inexplicable and inappropriate. The senate is just as representative as the house of representatives, or whatever you choose to call the popular house. Each member will represent the whole of his colony, not a mere section of the people, while in the lower assembly the smaller colonies will only be represented by a few people. There must, in order to create a union of the colonies, be a counter-balance somewhere. Otherwise, why not limit the senate to representation in proportion to population?<sup>14</sup>

He asserted that the difficulty could be resolved, and that there was no occasion for the display of all the violence on the part of Victoria:

We know the difficulties attached to what is termed "responsible government". Those difficulties can be easily met without this noise and bustle. Federation can be carried out, if we are each inclined to yield to a certain extent; but we must not be browbeaten by representatives from Victoria saying they are not going to have anything to do with it unless their particular views are carried into effect.<sup>15</sup>

He concluded with the main assertion of the smaller States that the House of Commons could not be imitated, and that the Senate, being equally representative of the people, would have some counter-balancing influence against the power of the larger colonies in the House of Representatives.

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<sup>13</sup> *Ibid.*, p.395.

<sup>14</sup> *Ibid.*, p.400.

<sup>15</sup> *Ibid.*, p.401.

A much wider view was introduced into the debate by Charles Cameron Kingston, QC, of the Lower House of South Australia:

I have come here with every desire to assist in bringing about a fair and reasonable scheme of federation; but I thought that the idea that underlay the federal scheme likely to be proposed was that though of course we were only to confer on the federal government the power of dealing with national questions, still, as regards national questions, it was not to be simply that the will of the majority of the people should prevail, but that in order that there should be federal legislation on any particular subject, there should be a consensus of opinion in two chambers—a majority of the people and a majority of the states.<sup>16</sup>

This was the clearest expression of the large gap that existed in the dispute between the two groups. Responsible Government on the one hand, giving full power to any Ministry which held the confidence of the Lower House to carry out the policy upon which it was elected, as against the radically different view that required, in all things, both the concurrence of the representatives of the whole population of Australia and the consent of the representatives of the people of the States. In advancing this latter view, Kingston accused Deakin and his supporters of proposing, in essence, government by one chamber only. On this basis the Senate would have no real influence, and would be “a sham, a snare, and a delusion.”<sup>17</sup> It is clear that Kingston’s formulation accurately expressed the expectations of the smaller colonies.

The principle of Responsible Government upon which Sir Henry Parkes, and the representatives, particularly, of New South Wales and Victoria, relied was that applicable strictly under British conditions. Whatever other power the Senate was to be given, it should not be capable of bringing down a government, which held the support of the House of Representatives, by refusing to grant Supply. The representatives of the smaller colonies argued that a new type of government was being formed, and that the principle of responsible government would have to be modified to conform to the needs of a federation. The federal government would depend on the joint agreement of two Houses, co-ordinate in power, in which the rejection of Supply by the Senate was a real power which it could appropriately exercise as particular conditions demanded.

At the end of a long day of argument on 16 March 1891, the suggestion of Arthur Rutledge, that a committee of compromise be appointed, was not taken any further. However, the adjournment overnight did, to some extent, cool the heat of the debate.

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<sup>16</sup> *Ibid* p 403.

<sup>17</sup> *Ibid*.p.404.

On the following day Edmund Barton recapitulated the dilemma which had presented itself:

If you give too much power to the senate, you tend to exalt the federal idea to the suppression of the national idea; and if you do the converse as the hon. member, Mr Deakin, I am afraid, wishes to do, you tend to exalt the national idea in the direction of unification or amalgamation, to the destruction of the federal idea. Then, what you have to do is to see that you do justice, and to do justice in this matter can never be consummated by bringing about such an engrossment of power into the hands of the national body as would result in the minimising of the states who had never given any such mandate to their representatives.<sup>18</sup>

Barton adhered to his support for Senate power in relation to money bills:

I submit that if we take away from the senate the power of vetoing money bills, unless they veto them altogether, we shall so cripple that body, that we shall not be able to report to our parliaments that which I believe they want.<sup>19</sup>

He confronted the suggestion that the granting of powers of amendment, or *veto in detail*, of money bills to the Senate was incompatible with the working of responsible government, by quoting instances in some of the colonies where this had been done. He referred to the statements of Sir Henry Parkes, when he extolled the dignity of the Senate as being something which would attract the greatest statesmen of the day to serve in it:

Why, after having created such a body as this for the avowed object of conserving state interests among other things, should we propose to degrade this body by refusing them in the greatest emergencies the right to stand by those very interests?<sup>20</sup>

He suggested that, if this were done, rather than attracting the greatest statesmen, it would have the opposite effect, when such statesmen found that they had nothing effective to do in such a Chamber. He returned to the question of whether, or not, the principles of democracy would be degraded by the investment of the Senate with great power. He disavowed any intention of vesting any executive power in the Senate, as was the case with the American Senate:

But it is sought to be shown that, where the citizen has to be represented, first in the national assembly, and next through another chamber, that where his representation in those two bodies is the sum total of his representation, to take away any portion of that full sum of representation is not in furtherance of the spirit of democracy, but is a lopping down of the representation to which the democracy ought not to consent.<sup>21</sup>

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<sup>18</sup> *Ibid.*, p.414.

<sup>19</sup> *Ibid.*, p.414.

<sup>20</sup> *Ibid.*, p.411

<sup>21</sup> *Ibid.*, p.413.

In seeking a compromise, he stressed that, in his view, there was nothing un-English in the proposal:

Let us set our ingenuity to work; let us appoint a committee on that subject, if need be, to find some means of accommodating this conflict. But do not let us talk about packing our portmanteaux the first difficulty we see.<sup>22</sup>

Whilst advocating a reasonable compromise, Barton still insisted that there should be preserved in the chamber “which would represent the federal principle,” some power of dealing with money bills by which the course of legislation could be arrested, if need be, in favour of State interests. The description of the role of the Senate as representing the federal principle in the Constitution carried a deal of weight, coming as it did from one of the major representatives of New South Wales, the largest colony represented at the Convention. However, somewhat incongruously, an equally strong voice in opposition to equal power for both Houses came from Thomas Playford, representing the smaller colony of South Australia. This illustrates the difficulty of dividing up the delegates on rigid lines of expected interest. In both of the Conventions of the 1890s the lines of division were never rigid. Delegates who could be conservative on one matter could be radical on others.

Thomas Playford was forthright in his declaration:

I have heard nothing to shake my belief that if we have two houses practically co-equal in power, we shall not be able to work responsible government with them... If the senate has the power of amendment, it has practically the power of deciding what shall be the form of taxation under which we shall live.

If we give larger rights to the senate than have been proposed by the hon. member, Sir Henry Parkes, we shall make the difficulty of responsible government greater and greater in proportion to the extra powers that we give, until we make the upper house co-equal, or practically co-equal.<sup>23</sup>

However, he hoped for a compromise which would preserve the rights of the individual States, so that they should not be “ridden over rough-shod by any combination of larger states,”<sup>24</sup> and yet preserving, for the populous States, rights and powers in the Lower Chamber in which they would be more largely represented.

Some of the most illuminating contributions to the debate were made by John Murtagh Macrossan, representing Queensland, who unfortunately died suddenly before the end of March 1891.<sup>25</sup> His contribution to the debate on 17 March 1891 was his last. He first

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<sup>22</sup> *Ibid.*, p.417.

<sup>23</sup> *Ibid.*, p.424, 426

<sup>24</sup> *Ibid.*, p.427

<sup>25</sup> His death was announced by William McMillan on 31 march 1897.



attacked the Victorian delegation because of their preoccupation with the type of Upper House to which they were accustomed in their own colony:

We are not here, in any way, to reproduce a constitution exactly like the constitutions under which the different colonies are now working, and indeed, we could not do so in carrying out a federal constitution.<sup>26</sup>

It is clear from this statement that many of the delegates were fully aware that **some modification of the traditional notion of responsible government was necessary if federation were to be achieved**. He also attacked the emphasis that had been placed in many of the speeches upon considerations flowing from the existence of small and large colonies. He claimed that such emphasis had caused a great deal of confusion:

Now, we are not here as small states and large states. We are here as representing sovereign and independent colonies, independent and sovereign from each other as much as we are from any other portion of the world.<sup>27</sup>

If it were proposed to model the Senate upon the House of Lords, the resemblance to the House of Lords would only be in “feebleness and want of authority.” He could see no objection to giving the Senate power in all respects. Other factors would reduce any ill effects from such a grant of power. He was one of those who foresaw the influence of party politics in the working out of the provisions of the Constitution:

Do not let us forget the action of party. We have been arguing all through as if party government were to cease immediately we adopt the new constitution. Now, I really do not see how that is to be brought about. The influence of party will remain much the same as it is now, and instead of the senate voting, as has been suggested, as states, they will vote as members of parties to which they will belong. Parties have always existed, and will continue to exist where free men give free expression to their opinions.<sup>28</sup>

The death of such a realistic and knowledgeable practical politician was a great loss to the deliberations of the Convention on this and other significant issues.

Other members stressed that the proposal for the co-ordinate power of the two Houses was designed to check possible precipitate action by those representing a bare majority of the Australia-wide population by the restraining power of the people represented on a different basis in the Senate which had greater continuity. This was a view that was even more strongly expressed in the 1897-8 Convention after it had been agreed that the Senate

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<sup>26</sup> *Convention Debates, Sydney, 1891*, p.431. Emphasis added.

<sup>27</sup> *Ibid.*, pp.431-2. Emphasis added

<sup>28</sup> *Convention Debates, Sydney, 1891*, p.434.

should be an elected, not an appointed body. Macrossan's speech shows that the debate was not circumscribed by a pre-occupation with the notion of the Senate as a States' House, designed to be concerned only with State interests, unaffected by party interests and manoeuvring. There was a clear desire to create an effective check on radical action by the representatives of a bare majority of the Australia-wide electorate. It has been frequently argued, in more recent times, that the possible use of the power of the Senate along party lines, rather than in support of States' Rights, or State interests, was not contemplated at the time the Constitution was framed. There is strong evidence that the framers were well aware of the possible use of the power of the Senate along party lines, and also that they regarded the Senate, not as representative of an institutionalised entity called the State, but rather as the representative of the interests of the electors arranged in an electorate distinct from the Australia-wide electorate.

The near deadlock in the Convention arose in the context of the debate over the power of the Senate to amend money bills. The demand for the Senate to have power to veto money bills in detail, as against the power of complete rejection, is likely to be misconstrued. One of the motives behind seeking the power of *veto in detail* was that such a power would reduce the possibility of a government, having the confidence of the Lower House, being forced to go to the people where the dispute arose over some detail in a money bill. As the only effective power possessed by the Senate to influence the Lower House on crucial matters, whether involving State interests or not, would be to reject a money bill *in toto*, the government could be forced to an election even when the matter in issue might only involve one particular item in a whole bill.

In appraising the expressions of opinion at the 1891 Convention, it is important to remember that it was not proposed that the Senate should be elected by the people directly. The fact that the Senate was to consist of members appointed by the various State parliaments tended to colour the discussion of the Senate as representing the corporate entities of the States rather than the people assembled in the State electorates. Members such as Macrossan had no difficulty in seeing that the Senate, even though appointed indirectly at that time, really represented the people of the various federating colonies. There certainly were strong and reasoned arguments recorded against the election of the Senate directly. In particular, Duncan Gillies, the Premier of Victoria, claimed that it would be a serious mistake to create two Houses from the same electorate. There is no

doubt that the principle of the supremacy of the Lower House, which was central to the ‘Westminster’ style of responsible government, may have been less diluted if the Senate had remained, on the 1891 model, a House responsible only to the various State parliaments. It was the elected Upper Chamber which could claim an equal mandate from the people as that of the Lower House. Confining the Senate to matters of State interest would have been easier on the basis of the 1891 Senate made up of representatives chosen by the parliaments of the States.

In the course of the debate, the question of the power of the Senate to amend the appropriations bills for annual supply was raised by Colonel Smith (Victoria). Sir Samuel Griffith in reply to this suggestion stated that if it was proposed to withdraw from the Senate power over the Annual Appropriation Bill, this issue was not worth discussing. He could understand the opposition to the Senate having power over annual Supply:

But it must be remembered that it is not proposed to deny the senate the power of veto. Surely, if the senate wanted to stop the machinery of government the way to do that would be to throw out the appropriation bill. That would effectively stop the machinery of government. I, for my part, am much inclined to think that the power of absolute rejection is a much more dangerous power than **the power of amendment; yet it is a power that must be conceded. We all admit that; and in a federation there is much more likelihood of that power of rejection being used that there is of a power of amendment being used.**<sup>29</sup>

In the light of the events of 1975, one can only have great respect for the foresight of Sir Samuel. It is not easy to appreciate the heat which developed in the debate over the power of the Senate to amend a money bill when its power of total rejection had already been conceded. It seems extraordinary that so much hostility was generated to the point of wrecking the Convention in the opposition expressed to this proposal. It might have been thought that the concession of total rejection by the Senate gave a much more powerful weapon against the Lower House. There is no doubt that the whole of this controversy revolved around the real problem of incorporating the Westminster principle of responsible government into the federation. No one was more keenly aware of this than Sir John Forrest, CMG, the Premier of Western Australia. Of course, he was critical of the whole notion of responsible government, when he referred to the Lower House under the British Constitution as **“the House of Common Appendages.”**

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<sup>29</sup> *Ibid.*, p.429. Emphasis added.

In an attempt to take the heat out of the debate, Henry J. Wrixon, QC, representing Victoria, suggested that the threats by some of the delegates to break up and go home were not really serious. However, it is clear that the rift which developed was a real one, and was based upon two fundamentally different approaches to the construction of the Constitution. The real dispute related to the basic principle upon which it was to be framed. Was it to be based on what was really conceived as an amalgamation of the former colonies into a single Nation State, or was the Constitution to be that of a federation of formerly near-sovereign colonies? Those opposing the wide powers of the Senate denied that they sought amalgamation. However, there was a clear division between those who contended that the development of a Nation depended on an emphasis on the role of the central government, and those who supported the retention of considerable power on the part of the federating colonies. This latter group argued for the principle that all major action by the central government required both the consent of the majority of the electors of the whole Commonwealth, and also the consent of the electors of the Commonwealth divided into electorates co-terminus with the boundaries of the former colonies, and having equal representation in the Senate. Responsible Government in which the Lower House was paramount was central to the Constitution, as conceived by Sir Henry Parkes, despite all his protestations that the federating colonies would lose nothing in terms of power over their own affairs.

In addition to these two viewpoints, there was a solid section of opinion which considered that responsible government, as understood under an unmodified “Westminster” style Constitution, was totally inconsistent with federation, and could only apply if all the colonies were to be amalgamated into one polity. It was argued that, if the principle of responsible government was to be made part of the new Constitution, it could not be incorporated under conditions in which the Upper House was powerless. At the very least, the Senate should have the power of total rejection of a money bill, which would include Supply, a demand which appears to have been conceded, though grudgingly, from a quite early stage in the Convention. Notwithstanding this concession, the division revealed by the heated debate on the Downer Amendments was real and deep.

This division of opinion was paralleled in the differences between the Draft Bill prepared by Andrew Inglis Clark and that prepared by Charles Cameron Kingston. Whilst they both provide that money bills can only originate in the House of Representatives, they differ fundamentally on the question of the Senate’s power of amendment of money bills.

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Clark's draft provided in Clause 52:

Every Bill for appropriating any part of the Public Revenue, or for imposing any tax or impost, shall originate in the House of Representatives, **but may be amended or rejected by the Senate**: Provided, that no amendment shall be made to any such Bill by the Senate which would have the effect of increasing any proposed expenditure, or tax, or impost.<sup>30</sup>

This provision was in total conflict with the principles of responsible government as developed in the United Kingdom as the "Westminster" system.

Kingston's draft, on the other hand provided:

5. Though the Senate might not alter money bills, it might "make suggestions for the amendment thereof; and in the event of such suggestions or some modification thereof not being accepted by the National Assembly the Senate shall either **pass or reject** such Bill."<sup>31</sup>

Both drafts gave ultimate power to the Senate to reject money bills *in toto*.

The use of the device of the Senate making "suggestions" was taken from similar provisions in the Constitution of South Australia.

Kingston's draft seems to be at odds with his later support of Sir Samuel Griffith's proposal that the principle of responsible government should not be made mandatory in the Constitution. It is also to some extent at odds with his later strong advocacy of Senate power, and that any removal of such power would be "a sham, a delusion and a snare." The inconsistency came to the surface on 9 March 1891 in the Convention when George Dibbs asked Kingston whether he was in favour of giving the Senate power to amend an appropriation bill, as well as an ordinary money bill. Kingston replied to the question as follows:

My present inclination—and I think I am justified in expressing my views at this stage of the proceedings in tentative form—is to give the senate the right of amending all money bills—not of increasing the burden, but simply of exercising the power of veto in detail.<sup>32</sup>

There is no doubt, in fairness, that he was influenced by the frequent use of the device of "tacking" whereby matters of substance were "tacked" onto money bills to prevent the Upper Chamber dealing with them. It also illustrates the fact that so many of the key delegates retained a degree of flexibility, and did not allow hardened viewpoints to prevent

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<sup>30</sup> Sir Samuel Griffith, *Successive Stages of the Constitution of the Commonwealth of Australia*, Document 5, Dixon Library, Sydney, DLMS Q198. Emphasis added.

<sup>31</sup> Sir Samuel Griffith, *Ibid.*, *Successive Stages*, Document 6. Emphasis added.

<sup>32</sup> Convention Debates, Sydney, 1891, p.163.

them from making necessary compromises. He remained at all times open to persuasion on any important matter pertinent to the Constitution:

If we are satisfied by the various arguments which have been expressed to us that responsible government is incompatible with a parliament composed of two houses, and possessing the jurisdiction to which I have referred, it is our duty to consider whether we should not provide for such a parliament without insisting on its being accompanied by responsible government.<sup>33</sup>

Whilst a supporter of the requirement that Ministers should sit in Parliament, and also of the provision that the Senate, whilst possessing a power of suggestion, would have no power to amend money bills, Kingston nevertheless departed from the “Westminster” system by giving the Senate the power to reject money bills outright, a power not possessed by the House of Lords.

The deep division which Sir John Downer’s amendments provoked was further illustrated by the vehemence with which Sir Henry Parkes came back into the debate, when he feared that there was a real possibility that the attack upon the incorporation of the principle of responsible government into the Constitution might succeed. There was an element of sheer panic in his speech, stemming from the fact that serious attack had been made on the specific inclusion of the principle of responsible government in his resolutions. He attacked Sir John Downer’s proposal to send the matters which divided the Convention to a Committee, saying that it was “an extremely unreasonable suggestion.” He wanted the issues to be fought out without any adjournment of the debate:

Now, with regard to the point at which we have been so long at a halt, unable to come to any conclusion.—I regard some of the views propounded by hon. gentlemen opposite to me as simply monstrous, and I maintain that neither the hon. member Dr Cockburn, nor the hon. member Mr Gordon, as far as I can see, has ever yet risen to the federal atmosphere.<sup>34</sup>

His reference was to Mr Gordon’s favouring of a loose confederation rather than a tight federation:

If that were the end which this Convention were aiming, I should at once retire, because I should think that would be plunging out of a sound condition of things indeed. I state at once what I have stated from the very first, in every utterance I have made, that my object is the union of Australia—the uniting of Australia into one great power, and I should think it a calamity upon these colonies to go from their present independent sovereignties into a loose confederation.<sup>35</sup>

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<sup>33</sup> *Ibid.*, p.162.

<sup>34</sup> *Ibid.*, p.445

<sup>35</sup> *Ibid.*, p.445.

He threw down the gage to all members, saying that unless they could take Australia as their country, and the people as one people under a government created without reference to New South Wales, Victoria, Western Australia, or South Australia, they were not ripe for federation. He expressed distrust of “paper constitutions,” saying that government was a practical business. They should be guided by the lamp of experience, and the lamp was the lamp held out by England, and no other country. He referred to the House of Lords which, he said, held:

a body of men who at this day have no superiors on the face of the earth as a governing body—. Notwithstanding all that, English genius and English statesmanship have said that the power of inflicting burdens upon the people and the expenditure of the people’s money shall reside exclusively in the House of Commons—And I say that we shall make a very great mistake if we do not preserve that form of government in the best way in which we can preserve it.<sup>36</sup>

The more he proceeded, the more eloquent he became. He extolled the giants of English parliamentary life, adding:

Those giants have one and all stood by the power of the Commons House of Parliament. Well, we seek—those who think as I do—to reproduce here, as nearly as we can, the British Constitution. We want no other... We seek to create a pattern of the House of Commons.<sup>37</sup>

Blinded by his own rhetoric, or seeking to conceal a desire for a much more centralised form of government than federation would achieve, he ignored any of the arguments that were put in detail dealing with the difficulty of marrying the principle of responsible government with federation, without modifying the very notion of responsible government, or abandoning it completely. He conceded that, in creating a system of two Houses, he was prepared to agree to equal representation of the States in the Senate, but he stipulated that the power which was held by the House of Commons should be held by the House of Representatives. In attacking Sir John Downer’s amendments, he concluded that:

We have no doubt come to a rock on which we may possibly—I hope not—split.<sup>38</sup>

Whatever other compromises were needed to achieve federation, there was no compromise, in his view, on the paramountcy of the House of Representatives. His very conclusion seemed to show a desire for a single government along the lines of the United Kingdom,

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<sup>36</sup> *Ibid.*, p.447.

<sup>37</sup> *Ibid.*, p.448.

<sup>38</sup> *Ibid.*, p.448.

ignoring the realities which required a federation rather than an amalgamation:

I, for one, will never consent for New South Wales to be linked to a federation of states, unless the object is to make the Australian people a nation, under one broad federal government, modelled on the plan of the British Constitution.<sup>39</sup>

John Hanah Gordon, MLC, of South Australia, was quick to pick up the gage thrown down by Sir Henry Parkes. He renewed the attack on the Parkes resolutions, claiming that the federation contemplated in them, as exemplified by Parkes' last utterance, meant complete centralisation which would stultify reform. He also attacked the fulsome advocacy of Deakin when he sought a government "as strong as a fortress and as sacred as a shrine." This viewpoint, he said, also involved a central government dwarfing all others.

Sir Samuel Griffith was obviously stung by Parkes' remarks. He said that, if the intention of the Parkes resolutions was to establish something analogous to the British Constitution, all the discussion that had taken place on that day, 17 March 1891, and on the day before, was completely wasted:

If we were going to reproduce the British Constitution, with a house of commons and a house of lords, it would be idle for us to talk about the powers of the House of Lords or an upper chamber; but I wish to point out, and I am sure that the hon. member, Sir Henry Parkes, will agree—for there is no one with a larger knowledge of constitutional history or practice—that it is absolutely impossible to reproduce the British Constitution in Australia. The circumstances of the country will not permit it. The British Constitution is not a federal constitution. It is quite different from a federal constitution; so that to attempt to do that is to attempt to make two things work together which cannot work together. What we have to do is to follow the British Constitution as nearly as its principles are applicable to a federal constitution.<sup>40</sup>

Sir Henry Parkes then interjected that he was saying nothing more than that, but had to agree that he had "to a large extent" been advocating a reproduction of the British House of Lords. Sir Samuel Griffith hammered home his point that all these matters were extremely important for the purpose of deciding how power was to be distributed, which Parkes was ignoring.

The crisis in the Convention did not end with the termination of the sitting on 17 March 1891. On the following day the debate suffered a further resurgence, when the resolution dealing with the Executive being responsible to the Lower House was further discussed.

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<sup>39</sup> *Ibid.*, pp.450-451.

<sup>40</sup> *Ibid.*, p.456.



Richard Chaffey Baker, CMG, MLC, of South Australia, joined issue with Sir Henry Parkes on the applicability of the British model, and with the view that the Constitution should not be a patchwork of provisions taken from Constitutions other than the British Constitution. He suggested that every resolution discussed to date had been taken from the American Constitution. He listed four specific items that fitted this description. These were the provision that the specific powers were to be given to the Federal Government with the residual powers remaining with the States; the provision for the federal government to impose a uniform tariff with free trade among the states; the placing of the defence forces under the control of the federal government; and the granting of equal representation to the states in the Senate. He concluded by saying that the only two words in all the resolutions which they had passed which were not identical with the American Constitution were those at the end of Resolution No 1 in the second series of resolutions. These were different because the American Constitution provided that the Senate could initiate a bill imposing taxation. The American Constitution only restricted the Senate in relation to bills appropriating revenue, which had to be initiated in the House of Representatives. It was inevitable that the Constitution would be, to some extent, a patchwork. However, they did not propose to follow the American Constitution in all respects. They did not propose to separate the Executive from the Legislature. It would be just as much a patchwork if that were attempted. He indicated that he had come to the Convention convinced of the necessity of incorporating the principle of responsible government into the Constitution. However, he had changed his mind to some extent after hearing the arguments brought forward by Sir Samuel Griffith and others. He was still open to argument but:

if we have, as we are bound to have, a strong senate which will be the guardian, the custodian of state rights and state interests, you cannot have the responsible form of executive government, because that form of executive subsists from the fact that one branch of the legislature is paramount.<sup>41</sup>

The resolution under discussion at this stage was the third supplementary one which provided:

3. An executive, consisting of a governor-general, and such persons as may from time to time be appointed as his advisers, such persons sitting in parliament, and whose term of office shall depend upon their possessing the confidence of the house of representatives, expressed by the support of the majority.<sup>42</sup>

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<sup>41</sup> *Ibid.*, p.465.

<sup>42</sup> *Convention Debates*, Sydney, 1891, p.23.

In accordance with the views he was advocating, he moved for the deletion of the words in the resolution after the words “advisers.” In this motion, he had the support of Sir Samuel Griffith, which was consistent with the latter’s approach to the powers of the Senate, and with his desire to leave the question of responsible government open. Sir Samuel Griffith said that he did not desire to tie the hands of any committee of compromise that might be appointed by a definite stipulation that responsible government should, or should not, be adopted.

The end of the crisis came when the Convention agreed to the appointment of a Constitutional committee, which would have an untrammelled discretion to make recommendations as to how the matter could be compromised. On this understanding, both Sir John Downer and Richard Chaffey Baker withdrew their amendments.

Professor La Nauze tends to regard this crisis as a “storm in a teacup.” In commenting on the threat, raised by James Munro and Lieutenant-Colonel William Collard Smith, that the Convention might break up because of the unacceptability of Sir John Downer’s amendments, he minimises the effect of the apparent deadlock:

Neither (Munro and Smith) was a politician of any great prestige, but Munro was, after all, premier, and those who knew something of Victorian history during the preceding thirty years would have realised that Smith spoke for the great majority of the Victorian Assembly. For the rest, most supporters of ‘veto in detail’ insisted on their case, but were anxious to explore possible compromises, though none knew quite what form they might take.<sup>43</sup>

A reading of the full text of the Debate brings out the extreme heat of the confrontation which had occurred at this point in the Proceedings. Whilst the immediate point in issue was whether the Senate should have a power of amendment as well as rejection of money bills, the matter in dispute was the question of the supremacy of the Lower House, which was one of the basic principles of the system of responsible government on the “Westminster” model.

It is clear that the crisis was a real one, and constituted a great danger to the progress of the federal movement towards the positive creation of a federal constitution. The delegates to the 1891 Convention came from the parliaments of the separate colonies. Unlike those who attended the later Convention of 1897-8 they were not directly elected by the people and, consequently, did not have the direct pressure of the electorates to urge them to a final agreement.

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<sup>43</sup> J.A. La Nauze, *Op Cit.*, p.44.

## THE DIFFERENCES BETWEEN THE CONVENTION OF 1891 AND THAT OF 1897-8

In considering the debates at the Convention of 1891 and that of 1897-8, it is important to appreciate the difference in the way these Conventions were set up.

The delegates to the 1891 Convention were appointed by the parliaments of the six Australian Colonies, and two were appointed by the legislature of New Zealand. It was otherwise with the Convention of 1897-8. Apart from those attending from Western Australia, the delegates from all the other participating colonies were elected by the people. The elections were conducted pursuant to Enabling Acts, which were all in substantially the same form as that passed, in the first instance, by the Parliament of New South Wales as the “Australasian Federation Enabling Act 1895.”<sup>44</sup> This Act was described as “An Act to enable New South Wales to take part in the framing, acceptance, and enactment of a Federal Constitution for Australasia.” This Act, and Acts in similar terms, were passed by the parliaments of New South Wales, Victoria, South Australia and Tasmania, following which elections for delegates were held in each of these colonies. Western Australia declined to adopt the election method of choosing its delegates, whilst Queensland sent no delegates at all.

The draft Constitution Bill adopted by the 1891 Convention had not been adopted by the legislatures of the colonies. However, the period from 1891 to 1897 saw the development of a Federation movement, inspired by the continued activism of staunch supporters of federation, coupled with campaigns carried on by the Australian Natives Association, and by Australia-wide Federation Leagues formed to promote the cause of federation. This movement gathered pace with the holding of the Corowa Federation Conference in 1893 attended by representatives from Federation Leagues in New South Wales and Victoria, with representation from the Australian Natives Association, Chambers of Commerce and the Commercial Travellers Association. This was followed by a Federation Conference in Bathurst in 1896, which has become known as the “People’s Federal Convention” because it was made up of individual delegates and invited members. It was these popular activities which acted as an additional spur to the politicians of the several colonies to take positive steps for the holding of the Convention of 1897-8, under circumstances where the delegates to the Convention were elected by the participating colonies except western Australia.

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<sup>44</sup> Act 59 Victoria, No 24.

The reason for the refusal of the Western Australian Government under John Forrest (as he then was) to hold elections for delegates to the Convention of 1897-8 may be found in the basic opposition of that government to West Australia becoming part of the Commonwealth, despite its participation in the 1891 Convention. That opposition itself may be explained by the fact that West Australia had barely gained independent responsible government by the time of the 1891 Convention, and also because of the massive influx of miners from the eastern colonies caused by the gold rush in that colony in the mid 1890s.

The Western Australian Government had passed an Act proclaiming responsible government in 1889, but it could not come into operation before enabling legislation had been passed by the Imperial Parliament. This did not take place until July of 1890, and responsible government was not proclaimed until 21 October 1890, with the first responsible ministry being appointed in December of that year. Referring to the “*Case for Secession*,” prepared in 1934 for presentation to the joint Committee of the House of Lords and the House of Commons in 1935,<sup>45</sup> Christopher Besant<sup>46</sup> describes the position of Western Australia:

Having already agitated to acquire self-government, and having met some resistance from the Colonial Office, it is not surprising that the initial ministry was reluctant to so quickly relinquish its newly won sovereignty. Forrest and his colleagues were opposed to federation throughout the Convention Debates, and thus unlike the eastern colonies, Western Australia did not participate in the referenda of 1898 and 1899 held upon the question of adopting a draft Federal Constitution. Rather, the new government was anxious to get on with the development, exploitation, and population (by whites) of its vast ‘barren’ areas.<sup>47</sup>

He quotes the opinion of the Western Australian historian, Professor Shann:

The Western Australian who knows the circumstances of this third of Australia... is well aware that Western Australia’s entry into Federation was a historical accident, her leaders having been pushed and cajoled into it by two forces of external origin.<sup>48</sup>

The government represented the interests of the rural and conservative interests rather than those of the miners who flowed in from the eastern colonies. These interests were most

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<sup>45</sup> Government Printer Perth 1934. It was prepared under the authority of the (WA) Secession Act 1932 and approved by the state parliament pursuant to the (WA) Secession Act (No2) (1934).

<sup>46</sup> Christopher Besant, “Two Nations, Two Destinies, A reflection on the significance of the Western Australian Secession Movement to Australia, Canada, and the British Empire,” *Western Australian Law Review*, Vol. 20, 1990, p.227. The two external forces were the “Separation for Federation” movement on the goldfields, and the actions of the Secretary of State for the Colonies, Sir Joseph Chamberlain, in placing pressure on the Western Australian Government by urging action in support of federation on the Governor of Western Australia.

<sup>47</sup> *Ibid.*, p.227.

<sup>48</sup> *Ibid.*, p.227.

suspicious of the possible surrender of local sovereignty to a central government, which might well reduce the Western Australian government to that of a mere municipality.

The election of delegates by all participating colonies, except Western Australia, created a totally different environment from that existing surrounding the Convention of 1891. The delegates to the 1891 Convention carried into that Convention the atmosphere and loyalties which had been developed in the several colonial parliaments. The loyalties of those attending the Convention of 1897-8 were affected by their exposure to the several electorates during a vigorous election campaign conducted in the full light of public debate and the active participation of local newspapers. The delegates to the 1891 Convention did not have behind them the full pressure of the people of the colonies in such a direct manner. On the other hand, the delegates to the Convention of 1897-8 were at all times mindful that it was the people who had sent them to the Convention to deliberate upon, and produce, a Constitution for a federated Australia. There was always the fear of public censure if they failed to produce what they had been sent to the Convention to achieve. The members of the 1891 Convention were not under this kind of pressure. That Convention was a meeting of politicians sent by politicians who were concerned to see that the colonies they represented would not be deprived of the full measure of power which they currently enjoyed. Rejecting federation on terms which were unacceptable to their particular colony would not have met with the same criticism as such an action would have attracted in 1897-8, when the delegates were charged with a specific mandate from the several electorates to finalise a constitution.

If the efforts of Edmund Barton and others to find a way round the impasse which had occurred in 1891 had not been successful, there is no reason to think otherwise than that the Convention could well have broken up in disarray, without any particular reaction by the people at large. There was no popular movement for federation in 1891. By 1897 there was such a popular movement, which clearly influenced the delegates to the later Convention in ways which had not been the case in 1891.

## RESPONSIBLE GOVERNMENT IN THE CONVENTION OF 1897-8

At the commencement of the Convention of 1897-8 in Adelaide on 22 March 1897, it was proposed that the 1891 Draft Bill should be the basis of the deliberations of the Convention. However, this approach was temporarily abandoned, when the majority opted for a broader discussion of general principles before detailed work in Committee was commenced. This broad debate was conducted on the basis of a discussion of a series of Resolutions proposed by the leader of the Convention, Edmund Barton QC, representing New South Wales. The Resolutions were divided into five general principles, followed by a series of specific recommendations to carry into effect the general principles if adopted. This debate occupied the whole of March 1897 and covered all the central issues relevant to the difficulty of incorporating the principles of responsible government into a federal structure, including the questions of equal or proportional representation of the States on the Senate, the powers of the Senate, particularly in relation to money bills and Supply, and the issue of the ultimate supremacy of the House of Representatives, coupled with the question of whether, or not, the Executive should be responsible to the House of Representatives, or to both that House and the Senate.

In broad principle, Edmund Barton pointed out that the basic principle of the new government to be created by the Constitution would be that federal laws required the assent of the people in the Australia-wide electorate and also the people in the separate electorates of the future States. Crucial to the federal structure was the provision for two Houses of Parliament. If this was not the basic principle, he asked:

why is it that the most democratic amongst us concede two houses?<sup>1</sup>

In seeking a balance between national interests and State interests, he considered that the two Chambers were the “golden mean:”

We must make our legislative machinery so that we shall have neither unification on the one hand, or confederacy on the other.<sup>2</sup>

At this early stage of the Convention the conflict between those seeking the creation of a nation governed by a Constitution made in the image of the British Constitution, and

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<sup>1</sup> *Convention Debates*. Adelaide, 1897, p. 377.

<sup>2</sup> *Ibid.*, p. 378.

those seeking the greatest retention of the rights of the federating colonies was again much to the fore. The need for a Senate with a greater function than that of ordinary Upper Houses was strongly argued by Sir Richard Chaffey Baker, President of the Legislative Council of South Australia:

I cannot help thinking that it is extremely difficult for some people to get out of their heads the ideal that the Senate is a kind of glorified Upper House; they cannot appreciate the fact that the Senate represents the people as fully as the House of Representatives.<sup>3</sup>

And in this federal form of government there will be two forces—the centrifugal represented by the Senate, and the centripetal or centralising force represented by the House of Representatives. What we want is to provide an equilibrium between these two, so that Federation may move in a true and proper course.<sup>4</sup>

If we want a federal form of government to continue, and if we wish to prevent a nominal Federation from becoming an actual amalgamation, we must look at the forces behind and we must give those powers to the Senate which will enable it to hold its own with the House of Representatives.<sup>5</sup>

It was thought that there could be a welding of the principles of responsible government into the Constitution, despite the difficulties. However, the crucial dispute over the question of the need for the supremacy of the House of Representatives reappeared. Richard Edward O'Connor, MLC, from New South Wales, framed the question by asserting that:

the principle which must guide us is to give the Senate the fullest possible powers consistent with carrying on responsible government. In the first place, that it is impossible to have responsible government unless you make up your mind that one House shall be the arbiter of the fate of the Executive Government.<sup>6</sup>

Edmund Barton interjected to assert:

You cannot carry it on by the confidence of one House alone.<sup>7</sup>

O'Connor agreed with this proposition as a general statement, but he persisted in the argument that, if it came to a disagreement between the two Houses:

it is clear that one House must have sway.<sup>8</sup>

In this regard he was putting, what might be called, the traditional view of responsible government, which was derived from the system of government in the United Kingdom,

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<sup>3</sup> *Convention Debates, Adelaide, 1897* p. 30.

<sup>4</sup> *Ibid.*, p.31.

<sup>5</sup> *Ibid.*, pp.30,31.

<sup>6</sup> *Ibid.*, p.52.

<sup>7</sup> *Ibid.*, p.52.

<sup>8</sup> *Ibid.*, p.52.

referred to as the “Westminster System.” He argued that the Lower House must have the ultimate sway because it was the House which had control of the purse:

For this reason the business of Government must be carried on by an Executive which must have the control of the purse and initiate legislation of a financial character, and as the existence of the government depends upon the will of the Representative House, it follows that the other House cannot be given equal powers with regard to those matters which effect the existence of the Government.<sup>9</sup>

Curiously, despite these general views, he did not retreat from the necessity, or propriety, of giving the Senate power to reject a money bill *in toto*. However, he did indicate a strong reservation to this concession:

I draw a very strong distinction between a deadlock which affects the carrying out of the daily business of Government—indeed its actual existence—and a deadlock which does not affect these matters. Any ordinary measure, or even a taxation measure, may be thrown out time after time by the Senate without stopping the daily working of the machine of Government; but where the Appropriation Bill for the ordinary annual services of Government is thrown out by the Senate you have a deadlock of a dangerous character.<sup>10</sup>

## THE CROWN AND THE ISSUE OF RESPONSIBLE GOVERNMENT AT THE CONVENTION OF 1897-8

To understand the intentions of the framers of the Constitution in relation to the principles of responsible government, it is important to keep in mind the position of the Crown as the central pivot of this principle. The principle of responsible government was uniquely developed in the constitutional law of the United Kingdom, and was at the heart of the development of the role of the Parliament. The British Constitution grew gradually out of the conflict between the Crown and the Parliament. From the earliest period of absolute power, the Crown always chose Ministers to advise and carry out the will of the Monarch. The conflict between the Crown and Parliament ultimately led to the deposition and beheading of Charles I, and the establishment of the Commonwealth. This constituted a shift of the fundamental repository of political power away from the Crown. With the Restoration of Charles II, power shifted back to the Crown. Conflict over the issue of whether, or not, the power of the Crown was unrestrained led to the “grand and glorious revolution of 1688,” which settled the relationship between the Crown, the Parliament, and the Judiciary. A free conference of the Commons and the House of Lords determined that

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<sup>9</sup> *Ibid.*, pp.52-3.

<sup>10</sup> *Ibid* p 53.



James II had abdicated, and as a consequence the throne was offered to Mary Stuart, the Protestant elder daughter of James II and her husband William of Orange to reign as joint sovereigns, with succession to Anne the younger daughter of James II in default of heirs of the joint sovereigns. Their rule was predicated upon their acceptance of the Declaration of Rights which was later incorporated into the Bill of Rights. Henceforth, the exercise of the Crown's prerogatives was subject to the law and the Constitution. The carrying out of these principles in the reign of Queen Anne established the structure of government in conformity with them.<sup>11</sup> These principles required Ministers to be selected from members of the Parliament who had the confidence of the House of Commons, and the acceptance by the Ministers of responsibility for advice tendered to the Crown. The Crown was not obliged at all times to accept the advice of the Ministers, but the circumstances under which such advice could be rejected were strictly limited by conventions, and by the realities of political and constitutional life. The Crown would not reject advice capriciously, because of the knowledge of the events which culminated in 1688. An extreme confrontation between the Crown and its Ministers, who still held the confidence of the House of Commons, would risk another revolution. The Crown was bound by the Constitution and could act as its guardian on behalf of the people in the face of unconstitutional actions by the parliament.

Whilst all power, theoretically, came from, and rested with the Crown, its exercise was restrained by the principle that the Crown acted on the advice of its Ministers. Whilst "the Crown could do no wrong," its Ministers took responsibility for the advice tendered to the Crown. If that advice was considered wrong, or inappropriate, by the Commons of the Parliament, the Ministers could be removed from office by reason of their failing to retain the confidence of that House. It was the Crown as so defined after these events which became incorporated into the Commonwealth Constitution.

The Enabling Acts, under which the Convention of 1897-8 was called, **constrained the delegates to frame a federal constitution under the Crown of the United Kingdom and Ireland.**

In the 1891 Convention, Sir Henry Parkes strongly urged the incorporation of the principle of responsible government into the Constitution. He argued that the principle which was the central basis of the British Constitution should be adopted as closely as possible in Australia. The adoption of a Constitution on the model of the United Kingdom,

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<sup>11</sup> See generally: Harris H.L. *British and Imperial History from 1688*, Sydney, 1946, pp.1-9.

linked also with the Crown, made the advocacy of responsible government consistent and appropriate. It was also in keeping with the fact that all the colonies represented at the Conventions already had been granted representative government under the Crown, later incorporating the principle of responsible government as it had been developed in the United Kingdom. It has been seen that strong supporters of the provisions of the Constitution of the United States of America were present, and exercised a positive influence at the 1891 Convention. Both Andrew Inglis Clark and Sir Samuel Griffith leaned heavily on the model of the Constitution of the United States. The final draft of the Constitution in 1891 did not entrench that part of the principle of responsible government, which required Ministers to be members of the Parliament. Apart from that variation, there was no question but that the Crown was to be an integral part of the Commonwealth Constitution. This was the more so at the Convention of 1897-8, made up of representatives from the participating colonies who, except those from Western Australia, were elected by the people for the express purpose of framing a constitution for a federation of the colonies under the Crown of the United Kingdom. Opponents of federation, who objected to the continued presence of the British Crown in the political affairs of Australia, such as the Labor Party, were rejected by the electorate. The only Labor representative elected was William Arthur Trenwith of Victoria. He was not an extremist such as William Morris Hughes, the leader of the Labor Party of New South Wales. He supported responsible government, and made no attempt to suggest that the incorporation of the Crown of the United Kingdom was incompatible with an Australian Constitution. Professor La Nauze described him as being:

typical of the self-educated organisers of the craft unions which had grown rapidly in the 1880s; dignified, earnest and moderate, he sought legislative intervention to protect and improve the lot of the working-classes within the capitalist system.<sup>12</sup>

Whilst his commitment to the working classes was strong and basic to his philosophy, he was in no way inhibited from taking a full and unrestricted part in the creation of a Constitution for a Federation under the Crown of the United Kingdom.

The Conventions of both 1891 and 1897-8 had no model before them where the principle of responsible government had been framed without the presence of the Crown. It would require a reformation of the principle itself for this to occur. Some former colonies of the British Crown, which have separated and become republics, have attempted such a

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<sup>12</sup> La Nauze, *Op. Cit.*, p.102.

reformation of the principle. This reformation has involved the basic republican assumption that all power comes from the people. It is exercised on their behalf by representatives chosen by them to protect their interests in the parliamentary government of the country. Ministers having the confidence of the Parliament advise the Chief Executive in the form of a President. However, the Presidents in such systems are in no way comparable to the Crown. They possess no inherent power, and constitutional power, in basic theory, does not stem from them. Their role is strictly defined, and in most cases is a purely ceremonial one, although conflicts have occurred where a President, elected by the people directly, has claimed a mandate independent from the Parliament. The mandate itself, if valid, comes from the people on the basis that all power comes from the people, not from the President as it used to come, at least in theory, from the Crown.

At the Convention of 1897-8 the question of Responsible Government, and its relationship to the powers of the Senate, was as hotly debated as it was at the 1890 Conference, and the 1891 Convention. Along with the question whether a Federal Suffrage should be placed in the Constitution, the debate on this subject took up at least one half of the time of the Convention.

In the early stages, there was pressure from the Western Australian delegates for the question of the representation of the States on the Senate to be dealt with out of the normal order, because those delegates had to return to their colony to face an election. Despite very vocal opposition to this course, the Western Australian delegates succeeded in having the standing orders set aside to have this matter dealt with at the very outset of the Convention. This course of action became the subject of continuing complaints from those who did not agree with the provision of equal representation of the States on the Senate. Time and time again, in the course of the debates, they complained that the decision on this most important issue had been pre-empted by a trick played by Sir John Forrest and his colleagues before the matter could be fully discussed.

Despite the continued opposition of delegates, such as Henry Bournes Higgins, to the undemocratic nature of the Constitution generally, and the provision for equal representation of the States in the Senate in particular, the Constitution, as finally adopted, departed considerably from the system of responsible government as it operated under the Constitution of the United Kingdom. Whilst, in theory, the Crown was the source of political power, this was not fully the case in the Commonwealth Constitution. The

Constitution itself was the creation of Australians elected by Australians to frame it. Whilst it became the subject of an Act of the Imperial Parliament, its true source was the consent of the Australian people arranged in the separate electorates of the participating colonies, without whose consent the Imperial Parliament would not have acted. In part, the Crown fulfils the role of protector of the Constitution on behalf of the people.

The Senate was in no way comparable to the House of Lords. Its members were elected by the people arranged in separate State electorates, who were represented by an equal number of Senators from each State. Unlike the House of Lords, the Senate had the power to reject money bills including the Appropriation Bills for annual Supply, without which the machinery of government could not be carried on. This would involve the consequence that a government could be paralysed even though it held the confidence of the House of Representatives. It was concern about eventualities of this kind which led to the debate on the question of Deadlocks at the Convention of 1897-8, and the introduction of s.57 into the Constitution. A broader question, which exercised the minds of the Convention delegates, was the degree to which it was intended that the Federation was to be permanent, and proof against the possibility of Secession. A related question was whether this permanence was also intended to involve the fundamental centrality of the Crown in the Constitution.

## INDISSOLUBLE FEDERATION UNDER THE CROWN

The Preamble to the Commonwealth of Australia Constitution Act 1901 provides as follows:

WHEREAS the people of New South Wales, Victoria, South Australia, Queensland and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established.

These words had already appeared in the Preamble of the draft Federation Bill of 1891, and since their enactment by the Imperial Parliament in 1901, have given rise to a controversy as to whether, or not, there are some features of the Commonwealth Constitution which are unchangeable, even by referendum under s.128. The particular features are those of the federal form of the Constitution, its indissolubility, and the central role of the Crown.

There are two aspects to this dispute. The first is what were the intentions of the framers of the Constitution? The second is what legal or political effect should be given to the Constitution Document itself, which involves a consideration of whether or not the words of the Preamble form any part of the Constitution.

The linkage of federation to the Crown of the United Kingdom remained constant from the Conference of 1890, through the Conventions of 1891 and 1897-8, to the final Bill which, when enacted by the Imperial Parliament, became the Commonwealth of Australia Constitution Act containing, in Section 9, the Constitution of the Commonwealth of Australia.

Republican sentiments, either in forthright support of the creation of an Australian Republic, or more mildly in terms of Federation being a step on the way towards ultimate complete separation from the United Kingdom, had been expressed by some members of the colonial parliaments when the resolutions of the 1890 Conference were debated. However, these members were very much in the minority, and the final resolutions of all colonial parliaments were in the form of an adoption of the resolutions of the 1890 Conference to the effect that “the best interests of the colonies would be promoted by an early union under the Crown,” and the appointment of delegates to the proposed Federation Convention in 1891.

At the Convention in 1891, George Dibbs, the Protectionist Leader of the Opposition in the New South Wales Parliament, expressed himself as one:

having a tinge of republicanism in my nature, the result naturally of my being a descendant of an Englishman.<sup>13</sup>

However, there was no doubt that he fully accepted the position that the delegates were meeting “under the crown.”:

We have been sent here by our various parliaments to frame a constitution under the Crown- under the Crown, bear in mind.<sup>14</sup>

There was no doubt as to the general agreement of the desirability of the continued link with the Crown of the United Kingdom, as expressed in the fulsome speeches of Sir Henry Parkes and other speakers, coupled with the terms of Address to Her Majesty the Queen, sent at the conclusion of the 1891 Convention.

As George Dibbs stated:

That is the idea which has been put forward in every speech that has been made.<sup>15</sup>

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<sup>13</sup> *Convention Debates, Sydney, 1891*, p.185.

<sup>14</sup> *Ibid.*, p.185.

<sup>15</sup> *Ibid.*, p.185.

The adoption of the Preamble to the 1891 Draft Bill showed a clear rejection of any proposals for a republic, or complete separation from Great Britain and the Crown.

The Enabling Acts providing for the election of delegates to the Convention of 1887-8 contained no specific reference to the Crown of the United Kingdom in the Preamble to those Acts, but s.7 of the Acts was most explicit as to the duty of the Convention to be created:

7. The Convention shall be charged with the duty of framing for Australasia a Federal Constitution under the Crown in the form of a Bill for enactment by the Imperial Parliament.

The proposed Bill was to be put to the vote of the people of each of the colonies, voting as a single electorate at a referendum, not on the basis, solely, of the acceptance of the Constitution, as set out in Section 9 of the Bill, but on the basis of an answer to a single question in the form, “Are you in favour of the proposed Federal Constitution Bill? Yes; No.”

The final Bill, upon which the people of the whole of Australia voted in State electorates, also contained a Preamble, as already set out, in substantially similar terms to the one originally proposed in 1891.

The parties to the original agreement, or compact, by which the Constitution was approved, were the electors of the various colonies voting as individual electorates.

The agreement, or compact, entered into by these separate electorates created an indissoluble federation under the Crown of the United Kingdom, in respect of which the future arrangements between the contracting parties or electorates, as to the relations between the States and the Federation, the States among themselves, and the distribution of powers between the States and the Federation, were to be governed by the Constitution referred to in Clause 9 of the Act.

Consequently, amendments to the Constitution contemplated by Section 128 could only be amendments to the detailed provisions affecting the relationship of the various organs of government, and the distribution of powers between the States and the Federation, and matters of that sort; and certainly not any fundamental changes **“contrary to the obvious intentions of the plan of Government” contemplated by the Constitution Act and the Constitution.**<sup>16</sup> Neither dissolution of the compact, secession from the Federation, nor the creation of a totally different polity, such as a republic, could be achieved by the use of the provisions of Section 128. All of these matters

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<sup>16</sup> Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, 1901, Reprint Sydney 1996, pp.295-6.

would involve the re-negotiation of the original compact, and would require the consent of all States, if the Federation were to remain intact. Section 128 requires a majority vote of the electors throughout the Federation, but only requires, in addition, a favourable vote in a majority of States, whereas the original formation of the indissoluble federation under the Crown required majorities in each and every State or colony which agreed to join the Federation. Any dissolution of the Federation, or the removal of the central position of the Crown, would require more than the consent of a majority of the States. Such proposals, also, would open up the question of the secession of those States who did not agree to the fundamental change, if s.128 were used to achieve a republic. It could result in a Republic, for instance, encompassing some only of the States as would have happened in the case of the original federation, for instance, if Western Australia or Queensland had not finally come into the federation.

To permit the secession of any State, or to create a republic in place of the Federation under the Crown, it would necessitate the novation, or renegotiation, of the original agreement, or compact. It would probably require, in the first place, enabling Acts in each of the States to initiate referenda at which the electors of each and every State would vote as one electorate, and would only succeed if majorities were achieved in every State, not merely in a majority of States, or a majority of voters in the whole of Australia considered as one electorate.

The framers of the 1891 Constitution Bill had no intention of framing any other entity but a federal constitution under the Crown of the United Kingdom.

Similarly, the hands of the delegates to the 1897 Convention were also tied on any issue relating to the formation of a republic. Their only mandate was to **frame a constitution for a federation under the Crown of the United Kingdom**. This is quite clear, not only from the explicit terms of the Enabling Acts, but also from the express statements of the Leader of the 1897 Convention, Edmund Barton, when he opened the proceedings of the Convention on 23rd March 1897. He had been entrusted with the role of Leader of the Convention because of his general eminence as a statesman and political leader, and because of the fact that he had been intimately involved with the Convention of 1891. Barton went to great pains to spell out precisely what was the task entrusted to the delegates. He made it clear that the boundaries of the deliberations had been expressly set by the provisions of the Enabling Acts:

We must observe that principle (which he had outlined), or else we do not observe the charge laid upon us by the Enabling Acts, which lays on us the duty to frame a "Federal" Constitution under the Crown.<sup>17</sup>

He reinforced his stand, when dealing with the provisions for the appointment by the Queen of the Governor-General. He stated that there was a difference of opinion on this question, not so much in the Convention, but outside by some who would favour the election of the Governor-General by the people. In supporting appointment by the Queen, Barton said that he was actuated by the provisions of s.7 of the Enabling Act:

It seems to me that if we are not to act in antagonism to the instructions given by the Act we should provide for the appointment of the Governor-General by the Queen.<sup>18</sup>

He argued that an elected Governor-General would be likely to be partisan. He said that, if they were to continue with responsible government, and yet elect the Governor-General, it would follow that, by electing a man from one side, they would be electing a man who would have a strong temptation to the thwarting of one Ministry, and unfairly assisting another. He then concluded:

That is not consistent with our position under the Crown. We should be nearer the condition of the South American republics. We should be a republic in everything but name, and if we should reduce ourselves to that nothing would remain for us but, as it was euphoniously put by a Victorian politician "to cut the painter entirely."

For if the substance of our connection is gone, there is nothing to be added but complete independence. I cannot justify that by our past relations with the old country and by section 7 of this Act.

Mr Peacock: "We shall be unanimous on that point."<sup>19</sup>

These sentiments are an echo of the opinions of Sir Samuel Griffith when, on 31st March 1891, in the Convention of that year, he pointed out the procedure for the amendment of the Constitution. The suggested method, in the 1891 draft Bill, was the requirement that a proposed amendment of the Constitution had to be passed by an absolute majority of both houses, and that, thereafter, it had to be submitted for the opinion of the colonies, expressed

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<sup>17</sup> *Convention Debates*, Adelaide, 1897, p. 21.

<sup>18</sup> *Convention Debates*, Adelaide, 1897, p.23.

<sup>19</sup> *Ibid.*, p.24.



in conventions elected for the purpose, and then, if the amendment was approved by a majority of the conventions in the States, it should become law:

subject, of course, to the Queen's power of disallowance. Otherwise the Constitution might be amended, and by a few words the commonwealth turned into a republic, which is no part of the scheme proposed in this bill.<sup>20</sup>

It is clear why there was no suggestion in the 1897 debates that the way would be open in the future, either for the creation of a republic, or for the secession of any of the future States by means of an amendment under s.128 of the Constitution. The matter is dealt with by Quick and Garran, under the heading §7. "Under the Crown":

This phrase occurs in the preamble, and is not repeated, either in the clause creating the Commonwealth or in the Constitution itself. It corresponds with similar words found in the preamble of the British North America Act and in the Commonwealth Bill of 1891. It is a concrete and unequivocal acknowledgment of a principle which pervades the whole scheme of Government; harmony with the British Constitution and loyalty to the Queen as the visible central authority uniting the British Empire with its multitudinous peoples and its complex divisions of political power.<sup>21</sup>

After referring to some degree of advocacy for a republic, they assert that there was no real support for such a policy at the time the Constitution was framed. They then set out that the origin of the Commonwealth, and the form of government prescribed by the Constitution, shows that the recital that the agreement was for a federation under the Crown is also implicit in the words of the Constitution itself. They conclude:

Although to some extent they are surplusage, as involving a recapitulation of what is otherwise provided in the Constitution, the words, "Under the Crown," standing as they do in the preamble of the Imperial Act, may hereafter be of service in answering arguments in favour of amending the Constitution by repealing the provisions above referred to. Strictly speaking, such amendments might be proposed, in the manner provided in the Constitution. Should they be proposed, however, strong arguments against their constitutionality, and even their legality, would be available in the words of the preamble. It might be contended with great force that such amendments would be repugnant to the preamble; that they would at least involve a breach of one of the cardinal understandings or conventions of the Constitution, and, indeed, the argument might go so far as to assert that they would be *ultra vires* of the Constitution, as being destructive of the scheme of Union under the Crown contemplated in the preamble.<sup>22</sup>

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<sup>20</sup> *Convention Debates, 1891*, p.531.Emphasis Added.

<sup>21</sup> Quick and Garran, *Op. Cit.*, p.294.

<sup>22</sup> Quick and Garran, *Op. Cit.*, p.294.

There is no doubt that the framers of the Constitution regarded it as constituting the terms and structure of government upon which the separate federating colonies agreed to unite. To abolish the Crown and set up a republic would be contrary to their intentions, and to the wishes of the electors in the separate colonies, who voted for the Constitution Bill. To establish a republic would require the consent of all State electorates, not merely a majority of such electorates.

The framers intended to incorporate into the Constitution the principles of responsible government, encompassing as they do the basic framework of Cabinet Government, ministerial responsibility to Parliament, the role of the Prime Minister, and all the Conventions touching the role of the Crown represented by the Governor-General. These attributes are not spelled out in so many words by the text of the Constitution, but are nevertheless basic and integral to the working of the polity created by the Constitution. There are other matters of intention, which are also not spelled out in detail, but which are nevertheless just as fundamental a part of the Constitution. In some cases, a bald literal reading of particular sections of the Constitution can give a misleading impression of what was intended, when the whole structure and background of the Constitution is taken into consideration.

Misreadings of the intentions of the framers of the Constitution can, and do, cause controversy in the Parliament, and legislation based on such misreadings can, and do, cause unforeseen consequences, not intended by the framers of the Constitution. They can frustrate the intended purpose of specific provisions of the Constitution itself.

## THE ‘UNAMENDABLE’ PARTS OF THE CONSTITUTION

“The unamendable parts of the Constitution pose a puzzle”<sup>23</sup>

The central question to be answered is whether the framers of the Constitution intended certain fundamental aspects of the polity, created by the agreement between the colonies which resulted in the federation, to be so permanent as to render certain core provisions of the Constitution incapable of amendment under s.128. There is no doubt that the federating colonies entered into a federation, which could not be dissolved by unilateral secession. This is clear from the Preamble to the Constitution Act. The validity of this stipulation does not depend solely upon the Preamble. Indissolubility was only one of the

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<sup>23</sup> G.Sawer, *The Canberra Times*, 21 July 1982, p.2.

core conditions upon which the federation was based. There were three elements to the nature of the entity into which the separate colonies agreed to unite. The first was that it was a federation, and not a complete Union. The second was that it was to be indissoluble in the sense that it could not be broken up by unilateral secession. The third was that the Crown was central to the nature of the polity created. Ancillary to these essential conditions, was the fact that the Agreement was not made between the governments of the separate colonies, but was made between the people of the separate colonies, voting as separate electorates. Additionally, it was agreed that the Constitution could only be amended with the consent of the people under the provisions of s.128.

This Section provides:

128. This Constitution shall not be altered except in the following manner:

The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State and Territory to the electors qualified to vote for the election of members of the House of Representatives.

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And if in a majority of States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.

There is a major difference of opinion among academics and legal experts on the question of whether, or not, it is at all possible for Australia to become a Republic by means of the mechanism provided by s.128. One school of thought, currently represented by the Australian Republican Movement, and academics such as Professor George Winterton<sup>24</sup> (The Minimalists), asserts that such a transition can be made with ease by, what might be called, a mere 'scissors and paste' approach to the constitution document, by substituting "President" wherever the word "Queen" appears, and submitting the result to a referendum under Section 128.

A contrary view argues that both indissolubility, and constitutional monarchy, are entrenched in the Constitution, either by reference to the Preamble of the Constitution Act, or more securely by the substantive sections of the Commonwealth of Australia Constitution Act (the Covering Clauses).

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<sup>24</sup> See Winterton (Ed), *We the People, Chapter 3* "A Republican Constitution," Sydney, 1994.

The peoples of the Australian colonies agreed to unite in an indissoluble Federal Commonwealth under the Crown. That which was solemnly declared to be indissoluble should not be dissolved without the consent of all the parties to the original compact (that is, all the States). If there is to be a new kind of union—as a republic rather than under the Crown - a referendum to bring about the change should be supported by a majority of electors in every State. The dissent of one State should cause the proposed change to fail.<sup>25</sup>

An additional argument has been raised more recently following the decision of the High Court in *McGinty v Western Australia*. In that case McHugh J. decided that the fifth paragraph of s.128 was not limited to matters affecting the boundaries of a State. Julian Leaser detailed the circumstances under which the paragraph had been added to s.128.

The controversial fifth paragraph was added at the Premiers' Conference in February 1899. The conference was convened at the instigation of Sir George Reid.<sup>26</sup>

It will be remembered that the first Federation referendum failed in New South Wales because the number of votes did not reach a required minimum imposed by the Parliament of New South Wales. A second referendum succeeded after the changes agreed to at this Premiers' Conference. Leaser points out that the fifth paragraph was inserted into s.128 as a result of the Australian Federation Resolutions introduced by Reid into the Parliament of New South Wales. In support of these Resolutions Reid had stated that the intention of paragraph (d) of the Resolutions, which became the fifth paragraph of s.128, was to protect the boundaries of the States against alteration without their consent. This intention appeared to be quite specific:

One curious point that needs to be noted concerns the debate which occurred in the Legislative Assembly. Mr Dacey said:

You are now trying to preserve those powers which have been left to the States - to secure them to the states in such a manner that they shall not be taken away without their consent. **That is in regard to boundaries. Why should not that extend to every other function and power not given up by the State Legislature just as well as to the question of boundaries?**

To which Reid interjected "Quite right."<sup>27</sup>

Leaser reviews the debates in the Parliaments of South Australia, Queensland and Victoria to support the view that the Premiers of those States were not aware of the broader

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<sup>25</sup> Sir Harry Gibbs, "A Republic: The Issues," *Proceedings of the Eighth Conference of the Samuel Griffith Society*, 1997, Vol. 8, p.15.

<sup>26</sup> Julian Leaser, "Tying up the Loose Ends of the ? Constitutional Convention." *UNSW Law Journal Forum*, Sydney, 1998, p.36.

<sup>27</sup> *Ibid.*, pp.36-37.

intention suggested by Dacey, and applauded by Reid. So far as the documentary evidence goes all other Premiers agreed with the addition of the fifth paragraph to s.128 on the basis that the words, “or in any manner affecting the provisions of the Constitution in relation thereto,” referred to the restriction placed by the paragraph upon “altering the limits of the State” without the consent of the State.<sup>28</sup> Leaser draws attention to the fact that a wider view of this paragraph was taken by McHugh J. in the *McGinty* case. The issue involved in that case was whether or not there could be implied from the Constitution a principle of “one man one vote” derived from recognition of representative government by the Constitution. If such a principle was implicit, State legislation in conflict with it could be struck down by the High Court. McHugh J., in deciding that no such implication could be made, disagreed with the Court’s decision in the *Theophanous* case as being:

fundamentally wrong and as an alteration of the Constitution without the authority of the people under s.128 of the Constitution.<sup>29</sup>

McHugh J. pointed out that s.128 itself permitted great divergence of the value of votes. Under this section the value of votes in a small State was equal to the value of votes in a more populous State.

Thus, the share in the right to amend the Constitution of each Tasmanian voter can be more than 12 times as great as the share of each New South Wales voter.<sup>30</sup>

He then concluded:

Further, where an alteration of the Constitution would in any manner affect the provisions of the Constitution in relation to a State, s.128 of the Constitution provides that the alteration shall not be valid unless the majority of electors in the State concerned approved the proposed alteration.<sup>31</sup>

In so far as a particular State was determined to remain a constitutional monarchy, an alteration of the Federal Constitution to create an Australian Republic could not be imposed on a dissenting State, because of the provisions of the fifth paragraph of s.128. This approach would support the contention that to be effective any change from a constitutional monarchy to a republic would require majorities in all States not merely in a majority of States as required by the fourth paragraph of s.128.

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<sup>28</sup> The fifth paragraph provides: No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or other wise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.

<sup>29</sup> *McGinty. Western Australia*. (1996) 186 CLR p.233.

<sup>30</sup> *Ibid.*, p.236.

<sup>31</sup> *Ibid.*, p.237.

## THE COVERING CLAUSES OF THE COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT

The Constitution Act is an Act of the British Parliament, and contains nine clauses. Of these, the first eight relate to the establishment of the Commonwealth, and the ninth Clause merely states that the Constitution of the Commonwealth shall be as thereafter set out under the heading, “The Constitution.” These Clauses are referred to as “the covering Clauses.”

Many constitutional experts rely on the Preamble to the Act as that part of the Act which prevents both secession, and the establishment of any kind of Constitution other than that of a Constitutional Monarchy.

The Constitution was described by Patrick McMahon Glynn, BA LLB, a Barrister and delegate from South Australia to the 1897 Convention, as a “crowned republic.”<sup>32</sup> This description highlights the fact that all the checks and balances, which guard against the development of an unrestrained Executive, created by the separation of powers, and which would be expected in a Republican Constitution, are to be found in the Constitution of the Commonwealth of Australia. The major distinguishing feature is that the Head of State is an hereditary Monarch, acting through a local representative, instead of a President however elected, or appointed.

A similar contemporary view was expressed in 1891 by Patrick Francis Moran, Roman Catholic Archbishop of Sydney. In describing these essentially republican features, he argued that the constitutions of the Australian colonies, even though under the Crown of the United Kingdom, had all the advantages normally associated with a republic. Geoffrey Partington described Cardinal Moran’s position:

Moran regarded ‘our colonial Administration, linked as it is to the Crown of Great Britain,’ as the most perfect form of republican government. It has all the freedom which a republican government imparts, and it is free from the many unpleasant influences to which, as in the United States, an elected head of a republic is subject.<sup>33</sup>

It was intended by the framers of the Constitution that the terms of the agreement, for which consent was to be sought from the separate electorates of the federating colonies, encompassed a polity consisting of a federation, which could not be dissolved by unilateral secession, and in which the centrality of the Crown was an indelible characteristic. It was never intended that the provisions of s.128, involving as it does only the consent of a

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<sup>32</sup> *Convention Debates*, Adelaide, 1897 p 73.

<sup>33</sup> Geoffrey Partington. *The Australian Nation*. Kew, Victoria, 1984, p.81. Quoting Moran, PF. *Lecture on the Rights and Duties of Labour*, Sydney: Finn Brothers, 1891, pp 5-20

majority of the States, could be used to substitute, for the indissoluble federation under the Crown, a polity of a totally different kind, which would be incompatible with any of these three characteristics. A referendum under s.128 could not be used to change the federation into a confederation allowing for unilateral secession. This would make a mockery of the consent of all the federating Colonies, which was a precondition to the creation of the federation itself. Similar considerations apply equally to the centrality of the Crown in the Constitution.

In so far as the three characteristics mentioned derive only from the Preamble, this could not be altered by a referendum under s.128, because the Preamble is not a Preamble to the Constitution alone, it is a Preamble to the Constitution Act. S.128 only allows alterations to the Constitution, not to the sections of the Constitution Act other than s.9 of that Act.

The three characteristics of federal structure, indissolubility, and monarchical form do not depend solely upon the Preamble, but are buttressed by the substantive provisions of the Constitution Act, and by the internal structure of the Constitution Document itself contained in s.9 of the Act.

The 1891 Convention had before it more than one distinct form of Draft Constitution Bill. The draft bill, prepared by the Hon Charles Cameron Kingston QC MP, from South Australia, separated the terms of the Constitution from the other substantive provisions of the Bill itself. Part I of the Bill was headed “Preliminary and Interpretation.” Part II, was headed “The Union,” and provided that it would be lawful for the Queen to declare by proclamation that the colonies should be united in one federal union and dominion, and under one federal constitution, from and after the day of the proclamation. Part III was headed, “The Federal Constitution,” but merely stated that the Federal Constitution should consist of (a)The Executive; (b)The Parliament and (c)The Judiciary. Part IV dealt with the Federal Executive, and subsequent parts dealt with all other provisions of the Constitution, such as the Parliament, the Senate, the National Assembly, the assent to Bills, the Referendum (a provision modeled on the Swiss Constitution), the Judiciary, Local Parliaments, the Distribution of Powers, the Powers of Local Parliaments, Transfer of various works and liabilities to the Federal Union, Revenue and Taxation, Admission of Remoter Colonies, and Part XVII Miscellaneous.<sup>34</sup>

It should be remembered that the 1891 Draft Bill owed much to the Draft prepared by Andrew Inglis Clark who, as a Member of the House of Assembly of Tasmania, attended

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<sup>34</sup> Griffith, Sir Samuel. “*Successive Stages of the Constitution.*” Dixon Library, Sydney. DL MS 1981. now DL MS Q 198. This draft was printed by the South Australian Government Printer and dated ‘26/2/91’

the 1891 Convention. He was a classical republican, with a fervent commitment to the public good, the *res publica*, which was protected against the tyranny of the executive by the separation of powers, and the checks and balances of parliamentary government. He was a life long admirer, and student, of the American republican system, and its Constitution, and was responsible for so much of the verbiage derived from the American Constitution, which found its way into the Commonwealth Constitution. It was influenza, alone, which prevented him from forming part of the famous drafting party, which repaired, in the Queensland Government yacht, the “Lucinda,” to Broken Bay, over the Easter Weekend of 1891, to seek peace and quiet for the purpose of putting the Draft Constitution into order for the more formal Sessions of the 1891 Convention.

Both of the drafts of Kingston and Clark included the Constitution in the body of a Draft Imperial Act. In Clark’s draft, the Preamble, and Clauses one to four inclusive, later formed part of the Covering Clauses. In Kingston’s Draft, the “Federal Constitution” formed a separate Part III of the Act, with the remaining detailed Constitutional provisions divided into subsequent Parts. Both drafts commenced with a Preamble, with the parts of the Act following directly on the Preamble. The Bill, as finally adopted by the 1891 Convention, was in the same form as the Bill that was presented to the Imperial Parliament after the later Convention. This made a separation between, what have become known as, the ‘Covering Clauses’, and the Constitution proper set out in s.9 of the Act.

The reason for the separation of the ‘Covering Clauses’ of the Constitution Bill, from the Constitution proper, became an issue with the Secretary of State for the Colonies, when the matter was raised in a Memorandum, setting out some of the concerns of the Home Government to certain provisions of the 1899 Draft Bill. One copy of this memorandum is to be found in the Barton Papers, annotated in Barton’s own handwriting.<sup>35</sup> The document was prepared in answer to a “Memorandum of the Delegates,” in which they requested that “the whole of the draft Bill as received from the Colonies may be submitted to Parliament and passed into law.” The Colonial Secretary’s Memorandum deals with this issue of the ‘Covering Clauses’ and the Constitution proper.

The distinction which was drawn in the discussions of the Federal Convention between the “covering clauses” and the “Constitution” is no longer recognised, and it is contended that the whole Bill, covering clauses and the Constitution alike, ought to be passed by the Imperial Parliament without alteration, on the ground that it embodies the Agreement at which the people of the Colonies have arrived.<sup>36</sup>

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<sup>35</sup> *Barton Papers*, Australian National Library No 57/1014, dated 29.3.1900 in Barton’s hand.

<sup>36</sup> *Ibid.*, *Barton Papers*, Australian National Library, No 57/1014, dated 29.3.1900.



The Memorandum then argued that the Enabling Acts, under which the Referenda were taken, formally referred to the “Constitution” only, and the Addresses from the Parliaments prayed that the “Constitution” might be submitted to the Imperial Parliament and passed into law. This statement is only partly correct. The specific question put before the people was also specified in the Enabling Acts in The First Schedule, which provided:

## AUSTRALASIAN FEDERAL CONSTITUTION

Ballot Paper.

Are you in favour of the proposed Federal Constitution Bill, as amended?

“Yes.”

“No.”

If you are in favour of the Bill, as amended, strike out the above word “No.”

If you are against the Bill, as amended, strike out the above word “Yes.”

It should be noted that the Referenda Campaigns were fought out between “Billites” and “Anti-Billites.” The question asked was not simply confined to the Constitution itself.

The Second Schedule to the Enabling Act sets out the various amendments, which were agreed to at the conference of Prime Ministers of New South Wales, Victoria, Queensland, South Australia, Tasmania, and Western Australia, which met in Melbourne on 28th, 30th, and 31st January, and 1st, 2nd, and 3rd February, 1899.

The Colonial Office Memorandum goes on to point out that Edmund Barton, himself, on several occasions, made a complete distinction between the covering clauses and the Constitution, in the course of the Convention Debates.

Speaking at Adelaide at the sitting of the 14th April, 1897, on clause 5, with reference to the provision as to the operation of the laws of the Commonwealth on British ships:

“This appears to be a concession to Australia, and the best thing to do is to let the Imperial authorities deal with it.”

In the course of the debates at the Sydney meeting of the Convention in 1890(sic), Mr Barton again expressed himself more fully to the same effect.

“We do not expect,” he said; “that that the Imperial Legislature will amend the provisions which are in the Constitution itself, although they are an endeavour to

extend our autonomy; but these covering clauses are suggestions to the Imperial Legislature, and it would be absurd to expect that, as regards these clauses, the Imperial Legislature will not make such amendments as they please.<sup>37</sup>

The conclusion drawn by the Colonial Office is not a valid one. The Memorandum concludes that the covering clauses were not regarded as part of the Agreement between the Australian Colonies, as to the Constitution under which they were prepared to unite, but rather as suggestions as to the terms of the Agreement between the Colonies and the mother country. This conclusion is at odds with the statements in the Preamble, which sets out the terms of the Agreement as being three-fold, namely, an agreement to unite in an **Indissoluble Federal Commonwealth under the Crown**, and an agreement to unite **under the Constitution “hereby established.”** The Federal Commonwealth was established by the combined operation of covering clauses 3 and 4 of the Constitution Act, and the Constitution was also to take effect by virtue of covering clause 4. Its terms were set out in Clause 9.

The immediate issue between the Colonial Office and the Australian delegation was the demand of the delegation that both, the ‘Covering Clauses,’ and the Constitution proper, should be passed without amendment. If there was any doubt about this, reference need only be made to the fact that the Australian delegates fought hard, vigorously, and successfully for the retention of ‘Covering Clause’ 5, which provided that the Constitution Act should be:

binding on the courts, judges, and people of every State, and of every part of the Commonwealth notwithstanding anything in the laws of and State, **and the laws of the Commonwealth shall be in force on all British ships, the Queen’s ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth (Emphasis added)**

In support of his insistence that the covering clauses should not be amended by the Imperial Parliament, Barton notes, in his own hand on the Memorandum, the following comment:

The covering clauses cannot be separated from the Schedule in cases where they protect the Constitution, and to alter them would be to take away that protection and so alter the agreement between the Colonies. **If we did not act *ultra vires* of the Enabling Acts in preparing and submitting the covering clauses, then they are all part of the Agreement.** But this Act does not touch the question whether the

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<sup>37</sup> The reference here is incorrect as to date. The reference is to the Convention of 1897. The side-note when applied to the 1897 Convention is correct, viz, *Convention Debates*, Sydney, p.247.

covering clauses should be altered so as to alter the Constitution. But the two together are the Constitution; See NSW Enabling Act S. 7. Also see Certificate at head of Bill and these Acts referring to “the Constitution” refer to the Constitution in the form of a statute for enactment. See 1st Schedule of the same Act and the (various amendments? or various Addresses?)<sup>38</sup>

Section 7 of the Enabling Act referred to, reads:

If two Colonies, in addition to New South Wales, accept the Constitution, both Houses of Parliament may adopt Addresses to the Queen, praying that the Constitution may be passed into law by the Parliaments of two such Colonies; and the Addresses so adopted shall be forthwith transmitted to the Queen, with a certified copy of the Constitution.

There is no doubt that there is a distinction between the covering clauses and the Constitution proper. They both deal with distinct subject matters, even though the subject matters are related the one to the other.

The covering clauses describe the Agreement which led to the creation of the Commonwealth, the establishment of the Commonwealth, the appointment of the First Governor-General, the binding nature of the laws of the Commonwealth, the definition of the Commonwealth as the Commonwealth established under the Act, the definition of States and original States, and the repeal of the Federal Council of Australasia Act 1885, and the Colonial Boundaries Act 1895.

It is also significant that Barton should describe the function of the ‘Covering Clauses’ as being that of protecting the Constitution, and that any alteration to them would take away that protection, and alter the agreement between the colonies. The agreement, which required protection, was the polity created thereby encompassing indissolubility, federal structure, and the central role of the Crown.

Clause 9 of the Constitution Act incorporates by reference the Constitution itself, within which there is provision for amendment.

It is clear that provisions establishing the Federal Commonwealth under the Crown of the United Kingdom are quite distinct from the internal provisions of the Constitution, relating to the operation of the Federal Commonwealth.

Whilst accepting that it required an Act of the Imperial Parliament to create the new entity of the Commonwealth of Australia, the people of the colonies uniting under their Agreement had only agreed to unite under the terms of their own Constitution. What the Imperial Act did was to create the Federal Commonwealth under the Crown of the United

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<sup>38</sup> *Ibid* Barton Papers, ANL, No 57/1014, 29.3.1900.

Kingdom. The delegates to the Constitutional Convention were elected, under the several Enabling Acts of the participating colonial Parliaments, for **the purpose of framing a Constitution for a Federal Commonwealth under the Crown of Great Britain and Ireland, nothing more, and nothing less.**

These issues became vitally important, when Western Australia sought legislation by the Parliament of the United Kingdom, in 1935, designed to permit Western Australia to secede from the Commonwealth. During the course of that application, it was agreed, by all parties, that none of the ‘Covering Clauses’ could be amended, by the process of s.128, to allow the secession of a State.

Lord Wright summarised the position as follows:

Assume that these are two propositions which cannot be disputed, first that the covering clauses can only be altered or repealed by the Imperial Parliament, and, secondly, that the Dominion Parliament has full power to alter the rest of the Act subject to the conditions laid down in Section 128. These we may start with as axiomatic.<sup>39</sup>

Faced with these propositions, Wilfred Greene KC, for the Commonwealth, stated:

I accept both those propositions. I think my learned friend and I are at one on that.<sup>40</sup>

## ARGUMENTS BASED ON THE PREAMBLE

Morgan KC, for the State of Western Australia, referred to the Preamble to the Constitution Act, but conceded that, “there is no particular virtue in a Preamble.”

Other commentators, in later years, have relied more heavily on the words of the Preamble. However, Professor Gregory Craven, in an article in the *Federal Law Review* in 1985, has convincingly argued that the Preamble would not be a possible source of a prohibition against dissolving the Federation.<sup>41</sup> He argued this view on the basis of the normal canons of statutory interpretation.

It follows from the application of the rule in the *Sussex Peerage Claim*, that the terms of a preamble cannot affect the unambiguous words of an enactment. The question thus arises as to whether a preamble has any role at all to play in the interpretation of statutes.<sup>42</sup>

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<sup>39</sup> Minutes of Proceedings of the *Joint Committee of the House of Commons and House of Lords on the Petition of the State of Western Australia*: 27 March 1935, p. 10.

<sup>40</sup> *Ibid.*

<sup>41</sup> Geoffrey Craven. “The Constitutionality of the unilateral secession of an Australian State,” 1988, 15 *Federal Law Review*, p.123.

<sup>42</sup> *Ibid* p.127.

He referred to the dismissive words of Isaacs J., in *Federated Saw Mills Employees v James Moore & Sons Pty Ltd*, when he described the preamble of the Constitution Act as merely containing “Pious aspirations for unity.”<sup>43</sup>

He also referred to another article, which he contributed to the *Melbourne University Law Review* in 1983, where he argued that:

in all probability the Founding Fathers did not insert their reference to the indissolubility of the Commonwealth through any hope that such a reference would thereby render secession illegal, but rather in an understandable desire to express their hopes for the future, and to assist in the creation of a dignified opening to the Constitution.<sup>44</sup>

In addition to the statement of Isaacs J., he quotes a statement of another of the Convention delegates, Patrick McMahon Glynn, writing in the *Commonwealth Law Review* 1903, in reference to the indissolubility recited in the Preamble, when he described the words of the preamble as:

one of those preliminary flourishes addressed to the conscience, which are to be found in instruments which suggest more than they accomplish.<sup>45</sup>

However, there are some very strong statements in the Debates as to the intention of the framers to prevent secession, by ensuring that the compact between the colonies was indissoluble.

On 26 March 1897 William John Lyne, a member of the New South Wales Legislative Assembly, argued:

We must frame a Constitution from which there shall be no secession, and one that will prove a binding contract between all colonies, or else the same troubles which arose in the United States, when States desired to withdraw from the Federation, will arise here.<sup>46</sup>

He was conscious of the terrible example of the American Civil War which was vividly present in the minds of the Convention delegates, and which was of relatively recent occurrence. If Professor Craven’s view is sound, the Preamble, without more, would likewise be no bar to the creation of a republic. However, as Lord Wright said, “the Preamble is a statement of fact.” As such it might become relevant in considering other arguments based on the Constitution regarded as a compact, or contract, between the peoples of the uniting colonies.

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<sup>43</sup> (1918) 8 CLR, p.465, pp.635.

<sup>44</sup> Craven, *Op. Cit.*, p.134, referring to Craven; 14 *Melbourne Law Review*, Melbourne, 1983, p.99, at pp.296-7.

<sup>45</sup> G.Craven *Op. Cit.*, p.135.

<sup>46</sup> *Convention Debates, 1897*, Adelaide Vol.2, pp.161-2.

## EFFECT OF THE SUBSTANTIVE PROVISIONS OF COVERING CLAUSES

Leaving the Preamble aside, Professor Craven considered that indissolubility was clearly stamped on the Constitution by the provisions of Sections 3 and 4 of the Constitution Act.

Morgan KC, on behalf of the State of Western Australia, before the Joint Committee of the House of Lords and the Commons, relied particularly on Section 3 of that Act.<sup>47</sup>

If the characteristic of indissolubility is so grounded in the specific provisions of the covering clauses, then the characteristic of the Constitution as a Federation under the Crown of the United Kingdom is also grounded in the specific provisions of the covering clauses, particularly Clauses 2, 3, 5, quite apart from the Preamble. Consequently, there is no way in which, either, the federation could be dissolved, or the federation changed from a federation under the Crown to a Republic, without the repeal, or amendment, of the Covering clauses, and the consent of each and every one of the States.

## CAN THE COVERING CLAUSES BE REPEALED? AND IF SO, BY WHOM?

The contention that the 'Covering Clauses' could not be altered, or repealed, by the process set out in s.128 of the Constitution, raised in the West Australia Secession Case, had already been asserted by Sir Robert Garran, in his evidence to the Royal Commission on the Constitution, given on 20 September 1927. Sir Robert, at the time, was Solicitor General for the Commonwealth, and had been Secretary to the 1897 Constitutional Convention. He had also been an active participant in the Federation Movement in the 1890's. With Dr Quick, he was the author of the most authoritative Commentary on the Commonwealth Constitution, and, consequently was in a strong position to indicate the intention of the framers of the Constitution.

His contribution to the Royal Commission was acknowledged in the Report of that Commission in 1929, which paid tribute to the:

account of the provisions of the constitution, and the various aspects of its working, from Sir Robert Garran, Solicitor-General for the Commonwealth, who was intimately associated with the framing of the Constitution, and whose experience of its working since Federation is unique.<sup>48</sup>

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<sup>47</sup> *Minutes of Proceedings of the Joint Committee of the House of Commons and the House of Lords London, 1935*, p.10.

<sup>48</sup> *Report of the Royal Commission on the Constitution, Canberra, 1929*, p.5.

In his evidence, he described the Constitution as follows:

After all, the Constitution is a schedule to a British Act of Parliament, and has the status of a British Act of Parliament; and it is as an Act of Parliament (by) which the British Parliament has given us power to amend.

202. BY THE CHAIRMAN "Has it given us power to amend anything but the schedule?\_\_ No, it has not given us power to amend the covering clauses. We cannot make an Amendment of the Constitution Act to which the Constitution is scheduled, but we can make any amendment to the schedule... We have power to amend the Constitution but I take it that that must be within the scope and limits of what is part of the Australian Constitution. We can, I think, alter the Constitution as regards our relations with the Empire, to a certain extent. We can probably not alter it to make this Constitution cease to be the Constitution of a Federal Commonwealth under the Crown. I take it an alteration which, for instance, declared for an independent Australia, would legally be an irrelevant amendment, because the Constitution is applied to an Act in which the union is said to be under the Crown of the United Kingdom; but short of that, so long as we keep within the scope of the act to which the Constitution is appended, I think we can effect the extent to which the legislation of the Commonwealth should have effect when repugnant to a British Act.<sup>49</sup>

Before the Statute of Westminster, the British Parliament, theoretically, could repeal these clauses. However, by constitutional convention, which developed in the course of Imperial conferences up to those of 1926 and 1930, no such action would be taken by the Imperial Parliament, unilaterally. There was no doubt that the Imperial Parliament had the power so to do.

A number of the constitutional changes, which developed over the years of the Imperial Conferences, were codified in the Statute of Westminster. This was a general Act of the British Parliament applying to all the Dominions. It confirmed that the power of the British Parliament to make laws applicable to a Dominion would not be exercised without the prior consent of that Dominion. It abolished the embargo placed upon Dominions, by constitutional theory and the provisions of the Colonial Laws Validity Act 1865, against the making of laws repugnant to the laws of the United Kingdom. It also provided that no future Acts of the Parliament of the United Kingdom should extend to a Dominion as part of the Dominion law, unless it was expressly declared that the Dominion had requested and consented to the enactment.

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<sup>49</sup> *Report of the Royal Commission on the Constitution 1929. Minutes of Evidence*, p.64. Emphasis added.

S.8 of the Statute of Westminster saved the Commonwealth Constitution Act, and the Commonwealth Constitution, from any alteration. The section provided:

Nothing in this Act shall be deemed to confer any power to repeal or alter the Constitution or the Constitution Act of the Commonwealth of Australia... otherwise than in accordance with the law existing before the commencement of this Act.

**Thus, no power was given to the Commonwealth Parliament to alter the Act, or the Constitution, other than any power it previously had before the Statute of Westminster. The Constitution could only be amended in accordance with s.128. The Commonwealth had no power to alter the Constitution Act, which previously could only be changed by the British Parliament, and any request to that Parliament to change that Act would need the authority of the Australian people, obtained in the same manner as it was obtained in the referenda of 1898-99.**

## CAN THE COVERING CLAUSES BE AMENDED BY THE USE OF S.128?

This specific question was addressed by the Acting Solicitor-General of the Commonwealth, Dennis Rose QC, in an advice given to the Republican Advisory Committee on 29 March 1993.<sup>50</sup>

He answered this question in the affirmative:

by altering the Constitution under Section 128 to confer power on the Commonwealth Parliament,

(a) to repeal Section 8 of the Statute of Westminster to the extent necessary and

(b) to repeal or amend the covering clauses and the Preamble.

He makes reference to the arguments advanced by Professor Winterton in countering, what he classified as, the “orthodox view,” and which asserted that s.128 could not be used to override the provisions of the preamble and covering clause 2 of the Constitution Act.

At least since 3 September 1939, when the Commonwealth acquired the power to enact legislation repugnant to Imperial legislation applying in Australia by paramount force (such as the Constitution Act), constitutional amendments pursuant to section 128 have enjoyed a legal status *equal* to that of the preamble and covering clauses, in which case any inconsistency between them should be resolved in favour of the constitutional

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<sup>50</sup> *Report of the Republican Advisory Committee, Canberra, 1993, Appendix 8.*



amendment pursuant to the principle that a later law prevails over an inconsistent earlier one. In other words, even if section 128 does not authorise *direct* amendment or repeal of the preamble and covering clauses, it is at least arguable that they can be amended or repealed *indirectly* pursuant to the power conferred by that section.<sup>51</sup>

Professor Winterton referred in support to the opinion of Senator Gareth Evans to the effect that a referendum could not change that part of the constitutional system which was embodied in the United Kingdom law and the covering clauses of the Constitution Act, but that law could be displaced, as it operates in Australia.

Once the monarchy was abolished in Australia there would simply be no scope for any purported overriding United Kingdom law to operate.<sup>52</sup>

If there was still doubt about the validity of this approach, Dennis Rose QC made the suggestion that s.128 could be used to give the Commonwealth Parliament power to deal with the preamble and covering clauses of the Constitution Act.

If there were no other available course, the High Court could probably be expected to agree that S.128 extends to a Commonwealth Bill, approved at a referendum, directly repealing or amending the preamble and the covering clauses, or both.<sup>53</sup>

He indicated that the suggestion of a referendum under s.128 to give the Commonwealth the necessary power under s.51 was first suggested by Professor Enid Campbell OBE, in an opinion for the Australian Constitutional Convention in 1974.

The contrary view, then suggested, was that s.8 of the Statute of Westminster retained:

many substantive obstacles to amendment by the Commonwealth Parliament of the Constitution Act and it was argued that the Colonial Laws Validity Act 1865 was such an obstacle. On this view only the United Kingdom Parliament could have altered the Preamble and covering clauses.<sup>54</sup>

Dennis Rose, QC contended that the way was cleared by the Australia Act (UK), s.15(1) of which provides that a statute, so far as it is part of the law of the Commonwealth, State, or Territory, may be repealed, or amended, by an Act of the Parliament of the Commonwealth, passed at the request of the Parliaments of all the States, and, subject to subsection (3), only in that manner. Subsection (3) provides that nothing in subsection (1) limits any powers conferred on the Parliament by an alteration of the Constitution under s.128.

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<sup>51</sup> G. Winterton, *Monarchy to Republic*, p.126.

<sup>52</sup> G. Evans, "God Save the Queen?—Australia as a Republic" (unpublished address to *Counterpoint Forum*, Murdoch University, 29 September 1982.)

<sup>53</sup> *Report of the Republican Advisory Committee, Canberra, 1993*, Appendix 8 p.298.

<sup>54</sup> *Ibid.*, Appendix 8, p.299.

**S.15 of the Act provides:**

15. (1) This Act or the Statute of Westminster 1931, as amended and in force from time to time, in so far as it is part of the law of the Commonwealth, of a State or of a Territory, may be repealed or amended by an Act of the Parliament of the Commonwealth passed at the request or with the concurrence of the Parliaments of all the States and, subject to subsection (3) below, only in that manner.

(2) For the purposes of subsection (1) above, an Act of the Parliament of the Commonwealth that is repugnant to this Act or the Statute of Westminster 1931, as amended and in force from time to time, or to any provision of this Act or of that Statute as so amended and in force, shall to the extent of the repugnancy, be deemed an act to repeal or amend the Act, Statute or provision to which it is repugnant.

(3) Nothing in subsection (1) above limits or prevents the exercise by the Parliament of the Commonwealth of any powers that may be conferred upon that Parliament by any alteration to the Constitution of the Commonwealth made in accordance with section 128 of the Constitution of the Commonwealth after the commencement of this Act.

**Dennis Rose, QC Concludes:**

There can be no limits to the power under section 15(1) read with section 15(2) to repeal or amend the Statute of Westminster so far as the Constitution Act is concerned, since otherwise the power of the United Kingdom Parliament having been terminated, the Constitution Act could not be changed by any procedure at all (at least if the orthodox view in para 12 above is accepted)<sup>55</sup>

He extracts from the Judgment of Dawson J., in *Polyukhovich v the Commonwealth*<sup>56</sup>, the principle that:

An interpretation (of the relevant legislation) which denies the completeness of Australian legislative power is unacceptable in terms of constitutional theory and practice.

He then sets out the method which, in his opinion, would be adequate to effect the repeal of the Preamble, and covering clauses, of the Constitution Act:

18. With the repeal or amendment of Section 8 of the Statute of Westminster to the necessary extent, the Parliament might then have power, under S.2(2) of the Statute of Westminster, to repeal or amend the preamble and covering clauses of the Constitution Act (see para 15 above) without the need to obtain any further powers. However, in order to avoid doubt on that aspect, legislation under S.15(1) could empower the Commonwealth Parliament to repeal or amend the preamble and covering clauses.

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<sup>55</sup> *Report of the Republican Advisory Committee, Canberra, 1993.*

<sup>56</sup> *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 638

19. Section 15(1) read with Section 15(2). is expressed to provide the ONLY way to repeal or amend the Statute of Westminster but this is expressly made subject to Section 15(3). Section 15(3) provides that nothing in Subsection (1) prevents the parliament from exercising any power conferred upon it by a Constitutional alteration under S. 128 of the Constitution after the commencement of the Australia Act (on 3 March 1986).

20. In my opinion, Section 15(3) allows the Parliament, if given the power pursuant to a referendum under S. 128 of the Constitution, to do anything that can be done by the alternate procedure under Section 15(1) read with Section 15(2).

**He submits that, if given the power, the Commonwealth could then repeal s.8 of the Statute of Westminster and, thereafter, repeal the covering clauses:**

being an exercise under Section 2(2) of the Statute of Westminster, or, if no such power exists an exercise of a new power conferred by Constitutional alteration.

**He concedes that argument could be mounted against this view, on the basis that:**

since the literal form of section 15(3) is that of a provision about the effect of section 15(1), section 15(3) really limits the effect of Section 15(1), and has not added to what could have been done under Section 128 of the Constitution in the absence of Section 15(3). On that view Section 15(3) has not removed the impediment created by Section 8 of the statute of Westminster contrary to Professor Campbell's 1974 suggestion.

**Dennis Rose, QC, claims that this interpretation is incorrect.**

Let it be accepted that, in the absence of Section 15 of the Australia Act, a constitutional alteration under Section 128 could not have conferred power on the Parliament to repeal or amend Section 8 of the statute of Westminster, Section 15(1), if unqualified by Section 15(3), would obviously not have allowed such a constitutional alteration. There would have been no need for Section 15(3) if its only point was to qualify Section 15(1) (c/f para 21 above) its purpose must have been positively to allow at least some kinds of amendments to the Statute of Westminster (and the Australia Act ) to be effected pursuant to a future alteration to the Constitution under Section 128.

23. In my opinion, the correct view of Section 15(3) is that it not only qualifies the exclusiveness of Section 15(1) but also allows a subsequent alteration under Section 128 to enable Parliament to do any of the things that can be done by the alternate procedure under Section 15(1) read with Section 15(2)

**These things include the repeal or amendment of Section 8 of the Statute of Westminster in so far as the Constitution Act is concerned.<sup>57</sup>**

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<sup>57</sup> Op. Cit., Appendix 8 *Joint Committee Report*.

He adds that this view is supported by “leading constitutional scholars” instancing L. Zines,<sup>58</sup> and Lumb.<sup>59</sup> He also referred to the Second Reading Speech on the Australia (Request and Consent) Act 1985, made on 13 November 1985,<sup>60</sup> where it was stated that the purpose of the Act was to enable the Australia Act, and the Statute of Westminster, to be amended by the Commonwealth Parliament, (so far as they are part of the law of the Commonwealth) at the request of the States, except where Commonwealth legislation is made pursuant to any constitutional alteration made under s.128 after the commencement of the Australia Act.

He also quoted the views of Professor Craven, expressed in his work on Secession,<sup>61</sup> when he said:

clearly the amendment to Section 128 contemplated by Professor Campbell would be itself an amendment of the covering clauses and more particularly the opening words of covering clause 9. Given this fact it would be beyond the power of the amending Authority provided for by Section 128 and would thus be void, quite independent of any operation of the colonial Laws Validity Act 1865. Accordingly, even if Section 8 of the Statute of Westminster did have the effect claimed by Professor Campbell, an amendment to Section 128 giving the Commonwealth Parliament the power to amend or repeal the covering clauses would still be ineffective.

Dennis Rose, QC, said that a counter to this argument would be to seek an amendment to s.51 of the Constitution, via a referendum under s.128, giving the Commonwealth Parliament power to amend the covering clauses. He added that, before the Statute of Westminster, such a conferral of power would be void because of the provisions of the Colonial Laws Validity Act 1865. Further, if the amendment were made after the Statute of Westminster, it would be void because of the provisions of s.8 of that Act. His final contention was that the barrier created by Section 8 was removed by the Australia Act (UK) 1986, and the Australia Act 1986 (Cwth).

Professor Craven, in an article in 1992,<sup>62</sup> detailed many of the problems raised by Dennis Rose QC. He commented, initially:

This very real difficulty with the covering clauses has produced a serious growth industry among constitutional academics (especially those of a republican opinion) directed towards finding a plausible ground for arguing that these inconvenient provisions can indeed be amended by s.128.<sup>63</sup>

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<sup>58</sup> L. Zines, *The High Court and the Constitution*.

<sup>59</sup> “*The Constitution of Australia Annotated*,” 4th Edition, 1986, p.11.

<sup>60</sup> *House of Representatives*, 1985, Vol.145, p.2686.

<sup>61</sup> G.Craven. “*Secession. The Ultimate States Right*,” Melbourne, 1986.

<sup>62</sup> “The Constitutional Minefield of Australian Republicanism,” *Policy Journal*, Spring, 1992.  
*The Centre for Independent Studies*.

<sup>63</sup> Craven, *Op. Cit.*, p.34.

He deals with the claim that the problem has been removed by the Australia Acts of 1986. It is argued that there is no longer any means, other than s.128, to secure the alterations and, consequently, that power must have come to reside in the machinery set up by that section. Professor Craven points out that the Australia Acts, themselves, explicitly make no reference to this fundamental constitutional change.

Professor Craven concedes that s.51(xxxviii) could be used to deal with the matter but adds:

The catch is that such an amendment would require the simultaneous and unanimous consent of all six legislatures, and the virtual impossibility of fulfilling this requirement is presumably at least part of the reason that constitutional lawyers of republican sympathies prefer to look to S.128 as the source of their deliverance.<sup>64</sup>

Professor Craven adverts to the basic arguments of those who oppose a republic on the ground that the Crown is one of the unalterable features of the Constitution. He points out that there are features of written constitutions which are unalterable. He instances certain features of the American and Indian Constitutions.

He states his position as follows:

My own view is that it would be a difficult task (to show that the monarchy was a truly 'fundamental' feature of the Constitution), and that other features of the Constitution, such as federalism, go more to its essence. But it must be acknowledged that the Crown stands at the centre of the Constitution, and that, on the basis of past judicial utterances, a fairly powerful case could be made for the constitutional indispensability of the monarchy.<sup>65</sup>

This description is echoed in the Report of the Constitutional Commission in 1988:

2.113 The growth to full national status, of course, did not affect the position of the Commonwealth as a community under the Crown. While the preceding events dissolved most of the constitutional links with the British Government, those with the Sovereign remain.

2.134. Indeed the notion of the Crown pervades the Constitution. The preamble recites that the people of the named colonies had agreed to unite in a Federal Commonwealth under the Crown. The Queen is empowered by section 2 of the Constitution to appoint a Governor-General who 'shall be Her Majesty's representative.' Section 61 of the Constitution vests the executive power of the Commonwealth in the Queen and declares that it is exercisable by the Governor-General as the Queen's representative.<sup>66</sup>

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<sup>64</sup> *Ibid.*, p.35.

<sup>65</sup> Craven, *Op. Cit.*, p.35.

<sup>66</sup> *Final Report of the Constitutional Commission, Canberra, 1988*, p.75.

Professor Craven concedes that the designers of a constitution may desire to place certain features of it beyond alteration. He doubts whether “would-be constitutional reformers” would be calling for revolutionary action, “even if that action would be no more dramatic than a peaceful (but technically unconstitutional) plebiscite.”

## EFFECT OF THE STATUTE OF WESTMINSTER

It should be remembered that there was great reluctance, not only on the part of the States, but also of the Opposition in the Commonwealth Parliament, to see the Bill giving effect to the Statute of Westminster adopted in the original form suggested. The States were apprehensive that the effect of the Statute, when adopted, would increase the power of the Federal government over the constitutions of the States, and be restrictive of the relations between the States, and between the States and the Imperial Government.

The Agents-General of the States met in London, in May 1931, to consider the effects of the draft Statute of Westminster, and produced a report, one particular section of which dealt with the question of the secession of a State.

Fear has been expressed by some of the Australian States that the Powers, Rights and Privileges of the States are not fully safeguarded in the above-mentioned proposals as agreed to by the Imperial Conference. If an imperial Statute rectifying the grievances of a State against the Commonwealth, or granting it freedom from the Federal tie could only be passed at the request, and with the consent of the Commonwealth Parliament, it is obvious that the last defence of the States against the Commonwealth will have vanished.<sup>67</sup>

The Statute was later submitted by the Federal Attorney-General, Mr Brennan, to the Federal Parliament for its approval, on a Motion for an Address to the King, seeking the enactment of the Statute.

Mr Brennan was careful to explain that the only purpose of the Statute was to remove the existing limitation of the Colonial Laws Validity Act 1865 on the operation of Federal legislation. He instanced Merchant Shipping Legislation, which was a specific Federal power, and the extra-territorial limitation.

He did not for a moment suggest that it would enlarge the field of federal legislation in the sense of enlarging the jurisdiction of the Federal Parliament, and certainly did not suggest that the Statute would give the Commonwealth power to repeal the covering clauses of the Constitution Act, with, or without, the assistance of Section 51(xxxviii).

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<sup>67</sup> *Op. Cit.*, *Minutes of proceedings of the Joint Committee*, p.19.

In relation to the effect of the Statute on the provisions of s.128, he stated:

Thus the Commonwealth will have no greater or lesser power to amend the Commonwealth Constitution after the passage of the Statute of Westminster than it has at present. The rights of the States with regard to the maintenance of their constitutional powers are also therefore safeguarded.<sup>68</sup>

Mr John Latham, as he then was, the Leader of the Opposition during the Scullin Government, suggested a draft amendment, which was subsequently moved by Mr Lyons, to provide that the Federal Parliament should have no “license or right to invite the British Parliament to legislate on matters which are exclusively within the State sphere.”

The amendment was passed without a division, and the principle contained within it was accepted by Mr Brennan on behalf of the government. He conceded that the object of the amendment was to restrict the operation of s.4 of the Statute to legislation within the Federal sphere. In other words, to matters already within the competence of the Federal Parliament.

Morgan KC, for the State of Western Australia in the Secession Case, submitted that:

The consent and request of the Federal Parliament to legislation outside that sphere, for example legislation amending the covering clauses of the Constitution Act, was really excluded by this amendment, accepted by Mr Brennan, from the scope of section 4 of the Statute.<sup>69</sup>

The amendment, itself, was not finally included in the Statute, but the government had inserted s.9 of that Statute, which carried the intention of the amendment into effect, by excluding Commonwealth power from areas in which it had no constitutional power, and in which the States had authority.

The only power left to the British Parliament under the Statute of Westminster was the power to legislate, if requested by the Parliament of the Dominion, ie, the Commonwealth Parliament. (s.4 Statute of Westminster.) It should be noted that the Australia Act 1986 repealed this section of the Statute of Westminster, so far as it was part of the law of the Commonwealth, or of a State, or Territory, and also subsections (2) and (3), of s.9.

S.1 of the Australia Act provided that no Act of the Parliament of the United Kingdom, passed after the commencement of the Act, was to extend to the Commonwealth or a State or Territory of Australia, as part of the law of the Commonwealth, of the State or Territory.

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<sup>68</sup> *Ibid.*, Joint Committee, p.81.

<sup>69</sup> *Ibid.*, p.82.

The result of all these provisions was that none of the provisions of the Constitution Act (ie the covering clauses) can be amended or repealed by the British Parliament in a way which would affect Australia.

The important question is whether there is any way in which the Parliament of the Commonwealth can amend, or repeal them. If a repeal cannot be effected by the Commonwealth Parliament, the question is then raised as to whether, or not, any other legislative authority within the Commonwealth can achieve this result.

Professor Craven, addressed this question squarely at the time when the Australia Acts were contemplated in 1985.

In his work on the power of secession, written before the enactment of the Australia Act (Cwth), he pointed out that the Statute of Westminster specifically prohibited the Commonwealth Parliament from amending, or repealing, the Constitution Act. In a postscript he dealt with the proposed terms of the Australia Act which were then known. He commented that the form of the Act was the same as what he had predicted that it would be in the earlier part of his work. He then went on to state:

Section 1 contains an unqualified renunciation of the British legislative power over Australia. Section 2 frees the States from the operation of the Colonial Laws Validity Act. Section 5 in all respects preserves the position of the Australia Constitution Act. Finally Section 12 makes the necessary consequential amendments to the Statute of Westminster, including the repeal of S.4. **Significantly, no power to amend the covering clauses is granted to the Commonwealth Parliament.**<sup>70</sup>

In the earlier part of his work, Professor Craven indicated that the difficulty would be overcome if substantive power were given to a legislative body within the Commonwealth to amend, or repeal, the covering clauses. However, this was not done. Having once legislated in parallel form by the Australia Act (UK), it is unlikely that the British Parliament would again legislate even if it had the power to do so. It is equally doubtful if the Australia Act (Cwth) can be altered to give the Commonwealth Parliament the power to alter the covering clauses, unsupported by a parallel British Act, notwithstanding some of the views of members of the High Court in relation to the repeal of ordinary British Statutes, expressed in *Kirmani v Captain Cook Cruises Pty Limited*.<sup>71</sup>

Some commentators seek to rely on the power of the Commonwealth Parliament under s.51(xxxviii). There is no doubt that this section was never intended to give the Commonwealth power to amend the Constitution, otherwise than in accordance with

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<sup>70</sup> G. Craven, *Op. Cit.*, Postscript to *Secession the Ultimate Right*, Melbourne, 1986. Emphasis added.

<sup>71</sup> (1984-85) 159 CLR, 351.



s.128, or to repeal, or amend, the 'Covering Clauses.' There is no substantial authority, which has sought to argue this proposition, without reservation. The doubt as to its validity is shown by the fact that it was thought necessary to obtain the agreement of the Parliament of the United Kingdom to pass the Australia Act (UK), in tandem with the Australia Act (Cwth).

As has already been noted, the Australia Act 1986 specifically did not deal with the Preamble, or the covering clauses of the Constitution Act.

**Short of the demise of the House of Windsor with no succession, or by Britain itself becoming a republic, there would appear to be great difficulty in finding a way in which a legislative body within the Commonwealth could convert the Constitution from that of a Constitutional Monarchy to that of an Australian Republic, except by reconvening the original electorate which, by referendum passed in each and every State, accepted the Constitution Act and the Constitution. In other words it would require the consent of each and every State. Otherwise a dissenting State might argue that it was entitled to secede.**

None of these matters appear to have received any particular attention in the course of the Republican debate in 1999. It was assumed that s.128 provides an appropriate means of seeking an alteration of the Constitution, which would convert Australia from a Constitutional Monarchy into a Republic.

## CONCLUSIONS

The following conclusions have been reached by reference to the intentions of the framers of the Constitution on this issue.

1 The framers of the Constitution were sent to the 1897-8 Convention after their election under parallel Enabling Acts (except in Western Australia), which authorized, and instructed, them to frame a constitution for a federation under the Crown of the United Kingdom. They had no other mandate than this. It would have been inconsistent with their duty under the Enabling Acts to frame a constitution, which could be converted into that of a republic, without the consent of the electorates of all federating colonies, or by different provisions in parallel Enabling Acts.

2. The effect of a proposal to alter the Constitution to that of a republic is that authority is being sought from the people of Australia for a totally new Constitution, which is in no way consistent with the existing one in the most fundamental aspects.

3. To constitute a republic in Australia would require the re-negotiation of the original compact made between the separate electorates of the constituent States. A majority vote in a majority of the States would be insufficient.

4. A favourable vote in a majority of States would not bind a dissenting State electorate. As in 1900, the federation would have involved only five States if Western Australia had not decided, at the last minute, to join the federation. This latter fact is born out by the terms of the Preamble, which specifically only included New South Wales, Victoria, South Australia and Queensland, leaving provision for the admission of “other Australian Colonies and possessions of the Queen.” This left Western Australia the freedom to join, or not join, the federation, as would be the case with New Zealand, and possibly Fiji. It should be remembered that, during the crisis at the Convention of 1891, some delegates contemplated the possibility of a much smaller membership of the Federation, if the matters causing the crisis had not been resolved.

5. The centrality of the Crown in the Constitution is written large in the Covering Clauses of the Constitution Act, and throughout the Constitution itself. It is central to the concept, and principles, of responsible government involving Prime Minister, Cabinet, Ministerial responsibility, and the supervisory role of the Crown’s representative, which was the basis of the type of polity specifically accepted as being integrally woven into the fabric of the polity created by the Constitution.

## THE DEADLOCK PROVISIONS SECTION 57

The debate over the provision and form of the deadlock provision, ultimately incorporated into s.57 of the Constitution, was one of the longest and most bitterly fought debates in all the sessions of the Constitutional Convention of 1897-8. Some of the major issues which were covered in this debate had already been raised in the Convention of 1891. Some consideration of the earlier debate can illuminate the issues which resurfaced in 1897-8.

### THE DEADLOCK DEBATE IN 1891

The question of the need for a deadlock provision arose in the context of the degree of power to be given to the Senate in relation to money bills. The representatives of the small States, having gained equality of representation in the Senate, argued that it was desirable to make the Senate a powerful and effective House, exercising co-ordinate powers with the House of Representatives. In such circumstances there was no reason why it should not be granted, as well as the power to reject money bills *in toto*, the power to amend money bills, referred to as the power of “*veto in detail*.” Those opposing such an additional power continued to argue that the power of “*veto in bulk*,” that is the total rejection of a money bill, was far more dangerous than the power of “*veto in detail*.” In fact, the power of amending individual items in a money bill could avoid final outright conflict. Total rejection, on the other hand, was “a power which will more likely be given effect to in the event of a conflict.”<sup>1</sup>

Henry John Wrixon (Victoria) was concerned, in these circumstances, at the lack of any machinery to resolve deadlocks. He suggested that, at least, there should be a joint meeting of both Houses, or a provision that, after an election, the voice of the Lower House should prevail. He was at pains to point out, however, that Supply bills were in a different category to ordinary bills, or other money bills. He stressed that, in relation to the method he was proposing to overcome a deadlock, it could not “apply to the appropriation act, which must be kept separate, **and which cannot wait.**”<sup>2</sup>

Andrew Inglis Clark posed two alternatives. It was a question of making a choice between providing deadlock machinery in the case where the Senate was given the power

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<sup>1</sup> Andrew Inglis Clark, MHA. Tasmania, *Convention Debates*, Sydney, 1891, p.250.

<sup>2</sup> *Ibid.*, p.539.

of amending money bills (*veto in detail*) on the one hand, or limiting the Senate to the power of total rejection of a money bill (*veto in bulk*), without making any provision for deadlock machinery. His approach was based on the proposition that, where the Senate rejected Supply, this act would force the government of the day to an election, even where it still retained the confidence of the Lower House. This was a clear statement of intention to modify the principle of responsible government to take in the power of the Senate to stop the machinery of government, and thereby force the government to resign or call an election. Responsible government in the United Kingdom meant that no government which held the confidence of the Lower House could be forced to resign. This was because the power of the purse was totally in the hands of that House. It was otherwise in a federation in which both Houses were almost completely co-ordinate in power, and where the Upper House could reject supply. In the final draft Constitution bill of 1891 there was no specific provision in regard to deadlocks. In accordance with the approach of Andrew Inglis Clark, the Senate had power to affirm or reject, but not amend, “laws imposing taxation and laws appropriating the necessary supplies for the ordinary annual services of the Government.”<sup>3</sup>

## THE DEADLOCK DEBATE AT THE CONVENTION OF 1897-8

The debate, commenced in the Adelaide Session, was taken up again in Sydney, and continued for many days at the Melbourne Sessions. Initially, when the Convention commenced in Adelaide on 22 March 1897, it was proposed that the 1891 draft bill be the basis of the deliberations. However, this approach was temporarily abandoned when the majority opted for a broader discussion of general principles proposed by the Leader of the Convention Edmund Barton QC, representing New South Wales. Five general principles were followed by a series of more specific stipulations, depending upon the acceptance of the general principles. This debate occupied the whole of March 1897, and covered all the central issues surrounding the creation of a federation; the difficulty of incorporating the principles of responsible government into a federal structure; equal or proportional representation of the States in the Senate; the powers of the Senate, particularly in relation to Supply and money bills generally; the ultimate supremacy of the Lower House, and the issue of whether, or not, the Executive was responsible to the House of Representatives, or to both that House and the Senate. Barton supported the principle that all federal laws

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<sup>3</sup> Chapter 1 Part V Clause 55(1) of the 1891 Draft Constitution bill. *Convention Debates*, Sydney 1891, p.954.

required the assent of the people, and the assent of the States. If this were not so, he asked “why is it that the most democratic amongst us concede two houses.”<sup>4</sup>

In his opinion, the two chambers were the “golden mean:”

We must make our legislative machinery so that we shall have neither unification on the one hand, or confederacy on the other.<sup>5</sup>

Sir Richard Baker (President of the Legislative Council of South Australia) argued that such balance should be created between the House of Representatives and the Senate that the centrifugal force, represented by the Senate, should be in equilibrium with the centripetal, or centralizing, force represented by the House of Representatives. He saw the power of the Senate as essential to “prevent nominal federation from becoming an actual amalgamation.” Richard O’Connor (New South Wales) said that the Senate should be given the fullest possible power consistent with the carrying on of responsible government, but that it was impossible to have responsible government “unless you make up your mind that one House shall be the arbiter of the fate of the executive government.”

To this Barton interjected:

You cannot carry in on by the confidence of one House alone.<sup>6</sup>

O’Connor agreed with this proposition, as a general statement, but, if it came to a disagreement between the two Houses, “it is clear that one House must have sway.” In this he was putting, what might be called, the traditional view of responsible government, derived from the United Kingdom. There, the Lower House, (the Commons), held sway because it was the House alone which had control of the purse.

For this reason the business of Government must be carried on by an Executive which must have control of the purse and initiate legislation of a financial character; and as the existence of the government depends upon the will of the Representative House, it follows that the other House cannot be given equal powers with regard to these matters which effect the existence of the government.<sup>7</sup>

Despite these views, O’Connor did not retreat from the necessity, or propriety, of giving the Senate power to reject a money bill *in toto*.

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<sup>4</sup> *Convention Debates*, Adelaide, 1897, p.377.

<sup>5</sup> *Ibid.*, p.378.

<sup>6</sup> *Ibid.*, p.52.

<sup>7</sup> *Ibid.*, p.53.

I draw a very strong distinction between a deadlock which affects the carrying on of the daily business of Government— indeed its actual existence— and a deadlock which does not affect these matters. Any ordinary measure, or even a taxation measure, may be thrown out time after time by the Senate without stopping the daily working of the machine of Government; **but where the Appropriation Bill for the ordinary annual service of Government is thrown out by the Senate you have a deadlock of a dangerous character.**<sup>8</sup>

This was exactly the kind of deadlock which arose in 1975, when the Senate refused to deal with the annual appropriation bills in order to force the Whitlam government to recommend a general election. O'Connor did not make any suggestions as to how a deadlock provision could be devised to meet such a dangerous situation with expedition, and without delay.

Many delegates argued that deadlocks were usually overcome by ordinary political means involving compromise. O'Connor agreed that this was the usual situation in the colonies, because both Houses were close to the effects of public opinion, whereas, in a federation, the Senate was amenable to a different public opinion to that influencing the House of Representatives. The first represented the public opinion of electors arranged in States, and the latter the public opinion of the electors of the whole of Australia. He urged that some machinery should be provided to resolve deadlocks, especially those involving a rejection of Supply. Despite his insistence on the urgency created by a rejection of Supply, his only suggestion was the presentation of a Supply bill in two consecutive sessions, with a provision that the two Houses should meet together if the deadlock did not resolve. This was really an extension of the traditional compromise means of resolving a deadlock. Even this proceeding would involve considerable delay, which he had already claimed was unacceptable in the case of the rejection of an Appropriation bill for annual Supply.

Patrick Glynn (South Australia) contended that Supply deadlocks would resolve by practical means without any deadlock provision.

Are we called upon to anticipate the probability of deadlocks? If we are, I trust very largely in the good sense of the people. I say, further, that if a deadlock occurs in connection with a money matter in the Appropriation Bill, and if the Upper House insists on interference, and a deadlock ensues, it will open the way to revolution. Their fear of such a thing occurring will operate as a sanction to prevent it.

If they (Supply Bills) are blocked, the whole machinery of Federation will be clogged. The end resulting from that state of affairs would be so great as to act as a deterrent against the possibility of it occurring.<sup>9</sup>

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<sup>8</sup> *Ibid.*, p.54.

<sup>9</sup> *Ibid.*, p.72.

This line of argument was similar to that advanced by some critics of the actions of Sir John Kerr in 1975, when they suggested that the crisis would have ended because of these very factors if Sir John Kerr had taken no action, at least, until Supply had actually run out.<sup>10</sup> Professor Howard and Dr Saunders took this view:

On 11 November, there were some signs that a political solution was, if not imminent, at least approaching. It seems likely that the ultimate solution would have been a negotiated surrender of the Opposition parties and the passage of the appropriation bills through the Senate.

It is impossible to credit that both leaders would have maintained their stand to the point where there was a total breakdown in civil order, still less that party discipline could have been maintained to that point.<sup>11</sup>

The impossibility of amalgamating the principle of responsible government with the degree of power accorded to the Senate was raised again by Henry Bournes Higgins. He argued that it was impossible to reconcile Senate power to amend money bills with the power of the House of Representatives to control Ministries:

You cannot, however, reconcile these two things. If you give the sole power of appointing and controlling Ministries to the House of Representatives, you must refuse to the Senate the power of amending Money Bills, because the whole of our system of responsible government turns upon the way in which you deal with Money Bills. **Money Bills will not wait.**<sup>12</sup>

He insisted that the power of total rejection gave the Senate power to dictate on matters of policy, on which the Lower House had been elected. There is no doubt that this was a correct appreciation of the result of the power of rejection to be given the Senate. However, this was finally what was done. Consequently, there was no doubt that the Senate had power to do what it did in 1975. Whether the circumstances were appropriate is another matter. If it was against the traditional principle of responsible government that was beside the point, because it was the Constitution itself which made this action possible. Consequently, if the principle of responsible government was enshrined in the Constitution, it did not incorporate, without modification, the principle that the Lower House was predominant in all things related to the supply of money for the carrying on of the normal machinery of government. The principle could not override the specific provisions of the Constitution itself.

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<sup>10</sup> See Professor Cooray in "Conventions. *The Australian Constitution and the Future*," Sydney 1979, p.137.

<sup>11</sup> C. Howard and C. Saunders, "The blockage of the Budget and Dismissal of the Government," *Labor and the Constitution. 1972-1975*, G.Evans(Ed), 1977, Richmond, Victoria (1976) pp.251-7. Also quoted in Cooray *Op. Cit.*, p.137.

<sup>12</sup> *Ibid* p.97 Emphasis added.

Further objection, particularly to the grant of power to the Senate to amend money bills, was voiced by Bernard Ringrose Wise, an independent delegate from New South Wales. In his opinion, giving power to the Senate to amend money bills would be to make the Senate part of the Executive, and thereby take the Executive out of the hands of the responsible ministers. There is no doubt that this argument would also apply to the power of outright rejection of a money bill. Wise agreed with the distinction, made by O'Connor, between the Annual Appropriation Bill and other money bills. Despite his criticisms, he did not support the need for specific provision to overcome deadlocks. It should not be forgotten, he said:

that there is only one way after all to absolutely avoid a deadlock and that is to create a despot. If you have the government of a single man, a deadlock cannot possibly occur, but I understand that deadlock is the price we and every free country have to pay for the benefit of constitutional government.<sup>13</sup>

In relation to O'Connor's suggestion of a meeting of both the Houses, Sir George Turner (Premier of Victoria) raised the possibility of a minority in the House of Representatives coalescing with a majority in the Senate to defeat the government, in such a joint sitting:

No minority in the House of Representatives, coupled with a majority in the States Assembly should override a majority in the House of Representatives which gave its confidence to the Ministry.

(To this Wise replied) Exactly so. If the Appropriation Bill is not passed what is the Ministry to do?

Sir George Turner. They must go to the people.

Mr O'Connor: My answer was that they must go to the people.

Mr Wise: Then what becomes of responsible government? This is one point in which in actual practice the theory of responsible government may be altered.<sup>14</sup>

There is no clearer statement of the consequences of giving the Senate power to reject money bills, and particularly the Appropriation bills for annual Supply. The delegates were well aware that, by retaining this power, the principles of responsible government were in fact being modified. There was no room to argue that a Ministry, retaining the confidence of the House of Representatives, could not be forced to go to the people in circumstances where the Senate, in the exercise of a clear Constitutional power, rejected Supply. It has

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<sup>13</sup> *Convention Debates*, Adelaide, 1897, p.97.

<sup>14</sup> *Ibid.*, p.110. Emphasis added.



been argued by many academics and commentators that the two propositions that the Senate could reject Supply, and that no government having the confidence of the House of Representatives could be forced to resign, can not stand together, and that the second proposition overrides the first. This would argue the presence of a dominant rule in the Constitution which is really not there. This view is not in accordance with the conclusions openly arrived at by the delegates at the Conventions, when they refused to deny the Senate's power to reject Supply on the basis that it infringed the principles of responsible government. With open eyes, the framers of the Constitution clearly modified the principle of responsible government, in so far as it was incorporated into the Constitution. The House of Representatives was not given total control over the purse, in that specific power was given to the Senate to reject Supply. If Supply was rejected, the government could not hide behind a principle, which only applied in its full extent where the only power to reject supply was in the House of Representatives itself. Such rejection would imply a lack of confidence of that House in the government. Where the Senate had such a power of rejection, the principle could be construed as being modified to the extent that a rejection of supply by the Senate could be described as the government losing the confidence of the Parliament which, under the Constitution was defined as consisting of the Queen, a Senate and a House of Representatives.<sup>15</sup> However it may be framed in principle, it is clear that there was no doubt in the minds of the framers that, where the Senate rejected Supply to a government which, presumably, held the confidence of the House of Representatives, the only alternatives open to the government, if it could not persuade the Senate to relent, was either to resign, or call an election. It was either of these two options which the Whitlam government refused to accept in 1975, which led the Governor-General to dismiss it.

The first concrete proposal for a dissolution provision was that proposed by the Legislative Assembly of New South Wales. This attempted to cover the position where the deadlock was created by either House rejecting legislative proposals from the other House. In relation to a money bill, this could only come from the House of Representatives, because of the specific provision that money bills could only be initiated by that House. The proposal was that, if a deadlock could not be resolved after serial dissolutions of both Houses, final settlement should be achieved by an Australia-wide referendum. This proposal was supported by Joseph Hector Carruthers (Secretary for Lands, New South Wales). He dealt with the alternate referendum proposal being canvassed, wherein there would be an Australia-wide referendum as well as a referendum State by State. Unless

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<sup>15</sup> Section 1, Chapter 1, of the Constitution provides:

"The legislative power of the commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives, and which is hereinafter called "The Parliament," or "the Parliament of the Commonwealth."

passed by such double majority, the matter would not be resolved. It was this lack of finality that induced Carruthers to support the Australia-wide referendum as a final means of resolving a deadlock. This Australia-wide electorate, of course, was the electorate which elected the House of Representatives. Consequently, the small States saw that this would mean that, in the end, the House of Representatives would be supreme.

Those who were of the opinion that there should not be any specific provisions to deal with deadlocks did not give up the fight easily. Sir John Downer (MHA, South Australia) regarded deadlock provisions as an invitation to destroy the Constitution. This was obviously based on the theory that the principles of responsible government required parliament to be the sole arbiter of all disputed matters. Reference of disputed legislation directly to the people would derogate from this parliamentary supremacy in all matters, and would also weaken the bi-cameral structure of the Parliament. Simon Fraser (MLC, Victoria) was equally strong in his view that the introduction of the referendum principle would weaken the federal structure, and would be a means of coercing the Senate:

I fail to see why there is any necessity to coerce the senate and to bring them under a referendum such as is now desired.

As sure as we give the referendum to the federal government, so surely shall we make it a unified government.

The people of the Australian colonies would rise up as one man if we were to unify them again. I maintain that the proper way of settling deadlocks is a conference between the two houses—the same in the future as in the past.<sup>16</sup>

The argument that there was no need to have any provision to deal with deadlocks was finally disposed of when, at the end of a lengthy and bitter debate at the Sydney Session of the Convention, Sir John Forrest tested whether there should be any deadlock provision at all. This attempt was rejected by 30 votes to 15.<sup>17</sup>

In supporting the proposal of Sir John Forrest that there should be no deadlock provision, eight members of the West Australian delegation joined with four members from Tasmania, William Walker from New South Wales, and Sir John Downer from South Australia. One member of the West Australian delegation, George Leake MLA, voted with the majority against the proposal.

Lengthy discussion occurred on the various suggestions of direct appeal to the people by way of referenda. Referenda were discussed as a final resort to settle a deadlock, which

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<sup>16</sup> *Ibid.*, *Convention Debates*, Sydney, 1897, p.567.

<sup>17</sup> *Convention Debates*, Sydney, 1897, p.709.

could persist even after both Houses had gone to their respective electorates. Some delegates favoured an Australia-wide referendum to seek the opinion of the Commonwealth-wide electorate. Others insisted on a double referendum whereby the question was first put to the people of the Commonwealth as a whole, and then, in a second referendum to the people voting State by State. A successful outcome for the disputed legislation would require majorities in both referenda. This approach was supported by those who regarded the federal principle as involving, in all matters, the consent of the representatives of the Australia-wide electorate as well as the electorate of the several States. There was common agreement that referenda should only be used as a last, and final resort to resolve a persisting deadlock. Richard O'Connor stressed that matters should not be submitted too easily. It was primarily the obligation of Parliament to find solutions to deadlocks.

if you provide that, before the referendum takes place, there should be a dissolution—if you like, of both houses at the same time; that being, I think, Mr Holder's view—that there should be dissolution of the two houses, whether at the same time or at different periods, it would insure that before the referendum was applied there would be the fullest and freest discussion in the community.<sup>18</sup>

Such a thorough canvassing of a disputed issue could hardly be an effective way of dealing with a supply crisis expeditiously.

Charles Cameron Kingston (Premier of South Australia) argued strongly against O'Connor's proposal, on the basis that it would wipe out the power of the representatives of the States. He became very agitated:

if that scheme is carried, I will take the responsibility of stumping the country in South Australia — throughout the length and breadth of the land — to secure its rejection.<sup>19</sup>

However, he was prepared to support a simultaneous double dissolution as a means of finality:

I think it is intolerable that the house of representatives, representative of the entire nation should be subjected to a control by their constituents from which the senate is absolutely free. Why should that be so? Under those circumstances, I am prepared to vote for a double dissolution, for provision that will enable the senators to be sent to their constituents at the same time that the members of the house of representatives are sent to their constituents, in order that the doubt as to whether the house of representatives are faithfully representing their constituents, or the senators are faithfully representing theirs, may be solved by the vote of the people themselves.<sup>20</sup>

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<sup>18</sup> *Ibid.*, p.577.

<sup>19</sup> *Ibid.*, p.579.

He added that, if that did not solve the deadlock, he would agree to a reference of the issue to both houses on the precise question in issue.

The framers of the Constitution showed great foresight in anticipating the future conditions, which might give rise to conflicts between the two houses.

Alfred Deakin (MLA, Victoria) predicted that the creation of two virtually co-equal, and co-ordinate Houses would involve the creation of:

what you may term an irresistible force on the one side, and what may prove to be an immovable object on the other side.

He was convinced that, in the future, deadlocks would not arise from disputes between States as States:

Contests between the two houses will only arise when one party is in possession of a majority in the one chamber, and the other in the possession of a majority in the other chamber— The contest will not be and never has been, and cannot be between states as states. It must be and will be between the representatives of the states according to the different political parties upon which they are returned.—it is certain that once this constitution is framed, it will be followed by the creation of two great national parties.

Our system, even more than the American system, implies government by party. It is an important fact that we propose to adopt in this federal constitution the same form of responsible government that we employ in these colonies. That in itself is a guarantee that party government must be introduced here and makes party government, if it be only the parties of the “ins” and the “outs,” an absolute necessity in federated Australia.<sup>21</sup>

Deakin explained the need for deadlock provisions by reference to the Constitution of the United States.

Because in the United States the executive is removed from the conflict of the two chambers it is absolutely indifferent as an executive to the result of the conflict. A deadlock between the two houses in the United States can be allowed to settle itself, because there is no government responsible to parliament. But a deadlock under responsible government as we have it in Australia is an entirely different problem.<sup>22</sup>

Recent events have confirmed that, under the United States Constitution, crises over supply to the executive are not infrequent, and can only be settled by political means of discussion and compromise.

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<sup>20</sup> *Ibid.*, p.580.

<sup>21</sup> *Ibid.*, pp.585-586. Emphasis added.

<sup>22</sup> *Ibid.*, p.587.

Like other delegates, Deakin rejected the solution of deadlocks by referendum, because it was not federal, and because it meant unification. Dissolution alone was regarded as a sufficient means of overcoming deadlocks by James Howe (MLC South Australia).

Specific reference to a Supply crisis was made by Edmund Barton on 15 September 1897.

To my mind "deadlock" is not a term, which is strictly applicable to any case except that in which the constitutional machine is prevented from properly working. I am in very grave doubt whether the term can be strictly applied to any case except a stoppage of the legislative machinery arising out of conflict upon the finances of the country.<sup>23</sup>

He related his views to the issue of responsible government:

A dissolution differs from a referendum in this, at the outset, that a dissolution is an assertion of the principle of responsibility, whilst the referendum tends to weaken the sense of responsibility.<sup>24</sup>

He went on to expand on the view that, under a federal structure, responsibility would not necessarily devolve upon one Chamber, particularly the Lower House. He conceded that in "ordinary constitutions" responsibility attached to the Lower House because it was usually representative in nature and constitution, and elected by the people.

Here, in this constitution, we have the difference that both houses are so constituted. As we admit the principle, to a certain extent, of a dissolution of the senate, because we provide for the retirement of one half of its members, and their submission to the people every third year. Then what can be the reasonable objection, if you must make some provision for deadlocks, to submitting the other popular chamber to dissolution just as you submit the popular chamber? They are both popular chambers.<sup>25</sup>

Barton then dealt with the argument that dissolution of both houses would not necessarily solve a deadlock.

what is there to make us suppose that the results of a double dissolution will necessarily be to leave things as they are, when the past has told us that generally the result of a dissolution has been to leave things as they were not?<sup>26</sup>

Barton did not develop this view into a specific proposal designed to deal with a supply crisis, which he regarded as the only type of crisis which should merit the description of "deadlock," by way of an immediate double dissolution. It would have been consistent with his views, at this point, to give an immediate power to the Governor-General, on advice, to

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<sup>23</sup> *Ibid.*, p.620.

<sup>24</sup> *Ibid.*, p.622.

<sup>25</sup> *Ibid.*, p.622.

<sup>26</sup> *Ibid.*, p.624.

dissolve both Houses, where rejection of Supply was likely to cause a total breakdown of the machinery of government, without any need to insist on delay of the kind ultimately incorporated into s.57. Consistently with his understanding of the principle of responsible government, he would have assumed that the initiative of seeking such a double dissolution, in the face of a supply crisis, would rest with the government which was being denied supply by the Senate, and with no one else.

He was prepared to concede that, if a double dissolution was granted first, there would be less objection to the holding of a referendum, if the double dissolution did not resolve the crisis. What he sought, in choosing which type of referendum would be appropriate, was a safeguard to prevent, on the one hand, the federation being under the control of the States, and on the other hand the States being under the control of the federation.

Barton's singling out the importance of dealing with a supply crisis was reiterated by Henry Dobson (MHA Tasmania):

I think our discussion is not conducted on the highest lines of intelligence unless we keep broadly before us the distinction between the senate by its veto bringing about a deadlock and preventing the machine of government going smoothly on, and the senate simply negating some bill of which it does not approve, and which it thinks may tend to disaster, and not to the prosperity of the Commonwealth.<sup>27</sup>

As the debate developed, the delegates appeared to reach agreement at least on the proposition that, in case of deadlock, with two elected chambers, it would be unfair to penalize only one chamber if dissolution occurred. This was consistent with the earlier views that had emerged to the effect that, if the fault of the deadlock was that of the Senate, there was no reason why that chamber should not also be dissolved, despite the fact that it was intended to have a greater continuity and stability than the House of Representatives.

All the issues raised in this debate came into sharp focus during the crisis of 1975. It is central to that crisis to understand the intentions of the framers of the Constitution, in their efforts to make provision for deadlocks between the two Houses. The first question raised by the action of Sir John Kerr, in withdrawing the commission of the Prime Minister, Gough Whitlam, and his Ministers, was whether the Governor-General could use his constitutional powers to dismiss a government which retained the confidence of the House of Representatives, but which had been denied supply by the Senate. A second question

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<sup>27</sup> *Ibid.*, p.640.

was whether the Governor-General could dissolve the Senate before the expiry of its normal term, and if so, on what authority. Further, the question arose as to whether, or not, the existence of bills, which complied with the provisions of s.57, were a necessary precondition to his ability to send both Houses to the people.

It is not part of this inquiry to enter into the merits of whether the factual political situation itself had reached such a point of crisis as to justify action by the Governor-General. What is sought to be explored is whether the framers of the Constitution, by reserving to the Senate the right to reject Supply, intended that the only solution to a crisis caused by such a rejection, apart from the ordinary political processes of compromise and the like, was that provided by the precise terms of s.57. The relevance of these matters can be seen in the reasons given by the Governor-General at the time, compared with the actual terms of the Proclamation giving effect to his action.

His stated reasons for dismissing the government were similar to the opinion given by the then Chief Justice, Sir Garfield Barwick, in which he set out the right of the Senate to reject Supply, and asserted that Supply had been rejected by the persistent postponement of any motion by the Senate to approve the Appropriation bills. In similar terms, the Governor-General stated that, under the principles of responsible government incorporated into the Constitution, a government which could not obtain Supply was under an obligation to resign, or stand aside in favour of an alternative government which could obtain supply, or seek an election. In effect, Sir John Kerr took the view that the principle of responsible government had been modified in its translation into a federal environment, by making Supply depend, not only on the support of the House of Representatives, but also on the concurrence of the Senate. The pattern which had been developed in the United Kingdom, where the House of Lords could not reject money bills, or Supply, had not been incorporated into the Commonwealth Constitution by the framers. The exact terms of the reasons given by the Governor-General were as follows:

Because of the principles of responsible government a Prime Minister who cannot obtain supply, including money for carrying on the ordinary services of government, must either advise a general election or resign. If he refuses to do this I have the authority and indeed the duty under the Constitution to withdraw his Commission as Prime Minister. The position in Australia is quite different from the position in the United Kingdom. Here the confidence of both Houses on supply is necessary to ensure its provision. In the United Kingdom the confidence of the House of Commons alone is necessary. But both here and in the United Kingdom the duty of the Prime Minister is

the same in an important respect—if he cannot get supply he must resign or advise an election. If a Prime Minister refuses to resign or to advise an election, and this is the case with Mr Whitlam, my constitutional authority and duty require me to do what I have now done—to withdraw his commission—and invite the Leader of the Opposition to form a caretaker government—that is one that makes no appointments or dismissals and initiates no policies, until a general election is held.<sup>28</sup>

Those who rejected the approach of both the Governor-General and the Chief Justice, did so on the basis that certain conventions were derived from the Westminster system inherited from the United Kingdom. In particular, it was argued that there was a convention that the Senate should not block Supply. Michael Coper analyzed the situation in the relation to the conflict between the view that a government unable to obtain Supply was obliged to resign or seek an election, and the opposing view that a government which retained the confidence of the Lower House could not be forced either, to resign or seek an election, coupled with the assertion that the Senate should not block Supply.

In the United Kingdom, these two notions, which collide in the Australian context, are perfectly consistent, since a government without a majority in the House of Commons cannot be denied supply unless it loses the confidence of that House. The populists say that the House of Lords' inability to block supply makes it misleading to draw the analogy that in Australia, as in the United Kingdom, the government is responsible to "the Parliament." The procrustians (starting from the other end of the bed) say that the Senate's ability to block supply makes it misleading to draw the analogy that in Australia, as in the United Kingdom, the government is responsible only to the Lower House.<sup>29</sup>

He asserted that both sides of the argument had selected only half the picture, and that such "selective analogy" supported neither side, and concluded:

The crux of our problem, as we know, is the difficulty of reconciling responsible government with federalism, or at least with that form of federalism in which the Upper House of the federal Parliament has the power to block supply.<sup>30</sup>

In a paper prepared at the request of the Standing Committee D for the Constitutional Convention of 1977, Coper reiterated these views. The Convention of 1977 considered two proposals designed to remove for the future the possibility of a recurrence of the crisis of 1975. The Whitlam proposal involved the removal from the Senate of the power to reject money bills. The Richard Court proposal, on the other hand, attempted to devise a mechanism to resolve a supply deadlock on the assumption that the Senate's power was to

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<sup>28</sup> Full text of the reasons, proclamation and the advice of the Chief Justice are given in 49 ALJ pp.646-7.

<sup>29</sup> *Encounters with the Australian Constitution*, Michael Coper, Sydney, 1987, p.234.

<sup>30</sup> Michael Coper, *Op. Cit.*, p.235.



be retained. In addressing the issues involved, Coper repeated what he had advanced in his work already noted.

The root of the problem is that both propositions are derived from an imperfect analogy with the Westminster system.<sup>31</sup>

Dr Cheryl Saunders, in a paper presented to the same Committee, drew attention to what is really the most important problem in relation to the application of s.57, to which Michael Coper had also made reference:

A further consequence of the failure of the Framers of the Constitution to re-assess the question of Senate financial powers in order to co-ordinate them with the rest of the Constitution is the inapplicability of the deadlocks provision, inserted in 1897-8, to deadlocks caused by Senate rejection of supply.

She goes on to assert that:

This was not a problem which was recognized and seriously debated. Plainly to have done so would have re-opened the whole question of Senate powers at a time when most of the delegates were anxious to finish their task, and to finish it in a form which held out the greatest prospect of acceptance in all colonies.<sup>32</sup>

This issue was, in fact, seriously debated. There was recognition of the problem with delay in a supply crisis. The central issues of the powers of the Senate, equal representation on the Senate, and the dangerous nature of the power of the Senate to block supply, were all debated *ad nauseam*. The insistence on the provision of a deadlock clause was at the instance of the large States, particularly New South Wales and Victoria, and was mainly concerned with the broad question of whether, or not, a government should be entitled, ultimately, to insist on its financial and other policy program being carried out. The very difficulties involved in framing a deadlock clause to meet the precise case of a supply deadlock, where it is assumed that the Senate's power to reject supply is retained, were evident in the 1977 Convention, when the alternative proposals of Whitlam and Court did not result in a generally agreed form of constitutional provision. This attempt was made some seventy odd years after the Constitution was originally drafted. It is somewhat specious to criticize the framers for their inability to draft such a clause, when all the subsequent ingenuity, and academic and legal expertise, has been unable to do so. The simple solution proposed by E.G. Whitlam was to deprive the Senate of the power to reject

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<sup>31</sup> Working paper for Standing Committee D, 1977, p.105 et seq.

<sup>32</sup> Dr Cheryl Saunders, *Senate Powers and Deadlocks: Historical Background*, Appendix F to Report of Standing Committee D, 1977, p.139.

Supply. This would have as much chance of success with the smaller States today as it had in 1900. The alternative of a special deadlock clause, with the retention of the Senate's power of rejection, proved too difficult in 1977. The framers of the Constitution did discuss the possibility of separating annual supply from all other types of money bills, as a means of preventing a supply deadlock. Such discussions came to nothing, because of the wider debate, in which the States of New South Wales and Victoria played a major part, which concentrated on seeking to restore the power of the "representative" House (the House of Representatives) against that of the Senate. The broad debate was concerned with finding a means to restrain the possible excesses of the "brutal" majority, by building into s.57 a sufficient delay to ensure that contentious issues were thoroughly and properly debated. The fear of a revolution, caused by a supply crisis, became lost in the pressure to provide a broad deadlock clause to protect the rights of the elected government to carry out its electoral mandate. In the minds of some the very fear itself was regarded as a protection against the possibility of such a drastic denial of Supply. The central problem which confronted the delegates was how to protect the small States by a powerful Senate, on the one hand, and how to restrain the Senate from frustrating the government carrying out its electoral mandate.

The demand for a powerful Senate did not solely come from the representatives of the smaller States. Representatives from larger States, who had come from the Upper Houses of those States, were equally strong in their demand. This was advocated for conservative reasons in support of a bi-cameral structure. Dr Saunders recognized this fact:

Nevertheless, there is some evidence that the concept of a powerful senate was supported by the more conservative delegates, particularly those who were members of Legislative Councils irrespective of their States of origin.<sup>33</sup>

In a footnote she quoted the words of Alfred Deakin, when he described the advocates of a powerful Senate as:

reactionary radicals and iconoclastic conservatives.

There is no doubt that, at the 1891 Convention, the need for a special deadlock clause to deal with a blockage of Supply by the Senate was not seriously debated. Delegates were confident that any such deadlock would be solved by the ordinary processes of political negotiation and compromise. Sir Samuel Griffith, when asked by Colonel Smith (Victoria)

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<sup>33</sup> *Ibid.*, p.141.

whether he would “allow the senate to alter an appropriation bill?” he replied that he did not think the matter is worth discussing.”

So far as the ordinary items of an appropriation bill are concerned I do not think the subject is worth half an hour's discussion.<sup>34</sup>

The context of Griffith's remarks of dismissal was clear when, in relation to possible irreconcilable differences arising between the views of the smaller States and those of the larger community of the whole of Australia, in which the large States would predominate, he said that argument over money bills was a “fetish in Australia:”

It is a fetish which is not worshiped in any other part of the world; it is not worshiped even in the United Kingdom. The circumstances there are of course quite different to what they are here.

This fetish about which we have been talking for so long a time is peculiar to Australia. How many constitutions are there in America? There are forty-two different states which have various constitutions; but they all agree in giving the senates or second chambers power to deal with money matters. There is no such fetish worship there.”<sup>35</sup>

Griffith went on to ask precisely what money bills were being debated. He asked the question :

Is it the annual appropriation bill, containing the ordinary supplies of the year, which is sought to be withdrawn from the Senate?

If it is the annual appropriation bill which is sought to be withdrawn from the Senate I do not think the matter is worth discussing. Nobody would want to alter it, unless the house of representatives were to attempt to coerce the senate by putting in improper or unusual items.<sup>36</sup>

He was clearly dealing with the question of the power to alter individual items in such a bill, and also to the practice of “tacking.” He had no doubts that it was intended to give the Senate the wider power of rejection. He said that he could understand the concern if the power of the Senate to interfere with money bills were to result in the Senate stopping the ordinary machinery of government:

But it must be remembered that it is not proposed to deny the senate the power of veto. Surely if the senate wanted to stop the machinery of government the way to do that would be to throw out the appropriation bill.

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<sup>34</sup> Quoted by Saunders in her paper (supra note 32) at p.144.

<sup>35</sup> *Convention Debates*, Sydney, 1891, p.428.

<sup>36</sup> *Ibid.*, p.428.

I, for my part, am much inclined to think that the power of absolute rejection is a much more dangerous power than the power of amendment; **yet it is a power that must be conceded.**<sup>37</sup>

Sir Richard Eggleston, on an analysis of the drafting history of s.53, had argued that, by the time its final form was accepted, the power of total rejection had been dropped.<sup>38</sup> Dr Saunders effectively refuted this argument. In so far as this type of approach is one adopted occasionally by the High Court, Dr Saunders showed that it was not always consistent with the actual intention of the framers. Her final word on the Eggleston argument was:

Whatever virtue this may have as a legal argument—and in the light of the dicta of four judges of the High Court in the PMA case its future as a legal argument must be doubtful—it is my opinion, on the basis of the material presently available to me, that it is historically inaccurate. The Convention debates show that no peculiar significance can be attached to the change in the wording of Section.53

There is nothing in the debates to suggest that such a fundamental plank in the compromise of 1891 had been removed.<sup>39</sup>

Dr Saunders' approach is justified in seeking from the Convention debates an answer to the question of whether the drafting history used by Sir Richard gives a correct result. There is no reason in principle why the High Court should not adopt a similar approach. The only bar to such action is the denial by the High Court of the relevance of the intentions of the framers of the Constitution. The Court has preferred to give to the words of the Constitution their contemporary meaning rather than what the framers intended them to mean. The rejection by the Court of the intentions of the framers of the Constitution as an aid to interpretation is justified on the basis that their use would, in the words of Professor Sawyer result in Australia becoming a "frozen continent." Legal commentators like Michael Coper support this rejection:

I have consistently argued in relation to constitutional interpretation that although familiarity with the historical context is important in understanding the Constitution and its particular provisions, it is wrong to proceed on the assumption that the intention of the founders should control the contemporary meaning of the Constitution (see, for example, my article on excise duties in (1976) *Federal Law Review*, at p.20)<sup>40</sup>

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<sup>37</sup> *Ibid.*, p.429. Emphasis added.

<sup>38</sup> *Constitutional Seminar: Sir Richard Eggleston and Edward St John*. University of New South Wales 1977, p.7.

<sup>39</sup> *Ibid.*, Saunders, p.147.

<sup>40</sup> Michael Coper, *Working Paper for Standing Committee D*, 1977, p.105.

He suggests that it is difficult to ascertain a coherent intention from provisions which arose from compromises. Despite his rejection of the relevance of the intentions of the framers he asserts that:

the founders themselves would no doubt have intended that the Constitution be interpreted to embrace changed political, social and economic circumstances.<sup>41</sup>

He concedes that major changes to the Constitution require formal amendment:

but where the words are unclear, as they so often are, an interpretation should be given which is appropriate for modern conditions, not one which was right for 1900.

Members of the Court have acknowledge that from time to time (see, for example the North Eastern Dairy case (1975) 7 A.L.R. 433 at o 471 per Mason J.)<sup>42</sup>

There is no doubt that the framers of the Constitution expected that their intentions would be honoured in the future, although they were concerned that legal interpretation might distort their intentions, if they were not very careful with the words they chose. They were convinced that their provisions for Constitutional alteration (s.128) would be adequate to meet future changing circumstances. The argument that difficulty in interpretation is occasioned by the fact that many of the terms resulted from political compromise is not convincing. The compromise in respect of the powers of the Senate and its power to reject supply is perfectly clear. It is the compromise itself which becomes the intention of the framers.

In relation to present day solutions of a deadlock over supply, Coper makes a somewhat grudging acknowledgment of the intentions of the framers:

It may be that the best solutions happen to coincide with the intentions of the founders, but this will largely be accidental.

He argued that if it were proposed that both Houses should go to an election if the Senate blocked Supply:

this would coincide with the intentions of the founders, but only because it was thought that s.57 would apply to such a situation. What the history of these sections does show is that the Constitution as framed was left with a gap: an unresolved potential conflict between responsible government and federalism.<sup>43</sup>

There is no doubt that the framers did consider the question of the circumstances under which both Houses, rather than the House of Representatives alone, should go to the

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<sup>41</sup> *Ibid.*, p.120.

<sup>42</sup> *Ibid.*, p.120.

<sup>43</sup> *Ibid.*, p.121.

people. Early discussion was in the context of the question of which house could be considered at fault in the creation and continuance of the deadlock. In general legislation, this was combined with caution which was inherent in a bi-cameral legislature in requiring sufficient delay for proper and adequate discussion, and the exploration of means of avoiding collision between the two Houses. The constitutional gap for which no solution has as yet been found is that no speedy machinery exists in the Constitution to solve a deadlock resulting from the rejection of Supply by the Senate by a double dissolution of both Houses without the delay which is intentionally built into the provisions of s.57. Forcing the House of Representatives to an election was, of course, obviously open.

In commenting on the method used by Sir Richard Eggleston, in support of the contention that there was no intention to permit the Senate to block supply, Coper makes a minor concession to a wider use of historical material than that of the drafting history of a particular section:

If resort is to be had at all to the founders' intentions, it seems a step worse to do so and yet exclude relevant historical material.<sup>44</sup>

The latter day debate on the question that the Senate, by convention, should not block supply, has become somewhat academic because of the very events of 1975. The real remaining issue is whether, or not, a double dissolution could be granted, and to whom, in the event of a blockage of Supply by the Senate, in circumstances where no bills complying with s.57 exist.

It is clear from an analysis of the Convention debates that the framers of the Constitution understood that the principles of responsible government needed modification to adapt them to a federal structure. There is no doubt that they intended that Supply could be refused by the Senate, and that such a refusal could force the government either to resign or advise an election of the House of Representatives. On the assumption that the circumstances in 1975 were such as to justify action by the governor-General, there is no doubt that the framers would have agreed that he had the power to dismiss the government. However, the Governor-General in 1975 did more than dismiss the government so as to force an election of the House of Representatives.

In a further detailed statement of Decisions, made in writing on the same day as the dismissal, 11 November 1975, the Governor-General expanded upon his reasons.

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<sup>44</sup> *Ibid.*, p.122.

Section 57 of the Constitution provides a means, perhaps the usual means, of resolving a disagreement between the Houses with respect to a proposed law. But the machinery which it provides necessarily entails a considerable time lag which is quite inappropriate to a speedy resolution of the fundamental problem posed by the refusal of supply. Its presence in the Constitution does not cut down the reserve powers of the Governor-General.<sup>45</sup>

It would appear that the Governor-General was asserting that s.57 was not the only means by which a deadlock could be resolved. The reference to s.57 would seem to imply that he was asserting that there were other means by which a double dissolution of the House of Representatives and the Senate could be effected. His statement that the presence of Section 57 in the Constitution did “not cut down the reserve powers of the Governor-General,” suggests that he was asserting that he had a right to dissolve both Houses in face of a deadlock in a manner not controlled by that Section. This is disputed in the positive statement by Professor P.H. Lane that there is no room for a power in the Constitution for a double dissolution to be brought about by “a non-statutory prerogative of the Governor-General.”<sup>46</sup> The Proclamation itself makes no reference to the reserve powers, and the double dissolution therein rested solely on the assertion that the conditions of Section 57 had been satisfied by the existence of the twice rejected bills (other than the Appropriation bills) which are specified in the Proclamation by the Governor-General. Whatever means the Governor-General was asserting were available to him by virtue of the reserve powers, there is no doubt that he did not rely upon them. If he did not intend to rely upon such powers, it is puzzling to know why he referred to their existence. In his claim that the government were obliged to resign or seek an election in the face of a denial of Supply by the Senate, the Governor-General was supported by the opinion of the Chief Justice, Sir Garfield Barwick, who accepted that the power of the Senate to reject Supply would force the government either to resign or call an election, failing which the Governor-General could dismiss it. There was otherwise ample support for this view in the joint opinion of Aitkin, Gleeson and Lane, referred to in *Current Topics in the Australian Law Journal*.<sup>47</sup>

The opinion asserted that the power:

would be available to be exercised in a case where the Governor-General considered that the maintenance of the law and the constitution, and the welfare of the nation required its exercise and that the manner and possible consequences of its exercise would not impair the authority of the Crown.<sup>48</sup>

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<sup>45</sup> *Current Topics*, 49 ALJ, No 12, p.647.

<sup>46</sup> 48 ALJ, p.161.

<sup>47</sup> *Current Topics*, 49 ALJ December 1975, p.650.

<sup>48</sup> *Current Topics*, 49 ALJ No 12, p.650

The opinion reviewed the various authorities, and considered a number of specific instances relating to the power of Governors to dismiss governments. They instanced a number of circumstances where the Governor-General could “force a dissolution” upon a Government which had the confidence of the lower House.

It is, in our view correctly, held that the Governor-General even has the legal power to go so far as to “force a dissolution” on a Prime Minister with the majority in the lower House. That occurs where the Governor-General first dismisses the Ministry that opposes the dissolution, and then commissions another Ministry that will accept responsibility for the Governor-General’s action. See A. Berridale-Keith. “The Kind and the Imperial Crown. The Powers and Duties of His Majesty,” 1936 pp 140, 17 78; E.A. Forsey, “The Royal Power of Dissolution of Parliament in the British Commonwealth.” 194 pp 3, 7, 46-49, 71.<sup>49</sup>

Views contrary to these are said to be concerned to protect the Crown from partisanship, not to effectively deny the existence of the power. The circumstances justifying action to “force a dissolution” are listed as the maintenance of the Constitution, the preservation of law and order against domestic strife of a serious nature, the welfare of the people, and where the Governor-General is satisfied that the majority of the House of Representatives did not also represent the majority of the electorate. The opinion, was given before the Governor-General dissolved both Houses and, consequently, did not consider the question of the power of the Governor-General to dissolve both Houses on the basis of the former government’s bills which, complied with the stipulations of Section 57, on the advice of a caretaker Prime Minister, whose party had been responsible for the deadlock. As has been shown, there is ample evidence in the Debates of the Constitutional Convention of 1897-8 to support the view that a government denied Supply by the Senate would be forced either to resign, or call an election, failing which the Governor-General had power to dismiss the government.

There is a real issue as to whether it was ever intended by the framers of the Constitution that the Governor-General should have power to initiate a double dissolution in circumstances other than those specified in s.57, and whether, as an alternative, it would be appropriate for the Governor-General to accept the advice of a caretaker Prime Minister to dissolve both Houses of Parliament under s.57, relying on the existence of twice rejected bills complying with that Section, which were bills introduced into the Parliament, not by the government of the caretaker Prime Minister, but by the government which had been dismissed by the Governor-General.

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<sup>49</sup> Joint Opinion of Aickin, Gleeson and Lane, pp.4,5. Copy in possession of current author.



Dissolving either House of Parliament is one thing; calling for elections of members of those Houses is another.

S.5 of the Constitution provides:

The Governor-General may appoint such times for holding the session of the Parliament as he thinks fit, and may also from time to time by Proclamation or otherwise, prorogue the Parliament, and may in like manner **dissolve the House of Representatives.**"

(Emphasis added)

Elections for the House of Representatives are governed by s.32 which provides:

The Governor-General in council may cause writs to be issued for general elections of members of the House of Representatives.

The calling of elections requires the advice of a responsible Minister. This advice he obtained from the Leader of the Opposition whom he had appointed in a caretaker capacity, under circumstances where he could be assured of Supply being granted to carry on the ordinary services of government. Such an action would have been in accord with the intentions of the framers of the Constitution. If the only solution to the deadlock, by way of a double dissolution, was the mechanism set out in s.57, there would be no way that such a deadlock could have been solved by those means where there were no bills in existence which complied with the stipulations of s.57. No specific section of the Constitution makes any provision for a double dissolution where the only bill in dispute is an Appropriation bill for normal Supply, which itself does not comply with the conditions laid down in s.57.

There is no doubt that the framers of the Constitution accepted that the principle of responsible government would need to be modified to accommodate the position where the Senate refused Supply, thereby forcing the government either to resign, or call and election. They recognised that the Senate's power to obstruct a government required some means of restraint, particularly where a dangerous situation was caused by the rejection of Supply, but s.57 was the only provision involving a double dissolution that the Convention adopted for this purpose. The Convention recognized that a situation caused by a rejection of Supply was one of the utmost urgency and danger, and required a speedy remedy, but it did not devise such a speedy remedy. The very conditions of delay contemplated by s.57 made it completely inappropriate to deal with a blockage of Supply.

The provisions of that section were only appropriate to deal with deadlocks which could wait without serious damage for the periods detailed in the section. It was concerned with the ultimate ability of a government, which had the confidence of the House of Representatives, to carry out the policy upon which it was elected. The very delay involved in the application of the section was designed to facilitate the settlement of the dispute by the ordinary means of argument negotiation and compromise, without the ultimate need, either for a double dissolution, or for a joint sitting of both Houses. Anything less appropriate to a simple deadlock on Supply could not be imagined.

How then should the action of the Governor-General be viewed, in seeking a speedy solution by accepting the advice of the caretaker Prime Minister to dissolve both Houses on the basis of bills which, whilst complying with the stipulations of s.57, were not the cause of the deadlock, and were not bills which the Minister tendering the advice had initiated, and in fact were bills which the same Minister had been the instrument in ensuring that they were not passed by the Senate?

There is no doubt that, before the adoption of the final form of s.57, there was strong support for the proposition that, where the Senate rejected Supply, the House of Representatives could be forced to an election, unless the government resigned, or called an election itself. There was also strong support for the notion that, where it could be shown that the Senate was the cause of the deadlock, it also should go to the people. There was complete realization that a deadlock on Supply would require speedy resolution. Provisions involving lengthy delays, with the need to present bills on more than one occasion, separated by a substantial period, were clearly inappropriate to a Supply crisis. Further, a Supply crisis could occur without any bills, fulfilling the criteria ultimately incorporated into s.57, being available to trigger a double dissolution. No provisions were devised to provide for a double dissolution in the event of Supply crisis where the only cause of the crisis was the refusal of the Senate to grant Supply by a rejection or postponement of a decision on the Appropriation Bills for annual Supply. This raises the question of whether, or not, the framers did in fact intend that s.57 was the only means available to deal with a Supply crisis by way of double dissolution.

As has been mentioned, Professor P.H. Lane asserted categorically that there was no power in the Constitution for a deadlock to be resolved by way of “a non-statutory prerogative of the Governor-General.”

In the *Report of the Royal Commission on the Constitution* in 1929, there is a statement to the following effect:

To overcome a deadlock between the two Houses on **matters with respect to which their powers are co-ordinate**, the House of Representatives may send a bill to the Senate twice, either in the same session or in successive sessions, with an interval of three months between the two occasions, and if there is still a deadlock both Houses may be dissolved simultaneously.<sup>50</sup>

This statement would seem to imply that the provisions of s.57 do not apply where the deadlock arises in cases where the two Houses are not fully co-ordinate in power. Such a case would be where Supply is rejected by the Senate, which cannot initiate or amend a money bill, and is restricted to the power of making non-mandatory suggestions to the House of Representatives, or outright rejection. A search of the evidence given to the Commission, the papers presented, and the address of Mr Nicholas KC, the Counsel assisting the Commission, does not disclose the authorship of this view. A former member of the Convention of 1897-8, Joseph Carruthers gave evidence, as did the Solicitor-General, Robert Garran, and A.B. Piddington, a State member of Parliament in the 1890s. No such view was advanced by any of these gentlemen, so that one can only conclude that the opinion was that which Mr Nicholas KC himself espoused.

This suggestion may only be a recognition that s.57, because of its purposely built-in delay, is of no use in speedily resolving a deadlock over Supply, where time is of the essence. This may also be the meaning of the statement in Sir John Kerr's reasons that s.57 provided "a means, perhaps the usual means" of resolving a deadlock.

The original form of the deadlock provision debated at the 1897-8 Convention was that proposed by the New South Wales Legislative Council, and also by Victoria. This provided that if a deadlock could not be resolved after serial dissolutions of both Houses, final settlement should be achieved by an Australia-wide referendum. In its later stages, the debate was partially concluded at the Sydney Session when Josiah Henry Symon moved an amendment to the referendum proposal, which merely provided for a dissolution of the House of Representatives followed, after a further delay and further rejection of the legislation by the Senate, by a dissolution of the Senate. This amendment was passed by a narrow margin of 27 to 22 votes. Immediate dissatisfaction was expressed at this result, with delegates arguing that other means should be discussed. To get over the difficulty created by the passing of the Symon amendment, further proposals were allowed on the

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<sup>50</sup> *Report of the Royal Commission on the Constitution*, 1929, Government Printer, 1929, Canberra p.9. Emphasis added.

basis that they could provide for alternatives to the serial dissolution which had been agreed to. The suggestion particularly arose out of the views expressed by some of the delegates that a simultaneous dissolution would be more effective. It also left in the arena the two referendum proposals. It should be remembered that the original proposal, coming from New South Wales and Victoria, was a provision which applied to legislation initiated by either house, and frustrated by the other house. It was meant to apply to cases where it was the Senate's legislation which was rejected by the Lower House, as well as to cases where it was the legislation of the Lower House which was being rejected by the Senate.

Joseph Carruthers, in supporting the original proposal, argued that the House of Representatives would be just as likely as the Senate to thwart the popular will. It was just as likely to be in the wrong as the other. To deal with this situation, he enunciated the general principle that:

The house standing against the tide should not have the power to mould the destinies of the Commonwealth.<sup>51</sup>

By the time the Symon amendment had been passed, the form of the clause dealt only with deadlocks created by the rejection of legislation by the Senate. The power of the Senate was the main concern of the representatives of the larger States. It was out of the discussion of the further alternatives to the serial dissolution of the two houses that the proposal for a simultaneous dissolution arose. It was only after this was agreed to, that, as an alternative to the Symon provision for consecutive dissolutions, the further step of a joint sitting of the two houses rather than referenda, whether mass or dual, was raised. Higgins claimed the credit for first suggesting this final method of resolving a deadlock. Despite its appeal on the grounds of finality, it was still regarded with suspicion by some representatives of the larger States, who feared that a minority in the House of Representatives could combine with a majority in the Senate to defeat the government of the day. It was opposed by representatives of the smaller States on the grounds that it detracted from the essential bicameral structure of the Constitution. The final form of s.57 did incorporate the joint sitting of both Houses. It was achieved after the Symon clause was dropped, leaving only the double dissolution, after twice rejection interspersed with delay, coupled with the final provision for a joint sitting.

In the whole of this later debate, the specific situation of the rejection of Supply by the Senate was not considered. The debate became so entangled with the arguments over the

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<sup>51</sup> *Convention Debates*, Sydney, 1897, p.544.

frustration of the power of the House of Representatives, the unfairness of protecting the Senate from dissolution, the incompatibility of referenda with the principles of responsible government, and the question of the coercion of the smaller States by the larger States, or the coercion of the larger States by the smaller States, that the major reason for the construction of a deadlock provision to avoid the possibility of the machinery of government coming to a standstill appeared to have been forgotten.

One thing that is clear is that the delegates fully considered the application of the principles of responsible government in relation to deadlock proposals. The various alternatives to the Symon amendment were alternative forms of action which should be at the discretion of the Executive. The power of dissolution should be in the hands of the Governor-General, who should exercise the power on the advice of his Ministers. Those opposing the power to dissolve the Senate queried whether:

at the will of the Prime Minister he shall have the power, not only, to dissolve one House but to send the whole parliament to the country<sup>52</sup>

William McMillan spoke of the:

power of the Governor-General, through his executive, to dissolve either house.<sup>53</sup>

Implicit in this approach, was a rejection of any suggestion that deadlocks should be solved by a self-executing power in the hands of the Governor-General, rather than an optional power in the hands of the Prime Minister to seek an appropriate dissolution of one or both houses from the Governor-General, where the government's policies were being frustrated by a recalcitrant Senate.

Richard O'Connor pointed out that:

a plan which enables the Senate to be dissolved at the will of the majority of the House of Representatives is a plan which, to a very large extent, puts that weapon in the hands of a majority of the House of Representatives.<sup>54</sup>

In other words, it would be a weapon in the hands of the government of the day. He favoured a provision where either house should have the option of calling for a double dissolution. It should not be an:

additional aid to be given an executive government, but simply as an exceptional remedy to be applied in a case where the two houses cannot agree.<sup>55</sup>

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<sup>52</sup> *Convention Debates*, Sydney, 1897, per Simon Fraser, p.718.

<sup>53</sup> *Ibid.*, p.719.

<sup>54</sup> *Ibid.*, p.730.

<sup>55</sup> *Ibid.*, p.731.

O'Connor did not spell out who was to apply the exceptional remedy. It may have been consistent with giving the Governor-General a power to dissolve both houses at the request of either house. If it really meant a self executing power to be exercised at the discretion of the Governor-General, it would have given Sir John Kerr in 1975 power to dissolve both houses on his own initiative to resolve the supply crisis in that year. However, such a view was not discussed further, and was not adopted by the Convention.

Edmund Barton saw the whole question of deadlock procedure as placing in the hands of the government of the day the means of resolving a deadlock created by the Senate. What had dropped out of the debate was the extreme urgency of a situation where there was a blockage of Supply by the Senate. What was to happen in a Supply crisis if the government of the day did not choose to set the machinery of the deadlock provisions into motion?

There is no doubt that the delegates finally accepted the power of the Senate to reject supply. If there were no double dissolution bills available to the government to set the machinery of s.57 in motion, it would be impossible for the government to re-present its appropriation bills after the delay contemplated by s.57, and then to utilize the s.57 double dissolution machinery. The country would come to a complete standstill before these steps could be taken.

It is clear that the delegates accepted that the principles of responsible government would need modification so that the power of the purse, in so far as it involved the rejection of Supply, could reside in the Senate rather than the House of Representatives. To this extent, therefore, a rejection of Supply by the Senate could force the government to resign or seek an election of the House of Representatives. If it refused to resign, the Governor-General had the power to seek other advisers who could accept the responsibility of recommending dissolution of the House of Representatives and the calling of an election. It was never intended that s.57 could be used by anyone else but the government of the day, whose policies were being frustrated by obstruction in the Senate. There is nothing in the debates at any of the Sessions which suggests that the events specified in s.57 would constitute an objective free standing basis for the dissolution of both houses at the instance of the Governor-General.

The purpose of the section, so far as the framers were concerned, was correctly stated by Stephen J. in *Cormack v Cope* as follows:

Section 57 of the Constitution is concerned with deadlocks resulting from the legislative will of the majority of the House of Representatives not being given effect to by the Senate. It acknowledges that ultimately the will of the House is most likely to prevail.<sup>56</sup>

In the same Judgement, His Honour expressed what was the result of the final compromise adopted by the Convention of 1897-8:

The operation of Section 57 does, it is true, infringe the generally bi-cameral character of the legislature and for the time being deprives the Senate, to the extent that it may be said to be representative of the States, of an effective distinct voice in the legislative process. This is, on any view of its operation, its effect, an intended effect which arises both from the need to find some solution to deadlocks and from the nature of the solution arrived at, one tending to ensure that the will of the lower House should prevail.<sup>57</sup>

As has been shown, the delegates were aware that the rejection of Supply by the Senate would create a dangerous situation where the whole machinery of government could break down. The delegates were concerned as to the dangerous nature of such a crisis, where delay could not be brooked. It would also appear that a Supply crisis was the kind of situation they were endeavouring to cover in a deadlock provision.

However, these aspects of the debate seemed to disappear in the face of the total preoccupation with the need to arrive at a solution which was fair as between the larger and smaller States, and consistent with the agreement that the principles of responsible government should be paramount, subject only to necessity of moulding them into a federation, where both houses were elected, and were co-equal in power, with the exception only that the Senate could not initiate money legislation, but, although it could not amend money bills, it could reject them outright, a power which was not possessed by the House of Lords in the British Parliament, from which the principles of responsible government were derived.

Those who fought for the adoption of that part of the theory of responsible government which required the total predominance of the Lower House were forced to see that predominance diluted because of the federal features of the Constitution. The particular features which made this change necessary were the fact that both Houses were elected by the same electors (even though arranged in different electorates), the co-equal power of the

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<sup>56</sup> *Cormack v Cope*, 131 CLR 432 at p.468.

<sup>57</sup> *Ibid.*, p.470.

Senate in all legislation with the exception of money bills, the power of the Senate to reject Supply, and the equal representation of the States in the Senate. Where the government could not obtain supply from the Senate, it had only two options: resign, or go to the people. Such a result was consistent with the principles of responsible government. Under the Constitution, the Parliament consisted of both Houses, not solely the House of Representatives.

In 1975 the Governor-General had the power to dissolve the House of Representatives and seek other advice to call an election of the Lower House. Having dismissed the Prime Minister and the government, the Governor-General sought advice from the Leader of the Opposition, whose party had created the crisis, to dissolve both Houses and call a general election of both Houses. He based this action on the assumption that the caretaker Prime Minister could take advantage of a number of bills, which had been twice rejected by his party, and which were not the immediate cause of the Supply deadlock, in order to advise the Governor-General to dissolve both Houses by virtue of the provision of s.57.

It is clear that it was the intention of the framers of the Constitution that s.57 was designed for use only by the government of the day, and could not be used to support advice from a caretaker Prime Minister to dissolve both Houses on the basis of a number of bills which had been rejected by the party of the caretaker Prime Minister himself, and where the crisis had been caused by the same party, not because of the rejected bills, but by a refusal to pass the Appropriation bills for Supply, which did not themselves comply with the requirements of s.57.

There is no doubt that the framers of the Constitution did not satisfactorily devise a speedy means of solving a Supply crisis by way of a double dissolution, where the Appropriation bills did not, and perhaps could not meet the requirements of s.57, and where the government had no other twice rejected bills, and particularly where the government, in any case, had no intention of setting the machinery of s.57 in motion by recommending a double dissolution to the Governor-General. The only means of resolving a deadlock where the provisions of s.57 could not be invoked would be for the Governor-General to dismiss the government and seek advice from alternate Ministers to dissolve the House of Representatives, and call an election of that House. This leaves the major issue unresolved. No challenge was ever made to the action of the Governor General in seeking advice from the Leader of the Opposition as caretaker to dissolve both Houses. Being an



Executive act, it may not be justiciable. No challenge was ever made to the validity of subsequent legislation enacted by the Parliament which followed the double dissolution.

All that can be said is that the situation is certainly a “paradox,” and that it would have been inconsistent with the understanding of the framers of the principle of responsible government for s.57 to be invoked by anyone but the government of the day, whose legislation was being frustrated by the Senate. It was the government Ministers alone who could give advice to the Governor-General to dissolve both Houses under the provisions of s.57, because the Section was designed to give such a government a means of seeking electoral support for its legislation, which was being obstructed by the Senate. Finally, it was never designed as a self executing power in the hands of the Governor-General, which would come into being the moment the conditions specified in s.57 came into existence.

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# PART II



The intentions of the framers  
in relation to particular sections  
of the Constitution

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## MISCONCEPTIONS OF THE INTENTION OF THE FRAMERS OF THE CONSTITUTION IN RELATION TO SECTION 41

Conflicting interpretations have been given by the High Court to s.41, at different times, and by different Justices of the High Court. Much of this conflict would have been avoided if the Court had not rejected the Convention Debates as an aid to the interpretation of the Constitution on the basis of seeking to elucidate the actual intentions of the framers in relation to the meaning of the section.

S.41 of the Commonwealth Constitution provides:

No adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth.

Controversy arose as early as 1902, during the course of the debate on the Federal Franchise Bill, as to the interpretation of this section of the Constitution. This controversy raises some important issues. The first is the question of whether, or not, the intentions of the framers of the Constitution, expressed in the Convention Debates, should be paramount, or at least taken into consideration, when interpreting the specific words of the constitution document. The second is that unforeseen results can flow from a refusal to take these intentions into consideration, either by the High Court, or by participants in constitutional, and political debates, whether within, or without, the Parliament of the Commonwealth. A further consequential issue is the effect upon legislation or constitutional change, where such intentions are ignored, misrepresented, or misunderstood.

In the first session of the Federal Parliament in 1902, the Federal Government, led by Edmund Barton, introduced a Federal Franchise Bill into the House of Representatives. This Bill shortly proposed to introduce a federal franchise based on universal adult suffrage. Such suffrage would have extended the right to vote, enjoyed by those women and aborigines who already had the vote, to all adult natural born, or naturalised members of the whole Australian community. The House of Representatives was heavily

engaged in the difficult problem of forming the first uniform tariff legislation and, consequently, the Bill was withdrawn. However, a Bill in identical form was introduced into the Senate by Senator O'Connor, the Leader of the Government in the Senate. This course of action was humorously referred to by Josiah Symon, the Leader of the Opposition in the Senate, when he complimented Senator O'Connor:

upon having dug out so very interesting a measure with which to amuse the Senate and while away the time while we are waiting for the tariff.<sup>1</sup>

Senator O'Connor, in explaining the purpose of the Bill, indicated that the test of a right to vote under the proposed Federal Franchise was not colour, but whether a person was native born, or a naturalized British subject. Questions of the desirability of restricting the increase in coloured residents was covered by the Immigration Restriction Act, which had already been passed, and applied to all persons entering Australia in the future. As to the question of Aborigines voting, he said:

I think it will be recognized that the question of whether aboriginals should vote or not is not a matter to be seriously taken into consideration where they are settled members of the community. Where they have settled down in occupations of some kind, **I fail to see why they should not be allowed to vote in the same way as is (sic) any other inhabitant of the Country.** I think we might treat this question of the position of aboriginals under our electoral laws not only fairly, but with some generosity. Unfortunately they are a failing race. In most parts of Australia they are becoming very largely civilized, and **when they are civilized they are quite as well qualified to vote as are a great number of persons who already possess the franchise.**<sup>2</sup>

Senator O'Connor pointed out that naturalized British subjects had the vote irrespective of colour. He referred to the fact that the Immigration Restriction Act took care of the future in regard to coloured persons of whatever status, but he conceded that they could not remove the rights of people who were already here.

Once having naturalized any of these coloured people and given them the rights of citizenship in relation to their holding of property and in other directions, it would be a mistake to deprive them of the right to aid in the making of the laws.<sup>3</sup>

In relation to the 'White Australia' policy he explained:

we do not want to have in any portion of our community any section which is in a servile condition; we do not want to have any proportion of our community

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<sup>1</sup> *Commonwealth Parliamentary Debates*. Vol. X, Senate, 1902, p.11458.

<sup>2</sup> *Ibid.*, p.11453.

<sup>3</sup> *Ibid.*, p.11453.

disfranchised and in a position of political inferiority, having no right to a choice in the making of the laws. <sup>4</sup>

As to naturalized persons, he argued that if they did not want these people to vote they should change the naturalization laws. He pointed out that the Commonwealth had not as yet legislated on naturalization, and pending this, the States could continue to legislate. He argued that if a person was not entitled to full citizenship he should not be naturalized. Under the legislation proposed by the Government:

Aboriginals and coloured persons who are naturalized will be put on exactly the same footing as any other person who has resided for six months in Australia.<sup>5</sup>

In summary, the Bill provided a basic franchise based on six months residence in Australia, being 21 years of age, and not being disqualified under the Constitution.

Opposition to the provisions of the Bill giving the vote generally to all aborigines came from Senator Matheson of Western Australia. He wanted steps to be taken to prevent the 200,000 aborigines at large from acquiring the vote. In an endeavour to achieve this aim, Senator Matheson moved an amendment in the following terms:

No aboriginal native of Australia, Asia, Africa, or the Islands of the Pacific, or persons of the half blood shall be entitled to have his name placed on an electoral roll, unless so entitled under Section 41 of the Constitution.

In speaking to his amendment, the Senator was most extreme in his views as to the capacity of aborigines to exercise a vote:

It appears hardly credible, but apparently is a fact, that in South Australia any aboriginal is entitled to be placed upon the roll, and so far as I can judge any lubra or gin is entitled to the same privilege.<sup>6</sup>

The Senators were aware of the fact that many aborigines did in fact have the vote, not only in Western Australia, but also in South Australia, where there was universal adult franchise. Senator Harvey of Western Australia emphasized this point and added:

In four of the other States there exists laws differing somewhat, but the general trend in each is to give coloured natural born or naturalized subjects the right to vote.<sup>7</sup>

He indicated that he did not support this principle, but was prepared to vote for it, because in the Commonwealth it was essential to have uniformity.

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<sup>4</sup> *Ibid.*, p.11453.

<sup>5</sup> *Ibid.*, p.11453.

<sup>6</sup> *Ibid.*, p.11580.

<sup>7</sup> *Ibid.*, p.11487.

Senator Pearce, another representative from Western Australia, raised the objection that, if aborigines were given the right to vote, their votes would be manipulated by unscrupulous squatters, who would then be able to decide elections. His objections extended to all aliens, because they were foreign to Australia in religion and:

their ideas of political life are foreign to our ideas, their ideas of civilization are foreign to ours. They have not a single idea in common with us.<sup>8</sup>

Whilst conceding exceptions, he argued that the great bulk of alien races have no understanding of political liberty, or political economy.

Matheson's amendment was defeated in the Senate, but a clause, in substantially the same form, was inserted when the Bill went back to the House of Representatives. The reason for the insertion of the clause was the same as that advanced by Senator Matheson, to the effect that large conglomerations of Aborigines were clustered on station properties, and in the vicinity of large towns in Western Australia, and that their vote would be manipulated by squatters and unscrupulous electoral agents. This was a situation which was largely confined to Western Australia but, in deference to the very vocal demands of representatives from that State, the Government conceded defeat, and allowed the section to pass into the Franchise Act, which thereby specifically deprived aborigines of the vote, except those who were protected by s.41.

In the debate in both Houses, those supporting the exclusion of aborigines from the vote argued that this exclusion, in fact, would only apply to Western Australia, so long as that State wished it to remain. This view was based on the allegation that the effect of s.41 was to enable aborigines, who obtained the right to vote in the States at any time after the passing of the Federal Franchise Bill, to qualify to vote in Federal elections. Reliance was placed on the words **"has or acquires a right to vote at elections for the more numerous House of the Parliament of a State."**

Senator O'Connor, who had played an important part in the Constitutional Convention of 1897-8, made it clear that it was intended by the framers of the Constitution that s.41 applied only to those who had the right to vote up to the time the Commonwealth Parliament passed a Federal Franchise Act. In describing the consequences of Senator Matheson's Amendment, he prefaced his remarks by reiterating the fact that aborigines had the vote in New South Wales, Victoria, and Tasmania (if there were any), and that that

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<sup>8</sup> *Ibid.*, p.11487

right could not be taken away because of s.41. He rhetorically asked what Senator Matheson was proposing:

He proposes to go back upon all that legislation, and to say that although in the past a blackfellow in New South Wales, Victoria, Tasmania, and South Australia had the right to vote; and that although in Western Australia and Queensland he had a right to vote if he had property, his son shall not have that right.<sup>9</sup>

Senator Matheson persisted in his view that, whatever franchise was passed by the Commonwealth, it could not deprive a person of a vote at a federal election if that person later acquired a right to vote at a State election, even after the Commonwealth had passed its franchise. It was this proposition that Senator O'Connor rightly corrected.

There is no doubt that the misconception of the Matheson amendment in the Senate was carried into the debate when the matter came before the House of Representatives. In that debate William McMillan repeated the argument used by Senator Matheson to the effect that s.127 of the Constitution in excluding aborigines from the reckoning of the number of the people of the Commonwealth or of a State or other part of the Commonwealth demonstrated that the framers of the Constitution:

Never for an instant contemplated, and I doubt whether they were aware, that in any State the right to vote should be given to aboriginals.<sup>10</sup>

Isaac Isaacs indicated his agreement with this statement. He asserted that it was intended to exclude the aborigines from participation in political power. He then repeated the misconception of s.41 that had been the basis of Senator Matheson's justification of his amendment, and which had been accurately refuted by Senator O'Connor:

If it is ever desired by one or more of the States to invest aboriginals within their territory with the franchise for the more numerous State House, they will come under section 41 of the Constitution, which then gives them the right to vote for the Federal Parliament. But until aboriginals are thought worthy to vote for the State Parliaments, I do not see why we should consider them worthy to vote for the Federal Parliament. The aboriginals have not the intelligence, interest, or capacity to enable them to stand on the same platform with the rest of the people of Australia and determine complex political questions. How, for instance would the blacks vote on the question of White Australia?

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<sup>9</sup> *Ibid.*, p.11488.

<sup>10</sup> Per Senator Matheson *Commonwealth Parliamentary Debates*, 1902. Vol. 1X, p.11580.

These are extraordinary sentiments indeed for an otherwise liberal minded man of high intelligence and standing. They were supported by Henry Bournes Higgins the erstwhile darling of the radical *Tocsin Newsletters* which had praised him for his unrelenting opposition to the enactment of the Constitution on the basis of its undemocratic character. Other prominent former members of the 1897 Convention who supported the exclusion of aborigines from the new Federal Franchise were Edmund Barton (NSW), Sir Edward Braddon (Tasmania), Sir John Forrest (West Australia), Sir Phillip Fysch (Tasmania), Sir John Lyne (NSW), Sir William McMillan (NSW), and Sir George Turner (Victoria). Consistently the Australian Workers' Union representative from the Darling Downs, William G. Spence, supported the exclusion.

Only six members of the House of Representatives opposed the exclusion of aborigines from the Federal Franchise. These were James B. Ronald (Victoria), Vaiben Solomon (South Australia), Henry Willis (NSW), Hugh Mahon (Western Australia), King O'Malley (Tasmania), and William Morris Hughes (NSW).

There is no doubt that the members of the House of Representatives and the Senate were induced to pass the Matheson amendment into law because of their belief that the descendants of those aborigines who already had the vote could subsequently acquire the vote by the action of the State Parliaments, where they did not have it, or by reaching adult age where that was the State requirement. In other words, it was believed that the amendment only limited the franchise for the time being, and not indefinitely. If Senator O'Connor's views were correct, it would mean that aborigines, from 1902 until 1962, (except those who had the vote in 1902) were irrevocably deprived of the right to vote in federal elections. Senator Matheson, and those who supported his approach in both Houses, pressed the amendment on the false assumption that s.41 would allow the States to enfranchise aborigines, after the date when the Commonwealth legislated to institute a Federal Franchise. On the interpretation advanced by Senator O'Connor, this was incorrect, and not in conformity with the intentions of the framers of the Constitution. The total effect of the new provision was, not only, to disenfranchise aborigines in Western Australia, but to disenfranchise all aborigines born after the Federal Franchise Act, or who did not have the right to vote as at the date of that Act. It is important to test the validity of Senator O'Connor's interpretation, in the light of the Constitutional Convention Debates, and in the light of the controversies in the High Court surrounding s.41.



## THE INTERPRETATION OF S.41 IN THE HIGH COURT

The controversy over the interpretation of s.41 of the Constitution continued in many of the cases involving the section coming before the High Court in subsequent years.

This section was part of a scheme which dealt with the qualifications of electors, for both the Senate and House of Representatives, for the first Commonwealth election, and thereafter for subsequent elections.

S.8 of the Constitution provides:

The qualification of electors of senators shall be in each State that which is prescribed by this Constitution, or by the Parliament, as the qualifications for electors of members of the House of Representatives, but in the choosing of senators each elector shall vote only once.

S.30 provides:

Until Parliament otherwise provides, the qualification of electors of members of the House of Representatives shall be in each State that which is prescribed by the law of the State as the qualification of electors of the more numerous House of Parliament of the State, but in the choosing of members each elector shall vote only once.

The reason why no final provision was made, in relation to the qualification of electors for both Houses, was that qualifications varied considerably between the States. At the time of the last Convention in 1897-8, only South Australia had adult franchise. Other States excluded women, and aborigines to a greater or lesser extent. There were also other differences in the franchise, which applied to some States that had manhood suffrage. Property qualifications still existed, and plural voting continued in Victoria until 1899. That State also was the last to give the vote to women, which it did only in 1909. Aborigines could vote in some States but not in others.

S.30, as originally drafted at the 1891 Convention, did not have the opening words:

Until Parliament otherwise provides.

nor did it have the concluding words:

but in the choosing of members each elector shall vote only once.

Early attempts to provide a prohibition against property qualifications, and plural voting, did not succeed, because it was argued that any such attempt would prejudice the

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acceptance of federation by some of the States. The present wording was not adopted until the later convention of 1897-8.

The question of adopting a constitutional provision to entitle women to vote was discussed at the Adelaide Convention in 1897.

S.29 (now S.30) was discussed on 15 April 1897. This section provided, at that stage, as follows:

29. Until the Parliament otherwise provides, the qualification of electors of members of the House of Representatives shall be in each State that which is prescribed by the law of the State as the qualification for electors of the more numerous House of the Parliament of the State. But in the choosing of such members each elector shall have only one vote.

Frederick William Holder, the South Australian Treasurer, moved to insert certain new provisions into this Section, as follows:

Every man and woman of the full age of twenty-one years, whose name has been registered as an elector for at least six months, shall be an elector.

He argued this proposal most eloquently, citing the fact that the Monarch was a woman.

This year we are celebrating the diamond jubilee of the greatest woman in political life in the British Empire, and if a woman be able, as that woman has been, with all the greatness and all the grandeur of her character, to preside over the destiny of this Empire during the last sixty years, it does not become anyone to say that other women are not able to rise to the responsibility of casting a single vote on a political question.<sup>11</sup>

He received very grudging support from delegates on this question. Caution was urged by Bernard Ringrose Wise, New South Wales:

Is it then a prudent thing to direct that the basis of the federal franchise should be one which does not approve itself to the electors of each colony in the management of their own affairs?

excellent though the form may be in their own colony, that is no justification to force it upon another colony preliminarily to coming into the union, which, when it is formed, will have supreme power over this and other matters.<sup>12</sup>

Even the Labor delegate, William Arthur Trenwith, indicated that he proposed to vote against the proposal, although he claimed that he supported the principle.

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<sup>11</sup> *Convention Debates*, Adelaide, 1897, p.716.

<sup>12</sup> *Ibid.*, p.717.

My reason is that female suffrage is desirable, but there is a very considerable number of persons in some of the States who think it extremely undesirable. If we load this Constitution with this principle we create another difficulty in the way of having Federation adopted, and we do not advance the cause of woman suffrage.<sup>13</sup>

Holder's proposed amendment was defeated by a majority of 11 (12 for the amendment and 23 against). Holder was supported by Clark, Cockburn, Deakin, Gordon, Higgins, Isaacs, Kingston, Dr Quick, Reid, and Sir George Turner.

It was in answer to his defeat on this issue, that Holder proposed to add a provision to the effect that:

No elector now possessing the right to vote shall be deprived of that right.

This was aimed to prevent the possibility of the Federal Parliament, when adopting a uniform Federal franchise, taking away from women the right to vote for the Federal Parliament, which they already had in the State of South Australia.

In opposition to the amendment it was argued that no uniform franchise could be achieved in practice, if the amendment was carried. Edmund Barton considered that the effect of the amendment was to tie the hands of the Federal Parliament, because that Parliament would not be able to legislate for a uniform franchise unless it included female suffrage.

Why should you now tie their hands and say that because the women of South Australia have a vote, the Parliament shall not be allowed to make a uniform franchise unless it is on the basis of adult suffrage? That is a fettering of Federation to which I will never consent.<sup>14</sup>

In the course of the discussion, George Reid changed his opinion in the interests of federation:

we have no right to expose any elector or class of electors, such as the female electors of South Australia, to the risk of disenfranchisement.

It is a breach of the principle of uniformity of suffrage, but considering the way in which we change our views from time to time, as to the wisdom of tying the hands of Parliament, and the wisdom of allowing Parliament to soar at its sweet pleasure over all provisions and matters, I do not attach the slightest significance to that aspect of the case. I am quite willing to fall in with the amendment, simply because it will strengthen the cause of Federation in South Australia.<sup>15</sup>

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<sup>13</sup> *Ibid.*, p.723.

<sup>14</sup> *Ibid.*, p.726.

<sup>15</sup> *Ibid.*, p.727.

Sir John Downer also expressed concern that what the amendment would do was to give to the women of South Australia the right to vote under the Constitution for all time. Isaac Isaacs challenged this interpretation of the effect of the amendment, and stated the effect of the amendment simply:

It means that everyone who has a vote under the Commonwealth Bill now shall always be permitted to have the vote.<sup>16</sup>

Sir John Downer persisted in his objection. He said that, if this was the intention, then it deprived both the local Parliament, and the Commonwealth Parliament of the power to interfere with it. To meet this objection, Holder indicated that he would reframe his amendment to read:

And no elector possessing the right to vote shall be deprived of that right by the Parliament of the Commonwealth.<sup>17</sup>

In support of this change, he indicated that it would still be open to a State Parliament to take away the right, if it thought fit.

At this point Edmund Barton sought clarification from Holder, asking whether it meant:

an elector at the establishment of the Commonwealth or an elector who at the establishment of the commonwealth, **or at any time after**, shall become entitled to vote, so that any person who **at any time after the establishment of the Commonwealth is given the right to vote by the local Parliament**—supposing, for instance, an infant of 16 years— shall not be deprived of the right to vote at federal elections by the Federal Parliament?<sup>18</sup>

Frederick William Holder made the intention of his amendment perfectly clear:

I desire that at any time any elector having a right to vote which he had at the time the Commonwealth came into operation, or which he acquired afterwards by State legislation **before the Federal Parliament legislates on the subject** shall be protected in the exercise of that vote against any action of the Federal Parliament.<sup>19</sup>

The important thing to note about this clear expression of intention by the mover of the amendment, is that the protection extended to individuals, and not to a class of individuals, and that it was only to protect those persons who had the vote at the establishment of the Commonwealth, or acquired it before the Federal Parliament entered the field by legislating for a federal franchise.

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<sup>16</sup> *Ibid.*, p.728.

<sup>17</sup> *Ibid.*, p.728.

<sup>18</sup> *Ibid.*, p.728. Emphasis added.

<sup>19</sup> *Ibid.*, p.728. Emphasis added

After making this explicitly clear statement, Holder expressed his willingness:

to leave the “matter of form” to the Drafting Committee.

That this was clearly understood by delegates, before they voted on the issue, was indicated by Sir George Turner:

We admit the right of the Federal Parliament to declare its own franchise. As soon as it does that it certainly would not be right to allow any State afterwards to alter that franchise, but we claim the right to say to the Federal Parliament: “In declaring that franchise you shall not take from any person or class of persons who **have the right to vote** that privilege.”<sup>20</sup>

It is clear, in the context of the debate, that his use of the words, “class of persons” did not mean that any such class of persons could consist of members who became members of that class **after the Commonwealth Parliament legislated.**

A further complication arose when Barton, who was a member of the Drafting Committee, suggested that the full form of Holder’s amendment would read:

And no elector who has at the establishment of the Commonwealth or who afterwards acquires a right to vote at elections for the more numerous House of the Parliament of a State shall be prevented by any law of the Commonwealth from exercising such right at elections for the House of Representatives.<sup>21</sup>

Sir George Turner was quick to point out that this went much further than Holder’s amendment. William McMillan, New South Wales, also agreed that it did go much further than was intended by Holder. It is difficult to see how a person as intelligent as Edmund Barton could be in any real doubt as to this intention, after Holder had explicitly clarified the meaning of his proposal. Barton asserted that Holder’s meaning was exactly as he had framed it for consideration. However, Holder again made it clear that the persons who came within the protection of his amendment were those persons who, either, had the right to vote as at the establishment of the Commonwealth, or **acquired it after the establishment of the commonwealth but before the Commonwealth enacted a federal franchise.**

What I wish is that these rights should be preserved which have been **acquired up to the time that the Commonwealth makes its franchise.**<sup>22</sup>

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<sup>20</sup> *Ibid.*, p.729. Emphasis added.

<sup>21</sup> *Ibid.*, p.731.

<sup>22</sup> *Ibid.*, p.732. Emphasis added

Holder's proposal was carried by a majority of three votes. This was how the matter stood at the end of the Adelaide Session of the Convention in 1897.

At the Melbourne Session of the Convention, on 3 March 1898, the clause again came up for discussion. It was then in the form prepared by the Drafting Committee, after the success of Holder's amendment at the Adelaide Session, and was in the following form:

Clause 44A. No elector who has at the establishment of the Commonwealth, **or who afterwards acquires**, a right to vote at elections for the more numerous House of the Parliament of a State, shall whilst the qualification continues, be prevented by any law of the commonwealth from exercising such right at elections for either House of the Parliament.<sup>23</sup>

Edmund Barton, in introducing the clause, sought to move an amendment which did cut down the ongoing effect of the words "afterwards acquires," but was much more restrictive than the original intention of Holder's original amendment at the Adelaide Session. Barton proposed to limit the protection of s.44A to persons who:

at the establishment of the commonwealth or afterwards has under the law in force in any state **at the establishment of the Commonwealth**.<sup>24</sup>

Barton had realised that the form of words, which he had drafted to give effect to Holder's original proposal, extended Holder's intention. in a way which would mean that a person acquiring a right to vote in a State, after the Commonwealth had brought down a Federal Franchise, would have that right to vote protected, even if such a right was not given by the Federal Franchise itself. He did not object to the protection of any right to vote existing at the commencement of the Commonwealth. However:

by the effect of the clause, as passed in Adelaide, any state might alter from time to time its suffrage for its House of Assembly, and, having altered it, notwithstanding the existence of the Commonwealth, the person who acquired under that alteration a right to vote for the House of Assembly in that particular state might vote—although the extension of the suffrage gave it not only to women , but, perhaps, to such a class as the young persons of sixteen years of age who are now agitating in some places for a vote— notwithstanding the different suffrages of other states, at elections for either House of the Commonwealth.<sup>25</sup>

It is not easy to understand this belated recognition by Barton of the effect of the form of the section which he had drafted, as representing Holder's intention at the Adelaide

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<sup>23</sup> *Convention Debates*, 1898, Melbourne, p.1840. Emphasis added.

<sup>24</sup> *Ibid.*, p.1840. Emphasis added.

<sup>25</sup> *Ibid.*, p.1841.

Session. Holder was not a member of the Drafting Committee, and had trusted that Committee, as an expert Committee of lawyers, to give legal effect to the intention that he had so clearly stated, both orally in debate, and in the very form of the original proposal drafted by himself.

Barton claimed that the matter had not had as full a discussion as it should have had at Adelaide. He proposed to limit the right to acquire a right to vote, not only to the period ending with the institution of a Federal Franchise, but also to the period ending with the establishment of the Commonwealth. Further the State law under which such a right was acquired would still need to be in force at the date of the commencement of the Commonwealth. Such proposal was contrary to the proposal originally proposed by William Holder, and adopted in Adelaide, by which it was intended that protection was to be given to a right to vote acquired under State law and still existing up to the time when **the Federal Parliament enacted a Federal Franchise.**

It had at last dawned on Barton that his own draft of Holder's proposal would mean that, after the Federal Parliament enacted a federal franchise, a State could alter the law of the Commonwealth by legislating a different franchise for its Lower House.

Holder was rightly annoyed that his original proposal could come up again for debate because of Barton's misconception, after he and others considered that the matter had been clearly settled at the Adelaide Session.

I think this clause was put in because of a motion I moved in the Adelaide Convention, and I regret exceedingly that, as the matter was fully discussed there, and this very issue we are now debating was raised and deliberately provided for, the question should be resuscitated now. Not at the instance of a private member, but at the instance of the leader of the Convention, we have here an effort made to upset the decision which was come to in Adelaide. I protest against this course of procedure, and I hope the Convention will stand by what it did in Adelaide.<sup>26</sup>

There is no doubt that what the Convention did in Adelaide was to adopt the proposal put forward by Holder, which clearly intended to limit the right to acquire a right to vote under a State law to a right acquired **before the Commonwealth Parliament enacted a federal franchise.**

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<sup>26</sup> *Ibid.*, p.1842.

That there was no doubt about this position was made doubly clear by the answer given by Holder to a question asked by William McMillan:

Mr McMillan.—Did not we give up to the Federal Parliament the right of the states to determine the suffrage?

Mr Holder.—As soon as the Federal Parliament moved, not before.<sup>27</sup>

If the honorable member (Mr McMillan) will look at the debates, he will find that this particular matter was raised at Adelaide, and **it was deliberately determined that the power of a state to extend its franchise would be protected till the Federal Parliament took action.**<sup>28</sup>

Holder was very much put out by Barton's attempt to water down the effect of his original proposal. He argued that a deliberate decision had been taken in Adelaide, and he hoped that it would not be upset. He again objected to Barton raising the whole matter afresh.

I do not like the idea of the special weight and influence which attaches to his position being cast, without the request of a single honorable member, so far as I know, against the decision so deliberately arrived at, and so consistently arrived at.<sup>29</sup>

Nicholas John Brown (Tasmania) taxed Holder with his attack on Edmund Barton for bringing in his amendment. Holder replied:

I did not intend to make any hostile reference to the honorable and learned member's action; but the amendment nearly slipped through as a draftsman's amendment.<sup>30</sup>

Holder was strongly supported, in his recapitulation of what had been determined at Adelaide, by Henry Bournes Higgins.

I should like to remind my honorable friend (Mr McMillan) of what took place at Adelaide. If he looks at the report of the proceedings of the Convention there, page 732, he will see that Mr Holder clearly expressed his views in the following words:

What I wish is that these rights should be preserved which have been **acquired up to the time that the Commonwealth makes its franchise.**<sup>31</sup>

McMillan replied that he did not doubt the statement, but he did doubt the effect of the vote on the division. Higgins rejoined that the statement had been made just before the division was taken, which it was.

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<sup>27</sup> *Ibid.*, p.1843.

<sup>28</sup> *Ibid.*, p.1844. Emphasis added.

<sup>29</sup> *Ibid.*, p.1844.

<sup>30</sup> *Ibid.*, p.1847.

<sup>31</sup> *Ibid.*, p.1845. Emphasis added.



Holder also referred to a discussion, which had taken place in Adelaide on 22 April 1897, following a discussion of the provision, in the same section, relating to the principle of 'one man one vote.' Edmund Barton had referred to the amendment, which had been carried "at the instance of my hon. friend Mr Holder". This was the clause being raised again by Barton on 3 March 1898, in the form of s.44A. On 22 April 1897, at Adelaide, Barton claimed that some members, who voted for the clause, which was to give effect to Frederick William Holder's amendment, did not appreciate that this clause permitted the acquisition of a right to vote for the Federal Parliament, if a State expanded its electoral qualifications. To overcome this alleged confusion, Barton had proposed an amendment which limited the protection for those, who were qualified to vote for the lower House of a State, to those who had this right as at the establishment of the Commonwealth. This would clearly cut down considerably the Holder amendment, which had been passed on 15 April 1897, and which entitled a person to protection who acquired a right to vote up to the time when the Commonwealth Parliament acted to introduce a federal franchise. Barton argued that the right should be confined to the date of the establishment of the Commonwealth because, whilst no-one wanted to interfere with the adult suffrage of South Australia, it was the right of the Commonwealth to make such a uniform suffrage "as would not compel it to grant every extension that should be wilfully and captiously made by any State." Barton claimed that, as Holder had expressed his amendment on 15 April 1897, he had endeavoured to carry it out. Unless Holder's clear statement of his intention is added as a gloss to the form drafted by Barton, that form did not carry out Holder's intention. In arguing the necessity for his amendment, at the Melbourne Session, fixing the possession of the right to vote at the date of the establishment of the Commonwealth, Barton stated that, under the clause as passed on 15 April 1897, a person who had the right to vote at the establishment of the Commonwealth, but whose vote had been taken away by the State, could not be prevented by the Commonwealth from voting at Commonwealth elections. Holder said he had no objection to accepting the words suggested by Barton, provided that any withdrawal of any franchise by the State shall have equal effect in the Commonwealth sphere. He again restated his position on the whole matter:

the right of the State to alter the franchise continues not up to the time of the formation of the Commonwealth, but up to the time that the Federal Parliament frames a franchise, and I want all the rights granted up to that time preserved in the future.

I want the States to have their rights with regards to the franchise unimpaired up to the day when the federal franchise is indicated, and that whatever franchise shall be at that date it shall be preserved, and so that no person having a right up to that date shall have it taken from him, and that this shall apply not only to South Australia but also to other colonies who may widen their franchise before a federal franchise is provided.<sup>32</sup>

Holder could not be persuaded that Barton's proposed amendment carried out this intention. He was quite clear that his amendment, agreed to in Adelaide, operated to stop the power of the State to grant a permanent franchise after the federal authority acted to frame a federal franchise:

I want the right of the state Parliament to be protected up to the moment when the Federal Parliament moves. We have done that with everything else.<sup>33</sup>

Henry Bournes Higgins suggested that the words "at the time Parliament provides the franchise" should be added to clear the whole matter up. At this point, it is clear that Higgins did not fully understand what Holder was so clearly advancing. He thought that Holder was saying that, if a uniform franchise was adopted by the Commonwealth, he wanted to compel the Federal Parliament to adopt any broader franchise which the States may enact. Kingston agreed with Holder that this was not what he wanted. Higgins then suggested that the words, "existing at the time when the Parliament makes provision for the franchise" be substituted, in Barton's amendment, for the words, "existing at the establishment of the Commonwealth."

Holder rightly said that this went back to the very provision which he had moved, and had been already accepted. When Barton's amendment was tested, it was rejected without a division. Holder then moved an amendment to add to the provision already passed on 15 April the words, "whilst the qualification continues."

This amendment was agreed to without a division. It took care of the objection raised by Barton that, on the Clause as already adopted, a person could have preserved a right to vote which had in fact been removed by the subsequent action of the State Parliament. This was the final form in which the Clause stood after the Adelaide Session of the Convention.

After further discussion on the matter raised again by Edmund Barton, Isaac Isaacs sought specifically to clarify the original Holder proposal, so that it would read:

No elector who has at the establishment of the Commonwealth, or who afterwards **and before the Parliament prescribes the qualification of electors for the Houses of**

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<sup>32</sup> *Convention Debates*, Melbourne, 1898, p.1195.

<sup>33</sup> *Convention Debates*, Melbourne, 1898, p.1843.

**Parliament** acquires a right to vote at elections for the more numerous House of the Parliament of a State, shall, whilst the qualification continues, be prevented by any law of the Commonwealth from exercising such right at elections for either House of the Parliament.”

William McMillan thought that this was really the same as the original Holder provision. Isaacs pointed out that it took away the objection that the Holder provision contained an “indefinite power in the hands of the states to constantly enlarge the franchise.”

Isaacs concluded by saying that he supported the clause as it stood, rather than have it cut down by the Barton suggestion. He commended his suggestions to the Drafting Committee.

The only other matter of substance, which was concluded in relation to the clause, was the agreement that the section should be confined to adult persons. As a matter of procedure, it needed Barton to withdraw his amendment before this alteration could be accepted.

The terms under which Barton withdrew his amendment make it quite clear that the Holder interpretation was explicitly accepted. His comment on the introduction of the elector’s requirement to be adult makes this abundantly clear.

The suggested amendment would simply go to this extent: That if the Parliament of the Commonwealth wish to make a uniform suffrage, it would be of necessity that that suffrage should be an adult suffrage—that is to say, that it should include womanhood suffrage— and that, **until the Parliament of the Commonwealth so legislated, the existing legislation of any colony would be preserved, together with such extension, but not beyond adult suffrage, as might be established.** I think on the whole I might consent to that amendment, I therefore withdraw my own amendment and accept this.<sup>34</sup>

It was after this withdrawal that the section amended by the insertion of “adult” was finally passed.

It should be remembered that there were only three distinct propositions, which were under consideration in relation to the section.

1. That adult suffrage should be enshrined in the Constitution itself.
2. The Holder proposal that the States could extend their franchise up to the time when the Commonwealth Parliament legislated to fix a Federal Franchise.
3. The Barton proposal that qualifications to vote under State laws should be the qualification existing at the time of the establishment of the Commonwealth and not thereafter.

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<sup>34</sup> *Ibid.*, p.1853.

**There was no room at all for any view that it was intended to give the States a continuing right to affect the Federal Franchise by extending their own franchise for their Lower Houses, after the Commonwealth Parliament enacted a Federal Franchise. All sides to the debate on this section affirmatively denied such intention, despite the fact that a literal reading of the unqualified word “acquires” might support such an interpretation.**

The very problem foreseen by Barton, in relation to the possibility of a State fixing a lower age limit for voting eligibility, did occur in 1972. In 1971 South Australia, by an amendment to the Constitution Act of that State, a minimum age of 18 years for voting at that State’s elections had been prescribed. It was claimed that this change entitled persons over the age of 18 years in South Australia to vote at a Federal election, despite the higher age prescribed by the Commonwealth Legislation. The High Court rejected this claim on the basis that s.41 only applied to adult persons, and that it applied only to persons who were adults within the meaning of the term in 1900, that is, a person over the age of 21 years.<sup>35</sup>

The interpretation of s.41 has led to a degree of divergence of opinion on the High Court, in particular in relation to the words:

who has or acquires a right to vote.

This question was discussed, but was not determined, in *King’s case*. However, Menzies J. specifically rejected the view, expressed by Quick and Garran, that the provision applied only to persons who had acquired a right to vote by State laws at some time after the establishment of the Commonwealth, and before the enactment of a Federal franchise by the Commonwealth Parliament. In his opinion s.41:

was not a provision to make temporary arrangement for the period between the establishment of the Constitution and the making of Commonwealth laws.<sup>36</sup>

Gibbs J. who, like the other members of the majority, found it was unnecessary to decide the point, said that he found the Quick and Garran view “far from clearly correct.”<sup>37</sup>

The issue emerged again in 1983, when the High Court did deal with the question, which arose because the writs for the election had been issued on the same day as the Federal Parliament had been dissolved, and the claimants had not enrolled before 6pm on that day. Three of the claimants were over the age of 21 years, but one claimant, Ms Walters, was 18 years of age.

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<sup>35</sup> *King v Jones*, (1972) 128 CLR 221.

<sup>36</sup> *Ibid.*, p.246.

<sup>37</sup> *Ibid.*, p.259.

The Court (including Gibbs C.J.), with the exception of Murphy J., held that the provision was limited to those people acquiring a right to vote after the commencement of the Commonwealth, but before the Commonwealth Parliament legislated to provide a franchise for the purpose of Federal elections.<sup>38</sup>

The Chief Justice, Sir Harry Gibbs, together with Mason and Wilson J.J., came to this conclusion on the basis of legal principles of construction. They did refer to the various alternatives raised by Quick and Garran, and accepted the one which supported the limited interpretation of the section. The only reference they made to the intentions of the framers of the Constitution was in the following answer to the contention that:

The Commonwealth law could in effect be amended by any State law which conferred a more liberal franchise. In other words, any State could, unilaterally, alter the Commonwealth franchise in a way which discriminated in favour of its own citizens. It is impossible to suppose that results of this kind were intended.<sup>39</sup>

If it is “impossible to suppose that results of this kind were intended,” it might well be asked why was it regarded as illegitimate to seek out positively what those intentions were? Whilst stating negatively that such an interpretation could not have been intended, they made no attempt to ascertain what the positive intention was. No reference, of course, was made to the Convention Debates, there being still a divergence of view as to the propriety, or utility, of consulting them in aid of constitutional interpretation.

Brennan, Deane, and Dawson J.J. gave a separate Judgment in which they concluded that:

Pending the enactment of a statutory franchise, the laws of the respective States which conferred the right to vote at elections of the more numerous House of the State Parliament were effective, by force of ss 30 and 8, to create a right to vote at elections for either House of the Commonwealth Parliament. That right was protected by s.41 ...Though it is right to see s.41 as a constitutional guarantee of the right to vote, the means by which that guarantee is secured is itself definitive of the extent of the guarantee. ...s.41 does not in terms confer a right to vote. If a right to vote is claimed by an elector in reliance upon the statutory franchise now prescribed by the laws of the Commonwealth, those laws are definitive of the right and s.41 has no work to do.<sup>40</sup>

They refer to the contention that s.41 entitled a State to extend the franchise after the time when the Commonwealth Parliament created a Federal Franchise.

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<sup>38</sup> *R. v Pearson; Ex parte Sipka*, (1983) 152 CLR 254.

<sup>39</sup> *Ibid.*, p.262.

<sup>40</sup> *Ibid.*, p. 279.

Such an operation of s.41, though surprising and unsatisfactory, might be warranted if the text of the Constitution demanded it. But that operation is wholly unsupported by the terms of s.41. It is impermissible to construe a provision relating to the prevention of the exercise of a right to vote as the source of the right itself... The purpose of s.41 is clear from its constitutional context: it was to ensure that those who enjoyed the constitutional franchise should not lose it when the statutory franchise was enacted.<sup>41</sup>

Again this shows a refusal to seek out what the framers understood the intention of the section to be. Their final conclusion was:

It follows, of course, that the practical effect of s.41 is spent. Most of the electors who acquired a right to vote at federal elections under ss.30 and 8 of the Constitution would have died. Since 12 June 1902, when the Commonwealth Franchise Act came into force, no person has acquired a right to vote the exercise of which is protected by s.41. None of the present applicants is a person to whom s. 41 applies.<sup>42</sup>

Again, the Justices saw no reason to refer to the Convention Debates in order to arrive at their conclusion.

On the other hand, Murphy J. did seek support for his contrary view by reference to these Debates. His Judgment must be analyzed more closely to determine whether, or not, the conclusions to which he came have the support in those Debates which he claimed, and also what was the nature of the use to which he put the Convention Debates.

Murphy J. held that Ms Walters was an “adult person,” and that all four claimants were protected by the provisions of s.41 of the Constitution, and were thereby entitled to vote, notwithstanding the fact that they had not enrolled before 6pm on the day of the issue of the writs. He noted that the respondents argued that the guarantee found in Section 41 was exhausted by the year 1902 (the date of the Commonwealth Franchise Act 1902), except in the case of persons who would be aged over 100 years. He stated that the concern before the establishment of the Commonwealth was that the women of South Australia (who already held the right to vote for the more numerous House in that State) should not be deprived of their right to vote in Federal Elections, if uniform Commonwealth franchise legislation did not include women. His Honour reasoned that the concern was not limited to women’s rights, neither was the guarantee written into s.41.

His Honour further argued that the restrictive interpretation of Section 41 did not do justice to the Convention Debates.

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<sup>41</sup> *Ibid.*, p.280.

<sup>42</sup> *Ibid.*, p.280.

Quick and Garran favoured a restricted interpretation of s.41 based on their account of the Convention Debates and this was followed by other early scholars (See Harrison Moore (The Constitution of the Commonwealth (1902) and Solicitor-General Garran (Opinions of the Attorneys-General of the Commonwealth of Australia (1981), p. 685). However, Quick and Garran's account of the Debates in this respect are not entirely satisfactory.<sup>43</sup>

Murphy J. then went on to refer to that portion of the Convention Debates on the particular section, which occurred on 3 March 1898, which has been examined in detail earlier in this Chapter. He noted the fears raised by Edmund Barton that the section, as it then existed, could authorize the alteration of the Federal Franchise, when enacted, by changes to the franchise in any of the States. He then quoted the amendment, proposed by Isaac Isaacs, to limit such a continuing right to the period ending on the date when the Federal Parliament enacted a Federal Franchise. In support of his view that s.41 had an ongoing and continuing effect, Murphy J. relied on the fact that Isaacs' proposal was never adopted. He then criticized the reasoning of Quick and Garran in arguing for a restricted view of the Section.

Unfortunately Quick and Garran in The Annotated Constitution of the Australian Commonwealth do not disclose fully these references to the continuing operation of the clause and although suggesting that there were several possible interpretations of s.41 preferred that which in fact reflects the unadopted proposal of Mr Isaacs.<sup>44</sup>

In the light of the detailed analysis of the whole debate in relation to s.41, not only, at the Melbourne Session in March 1898, but also at the Adelaide Session, where the proposal was first introduced by Frederick William Holder, a number of positive conclusions can be drawn in relation to the approach of Murphy J.

Whilst purporting to rely on the events at the Constitutional Convention of 1897-8, it is clear that Murphy J. was not really relying on that source to ascertain the intentions of the framers of the Constitution in relation to Section 41 of the Constitution. He was going no further than the High Court had done in earlier cases by relying on the drafting history of the section. He begged the question as to the meaning of the section, as understood by the delegates, before Isaacs offered his amendment designed to clarify its meaning. He went no further than that part of the record of the Debates which appeared on page 1841 of the Convention Debates of the Melbourne Session of 1898.

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<sup>43</sup> *Ibid.*, p.272.

<sup>44</sup> *Ibid.*, p.272. Emphasis added.

The part of the Convention record, upon which he relied, was only a small fraction of the debate which took place, not only, in Melbourne, but also, earlier in Adelaide.

Murphy J. did not undertake a full analysis of the whole debate, and the conclusion to which he came is not supported by this debate.

The reliance placed by Murphy J. upon the fact that the proposal of Isaacs J. was not adopted, shows that he confined himself solely to the drafting history of the section, without any regard to the full reasoning disclosed by the full debate. The approach of the Court, in looking at the drafting history of a section, by its nature excludes any real attempt to look at the transcript of the Debate to ascertain the true intent of the framers of the particular section. In this case, what he considered as the drafting history of the section gives a totally false account of the intentions of the framers.

The full analysis of the Debates, detailed earlier, demonstrates that the conclusion of Murphy J. is incorrect. There never was in the whole of the Debates any intention on the part of any of the delegates to give State Parliaments a power of altering the Federal Franchise, after it was enacted, by an alteration of the State franchise law. The section was, in fact, a sunset clause, which ceased to have effect from the death of the last adult who had a right to vote for the Federal Houses of Parliament by reason of the possession of a right to vote for the Lower House of any State, prior to the enactment of the Federal Franchise in 1902.

In final support of his view that an unrestricted interpretation should be given to s.41, Murphy J. relied on the views of other Judges in other cases who took a similar view, and also on the opinions of “more recent scholars,” who were of the same opinion, in particular Professor Sawyer, Solicitor-General Bailey, and Professor Lane.

It is no part of this discussion to enter into the legal reasoning of these scholars, which was not based on an analysis of the intentions of the framers of the Constitution disclosed by the Convention Debates.

The conclusion advanced here is that it was not the intention of the framers of the Constitution that s.41 should lead to the result that a change in the franchise of any State should, after the enactment of the Federal Franchise, be capable of altering the entitlement to vote of persons covered by the Federal Franchise. It was limited to protect the rights of those people who had the right to vote for the Lower House of a State, as at the establishment of the Commonwealth, so long as that right continued in the State, or who acquired such a right to vote before the enactment of the Federal Franchise.

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## ABORIGINES UNDER THE CONSTITUTION

### THE SPECIAL LAWS POWER s.51 (xxvi)

In a referendum conducted in 1967, certain changes were sought in relation to two sections of the Commonwealth Constitution, in which aborigines and members of the aboriginal race were mentioned – s.51(xxvi) and s.127.

S.51(xxvi) of the Constitution provided:

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

(xxvi) the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws;

The amendment to the Constitution considered in the referendum in 1967 sought to strike out the words “other than the aboriginal race in any State,” where they appeared in the section.

### ARGUMENTS DURING THE 1967 REFERENDUM

Owing to the fact that none of the Parliamentary Parties opposed the proposed change, no official “No” case was circulated to the electors. The only case presented to the electors was the “Yes” case.

The most vocal group advocating a “Yes” vote was the Federal Council for Aboriginal and Torres Strait Islanders (the precursor of the present ATSIC). This group claimed that the two major arguments why the words of exclusion should be deleted from s.51(xxvi) were:

First, that the Commonwealth had no power to benefit aborigines by legislation,

Second, that the change would give such power to the Commonwealth, and that “the assumption of legislative power in respect of aboriginal affairs would result in beneficial legislation.”<sup>1</sup>

E.G. Whitlam, the Leader of the Labor Opposition in the House of Representatives, claimed that “excision of the words from s.51(xxvi) would mean that “members of this Parliament will be able for the first time to do something for aboriginals.”<sup>2</sup>

The reasoning supporting these two major arguments was overstated and misleading. It was claimed that the exclusion of aborigines from s.51(xxvi) deprived the Commonwealth of the power to make **beneficial laws** with respect to aborigines, and that, consequently, they were the subject of discrimination under the Constitution. This section gave the Commonwealth the power to legislate in respect to “the people of any race, other than the aboriginal race in any State for whom it was deemed necessary to make special laws.”

The underlying assumption of this reasoning was that the term “special laws” meant laws making special **beneficial provisions** in respect of the people covered by the power, and that the exclusion of the aboriginal race from that provision was a clear discrimination, and that the removal of the words from the placitum would give the Commonwealth Parliament the power to make special beneficial laws for aborigines.

The concept of “special laws” in the minds of the framers of the Constitution was not a concept of “special beneficial laws.” It was rather a concept of “special restrictive laws” from which it was desired to relieve the Aborigines who were not one of the races for whom the provision was designed. Therefore, it is clear that the proposal put to the referendum was unnecessary for the purpose of removing a supposed disability from the aborigines.

On a literal reading, the constitutional amendment to s.51(xxvi) made in 1967 gave the Commonwealth a power, over and above the general power, within the heads of Commonwealth power, to make special laws for all citizens who could be classified as being members of a race in need of special legislation. This was certainly not the intention of the framers of the Constitution.

The Commonwealth had power, within the scope of the matters vested in it by s.51 of the Constitution, to legislate for all Australians, be they Aborigines or otherwise, as individuals. The races in contemplation under s.51(xxvi) were those who were immigrants. Reference to the Convention Debates establish that the “special laws” which were contemplated were not “beneficial laws.” If this intention were carried into the amended s.51(xxvi), it would mean that the amendment would give the Commonwealth a wide power of making, where it considered it necessary, restrictive laws in respect of any race, including the aboriginal race.

In 1891, when it was still considered that New Zealand might join the Federation, the Maori race, as well as the Aboriginal race, was excluded from s.51(xxvi) (which was then part of s.53). After the Convention of 1897-8 the exception of the Maori race became unnecessary when New Zealand did not join the federation.

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<sup>1</sup> *The Case for Yes. The 1967 Referendum*. Mitchell Library Q.323, 1191/11.

<sup>2</sup> *Ibid.*, p.110.

Apart from the supporters of the 1967 referendum proposals, it must be conceded that some eminent legal academics and commentators assert that the special laws power at all times included a power to make beneficial as well as restrictive laws. In particular, Professor Sawyer supports this view in a lengthy article in the *Federal Law Review*.<sup>3</sup> He agrees that an extensive analysis of secondary sources shows that restrictive laws were certainly in the minds of the framers of the Constitution.

The secondary sources mentioned above, and in particular Quick and Garran and Harrison Moore, make it clear that (xxvi) was intended to enable the Commonwealth to pass the sort of laws which before 1900 had been passed by many States concerning 'the Indian, Afghan and Syrian hawkers; the Chinese miners, laundrymen, market gardeners, and furniture manufacturers; the Japanese settlers and Kanaka plantation labourers of Queensland and Western Australia. Such laws were designed 'to localise them within defined areas, to restrict their migration, to confine them to certain occupations, or to give them special protection and secure their return after a certain period to the country whence they came.'<sup>4</sup>

Professor Sawyer in discussing the United States case of *Yick Wo v Hopkins* doubted the validity of the claim that the arbitrary licensing power in the American case could be validly made under a Federal law. However, he sees that there would be a way of enacting such a law under s.51(xxvi).

If the *policy* by which the San Francisco licensing power was *administered* — no Chinese to conduct a laundry—were specifically embodied in a Commonwealth law, then perhaps this might be valid under (xxvi). But plainly a general Commonwealth law requiring laundries to be licensed would be invalid in peacetime, as lacking any head of power under which it could be brought, and the method of its administration would be irrelevant to the question of characterisation.<sup>5</sup>

Sawyer argues that the power encompassed both beneficial and non-beneficial laws. In support of this position he relied on the fact that some of the earliest Constitutional Committee drafts in 1891 did not have the exclusion clause. However, this omission was soon remedied, and the form which went before the Convention for debate had the exclusion clause clearly within it. Professor Sawyer agrees that the origin of the section was attributable to Sir Samuel Griffith, and the original concept had nothing to do with legislation referable to aborigines.

Professor Sawyer makes an assertion to the effect that the power was equally intended to be applied to people who were born in the colony.

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<sup>3</sup> "The Australian Constitution and the Australian Aborigine," Geoffrey Sawyer, (1996-7) 2 *Federal Law Review*, p.17.

<sup>4</sup> *Ibid.*, p.20.

<sup>5</sup> Sawyer, Op. Cit., p.21.

In 1898 at Melbourne, Forrest did not want the power to be given at all, and Bernard Wise shrewdly suggested that Griffith's purpose would be met if the power was confined to circumstances in which the Commonwealth had made an immigration law on the lines indicated by Griffith. The discussion on this occasion tended to be in terms of 'aliens', but Barton showed clearly that the power was not confined to aliens in any legal sense; the persons coming under it might well be British subjects. Nor need they be migrants; they could well be born in Australia.<sup>6</sup>

The comment that 'they could well be born in Australia' is not substantiated by reference to any positive statement to this effect in the Convention Debates. Such a view may be implied from statements to the effect that the section was to apply to certain races who are present in the Commonwealth when the Commonwealth was established. At the Melbourne Session of the Convention of 1897-8 Isaac Isaacs argued that the section applied to what were considered by many to be "inferior races":

who may be in the Commonwealth at the time it is brought into existence, or who may under the laws of the Commonwealth regulating aliens come into it.<sup>7</sup>

However, the significant fact is that the groups which were in contemplation were migrant groups who differed culturally and otherwise from the local population, and the concern of that local population was their behaviour after they had entered the country. Whatever reliance Sawyer places on this last statement, his final conclusion is consistent with the matters urged in the present context. It does not detract from the contention that the prime purpose was to give the Commonwealth power to enact the same type of restrictive laws in respect of immigrants after they had arrived as had already been enacted by the separate colonies. Despite his view that the power also had a beneficial potential, he still recognises its equally restrictive potential.

The exclusion of aborigines may not necessarily have been against their interests in accordance with the ideas of the time; while they might have lost the possibility of Commonwealth laws for their protection and advancement, so far as such laws had to depend on (xxvi), they were also **saved from the sort of laws against their interests which were uppermost in the minds of the delegates as likely to be passed pursuant to the placitum.**<sup>8</sup>

This opinion would certainly open up the argument that, once the exclusion of aborigines was removed, the Commonwealth could pass special laws which were against the interests of aborigines, as well as those which were in their interests. Electoral laws adverse to the

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<sup>6</sup> *Ibid.*, p.23.

<sup>7</sup> *Convention Debates*, Melbourne, 1898, p.228.

<sup>8</sup> *Ibid.*, p.23. Emphasis added.

rights of Aborigines had been passed in 1902, but these did not depend on the race power. In 1891 Sir Samuel Griffith took the view that a law restricting the franchise to British subjects would not be a law under the special laws clause.

I do not think that an electoral law saying that only British subjects shall vote can be said to be a special law applicable to the affairs of any race for whom it is considered necessary to make special laws.<sup>9</sup>

The Commonwealth had plenary power to enact laws dealing with the Federal Franchise.

All Aborigines were granted the vote in 1962 by a Federal Franchise Act, but this provision did not depend on the special laws power. Professor Sawyer fairly concedes that, in relation both to s.51(xxvi) and s.127, “an exaggerated negative importance has been attached to these sections.”<sup>10</sup>

Despite his view that there was no doubt that “beneficial laws” could be enacted under s.51(xxvi), Professor Sawyer expressed some concern as to the method used to ensure that the Commonwealth had such power by removing the words of exclusion from the section.

Having regard to the dubious origins of the section, and the **dangerous potentialities of adverse discriminatory treatment which it contains, the complete repeal of the section would seem preferable to any amendment intended to extend its possible benefits to the aborigines.**<sup>11</sup>

In the emotionally charged atmosphere of the 1967 referendum this caution was ignored. Professor Sawyer added a more extensive opinion to this caution.

There is much to be said for the Commonwealth taking over complete responsibility for the welfare of the aboriginal people, since it is already responsible for the largest single group— in Northern Territory— and is less likely to be inhibited by local built-in prejudices against the aboriginal people that exist in several areas of State electoral representation, government and administration. But the Commonwealth is not well placed to handle the integration of the aborigines, where that is the main object of policy, and since 1961 there has been a trend towards co-operative federalism in this sphere, which might be better than sole action by any government. Lacking the support of any Commission or Committee report, and having regard to the formidable difficulty of explaining the issues, including the meaning of section 51(xxvi) to an Australia-wide electorate, it would still seem best to leave these issues alone.<sup>12</sup>

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<sup>9</sup> *Convention Debates*, Sydney, 1891, p.701.

<sup>10</sup> Sawyer, *Op. Cit.*, p.18.

<sup>11</sup> *Ibid.*, p.35. Emphasis added.

<sup>12</sup> *Ibid.*, p.35.

## Origin of Provision for Special Laws for Certain Races

The original form of this clause had been included by Sir Samuel Griffith in a scheme he proposed for a Queensland federation in 1890. It arose out of a movement for the separation of the Northern part of Queensland from the rest of the colony. In 1887 and in 1890 Hugh Murtagh Macrossan (Townsville) brought forward a motion affirming the desirability of the separation of the north from the south of Queensland. In 1890 Sir Samuel Griffith moved an amendment to this motion in which he sought a Queensland federation. The whole matter was stood over for want of support from the Southern members.

A year later on 15 September 1891, after the conclusion of the 1891 Constitutional Convention, Sir Samuel Griffith moved the Lower House of the Queensland Parliament to sit as a Committee to consider the following motion to establish a Queensland federation:

That it would be to the advantage of the Colony to constitute Southern, Central, and Northern Districts of Queensland as separate and autonomous provinces with separate legislatures... but so that matters of general concern, including the administration of the public debt should remain under the control of one legislative and executive authority for the united provinces... until the establishment of an Australian Federal Government.<sup>13</sup>

Sir Samuel said that the substance of this Motion had been before the House for over one year. In the list of powers he considered should be allocated to the central government was the following:

26. Affairs of people of any race with respect to whom it is necessary to make special laws not applicable to the general community, but not including the aboriginal native race.

Dealing with a reference by Sir Samuel Griffith to a vote against separation, A. Rutledge, during a lengthy debate, commented:

But the Hon. Member did not inform the House that on that occasion the feeling which dominated the minds of the people of Charters Towers was the fear that in the event of territorial separation taking place, or the new colony as it would then be, would be inundated by black labour.<sup>14</sup>

The relationship of this provision (No 26 above) to the question of the control of the entry of black labour into Northern Queensland was quite clear. It originated in Griffith's amendments to Macrossan's Motion in 1890. It was then incorporated in the 1891 Draft Commonwealth Constitution Bill, including the provision that the power should be one which was exclusive to the Federal Parliament. It was reinforced when Sir Samuel Griffith

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<sup>13</sup> *Queensland Parliamentary Debates*, 1891, Vol. LXIV, p.1045.

<sup>14</sup> *Queensland Parliamentary Debates*, 1891, Vol. LXIV, p.1045.

in 1892 introduced into the Queensland Parliament his Queensland Constitution Bill, which set out in detail the proposed division of Queensland into three provinces, and their union in a Queensland Federation. Under s.63 of this Bill the central government would, inter alia, have exclusive power to make special laws not applicable to the general community in respect of the affairs of any race with respect to whom it was necessary to make special laws.

Griffith explained the main outlines of the Bill:

It is a Bill to radically alter the Constitution of the Colony — to substitute for the present Constitution with its Parliament consisting of a Legislative Council and Legislative Assembly an entirely different Constitution — that is, three autonomous provinces, with a federation of those three provinces, and one central legislature and one Governor. ...it is framed to a great extent upon the lines of the Commonwealth Bill adopted by the Convention in Sydney last year.<sup>15</sup>

In support of his Bill, Sir Samuel Griffith advanced two major arguments.

First, he argued that separation movements had developed strongly in north Queensland and central Queensland over the previous twenty years. Queensland governments, in which members from the south predominated, feared that separation of the north of Queensland would result in the importation of huge quantities of Kanakas, or “tropical labour.” One of the main objects of Griffith’s 1892 Bill was to head off this possibility by creating a federation of three provinces.

Second, he referred to the various sections of the proposed s.63 of the Bill:

The first deals with the affairs of the people of any race with respect to whom it is deemed necessary to make special laws not applicable to the general community, but not including aboriginals. I have always maintained, and I think it will be maintained by all who take any part in this discussion, that it is very desirable that the power of dealing with races, with respect to whom it is necessary to make special laws, should be in the hands of the general government, and not in the hands of the legislatures of the particular provinces.<sup>16</sup>

Griffith explained the purpose of this provision:

Hon. Members who objected to territorial separation on the ground that the North might introduce coloured labour will see that the matter of alien races, which has so long been a bogey to many persons, is by this Bill to be dealt with by the central government; so that nothing can be done by the North against the expressed wish and desire of the other provinces.<sup>17</sup>

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<sup>15</sup> *Queensland Parliamentary Debates*, 1892, Vol. LXC VII, p.794.

<sup>16</sup> *Queensland Parliamentary Debates*, Vol LXVII 1892 p.794.

<sup>17</sup> *Queensland Parliamentary Debates*, Volume LXVII, 1892 p.794.

Doubt was thrown upon the necessity for any such clause as an exclusive aspect of the powers of the proposed central government. In the light of the problem which has subsequently arisen from the 1967 Constitutional amendments, and of many of the arguments later put in the 1897-9 Convention, this criticism may well have been merited.

### Races For Whom Special Laws Were Considered Necessary

In elucidating the intentions of the framers of the Constitution in relation to the **special laws power**, it is important to determine who were the races for whom the framers considered it might be necessary to make special laws, and why it was so necessary. The concern behind Griffith's proposal, both in 1891 and 1892, was not solely limited to the Kanakas, but also involved concern about the activities of Chinese and other Asiatics. They were all aliens in more than one sense. They were aliens because they were coming into Australia from abroad. They were aliens because they were coming from cultures which were entirely different to what was considered to be the local culture, that arising from what Sir Henry Parkes described as the "crimson thread of kinship"<sup>18</sup> which bound all the colonists together. In short these other races were aliens in the sense that many aspects of their cultural behaviour and values were alien to values dearly held by Australian colonists.

The original Griffith proposal for the **special laws power** which was carried into s.53 of the Draft Constitution bill of 1891 contained the words "special laws not applicable to the general community." These words, were dropped during the Convention of 1897-8 because of objections by Isaac Isaacs that the words were ambiguous. It was not clear whether or not the words meant the general community of the Commonwealth as a whole. The omission of these words, however, did not alter the general nature of what was intended to be covered by the term "special laws," viz, that they should be laws which did not apply to everyone in the community. Isaacs also argued successfully that there was no need to make the special laws power exclusive to the Commonwealth Parliament, because it could only relate to Commonwealth laws, and would not affect the power of the States to legislate in the same field so far as it affected the interests of a particular State. He indicated that, if the intention of the section was to debar the States from legislating in the field he would oppose it. Isaacs pointed out that all the States had the power to enact such laws, and had done so. As instances of such "special laws," he mentioned factory legislation restrictive of Chinese, laws licensing hawkers restrictive of Afghans, and laws restricting the employment of Kanakas in some States.

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<sup>18</sup> Speech of Sir Henry Parkes at a banquet in the Queen's Hall of the Victorian Parliament on 6 February 1890. Quoted by La Nauze, *The Making of the Australian Constitution*, p.11.



Edmund Barton, the leader of the 1897-8 Convention, replied to these objections by saying that the section intended to extend the Commonwealth power over immigration and aliens so as to make them subject to special laws **after they arrived**. A number of delegates suggested it would be more appropriate to make the **special laws power** concurrent under s.52 (now s.51), and to rely on Section 109 to override inconsistent State legislation. Barton, however, raised a quite different matter in opposition to such suggestions:

However it becomes exclusive it is desirable because international relations may exist in relation to such races.<sup>19</sup>

### Question of Treaty Obligations and Special Laws for Certain Races

Bernard Ringrose Wise (New South Wales) wanted to restrict the **special laws power** to races “for whom laws have been passed by the Commonwealth in respect of their immigration into and emigration out of the Commonwealth.”<sup>20</sup> He intended this to make the relationship with the immigration power clear, so that it would leave “domestic control to the States” in such fields as the employment of Chinese. This view was supported by Alfred Deakin (MLA Victoria) by agreeing that the special laws power should be made concurrent. He argued that it would be unwise to vacate the local laws in respect of Chinese, Afghans and Kanakas on the establishment of the Commonwealth, which would be involved if the **special laws power** were made exclusive.

Edmund Barton again defended his position on the ground of the possibility of external relations being involved:

You may have the complication, if you do not insert a provision of this kind, of having the States continuing to legislate in respect of a matter in which they have no responsibility, while the external relations, the explanation of all these matters, and the responsibility for them to the Imperial Government will rest with the Commonwealth.<sup>21</sup>

Barton was mindful of the problem that arose in relation to the accession of the colonies to the Anglo-Japanese Trade Treaty of 1894, and when the renewal of that treaty came up for discussion. The Japanese Government had sought exemption from the effect of Australia’s policy of excluding non-white immigration in so far as it might restrict the free movement of Japanese businessmen in and about the colonies for purposes of trade, if the Colonies acceded to the Anglo-Japanese Treaty of 1894, and to the later Treaty on the same subject. The reason that the Anglo-Japanese Treaty was important was that Japan

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<sup>19</sup> *Convention Debates*, Melbourne, 27 January 1898, p.228.

<sup>20</sup> *Ibid.*, p.229.

<sup>21</sup> *Convention Debates*, Melbourne, 1898, p.232.

had passed a general tariff of a seriously restrictive nature applicable to all countries which had no commercial treaty with Japan. To avoid such restrictions it was necessary for the colonies to accede to the Anglo-Japanese Commercial Treaty of 1894, and any subsequent Treaty on the same subject. The United Kingdom was responsible, as the Treaty Making authority, for the enforcement of any undertakings given by the colonies as part of the renewal of the Trade Treaty with Japan, and the accession of the colonies to the Treaty. The Imperial Government was concerned to meet the complaints of the Japanese Government that the “White Australia” immigration restrictions of the colonial governments would restrict the movements of Japanese businessmen visiting the colonies for the purpose of trade. The Imperial Government had pressed the colonies to abandon their explicit ‘White Australia’ policies, and to frame any immigration restrictions in terms of the Natal Act, which made the main condition of entry a knowledge of the English language.

The difficulty was set out in a note dated 10 May 1897 from Francis Bertie to the Secretary of the Colonial Office:

As Mr Chamberlain is aware, the Japanese Government, in the negotiations which have recently taken place in regard to the adhesion of the Colonies to the Anglo-Japanese Commercial Treaty of 1894, have agreed to legislation by the Colonies for the exclusion of Japanese artisans and labourers, and I am to suggest that no bill should be confirmed which does not in one way or another provide for the exemption of Japanese merchants, tourists etc from the restrictions imposed upon Asiatics as regard to admission to the Colonies.<sup>22</sup>

The same file includes a Minute initialled by Joseph Chamberlain, in which the Colonial Secretary, noted the existence of treaties with countries like Borneo, Dominican Republic, Liberia, Morocco, Persia, Samoa, Tonga and others which applied to the Australian colonies and which guaranteed certain travel and residential rights to nationals of those countries. In supporting the use of the Natal Act as a model, the Colonial Secretary stated:

I have some doubt whether legislation excluding Japanese specifically, and not by some general test as the Natal law lays down, would not be a contravention of Art I and III of the Treaty, the protocol notwithstanding.<sup>23</sup>

The Protocol was the agreement that labourers and artisans could be excluded from entry without breaching the Treaty. Under this Protocol the Imperial government could not prevent legislation excluding Japanese labourers, but it was essential that the freedom of movement of Japanese businessmen should be secured.

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<sup>22</sup> C.O 418/4, Public Records Office, Kew, London.

<sup>23</sup> *Ibid.*, C.O. 418/4.

It was to meet these objections that Barton pressed for making the provision exclusive to the Commonwealth. By this means the Commonwealth would avoid complications of this sort:

Questions which relate to the whole body of the people, to the purity of race, to the preservation of the racial character of the white population are Commonwealth questions, and should be so exclusively.<sup>24</sup>

He saw no reason why the Commonwealth should have to wait until it had legislated with regard to the introduction of aliens, or of coloured races not being aliens, before it could deal with the affairs of those people of coloured race who are already settled in Australia:

But the very reason which makes the preservation of the continent as a continent to the Federation as a whole Federation so necessary as one of the powers is a reason that applies with just as much force to the affairs of the people of such races who have already been admitted and are at present in the commonwealth.<sup>25</sup>

A number of underlying themes emerged from the Debates. There was general appreciation that some States had more pressing problems in regard to the presence of and activities of certain groups or races which came from overseas. In the tropic areas of Australia, the use of black labour from the pacific islands was the main problem. In the more developed States, such as Victoria, the local population were concerned about the effect of significant numbers of Chinese artisans upon the economic prosperity of non-Chinese manufacturers and workers. In States where significant mining operations were proceeding after the discovery of gold, large numbers of Chinese miners had been attracted. In urban areas, the local population were disturbed by the presence and activities of hawkers and street sellers from Pakistan and Afghanistan.

The concern of the local population in all areas was that social tension would result from the continuous presence of these groups whose cultural background, values, and languages were totally “alien” and “foreign.” These concerns had occasionally resulted in violence such as that which occurred in anti-Chinese riots on the goldfields

There were strong feelings that coloured and Asian people should not be allowed to remain in Australia and should be deported. Where they were allowed to remain there was a demand that they should conform to local laws and customs, and as far as possible that they should “integrate” with the local community.<sup>26</sup> To enforce these demands, stringent

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<sup>24</sup> *Convention Debates*, 1898, Melbourne, p.232.

<sup>25</sup> *Convention Debates*, 1898, Melbourne, p.232.

<sup>26</sup> In a Memorandum dated 8 July 1897 Joseph Chamberlain, the Colonial Secretary, indicated that he was aware of the determination of the Premiers, which was shared by the colonies they represented, to “preserve unmistakably the European character of Australian Colonisation, and so set up a barrier once for all against the introduction into the population of the colonies of an element **incapable of assimilation** and at the same time capable of indefinite expansion.” He felt that there was force in the argument that unless the colonies were able to limit Asiatic immigration it would be impossible to avoid outbreaks of anti-colour riots such as happened in America, thereby damaging the relations of the colonies with Asiatic countries. *C.O. 318/4*, Public Records Office, Kew, London.

local laws and regulations had been enacted in a number of the colonies to govern the conditions which should be observed by those foreign groups who were permitted to remain.

Some of the laws on the gold fields and in industrial areas were so stringent that they acted, occasionally, as totally prohibitive of the activities considered to be unacceptable, and were suggestive that their real purpose was to induce the groups to leave Australia altogether.

From the viewpoint of organised Labor and Industry, perceived unfair competition was the motivating force towards these restrictive laws applicable to these foreign or alien groups, which were identified as races by reference to appearance, language, and customs.

### Residual Role of the States re Special laws power

The final outcome of the debate in the Convention of 1897-8 was that the need for a **special laws power** was confirmed but it was reduced to the terms of the present provision in the Constitution. By being placed in s.52 (now s.51), it was made a concurrent power, thereby preserving the right of the States to legislate until such times as the Federal Parliament exercised the **special laws power**.

It is quite clear that, in both the Conventions of 1891 and 1897-8, what the framers of the Constitution had in mind, when they used the term “special laws,” was legislation which would ensure that any persons admitted to the country would not act in any way that could be detrimental to the interests of the existing population. This legislation involved laws to prevent competition by cheap imported labour with local workers, laws to ensure that the conditions under which businesses, for example, Chinese Laundries and furniture factories, were conducted would conform to the conditions imposed on all local businesses, and laws to prevent, what were considered to be, undesirable practices on the gold fields by people whose cultural values were different from those of the local population.

The liberal contention of some delegates, that those coming into the country should be dealt with in the same way as local residents, was considered to be ineffective in dealing with people whose cultural values were so distinctly different. Even liberals and democrats expressed reservations about giving such races the right to vote.<sup>27</sup>

Additional light can be thrown on the meaning of the **special laws power** in the minds of the framers of the Constitution by considering the terms of the election program of George Reid, Premier of New South Wales, when he stood as a delegate to the 1897 Convention. In this program, he set out a list of points, which he considered were central to its deliberations. In Part VI, Powers of Parliament, he listed a number of points, the

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<sup>27</sup> See C.C. Kingston, *Convention Debates, Melbourne*, 1898, p.247.

relevant one for this discussion being No 7 - "Power over coloured races and immigration."<sup>28</sup> The coupling of the two subjects together shows that the **special laws power** was designed to enable the Commonwealth to legislate as to the conduct of immigrants after their admission to Australia, either as permitted aliens or settlers.

The exclusion of Maoris as well as aborigines in the 1891 Draft Constitution demonstrates the same point. Neither Maoris nor Aborigines were immigrants. There is nothing in the Debates at, either, the 1891 Convention, or the 1897 Convention, which would suggest that the framers of the Constitution had laws of a beneficial nature in mind. They were concerned to place any necessary restrictions upon new arrivals to ensure that they observed both the laws and customs of the community into which they were being admitted. They were mindful of the fact that many of the values accepted by society in Australia were not necessarily accepted by many of the races with which they were concerned when proposing to give to the Commonwealth Parliament powers, which were possessed by the federating colonies, to enact special laws not applicable to the general community, but applicable to particular groups recognised at the time as alien races who were entering the country. Special licensing laws were common in those of the States where there were significant numbers of Chinese, Afghan, Pakistani, Indian, and South Sea Island people.

Further insight into the reasoning behind the introduction of s.51(xxvi) can be obtained from the Report on the Conditions of the Chinese Population in Victoria in 1868 detailed in the Appendix.

None of the considerations raised in this Report were concerned with making beneficial provisions for alien races. On the contrary, it was contemplated that restrictive, and even penal, provisions should be made to protect local industrial conditions of work, and local cultural and social behaviour against people from alien cultures, who did not think and act in accordance with local social mores.

Such attitudes have been frowned upon in recent times under the influence of pronouncements by International Agencies. The Commissioner of Police in New South Wales was criticised in 1999 for linking certain types of drug, extortion, and immigration crimes to particular racial groups. The framers of the Constitution would not have blushed at the suggestion that special laws might be necessary particularly to combat the activities, for instance, of Chinese Triads, or Italian Mafiosi in organised criminal activities. They did

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<sup>28</sup> "The Outlook for Federation," by The Hon G.H. Reid, Premier of NSW, in *Review of Reviews*, January 20, 1897. Australian National Library.

not have in mind any beneficial legislation for the purpose of assisting migrant groups who were permitted to enter the country.

### The Exclusion of Aborigines from the Special Race Power

The **special laws power** in s.51(xxvi) of the Federal Constitution agreed to at the 1987-8 Convention was clearly limited to matters specifically discussed by the delegates in the Conventions. It was from the effects of legislation for these purposes that the people of the aboriginal race were excluded. If the section was intended to be discriminatory against aborigines, they would not have been excluded from the effect of its provisions.

Hence the reasons given to the voters in the 1967 referendum for the omission of the words of exclusion in s.51(xxvi)<sup>29</sup> had no real relationship to the purpose for which the words were originally included in the Section.

The earlier provision for the **special laws power** of 1891 differed from the final provision for the **special laws power** of 1897-8 in that the earlier one was directed to the “affairs of people of any race,” whereas the final provision was directed to “the people of any race.” To judge by the Convention debates, the intention of the framers of the Constitution was that the **special laws power** should deal with people after they had arrived in Australia not with their affairs generally. Henry Bournes Higgins at the Adelaide Session of the Convention of 1897-8 explained the reason for the omission of the word “affairs”:

I apprehend it is to provide for the Parliament dealing with the kanaka question, for instance. I would suggest that the object of the clause is not to allow the Federal Parliament to deal with the affairs of kanakas, but rather with the relations of kanakas towards Australia.<sup>30</sup>

He added that he considered that the section was aimed to allow the Federal Parliament to:

“deal with the important question of the exclusion of the kanakas.”<sup>31</sup>

It was because it could be said that the use of the word “affairs” would give the Commonwealth Parliament power to deal with “the affairs of the kanakas in their own islands” that he supported their removal.

The main problem with both provisions was that the framers did not define what they meant by a “race” in the context of the Constitution. They undoubtedly had a clear view

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<sup>29</sup> Section 51(xxvi) originally provided that the Commonwealth should have legislative power in respect of “the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws.”

<sup>30</sup> *Convention Debates*, Adelaide, 1897, p.831.

<sup>31</sup> *Convention Debates*, Adelaide, 1897, p.831.

of the “races” they intended should be **included** - races who were fairly easy to distinguish as of a different racial and cultural origin from the bulk of the already resident population, for example, Kanakas, Chinese, Pakistanis, and Afghans.

Although aborigines could easily be distinguished as of a distinct race, they were **excluded** from the provision of the **special laws power because they were not immigrants**.

They were a settled part of the local population. Thus the **exclusion of aborigines** from the impact of possible laws enacted under the **special laws power** was a **beneficial exclusion not a discriminatory one**.

When the reformers of 1967 formed an incorrect view of the nature of the **special laws power** of s.51(xxvi) from which the aboriginal race had been excluded, the obvious change which should have been sought, particularly by those representing the aborigines, was the repeal of the whole section, a suggestion made by Professor Sawyer at the time.<sup>32</sup> That this was not sought, particularly by those representing the Aborigines, was due to the misconception that the special laws power was intended to encompass only beneficial laws, exclusively or at least in part, which would give benefits to the aborigines not given by the same legislation to anyone else, and which would confer on the Commonwealth a power appropriate for this purpose. This is by no means certain. What is certain is that the removal of the words in the 1898 provision, incorrectly thought to be denigratory of the aboriginal race, has dissociated the section from its original meaning and intention.

### The Original Intention of the Race Power

Whether the hopes of beneficial action by the Commonwealth would be realised by the enactment of special Federal Legislation was a matter which the amended provision would not guarantee. If the original intention were to be preserved, it would mean that special laws would only be enacted for the purpose of making sure that any race which by its culture or social attitude acted in a way inconsistent with the general rights and obligations of all other citizens could be restrained from so acting by the enactment of special laws.

In the sense that the section was conceived as discriminatory in purpose, it was confined to making provision to ensure that immigrants conformed with the laws and customs of the local community. It was not intended that they should be subject to discrimination of such a nature as to enslave them, or gratuitously injure them. They would be under no threat if they behaved like everyone else in the community. They may have

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<sup>32</sup> Sawyer G, “The Australian Constitution and the Australian Aborigine,” (1966-67) 2 FLR 17, p.35.

been kept out by the use of discriminatory immigration laws, but once admitted, what was expected of them was that they behaved like everybody else, as in the case of the “assimilated” Chinese-Australian Citizen, Quong Tart. As described by Professor Irving:

he rose to eminence in his adopted country, adopting its customs and mores and eschewing the more undesirable activities and perceived characteristics of less sophisticated Chinese.<sup>33</sup>

This merging of immigrants into the local community was both accepted and expected at the time.

During the course of the *Hindmarsh Island Bridge Case*, it was suggested that the omission of the words excluding aborigines from the provisions of s.51(xxvi) would entitle the Commonwealth Parliament to enact penal laws as violently discriminatory as those enacted by the Nazis in Germany. Kirby J. countered this argument by asserting that the High Court would not uphold such laws because they would be in breach of international treaty obligations. On the basis of the expressed opinions of the delegates at the Convention of 1897-8, such an approach would be unnecessary. There was no intention on the part of the framers to invest the Commonwealth with any such power. If immigrants did not conform to the laws and customs of the country, then the Government could make special laws to ensure that they did. It is certain that laws of a gratuitously draconian nature, having no relation to the matters which were desired to be corrected, were not in any way contemplated by the framers of the Constitution.

At the Melbourne Session of the Convention of 1897-8 Charles Cameron Kingston was advocating a liberal approach to immigrants irrespective of their racial origin:

if you do not like these people you should keep them out, but if you do admit them, you should treat them fairly—admit them as citizens entitled to all the rights and privileges of Australian citizenship.<sup>34</sup>

In reply to this statement William A. Trenwith, the only Labor delegate, interjected:

“And compel them to observe the same rules as other citizens?”

Kingston replied:

Yes, compel them to observe the same rules as other citizens, but impose no special rules intended for their special injury and to emphasize what some may consider the degradation of their position.<sup>35</sup>

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<sup>33</sup> Professor Helen Irving. *To Constitute a Nation*, p.105.

<sup>34</sup> *Convention Debates*, Melbourne, 1898, p.246.

<sup>35</sup> *Convention Debates*, Melbourne, p.246.



Despite these liberal sentiments Kingston when questioned said:

I do not think we ought to give them the right to vote.<sup>36</sup>

It is clear from these expressions of opinion that it would not have been in the contemplation of the framers of the Constitution that the special laws power could be used to support laws of the kind enacted by the Nazi regime in Germany before their defeat in 1945. Consequently, there would be no need to resort to the external affairs power to defeat any such legislation. Many of the possible consequences of the amendment of the special laws power in 1967 came before the High Court for consideration in the *Hindmarsh Island Bridge case*.

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<sup>36</sup> Ibid., p.247.

## THE HINDMARSH ISLAND BRIDGE CONTROVERSY

Issues raised in the *Hindmarsh Island Bridge Case*<sup>1</sup> brought to the fore the effect of the removal of the words of exclusion from s.51(xxvi) of the Constitution, (the Special Laws Power). That case is also important from the point of view of the use to which the Convention Debates were put in argument addressed to the Court.

In his judgment, Kirby J. made specific reference to the use of the Convention Debates:

In former times, this Court was resistant to the use of historical materials, such as the Convention Debates, to help elaborate and explain the text. Its then practice can be traced to the previously fashionable rules governing the construction of the language of statutes combined with the former view of the Australian Constitution as nothing more than a statute of the Imperial Parliament, deriving its legitimacy from that source alone. In the context of para (xxvi), Professor Geoffrey Sawer lamented a refusal of access to the history of the paragraph, as in the Convention Debates. The Court has now abandoned its former self denial. It regularly looks at the Convention debates. It was taken to them in this case.<sup>2</sup>

Five Justices sat on the case. Joint Judgments were delivered by Brennan C.J. and McHugh J., and also by Gummow and Hayne J.J. Separate Judgments were delivered by Gaudron J. and Kirby J.

Two major points were in contention.

1. Whether or not the Hindmarsh Bridge Act could, or did, repeal in part the provisions of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984.
2. Whether the Hindmarsh Island Bridge Act 1997, or any part thereof, was invalid in that it was not supported by s.51(xxvi) of the Constitution.

All Justices, with the exception of Kirby J. answered, “No,” to paragraph 2 above.

Kirby J. held that the Act was invalid. In view of the fact that he based his Judgment on an approach which quite different from any of the other Justices, his reasons will be analysed first.

He reasoned along two main lines:

1. That there was sufficient conflict of opinion, during the course of the Convention Debates in 1897-8, to support a view that the overall intention of the framers of the

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<sup>1</sup> *Kartinyeri and Anor v The Commonwealth of Australia (The Hindmarsh Island Bridge case.)* (1998) 195 CLR 337.

<sup>2</sup> *Ibid.*, para.132, p.401.

Constitution could not be unequivocally shown to support the interpretation that “special laws” was particularly related to non-beneficial laws.

2. The history of the 1967 referendum campaign clearly showed that the intention of the government, and the electors, in supporting the removal of the words of exclusion was for the express purpose of giving to the Commonwealth parliament, for the first time, the power to enact laws specifically beneficial to people of the aboriginal race.

Kirby J. raised a number of suggestions as to the reasons for the inclusion of s.51(xxvi) in the Constitution. He referred to the practice of “blackbirding” in the Pacific and stated:

Whether its inclusion was out of a concern for the victims of such activities, a desire to exclude the States from control over them or to provide the Federal Parliament with powers, in addition to the proposed power over aliens, to deal with possible unrest and expulsion, is not entirely clear.<sup>3</sup>

No concern was expressed in the Convention Debates for the races in contemplation considered as “victims.” His Honour then referred to the fact that some of the delegates in 1898 intended to vest the Commonwealth Parliament with power to enact:

laws far from beneficial for people of minority races (such as Chinese in factories and shops, “Asian or African... miners” and so on.) However, other delegates regarded the prospect of discriminatory legislation on the part of the new federal polity as “disgraceful” and “degrading to us and our citizenship.”<sup>4</sup>

On this basis Kirby J. concluded that the section was designed to empower the Commonwealth Parliament to enact both beneficial and restrictive laws. This conclusion appears to have been drawn from the fact that some delegates were concerned as to the extreme use of the power. As has been shown in Chapter 7, the purpose envisaged was to give the Commonwealth the power to enact laws for the purpose of controlling the behaviour of members of well recognised alien races after their admission to Australia, either as citizens or permitted residents. Further, whilst the power was clearly intended to be restrictive, there was no intention to use it in an inhumane or draconian manner. It was on this basis that the provision was adopted. The only consideration that might be viewed as beneficial was that indentured coloured labourers and their employers should be held strictly to the terms of their engagement to ensure that they returned to their homes at the expiry of their terms of engagement. In the Appendix it has been noted that local concern over the gambling and opium habits of single Chinese males was directed to the fact that

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<sup>3</sup> *Ibid.*, *Hindmarsh Island Case*, para.135, pp.402-3.

<sup>4</sup> *Ibid.*, para.135, p.402.

such habits prevented them from saving their earnings, thereby rendering them unable to afford to return to their home country.

Kirby J. was forced to speculate as to the purpose of the exclusion of aborigines:

The exclusion from the paragraph of power with respect to “the aboriginal race in any State” appears principally to have been designed to leave their regulation to the States. It may have had the effect of protecting them from any risk of misuse of the race power by the new Federal Parliament.<sup>5</sup>

The only substantive vote which was taken on the sub-clause was that to omit the words “the affairs” of any race. This was carried by 35 to 10. Without a division the clause was then deleted with a view to its transfer to what is now s.51 which made the power concurrent, and disposed of the argument that it should be made exclusive to the Commonwealth.<sup>6</sup>

There is no doubt that the members of the Convention were content to leave matters affecting Aborigines to the States. However, this fact would not determine the purpose of the section, which was not specifically related to this consideration. Matters touching the conditions of aborigines differed in each State, and central control of aboriginal affairs was never considered as an alternative. The whole section had nothing to do with the aborigines or any race already considered part of the Australian Community. It related only to immigrants belonging to certain alien races whose presence might need regulation, at least for a time after their entry, to protect the values and living standards of the existing community. The argument that, because only beneficial legislation in relation to aborigines could be considered proper and that such legislation should be left to the States, therefore the meaning of s.51(xxvi) must also be interpreted as having a beneficial purpose would appear to be fallacious.

Kirby J. examined the history of the period between the commencement of the Commonwealth under the Constitution and the removal of the words of exclusion in 1967.

His Honour pointed out that there had been an attempt, prior to 1967, to give power to the Commonwealth Parliament to legislate with respect to Aborigines. He noted the failure of first attempt when the 1944 “fourteen powers” referendum was defeated. The Constitutional Review Committee established by the Federal government in 1959, whilst recommending the repeal of s.127 failed to agree on a grant of special legislative powers in respect of aborigines. Kirby J. asserted that:

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<sup>5</sup> *Ibid.*, *Hindmarsh Island Bridge case*, para.136, p.403.

<sup>6</sup> *Convention Debates*, Melbourne, 1898, pp.255-6.

Whatever the original intention of these constitutional provisions, and whatever may have been the initial protective effect of the exclusion of people of the Aboriginal race from the race power, by the late 1950s, both in and out of the Federal Parliament, commentators were viewing ss 51(xxvi) and 127 (containing as they did the only references to Australian Aboriginals in the constitution) as negative and discriminatory, and needing amendment.<sup>7</sup>

Amendments in precisely the same form as those submitted in 1967 were introduced into the Commonwealth Parliament, in 1964, by Arthur Caldwell, the Leader of the Opposition, who was concerned about possible criticism by the United Nations that the Constitution discriminated against aborigines. In the debate on the Constitutional Amendment Bill, the Attorney-General (Mr Snedden) suggested that the removal of the words of exclusion raised the possibility of “discrimination... whether for or against the aborigines.” Caldwell persisted in his view that the removal of the words of exclusion would ensure that only beneficial legislation would result.<sup>8</sup>

Having regard to the clear views expressed by leading members of the 1897-8 Convention, it is unfortunate that the political parties seem to have given scant consideration to these views. The linkage of s.127 with the view that s.51(xxvi) excluded Aborigines from Federal beneficial legislation was not warranted by the history of the debate which led to the inclusion of both sections in the Constitution. No action had ever been attempted before 1967 to enact any beneficial laws from which aborigines were excluded by the section. If it was desired to remove any suggestion of discrimination from the Constitution, approval could have been sought from the electors under Section 128 for the repeal of both sections. The question of precisely what power was thought to be appropriate for the Federal Parliament to exercise in relation to Aborigines could then have been dealt with clearly and explicitly. The means adopted in 1967 were based on a total misunderstanding of the purpose for which both sections were included in the Constitution. The repeal of Section 127 has created no problems, because its purpose was exhausted by 1967, being mainly relevant to certain of the transitional financial clauses. The amendment of Section 51 by the removal of the words of exclusion from par (xxvi) has created, unnecessarily, the very controversy which arose in the *Hindmarsh Bridge* case.

Kirby J. noted that a proposal was passed by the Federal Parliament in 1967 merely to repeal s.127, but this was not put to a referendum. He then referred to the proposal by

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<sup>7</sup> *Hindmarsh Island Bridge case*, para.138, pp.404-5.

<sup>8</sup> *Ibid.*, para.139, pp.405.

W.C. Wentworth, later the first Minister for Aboriginal Affairs, to repeal s.51(xxvi) and to substitute for it a positive provision for:

The advancement of the aboriginal natives of the Commonwealth of Australia.

He coupled this with a new s.117A of the constitution, which would forbid the Commonwealth and the States from making or maintaining any law which subjected any person born or naturalised within the Commonwealth “to any discrimination or disability within the Commonwealth by reason of his racial origin:”

The proposal contained a proviso that the section should not operate “so as to preclude the making of laws for the specific benefit of the aboriginal natives of the Commonwealth of Australia. One of the reasons given by Mr Wentworth for his amendments was his concern that the deletion of the exclusion of people of the Aboriginal race from par (xxvi) could leave them open to “discrimination — adverse or favourable.” He suggested that the “power for favourable discrimination” was needed; but that there should not be a “power of unfavourable discrimination.” His Bill was supported by the Opposition, but it ultimately lapsed.”<sup>9</sup>

Wentworth’s approach to all the matters involved was completely consistent with the view of the intentions of the framers of the Constitution contended for herein. The removal of the words of exclusion from s.51(xxvi) would expose the aborigines to the full power of the Commonwealth Parliament to enact unfavourable legislation in relation to them, as other races were already exposed to such action. It is regrettable that this approach to the problem was not adopted.

After the lapsing of the Wentworth Bill, the new Prime Minister, Mr Harold Holt, on 1 March 1967, introduced the Constitutional Alteration (Aboriginals) Bill 1967 (Cth). Kirby J. traces the steps which followed:

“He (Mr Holt) explained that the government had been influenced by the “popular impression” that the words “other than the aboriginal race in any State” in par (xxvi) “are discriminatory.” This was a view which the government believed to be erroneous. But it was deeply rooted. It required amendment of the constitution in a way that would give the Parliament the power to make special laws for Aboriginals which, with cooperation with the States, would “secure the widest measure of agreement with respect to Aboriginal advancement.”<sup>10</sup>

In dealing with the debate in the Senate in relation to the constitutional amendment, Kirby J. referred to the views expressed by Senator Murphy, as he then was. The Senator’s views

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<sup>9</sup> *Ibid.*, para.141, pp.405-6.

<sup>10</sup> *Ibid.*, para.142, p.406.

are important because he continued to hold them after his appointment to the High Court, and adhered to them specifically in his Judgment in *Koowarta v Bjelke-Petersen*.<sup>11</sup>

In the *Koowarta* case Murphy J. argued that the word “for” in para (xxvi) meant “for the benefit of.” It did not mean “with respect to” so as to enable laws intended to affect adversely the people of any race.

Having regard to the matters debated in the Conventions, it is incongruous to suggest that s.51(xxvi) was designed to enable beneficial laws to be made for the benefit of Chinese, Pakistanis, Afghans and others.

Kirby J. did make reference to a contrary opinion given by Gibbs C.J., in the *Koowarta* case, to the effect that, having regard to the history of the section, the power in para (xxvi) extended to making laws which discriminated against as well as in favour, of the people of a particular race.

Kirby J. relied heavily on the approach of Murphy J. in the *Koowarta* case. He quoted the strong words of Murphy J. in reference to the effect of the removal of the words of exclusion:

A broad reading of this power is that it authorises any law for the benefit, physical, and mental, of the people of the race for whom Parliament deems it necessary to pass special laws... To hold otherwise would be to make a mockery of the decision of the people to delete from s.51(xxvi) the words ‘other than the aboriginal race in any State.’<sup>12</sup>

He also quoted favourably the view of Brennan J. in the *Tasmanian Dam Case*:

“No doubt par (xxvi) in its original form was thought to authorise the making of laws discriminating adversely against particular racial groups... The approval of the proposed law for the amendment of par (xxvi) by deleting the words “‘other than the aboriginal race’ was an affirmation of the will of the Australian people that the odious policies of oppression and neglect of Aboriginal citizens were to be at an end, and that the primary object of the power is beneficial. The passing of the Racial Discrimination Act 1967 manifested the Parliament’s intention that the power will hereafter be used only for the purpose of discriminatorily conferring benefits upon the people of a race for whom it is deemed necessary to make special laws.”<sup>13</sup>

The approach of Murphy and Brennan J.J. involves the proposition that the section as amended can only be used to support legislation of a beneficial nature which discriminates in favour of any selected race, not only the aboriginal race. It leaves at large precisely what criteria would be used to determine what constituted a selected race.

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<sup>11</sup> *Koowarta v Bjelke-Petersen* (1983) 158 CLR .

<sup>12</sup> *Ibid.*, *Hindmarsh Island Bridge Case* para.126, p.397 referring to *Koowarta v Bjelke-Petersen* (1983) 158 CLR at p.180.

<sup>13</sup> *Ibid.*, para.127, p.397 referring to the *Tasmanian Dam Case*.(1983) 158 CLR at p.242.

Kirby J. made reference to the reasons of Deane J. in the same case where he:

described the way in which the exclusion of the Aboriginal race from the original paragraph had the effect of protecting them from the danger of adverse discrimination on the ground of race. But his honour went on to state that, with the passage of time, such exclusion came to be seen as a fetter upon the legislative competence of the Commonwealth parliament to pass necessary special laws for their (ie Aboriginal) benefit." Their inclusion in the power was thus for the making of "laws benefiting the people of the Aboriginal race"<sup>14</sup>

It is strange indeed that, because of a total misconception of the real intention of s.51(xxvi), that section was amended to include Aborigines within the scope of the power which was never intended to apply to them because it was discriminatory, and then to assert that, because Aborigines were so included, the whole nature of the power, which related not only to Aborigines, was thereby changed from an adversely discriminatory power to a power which was solely a beneficially discriminatory power.

After traversing the matters of history, and the varied expression of opinions in earlier cases, Kirby J. went on to deal with the proper approach of the court to the interpretation of the Constitution. He rejects the contention that "words in the Australian Constitution cannot be altered from that which those words bore when they were settled a hundred years ago." He also rejects the attempts that were made to retain the connotation of words as they were in 1900, but to expand their meaning by an expansion of the denotation of the words:

Each generation reads the constitution in the light of accumulated experience. Each finds in the sparse words ideas and applications that earlier generations would not have imagined simply because circumstances, experience and common knowledge did not then require it. Among the circumstances which inevitably affect any contemporary perception of the words of the constitutional text are the changing values of the Australian community itself, and the changes in the international community to which the Australian community must, in turn, accommodate."<sup>15</sup>

This is one form of a statement of the "living force" theory of interpretation, attributed to Andrew Inglis Clark which has been embraced particularly by Mason and Deane J.J.

Such approach, as adopted by Kirby J., begging as it does the meaning of the expressions "the values of the Australian Community," and the "changes in the international community," seems to be the very negation of the caution expressed by

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<sup>14</sup> *Ibid.*, para.132, pp.397-8.

<sup>15</sup> *Ibid.*, para.132, p.400.



Kentridge A.J. in the Constitutional Court of South Africa in the case of *State v Zuma* in 1995, favourably quoted earlier by Kirby J. when he said:

It cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean. If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination.<sup>16</sup>

It also ignores the possibility that the views of the International Community may become abhorrent to the views of the Australian Community. The experience of the United Kingdom in relation to the European Union demonstrates that such a possibility is not completely remote or fanciful.

Kirby J. concluded that the special laws power as amended would not support legislation of discriminatory or restrictive nature against the people of any race including the aboriginal race.

He specifically rejects the view that provisions should be considered in the light of what was understood in 1901:

In that century the concept of what it is, in the nature of law, that may be deemed "necessary" and in a "special" form for the people of a race, by reference to race, cannot and should not, be understood as it might have been in 1901. Such a static notion of constitutional interpretation completely misunderstands the function which is being performed.<sup>17</sup>

On this approach the question may well arise in the future as to why the understanding of the electors who supported the changes in 1967 should govern the future interpretation of the section if the understanding of the framers as to the purpose of the original section is to be completely ignored.

In the light of the understanding of the purpose of the changes proposed in 1967, Kirby J. argued that:

Whatever the initial object of the original exception to par(xxvi), by the time that the words were removed, the amendment did not simply lump the Aboriginal people of Australia in with other races as potential targets for detrimental or adversely discriminatory laws.

To construe the resulting power in par(xxvi) as authorising the making of laws detrimental to, and discriminatory against, would be a complete denial of the clear and unambiguous object of the Parliament in proposing the amendment to par(xxvi).

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<sup>16</sup> *Ibid.*, para.132, p.399.

<sup>17</sup> *Ibid.*, para.156, pp.412-413.

It would amount to a refusal to acknowledge the unprecedented support for the change, evident in the vote of the electors of Australia. This Court should take notice of the history of the amendment and the circumstances surrounding it in giving meaning to the amended paragraph.”<sup>18</sup>

For someone who is at pains to focus special attention on “text,” the complete abandonment of the unrestricted meaning, which a plain reading of the text would support, is curious. The effect of the removal of the words of exclusion surely did ‘lump the Aboriginal people’ in with all other races to whom the section may be made to apply. The real issue was whether the section itself was intended to be a section giving power to make only beneficial laws, even if the full intention of the framers of the Constitution that the laws covered were adversely discriminatory laws was ignored. No reference was made to the fact that the new section’s applicability to other races found no consideration in the Referendum Campaign. Further, it is inconsistent with a rejection of the matters of history which would disclose the intentions of the framers of the Constitution that similar matters of history should be used to support a meaning of the section which is not clearly apparent in the words of the amended section. This meaning is that the new section was designed to give the Commonwealth power to make only beneficial laws in favour of aborigines and possibly exclusively for them.

The stress on the circumstances in which the amendment was brought minimises the real difference between the original Wentworth proposals and those brought to the referendum, and avoids reference to such factors as the misconception of the meaning of the original section, admitted by the Prime Minister who propounded the change, the omission of any official presentation of a statement setting out arguments against the Yes case, and the complete disregard of the views of such eminent people as Professor Sawer and the Anthropologist A.P. Elkin.<sup>19</sup>

If this is a legitimate approach to constitutional interpretation, why then should the understanding of the framers of the Constitution of the meaning and purpose of what they were drafting not be equally legitimate?

In the *Corporations case* Deane J. had asserted that:

It is not permissible to constrict the effects of the words (of the constitution) by reference to the intentions or understanding of those who participated in or observed the Convention Debates.<sup>20</sup>

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<sup>18</sup> *Ibid.*, para.157, p.413.

<sup>19</sup> *The Case for Yes. The 1967 Referendum*. Mitchell Library Q.323, 1191/11.

Sawer, G. Op. Cit., *Supra* Chapter 6, Note 3.

<sup>20</sup> *New South Wales v The Commonwealth (The Corporations Case)* (1990) 169 CLR 483 at p.511.

Whilst rejecting in this way the relevance of the intentions of the framers, he argued that the Constitution should be interpreted on the basis of what “the people” now desire it to mean, because it was the sovereign people who accepted it in 1900. This, of course, ultimately means what the High Court conceives what the people desire it to mean.

In Kirby’s not dissimilar approach, the meaning of s.51(xxvi) should be determined on the basis of a criterion which should:

be one apt to the words and the character of the Australian Constitution; but also to the shared experience of the Australian people that lay behind the amendment of par(xxvi) in 1967.<sup>21</sup>

The context of this latter passage was his consideration of the possible use of the section to introduce Nazi type laws. As has been shown elsewhere such uses had no real relationship to the original intention of the framers of the Constitution. They intended the power to be used discriminatingly in the sense only that the particular special law was a law which did not apply to every member of the community. Its purpose was solely to ensure, where necessary, that the immigrant races abided by the laws of the land, and complied with the customs and values of the local community, whether, or not, such customs were customs of their country of origin. That was the sense in which any laws passed under the power could be described as discriminatory. The essence of the Nazi laws was not to insist that the particular racial group behaved like everyone else in the community, but was to set them apart and deprive them of rights which the general community possessed. There was no true comparison between the two situations.

If the amendment to s.51(xxvi) has, in many respects, precipitated an atmosphere of uncertainty and confusion, the reason must be sought in the fact that, despite warnings from informed specialists, the government put to the Australian people an ill considered alteration to achieve a purpose for which it was unsuited to achieve.

The government was on notice as to the meaning of s.51(xxvi), having regard to the intentions of the framers of the Constitution, but chose to ignore such considerations in deference to alleged international perceptions of the meaning of these provisions. If the Government was concerned that the “international community” might misconstrue the true meaning of the section, the considered course would have been to have repealed the section *in toto*, as was done with s.127. If it was considered necessary to vest the Commonwealth Parliament with power to make specifically beneficial laws in favour of

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<sup>21</sup> *Ibid.*, *Hindmarsh Island Bridge case*, para.163, p.416.

Aborigines, it would have resulted in greater clarity if the Government had followed the example of W.C. Wentworth, and advanced a clear specific proposal for the handling of Aboriginal affairs by the Commonwealth Parliament.

Kirby J. has advanced a quite novel approach to the interpretation of amendments to the Constitution. Whilst rejecting any consideration of the intention of the framers in relation to the section in question, he relies on the suggested intention of the Parliament and the voters in order to find a positive Commonwealth power to enact beneficial legislation in respect of a particular section of the community, by the removal of the exclusion of that group from a section which, under no view of the matter, ever deprived that group of the benefit of such a Commonwealth power.

Alternatively, he seeks to give effect to the intention of the voters at the referendum irrespective of what means, defective or otherwise, were used in an attempt to give effect to that intention, without any real consideration of the appropriateness of the means used.

It may be suggested that the argument that the section as amended should be interpreted in accordance with what is said to be the intentions of the voters in the referendum, (that the amendment was intended to give the Commonwealth power to enact beneficial legislation in favour of the Aborigines), is no different from the main thrust of the argument advanced herein that the original section should be interpreted in the light of the intentions of the framers of the Constitution. The two situations are in no way comparable. The framers of the Constitution introduced the section after an exhaustive debate in which all sides of the question being resolved were considered in detail. The total details of that debate were recorded in Hansard form and are fully available for consideration by the High Court and any interested inquirer. In the 1967 referendum there was only one case put to the electorate. There was no official argument put in favour of a “No” vote. Apart from the matters of caution raised by Professor Sawer and Professor AP. Elkin,<sup>22</sup> there was no consideration of the appropriateness of the change to achieve the stated purpose. It is true that, despite their cautions, both of these commentators supported a “Yes” vote. If the change had been the subject of scholarly consideration by a Constitutional Committee or Commission, the two situations might then be capable of comparison. Lacking such consideration there is no inconsistency in asserting the appropriateness of paying regard to the intentions of the framers of the Constitution, and at the same time rejecting the implied suggestion by Kirby J. that the intentions of the

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<sup>22</sup> *Supra*, Note 19.

voters in the referendum should override the expressed intentions of the framers of the Constitution under circumstances where the intentions of the framers were never considered, and where no other informed considerations were put to them. Even on the basis suggested by Kirby J., there is no support for the submission made on behalf of the Aboriginal Plaintiffs that the section now only supports beneficial legislation in favour solely of Aborigines, and no longer applies to other races.

The very divergence of opinion in the *Hindmarsh Island Bridge case* under discussion is itself a possible source of future confusion and contention.

The support of the other Justices of the High Court for the action of the Commonwealth in relation to the facilitation of the construction of the Hindmarsh Island Bridge, approached the questions raised from quite different perspectives than those put forward by Kirby J. It is important to consider these differences, also in relation to the manner in which they approached the intention of the framers of the Constitution as evidenced by the Convention Debates.

Gaudron J., in a separate judgment, set out the problem posed for decision in the terms of the Hindmarsh Island Bridge Act 1997 (Cwth), which provided that the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cwth) “does not authorise the making of a declaration in relation to the preservation or protection of an area or object from... (a) the construction of a bridge, and associated works (including approaches to the bridge) in the Hindmarsh Island bridge area.”

The question for determination was whether the Bridge Act was validly enacted pursuant to s.51(xxvi) of the Constitution.

Her Honour set out the arguments advanced by the Plaintiffs:

1. That the words “people of any race” in s.51 (xxvi) mean all people of a particular race, not some of them.
2. That s.51(xxvi) only authorises laws for the benefit of the people of a race or, in the alternative, for the benefit of the people of the Aboriginal race.

Her Honour pointed out that much of the argument directed to the proposition that the section only authorised beneficial laws was based on the fact that the words “other than the aboriginal race in any State” were deleted by the 1967 referendum:

In this regard, it was said that, by 1967, Australian values had so changed that it is to be taken that the amendment disclosed a constitutional intention that, thereafter,

the power should extend only to beneficial laws. In the alternative, it was put that the amendment disclosed an intention to that effect in relation to laws with respect to Aboriginal "Australians."<sup>23</sup>

Her Honour pointed out that the amendment did no more than remove the then existing words of exception from the section:

And unless something other than language and syntax is to be taken into account, it operated to place them in precisely the same constitutional position as the people of other races.<sup>24</sup>

Her Honour then referred to the arguments set out in the "Yes" Case<sup>25</sup>, in favour of the referendum proposal. The first was to "remove any ground for the belief that, as at present worded, the Constitution discriminates in some ways against people of the aboriginal race." The other was "to make it possible for the Commonwealth Parliament to make special laws for the people of the Aboriginal race, wherever they may live."

From this statement of purpose, Her Honour concluded that:

Given the limited nature of the purposes thus disclosed and given, also, that as a matter of language and syntax, the amendment was apt to achieve those purposes, and only those purposes, it is not possible, in my view, to treat s 51 (xxvi) as limited to laws which benefit Aboriginal Australians, if it is not similarly limited with respect to the people of other races.<sup>26</sup>

Her Honour then dealt with the question of whether, or not, the section extended to make laws of a non-beneficial nature to the races contemplated by the Section:

If, prior to 1967, s.51(xxvi) extended to authorise laws which were not for the benefit of a particular race, it is difficult to see that the 1967 amendment which, as already indicated, simply removed the exception or limitation which then existed could have altered that position.<sup>27</sup>

She then dealt with the two arguments against this simple formulation:

The first was that, by 1967, international standards and community values were such that racial discrimination was not to be tolerated. The second was that it was intended

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<sup>23</sup> *Ibid.*, *Hindmarsh Island Bridge case*, para.28, p.361.

<sup>24</sup> *Ibid.*, p.361.

<sup>25</sup> *The Referendum (Constitution Alteration) Act 1906 (Cwth)*, still in force in 1967, provided, inter alia, that if within nine weeks of the passage of the proposed law through both Houses there is forwarded to the Chief Electoral Officer '(a) an argument in favour of the proposed law... authorised by a majority of those members of both Houses of Parliament who voted for the proposed law, or (b) an argument against the proposed law... authorised by a majority of those members of both Houses of Parliament who voted against the proposed law,' the chief Electoral Officer is obliged to forward to each elector a pamphlet containing the arguments together with a statement showing the textual alterations and additions proposed to be made to the Constitution." The document referred to as the "Yes" Case was a document covered by sub-clause (a) above. There was no document submitted under sub-clause (b) and, consequently, no case for "No" was ever produced.

<sup>26</sup> *Ibid.*, p.362.

<sup>27</sup> *Hindmarsh Island Bridge case*, para.31 p.362.

by the electors that the amendment would enable the Parliament to legislate for the benefit of Aboriginal people and only for their benefit. Given the terms of the “Yes” case to which reference has already been made, it is doubtful whether the intention of the electorate was as stated.<sup>28</sup>

**Her Honour concluded on this point:**

Whatever the international standards and community values in 1967 and whatever the intention of those voting in the 1967 referendum, the bare deletion of an exception or limitation on power is not, in my view, capable of effecting a curtailment of power. Accordingly if, prior to 1967, s.51(xxvi) authorised special laws which were not for the benefit of the people of a particular race, the referendum did not, in my view, alter that position.<sup>29</sup>

From the examination of the Debates already made, it is confidently argued that it was the intention of the framers of the Constitution that laws could be made under this section which could not be described as beneficial laws. In any case, if governments were concerned about International disapproval of discriminatory laws, Federal governments could refrain from using any power that it had to do so. It would not alter the meaning of the Constitution.

**In further exposition of her decision Her Honour stated:**

there would, in my view, be no doubt that Parliament might legislate in any way it chose so long as the law in question differentiated in some way with respect to the people of a particular race, or dealt in some matter of special significance or importance to them.<sup>30</sup>

She did, however, consider that some limitation should be placed on the power, because of the fact that some emphasis must be given to the words “for whom it is deemed necessary to make special laws.”

Her Honour referred to expressions of opinion by other Justices in prior cases to the effect that special laws meant beneficial laws. She did concede that the removal of the exception from, or limitation of, the power did nothing to disclose the nature of the power itself.

The most significant statement made by Her honour, which relates to the view advanced in this Thesis is the following:

although I expressed the view in *Chu Keng Lim v. Minister for Immigration*<sup>31</sup> that there was much to commend the view that, in s 51(xxvi), “for” means “for the benefit

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<sup>28</sup> *Ibid.*, para.31, pp.362-363.

<sup>29</sup> *Ibid.*, para.32, p.363.

<sup>30</sup> *Ibid.*, para.34, p.363.

<sup>31</sup> (1992) 176 CLR 1 at 56.

of," that view cannot be maintained in the face of the constitutional debates earlier referred to.<sup>32</sup>

In relation to these Debates Her Honour said:

There are two matters with respect to s.51(xxvi) which are beyond controversy. The first is that the debates of the Constitutional Conventions relevant to the provision which ultimately became s.51(xxvi) reveal an understanding that it would authorise laws which discriminated against people of "coloured races" and "alien races."<sup>33</sup>

Her Honour asserted that there must be some difference attaching to the particular race necessitating some special legislative measure. The section does not authorise special laws affecting rights and obligations in areas in which there is no relevant difference between the people of the race, to whom the law is directed, and the people of other races:

race is simply irrelevant to the existence or exercise of rights associated with citizenship. Consequently, s.51(xxvi) will not support a law depriving people of a particular racial group of their citizenship or their rights as citizens. And race is equally irrelevant to the enjoyment of those rights which are generally described as human rights and which are taken to inhere in each and every person by reason of his or her membership of the human race.<sup>34</sup>

This statement is totally consistent with the intentions of the framers of the Constitution. The second stipulation made by her Honour, as to a valid law under the section, is that the law must be reasonably capable of being seen as appropriate, and adapted, to the difference asserted between the particular race and other races. There must be some difference requiring different treatment. Her Honour appears to come down in favour of the view that the section really only covers beneficial legislation:

Although the power conferred by s 51(xxvi) is, in terms, wide enough to authorise laws which operate either to the advantage or disadvantage of the people of a particular race, it is difficult to conceive of circumstances in which a law presently operating to the disadvantage of a racial minority would be valid. It is even more difficult to conceive of a present circumstance pertaining to Aboriginal Australians which could support a law operating to their disadvantage. To put the matter another way, *prima facie*, at least, the circumstances which presently pertain to Aboriginal Australians are circumstances of serious disadvantage, which disadvantages include their material circumstances and the vulnerability of their culture. And *prima facie*, at least, only laws directed to remedying their disadvantage could reasonably be viewed as appropriate and adapted to their different circumstances.<sup>35</sup>

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<sup>32</sup> *Ibid.*, para.36, p.364.

<sup>33</sup> *Ibid.*, para.33, p.363.

<sup>34</sup> *Ibid.*, para.40, p.366.

<sup>35</sup> *Ibid.*, para.44, p.367.



One of the problems which arises in a discussion of these matters is the open ended use of the notion of “disadvantage.” Having raised the question of the original intention of the section, as found in the Convention Debates, Her Honour appeared to feel the need to erect a new test for validity under the section. She argues that the test of a valid law:

is not whether it is a beneficial law. Rather, the test is whether the law in question is reasonably capable of being viewed as appropriate and adapted to a real and relevant difference which the Parliament might reasonably judge to exist.<sup>36</sup>

If such test were applied in the context of the Convention debates, the difference between the two races would be that the immigrant alien race is acting in a way different from, and inconsistent with, the expected and accepted norms of the Australian Community. On the other hand, Her Honour reaches a different result by the application of her test:

It is the application of that test to today’s circumstances, so far as they are known, that leads to the conclusion that *prima facie*, at least, s 51(xxvi) presently only authorises laws which operate to the benefit of Aboriginal Australians.<sup>37</sup>

If the section presently is only intended to authorise beneficial laws, it would have been far better to have repealed the original section as being no longer appropriate to any race, and to have inserted a section, such as that proposed by W.C. Wentworth, for the benefit specifically of aborigines.

The question that appears to have escaped notice in this area of discourse is that, if the framers of the Constitution did not intend the section to apply only to beneficial laws, or to beneficial laws at all, why should the removal of the exclusion of Aborigines from the effect of the section change the very nature of the substantive provisions of the section itself? If the section was in fact a non-beneficial section, from which the Aboriginal race was excluded, then, logically, their inclusion should subject them to the same non-beneficial power as all other races covered by the section.

Escape from the consequences of this position seems to have been achieved neither by textual interpretation, nor by new tests, such as that propounded by Gaudron J. The escape seems to have been achieved by going beyond the text of the amendment, and giving effect to what is considered to have been the intention of the electors in approving the amendment, when that intention is nowhere explicitly stated in the amending provision, or capable of extraction from them without resort to extraneous material. It has been argued in this, and the previous chapter, that the amendment proposed in 1967 was

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<sup>36</sup> *Ibid.*, para.45, p.368.

<sup>37</sup> *Ibid.*, para.45, p.368.

misconceived as a means to right what was considered to be constitutional discriminatory provisions. s.51(xxvi) never had any applicability to Aborigines because they were not part of any immigrant, or alien, race coming into Australia. The original provision was directed to what was considered to be a need to have special legislation to ensure that values and practices which were alien to the local culture should not be allowed adversely to affect the local community. If the intention of the referendum of 1967 was to endow the Commonwealth Parliament with power to make discriminatory laws in favour of Aborigines, it would have been simpler and clearer to have introduced an appropriately worded placitum into s.51 to say precisely that. If it were still considered that uninformed people would regard s.51(xxvi) as in some way discriminatory against Aborigines, it could have simply been repealed.

If the effect of the amendment is to limit valid laws under the section to laws which can be described as beneficial, it follows that the original intention of the framers of the Constitution to give the Commonwealth Parliament power to enact non-beneficial laws in respect of alien races has been watered down by the change. Nowhere can it be found that such a intention was put clearly to the electors in 1967. If only beneficial laws can now be enacted in respect of Aborigines, only beneficial laws can be enacted in respect of other races.

Some of the fears expressed by the framers of the Constitution when drafting s.51(xxvi), are paralleled today in the fears that are currently expressed in relation to the incursion of Triad Gangs, and other such agents of organised crime who have entered the country in recent years, resulting in an upsurge in new crimes such as home invasion, and extortion rackets, which were not previously characteristic of Australian society. Great difficulty has been experienced in dealing with crime of this type because of what has been called the “conspiracy of silence,” exhibited by the ethnic communities upon whom these criminals prey.

The interpretation of s.51(xxvi) as now giving the Commonwealth Parliament only a power of enacting beneficial laws would deprive the Parliament of any power, which the framers of the Constitution intended it should have, to make discriminatory laws to ensure that immigrant and alien races complied in all respects, after their arrival, with the mores of the local community.

As Gaudron J. opined, it may be difficult to conceive of circumstances where a law discriminatory against Aborigines might be needed. However, it is not difficult to conceive

of cases where discriminatory legislation might well be required in respect of certain elements of other races whose presence in Australia has been associated with organised and violent criminal activities.

Gaudron J. had no hesitation in upholding the Hindmarsh Bridge Act on grounds similar to those adopted by other Justices, who supported its validity on the basis that it acted as a partial repeal of the Heritage Act. The Heritage Act was held to be within the power conferred on the Commonwealth Parliament by s.51(xxvi). Consequently, if the Commonwealth Parliament had power to enact a law, it had ample power to repeal it, in whole or in part. In the present case, that power of repeal was not restricted in any way by any manner and form provision in the Heritage Act itself. As amended by the Hindmarsh Bridge Act, the Heritage Act remained in full force and effect for all other purposes not covered by the partial repeal.

Gummow and Hayne J.J., among other matters, dealt with the contention that the Hindmarsh Island Bridge Act had a discriminatory effect upon the Plaintiff Aborigines, because it deprived them of certain rights to seek declarations under the Heritage Act in relation to areas covered by the Hindmarsh Island Bridge Act itself. Consequently, the Act could not be a valid enactment under s.51(xxvi) because it did not have a beneficial effect upon the Aborigines affected by its operation.

Their Honours rejected out of hand a submission that the Bridge Act was invalid because it only applied to a section of the Aboriginal Race:

‘differential operation’ is that which gives to any law based upon s.51(xxvi) its character as a “special law.” Once it is accepted, as it has been, that a law may make provision for some only of a particular race, it follows that a valid law may operate differentially between members of that race. That is the situation with the Bridge Act.<sup>38</sup>

They quoted with approval a passage from the *Native Title Act Case* which stated:

A special quality appears when the law confers a right or benefit or imposes an obligation or disadvantage especially on the people of a particular race.<sup>39</sup>

They then comment:

Here, the Bridge Act imposes a disadvantage, of the nature identified above, with respect to areas and objects within the Hindmarsh Island Bridge area and the pit area. The disadvantage is in the contraction of the field of operation of the Heritage Protection Act, itself a law which is to be taken as supported by s.51(xxvi).<sup>40</sup>

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<sup>38</sup> *Hindmarsh Island Bridge case*, para.84, p.379.

<sup>39</sup> (1995) 183 CLR 373 at 461.

<sup>40</sup> *Hindmarsh Island Bridge case*, para.84, p.379.

That the power to make special laws was not limited to beneficial laws was supported elsewhere by the contention that a special law, which was beneficial to one race, could well be non-beneficial to, and discriminatory against, another race. This contention seems to gain some support from the joint judgment of Gummow and Hayne J.J. They point out that the conferring of a right or benefit upon one race may well impose an obligation or disadvantage on others. They quote with approval a statement from the case of *Koowarta v Bjelke-Petersen*, to the effect that it is “of the essence of a law supported by s.51(xxvi) that it discriminates between the people of the race for whom the special laws are made and other people:”

The differential operation of the one law may, upon its obverse or reverse, withdraw or create benefits. That which is to the advantage of some members of a race may be to the disadvantage of other members of that race or of another race.<sup>41</sup>

Their Honours then dealt with the contention that the circumstances surrounding the passage of the 1967 Act, following the successful referendum:

favoured, if they did not require, a construction of s.51(xxvi) in its amended form which would support only those special laws which were for the “benefit” of the indigenous races.

They dealt with this contention in this way:-

The circumstances surrounding the enactment of the 1967 Act, assuming regard may properly be had to them, may indicate an aspiration of the legislature and the electors to provide federal legislative powers to advance the situation of persons of the Aboriginal race. But it does not follow that this was implemented by a change to the constitutional text which was hedged by limitations unexpressed therein.<sup>42</sup>

They refer to the fact that, because there was no opposition in Parliament to the proposal, there was no requirement for the distribution of a “No” case to the electors. They also draw attention to the fact that “learned opinion” supported the repeal of the section as being a preferable course of action, a clear reference to the opinion of Professor Geoffrey Sawer previously discussed. They conclude:

the omission in the 1967 Act of any limitation, making specific reference to the provision of “benefits” to persons of the Aboriginal race, upon the operation of the amended s 51(xxvi), is consistent with a wish of the Parliament to avoid later definitional

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<sup>39</sup> *Ibid.*, para.87, p.379.

<sup>40</sup> *Ibid.*, para.90, p.380.

argument in the legislature and the courts as to the scope of its legislative power. That is the effect of what was achieved.<sup>43</sup>

On this basis it can be argued that the original intention of the framers of the Constitution has not been altered, or watered down, by the effect of the amendment, or by any decision of the Justices of the High Court expressed in a clear majority and definitive decision.

Finally, their Honours dealt with the contention that the Constitution had to be read in such a way as to conform to the principles of International Law. They answered this argument by reference to the fact that:

it has long been established that the legislative powers of the Parliament given by the Constitution itself stand in a special position.<sup>44</sup>

The remaining Judgment is that of the joint Judgment of Brennan C.J. and McHugh J. This Judgment goes to the central point of whether the Parliament had the power to restrict the operation of the Heritage Protection Act in respect of which the Parliament had power to legislate by virtue of s.51(xxvi).

Reading the two acts together, the will of the Parliament is that the operation of the Heritage Protection Act be restricted to the extent stated in the Bridge Act.<sup>45</sup>

The Judgment restricts itself to this single and simple point:

Once it is accepted that s 51(xxvi) is the power that supports Pt II of the Heritage Protection Act, an examination of the nature of the power conferred by Section 51(xxvi) for the purpose of determining the validity of the Bridge Act is, in our respectful opinion, not only unnecessary but misleading. It is misleading because such an examination must proceed on either of two false assumptions; first, that a power to make a law under s 51 does not extend to the repeal of the law, and, second. that a law which does no more than repeal a law may not possess the same character as the law repealed. It is not possible, in our opinion, to state the nature of the power conferred by s 51(xxvi) with judicial authority in a case where such a statement can be made only on an assumption that is false. The Bridge Act exhibits no feature to which it is necessary to apply one of the opposition views of s 51 (xxvi) in order to answer the question reserved. The Bridge Act can have no character different from, and must have the same validity as, the Heritage Protection Act.<sup>46</sup>

The final conclusion to be drawn from this lengthy analysis of the Judgments of all the Justices in the *Hindmarsh Island Bridge case* is that there has been no final pronouncement by the High Court on the total effect of the alteration of s.51(xxvi) by the 1967

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<sup>43</sup> *Ibid.*, para.94, p.381.

<sup>44</sup> *Ibid.*, para.98, p.382.

<sup>45</sup> *Ibid.*, para.10, p.354.

<sup>46</sup> *Ibid.*, para.20, p.358.

Constitutional Amendment. There has been no pronouncement as to what constitutes a race, and how a person becomes a member of a race.

The High Court in this and other cases has taken the view that “beneficial laws” can be enacted under s.51(xxvi), but it is still open to persuade the Court in an appropriate case that there is still room for the interpretation of the section consistently with the original intention of the framers of the Constitution, which was that it was necessary to give the Commonwealth Parliament power to make special laws to ensure that those members of alien races entering Australia were prevented from acting in ways detrimental to, and inconsistent with, the mores of the local community, even where those actions may well have been tolerated in the countries and cultures from which they came. If such a view were adopted there is no doubt that, under the amended section, it would equally apply to Aborigines. It could be argued that a punishment or practice under Aboriginal law, or the laws of any other race, which would be regarded as uncivilised or barbaric under Australian law could be outlawed under a special law applicable to the particular race. It may be necessary to deal with such a problem in a way which could not be effectively prevented by legislation under the ordinary criminal law applicable to all citizens.

A recent controversy was provoked by Pauline Hanson, the leader of the One Nation Party, who, like many other people, thought that the effect of the 1967 referendum, removing the words of exclusion from s.51(xxvi), and the repeal of Section 127, gave aborigines the right to vote. Bernard Lane commented on this in *The Australian* newspaper on Thursday July 16 1998:

In 1962 parliament had already changed electoral law to confirm the federal voting rights of adult Aborigines. Yet the myth still persists. It has even inspired a book—The 1967 Referendum, or When the Aborigines Didn't Get the Vote.

Why the confusion?

The heady rhetoric of 1967 is simpler and more memorable than its legal significance. In her speech, Ms Hanson said those who supported the referendum ‘believed that Aborigines should have the right to vote and should be treated equally.’

A belated acceptance of Aborigines as equals within the nation—this is the familiar rhetoric of 1967. Many conclude it must have been a victory for equal voting rights.

In fact, 1967 brought Aborigines within the reach of federal parliament's power to make race based laws.

Seen as a State responsibility, Aborigines had been excluded from the 1901 race power, which was directed at "coolie Labour."

Until recent forays in affirmative action — such as native title — parliament made little use of its new power.

The 1967 referendum also did away with a provision that excluded Aborigines from a population count (for reckoning the number of federal seats in each State).

By 1967, these two exclusions came to be seen as discriminatory. But their convoluted history defies any simple rhetoric.

On the same page of the same edition of *The Australian* newspaper, reference is made to the reply made by the Prime Minister, John Howard, to the speech of Ms Hanson. The Prime Minister is reported as inferring that her statements in relation to the 1967 referendum implied that she wanted to deprive the Aborigines of the right to vote. In correcting her misapprehension that the referendum gave the Aborigines the right to vote, the article stated that:

Mr Howard stressed the 1967 constitutional referendum was not about giving Aboriginal people the right to vote, but to include them in the Census and give the Commonwealth power to legislate for indigenous people.<sup>47</sup>

If he was correctly paraphrased, John Howard was correct in relation to the question of voting, but he also was under a misapprehension as to the purpose of the repeal of s.127, which had excluded the Aborigines from being reckoned in the number of the population. As will be shown, the repeal of s.127 had nothing whatsoever to do with the inclusion of Aborigines in the Census.

## THE REPEAL OF SECTION 127

The other change, proposed in the referendum of 1967, was the repeal of Section 127, which stated that:

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.

Different reasons were given, and different emphasis was placed on the proposals by the different political parties. The Holt Government stressed the need:

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<sup>47</sup> *The Australian*, July 16, 1998, p.4.

to remove any ground for belief that the Constitution discriminates against aboriginals.<sup>48</sup>

The Prime Minister stated that s.127 was incompatible with the image of Australia as a modern egalitarian society. This provision was also described as offensive to aborigines, because it endeavoured to legislate them out of existence.

A consideration of the Convention Debates on the subject will show that the intention of the framers was to do no such thing. The provision was there for a purely technical purpose, which had nothing to do with the matters urged in the referendum campaign.

It was also asserted that s.127 had the effect of depriving aborigines of the right to vote. This was clearly incorrect and misleading.

Some aborigines did, in fact, have the right to vote at the commencement of the Commonwealth. The Constitution made no specific provision for a Commonwealth franchise. The formulation of a federal franchise was deliberately left to the Commonwealth Parliament itself. In respect of Federal elections, held prior to the institution by the Federal Parliament of a Franchise Act, the Constitution provided that those entitled to vote were those entitled to vote in the various States for the Lower Houses of Parliament. There was the additional provision, under s.41, that anyone acquiring the right to vote in a State, between the commencement of the Commonwealth and the date on which the commonwealth legislated for a Federal Franchise, would be entitled to vote in Commonwealth elections.

It was not the Constitution which restricted the right of aborigines to vote, any more than it restricted the rights of women to vote. Until the Federal Parliament legislated for a Federal Franchise, those who had the right to vote in the States for the Lower Houses were entitled to vote in the Federal elections. At the commencement of the Commonwealth, South Australia was the only State where women had the vote. s.41 preserved the right of the women of that State to vote in the first Commonwealth election. Aborigines had the right to vote in some States, but not in others. The right to vote was not always absolute. In New South Wales those in receipt of government aid were disqualified. Some aborigines had the vote in Victoria, South Australia and Tasmania. Like women, if Aborigines had the right to vote for a State Lower House, they had the right to vote in the Federal elections until Parliament otherwise provided. Having regard to the Constitutional provisions, the need for the recognition of the variation in voting rights in the different colonies, and the

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<sup>48</sup> *The Case for Yes. The 1967 Referendum*, NSW Mitchell Library, Q.323. 119915/11.



decision that these individual differences would not be overridden by compulsory Constitutional provisions, it is clear that the framers of the Constitution did not ignore the position of aborigines. What rights they presently had were preserved, whilst their voting rights for the future were left to the legislative efforts of the Federal Parliament, as was the case with the voting rights of women. The fact that aborigines did not have the right to vote in Federal elections, with the exception of those covered by Section 41, was not due to any lack in the Constitution, but was due to the political policies of the successive Commonwealth governments before the general enfranchisement of aborigines in 1962, by the Commonwealth Electoral Act of that year.

The First Commonwealth Electoral Act of 1902 provided:

No aboriginal native of Australia, Asia, Africa, or the islands of the Pacific except New Zealand shall be entitled to have his name placed on the electoral roll unless he is entitled under Section 41 of the Constitution.

This meant that only aborigines who had the vote, as at 1902, could benefit from the first electoral Act. No aborigine thereafter could obtain the Federal Franchise until the Commonwealth Parliament decided to expand the electoral entitlement.

S.127 was raised at the Adelaide Session of the 1897 Convention, when Dr Cockburn spoke on the Section, which was then numbered Clause 120:

As a general principle I think this is quite right. But in this Colony, and I suppose in some of the other Colonies, there a number of natives who are on the rolls, and they ought not to be debarred from voting.<sup>49</sup>

It became obvious that Dr Cockburn was really discussing the provisions of s.24, rather than s.127. Deakin also appears to have been sidetracked into discussing the provision, as if it were the same as s.24.

S.24 provided, *inter alia*, that the number of Members of the House of Representatives chosen in the several States “shall be in proportion to the respective numbers of their people.”

Alfred Deakin answered Dr Cockburn’s point by saying:

This only determines the number of your representatives and the aboriginal population is too small to affect that in the least degree.<sup>50</sup>

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<sup>49</sup> Convention Debates, Adelaide, 1897, p.1020.

<sup>50</sup> *Ibid.*, p.1020.

Edmund Barton intervened:

It is only for the purpose of determining the quota.<sup>51</sup>

Dr Cockburn then asked:

Is that perfectly clear? Even then as a matter of principle, they ought not to be deducted.<sup>52</sup>

Richard O'Connor pointed out that provisions already carried preserved their votes. He had in mind, no doubt, the provisions of s.41, preserving the rights of those who had the vote, or acquired it between the establishment of the Commonwealth and the date on which the Commonwealth Parliament legislated for a Federal Franchise.

Dr Cockburn persisted:

I think these natives ought to be preserved as component parts in reckoning up the people. I can point out one place where 100 or 200 of these aboriginals vote.

Deakin. Well, it will take 26,000 to affect one vote.(meaning the quota).<sup>53</sup>

James Walker effectively brought the discussion back to the particular terms of s.127 when he said:

I would point out to Dr Cockburn that one point in connection with this matter is, that when we come to divide the expenses for the Federal Parliament per capita, if he leaves out these aboriginals. South Australia will have so much less to pay, whilst if they are counted South Australia will have so much more to pay.<sup>54</sup>

This statement ended the discussion at this point. It is enough to point out that James Walker correctly drew attention to the fact that s.127 had nothing to do with the question of the aboriginal right to vote or otherwise. It had to do with the financial arrangements between the States and the Commonwealth.

The question of the exclusion of aborigines from counting of the people of the Commonwealth came up for further consideration at the Melbourne Session of the Convention on 8 February 1898

Clause 120 (which became s.127) was under consideration. An amendment had been proposed, both by the Legislative Council of New South Wales and that of Tasmania, to add to the section the additional words of "and aliens not naturalised."

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<sup>51</sup> *Ibid.*, p.1020.

<sup>52</sup> *Ibid.*, p.1020.

<sup>53</sup> *Ibid.*, p.1020.

<sup>54</sup> *Ibid.*, p.1020.

In dealing with this amendment, Edmund Barton pointed out that there was a confusion again between s.24 dealing with the quota, and the section under discussion:

This is not like the clause which comes under the provision relating to both Houses dealing with the reckoning of the number of electors. This has reference to the reckoning of people of the states or other parts of the Commonwealth. There are various other clauses, dealing with finance and other questions, under which it becomes necessary to count the people of the states. This clause is not the same as the clause to which the people of New South Wales thought it had some relation.<sup>55</sup>

Isaac Isaacs suggested that what they had in mind was s.24. Barton correctly thought it was a later section. It was in fact s.25 which provided that where any race is disqualified by the laws of any state from voting at elections for the lower House of state Parliament then that race shall not be counted in reckoning the number of people of that state.

Barton insisted that the section under consideration had:

reference solely to the reckoning of the number of the people of a state when the whole population has to be counted and where it would not be fair to include aborigines.<sup>56</sup>

Barton explained, in relation to s.25:

It was intended all along that the number of representatives should be determined by the number of people in the state... All provisions relating to the quota are, and are intended to be, distinct from the provision that we now have before us. Under Clause 25, in ascertaining the number of the people of the states, so as to determine the number of members to which the state is entitled, there is to be deducted from the whole number of the people of the state the number of the people of any race not entitled to vote. In other parts of the Bill, where the provision is merely for statistical purposes, it is only considered necessary to leave out of count the aboriginal races. The two provisions are for different purposes, and I think that is tolerably clear.<sup>57</sup>

Aborigines are only excluded from counting for quota purposes where they were disqualified from voting. If they were qualified, it followed that they would be counted for purposes of the quota.

The inference to be drawn from the terms of this debate is that the exclusion, referred to in s.127, had nothing to do with the right to vote, and on one view of the argumentation it had nothing to do with the fixation of the quota for the numbers of members of the House of Representatives.

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<sup>55</sup> *Convention Debates*, Melbourne, 1898, p.713.

<sup>56</sup> *Ibid.*, p.713.

<sup>57</sup> *Ibid.*, p.714.

The purpose of the exclusion in s.127 related to the counting of the number of people in the state to determine, as James Walker pointed out earlier, the amount of contribution to be made *per capita* by the people of the states to Commonwealth expenditure, and also to determine, after the transition period, the amount of any return to the States of surplus revenue collected by the Commonwealth from duties of customs and excise, if the Commonwealth Parliament decided that the return should be made on a *per capita* basis.

There is no specific explanation in the record of the Debates as to what Barton meant when he said that the inclusion of aborigines for this purpose would be unfair. However, it is likely that the reason behind the exclusion related to the fact that the Aborigines as a group made no significant contribution to the revenues raised by Customs and Excise Duties. Similar reasons appeared, expressly in article 1, section 2 of the American Constitution which excluded “Indians not taxed” in relation to the appointment of direct taxes. It would certainly be unfair to a small State with a large Aboriginal population to contribute to the expenses of the Commonwealth on a per capita basis with its population disparately boosted by its large Aboriginal population as against other States where Aborigines were not large in number.

Difficulty had been experienced in enumerating the Aboriginal population because of their migratory habits.

As mentioned by Alfred Deakin, in relation to the electoral quota, the numbers, as known, were too small to make any great impact on either the quota provision or on the financial provisions.

Quick and Garran set out a table showing the number of aborigines in the various States compiled from the figures gathered by J.J. Fenton Assistant Government Statist of Victoria in 1899.

<b>Colony</b>	<b>Males</b>	<b>Females</b>	<b>Total</b>
Victoria	325	240	565
New South Wales	4,559	3,721	8,280
Queensland (1881)	10,719	9,866	20,585
South Australia	14,510	9,279	23,789
Western Australia	3,516	2,729	6,245
Tasmania	73	66	139
Commonwealth	33,702	25,901	59,603
New Zealand	22,861	19,132	41,993
<b>Total</b>	<b>56,563</b>	<b>45,033</b>	<b>101,596</b>

In what appears to be a quotation from J.J. Fenton, the Assistant Government Statist of Victoria, 1899, Quick and Garran comment on the Table:-

In most, if not all, of the Colonies, this enumeration was incomplete. In Victoria, whilst only 565 (including half-castes) were enumerated, 731 are believed to be in existence. In Queensland no attempt was made to enumerate or estimate the number of aborigines, therefore the number returned in 1881— which is believed to understate the truth — has been repeated. In South Australia the aborigines were not regularly enumerated, the figures being derived from estimates. In Western Australia, only civilised aborigines were enumerated. In the numbers given for that Colony 575 are half-castes. In Tasmania there are no longer any aborigines of unmixed race, the last male having died in 1869 and the last female in 1876. There are, however, a few half-castes. With the Maoris of New Zealand, 40 Morioris are included. These are the last surviving aboriginal inhabitants of the Chatham Islands, which are a group lying about 300 miles to the east of New Zealand, and form a dependency of that Colony.<sup>56</sup>

A.P. Elkin, the Anthropologist, speaking in favour of a “Yes” vote in the 1967 Referendum, gave his opinion on the exclusion of aborigines under Section 127.

Being unaware of the historical circumstances to which they applied, most persons, quite understandably think they discriminate against aborigines, therefore the words should be deleted.

On the other hand, such deletion does not mean that aborigines have not been counted hitherto (they have been), or that they will receive the franchise (they have it) or that the Federal Government will henceforth be free to legislate for aboriginal welfare to a degree not possible up to date.

The Commonwealth does legislate for the benefit of aborigines but only as Australian Citizens not aborigines.<sup>57</sup>

He pointed out that:

Census and other Commonwealth authorities have only regarded as aborigines persons who are either full bloods or in whom aboriginal ancestry predominates. Half and Lighter castes have not been so regarded for census, electoral, social service benefits or any other purpose. The Census only excluded full bloods.

The reason for the exclusion was obvious at the time of Federation in 1912 (sic). Only occasional, if any, contact had been made with the majority of full bloods in the Central and Northern parts of the continent. Moreover, the view was firmly held that they would die out. In spite of this, attempts have been made at census times to enumerate where possible and to estimate elsewhere the number of full blood aborigines.

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<sup>58</sup> Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, p.984.

<sup>59</sup> *The Case for “Yes.” The 1967 Referendum*. Mitchell Library, Sydney, Q 323, 1191/11.

As few live nomadic life it is now possible to enumerate more easily.<sup>60</sup>

Not dissimilar views to those advanced by Edmund Barton set out earlier, had already been put by Professor La Nauze, in a Note on s.127.

Briefly, it is quite clear that the origin of the exclusion of aborigines from the reckoning of the 'numbers of the people' lay in the requirements of the finance clauses including the cancelled clause concerning federal direct taxation. Not until a late stage of the drafting was it decided to place this exclusion in the "Miscellaneous" chapter, so that it would apply not only to the financial clauses but to the 'numbers' on which each State's membership in the House of Representatives would be based. Although the origin of the section was a good deal more complicated than is implied by Geoffrey Sawer in his article 'The Australian Constitution and the Australian Aborigine' *Federal Law Review*, vol.2. no 1 (1966) pp.17-36, he is completely justified in holding that it had no relevance to the taking of the census.<sup>61</sup>

It is not easy to reconcile the statement that s.127 was to operate on the quota as well as the financial clauses in the light of the distinction that Edmund Barton and James Walker made explicitly in the portion of the Debates in 1897 referred to earlier, in relation to the financial clauses, on the one hand, and the quota clause on the other. Barton was at pains to point out there that s.120, as it was then numbered, related to the financial clauses, and not to the provisions for the determination of the number of members a State was entitled in the House of Representatives. The only exclusion made in relation to the number of members was covered by s.25, where a particular race is disqualified from voting.

S.25 is stated specifically to be for the purpose of s.24, which deals with the ascertainment of the number of members of the House of Representatives.

S.25 provides:

For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.

The first Commonwealth Electoral Act in 1902 provided that no aboriginal could get on the roll who was not entitled under Section 41.

The comment of La Nauze that s.127 was introduced at a later stage of drafting and placed in the Miscellaneous Chapter appears to refer to the fact that Sir Samuel Griffith, on 8 April 1891, stated:

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<sup>60</sup> *Ibid.*, p.113.

<sup>61</sup> La Nauze *The Making of the Australian Constitution*, Sydney, 1972, p 68.

I intend to propose a new clause, dealing with the mode of reckoning the population. The clause was in the bill as prepared by the drafting committee, but the general committee struck out the clauses to which it referred. Those clauses having been re-inserted, it is necessary that this clause also should be reinserted. He then moved the reinsertion of the clause as a new Clause 3 of Chapter VII, headed Miscellaneous.<sup>62</sup>

The section was in Chapter VII at the very time that the debate occurred in 1898, when Barton linked s.25 with the purpose of the quota, and s.127 with the purpose of the financial clauses, rather than regard it as an ambulatory provision which referred also to the quota provisions of s.24.

The commentator in “The case for Yes” adds this comment, which accords with the view expressed by La Nauze:

Other scholars have agreed that, on the best evidence available, the main purpose of S.127 relates to the apportionment of funds — to formulas for the distribution of government revenues on the basis of population — and the apportionment of parliamentary seats.<sup>63</sup>

## CONCLUSIONS

The amendments to the Constitution agreed to in 1967 were introduced without any considered presentation of the nature of the sections in respect of which amendments were sought.

The advice of qualified persons in the fields of law and Anthropology in relation to the possible difficulties which might arise from the particular proposals the subject of the referendum were ignored. The repeal of Section 127 was a proposal adopted for reasons which had nothing to do with the purpose of the section. It was justified on other and valid grounds, but these were not put to the electorate, which was induced to believe that the change was desirable to remove actual discrimination against aborigines. The purpose of s.127 had ceased to exist. It applied only to the transitional financial arrangements which were limited as to time. Once the time had expired there was nothing left for s.127 to operate upon.

The change to s.51(xxvi) was advocated for reasons that had nothing to do with the purpose of the section as conceived by the framers of the Constitution. The precise method of its amendment has raised much confusion as to the present meaning and scope of the section.

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<sup>62</sup> *Convention Debates, Sydney*, 1891, p.898.

<sup>63</sup> *Ibid.*, the case for “yes,” p.2.

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## PART III



The intentions of the framers  
in respect of the financial powers  
of the Commonwealth and  
the provision of the freedom  
of interstate trade, commerce  
and intercourse

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## THE POWER OF THE COMMONWEALTH UNDER THE FINANCIAL CLAUSES

The years since the commencement of the Commonwealth have seen the gradual increase in Commonwealth control over the whole Australian economy. This occurred as a result of constitutional changes validating the Financial Agreement resulting from the Great Depression, and the Commonwealth take-over of the power to levy income tax from the States, as well as centralist interpretations of the Constitution favouring an increase in the economic power of the Commonwealth. Prior to the Second World War, both Commonwealth and States levied income tax. During the War, the Commonwealth passed four Acts which forced the States to relinquish their income tax power. The ultimate effect of this action was described by Professor Cooray:

The effect of the Act was to take over the State income tax power, the State income tax offices (buildings) and the State income tax officers. This happened during war time and part of the scheme was limited to the duration of the war. But once the Commonwealth had taken over the income tax field and imposed taxes equal to the prior State and Commonwealth taxes combined, it became politically difficult and impractical for the States to re-enter the income tax field.<sup>1</sup>

Professor Cooray's criticism of the decision of the High Court in the Uniform Tax case was that the Court looked at each Act individually, and refused to consider the wider effect of all the Acts combined on the balance between the States and the Commonwealth. The result was an unwarranted accretion of Commonwealth power.

One of the worst results from the increased financial power of the Commonwealth is that the States have become virtual mendicants, assembling periodically to seek financial sustenance from the Commonwealth. It has also derogated from the basic democratic principle that the Parliament, which spends the taxpayers' money, should be responsible to the same taxpayers for its imposition. Where the Commonwealth raises revenue from income tax it is only responsible for its spending in relation to Commonwealth matters. The States are not responsible to their electors for income tax money spent, because they did not raise it. The Commonwealth is not responsible to the electors from whom they raised the tax, because the Commonwealth does not spend the money on State matters; it is the States which spend it.

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<sup>1</sup> "The High Court - The centralist tendency," by IJM Cooray, in *Proceedings of the Inaugural Conference of The Samuel Griffith Society*, 1992, Chapter 6, pp.129-30.

The breach of this basic principle was not solely caused by events happening after the establishment of the Commonwealth. It was inherent in the very means by which the framers of the Constitution attempted to ensure that trade between the future States was “absolutely free.” The means adopted was the removal of the power to levy duties of customs and excise from the federating colonies.

The breach of the principle has been reinforced by expansive legislation by the Commonwealth government, supported by favourable decisions of the High Court in individual cases, on the one hand, and decisions of the High Court invalidating action by State Governments on the other. An illuminating illustration of the cutting down of State financial power by the interpretative power of the High Court in favour of the Commonwealth can be found in the most recent disallowance of certain State taxation in New South Wales<sup>2</sup> as being contrary to the exclusive power of the Commonwealth in relation to duties of excise. Principles enunciated, and restated, in that case, in relation to the exclusive power of the Commonwealth, are likely to affect a large number of other areas of State taxation in relation to a wide range of commodities.

The exclusive power of the Commonwealth in relation to excise, particularly as interpreted by the High Court, has excluded the States from imposing many indirect taxes, with consequent severe contraction of their ability to raise revenue in respect of which they are not dependent upon the largesse, or lack of it, of the Commonwealth Government. The opinions of some of the Justices of the High Court are consistent with support for what might be regarded as a movement towards endowing the Commonwealth Government with an overriding power to shape and direct the Australian economy as befitting a sovereign nation state. This approach has not met with complete unanimity on the part of the Justices of the Court. There has arisen a great divergence of judicial opinion on this issue. Many of the decisions, crucial to the power of the Commonwealth, have been decided by extremely narrow majorities, often by one vote only. The extreme view that the financial clauses of the Constitution evince an intention to endow the Commonwealth Parliament with general Economic power to enable it to direct the Australian economy as a whole, has competed with a more restricted interpretation of these powers for support amongst the Justices at different times.

Central to the whole issue is the question of why it was that the framers of the Constitution vested exclusive power in relation to customs and excise in the Commonwealth Parliament to the detriment of State revenue.

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<sup>2</sup> *HA v New South Wales* (1997) 71 ALR, 1080, at 1091

Apart from the question of Defence, which was brought to the fore in the movement for closer union of the six colonies by the report of Colonel Edwards,<sup>3</sup> the main motivation of the movement towards federation of the colonies was the desire to remove the trade barriers that had grown up between them. These barriers were evidenced by customs houses placed on the borders of the various colonies for the purpose of exacting customs duties on goods being sent from one colony to another. There was no uniformity between the level of customs charged by the individual colonies. All relied heavily on customs duties for the necessary revenue to sustain their respective governments. Some colonies levied customs duties largely, if not solely, for revenue purposes, relying on the stimulus of free trade to increase beneficially the volume of duties and revenue.

Other colonies looked to customs duties, not only, as a revenue raising tool, but also as a means of sheltering their growing industries from competition, and so enable them to grow.

New South Wales, for many years, had pursued an essentially free trade policy. This was possible because of the size of the colony, which enabled governments to raise most of their revenue from land sales, and rentals from leaseholds. This source of revenue could not be expected to last indefinitely, and, particularly after the 1897 elections, the protectionist forces were increasing in numbers and influence in New South Wales.

Victoria, on the other hand, was smaller in size, and did not have the large potential to raise revenue from the sale and lease of land. That colony had pursued a strong policy of industrialisation, and the development of a strong manufacturing capacity. For this purpose its customs policy had become strongly protectionist. South Australia had not yet reached the point where a manufacturing capacity had been developed, but was hoping by protection to do so. Western Australia had other sources of wealth in minerals, with strong capacity in the production of gold. None of the colonies were desirous of raising revenue by way of land tax, or income taxation. The former found opposition from rural interests, whilst the latter met stiff opposition from the commercial and manufacturing interests.

There is no doubt that Victoria's later support for federation was related to the fact that, having developed its strong manufacturing capacity, it was hoping, by the removal of border customs, to increase its export trade to the other colonies. Sir John Forrest asserted as much on 11 February 1898, at the Melbourne Session of the Convention in that year:

We all know that Victoria has, under protection, for a quarter of a century, built up manufactures to such an extent that she is now longing for the time to come when she

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<sup>3</sup> Major-General Edwards. An imperial military officer who was sent to Australia in 1890 to report on the state of the defences of the colonies. He made a Report in October of 1890 which recommended that all colonial military forces be centralised under the control of some federal authority.

will have an outlet for those manufactures, and that free-trade will give her the markets she now absolutely requires.<sup>4</sup>

The central question for which a solution was sought on all sides was how the new States were going to be compensated for the loss of their customs revenue, raised by levies on the products of other States, when they crossed the State borders.

After the commencement of the Commonwealth, financial and fiscal problems arose from the very means that were adopted to institute freedom of trade between the colonies. S.92 of the proposed Federal Constitution was to provide that trade and intercourse between the States should be absolutely free. This could not be achieved until prohibitive customs duties, exacted on the borders of the colonies, were abolished.

The solution to the problem of inter-colonial trade rivalry and restriction, originally proposed by Sir Henry Parkes in the Conference of 1890, and in the first Convention in 1891, was:

free trade between the States and Protection against the World.

There may well have been other means by which this result could have been achieved, but none was found or proposed, and none has been found since then.<sup>5</sup>

Richard O'Connor (New South Wales) was not alone in his desire and wish that other means could be found:

I should have much preferred some system of finance by which the states and the Commonwealth could have been absolutely independent on matters of account and matters of money. Unfortunately, that cannot be; but if we must have relations of the kind between the Commonwealth and the states, let them be such that the states will have certain definite rights which they can assert, and the Commonwealth definite rights which it can assert.

Do not let us create a relationship between the states and the Commonwealth in which one state may have power to exact terms from the Commonwealth, while the Commonwealth may be able to bring pressure to bear upon a state or its representatives. If that is possible under the constitution, you have at once the germs of corruption and improper influence, which may be used disastrously in the interests of the whole people.<sup>6</sup>

The Commonwealth was only responsible for that part of the Customs revenue reserved to itself for the purposes of the Commonwealth. In relation to the rest of the revenue raised from duties of customs and excise, the Commonwealth fixed the level of uniform duties,

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<sup>4</sup> *Convention Debates*, Melbourne, 1898, p.248.

<sup>5</sup> One aspect of the debate in 1999 in relation to the introduction of a Goods and Services Tax was that it was urged that the way in which this tax was to be structured would return to the States a significant part of their revenue formerly raised by them.

which it had the exclusive right to collect, but was not responsible to the State electorates for its expenditure. However, the State governments were not responsible to the electorate from which the money was raised, particularly after the expiration of the transitional period of five years. The State governments never had to go to the people on the issue of the level of revenue to be raised from the customs source. Much political controversy has arisen on this issue in subsequent years, but no other solution to the problem of how to ensure free-trade between the states has been proposed. As has been seen, the disadvantages of the original method of giving exclusive power to the Commonwealth to levy customs duties has been further added to by the transfer to the Commonwealth of the power to levy income tax, a wartime temporary measure which became permanent.

The combination of these two factors has been largely responsible for the unduly dominating role of the Commonwealth Parliament, which was something that the founders of the Constitution never desired, but which was, to some extent, inherent in the solution that was adopted as the only way of abolishing the disparate border duties, which was the major inducement to the colonies to federate.

An almost prophetic glimpse into the future possibilities that could result from the States' dependence upon the Commonwealth was given by Patrick Glynn (South Australia):

What is the state of affairs in Canada from the states appealing periodically for subventions? The result, as has been pointed out by Professor Goldwyn Smith, is that men go to the Dominion Parliament simply as local members, for the express purposes of seeing what they can get for their states; and this has resulted in a most extraordinary and corrupt system of log rolling. I hope we shall not give any chance of the Canadian experience being realised here.<sup>7</sup>

One could not think of a more apt description of the proceedings of the modern Premiers' conferences with the Commonwealth, when the allocation of Commonwealth money to the states is the subject of discussion.

As to the relation of "free-trade" to "protection," Alfred Deakin encapsulated the question in one illuminating sentence at the Sydney Session of the Convention in 1891.

It is clearly impossible to have two tariffs in operation, one for the protection of our industries against importations of a neighbouring colony with lower duties, and the other against the outside world.<sup>8</sup>

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<sup>6</sup> *Convention Debates*, Melbourne, 1898, p.1109.

<sup>7</sup> *Convention Debates*, Melbourne, 1898, p.854.

<sup>8</sup> *Convention Debates*, Sydney, 1891, p.793.

Whilst there was ultimate agreement on the adoption of the provisions giving the exclusive power of levying duties of customs and excise to the Commonwealth, there was much heart-burning as to its effect on the revenues of the States. The New South Wales Statistician, T.A. Coghlan, who provided as mass of detailed information on the volume of customs duties raised by the individual colonies for some years prior to 1898, expressed the conclusion that the introduction of a uniform tariff would have a devastating effect on the finances of some of the colonies.

It was to soften the impact of the major change in the financial arrangements that the transition clauses were devised. Charles Cameron Kingston (South Australia) agreed that the transitional clauses were necessary to soften the financial shock but:

All that is desired is that no one colony should suffer greater loss in proportion than the others.<sup>9</sup>

However, the permanent changes, after the transition period, were of a different character:

It makes the financial condition of the provinces absolutely depend on the good-will of the Federal Parliament, and that means the good-will of the Federal Treasurer. It places the question of solvency, or insolvency, of the states absolutely at the mercy of the Federal Parliament.<sup>10</sup>

He was not alone in his concerns. He raised, again, the possibility of endowing the Federal Parliament “with a proportion of the Customs Revenue rather than the whole of it,” or some means of limiting the Federal Government to certain types of customs revenue only, for example, duties on spirits and narcotics. He argued that there was a general feeling “to see something which would render them less absolutely at the mercy of the Federal Executive.” He could not offer a concrete proposal, himself, except to seek “a more satisfactory assurance of no unnecessary interference with their finances.” If some solution was not incorporated into the Constitution, he considered that:

a source of friction will be introduced into the Commonwealth for all time.<sup>11</sup>

The early view of the transfer of the customs power exclusively to the Federal Government was that it would give that government total control over tariff policy, no more no less. As William McMillan (NSW Treasurer) said at the 1891 Convention:

The free traders of New South Wales have gone so far—that is, myself speaking for others, and my chief at the heart of the Government (Sir Henry Parkes)—we have gone

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<sup>9</sup> *Convention Debates*, Melbourne, 1898, p.862.

<sup>10</sup> *Ibid.*, p.863.

<sup>11</sup> *Ibid.*, pp.865-866.

so far that we say it is absolutely necessary in order to have any union that we place in the hands of a federal parliament the whole question of the tariff of the future. The if we as free traders fall, we fall.<sup>12</sup>

During the course of the Conventions of 1891, and 1898, there developed an understanding that all of the financial clauses were linked together to achieve a common purpose. This purpose was to ensure that the Commonwealth had effective control over tariff policy, to enable it effectively to produce a uniform national tariff. The sole purpose of this uniform national tariff was to underpin the provision that trade, commerce, and intercourse between the states should be absolutely free.

The financial sections consisted of all of the provisions contained in Chapter 4 of the Constitution. These provided for a Commonwealth Consolidated Revenue Fund for the purposes of the Commonwealth. They provided for the transfer to, and future operation by, the Commonwealth of various departments of the public service, where their functions had been taken over by the Commonwealth under s.51 of the Constitution, which listed the powers of the Commonwealth. Provision was made for the collection and control of duties of customs and excise, and the control of the payment of bounties, to pass to the Executive Government of the Commonwealth.

In particular, s.90 provided that, on the imposition of uniform duties of customs, the power of the Parliament of the Commonwealth to impose duties of customs and excise, and to grant bounties on the production or export of goods, should become exclusive. The only exemption was that States were not prohibited from granting aid or bounties on the mining of gold, silver, and other metals or, with the consent of both Houses of the Commonwealth Parliament, to grant aid to, or bounty on, the production or export of goods.

Excise duties are not concerned with the passage of goods over the borders. It might be asked why then should excise duties be given exclusively to the Commonwealth along with customs duties. The obvious reason was that States, by the manipulation of excise duties, and with unrestricted manipulation of the distribution of bounties, could frustrate the tariff policy of the federal government, and, consequently, interfere with the guarantee of absolute freedom of inter-state trade.

There is no doubt that the provisions collected together in Chapter 4 of the Constitution consisted of, and were intended as, an integrated scheme to give effect to the central provision of freedom of inter-state trade.

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<sup>12</sup> *Convention Debates*, Sydney, 1891, p.798.

That there were dangers in the scheme adopted was seen clearly by Isaac Isaacs:

you not only leave the Federal Parliament untrammelled, but exposed to continual pressure by the states to produce enough money, not only for federal but for state purposes, while we are asked to leave the states perfectly free to contract debts and increase them, and to enlarge their liabilities and necessities. It leaves the Federal Parliament as the one source by which pressure can be exerted on the various states to get money raised. I can see no more fruitful sources of collision and deadlocks than these very financial proposals. That is one of the demerits of this scheme.<sup>13</sup>

Again, we see the clearest insight into the problems that would result from the method that seemed the only possible way of achieving the abolition of the border customs wars.

The lack of any alternate proposal was raised by Sir William Zeal (Tasmania). His complaint was countered by Simon Fraser (MLC Victoria)

I think the individual who finds fault is bound to propose a better scheme, and I do not think a better one can be discovered.<sup>14</sup>

Much criticism has been made of the failure of the Conventions to solve the financial question. However, it should be remembered that it was not for want of trying that the only solution adopted was to leave the matter to the new Federal Parliament. No modern politician has been able to devise a scheme whereby freedom of interstate trade can be secured by some method not involving the collection of significant revenue by the Commonwealth, and the doling out of the same amongst the States. The problem of, what Isaac Isaacs predicted would be, an undignified scramble amongst the States for a division of the revenues collected by the Commonwealth, for the raising of which the States were not responsible, was irrevocably linked to the particular method used to wipe out the border customs wars.

Apart from the problems associated with the exclusive power of the Commonwealth over customs and excise, and the interpretation of the specific provisions of s.92 prescribing intercolonial free trade, the major difficulties which have arisen in the Scheme relate to the meaning assigned by the High Court to the terms “duties of excise.”

S.90 of the Constitution provides:

On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and excise, and to grant bounties on the production or export of goods, shall become exclusive.

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<sup>13</sup> *Convention Debates*, Melbourne, 1898, p.882.

<sup>14</sup> *Ibid* p.886.



On the imposition of uniform duties of customs, all laws of the several States imposing duties of customs or of excise, or offering bounties on the production or export of goods, shall cease to have effect, but any grant or agreement for any such bounty lawfully made by or under the authority of the Government of any State shall be taken to be good if made before the thirtieth day of June one thousand eight hundred and ninety-eight, and not otherwise.

Peter Hanks, in an article in the *Adelaide Law Review* in 1985-6, describes the structure of the financial provisions of the Constitution.

In the Australian federation, fiscal power has been divided (as have other aspects of governmental power) between the central (Commonwealth) and regional (State) governments. The pattern of that distribution can be located by piecing together a series of irregularly-shaped (indeed eccentric) elements. Of these, s.90 of the Commonwealth Constitution (which denies to the States the power to levy "duties of excise") is, perhaps, the most irregular. A great deal of the eccentricity which characterises this limitation on State power is due to the radically different styles of analysis adopted by different members of the High Court in assessing whether particular State taxes fall within what is now accepted (with only one judicial dissent) as the standard constitutional definition of an excise duty; "A tax upon a commodity at any point in the course of distribution before it reaches the consumer."<sup>15</sup>

The definition referred to by Hanks is that derived from the decision of the High Court in, *Parton v Milk Board (Victoria)* (1949) 80 CLR 229 per Dixon at 260.

Hanks speaks of the division between members of the High Court being between those who look to the economic effect of a particular tax to determine whether or not it is an excise tax, and those who confine their analysis to the legal operation of the particular tax:

The accidents of majorities (frequently relying on the casting vote of the chief justice) have largely determined whether, from one case to another, the result has been a preservation or a reduction of the States' tax base.<sup>16</sup>

In the period before 1983, he suggests that:

the diversity of opinion on the Court is remarkable: the Court has been consistent only in maintaining a fine balance of disagreement over the appropriate analysis of State taxing legislation.<sup>17</sup>

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<sup>15</sup> Peter Hanks, "Section 90 of the Commonwealth Constitution: Fiscal Federalism or Economic Unity," *Adelaide Law Review*, Vol.10, p.365.

<sup>16</sup> *Ibid.*, p.365.

The concentration of the Court on the use of principles of legal reasoning and interpretation, coupled with its refusal to consult the Convention Debates to ascertain the real intention of the framers of the Constitution, has stemmed from the major departure in legal interpretation made by the Court in the *Engineers' Case*, and the cases which followed that decision:

Despite the diversity of analysis and result, the Court has, so far as the published reasons of the justices reveal, paid scant attention to what must be the critical question in establishing the scope and impact of s.90 — the constitutional purpose which lies behind the prohibition. Until its recent decision in *Hematite Petroleum Ltd. v. Victoria*, ((19830 47 ALR 641.) the Court appears to have been preoccupied (with the exceptions, at different times, of Fullagher J, Barwick CJ, and Murphy J,) with a relatively arid debate over the appropriate method of statutory analysis (is it the “criterion of liability” of the tax or the economic burden imposed by the tax which is critical?) to be used when fitting the standard definition of an excise duty to the State taxing legislation under challenge.<sup>18</sup>

It is important to understand the purpose which has been assigned by the justices of the High Court to the provisions of s.90, and the other sections in Chapter 4 of the Constitution, before going on to analyse the purpose which was understood by the members of the Constitutional Conventions to be the purpose of the scheme created by these sections.

In *Hematite Petroleum Pty Ltd. v Victoria*, the Pipelines Act 1967 (Victoria) placed a licence fee on persons who operated trunk pipelines. The Plaintiffs operated two trunk pipelines, which carried both oil and gas from the wells in Bass Strait. The licence fee imposed by the State of Victoria was classified by the High Court as an excise duty, and consequently outside the power of the state Parliament of Victoria. Four of the justices followed the definition of excise duty endorsed in *Parton's case* as “any tax on the production or distribution of goods.” Murphy J., in dissent, held that a narrower definition should apply, and that an excise duty could only be levied on locally produced goods. Gibbs CJ. would have agreed with Murphy J., if it had not been for the weight of authorities to the contrary. Peter Hanks comments on the conflicting definitions of “excise” duties:

The broad definition of excise duty, adopted by four of the six justices, threatens the tax raising capacity of the States; the narrow definition adopted by Murphy J. (and left open by Deane J.) avoids, as Murphy J. recognised, “adverse consequences to the States.”

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<sup>17</sup> *Ibid.*, p.366.

<sup>18</sup> *Ibid.*, p.366.

The point is that, while the adoption of a broad definition of excise duties places the States' taxing powers at risk, the real threat to those powers materialises only when the definition is applied to taxing legislation in a way which takes account of the legislation's assumed economic impact.<sup>19</sup>

Hanks comments on the approach of the Chief Justice, Sir Harry Gibbs, who attempted to minimise the adverse effect upon the State taxing power by adopting a legalistic interpretation of s.90. In order to balance the fiscal autonomy of the States against the protection of the Commonwealth control over tariff policy, it was necessary to avoid a "wide and loose" construction of s.90. The Chief Justice considered that there was:

no justification for deciding the question whether a tax is a duty of excise by considering whether the real or practical effect of the legislation is the same as that which would be produced by a duty of excise.<sup>20</sup>

Hanks finds it difficult to see why Gibbs C.J. abandoned the relevance of the real operation of the tax under attack. He considered that the tax, which s.90 prohibited, was a tax which did achieve the economic result of undermining the real control of the tariff policy of the Commonwealth.

Murphy J., alone, returned to the definition of excise duties given in the early case of *Peterswald v Bartley*, as adopted by Latham C.J. and McTiernan J. in *Parton's case*, where 'excise duties' were defined as taxes on the manufacture, or production, of goods. Murphy J. stressed federal considerations which would avoid adverse consequences to the States. He noted that the context in which the provision appeared (ss 91,92,93.) made the distinction between goods imported into, and goods produced within a State. It was control over Federal Tariff policy which was the purpose of s.90, not some wider power of economic control and direction.

Historically, the first excise duty was introduced in the United Kingdom in 1643. This consisted of charges on beer, ale, cider, cherry wine, and tobacco. Later, charges were extended to cover paper, soap, candles, malt and hops. Areas of taxation were expanded into the field requiring licences of people who neither manufactured or disposed of goods the subject of excise duties. These included licences for auctioneers, owners of armorial bearings, owners of dogs and game, gun dealers, gun carriers, hawkers, house agents, sellers of patent medicines, owners of carriages, pawnbrokers, plate dealers, refiners of gold and silver, refreshment house keepers and the like. These were regarded as secondary

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<sup>19</sup> *Ibid.*, p.367.

<sup>20</sup> *Ibid.*, p.369.

excise duties. They were never part of the concept of ‘excise duty’ current in the context of the Constitutional Conventions, which considered that ‘excise duties’ related to the production or manufacture of goods. The use of the term, “exclusive” in s.90 did not mean, “unlimited.” It strictly applied only to goods manufactured or produced within a colony. It was a tax on the production and manufacture of articles, which could not be taxed through customs houses, which dealt only in customs duties.<sup>21</sup>

The High Court has most recently reconsidered the whole question of the nature and meaning of, “excise duties,” in *Walter Hammond & Associates Pty Ltd. v New South Wales*.<sup>22</sup> This was another decision where there was a very narrow majority in favour of declaring null, and void, certain taxes, by way of licence fees, charged by the New South Wales State government to vendors of tobacco. These taxes had gone without challenge for a number of years, but the present challenge had been provoked by a heavy increase in the rate of tax charged on sales of tobacco, which were measured by reference to the quantity of goods sold. The taxes, expressed as licence fees, were increased from 30%, in 1987, to 100%. The state taxes were declared void by a majority of four justices against three.

The reasoning of the majority adopted the definition of “excise duty,” formulated in *Parton’s case*, as being any tax on the production, manufacture, distribution of, or the taking of any step in relation to, goods until it finally reaches the ultimate consumer. They rejected the proposition that the manufacture or production of goods was the “discrimen” of the definition of an excise tax.

They extracted from *Parton’s case* the principle that importation, or exportation, of goods characterises customs duties, and any inland tax upon goods are excise duties.

Consideration was given to the earlier cases, where licence fees in relation to liquor and tobacco had been exempt from the definition of excise duties. Reference was made to the diversity of opinion amongst the justices.

The imposts in *Coastace Pty Ltd. v. New South Wales* ((1989) 167 CLR 503) were held to be valid by a majority whose opinions were markedly dissimilar. In particular, Mason CJ and Deane J upheld the imposts for reasons which their Honours had stated more extensively in their judgment in *Phillip Morris*. In that case, their Honours expressed the view that liquor and tobacco were commodities that invite regulatory control and, that being so, they were prepared to accept the correctness of *Dennis Hotels and Dickenson’s Arcade* on a special basis.<sup>23</sup>

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<sup>21</sup> See Quick & Garran, *Op. Cit.*, p.837. Note 381.

<sup>22</sup> *HA. v New South Wales* (1977) 71 CLR 1080.

<sup>23</sup> *HA. v New South Wales* (1997) 71 ALJR, 1080, at 1091.

The views of Brennan J., in *Phillip Morris*, were adopted, where His Honour said:

I would hold that liquor or tobacco are in no special category which denies to a tax on any step in their production or distribution the character of a duty of excise.

The majority judgment rejects explicitly the view of Mason C.J. and Deane J. in *Dennis Hotel and Dickenson's Arcade*, in relation to their view that liquor and tobacco are in a special category, and added:

Were it not for that basis, Mason CJ and Deane J would have joined Brennan and McHugh JJ in holding the imposts in Phillip and Coastace to be duties of excise and, on that account, invalid.

In the cases prior to *HA v New South Wales*, often by narrow margins, the High Court had accepted the definition of a duty of excise as a tax on any step in the production, or distribution, of goods to the point of ultimate consumption. Brennan J. in *Phillip Morris Ltd. v Commissioner of Business Franchises (Vic)* stated the position succinctly:

If there be any rock in the sea of uncertain principle, it is that a tax on a step in the production or distribution of goods to the point of receipt by the consumer is a duty of excise.<sup>24</sup>

An additional consideration was also introduced by this decision. As outlined in the HA decision:

The proposition that was not clearly established before *Phillip Morris* was that the character of a tax required a consideration of the substantive operation as well as the text of the statute imposing the tax.

The majority then set out the argument, advanced by the Defendants, in the case:

They submitted that Parton had departed without warrant from what they identified as the narrow view of "duties of excise" expressed by Griffith CJ, speaking for the Court in *Peterswald v. Bartley*. The defendants sought to show the departure by reference to the words of s.90 which identify "production or export of goods" as the only subjects of bounties, to s 55 which draws a sharp distinction between laws imposing duties of customs and laws imposing duties of excise, and to s.93 which specifically applies duties of customs to "goods imported into a State" and duties of excise to "goods produced or manufactured in a State."<sup>25</sup>

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<sup>24</sup> (1989) 167 CLR 399, at 445.

<sup>25</sup> *HA v New South Wales* (1997) 71 ALJ, pp.1085-6.

The *HA case* is important because reference was made to circumstances surrounding the framing of s.90 of the Constitution. Two totally different approaches were made. The majority, consistent with earlier authority, were prepared to look at the drafting history of the section. On the other hand, it is clear that the minority went a lot deeper into the substance of the Convention Debates to ascertain the nature of “excise duties” at the time the Constitution was formulated. The majority referred to the Convention Debates as authority for the proposition that there was no common use of the word “excise,” and that the transfer of exclusive power over excise duties to the Commonwealth removed the principal source of revenue of the States principally from taxes on the production or manufacture of beer, spirits and tobacco.

The majority took the view that the definition of a “duty of excise” was not in dispute in *Peterswald v Bartley*, in so far as it was a tax on the manufacture of goods. They accepted that it was a clear objective of federation to introduce inter-colonial free trade, which could not have been achieved if the States had retained the power to tax goods within their own borders. If goods that attracted a State tax were imported from outside the Commonwealth, Commonwealth tariff policy would have been compromised by the imposition of the State tax. Further, if a State tax were imposed on goods brought into the State, having been produced or manufactured elsewhere in the Commonwealth, the tax would affect the freedom of trade in those goods.

The majority adhered to the wide definition of duties of excise formulated in *Parton’s case*. They referred to the contention that the exclusive power of the Commonwealth was directed solely to protect the Commonwealth’s control over tariff policy.

The majority then called in aid the history of s.90, which they claimed disposed of this narrow interpretation, “although that was the original purpose in mind during the 1891 Convention.”

Reliance was placed on the fact that the second part of the current s.90, at that time, was based upon the adoption of resolution (4) which provided:

- (4) That the power and authority to impose customs duties and duties of excise upon **goods the subject of customs duties** and to offer bounties shall be exclusively lodged in the federal government and parliament, subject to such disposal of the revenues thence derived as shall be agreed upon.

They then explained the view that they took in relation to the change in the wording of the second part of s.90, when the words emphasised above were deleted in the 1898 version which became the final form of the section:

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So long as the objective of the Convention was limited to prescribing the powers needed to create a disparity between the tax on imported goods and the tax on goods of local production or manufacture, the insertion of the words “upon goods the subject of customs duties,” was appropriate. But at the Adelaide Convention in 1897, Sir George Turner moved an amendment to omit the qualifying phrase in order to enlarge the power of the Commonwealth Parliament. Although Mr McMillan had advocated the retention of the phrase in 1891, in 1897 he accepted that “it would be as well not to do anything that would restrict the power of the Federal Parliament”<sup>26</sup>

The majority inferred from the history of the section, as given above, that:

the exclusive power to impose duties of excise was conferred on the Parliament as a free-standing power.<sup>27</sup>

And that:

The history of s.90 denies any necessary linkage between the exclusivity of the power to impose duties of excise and Commonwealth Tariff policy.

The majority then dealt with the argument that, because the disputed taxes applied equally to locally manufactured goods and imported goods, such taxes could not impair interstate free trade in those goods. On the basis that the criterion of liability was local manufacture, the Defendants argued that a tax, which imposed a liability indifferently upon goods irrespective of their origin, could not be a duty of excise. The majority rejected his contention:

Therefore we reaffirm that duties of excise are **taxes on the production, manufacture, sale or distribution of goods, whether of foreign or domestic origin**. Duties of excise are inland taxes in contradistinction from duties of customs which are taxes on the importation of goods. Both are taxes on goods, that is to say, they are taxes on some step taken in dealing with goods.<sup>28</sup>

As to the contention that the taxes were fees for licences aimed at the regulatory control of businesses selling tobacco, they held that, having regard to the level of the charges:

The licence fee is manifestly a revenue-raising tax imposed on the sale of tobacco during the relevant period. The licensing system is but “an adjunct to a revenue raising statute.”<sup>29</sup>

The minority Judgment was delivered by Dawson, Toohey and Gaudron J.J. It should be said, at the outset, that, unlike the Judgment of the majority, no specific reference was made to the

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<sup>26</sup> *HA v New South Wales* (1999) 71 ALJ, 1080, at p.1088.

<sup>27</sup> *Ibid.*, p.1080. Emphasis added.

<sup>28</sup> *Ibid.*, p.1090.

<sup>29</sup> *Ibid.*, p.1093.

Convention Debates, on a chapter and verse basis. However, strong reliance was placed on the statement of Griffith C.J. in *Peterswald v Bartley* as to the intention of the framers of the Constitution. Griffith C.J. had recalled that the Constitution “was framed in Australia for Australians.” He had asserted that the word “excise” had a well understood meaning at the time as being a tax on goods produced or manufactured in a State. In summary:

the conclusion is almost inevitable that, whenever it is used, it is intended to mean a duty analogous to a customs duty imposed upon goods either in relation to quantity or value when produced or manufactured, and not in the sense of a direct or personal tax. Reading the Constitution alone, that seems to be the proper construction to put upon the term.<sup>30</sup>

Having regard to the stress placed on the change from the form of words in the 1891 draft Bill, and the form used in the final Bill at the later Convention of 1897-8, it should be remembered that, although Sir Samuel Griffith was not a member of the 1897-8 Convention, having been appointed to the position of Chief Justice of the Supreme Court of Queensland, he continued to exert a powerful influence on the deliberations of the later Convention, submitting documents amounting to commentary papers for the use and assistance of that Convention. His views were well known to the framers of the Constitution, and his adherence, when Chief Justice of the High Court, to the view of the intention behind the words ‘duties of excise,’ expressed in *Peterswald v Bartley*, itself is consistent with the understanding of that intention held by participants in the later Convention, and in the minds of the commentators and contributors, who were active in the discussions surrounding the provisions of the final Bill.

The minority in the *HA case* point out that the use of the words, ‘on goods produced or manufactured in the States,’ appeared to be a reference to s.93, which was one of the transitional provisions, and was inserted to overcome the objection that traders, anticipating the coming into effect of the uniform federal tariff, might stock-pile goods in States of low tariff. They took the view that:

there is no reason to suppose that those words are used to differentiate one type of excise duty from another. On the contrary, they are plainly intended to be descriptive of what is meant by the term, ‘duties of excise,’ as it is used in the Constitution. Otherwise, the use of the restricted expression would be by way of exception which it would be impossible to explain.<sup>31</sup>

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<sup>30</sup> (1904) 1 CLR, 497, at 509.

<sup>31</sup> *HA v New South Wales* (1997) 71 ALJ, 1080, at 1094.



The minority considered that, not only, was the meaning completely clear, but that there was a compelling explanation for the restriction to manufactured goods to be found in the circumstances that gave rise to the inclusion of s.90 itself in the Constitution:

Two of the principal objectives of federation were, on the one hand, the creation of a common external tariff which would bind the States together in a customs union and, on the other, the creation of a free trade area internally by the elimination of customs duties at State borders and other restrictions upon the freedom of interstate trade.<sup>32</sup>

The question of whether, or not, the federal Tariff would be protectionist, or of a free trade character, was left to the future Federal Parliament. A protectionist tariff, designed to protect locally produced goods, could be undermined by the imposition by the States of excise duties upon such goods. Similarly, with the case of bounties, which were permitted only in the areas sanctioned by s.91:

Section 90 was central to the achievement of a common external tariff. Section 92 was the chief means by which an internal free-trade area was to be achieved.<sup>33</sup>

The minority stressed the correlation in the Constitution between customs duties and duties of excise, and that nowhere is ‘excise’ mentioned without an adjacent reference to ‘customs.’ The boundaries of the section is set by its purpose:

The purpose was not to confer power to impose duties of customs and excise. The power to make laws with respect to taxation was already given to the Commonwealth Parliament by s.51(ii). The purpose was to confer exclusivity in the exercise of the power. Exclusivity was necessary lest the policies lying behind the common external tariff be impaired. So far as excise duties were concerned, it was unnecessary to extend the exclusivity beyond duties imposed upon goods when produced or manufactured, because a tax imposed upon some later step which fell indiscriminately upon locally produced and imported goods—a step in the distribution of the goods, for example—would not operate to impair any policy of protection to be found in an external tariff in respect of those goods.<sup>34</sup>

They refer to the fact that the case of *Parton v Milk Board (Vic)*<sup>35</sup>, by majority decision, had extended the meaning of “duties of excise” to include, not only, a tax upon production or manufacture of goods, but also “a tax upon any step in the distribution of goods before they reach the hands of the ultimate consumer.”

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<sup>32</sup> *Ibid.*, p.1094.

<sup>33</sup> *Ibid.*, p.1094.

<sup>34</sup> *Ibid.*, p.1095.

<sup>35</sup> (1949) 80 CLR, 229, at 260.

Justification for this extension was not grounded in s.90. Dixon J., in *Parton's case*, had asserted that:

it may be assumed that it was intended to give the Parliament a real control of the taxation of commodities and to ensure that the execution of whatever policy it adopted should not be hampered or defeated by State action. A tax upon a commodity at any point in the course of distribution before it reaches the consumer produces the same effect as a tax upon its manufacture or production.

The minority Judgment disputes both of the propositions involved in this statement. They disputed that it was ever intended to give the Commonwealth Parliament real control of the taxation of commodities, and thereby power to carry out all or any of its economic policies. They assert that s.90:

is part of a constitutional framework designed to achieve the objectives of a customs union. So much is suggested by the Convention Debates and by colonial legislation as it stood in the lead up to federation.<sup>36</sup>

The reference to the Convention Debates was not a direct reference to the detail of those Debates. The footnote to the assertion gives only a reference to the Judgment of Dawson J. in *Capital Duplicators* (No2) (1993) 178 CLR 561 at 606-8, and to the decision in *Peterswald v Bartley*.

The Judgment asserts that only a limited power over the economy could be derived from the widest interpretation of the terms “duties of excise.” The States retained substantial power over the manufacture and production of goods within their borders, such as the taxation of services, the regulation of transport, health and safety, and even the imposition of quotas.

In so far as the Commonwealth has power to intrude upon those areas to the exclusion of the States, it is to be found principally in s.51(i), (ii), and (iii) of the Constitution , coupled with the operation of s 109, not in the exclusivity conferred by s 90.<sup>37</sup>

They further dispute the statement of Dixon J. to the effect that a tax on a step in the delivery of goods to the consumer has the same effect as a tax on their manufacture. They point out that a tax falling equally upon imported and locally produced goods does not alter the relative cost of such goods to the consumer and cannot defeat the effect of the Federal Tariff.

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<sup>36</sup> *Ibid.*, p.1095.

<sup>37</sup> *Ibid.*, p.1095.

A State tax which fell selectively upon imported goods would, of course, be a customs duty and be prohibited by s.90. A State tax which fell selectively upon goods manufactured or produced in that State would be an excise duty and be prohibited by s.90. A State tax which discriminated against interstate goods in a protectionist way would offend s.92 and be invalid. But those three instances do not exhaust the categories of taxes upon goods and do not support, as a legal conclusion, the proposition that the Commonwealth was intended to have an exclusive power to tax commodities.<sup>38</sup>

As to the taxes under dispute in the case, the minority concluded that they did not offend against any of the constitutional prohibitions, and did not infringe s.92 because all goods would compete on an equal footing and there was “no discrimination of a protectionist kind.”

As to the argument of the majority based upon the drafting history of s.90, the minority Judgment took a completely opposite view. They referred to the removal of the words “goods for the time being the subject of customs duties” from s.90. Some members had thought that the words unduly limited Commonwealth power so that:

the amendment was required to ensure the preservation of Commonwealth Tariff policy even where no relevant customs duty was imposed. This was the real reason for the amendment and it is apparent from the debate. The absence of customs duty upon particular goods is as much an aspect of Commonwealth tariff policy as is the presence of a customs duty and even in the absence of a customs duty, tariff policy is liable to be impaired by the imposition by a State of an excise duty upon the same goods locally produced. Thus the amendment at the Adelaide Convention, far from severing the linkage between the exclusivity of Commonwealth power to impose duties of excise and its external tariff policy, served to emphasise it.<sup>39</sup>

In the light of all these considerations, the minority supported the suggestion that the principles enunciated in *Parton's case* should be re-examined. Such a view had already been espoused by Dawson J. in the earlier case of *Capital Duplicators (No2)*.<sup>40</sup>

It is important at this stage to examine the Debates to determine whether it was the minority, or the majority, which correctly stated the intention of the members of the Convention in 1897-98. It should be noted that this was a case in which the former refusal of the Court to examine the Convention Debates was modified to some extent. In referring to the Debates the Court was considering whether, or not, the meaning to be given to Constitutional words is the meaning which attached to them in 1901, and the degree to which matters of history can be introduced into the Court's function.

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<sup>38</sup> *Ibid.*, p.1098

<sup>39</sup> *Ibid.*, p.1099.

<sup>40</sup> *Capital Duplicators Pty. Ltd v Australian Capital Territory*, 178 CLR 561.

## THE FINANCE CLAUSES AT THE 1891 CONVENTION

At the earliest stage of the discussion of the abolition of interstate customs, it was clear that the handing over to the Commonwealth government of exclusive control of customs and excise was related to the underpinning of the institution of free-trade among the various States. Whilst, initially, revenue for Commonwealth purposes would obviously come out of the money raised from duties of customs and excise, the provision was not primarily considered as a means of raising Commonwealth revenue.

If the Commonwealth decided to raise revenue from sources other than duties of customs and excise, such action would have no connection with the provision securing free-trade among the States, which was to be achieved by the exclusive control of the Commonwealth over duties of customs and excise, exercised by way of a Uniform Tariff in relation to goods imported from abroad. This tariff was to be protected against adverse State action by similar control over the imposition of excise duties, and the granting of bounties by the States in relation to local manufactures.

## THE FINANCIAL CLAUSES AT THE ADELAIDE SESSION OF THE CONVENTION IN 1897

It was the change in the wording of s.90 at the Adelaide Session of the Constitutional Convention of 1897-8 that the majority of the High Court in the *HA case* relied upon to find that there was no connection between the exclusive power of the commonwealth to raise duties of excise and the original purpose of the exclusive power, namely, to underpin the absolute freedom of trade and intercourse between the States guaranteed by s.92 of the Constitution.

The conclusion drawn from the sequence of events leading up to the change in the wording was that the excise power, after the deletion of the linking words, rendered the power a free standing one. What was meant by a free standing power was that there was no restriction of purpose imposed by s.90 upon the Commonwealth when deciding upon any particular duty of excise. Consequently, any tax upon goods of any nature whatsoever, and at whatever stage before reaching the ultimate consumer, became a duty of excise covered by s.90. It was this inference which was disputed by the minority.

It is well to recall the exact sequence of events at the 1897-8 Convention upon which the majority relied.

The discussion in Committee of s.90 of the draft Bill, which at that time was numbered Clause 82 of Chapter IV, came was reached on 19 April 1897 in the Adelaide Session. The first part of the Clause read:

Clause 82. The Parliament shall have the sole power and authority, subject to the provisions of this Constitution, to impose customs duties, and to impose duties of **excise upon goods for the time being the subject of customs duties**, and to grant bounties upon the production or export of goods.

The third paragraph of the Clause also qualified duties of excise by the addition of the words, “upon goods the subject of customs duties.”

Sir George Turner, after setting out the first paragraph of the Clause, as noted Above, asked:

Why should we limit our power to impose excise upon articles which are the subject of Customs duty. I fail to see the necessity of these words, because it might be that we would deem it to be advisable to have an excise duty on an article which was not subject to Customs duty. If we leave these words in we limit the power of the Federal Government, but if we strike them out we enlarge their power. Unless some strong reason can be shown for the retention of the words, I propose:

To leave out “on goods for the time being the subject of Customs duties.”

MR McMILLAN It seems to me that under almost every conceivable circumstance an excise duty would be a sort of counterpoise to an import duty. But you may have an excise proposed upon an article which is not the subject of Customs duty, and perhaps in a Bill of this sort it would be as well not to do anything that would restrict the power of the Federal Parliament.”<sup>41</sup>

It is true that, where this counterpoise existed, the fiscal policy of a Government would be established by the difference, if any, between the duties of customs and the duties of excise on particular articles. This principle was extracted by the majority of the High Court from the statement of Alfred Deakin on 15 February 1898, at the Melbourne Session of the Convention when he said:

The fiscal policy of a Government is established by the difference, if any, between the duties of customs and the duties of excise on certain articles, and it appears to me, from every point of view, desirable that these duties should be capable of being dealt with in one measure.<sup>42</sup>

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<sup>41</sup> *Convention Debates*, Adelaide, 1897, pp.835-6.

<sup>42</sup> *Convention Debates*, Melbourne, 1898, p.941.

The majority of the High Court did not quote the final words of that passage which was concerned with the question of whether or not duties of customs should be placed in the same measure as duties of excise. It is important, however, to point out that Deakin was stressing the very counterpoise nature of customs and excise duties in the context of fiscal policy, and in the context of the use of fiscal policy to ensure freedom of trade between the States. The fiscal policy issues which were uppermost in the minds of the framers of the Constitution was “Protection” on the one hand and “Free Trade” on the other. If the Federal government desired to bring in a policy of Protection to protect local industries in all the states from overseas competition, it could not allow the States to frustrate its policy of Protection by altering local excise duties and bounties in a way which would reduce the amount of protection of local industries in favour of overseas imports. Similarly, if the Commonwealth adopted a Free Trade policy which would involve lowered or no Customs duties on overseas imports, it could not allow the states to defeat this policy by granting bounties upon locally produced goods, or imposing excise duties upon goods once imported into the state from overseas. To avoid all these problems it was necessary to make the power to impose duties of excise exclusive to the Commonwealth Parliament whether or not the articles upon which the duties of excise related were or were not the subject of Customs duties.

It was correctly pointed out by the minority of the High Court that the Commonwealth had a general power of raising revenue by taxation of any kind whatsoever. The difference with taxing power, when it related to excise taxation, was that it had special provisions dealing with exclusivity. This exclusivity was there not for the purpose of revenue raising as such, but for the purpose of ensuring the impregnability of Commonwealth fiscal policy, where it was designed to underpin freedom of trade between the States.

The significant portion of the statement of William McMillan, relied upon by the majority of the High Court, was the earlier part of the statement, which was not quoted, where McMillan said that “under almost every conceivable circumstance an excise duty would be a sort of counterpoise to an import duty.”<sup>43</sup>

It is consistent with this statement that what he was saying was that, whilst he could not think of a circumstance where it would be necessary for the Federal Government to impose an excise duty in cases where there was no customs duty, he was not prepared to rule it out, not for the purpose of giving the Commonwealth an additional revenue raising power, but merely to ensure that its power in this field, which was designed to ensure that interstate trade and intercourse was “absolutely free,” was not impaired.

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<sup>43</sup> *Convention Debates*, Adelaide, 1897, p.836.

If it had been intended that the Commonwealth should have a “free-standing” power to impose duties of excise, such a “free-standing” power would not have formed part of a scheme linking fiscal policy to the protection of free-trade between the States. There should be no circumstance where, for the purpose of protecting the absolute freedom of interstate trade, the Commonwealth should lack power of an overriding nature in relation to duties of customs and excise. The omission of the words, relied upon by the majority of the High Court, did not remove from s.90 the overriding purpose of the power vested in the Commonwealth, namely the object of protecting inter-state free-trade.

What the majority was saying was that the section, as so amended, gave the Commonwealth Parliament an exclusive right under all circumstances to levy duties of excise, and to treat any tax on goods, at any stage from manufacture to delivery to the consumer, as an excise duty in respect of which it had exclusive power. By so expanding the definition of an excise as any tax upon goods, whether such impost was inimical to the freedom of interstate trade, or inimical to the fiscal policy of the Commonwealth government adopted for the purpose of protection of the freedom of trade, it really classified the purpose of the amendment of the section as one designed to give the Commonwealth a freestanding, and exclusive, revenue raising power.

It is clear from other sections of the Debates relating to this subject that it was definitely not the intention of the framers of the Constitution to grant the Commonwealth, under this section, an exclusive revenue raising power at the expense of the States and their revenues. Isaac Isaacs, speaking at the Melbourne Session of the Convention on 14 February 1898, dealt with the reasons why the whole question of the control of customs and excise was being left exclusively to the Commonwealth. He said:

from the very circumstances of the case, we must leave the whole control of Customs and Excise to the Federal Parliament. If it were a mere question of revenue we should not do that. It is, however, a question of inter-colonial and international trade, and there must be uniformity. We cannot secure that uniformity without giving an uncontrolled discretion to the Federal Parliament. From a fiscal stand-point it is unchallengeable. From a revenue stand-point, it assumes a different aspect. There is no reason whatever why the Federation should have the whole of the revenue.<sup>44</sup>

If the intention of Sir George Turner was to create the free-standing power that was inferred by the majority of the High Court, he took up a strangely inconsistent stance when the question of Commonwealth control over bounties was being discussed. He could

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<sup>44</sup> *Convention Debates*, Melbourne, 1898, p.881.

see no reason why the States should not be entitled to offer bounties to local industries and mining and agricultural activities to encourage export in cases where there was no interference with interstate free-trade. It was largely pressure from Sir George and other members that the exception in relation to bounties was provided in s.91. This reinforces the conclusion that the amendment that he moved in relation to excise duties was not designed to cut loose the Commonwealth power in relation to duties of excise from the overall purpose of s.90 to underpin interstate free trade. If it is so cut loose, it becomes merely a revenue power which, on the strong view expressed by Isaacs, it clearly was not. The framers of the Constitution designed the Scheme of the Financial clauses solely for the purpose of protecting interstate free trade by way of eliminating border duties. It was then tied in to the ancillary problem of how to compensate the States for so much of their essential revenue had been removed from them to achieve this central purpose.

There is no doubt that the reasoning of the minority of the High Court in the *HA* case was fully consistent with the expressed intentions of the framers of the Constitution. This intention found early confirmation by the decision of the High Court in *Peterswald v Bartley*, in which the bench was led by the then Chief Justice Sir Samuel Griffith, who had the strongest hand in the framing of the Constitution, both in his initial leadership in the drafting of the 1891 Constitution Bill, and in his later influence on the Debates in the later Convention.

## CONCLUSION

A consideration of the detailed reasoning of the opposing Judgments in the *HA* case reveals continuing strong support for the restricted interpretation of the power of the Commonwealth in relation to duties of excise, and in the definition of such duties as they appear in s.90 of the Constitution. It also discloses that the examination, made by the majority, of the drafting history of that section, failed to give consideration to the surrounding reasoning of the framers of the Constitution, which would have disclosed the context in which the early amendment of that section was made. The basic difference of view between the majority and the minority Judgments centred on whether, or not, the excise power was divorced from the basic purpose of s.90 to underpin interstate free trade. The interpretation adopted by the minority is fully consistent with the expressed intention of the framers of the Constitution as evidenced by the full transcript of the Debates themselves, whereas the limited reference by the majority to the proceedings of the



Conventions of 1891 and 1898, under the guise of seeking the drafting history of the section, led to inferences which were not justified as a proper statement of the intentions of the framers of the Constitution.

It is significant that the minority considered matters evidenced by the Convention Debates, and, to that extent, some members of the Court appear to be moving away from the rejection of the Convention Debates as an aid to the proper interpretation of the Constitution. A majority still adhered to a more legalistic approach to the Constitution Document, ignoring its character as a political document framed by politicians for the purpose of the orderly conduct of the political life of the Nation. However, a different situation arose in relation to the interpretation of s.92, where there was such a divergence of opinion among the Justices of the Court as to create such great uncertainty in the whole field covered by the section, that the Court was finally induced to review its approach to the section, in a way which did necessitate a frank consideration of the original purpose of the section when it was adopted in 1900. As a result the Court delivered a single Judgment in *Cole v Whitfield*,<sup>45</sup> which attempted to give a firmer foundation to the interpretation of the section by going beyond a mere textual analysis of the section in favour of one which was more consistent with this original intention.

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<sup>45</sup> *Cole v Whitfield* (1988) 165 CLR 360.

<sup>i</sup> Peter Hanks "Section 90 of the Commonwealth Constitution: Fiscal Federalism or Economic Unity." (1985-6) Vol.10 *Adelaide Law Review*, p.365.

## THE USE OF THE CONVENTION DEBATES IN AID OF THE INTERPRETATION OF SECTION 92

The first paragraph of s.92 of the Constitution provides that:

“92. On the imposition of uniform duties of customs, trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.”

Despite the optimistic views of some of the framers of the Constitution, this section has been the subject of more dispute, disagreement, and litigation than any other section of the Constitution. The problem at the centre of these disputes is the meaning of the words “absolutely free” in the first paragraph.

On 11 March 1898 at the Melbourne Session of the Convention of 1897-8, Isaac Isaacs, for the second time, attempted to amend the section by introducing into it some additional words aimed at clarifying the precise meaning of the words “absolutely free.” He proposed that the section should read:

“absolutely free from taxation or restriction.”

In the course of the debate on this amendment George Reid (Premier of New South Wales) defended the use of the original words “absolutely free.”

This clause touches the vital point for which we are federating, and although the words of the clause are certainly not the words that you meet with in Acts of Parliaments as a general rule, they have this recommendation, **that they strike exactly the notes which we want to strike in this Constitution. And they have also the further recommendation that no legal technicalities can be built upon them in order to restrict their operation. It is a little bit of layman’s language which comes in here very well.**<sup>1</sup>

Edmund Barton was quick to point out that laymen could not be credited with the authorship of the words “absolutely free.” He asserted that:

It is the language of three lawyers.

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<sup>1</sup> *Convention Debates*, Melbourne, 1898, p.2367.

Isaac Isaacs interjected:

And one of the lawyers who helped to frame the clause now finds fault with it.<sup>2</sup>

Reid persisted in his defence of the words:

The learned gentlemen who drafted this Bill have put in this clause words which we do not often read in Acts of Parliament, but they are absolutely the best words which could be used here. And the moment we begin to define we have to define what the definition means, and then we involve everything in the necessary amount of confusion. The thing in view in this clause is not so much the goods that will pass one way or the other, but that the relationship between those who deal in commodities, and send them from port to port within the Commonwealth, shall not be hampered by laws or officers of the Commonwealth in the sense of interfering with the absolute equality of intercourse. Words of this type exactly hit this requirement, **and I do not think any one can mistake their meaning.**<sup>3</sup>

Isaacs' amendment was resoundingly defeated by 20 votes to 10. Undeterred by this defeat, Isaacs again argued the question when the motion that the clause, in its unamended form, stand part of the Constitution Bill. In support of his argument that the clause was too vague, and too wide, he raised the parochial issue of the effect of the clause in frustrating Victoria in its ability to retaliate against New South Wales when that State attracted the Riverina trade into New South Wales by preferential railway rates. This approach only engendered further hostility against him, and stiffened the views of those who thought that the clause encompassed what everyone intended. Despite an earlier indication that he would consider a redraft of the clause in the light of the criticism both of Isaacs and Griffith, Edmund Barton, at this point, seemed to lose patience with Isaacs.

I cannot see any particular difficulty about this matter, except so far as intercolonial free-trade may be an irritating thing. I cannot apprehend the difficulty that my honorable and learned friend seems to be suffering under.<sup>4</sup>

After quoting the precise words in the first paragraph of the clause, he continued:

Do we mean that, or not? Do we mean that trade and intercourse is to be absolutely free, or is it to be free only *Sub modo*? A state is not interfered with except when it usurps the Commonwealth power of regulating trade and commerce between the states. What advantage does any state seek to gain beyond this?<sup>5</sup>

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<sup>2</sup> *Ibid.*, p.2367.

<sup>3</sup> *Ibid.*, p.2367. Emphasis Added.

<sup>4</sup> *Ibid.*, p.2369.

<sup>5</sup> *Ibid.*, p.2369.

Barton then went off on a side issue as to whether or not free trade was a good thing.

Isaacs pleaded that he was only seeking to add the words “from taxation and restriction.”

In reply Barton asserted that absolute freedom did not mean that the freedom guaranteed did not free interstate traffic from payment for services rendered for the conveyance of goods and passengers. He suggested that it was out of this question that all the arguments had arisen.

I do not find any way out of the difficulty in the words of Sir Samuel Griffith. He says that the real meaning is that the course of commerce shall not be restricted by taxation, charges or imposts, and that it would be a good thing to use these or similar words. Then he points out that the intention is to prevent interference with preferential or differential rates, and he suggests that certain words might be added. We have chosen our own words, and I hope the Convention will not consent to re-open the discussion at this stage.<sup>6</sup>

The reference to the reservations of Sir Samuel Griffith were those that he had expressed at the time of the Convention of 1897-8, in contrast to his earlier support for, and possible authorship, of the words “absolutely free,” The relationship of interstate free-trade to overall revenue questions was considered when Sir Samuel dealt with the possible tariff policy towards the rest of the World in his paper prepared for the Queensland government in 1896. Sir Henry Parkes had originally formulated his view of federation on the basis that federation would be based on free trade among the States and protection against all the world. In section X of his Notes Sir Samuel dealt with this issue:

It has been proposed that the surplus revenue collected by the Federal government, after defraying the Federal expenditure, should be returned to the several States. This plan, however, leaves the States exposed to all the consequences of the dangerous temptation just adverted to;[that is the possibility of federal extravagance, or total deprivation of the states of any revenue at all]; for the amount to be returned to the States would form, on any basis of division, so large a part of their ordinary revenue that any considerable diminution of it would throw their finances into confusion, and compel recourse to direct taxation, perhaps of a burdensome or even intolerable nature.<sup>8</sup>

Sir Samuel clearly understood that, intrinsic to the arrangement of fiscal affairs was the exclusion of the States from raising duties of customs and excise. As a consequence those

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<sup>6</sup> *Ibid.*, p.2370.

<sup>7</sup> *Notes on Australian Federation, its nature and probable effects*. Brisbane 1896.

<sup>8</sup> *Ibid.*, p.5.

responsible for raising the revenue would not be responsible for its expenditure in the States. He concluded:

But experience (as in the United States) need hardly be appealed to to show that it is not safe to leave to one body of persons to say how much money shall be spent, and to another independent body to say how much shall be available for expenditure... There is no subject on which the necessity of the retention of autonomous powers by the States is more apparent. And this is the best of reasons for not practically surrendering them to the Federal Legislature, however trustworthy it may be in theory.<sup>9</sup>

Professor La Nauze traced the history of the change in Griffith's views in his history of the expression "absolutely free." He records that, before the 1891 Convention commenced Sir Henry Parkes drew up a series of resolutions for presentation to the Convention. His first resolution was as follows:

That trade and intercourse between the Federated Colonies, whether by means of land carriage or coastal navigation, shall be free from the payment of customs duties and from all restrictions whatsoever, except such regulations as may be necessary to the conduct of business.

Charles Cameron Kingston had prepared a draft Constitution in which he gave power to the Federal Parliament:

To impose and collect taxes and duties of Customs and Excise, but so that all taxes and duties shall be uniform throughout the Union and no tax or duty shall be imposed on any article exported from one colony into another.<sup>10</sup>

He also provided that no colony could impose tonnage, taxes, duties, or duties on imports or exports without the consent of the Federal Parliament.<sup>11</sup>

After the formal opening of the 1891 Convention, there was an informal meeting in Parkes' office of Premiers and other delegates, except those from Western Australia, who had not yet arrived. Professor La Nauze quotes a form of Resolution framed by Andrew Inglis Clark (Tasmania) as the basis of his understanding of the changes that Griffith had proposed to Parkes' Resolution:

After the establishment of the Federation all trade and commercial intercourse between the several Colonies whether by transit on land or coastal navigation shall be free and exempt from all Customs duties whatsoever.<sup>12</sup>

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<sup>9</sup> *Ibid.*, p.8.

<sup>10</sup> This draft is included in the *Griffith Papers*, Mitchell Library, Sydney, DL MS Q 198.

<sup>11</sup> Parts XII(iv) and XIII of Kingston's draft Constitution.

<sup>12</sup> La Nauze *Op. Cit.* Note 15 "Enclosure in Clark to Griffith 32 March 1891. Note that in the bound volume of correspondence this document precedes the letter. It is not in Clark's hand. But he generally preferred to use and amenuensis. (See Clark to Edmund Barton, 19 June 1889. Barton Paper MS 51/62).

Following this meeting, the form of the Resolution, ultimately moved by Parkes was quite different from his original. It now provided:

That trade and intercourse between the Federated Colonies, whether by means of land carriage or coastal navigation shall be absolutely free.<sup>13</sup>

Parkes had been concerned that intercolonial trade could be restricted by means other than customs duties. American experience indicated that reasonable charges for services were compatible with free trade. He appears to have been persuaded that this interpretation would have attached itself to the section as redrafted after the informal meeting. In speaking to his Resolution on 4 March 1891, he said:

I seek to define what seems to me an absolutely necessary condition for anything like perfect federation, that is Australia, as Australia, shall be free—free on the borders, free everywhere—in its trade and intercourse between its own people, that there shall be no impediment of any kind—that there shall be no barrier of any kind between one section of the Australian people and another, but, that trade and the general communication of these people shall flow from one end of the continent to the other with no one to stay its progress or call it to account; in other words, if this is carried, it must necessarily take with it the shifting power of legislation on all fiscal questions from the local or provincial parliaments to the great National Parliament sought to be erected.<sup>14</sup>

In extolling the American situation Parkes noted:

from one end of the United States to the other there is no custom-house office. There is absolute freedom of trade throughout the extent of the American Union, and the high duties which the authors of protectionist tariff are now levying on the outside world are entirely confined to the federal custom-houses on the sea coast.<sup>15</sup>

Sir Samuel Griffith stressed the reliance placed by the colonies upon customs revenue, and stated that revenue from this source would still be available. He claimed that, even after the deduction of federal expenses, the residue would still be sufficient when distributed to cope with the needs of the several colonies.

In drawing attention to the possible danger of the federal government raising insufficient revenue to sustain the new States, he indicated what he understood to be the concept of absolute free-trade, and the possible consequences to the States of the adoption of such a policy by the federal government in relation to the customs areas under its control:

Suppose the Federal Parliament were to consider it desirable that there should be something like absolute free-trade, or as near free-trade as possible, that as small an

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<sup>13</sup> *Convention Debates, Sydney*, 1891, p.23.

<sup>14</sup> *Ibid.*, p.25.

<sup>15</sup> *Ibid.*, pp.24-5.

amount of money should be raised by Customs as is compatible with the existence of the government. Then some other means of raising revenue would have to be devised by the separate States.<sup>16</sup>

The Clause was considered by the Finance Committee and the Drafting Committee of the Convention, and neither made any alteration to the words “absolutely free.”

In an address to the Queensland University Extension Council in June 1896, Sir Samuel Griffith had no reservations about the clarity of the words “absolutely free.”<sup>17</sup> In July 1896, when Chief Justice, he prepared a more formal paper for the Queensland government in which he gave his then views on the provisions of the 1891 Constitution Bill. In relation to Clause 89 (now s.92) he said:

The most important of the material effects of Federation would probably be those which would follow from making ‘trade and commerce absolutely free’ within the Territory as must inevitably happen when a uniform tariff is established for the whole Federation. This means the abolition of such Customs duties as have the effect of protecting the industries of one Colony against another.<sup>18</sup>

It is important to note that he saw the achievement of absolute free trade as resulting from the abolition of such customs duties which had a protective effect on the trade and industry of one colony against another. La Nauze comments on this formulation of the notion of absolute free trade by reference to the nineteenth century economic concepts:

in the great Nineteenth Century debate on free-trade versus protection, a debate in which Australian arguments were a mere echo of those familiar in England, continental Europe and America for half a century, ‘free trade’ as a national policy was not incompatible with customs houses and customs duties. Free trade meant the absence of tariff protection, and a revenue tariff could be a free trade tariff provided either that the imports taxed were not, or could not, be produced in the country concerned, or that equal excise duties were imposed on similar goods produced there.<sup>19</sup>

New South Wales had followed a free trade policy for many years, even though it derived a significant amount of government revenue from customs duties. Victoria had adopted a protectionist policy, fixing the level of its customs duties in order to protect its growing manufacturing industries. It justified its actions on the basis that, unlike New south Wales, with its large residue of Crown land, Victoria could not derive adequate revenue from the sale and lease of Crown land. In all the colonies there was strong resistance to the raising

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<sup>16</sup> *Ibid* p.30.

<sup>17</sup> Referred to in La Nauze *Op. Cit.*, pp.74-75.

<sup>18</sup> Sir Samuel Griffith, *Notes on Australian Federation: its nature and probable effects*, Brisbane, 1896, p.29.

<sup>19</sup> La Nauze, *Op. Cit.*, p.76.

of revenue from direct taxes in the form of income and land tax. Industrial interests opposed income taxation and rural interests were equally opposed to land tax.

Professor La Nauze contended that contemporary thinking on the issue involved the proposition that absolute free trade implied only that no revenue was to be raised from customs duties, whether protective or non protective:

Non-protective duties on imports of some kind might still have been compatible with free-trade as generally understood; a Tasmanian tax on pineapples, for example, or a Victorian tax on jarrah timber. Absolute free-trade meant no duties at all, protective or non-protective, a state of affairs existing in no country in the world, not even in free-trade Britain, but what it was intended to establish between the semi-independent 'countries' or States of the Federation.<sup>20</sup>

As customs duties were the main source of colonial revenue, the only way adopted to secure both free-trade among the colonies at the same time as preserving their revenue was the method described in Parkes' original formula of "free trade among the States and protection against the world." To prevent any State action which would undermine this arrangement, the power over customs and excise was to be made exclusive to the Commonwealth Parliament, but requiring that Parliament to fix a uniform rate of tariff.

It was not until June 1897 that Sir Samuel Griffith expressed any concern that the words "absolutely free" might be vague and ambiguous. This he did in certain comments on the Adelaide Draft Bill of 1897, submitted to the Queensland government, and published as a Parliamentary Paper. In it he compared the provisions of the 1897 draft Bill with that of 1891:

I venture to suggest a doubt whether the words of s.89 (which are the same as in the Draft Bill of 1891) are, in their modern sense, quite apt to express the meaning intended to be conveyed. It is, clearly, not proposed to interfere with the internal regulation of trade by means of licenses, nor to prevent the imposition of reasonable rates on State railways. I apprehend that the real meaning is that the free course of trade and commerce between the different parts of the Commonwealth is not to be restricted or interfered with by any taxes, charges, or imposts. Would it not be better to use these or similar words?<sup>21</sup>

It was this statement to which Isaac Isaacs referred in his attempt to have the Clause amended to ensure greater particularity. As has been seen, Edmund Barton overrode the difficulties raised by Isaacs. In his second attempt to raise the issue, Isaacs' resort to the

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<sup>20</sup> La Nauze, *Op. Cit.*, p.76.

<sup>21</sup> Quoted in La Nauze *Op. Cit.*, p.84.



parochial argument about differential railway rates, which were harming Victorian competition with New South Wales for the Riverina trade, blunted the validity of his argument. George Reid ridiculed Isaacs:

These particular words have nothing whatsoever to do with the question my honorable friend is concerned about. Let us suppose that immediately this law is passed, Victoria, having put up all these obstacles, removes them and facilitates the means of transit across the border, with the result of making trade flow from New South Wales into Victoria more readily, could New South Wales complain that Victoria was infringing the doctrine? Then again, ocean navigation is to be free. Let us suppose that there is a line of Melbourne-owned steamers, trading between Sydney and Melbourne. They are competing with one another, and they gradually reduce their charges until at last the Victorian Company carry goods free, whilst the Sydney Company carry them at a ruinously low rate of say, 1s a ton. Could the complaint of the Sydney Company that the Melbourne Company was violating the spirit of free-trade by carrying these goods free be heard in the courts? The thing is ridiculous. These words cannot cover limitation of that sort.<sup>22</sup>

He argued that ordinary competition could not be interfered with under a provision designed to make trade as free as possible. Barton also brushed Isaacs aside by declaring:

I think somebody has got hold of a bogey here tonight.<sup>23</sup>

However, Barton did promise to give further consideration to the question. He said that he would do what he could to make the draft acceptable to all delegates but:

reserving to myself, if I think the Clause is clear, the right to make no alteration whatever."<sup>24</sup>

In the end no alteration was made and the section was incorporated into the Constitution unamended.

The rejection of Isaacs' attempt to give more particularity to the section was relied upon by the majority in the *HA case*<sup>25</sup> to rule out any possible avenue of revenue derived from any charges imposed by a State upon any aspect of the trade in goods from the point of its manufacture into the hands of the ultimate consumer. From a consideration of the matters raised in the debate on s.92, it is clear that the rejection of Isaacs' amendment did not mean that the framers of the Constitution intended the first paragraph of s.92 to have a totally unrestricted operation. They did expect that those who might subsequently be called upon to interpret the section would honour their intentions which could be gathered

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<sup>22</sup> Convention Debates, Melbourne Session 1898 p.2371.

<sup>23</sup> *Ibid.*, p.2374.

<sup>24</sup> *Ibid.*, p.2375.

<sup>25</sup> *HA v New South Wales* (1971) 71 ALR 1080.

from the detail of the debate itself, and the specific evils which they had in mind to correct. It has been suggested that Isaac Isaacs, when a member of the High Court, argued for the widest interpretation of s.92 in retaliation for the original rejection of his proposal to amend the section.

Further light was thrown on the meaning of the words “absolutely free” earlier in the Convention when Alfred Deakin sought to reduce the power of the Commonwealth over trade under s.51(1) of the Constitution, to enable the States to prohibit, or restrict, the import of alcohol and opium. On 17 April 1897, during the Adelaide Session, Deakin suggested that the Drafting Committee:

ought to look into the question as to whether the first sub-section, giving the power to the Federal government to regulate trade and commerce of the Commonwealth, does not take away unintentionally from the States the power, which each of them undoubtedly possess at the present moment, of regulating and of absolutely prohibiting the importation of alcohol and opium and other imports calculated to be injurious to the State.<sup>26</sup>

During the break in the proceedings of the Convention, occasioned by the absence of the Premiers in London on the occasion of Queen Victoria’s Diamond Jubilee celebrations, the parliaments of the colonies suggested amendments along the lines of Deakin’s motion to preserve the powers of the States in relation to alcohol and opium, either as a proviso to s.52 (s.51) or to Clause 89 (s.92). Edmund Barton suggested that Deakin’s proposal would more properly come under Clause 89 (s.92) and proposed that the Drafting Committee should frame a Clause, if Deakin would draft it. Deakin’s draft provided:

But nothing in this Constitution shall prevent any State from prohibiting the importation of any article or thing, the sale of which within the State has first been prohibited by the State.<sup>27</sup>

Sir George Turner (Premier of Victoria) found the occasion appropriate to seek clarification on the meaning of the words “absolutely free.” He commented:

I can understand you saying that they should be absolutely free from any duty on importations. These words are about the largest that could possibly be used, and might include charges for tolls, wharfage dues, and other matters like that. We ought to be careful about using words which may have a wider interpretation than was originally intended. I will ask Mr Barton to tell us what the words mean, for the desire of the Committee is that when we have a uniform tariff as against the outside world, as between State and State there should not be any customs tariff.<sup>28</sup>

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<sup>26</sup> *Convention Debates*, Adelaide, 1897, p.830.

<sup>27</sup> *Ibid.*, p.875.

<sup>28</sup> *Ibid.*, p.875.

Edmund Barton disposed of any suggestion that s.92 would prohibit the payment for services done by any private person, or a State. He also asserted that lighterage duties, and wharfage dues were in the same position, as were rents for the use of wharves:

Every ordinary service must be paid for, but, subject to the services which are paid for, trade and intercourse is to be absolutely free. We had better leave the clause in its present form.<sup>29</sup>

Deakin's motion was deferred for later discussion, and came up again on 22 April 1897. At this time Deakin indicated that he wanted the States to retain the power of prohibition of importation of opium, except for medical purposes. It was at this early stage Isaac Isaacs took the opportunity to argue that Clause 89(s.92) was "not only unnecessary but it is dangerous."<sup>30</sup> At this stage he was concerned not only with the use of the words "absolutely free," but also with the use of the words "throughout the Commonwealth," rather than the use of the expression "among the States." It was on this occasion that he argued that "absolutely free" meant "free of everything, even a licence."<sup>31</sup> He succeeded in having the words "among the States substituted for the expression "throughout the Commonwealth." In relation to this matter as well as the expression "absolutely free," he was concerned with possible misinterpretation of the provision at a later stage.

We know what we intend but these provisions will be subject to judicial interpretation hereafter.<sup>32</sup>

The fear of judicial misinterpretation was a lawyer's fear, based on the assumption that the Constitution, as a document, might be interpreted strictly in accordance with the literal meaning of its words alone, without regard to the intentions of the framers themselves. In this, his fears were well justified by subsequent events in the High Court.

During the discussion of Deakin's proposal to allow the States to deal with alcohol and opium, Edmund Barton raised the issue of bounties. Isaacs had contended that bounties did not prevent trade being absolutely free. Barton then asked the question:

If they have a protective effect are they not against free-trade?<sup>33</sup>

This very question illustrates the fact that, in the minds of the framers, the question of the freedom of intercolonial trade was permanently linked to the prohibition of State action designed to protect its industries and enterprises from interstate competition. The test to be

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<sup>29</sup> *Ibid.*, p.876.

<sup>30</sup> *Convention Debates*, Adelaide, 1897, p.1141.

<sup>31</sup> *Convention Debates*, Adelaide, 1897, p.1142.

<sup>32</sup> *Convention Debates*, Adelaide, 1897, p.1142.

<sup>33</sup> *Ibid.*, p.1142.

applied to every charge levied by a State was whether or not such a charge had a protectionist intention or effect. There is no doubt that the majority of the delegates did not agree that the words “absolutely free” involved the extreme freedom from everything suggested by Isaacs. This was part of the reason why his views were treated so perfunctorily. Another reason was the fact that Isaacs had not endeared himself to the rest of the delegates. His tendency to lecture them at length irritated them. It was this aspect of his demeanour which no doubt led to the cursory way in which Barton dismissed his concerns.

The discussion in relation to alcohol and opium raised the question as to whether there were areas wherein it would be reasonable and proper to allow a State to prohibit the importation of items of merchandise, which the State considered inimical to the health, safety and interests of its people. The demands of such powerful organisations as the Womens Christian Temperance Movement could not be ignored, particularly when their views were specifically put to the Convention in the form of Petitions supporting such action. Whatever the merits of the various matters raised, the Convention attempted to resist pressure from lobby groups, if by acceding to their demands the whole design of the scheme to underpin the freedom of interstate trade would be compromised. Of course, some special provisions were introduced into the Constitution to meet some of these pressures. Allowance was made under s.104 for special railway rates to enable the development of the territory of a State, where such rates were deemed necessary by the Inter-State Commission. But such rates had to be applied equally to goods within the State as well as to goods coming into the State from other States. Charges involved in the execution of a State’s inspection laws were covered in s.112. Finally, the question of intoxicating liquids was dealt with by s.113, which provided:

113. All fermented, distilled, or other intoxicating liquids passing into any State or remaining therein for use, sale, or storage, shall be subject to the laws of the State as if such liquids had been produced in the State.

No specific provision was made in respect of opium as such.

Returning to the persistent attempts by Isaac Isaacs to make s.92 more specific, it is argued that the rejection of his amendment in favour of the retention of the original wording of the section did not evidence an intention that the words “absolutely free” should be construed as “free of everything.” The contention that it did evidence such an intention has been based, not only, on the rejection of Isaacs’ amendment, but also on the fact that

the original form of Parkes' Resolution had been altered before it was presented to the Convention of 1891. This alteration involved the omission of the words:

free from the payment of customs duties, and free from all restriction whatsoever,  
except such regulations as may be necessary for the conduct of business.

So far as possible State action was concerned, the reference to customs duties was unnecessary, because the power to levy customs duties had been given exclusively to the Commonwealth Parliament. This was the common feature of the various drafts of the Constitution suggested by Clark and Kingston, and of the "Suggested Instructions" prepared in advance by Sir Samuel Griffith. Difficulty was obviously felt in coming to grips with the notion of regulation "necessary for the conduct of business."

Considering all aspects of the debate on this question in both Conventions, there is little doubt that the delegates did not accept the contention of Isaac Isaacs that the use of the words "absolutely free" implied that there were no limits on the freedom granted. However, it must be said that during the period when the High Court refused to give any weight to arguments based on the actual intentions of the framers of the Constitution, and refused to give consideration to the substance of the Conventions Debates, much litigation arose in relation to the interpretation of s.92.

This fact was referred to in the single Judgment of the High Court Justices in 1988 in *Cole v Whitfield*:

No provision of the Constitution has been the source of greater judicial concern or the subject of greater judicial effort than s.92. That notwithstanding, judicial exegesis of the Section has yielded neither clarity of meaning or certainty of operation. Over the years the Court has moved uneasily between one interpretation and another in its endeavours to solve the problem thrown up by the necessity to apply the very general language of the Section to a wide variety of legislative and factual situations. Indeed these shifts have been such as to make it difficult to speak of the Section as having achieved a settled or accepted interpretation at any time since federation.<sup>34</sup>

The Court further quoted the opinion of Mason J. in *Miller v TCN Channel Nine Pty Ltd*<sup>35</sup> where he said:

there is now no interpretation of s.92 that commands the acceptance of a majority of the Court.

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<sup>34</sup> *Cole v Whitfield & Anor* (1987-88) 165 CLR 360 pp.383-4

<sup>35</sup> *Miller v Channel Nine Pty Ltd.* (1986) 161 CLR 556.

For these reasons the Court acceded to the request of all parties to reconsider some 140 decisions of the Court and the Privy Council relating to s.92.

It is contended that one of the basic reasons for the dilemma addressed by the Court was the prior refusal of the Court to give consideration to the real intentions of the framers of the Constitution, and limiting its interpretative inquiry to the strict words of the Constitution considered as a mere document. Where ambiguity was found to exist in the text a concession was made by allowing consideration of the history of the development of the text up to its final form. Reference could be made to circumstances surrounding the enactment of the text to throw light upon the evil which was sought to be remedied by the text. There has been no explicit acceptance by the Court that the actual intentions of the framers except as evidenced by the text itself was either relevant or paramount. In *Cole v Whitfield* the Court referred to the Convention Debates, and also to three detailed examinations of the origin and purpose of s.92. These examinations were the essay by Professor La Nauze, already considered,<sup>36</sup> an extensive article by Professor Beasley of the University of Western Australia,<sup>37</sup> which pre-dated it, and an article by Lord Wright of Durnley,<sup>38</sup> who was a member of the Privy Council which considered the appeal in *James v The Commonwealth*. However, the detailed reference by the Court to these articles, and to the Convention Debates, did not amount to a frank acceptance of the need to elucidate the actual intentions of the framers of the Constitution, or their relevance, or paramountcy, in the interpretation of the Constitution.

Reference to the history of s.92 may be made, not for the purpose of substituting for the meaning of the words used the scope and effect— if such could be established— which the founding fathers subjectively intended the Section to have, but for the purpose of identifying the contemporary meaning of the language used, the subject to which that language was directed, and the nature and objectives of the movement towards federation from which compact the Constitution finally emerged.<sup>39</sup>

For the non-lawyer, this approach is difficult to understand. What appears to be avoided by the High Court, at all costs, is the importance of the actual intentions of the framers of the document being interpreted. Its meaning can be inferred from matters of history touching the “movement towards federation,” but not from the course of the debates themselves, and the intentions to be derived from a study of these debates. If the

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<sup>36</sup> J.A. La Nauze. A little bit of lawyers language. The history of “absolutely free.” *Essays in Federation*. A.W. Martin (Ed), Melbourne, 1969.

<sup>37</sup> Beasley F.R. “The Commonwealth Constitution: Section 92-Its History in the Federal Conventions,” *Annual Law Review*, University of Western Australia, vol.2, pp.97,273,433.

<sup>38</sup> Lord Wright of Durnley. “Section 92—A Problem Piece,” *The Sydney Law Review*, Vol.1, No 2, Sydney, January 1954, p.145, et seq.

<sup>39</sup> *Cole v Whitfield* (1987-88) 165 CLR 360 at p.385. Emphasis added.

contemporary meaning of the words is a legitimate source of instruction, why not the meaning that the framers themselves intended them to have? In so far as the quotation suggests that it is difficult to establish the scope and effect of the words used, and the actual intentions of the framers, it is contended that this difficulty has been exaggerated. Any difficulty in regard to the intentions of the framers is no greater than that of finding the evil to be remedied, or the “objectives of the movement towards federation.” There is no substantial reason for such a blanket ban on the relevance of the actual intentions of the framers. Geoffrey Schoff has persuasively argued that, in subsequent cases, members of the High Court have in fact clearly sought out the actual intentions of the framers. Despite their denial of the relevance of the intentions of the framers, the members of the Court in *Cole v Whitfield* did examine the Convention Debates in great detail. They expanded upon the effect of the compact between the colonies, which made it impossible for one State to protect its industries and productive enterprises against competition from other States. Reference was also made to the Report of the South Australian Royal Commission of 1891 which recommended “intercolonial free trade on the basis a uniform tariff,” and the First Report of the Victorian Board of Inquiry in 1894, which listed a number of factors which created an impediment to intercolonial free trade, such as border taxes, differential railway freight rates designed to secure trade for Victorian railway lines and ports, and stock taxes designed to keep out cattle from interstate.

The precise form of s.92 was considered in the light of the changes in the Resolutions and provision which preceded it. Despite all this detailed analysis, the Court came to the conclusion that the notion of absolute free trade had no precise settled contemporary content. Extensive consideration was given to the attempt of Isaac Isaacs to qualify the words “absolutely free,” in view of his opinion that the words without qualification meant, literally, “free of everything, even a licence.” Reference was also made to the apparent change of opinion by Sir Samuel Griffith previously detailed. The Court came to a number of detailed conclusions. First, that it was intended that all border customs should be removed, and that it was not designed to prevent the enactment of regulations “necessary for the conduct of business.” Further, that it was not intended to detract from the power of the Commonwealth to legislate in respect of “trade and commerce with other countries, and among the States”(s.51(i)), subject only to the restriction that the Commonwealth could not discriminate against particular States, or fix anything but a uniform tariff.

The overall conclusion drawn was that “the precise scope and effect of the guarantee was left as an unresolved task for the future.”<sup>40</sup> Despite this reservation, the Court in more positive vein, concluded:

The purpose of the Section is clear enough: to create a free trade area throughout the commonwealth and to deny to the Commonwealth and States alike a power to prevent or obstruct the free movement of people, goods, and communications across the State boundaries. Free trade was understood to give “equality of trade.” Which Mr McMillan (of the New South Wales delegation) asserted to be “one grand principle involved in the whole of our federation” (Convention Debates. Melbourne 1898 vol ii p 2345). The enemies of free trade were border taxes, discrimination, especially in railway rates, and preferences.<sup>41</sup>

This would appear to be a fairly positive statement of the intentions of the framers of the Constitution. Nevertheless, the Court took the view that, by the failure of the framers:

to define any limitation on the freedom guaranteed by s.92, they passed to the Courts the task of defining what aspects of interstate trade, commerce and intercourse were excluded from legislative or executive control or regulation.<sup>42</sup>

However, the Court did concede that:

attention to the history which we have outlined may help to reduce the confusion that has surrounded the interpretation of s.92.<sup>43</sup>

It would follow from this that some of the confusion has resulted from a failure to give adequate consideration to matters of history, if not to the actual intentions of the framers of the Constitution. Some of the Justices of the High Court have “free-floated” the Constitution completely away from such intentions to the extent of giving the Court the right to adapt the meaning of the Constitution in accordance with their own views of contemporary needs, and the present day meaning of the words of the Constitution. This has led to criticism of the Court on the basis that it has arrogated to itself legislative functions. In *Cole v Whitfield* the Court accepted that it was proper to establish the meaning of free trade at the time the Constitution was framed.

The expression “free trade” commonly signified in the Nineteenth Century, as it does today, an absence of protectionism, ie, the protection of domestic industries against foreign from competition. Such protection may be achieved by a variety of different measures – eg. Tariffs that increase the price of foreign goods, non-tariff barriers such as quotas on imports, differential railway rates, subsidies on goods produced and

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<sup>40</sup> *Ibid.*, p.391.

<sup>41</sup> *Ibid.*, p.391.

<sup>42</sup> *Ibid.*, p.392.

<sup>43</sup> *Ibid.*, p.392.



discriminatory burdens on dealings with imports—which, alone or in combination, make importing and dealings with imports difficult or impossible. Sections 92, 99, and 102 were apt to eliminate these measures and thereby ensure that the Australian States should be a free trade area in which legislative or executive discrimination against interstate trade and commerce should be prohibited. S.92 precluded the imposition of protectionist burdens, not only interstate border customs duties but also burdens, whether fiscal or non-fiscal which discriminated against interstate free trade and commerce. This was the historical object of s.92 and the emphasis of the text of s.92 ensured that it was appropriate to attain it.<sup>44</sup>

As to why the Convention failed to be more specific in the wording of the section, the Court concluded:

the failure of the Section to define expressly what interstate trade and commerce was to be immune from is to be explained by reference to the dictates of political expediency, not by reference to the purpose of prohibiting all legal burdens, restrictions or controls or standards.<sup>45</sup>

This opinion in itself is very close to a statement of the intentions of the framers. It was a different approach to that which relied on the argument that the rejection of Isaacs' amendment implied a positive proposition that s.92 was intended to have the effect of making interstate trade "free of everything." That this was not so is clear from the substance of the Debates on this very matter, which rather suggest that the majority of delegates knew, and had expressed their intentions clearly enough, and that the approach of Isaacs, and even that of Alfred Deakin, were regarded as unnecessary, tiresome and even obstructive.

Another aspect of the question considered by the Court was the view, subsequently advanced by Lord Wright of Durley, a member of the Privy Council which decided the case of *James v Commonwealth*, that s.92 should be confined to fiscal matters. This was a view which had found favour with Murphy J. in *Buck v Bavone*<sup>46</sup>. The Court did not accept this approach. It also rejected the wide interpretation of s.92, both on the basis of the historical matters examined, and also on the structure of the surrounding sections.

Obviously the provision conferring legislative power (s.51)(i) and the provision restricting the exercise of legislative power (s.92) sit more easily together if the latter is construed as being concerned with precluding particular types of burdens, such as discriminatory burdens of a protectionist kind.<sup>47</sup>

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<sup>44</sup> *Ibid.*, p.393.

<sup>45</sup> *Ibid.*, p.394.

<sup>46</sup> *Buck v bavone* (1976) 135 CLR 110 at 137.

<sup>47</sup> *Ibid.*, *Cole v Whitfield*, p.398.

On the basis of matters of history, the Court concluded:

The history of the movement for abolition of colonial protection and for the achievement of intercolonial free trade does not indicate that it was intended to prohibit genuine non-protective regulation of intercolonial or interstate trade.<sup>48</sup>

In dealing with these matters of history, the contemporary philosophies of free trade and protection, and the detailed analysis of the relevant debate on the subject, it is difficult to see how the Court could really avoid the conclusion that it was, in so many words, despite its disavowal, seeking out the real intentions of the framers of the Constitution. So far as this is implicit in the reasoning, the decision carries weight also because it was the unanimous decision of the whole Court. There may be differences of view as to the conclusions reached, but, in substance, there seems little doubt that the analysis was justified and relevant to the problem in hand. One of the criticisms made of the decision was that it was unnecessary, for the purpose of the case itself, to undertake the exercise of reviewing the interpretation of s.92. The only issue was a factual one, on which the Court held that a requirement that crayfish for sale in Tasmania be restricted to those of a specific size, whether they were obtained from Tasmanian waters or in other States, such as South Australia where there was no such requirement, did not infringe s.92.

Specific criticism of the decision was made by Peter Connolly CBE QC in an address given at the inaugural conference of the Samuel Griffith Society in Melbourne in July 1992. He first contrasted the approach of the early High Court to questions of interpretation to the Court which followed the *Engineers' case*. He stated that the early High Court had adopted legal theories to ensure the maintenance of federal balance. He described the change in the attitude of the Court:

What occurred was that lawyers, and in particular one Melbourne lawyer Mr Justice Isaacs, perceived that strict legalism which involved treating the Constitution of the country as if it was no more than a Hides and Skins Act, could be used to enlarge the legal authority of the commonwealth at the ultimate expense of the States.<sup>49</sup>

He asserted that part of the legalistic approach was the rejection of the use of the Convention Debates as a aid to interpretation. In this he was incorrect in implying that the rejection of the use of the Convention Debates was allied to the development of the legalistic approach since the *Engineers' case*. The early High Court from the very commencement of its operations had rejected the use of the Convention Debates.

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<sup>48</sup> *Ibid.*, p.403.

<sup>49</sup> *Inaugural Proceedings of the Inaugural Conference of the Samuel Griffith Society*, July 1992, p.xxiv.

Connolly's real argument is that the Court had overturned settled doctrine, in aid of an interventionist approach to interpretation. It is difficult to see how an attempt to ascertain what was the real intention behind the section can be classified as interventionism. He claimed that the overturn of settled doctrine had deprived individual traders of rights that they had acquired over time. He described *Cole v whitfield* as a decision in which:

the Attorneys-general of the Commonwealth and all the States combined to present more or less the same argument and the result of which was to strip from the people of Australia a constitutionally entrenched right which they had enjoyed before any of the present Justices were born, to remove to a great extent restrictions on the powers of the States and virtually to free the Commonwealth altogether of any constraint arising out of s.92.<sup>50</sup>

At the same conference, Professor Mark Cooray also attacked the decision on the basis that the Court had turned its back on all previous interpretations of s.92, thereby rendering the section nugatory. In support of his criticism, he argued for the centrality of the text. He supported the criticism made by Professor de Q. Walker in 1980 that the High Court had embraced "outmoded doctrines supporting state intervention despite the increasingly influential body of economic opinion that condemns restrictive occupational licensing and state trading monopolies as anti-competitive and contrary to the interests of consumers."<sup>51</sup> In contrast to his argument that the Court's interpretation was inconsistent with the text, Cooray strongly argues in favour of respecting the intentions of the framers. He referred to a common argument against reliance on the intentions of the framers on the basis that such intentions are uncertain, but concludes:

The broader objects of the founders are sufficiently clear from the history of the federation and the text of the Constitution. The principal submission is that in the construction of specific provisions, it is unwarranted to adopt interpretations which are clearly inconsistent with the broad objects of the founders. ...is it not important to ask the question whether the Colonies would have ever agreed to federate on terms such as those which are reflected in many of the High Court Judgments? Would they have federated on the terms they agreed to if they anticipated the interpretation in successive High Court decisions culminating in the *Franklin Dam case*?<sup>52</sup>

As distinct from his criticism of the High Court in *Cole v Whitfield* for departing from the literal meaning of the text of s.92, and entering upon an excursus into matters of history and an analysis of the Convention Debates, Professor Cooray in an earlier Paper, prepared in collaboration with Suri Ratnapala, made a strong attack on the High Court

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<sup>50</sup> *Ibid.*, p.xxii.

<sup>51</sup> *Ibid.*, pp.134-5.

<sup>52</sup> *Ibid.*, p.121.

for its espousal of the doctrine of literalism to achieve an unprincipled purposive and interventionist result. In that paper the authors criticised the High Court's decision in the *Engineers' case*:

The decision dethroned the Constitution and reduced it to Statutory status. It swept away from judicial reasoning those considerations peculiar to constitutional documents. It excluded from judicial reckoning the conceptual bases upon which the objects of a fundamental law may properly be understood and the intentions of its authors properly realised.<sup>53</sup>

Meagher J. also strongly criticised the decision in *Cole v Whitfield*:

It is worth reflecting upon the droll result: in *Cole v Whitfield* the idea of an individual right to enforce s.92 disappeared from the Constitution into which it was written, whereas in *Mabo* a newly invented right which is not even in the Constitution was held to confer individual rights.<sup>54</sup>

In relation to individual rights and previous interpretations of s.92, in particular the “criterion of operation” theory, the Court stated:

In some respects the protection it offers to interstate trade is too wide. Instead of placing interstate trade on an equal footing with intrastate trade, the doctrine keeps interstate trade on a privileged footing, immune from burdens to which other trade is subject.<sup>55</sup>

Whatever the force of these various criticisms, *Cole v Whitfield* does give some support, albeit indirect, to the contention that, in approaching constitutional interpretation, matters of history and the course and details of the debates in the Constitutional Conventions of the 1890s are relevant. On the basis of the material extracted by Geoffrey Schoff<sup>56</sup> from subsequent High Court cases, there is certainly room for the contention that the High Court, despite its denials, has accepted that the intentions of the framers of the Constitution are highly relevant in its interpretation, if not paramount.

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<sup>53</sup> Mark Cooray and Suri Ratnapala “The High Court and the Constitution – Literalism and beyond,” *Commentaries to the Convention Debates*, Sydney, 1996, p.209. Emphasis added.

<sup>54</sup> Comments made at the launching of the first volume of the *Proceedings of the Samuel Griffith Society*. 1993. *Proceedings of the Samuel Griffith Society*, vol.3, p.151.

<sup>55</sup> *Cole v Whitfield*, p.402.

<sup>56</sup> Paul Schoff, “The High Court and History: It Still Hasn’t Found(ed) What It’s Looking For,” (1994). *5 Public Law Review*, pp.253-273.

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## PART IV



The sections upon which  
the Tasmanian Dam Case  
was based. The expansion of  
Commonwealth power by the use  
of the “external affairs” power,  
and the corporations power

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## THE EXTERNAL AFFAIRS POWER SECTION 51(XXIX)

The power of the Commonwealth Parliament in relation to external affairs is found in s.51(xxix) of the Constitution.

This provides, under the general heading of “Legislative powers of the Parliament,” as follows:

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

(xxix). “external affairs.”

The interpretation of this section has given rise to great controversy in both legal and political fields.

### CONTROVERSY IN THE LEGAL FIELD

There has been no disagreement amongst Judges of the High Court that the Executive of the Commonwealth has power to enter into Treaties and International Agreements and Conventions. There has been little disagreement amongst the Judges of the High Court that the Commonwealth Parliament has full power to legislate, under this section in order to carry out the obligations entered into under such Treaties, and International Agreements and Conventions. However, the question has been robustly debated as to whether the mere entry of the Executive into an international Treaty, Agreement, or Convention, automatically gives to the Commonwealth Parliament the power to legislate on the subject matter of such an instrument, irrespective of the nature of the subject matter covered by the particular instrument, in cases where the Commonwealth parliament has otherwise no specific power so to legislate. The view that the Commonwealth Parliament is so empowered has not been held, at any one time, by a majority of the Justices of the High Court, but the views of those who have espoused this interpretation have been expressed in extremely positive terms.

In 1936 in *The King v Burgess; ex parte Henry*<sup>1</sup>, Evatt and McTiernan J.J., adopted the broad view of the power:

The Commonwealth has power both to enter into international agreements and to pass legislation to secure the carrying out of such agreements according to their tenor even although the subject matter of the agreements is not otherwise within Commonwealth legislative jurisdiction.

The subject matters of these agreements may properly include such matters as, eg, suppression of traffic in drugs, control of armament, regulation of labour conditions, and control of air navigation.<sup>2</sup>

This expression of opinion was clearly wider than was necessary for the disposal of the case itself, which concerned the validity of regulations made under the Air Navigation Act 1920.

The Justices asserted that it was:

no longer possible to assert that there is any subject matter which must necessarily be excluded from the list of possible subjects of international negotiation, international dispute or international agreement.<sup>3</sup>

Their joint judgement conceded that:

The legislative power in s.51 is granted "subject to this Constitution" so that such treaties and conventions could not be used to enable the Parliament to set at nought constitutional guarantees elsewhere contained such, for instance, as ss 6, 41, 80, 99, 100, 116, or 117.<sup>4</sup>

However, they argued that the power was not limited to legislating for the execution of treaties, and could be activated simply by international recommendations, requests and conventions.

Despite this very broad description of the nature of the power, they were cautious enough to state that any such treaty, international agreement or convention could not be used "merely as a device to procure for the Commonwealth an additional domestic jurisdiction."

Latham C.J., also took a wide view of the power:

The Commonwealth Parliament was given power to legislate to give effect to international obligations binding on the Commonwealth or to protect national rights internationally obtained by the Commonwealth whenever legislation was necessary or deemed to be desirable for this purpose.<sup>5</sup>

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<sup>1</sup> (1936) 55 CLR 608, at 696.

<sup>2</sup> *Ibid.*, p.696.

<sup>3</sup> *Ibid.*, p.681.

<sup>4</sup> *Ibid.*, p.687.

<sup>5</sup> *Ibid.*, p.644.

But he had already conceded that it could not be used so as indirectly to amend the Constitution, and that it was subject to the prohibitions contained in the Constitution.<sup>6</sup>

Starke J. suggested that possibly:

the laws will be within the power only if the matter is "of sufficient international significance" to make it a legitimate subject for international co-operation and agreement "(Willoughby on The Constitutional Law of the United States 2nd Ed (1929) p 519."<sup>7</sup>

Dixon J., in contrast, expressed a somewhat restricted view which was to become accepted by a number of the Justices:

If a treaty were made which bound the Commonwealth in reference to some matter **indisputably international in character**, a law might be made to secure observance of its obligations if they were of such a nature affecting the conduct of Australian citizens. On the other hand, it seems an extreme view

that merely because the Executive Government undertakes with some other country that the conduct of persons in Australia shall be regulated in a particular way, the legislature thereby obtains a power to enact that regulation although it relates to a matter of internal concern which, apart from the obligation undertaken by the Executive, could not be considered a matter of external affairs.<sup>8</sup>

This clearly raised the issue of precisely what was, and was not, an external affair. It suggested that if a matter could not be considered an "external affair" without a treaty, no treaty could convert it into one. Dr Colin Howard at the Inaugural Conference of the Samuel Griffith Society in 1992,<sup>9</sup> neatly encapsulated the problem in a paper entitled, "When External means Internal." He clearly had in mind the reliance placed by the High Court on s.51(xxvi) in upholding the Commonwealth's intervention to stop the construction of the Gordon below Franklin Dam in Tasmania, contrary to the decision of the government of Tasmania to authorise the project. This issue is important because Australia, under its Constitution, is not a unified polity but a federation. In a unified polity, such as the United Kingdom, the power of the legislature is unlimited. Whilst the mere entry into treaty obligations by the Executive would not make the obligations under the treaty part of domestic law, there was no restriction on the power of the Parliament to legislate to carry out the obligations set out in the treaty, whatever they were. Since the entry into the European Union, the position has changed to the point where the British

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<sup>6</sup> *Ibid.*, p.642.

<sup>7</sup> *Ibid.*, p.658.

<sup>8</sup> *Ibid.*, p.669. Emphasis added.

<sup>9</sup> *Proceedings of the inaugural conference of The Samuel Griffith Society*, July 1992, Melbourne.



courts are now prepared to take note of such treaty obligations, whether, or not, legislative action has been taken by the Parliament to translate the obligations into domestic law.

The question of what, of an external nature, is involved in a particular Treaty, or Agreement, which would enable the Commonwealth Parliament to legislate in areas normally beyond the specific powers granted to it by the Constitution, is a consideration raised by those Justices who, over the years, have not supported the wide characterisation of the “external affairs” power which was foreshadowed by Evatt and McTiernan JJ. Latham C.J., in a later case, considered the nature of an “external affair”:

The relations of the Commonwealth with all countries outside Australia, including other Dominions of the Crown, are matters which fall directly within the subject of external affairs, a subject with respect to which the Commonwealth Parliament has power to pass laws—Constitution s.51(xxix). The preservation of friendly relations with other Dominions is an important part of the management of the external affairs of the Commonwealth.<sup>10</sup>

Barwick C.J. postulated that there would be some kind of limit to the situations which could be characterised as an “external affair”:

the mere fact that the Commonwealth has subscribed to some international document does not necessarily attract any power to the Commonwealth parliament. What treaties, conventions, or other international documents can attract the power given by s.51(xxix) can best be worked out as occasion arises.<sup>11</sup>

On 30 September 1975, Australia ratified the International Convention on the Elimination of All Forms of Racial Discrimination. In *Koowarta v Bjelke-Petersen*<sup>12</sup>, the Chief Justice, Sir Harry Gibbs, referred to the description of the “external affairs” power by Professor Harrison Moore<sup>13</sup> as that “somewhat dark” power. He also quoted the prediction of Quick and Garran<sup>14</sup> that the power:

may hereafter prove to be a great constitutional battleground.

Sir Harry considered that the expression “external affairs” was vague and imprecise:

However, if the phrase is considered as a whole, its natural meaning is matters concerning other countries. When the word “affairs” is used in the phrase “foreign affairs” it has the sense of “public business, transactions or matters concerning men or

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<sup>10</sup> *R.v Sharkey* (1949) 79 CLR 1221, at pp.136-7.

<sup>11</sup> *Airlines of NSW Pty Ltd .v New South Wales (No 2)* (1965) 133 CLR 54, at p. 85.

<sup>12</sup> *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

<sup>13</sup> 16 *Law Quarterly Review* p.39.

<sup>14</sup> Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*. 1901, 1996, Sydney, p.631.

nations collectively” (see Oxford English Dictionary), and the word “foreign” indicates that such business, transactions or matters take place in or with other countries, or concern other countries.<sup>15</sup>

He had no doubt that the power would authorise legislation to carry into domestic law the provisions of an international agreement. However:

The crucial question in the case is whether under the power given by s.51(xxix) the Parliament can enact laws for the execution of any treaty to which it is a party, whatever its subject matter and in particular for the execution of a treaty which deals with matters that are purely domestic and in themselves involve no relationship with other countries or their inhabitants.<sup>16</sup>

He stressed that there were strong arguments in favour of a restricted interpretation of s.51(xxix):

If the Parliament is empowered to make laws to carry into effect within Australia any treaty which the Governor-General may make, the result will be that the executive can, by its own act, determine the scope of the Commonwealth power. If the view of Evatt and McTiernan JJ is correct, the executive could, by making an agreement, formal or informal, with another country, arrogate to Parliament power to make laws on any subject whatsoever.<sup>17</sup>

After giving some examples of what the Commonwealth Parliament could do under an expansive view of the power he argued that:

it is impossible to envisage any area of power which could not become the subject of Commonwealth legislation if the Commonwealth became a party to an appropriate international agreement.<sup>18</sup>

Such an interpretation would give the Commonwealth the opportunity to acquire unlimited legislative power:

The distribution of power made by the Constitution could in time be completely obliterated; there would be no field of power which the commonwealth could not invade, and the federal balance achieved by the constitution could be entirely destroyed.

However, in determining the meaning and scope of a power conferred by s.51 it is necessary to have regard to the federal nature of the Constitution.<sup>19</sup>

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<sup>15</sup> *Koowarta v Bjelke Petersen* (1982) 153 CLR 168 at 188.

<sup>16</sup> (1982) 153 CLR 168, at pp.188-192.

<sup>17</sup> *Ibid.*, p.198.

<sup>18</sup> *Ibid.*, p.198.

<sup>19</sup> *Ibid.*, pp.198-99.

He suggested that a narrower interpretation of s.51(xxix) would be more consistent with “the federal principle”, and the “true object and purpose of the power.” He considered that the exercise of the power must involve “a relationship with other countries or persons or things outside Australia.”

Dealing specifically with the issue of racial discrimination involved in the *Koowarta case* he stated his opinion:

The fact that many nations are concerned that other nations should eliminate racial discrimination within their own boundaries does not mean that the domestic or internal affairs of any one country thereby become converted into international affairs. There may be legitimate international concern as to the domestic affairs of a nation. An Australian law which is designed to forbid racial discrimination by Australians against Australians within the territory of Australia does not become international in character, or a law with respect to practices with regard to racial discrimination. It follows that I respectfully disagree with the suggestion by Murphy J in *Dowd .v. Murray* (1978) 143 CLR 410 at 429-30, that the power given by S.51(xxix) enables the Parliament to legislate with respect to any subject of international concern. The examples given by Murphy J. show that the acceptance of such a view would render the detailed specification of Commonwealth powers in s.51 almost completely irrelevant.<sup>20</sup>

Sir Harry also dealt with the Commonwealth’s alternative proposition that the Commonwealth legislation would be valid on the basis that there was a non-discrimination principle of international law. He reasoned that an obligation under that principle could “only be given effect within Australia in the manner for which the Constitution provides, ie, if the subject matter is not within Commonwealth power, by a law of a State.”

His final conclusion was:

To understand the power as becoming available merely because Australia enters into an international agreement, or merely because the subject matter excites international concern, would be to ignore the federal nature of the Constitution. It would be to allow the Commonwealth, under a power expressed to be with respect to external affairs, to enact a bill of rights entirely domestic in its effect—a bill of rights to which State legislation and administrative actions would be subject, but which of course not necessarily have the same effect on Commonwealth legislation or administrative action. My rejection of so wide an interpretation does not mean either that Australia is unable to fulfil her international obligations— that can be done by co-operative action between the Commonwealth and the States—or that the Parliament is unable, if such co-operation is not forthcoming, to protect the people of Aboriginal race from discrimination—that can be done under the power conferred by s.51(xxvi).<sup>21</sup>

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<sup>20</sup> *Ibid.*, pp.200-203.

<sup>21</sup> *Ibid.*, p.207.

Stephen J., in the same case, considered that the word “external” must qualify the word, “affairs.” This would restrict the meaning of the phrase “external affairs” to so much of the “public business of the national government as related to other nations or other things or circumstances outside Australia.” Whilst appearing to agree that the interpretation of Evatt, McTiernan, and Murphy J.J. was too wide, he was impressed by the existence of the Charter of the United Nations, the Universal Declaration of Human Rights, and by International Conventions on the Elimination of All Forms of Racial Discrimination:

This brief account of international post-war developments in the area of racial discrimination is enough to show that the topic has become for Australia, in common with other nations, very much a part of its external affairs and hence a matter within the scope of S.51(xxix).<sup>22</sup>

Stephen J joined Gibbs C.J. Aickin and Wilson J.J. in rejecting the wide interpretation of the power. However, by holding that the subject matter of the legislation was “international in character”, within the narrow interpretation, he joined Mason, Murphy, and Brennan J.J. in upholding the validity of the Racial Discrimination Act.

Despite his act in making up the majority, he did see the danger involved in the wide interpretation of the section. If the Federal Executive, by concluding treaties upon any subject it seems fit:

can thereby at will create such “external affairs” as it wishes and if para (xxix) then confers power upon the federal legislature to legislate with respect to whatever external affair has thus been brought into being, this may place in jeopardy the federal character of our polity, the residuary legislative competence of the States being under threat of erosion and final extinction as a result of federal exercise of the power which para (xxix) confers.<sup>23</sup>

Even where the extreme view of s.51(xxix) has not been adopted, the High Court has allowed wide scope for the Commonwealth Parliament to legislate on subject matters which otherwise are not within its specified powers under the other placita of s.51.

Support for a wide interpretation of s.51(xxix) of the Constitution would mean that the High Court could authorise a method for the drastic alteration of the Constitution in favour of Commonwealth power, without the need to consult the electors as provided by s.128. The view that requires that subjects covered by treaties or international agreements must be characterised as being “external”, in order to activate the power under s.51(xxix), gives no positive help in elucidating the scope of the area of power.

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<sup>22</sup> *Ibid.*, p.220.

<sup>23</sup> *Ibid.*, p.215.

Leaving aside the “external affairs” power, where the Commonwealth Parliament has specific legislative power under s.51, it has unlimited power to legislate in that area for the purpose of carrying out Australia’s obligations under an international treaty or agreement on the same subject matter. In that case, whilst the obligation arises from the treaty, the power of the Commonwealth to legislate for the purpose of making the subject matter of the treaty part of the domestic law of the Commonwealth arises from the specific grant of power under s.51.

In the *Tasmanian Dam case*, Mason J. touched upon the possible effect that the wide interpretation of the power might have upon the relationship between the Commonwealth and the States. He quoted the words of Dixon J. in *Stenhouse v Coleman*:<sup>24</sup>

In most of the paragraphs of s.51 the subject of the power is described either by reference to a class of legal, commercial, economic, or social transaction or activity (as trade and commerce, banking, marriage), or by specifying some class of public service (as postal installations, lighthouses), or by naming a recognised category of legislation (as taxation, bankruptcy).

He commented that the boundaries of these categories were capable of definition, in contrast to the difficulties posed by s.51(xxix):

The division of powers between the Commonwealth and the States which the Constitution effects could be rendered quite meaningless if the Federal Government could, by entering into treaties with foreign governments on matters of domestic concern, enlarge the legislative powers of the Parliament so that they embraced literally all fields of activity. This result could follow even though all the treaties were entered into in good faith, that is, not solely for the purpose of attracting legislative power. Section 51(xxix) should be given a construction that will, so far as possible, **avoid the consequence that the federal balance of the constitution can be destroyed at the will of the executive.**

the federal nature of the Constitution requires that “no single power should be construed in such a way as to give the Commonwealth Parliament a **universal power of legislation which would render absurd the assignment of particular carefully designed powers to that parliament**: *Bank of New South Wales v. Commonwealth* (1948) 76 CLR 1 at 184-5.”<sup>25</sup>

From the approach of Sir Anthony Mason, it would follow that, if the Commonwealth Executive entered into a treaty in respect of trade and commerce matters, the Commonwealth Parliament would have power to legislate to carry out its treaty

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<sup>24</sup> (1944) 69 CLR 457, at 471.

<sup>25</sup> *Commonwealth of Australia and Another v State of Tasmania and Others (The Tasmanian Dam case)* (1983) 158 CLR 1, at 99-100. Emphasis added.

obligations, because it had specific power under s.51 to legislate in respect of “trade and commerce”, treaty or no treaty.

One way to resolve the conflict which, for some considerable time, has divided the High Court, would be to assert that the Commonwealth power to legislate under the section in respect of matters of “purely domestic concern” should be limited to those areas in respect of which the Commonwealth has power to legislate in the absence of a treaty. This may only be another way of expressing the more conservative view of Sir Harry Gibbs that:

The power of Parliament to carry treaties into effect is not necessarily as wide as the executive power to make them.<sup>26</sup>

In the *Tasmanian Dam Case*, Gibbs C.J. reviewed the various tests which had been formulated in previous cases. He considered that the “external affairs” power was not attracted in the absence of a provision in the Convention which the legislative act followed, placing an obligation upon Australia to legislate to carry it out.

He considered the argument which was advanced on the basis that, quite apart from the Commonwealth’s specific and enumerated powers, there was a wide area of power available to the Commonwealth as an implication from the establishment of the Commonwealth as a polity, and from its emergence as an international state. This was a view enunciated and held by Mason and Jacobs J.J. in *Victoria v The Commonwealth and Hayden*. Mason J. had expressed the opinion that:

there is to be deduced from the existence and character of the Commonwealth as a national government and from the presence of s.51(xxxix) [the incidental power] and 61 a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation.<sup>27</sup>

Jacobs J., after giving the example of the establishment of the Commonwealth Scientific and Research Organisation, expressed the view in not dissimilar vein:

No doubt there are other enterprises and activities appropriate to a national government which may be undertaken by the Commonwealth on behalf of the nation. The functions appropriate and adapted to a national government will vary from time to time. As time unfolds, as circumstances and conditions alter, it will transpire that particular enterprises and activities will be undertaken if they are to be undertaken at all, by the national government.

Thus, the complexity and values of a modern national society result in a need for co-ordination and integration of ways and means of planning for that complexity and

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<sup>26</sup> *Ibid.*, p.193.

<sup>27</sup> (1975) 134 CLR, at 397.

reflecting those values... Moreover, the complexity of society, with its various interrelated needs, requires co-ordination of service designed to meet those needs.<sup>28</sup>

After referring to a cautionary note struck by Mason J. himself, Gibbs C.J. concluded that the implied power could have no relevance to the *Tasmanian Dam case*. He concluded:

the question whether and to what extent restrictions should be put on the use of lands within a state is not a matter which is peculiarly appropriate to a national government. On the contrary, it is a matter which traditionally has been considered to be within the province of the government of a state within which the lands are situated.<sup>29</sup>

The Chief Justice was joined by Wilson and Dawson J.J., in holding that it was unnecessary to consider the nationhood power stemming from the existence of the Commonwealth as the national Parliament. Deane J. held that the legislation was not supported by this inherent power, which meant that there was no majority support for this basis of power.

Much argument before the High Court has been addressed to the particular treaties or Conventions involved in particular cases. Whilst it is important to know whether or not a particular treaty imposes an obligation, or should otherwise be carried into domestic law, it is just as important to know what is the precise area covered by the subject “external affairs.” All powers granted to the Commonwealth Parliament by s.51 are plenary powers within the specific area of the particular grant. Each and every one of them can arise in the context of an obligation imposed by treaty. In a sense the existence of a treaty is totally irrelevant to the question of whether, or not, a particular power extends to enable the Commonwealth to legislate on a particular subject matter. The “external affairs” power is no different from any of the other specific powers of the Commonwealth. If the Commonwealth can legislate under it, it can equally legislate if the same subject matter is related to a treaty obligation. An important aspect of the inquiry is to consider what power the Commonwealth would have under s.51(xxix) in the absence of a treaty. Some light will be thrown on this problem when the Convention Debates on the subject are considered.

The treaty-making power is vested in the Executive, not the Legislature. It cannot increase or decrease the competence of the Legislature. As to how the Commonwealth acquired the treaty making power is a matter for subsequent discussion. For the moment it is sufficient to say that no power in the Executive can, of itself, effect a change to the Constitution. The power to legislate is governed by the Constitution. Unless the Legislature

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<sup>28</sup> *Ibid.*, pp.48-49.

<sup>29</sup> *Ibid.*, p.109.

has a specific power, the Executive, by entering into a treaty or international agreement, cannot give to the Legislature a power that it does not possess under the Constitution.

In the sense that those of the Justices of the High Court who support the extreme view of the “external affairs” power have followed the Evatt-McTiernan reasoning, they have purported to assert that the Executive, by its treaty making power, can alter the Constitution and extend the power of the Legislature beyond the specific area to which it is confined thereby.

The issue continues to be a live one, because there are still supporters of the extreme view on the High Court, and the cases where it has continued to be debated have frequently been decided by small majorities.

## CRITICISM OF THE HIGH COURT IN RELATION TO DECISIONS ON THE EXTERNAL AFFAIRS POWER

Quite apart from the internal division of opinion on the High Court, decisions of the Court on the interpretation of the “external affairs” power have provoked much political, and some academic criticism of the High Court on the basis of its alleged “activism”, “progressivism”, or even “adventurism.”

Much of this criticism arose after the *Tasmanian Dam case*, which was decided in the year following the *Koowarta case*. In the latter case, the Court was sharply divided, and the result was decided by a four to three majority. The majority was made up of Mason, Stephen, Murphy and Brennan J.J. Despite the reservations of the Chief Justice referred to earlier that the power could not be used as a mere device to extend the power of the Commonwealth into fields where it lacked power, an extremely wide view was taken by the majority as to the scope of the power.

It is not solely the Court’s expansive view of the external affairs power itself which has aroused criticism. It is also what is seen as an intrusion of the court into matters which should be the exclusive preserve of the Legislature, and also to the perceived political considerations behind some of the reasoning. An example of the reliance on essentially political views as to the consequences of a restrictive interpretation of the external affairs power is clearly seen in the Judgment of Sir Anthony Mason, when he was referring to the decision of the court in *R v Burgess Ex parte Henry* as a landmark decision. He commented that the outcome of the case appeared to be inevitable, and then went on:



Any other result would have been plainly unacceptable, not only because it would have entailed a failure to acknowledge the plenary nature of the power and the important purpose which it served, but also because the consequence of the failure would have been to leave the decision on whether Australia should comply with its international obligations in the hands of the individual States as well as the commonwealth, for the commonwealth would lack sufficient legislative power to fully implement the treaty. The ramifications of such a fragmentation of the decision-making process as it affects the assumption and implementation by Australia of its international obligations are altogether too disturbing to contemplate. Such a division of responsibility between the Commonwealth and each of the States would have been a certain recipe for indecision and confusion, seriously weakening Australia's stance and standing in international affairs.<sup>30</sup>

If the Constitution in fact left the “decision on whether Australia should comply with its international obligations in the hands of the individual States as well as the commonwealth,” any adverse comment by members of the High Court on this fact would not be a judicial comment, but would be the expression of an essentially political opinion, irrelevant to the exercise of the Court's interpretive jurisdiction.

It is true that the statement was made in the context of reasoning why a particular interpretation was to be preferred over another. However, the Court was trying to avoid what it regarded as an essentially politically undesirable result. The Court may properly draw the attention of the Legislature to a particular result which arises from the Constitution so that the Legislature may have the opportunity of considering whether, or not, a constitutional amendment should be sought from the electorate under Section 128.

Statements of the kind made by Mason J. have led to the criticism that the High Court is introducing into its role of interpreting the Constitution, considerations of an essentially political nature, which should be solely in the province of the Parliament. If the Court was of the view that Australia was constitutionally crippled in the field of world affairs, then the proper remedy would be an alteration of the Constitution by the people in a referendum called under Section 128, not in the quasi-legislative approach that the statement appears to involve.

The concern of some members of the High Court to ensure that the Commonwealth has been clothed with ample power to carry itself onto the world stage, representing Australia as a nation, has increased over the years. Sir Isaac Isaacs, during the course of the 1897-8 Convention, fought strongly against the forces in the Convention which were determined to secure the rights of the States in wide areas and to restrict the

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<sup>30</sup> *Koowarta v Bjelke-Petersen* (1992) 153 CLR 168, at 225. Emphasis added.

Commonwealth Parliament to the bare minimum of power consistent with what were conceived as areas where, either, the States could not act individually, or where the Commonwealth could take common action on behalf of all the States. In this struggle Isaacs was defeated on most of the issues which he held dear. L.F. Crisp commented:

Outnumbered by the well-entrenched provincialists and conservatives, and those who fell in step behind them, he never admitted defeat. Until his death half a century later he fought unrelentingly to have written or read into the Constitution as many as possible of the details and principles he and like-minded colleagues had failed to have adopted in 1897-8 and enacted in 1900.<sup>31</sup>

The High Court has been reluctant to accept that the Commonwealth lacks any power to enable it to fulfil the role of a fully sovereign nation on the world stage. The Commonwealth has made ever-increasing use of the “external affairs” power to give full effect to international treaties entered into by the Executive. This use has not been unduly restricted by the decisions of the High Court. Dr Colin Howard has been very strong in his criticism of the use made by the Court of the “external affairs” power to strengthen the central government in areas where, otherwise, it might lack specific power. In an Address to the Inaugural Conference of the Samuel Griffith Society, after referring to the fact that there were a large number of treaties and Conventions into which Australia had entered:

Implementation of practically every one of them can be referred to the external affairs power if nothing else is available.<sup>32</sup>

He commented adversely on:

the steadily increasing tendency to look to international rather than national action on world issues.<sup>33</sup>

He claimed that the High Court’s approach in relation to the external affairs power:

mortgages the domestic effect of much of our Constitution to the accidents of international diplomacy.<sup>34</sup>

After referring to the analysis of the “external affairs” power by Quick and Garran, in their *Annotated Commonwealth Constitution*, he concludes that:

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<sup>31</sup> “Federation Founders” a series of articles by L.F. Crisp, *“Studies in Australian Federation,”* John Hart (Ed), Melbourne 1990, p.186.

<sup>32</sup> Colin Howard, “When External means Internal,” *Proceedings of the Inaugural Conference of the Samuel Griffith Society*, Melbourne, 1992, p.153.

<sup>33</sup> *Ibid.*, p.153.

<sup>34</sup> *Ibid.*, p.156.

exactly as Quick and Garran envisaged with remarkable prescience long ago, the emphasis should be not on expanding the external affairs power but on setting sensible limits to its proper area of operation.<sup>35</sup>

Cooray and Ratnapala in their critical analysis constantly argue that the actions of the High Court have distorted the Constitution and have produced results which are completely contrary to the intentions of the framers of the Constitution:

is it not important to ask the question whether the colonies would have ever agreed to federate on terms such as those which are reflected in many of the high Court Judgments? What were the perceptions of the people who voted for a federation? Would they have federated on the terms they agreed to if they anticipated the interpretations in successive high Court decisions culminating in the Franklin Dam Case?<sup>36</sup>

There is no doubt as to the centrality of these concerns in the contemporary discussions of the Constitution.

Sir Anthony Mason recognised this fact when he said:

The burning issues in Australian constitutional law centre around federal-state relationships and the Court's approach to interpretation of powers.

He recognised the nature of the criticism of the Court's activities:

Liberal interpretation has led to the criticism in both the United States and Australia that the courts in interpreting the Constitution have been unfaithful to its words and to the original intent of those who framed it.<sup>37</sup>

Whilst conceding that the framers of the Constitution intended to preserve the strength of the States, he asserted that critics of the expansion of Commonwealth power by the interpretative power of the High Court failed to give equal importance to the:

Paramount purpose of entrusting to the federal government all the powers necessary to conduct the affairs of a nation on matters outside the competence of the individual states.<sup>38</sup>

He referred to the criticism that the Constitution provided for its amendment by formal procedure, not by judicial interpretation. He answered this by pointing out that:

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<sup>35</sup> *Ibid.*, p.156.

<sup>36</sup> L.J.M. Cooray and Suri Ratnapala. "The High Court and the Constitution-Literalism and beyond," *The Convention Debates 1891-1898: Commentaries, Indices and Guide*, G.Craven(Ed), Sydney 1986, p.222.

<sup>37</sup> Sir Anthony Mason "Future Directions in Australian Law," (1987) *Monash University Law Review* p.149, at pp.157-8.

<sup>38</sup> *Ibid.*, pp.157-8.

the electorate has been notoriously unsympathetic to the expansion of federal powers, approving only two out of twenty-five such proposals placed before the people.<sup>39</sup>

He argued that the critics:

overlook the fact that the process of amendment is so exceptional, so cumbersome and so inconvenient that governments cannot set it in motion regularly to ensure that the Constitution is continuously updated.<sup>40</sup>

On the basis that:

The problem is that the words of the Constitution have to be applied to conditions and circumstances that could not have been foreseen by its authors. It follows that the exploration of the meaning of the language of the Constitution at the time of its adoption and of the intentions of the authors have a limited value in resolving current issues. Accordingly, there is a natural tendency to read the Constitution in the light of the conditions, circumstances and values of our own time, instead of freezing its provisions within the restricted horizons of a bygone era. Viewed in this way, the Constitution is not so much a detailed blueprint as a set of principles designed as a broad framework for national government.<sup>41</sup>

This is the classic defence of those who support the Court's approach. The statement raised a number of problems itself. There is no doubt that the authors of the Constitution intended to place some restraint upon the ease of constitutional amendment. If difficulties for governments arise from the fact that the "the process of amendment is so exceptional, so cumbersome and so inconvenient that governments cannot set it in motion regularly to ensure that the Constitution is continuously updated," the people must bear the responsibility for the problems in so far as they have refused to allow the Constitution to be updated. It is not for the High Court to do the task for them. What are the "values of our own time" to which the former Chief Justice is referring, and whose values are they in any case? On the basis that the Constitution is to serve the interests of the Australian people, surely it is their values that should be paramount. The only constitutional way of ascertaining what the values of the Australian people are is to test the values that government desires to be served by the Constitution at the referenda provided by the constitution itself. What is being argued really is that the means of constitutional change is no longer appropriate. If so there is good reason for changing it. However, unless the appropriate constitutional means is adopted to effect the change, governments and the High Court are stuck with the degree of rigidity which results. It may be a natural

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<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> Sir Anthony Mason. (1987) *Monash University Law Review*, p.149, at p.157. Emphasis added.

tendency of Justices of the High Court to read the Constitution in the light of what they consider to be the “values of our time,” but that is not really the point. Judgments of this sort are more appropriately in the province of the Parliament as representing the current state of these values. If the Parliament needs greater power to legislate in accordance with those values, it is constrained to persuade the electorate that it is time either to grant it the power sought by the prescribed majorities under Section 128 of the Constitution, or to frankly ask that same electorate to change the conditions under which amendments to the Constitution can be effected.

Refusal to give importance to the intentions of the framers leaves the Constitution at large to be interpreted and changed from time to time by the interpreters. Today’s interpretation can be overthrown by tomorrow’s majority on the High Court. By giving great weight to the intentions of the framers a greater degree of security and consistency in interpretation would result, and any need for constitutional change would be highlighted rather than concealed under the view of a passing majority on the Court.

## THE HISTORICAL SETTING OF THE ‘EXTERNAL AFFAIRS’ POWER

As originally drafted there was a clear intention to give to the Commonwealth power to enter into treaties coupled with power in relation to “external affairs.”

It is important in the first instance to consider the provisions of Covering Clause 5 of the Commonwealth Constitution Act, before considering the provisions of Section 51(xxix)

The original form of Covering Clause 5, which appeared as Covering Clause 7 in the 1891 Draft Bill, was as follows:

The Constitution established by this Act, and all laws made by the Parliament of the Commonwealth in pursuance of the powers conferred by the Constitution, AND ALL TREATIES MADE BY THE COMMONWEALTH, shall, according to their tenor, be binding on the Courts, Judges and people, of every State, and every part of the Commonwealth, anything in the laws of any State to the contrary notwithstanding: and the Laws AND TREATIES of the Commonwealth shall be in force on board of all British ships whose last port of clearance or whose port of destination is in the Commonwealth.

This Clause came before the 1891 Convention on 1 April 1891. At that stage, there was no discussion on the question of the inclusion of the word “treaties.” All of the discussion on the clause centred on the propriety of its application to British ships.

The word “treaties” remained in the Draft Bill, as adopted at the end of the 1891 Convention. It also appeared unaltered in subclause 26 of s.52 of the 1891 Draft Bill. S.52 was the 1891 section which is now s.51 of the current Constitution. Subclause (26) read: “External affairs and Treaties.”

The matter was considered on 9 September at the Sydney Session of the 1897 Convention. An amendment had come from the Legislative Council of New South Wales suggesting that the words, “and all treaties made by the Commonwealth”, be omitted from the then Clause 7 of the covering clauses of the Constitution Act.

Edmund Barton explained the reason behind the suggested amendment:

In the first place, the desire of that body is that, inasmuch as the treaty-making power will be in the Imperial Parliament, we should omit any reference to the making of treaties by the commonwealth; in other words while they concede that we should make certain trade arrangements, which would have force enough if ratified by the Imperial Government, the sole treaty-making power is in the Crown of the United Kingdom.<sup>42</sup>

Henry Bournes Higgins then pointed out that treaties were also referred to in Clause 52 (s.51). Barton conceded this point:

And, in conformity with the amendment they suggest in this clause, they desire that the words “and treaties” should disappear from clause 52.<sup>43</sup>

Reid supported the omission of “treaties,” because the power:

would be more in place in the United States Constitution, where treaties are dealt with by the President and the Senate, than in a constitution of a colony within the empire. The treaties made by Her majesty are not binding as laws on the people of the United Kingdom, and there is no penalty for disobeying them. Legislation is sometimes passed to give effect to treaties, but treaties themselves are not laws, and indeed nations sometimes find them inconvenient, as they neglect them very seriously without involving any important legal consequences.<sup>44</sup>

The amendments were duly made at the Melbourne Session on 21 January 1898. Immediately following this Subclause (30) was considered:

(30) The relations of the Commonwealth to the islands of the Pacific.

Edmund Barton referred to the suggestion that the power to deal with the Pacific Islands was covered by the “external affairs” power:

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<sup>42</sup> *Convention Debates*, Sydney, 1897, p.239.

<sup>43</sup> *Ibid.*, p.239.

<sup>44</sup> *Ibid.*, p.240.

That is arguable; it is quite possible that it may be true; but there are a very large number of people who look forward with interest to the commonwealth undertaking, as far as it can as part of the British Empire, the regulation of the Pacific Islands.<sup>45</sup>

Alfred Deakin (Victoria) indicated that he understood that Barton would give consideration to the effect of the removal of the words “and treaties”:

with a view to see how far, by omitting them, we would limit the range of the powers of the Federal Parliament within the range of the powers that the Canadian Parliament already enjoys.<sup>46</sup>

It was well known that, under the British North America Act, the central government of Canada had greater power than the Commonwealth Parliament. This resulted from the fact that the central government held all residuary powers and the Provinces were limited to specified powers.

Additionally to this, s.132 of the Canadian Constitution provided:

132. The Parliament and government of Canada shall have all powers necessary or proper for performing the obligations of Canada or any province thereof as part of the British Empire towards foreign countries arising under treaties between the Empire and such foreign countries.

The Canadian Constitution was framed in accordance with the then legal relationships between the colonies and the Imperial government. That government alone had power to make treaties in relation to the United Kingdom and all of its Dominions and colonies. It alone was responsible for the conduct of the Dominions and colonies in relation to the subject matter of any such treaty. In the case of Canada specific power was given to the Dominion parliament to legislate to carry out the obligations of Canada under any treaty entered into by the government of the United Kingdom affecting Canada or any other part of the British Empire. It is doubtful whether the use of the words “external affairs” by the framers of the Australian Constitution encompassed the specific power granted to the Canadian parliament and government. Having regard to the relationship of the Dominions and colonies to the Imperial government at the time the provision could not cover a field wider than that encompassed by s.132 of the Canadian Constitution, in so far as it could be related to legislation to implement of treaties at all. Such treaties could only be those entered into by the Executive of the Imperial government. The terms of the Canadian Constitution were well known to the framers of the Australian Constitution. S.132 of the Canadian model was not followed and, consequently, no

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<sup>45</sup> *Convention Debates, Melbourne, 1898*, p.30.

<sup>46</sup> *Ibid.*, p.31.

specific power was intended under “external affairs” to legislate for the implementation of the only treaties which could apply to the Commonwealth at the time. The subsequent acquisition of treaty-making power could not widen the content of the “external affairs” power. The field intended to be covered by “external affairs” was clearly much more confined than the whole range of subject matters normally covered by treaties with foreign countries. It has been asserted that the framers of the Constitution never contemplated that the Imperial government would be likely to vest treaty-making power in the Commonwealth.<sup>47</sup>

M.H. Kidwai argues that the “external affairs” power was a concurrent, not an exclusive power under the Constitution.<sup>48</sup> State action, of course, could be overridden under s.109. However, the conclusion that the “external affairs” power was a very limited one would be reinforced by these considerations. The Commonwealth power could not be wider than that previously possessed by the former colonies in the context of the treaty-making power being solely possessed by the Imperial government. The only difference is that the Commonwealth was an entity recognised as an international person, in contrast to the States or former colonies which were not so recognised. In contrasting the development of this subject in Canada and Australia, Kidwai concludes:

It will be observed that judicial interpretation has assigned to the Commonwealth of Australia much wider powers than appear from the face of the constitutional instrument, a process which in the case of Canada by a narrow construction placed on the British North America Act makes it incumbent upon the federal government, unlike Australia, to depend entirely upon the goodwill of its constituent units.<sup>49</sup>

Professor A. Berridale Keith took the view that the Commonwealth had less power than that given to the Dominion of Canada, and that the Commonwealth had:

only the most vague power under s.51(xxix) to deal with external affairs, treaties included in the drafts of 1891 and 1897 having disappeared in the final form. The result is rather chaotic; the Commonwealth, it seems clear, can ask for adherence to be notified in respect of any treaty regarding a matter in which she possesses paramount legislative power to legislate. On the other hand, if she has no legislative power, she should only propose to adhere in respect of any State which desires that adherence should be notified, and it must depend on the subject matter whether the adherence can be given unless all the States concur, thus, for example, adherence in respect of the Aerial Navigation Convention would have been inadvisable unless it could have been expressed for all the States.<sup>50</sup>

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<sup>47</sup> Zelman Cowen, *Federal Jurisdiction in Australia* (1959) p.27, quoted by M.H. Kidwai, *Op. Cit.*, p.182.

<sup>48</sup> Kidwai *Op. Cit.*, p.183.

<sup>49</sup> Kidwai *Op. Cit.*, p.186.

<sup>50</sup> A. Berridale Keith, *Responsible Government in the Dominions*, 2nd Edition, 1928, p.922.



This raises the central issue whether there are areas of power denied to the Commonwealth to legislate in the field of “external relations.” After the Commonwealth acquired treaty making power, this would imply that the Commonwealth should not enter into treaty obligations which affect the internal domestic affairs of the States without their prior consent. Alternately it would be consistent with the proposition that where the subject matter of a treaty concerned only the domestic affairs of the States, the Commonwealth would have no power to legislate to carry out any such treaty in respect of those matters. In respect of pre-federation treaties adhered to by individual colonies, he pointed out that the Commonwealth would be bound by these treaties. He instanced the Anglo-Dutch agreement in respect of deserting seamen which was held to bind the Commonwealth in respect of South Australia, and the Anglo-French declaration of 1889 as regards wreck, and others. This was consistent with the need to have the consent of the particular States where treaty obligations might intrude into their domestic affairs. It was also consistent with the similar principle governing the relations between the Imperial government and particular Dominions:

It is an essential part of the constitution of the Empire that so far as is practical no treaty obligations shall be imposed without their concurrence on the self-governing Dominions.<sup>51</sup>

The imperial government at that stage still retained absolute power of concluding treaties. Keith asserted that:

There is no case yet known in which any treaty proper has been made without the consent of the Imperial government, and the normal mode is to conclude them through plenipotentiaries granted full powers by the Crown.<sup>52</sup>

He described the effect of the retention of the treaty-making power by the Imperial government upon individuals:

An Australian, for example, as a British subject must be held to be entitled in Japan to all the privileges given to British subjects by the Treaty of 1911, although the Commonwealth is not bound by that treaty. On the other hand, it is equally clear that goods from Australia are not entitled to the special tariff granted by the treaty of 1911 to goods from the United Kingdom, and as a matter of fact they are not accorded such treatment, and one of the great obstacles to the development of commercial intercourse between the Commonwealth and Japan is the differential tariff imposed by the Japanese against places which have no treaty rights.<sup>53</sup>

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<sup>51</sup> *Ibid.*, p.1102.

<sup>52</sup> *Ibid.*, p.1101.

The acquisition by the Dominions of treaty-making powers resulted from a very gradual process. The Imperial Government preferred to allow things to develop gradually rather than by formal arrangements.

The Imperial conference of 1926:

expressed its unwillingness to seek to fetter by formal arrangements the natural growth of inter-Imperial relations.<sup>54</sup>

For this reason it is not easy to fix an exact date on which the Commonwealth acquired the full right to enter into treaties of all kinds without reference to the Imperial Government.

The Colonial position on foreign relations had been considered at the Imperial Conference of 8 October 1923. A note by the Lord President of the Council, 10 October 1923, shows a difference of approach to Empire foreign policy by Canada on the one hand, and Australia on the other. Whilst all dominions desired the “local foreign policy” should be handled by the particular Dominion involved:

the Canadian and the Australian Prime Ministers considered that their Dominions should not be involved in international complications without the consent of their Governments, but this premise led them to precisely the opposite conclusion. Mr Mackenzie King deduced from this point of departure that Canada generally speaking should have nothing to do either with the decision of foreign policy or with its consequences. Mr Bruce on the other hand held the view that the Dominions should share in every important decision in a foreign policy which should be the foreign policy of the Empire as a whole.<sup>55</sup>

The question of foreign policy was again much to the fore at the Imperial Conference of 1926, at which the Earl of Balfour was the Lord President of the Council. In opening the Conference the Prime Minister of Great Britain said:

the problem before us is how to reconcile the principle of self-government in external as well as domestic affairs with the necessity for a policy in foreign affairs of general Imperial concern which will commend itself to a number of different Governments and Parliaments.<sup>56</sup>

It was the Balfour Declaration arising from this Conference which gave rise to the Statute of Westminster passed by the British Parliament in 1931. Its adoption by Australia was delayed until 1942 largely because of fears that it would affect the balance of power between the Commonwealth and the States.

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<sup>53</sup> *Ibid.*, p.1110.

<sup>54</sup> *Ibid.*, p.xvi, Preface.

<sup>55</sup> I.M. Cumpston: *The Growth of the British Commonwealth 1880-1932 - Documents of Modern History*, pp.50-51.

<sup>56</sup> *Ibid.*, p.51.

Despite his view that the Commonwealth had only “vague power” to deal with “external affairs,” A. Beridale Keith was making a clear distinction between the power of the Parliament of the Commonwealth to legislate in relation to “external affairs,” and the power of the Commonwealth Executive to enter into treaties with other national states, whenever such power was acquired by gradual surrender of the treaty-making power by the Imperial Government.

One of the earliest comments in Australia, made on the “external affairs” power was that of Quick and Garran:

Considerable speculation has been already indulged in by constitutional writers as to the meaning and possible consequences of this grant of power over external affairs. It may hereafter prove to be a great constitutional battle-ground.<sup>57</sup>

They argue that it was clear that the Imperial Parliament, in the Australia Constitution Act, did not intend to divest itself of all authority over the external affairs of Australia in favour of the Commonwealth. Among other things, the Colonial Laws Validity Act still remained applicable at the commencement of the Constitution:

The expression “external affairs” is apparently a very comprehensive one, but it has obvious limitations. As already pointed out, it can hardly be intended to confer extra-territorial jurisdiction; where that is meant, as in other sub-sections, it is distinctly expressed. It must be restricted to matters in which political influence may be exercised or negotiation and intercourse conducted, between the Government of the Commonwealth and the Governments of countries outside the limits of the commonwealth, This power may therefore be fairly interpreted as applicable to (1) the external representation of the Commonwealth by accredited agents, (2) the conduct of the business and promotion of the interests of the Commonwealth in outside countries and (3) the extradition of fugitive offenders from outside countries.<sup>58</sup>

It must be stressed that the views here expressed related to the extent of the external affairs power unrelated to the power of making, or the existence of a treaty. The treaty-making power had been specifically abandoned because of the knowledge that, at the time, the only entity with the authority to make treaties on behalf of the separate colonies, or the emerging Commonwealth, was the Executive of the Imperial Government. The original intention of the framers of the Constitution must be sought by considering the “external affairs” power as one of the many powers vested in the Commonwealth Parliament by s.51, none of which depended for their exercise or the existence of a treaty on the subject matter of the particular power.

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<sup>57</sup> Quick and Garran: *The Annotated Constitution of the Australian Commonwealth*, p.631.

<sup>58</sup> *Ibid.*, p.632.

In the *Tasmanian Dam case*, Murphy J. reasoned that:

The power extends to the execution of treaties by discharging obligations or obtaining benefits, but it is not restricted to treaty implementation. The power will be available for example when, without any treaty, Australia wished to assist in an overseas famine.<sup>59</sup>

However, he did not attempt fully to explore the extent of the power so divorced from treaty considerations. In expanding on the type of situation which could invoke the use of the power, he linked its use to requests from such international bodies as the United Nations:

Suppose the United Nations were to request all nations to do whatever they could to preserve the existing forests. Let us assume that no obligation was created (because firewood was essential for the immediate survival of people of some nations). I would have no doubt that the Australian Parliament could, under the external affairs power, **comply with that request** by legislating to prevent the destruction of any forest, including any State forest.<sup>60</sup>

He did suggest one example of the use of the “external affairs” power without any need for a treaty or international agreement, convention or request:

Again, without any treaty but in order to avert threatened military or economic sanctions by another nation, the Parliament could legislate on a subject which was otherwise outside power.<sup>61</sup>

It would appear that the latter suggestion would be more appropriate to an argument based upon the use of the defence power. His Honour then went on to argue that:

Australia’s external affairs, as a matter of practicality, are not confined to relations with other nation States.

He then proceeded to set out what he considered to be sufficient to bring into play the “external affairs” power. He stated that it was sufficient that a law, with respect to external affairs:

(a) implements any international law, or (b) implements any treaty or convention whether general (multilateral), or particular, or (c) implements any recommendation or request of the United Nations organisation or subsidiary organisations such as the World Health Organisation, the United Nations Education, Scientific and Cultural Organisation, the Food and Agriculture Organisation or the International labour Organisation, or (d) fosters (or inhibits) relations between Australia or political entities, bodies or persons

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<sup>59</sup> *The Commonwealth v Tasmania. The Tasmanian Dam case.* (1983) 158 CLR.1, at p.171.

<sup>60</sup> *Ibid.*, p.171

<sup>61</sup> *Ibid.*, p.171.

within Australia and other nation States, entities, groups, or persons external to Australia or (e) deals with circumstances or thing outside Australia, or (f) deals with circumstances or things inside Australia of international concern.<sup>62</sup>

The circumstances outside the area of implementation of international instruments or requests, and the like, are those mentioned in sub-paragraphs (d) and (e). Sub-paragraph (f) would be consistent with the views of Justices like Sir Harry Gibbs, who reject the expansionist interpretation of the power propounded by Evatt and McTiernan J.J., and which would be involved also in sub-paragraphs (a), (b) and (c).

His only restriction on the exercise of the power was that, if the power comes into play by reason of a treaty, the law must be appropriate to the execution of the treaty; if the power comes into play by reason of one or other of the circumstances outlined apart from a treaty, the law must be reasonably appropriate for dealing with the circumstance.

In the instant case Murphy J. decided that the federal law was within power in the circumstance of a treaty obligation, and would be equally within power in the absence of a treaty obligation. The end result of his reasoning is that Commonwealth power can be increased both by the treaty-making power, and the changing circumstances of the world outside.

It has already been pointed out that the *Tasmanian Dam case* was decided by a majority of four Justices to three. The minority took the view that the external affairs power could not be invoked by the mere entry of Australia into treaty relations, and that there needed to be an external, or international factor before the power would come into operation. In any case, where a treaty was involved, there had to be a clear obligation contained within it requiring legislative action for its implementation.

Dr Colin Howard dealt with the question of the acquisition by the Commonwealth of a treaty-making power. After referring to the grant by the Statute of Westminster of the power to make laws with extra-territorial effect, he adverted to the position of Australia in 1900, and to the fact that laws were presumed to have effect only inside Australia and not extra-territorially. He then considered the approach of Quick and Garran which held that the external affairs power was a distinct legislative power in its own right, and did not qualify any of the other powers in s.51. He then referred to the three matters which they considered fell within the power at the time of its enactment.

Contrary to his view that it was not clear why the Convention of 1897-8 removed the word "treaties," the words were removed in recognition of the fact that, whilst Australia

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<sup>62</sup> *Ibid.*, p.172.

may have become an international person by the establishment of the Commonwealth, it did not as yet have full independent treaty-making powers, which at the time could only be exercised by the Imperial Government. Dr Howard considered that it was clear:

that their deletion is not consistent with the intention that the Commonwealth should acquire legislative power by merely entering into an international agreement. The Quick and Garran analysis of the external affairs power is in my view clearly correct. It recognises that in the scheme of s.51 of the Constitution it cannot be relegated to a subordinate or supplementary category, but that equally it should not be elevated to a status that effectively predominates over the other legislative powers. Still less should it assume a character that invites any government to extend the scope of Commonwealth legislative power almost at will.<sup>63</sup>

Despite this clear intention he asserts that this is precisely what has happened:

because in the last 30 years the High Court of Australia, in a mere handful of decisions, has seen the two words "external affairs" as holding the key to Australia's assuming its proper place in the international community. This I believe to have been a mistake in two ways. One is as a matter of constitutional interpretation. The other is as a matter of wisdom.<sup>64</sup>

Dr Howard sees nothing wrong with the use of the external affairs power to deal with Australia's scientific and other interests in Antarctica, and agrees with the High Court's reasoning that the base has an obvious connection with Australia and is external to it geographically. He points to the fact that, since the Second World War, change has been rapid, and the implementation of international agreements and obligations have become more important:

My disagreement with the High Court, or at least the majority thereof, is over the conclusion to be drawn from those indisputable facts. According to the Court they require an expansive interpretation of the external affairs power in order that Australian governments should not be hamstrung in the international sphere by constitutional limitations on the Parliament's legislative powers.

The acceptance of international obligations is no warrant for interpreting basic provisions of anyone's Constitution out of existence in order to comply with them. Legally the Constitution of a country is that country. I am not talking about totalitarian window dressing, where the so-called Constitution of a country is pure fiction. I am talking about a country like Australia where the Constitution has been freely adopted, has the force of law and is ultimately guaranteed by an independent judiciary.<sup>65</sup>

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<sup>63</sup> C. Howard, "When External means Internal," *Proceedings of the Inaugural Conference of the Samuel Griffith Society*, Melbourne, 1992, p.148.

<sup>64</sup> *Ibid.*, p.148.

<sup>65</sup> *Ibid.*, p.149.

He then argues that, if the Commonwealth government enters into treaties which place upon it obligations which go beyond its constitutional powers, it will need to seek the co-operation of the States to implement them, or to seek an amendment to the Constitution.

He points out that the problem of divided Constitutional power is not unique to Australia:

The limitations on federal legislatures are well recognised in international law and diplomacy. They are dealt with as a matter of routine by what is known a federal clause. This simply acknowledges that a federal government may face constitutional obstacles that impede or prevent complete implementation of an international obligation. There is not, and never has been the slightest reason why the High Court should distort our Constitution in order to make an exception of Australia in this respect. The United States has a much older federal Constitution than we do, and also a much more adventurous Supreme Court, but I am not aware that any Administration has needed to be judicially rescued in a similar way. That, then, is why I disagree with the high Court simply as a matter of constitutional interpretation. Its enormous expansion of the external affairs power runs counter to basic principles of construction, was justified by no emergency and seriously distorts the domestic balance of legislative power.<sup>66</sup>

There is no doubt that the *Tasmanian Dam Case* has now established the wide view of the “external affairs” power. This has avoided a detailed analysis of the scope of the power in the absence of treaty obligations. The slender majority on the High Court which determined this case could always change in the future. Now that the Court has allowed the use of the Convention Debates in argument before it, there is room for considerations based on the intentions of the framers of the Constitution. The Debates have shown that the final form of the Constitution envisaged the existence of the external affairs power in the context of the Commonwealth having no treaty-making power. The subsequent acquisition of this power by general agreement of the British Government expressed through the proceedings and declarations of the Imperial Conferences, and culminating in the enactment of the Statute of Westminster must be considered in context.

One argument, of course, which might support the expansive view of the High Court is that the framers originally intended that Australia should have unfettered treaty-making power coupled with a legislative power over external affairs as wide as the treaty-making power could cover. This legislative power would not only cover “foreign affairs” in the strict sense, but a much wider area involving all things external to Australia. It was not only concerned with foreign policy but also with a wider area, which would encompass relations

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<sup>66</sup> *Ibid.*, p.150.

with Britain and all the other Dominions in the Empire. Having been forced to abandon the demand for full treaty-making capacity, because of the then paramountcy of the Imperial government and Parliament, it could be argued that this abandonment did not involve a parallel contraction of the area contemplated by the external affairs power as originally framed in tandem with the treaty making power. Thus, the emergence of the treaty-making power at a later stage would result in the automatic expansion of the external affairs power to its full original scope. In other words the external affairs power in its full bloom was resting in the locker and re-emerged in all its powerful glory on the recapture of the treaty-making power. In answer to such an approach, it could be suggested that “external affairs” at the time could only permit arrangements with countries or Dominions outside Australia restricted by the paramountcy of the British Parliament. Arrangements which resulted in local laws inconsistent with those of the British Parliament would be void under the Colonial Laws Validity Act. If such arrangements involved international obligations they would be restricted because Britain alone was the international personage upon whom such obligations would fall. Royal assent to the legislation could be refused. In this way the choice of the words “external affairs” in stead of “foreign affairs” could be seen as restrictive in itself. The less expansive approach would also be to accept, in broad terms, the scope of the “external affairs” power delineated by Quick and Garran, both of whom were intimately connected with the federal movement and the Conventions.

Whilst in specified matters beyond the capacity of the States, it was intended that the Commonwealth should have the fullest power necessary for its effective operation, the framers intended, by the specification of the powers granted to the Commonwealth, to protect the States from so much invasion by the Commonwealth as would convert the federation into a full Union. If anything is clear from the Debates, it is the constant reiteration on all sides that what the Constitution was creating was not a full union, such as existed in the United Kingdom, but a federation of States which, prior to federation, had possessed full independence, and were virtually sovereign within the framework of their powers. In the heated debate on the structure and power of the Senate, men such as Deakin said that the small States did not require the degree of protection which was being sought in the strongest of Senates, because the protection of the States was assured by the fact that only specified powers were given to the Commonwealth, whilst the residue remained with the States.



There is no doubt that the framers would not have tolerated a situation where, by the use of the external affairs power, the Commonwealth could invade areas considered to be exclusively within the power of the States, merely by entering into an international treaty. If it were considered that the power of the Commonwealth Parliament was inadequate, and should be increased for the purpose of more fully implementing and executing an international treaty, the proper means of so doing would be by way of an approach to the people to grant the extra power by amending the Constitution, or by the Commonwealth seeking that all treaties should contain a federal clause, and that implementation, in areas beyond the legislative power of the Commonwealth, should be achieved by co-operation between the Commonwealth and the State, or States involved.

An informed overview of what was intended by the framers as to the extent of the powers of the Commonwealth government is to be found in a paper presented to the Government of Queensland by Sir Samuel Griffith, then Chief Justice of Queensland, in 1896.<sup>67</sup> In commenting upon what is now s.51 of the Constitution, and which was section 52 in the 1891 Draft bill, he said:

Although the list appears a long one, it will be seen on attentive perusal that, with the exception of that first mentioned in s.53 [clearly referring to s.52, and being the power over trade and commerce] and to which reference will afterwards be made, it **does not include any subjects which specially concern the domestic affairs of the separate States.**<sup>68</sup>

As part of the domestic affairs of the separate States he lists their powers over the Constitution of their Legislatures, the disposition of Crown lands and mines, contracts and transactions between individuals, local government, the regulation of trades, **joint stock companies**, succession, **criminal law**, the administration of justice, education, police, direct taxation, public health, **public works**, and the infinite variety of subjects which fall within the words of their several Constitution Acts.

The only intrusion into the domestic affairs of a State was that provided by sub-clause 30 of s.52. This was the provision that gave the Commonwealth power to legislate in respect of:

Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the Law shall extend only to the State or States by whose Parliament or Parliaments the matter was referred, and to such other States as may afterwards adopt the Law.<sup>69</sup>

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<sup>67</sup> Sir Samuel Griffith, *Notes on Australian Federation: Its Nature and Probable Effects*, 1896, Brisbane, Queensland.

<sup>68</sup> *Ibid.*, p.3.

<sup>69</sup> *Convention Debates*, Sydney, 1891, p.953.

Sir Samuel Griffith contrasted the position in Australia with that of the Brazilian Republic, “where the several States have never had an independent autonomous existence,” and also with Canada “where the autonomy of the Provinces is seriously impaired.”<sup>70</sup>

He concluded that federation would never have been achieved if the whole of Australia had been placed under the control of a “mere majority of electors,” meaning thereby the control of the central government.

Michael Coper in his analysis of the *Tasmanian Dam case*, commented that:

The reaction of some commentators to the dam case has been to suggest that it ushers in the end of the federal system in Australia.<sup>71</sup>

After referring to the origins of the unrestricted view of the “external affairs” power in the statements of Evatt and McTiernan J.J. in *Burgess’ case*, he concluded:

The *Dam* case should be seen as part of a fairly consistent trend in High Court decisions over many years to enhance the power of the Commonwealth.<sup>72</sup>

In defence of this trend he comments:

If the trend is thought to be undesirable, or to have gone too far, it should not be forgotten that the High Court has determined and can determine only that certain powers exist, not whether or how these powers should be exercised.<sup>73</sup>

There is no doubt that the High Court, in determining the nature of the “external affairs” power has expanded its meaning and scope by ignoring the intentions of the framers of the Constitution. The framers were well aware that, in a constitution under the Crown of the United Kingdom in the later nineteenth century, the powers appropriate to the Commonwealth of Australia could be no greater than powers of the nature of those capable of exercise by the federating colonies, either singly or in concert. The removal of the words “and treaties” from covering Clause 5, and the same words from s.51 (xxix) was in recognition of this fact. If the meaning and purpose of the “external affairs” power was so restricted it could not be expanded merely by the *de facto* acquisition of treaty-making powers with the consent of the Imperial government. The area in respect of which the Commonwealth could legislate to impose a treaty obligation upon the individual States was the original restricted area. Such acquisition of treaty-making power did not effect any amendment of the Constitution.

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<sup>70</sup> Sir Samuel Griffith, *Op. Cit.*, p.3.

<sup>71</sup> Michael Coper. *The Franklin Dam Case*, Sydney, 1983, p.25.

<sup>72</sup> *Ibid.*, p.25.

<sup>73</sup> *Ibid.*, p.25.

## THE CORPORATIONS POWER

As discussed in the previous Chapter, the majority, in the *Tasmanian Dam case*, held that the actions of the Commonwealth government in preventing the Tasmanian government constructing a dam on the Gordon river were within the “external affairs” power of the Commonwealth Parliament. The majority also held that the Tasmanian Hydro-Electric Authority was a corporation within the meaning of the Corporations power, s.51(xx) of the Constitution. Consequently it could be directed to refrain from the construction of the dam in question. The Court was faced with the question of whether or not the “corporations power” should be given a wide or a restricted interpretation.

Just as on the wide view of the external affairs power the Commonwealth could legislate on any subject whatsoever, so long as it had entered into a treaty in relation to that subject, so on one view of the corporations power the Commonwealth could legislate on any subject whatsoever, so long as it addressed the legislation to corporations of the relevant kind.<sup>1</sup>

The Court by majority (Dawson J.J. dissenting, and Wilson not deciding) held that the Tasmanian Hydro-Electric Commission was a trading corporation within the meaning of s.51(xx), and of the World Heritage Properties Conservation Act, s.10(1), because it had substantial trading activities for the sale of electricity, and that it was constructing the dam for the purposes of its trading activities.

THE INTENTIONS OF THE FRAMERS OF THE CONSTITUTION IN RESPECT OF THE CORPORATIONS POWER s.51(xx).

S.51(xx) of the Constitution provides that the Commonwealth Parliament should have power to make laws for the peace, order and good government of the Commonwealth with respect to:

(xx) Foreign Corporations, and trading or financial corporations formed within the limits of the Commonwealth.

The first case in which this section came under consideration was that of *Huddart, Parker & Co Pty Ltd v Moorehead* in 1909.<sup>2</sup> S.5 and s.8 of the Australian Industries Preservation Act 1906 (Cwth) prohibited combinations in restraint of trade, and trade monopolies in respect

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<sup>1</sup> *The Franklin Dam Case*, Michael Coper, Sydney, 1983.

<sup>2</sup> *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR. 330.

of all trade and commerce within Australia by foreign corporations, and trading and financial corporations formed within the Commonwealth. The majority of the Court held that the sections were invalid as being beyond the power of the Commonwealth Parliament. The Majority of the Court, as well as Isaacs J., who was in the minority, had all taken part in the Convention Debates, either in 1891 or in the later Convention of 1897-8.

It is rare for the High Court to give a single judgement as the Judgement of the Court. The practice of separate judgements of members of the Bench, frequently makes it difficult to extract what is called the “*ratio decidendi*” of the decision. The decision of today’s minority, or that of a single dissenter, could become tomorrow’s law.

In some cases, the High Court, whilst adhering to its policy of not allowing reference to the Convention Debates, has allowed consideration of the drafting history of a section, comparing earlier drafts with the final draft adopted in the Constitution. In recent years the Court has permitted a wider reference to the Convention Debates to elucidate the historical setting in which particular sections were devised. Despite this there has been a frank denial that the court is attempting to seek out the intentions of the framers. It has considered that it would be impossible to ascertain such an intention in any case. In so far as particular sections were the result of compromise, the High Court has rejected the reasons for the compromise as irrelevant, and has limited consideration to an analysis of the text itself.

The majority in the *Huddart Parker case* were, themselves, all relatively fresh from the Convention Debates. They were most conscious of the fact that the Constitution resulted from a compact between self governing entities which joined a federation on the basis that only specified powers were to be given to the central government, with all other powers not surrendered remaining with the federating States. The Chief Justice, Sir Samuel Griffith, conceded that the words of the section, looked at on their face, might be capable of a construction giving the widest powers to the Commonwealth in relation to corporations of the type described in the section. However, having regard to the context of the Constitution, where there was a division of powers such that specific and restricted powers were intended to be granted to the central government, leaving the residue to the States, he adopted a narrow construction of the words. He concluded that the intention of the section was to give to the central government only power to deal with the legal capacity of

the designated corporations, and not power to control the actions of the corporations acting within their own capacity. He stated that the section:

ought not to be construed as authorising the Commonwealth to invade the field of State law as to domestic trade, the carrying on of which is within the capacity of trading and financial corporations formed under the laws of the State. In other words, I think that *placitum* (xx) empowers the Commonwealth to prohibit a trading or financial corporation formed within the Commonwealth from entering into any field of operation, but does not empower the Commonwealth to control the operations of a corporation which lawfully enters upon a field of operation, the control of which is exclusively reserved to the States.<sup>3</sup>

Higgins J. was of the opinion that the Commonwealth could regulate the status and capacity of corporations, and the conditions on which they might be permitted to carry on business, but it did not have the power to control or regulate any contracts into which they might enter.

All the Justices agreed that the power did not authorise the Commonwealth Parliament to create corporations under Section 51(xx). The word “formed” clearly related to corporations already in existence. Also the Commonwealth could not possibly create foreign corporations.

Isaacs J., in his dissenting Judgment, was of the opinion that the section gave the Commonwealth power to regulate “the conduct of the corporations in their transactions with or as affecting the public.”<sup>4</sup> Despite this wider view of the section, he did place certain limits on the scope of the power. For instance, he took the view that the section did not go as far as authorising the regulation of the formation of corporations, their internal affairs, or their liquidation. Such things as the qualification of directors, or the level of wages to be paid to employees of such corporations, were beyond the power given by the section. Matters of internal corporate regulation would be exclusively matters for the States. He considered that the operative words of the section were those related to trading and financial activities. His view would have given the Commonwealth a wide range of power to regulate the economic activity of the whole of Australia in so far as it was carried on by the corporations specified in s.51(xx). This would encompass the whole field of economic activity not controlled by individual entrepreneurs.

He confronted the argument that, if the provisions of the Australian Industries Protection Act were upheld, it would mean that the Commonwealth would have power to

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<sup>3</sup> *Ibid.*, p.354. Emphasis added.

<sup>4</sup> *Ibid.*, p.396.

enact any law directed to corporations of the types specified. He stated that there would be many types of corporations which could not possibly come within the power given by the section:

For instance, a purely manufacturing company is not a trading corporation; and it is always a preliminary question whether a given company is a trading or financial corporation or a foreign corporation. This leaves entirely outside the range of federal power, as being in themselves objects of the power, all those domestic corporations, for instance, which are constituted for municipal, mining, manufacturing, religious, scholastic, scientific, and literary purposes, and possibly others more nearly approximating a character of trading: a strong circumstance to show **how and to what extent the autonomy of the States was intended to be safeguarded.**<sup>5</sup>

It is also significant that he stressed the need for legislative control for the purpose of protecting the public.

In so far as the majority view was based on an overall doctrine of “reserved powers” to the States, it was weakened by the decision of the Court in the *Engineers’ Case*, which overthrew this doctrine and also the doctrine of implied immunities between the States and the Commonwealth.

In the light of the *Huddart Parker* decision, much of the Commonwealth legislation of an economic nature tended to be based more on the Trade and Commerce power (s.51 (i)), rather than on the corporations power.

The specific decision of the High Court in the *Huddart Parker case* was not challenged until 1971, when its interpretation of s.51(xx) was overruled in the decision in *Strickland v Rocla Concrete Pipes Ltd.*<sup>6</sup>

The Chief Justice, Sir Garfield Barwick, in that case, paid due deference to the Justices who decided the *Huddart Parker case*, but gave strong reasons for the abandonment of the authority of that case:

It is plain enough from a reading of the reasons given by the majority in *Huddart, Parker & Co Ltd. v. Moorehead* (1909) 8 CLR 330 that the influence of the then current reserved powers doctrine was so strong that the court was driven to the statutory recognition of corporations falling within the terms of the paragraph and the fixing of the conditions upon which they might enter trade in Australia: for the rest their trading activities in intra state trade was a matter for the State legislation exclusively.<sup>7</sup>

There is no doubt that the development of this doctrine was influenced by the strong support that Griffith C.J., Barton and O’Connor J.J. had exerted in the cause of protecting

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<sup>5</sup> *Ibid.*, p.393.

<sup>6</sup> (1971)124 CLR. 468.

<sup>7</sup> *Ibid.*, p.488.

the States from legislative invasion by the central government in their roles as delegates to the Conventions of 1891 and 1897-8 respectively.

Sir Garfield, in speaking of the reserved powers doctrine, pointedly declared that this doctrine:

was exploded and unambiguously rejected by this court in the year 1920 in the decision of the Amalgamated Society of Engineers .v. Adelaide Steamship Co Lit (the Engineers' Case) (1920) 28 CLR 129.<sup>8</sup>

He reiterated the reasoning of the Court in the *Engineers' case* by saying that the task of the Court was to interpret the grant of Commonwealth power by reference to the granting section itself, without resort to any prior theory. The extent of a Commonwealth power was not to be ascertained by any consideration of what was intended to be left to the States, before determining the extent of the grant to the Commonwealth. He concluded that the use of the reserved powers doctrine had resulted in the Constitution being reversed.

However, Sir Garfield did indicate that there would certainly be limits to the power granted by s.51(xx), even though he adhered to the view that the section must not be interpreted "in any narrow or pedantic manner." Whilst declining to define these limitations, he stated that it did not follow:

that any law which in the range of its command or prohibition includes foreign corporations formed within the limits of the Commonwealth is necessarily a law with respect to the subject matter of s.51(xx). Nor does it follow that any law which is addressed specifically to such corporations or some of them is such a law.<sup>9</sup>

From this negative stipulation, of course, it is not possible to deduce the positive boundaries of the power.

The majority of the Justices agreed that the power conferred related only to the regulation of the "trading" or the "business" of trading corporations.

In relation to the specific matter under consideration in the *Rocla Pipes Case* Sir Garfield held that:

A law requiring the registration of trading agreements restrictive of trade to which a foreign corporation or trading or financial corporation formed within the limits of the Commonwealth is a party, and requiring the corporation to give particulars of such an agreement under penalty of a fine for failing to do so, appears to me clearly to be a law with respect to corporations of the kind described.<sup>10</sup>

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<sup>8</sup> *Ibid.*, p.485.

<sup>9</sup> *Ibid.*, p.490.

<sup>10</sup> *Ibid.*, p.490.

In most respects the dissenting Judgment of Isaacs J., in the *Huddart Parker case*, was followed in extending the control of the Commonwealth to:

the trading activities of trading corporations, the financial activities of financial corporations and perhaps a wider area in relation to foreign corporations.<sup>11</sup>

The *Rocla Pipes case* did not purport to answer the many questions that could arise under the section.

The question of whether, or not, the St George County Council was a trading corporation arose in 1974.<sup>12</sup> The St George County Council was set up under the Local Government Act 1910 (NSW), “for local government purposes.” Its sole powers and activities were the supply of electricity and the installation of electrical fittings and appliances. On the question as to whether, or not, the Trade Practices Act 1971 applied to it as a trading corporation, the Majority of the High Court held that it was not a trading corporation. The decision is not as helpful as might be considered because of the divergent reasons given by the members of the Court. The Court consisted of five members. Two of the Majority held that the Council was not a trading corporation within the meaning of Section s.51(xx). The other member of the Majority, McTiernan J., considered a decision on this point was unnecessary, because he found an intention in the Act itself to apply only to free enterprise corporations, and not to a body such as the St George County Council.

Of the Justices who dealt with the s.51(xx) question, two took the view that, in determining whether, or not, a company was a trading corporation, one looked to the main purposes of the company involved. The remaining two looked rather to the actual activities of the company.

Later cases emphasised the matters raised by the two Minority Justices, and looked to the activities rather than the stated purposes of the particular company. Murphy J. took the view that a company would be a s.51(xx) corporation if, either, its objects or purposes were that of trading, or it traded in fact, irrespective of its objects.<sup>13</sup>

In 1982 the High Court, again by a majority, held that the State Superannuation Board of Victoria was a financial corporation within the meaning of s.51(xx). The Minority Justices (Gibbs C.J. and Wilson J.) were of the opinion that it was not the quantity of the corporation’s trading or financial activities which was the determining factor, but “the predominant or characteristic activity.”<sup>14</sup>

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<sup>11</sup> L. Zines, “*The High Court and the Constitution*,” Sydney, 1992, p.74.

<sup>12</sup> *R. v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR. 533.

<sup>13</sup> See *R. v Judges of the Federal Court of Australia and Adamson; Ex parte Western Australian Football League* (1979) 143 CLR. 190.

<sup>14</sup> *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282. at p.296.



As can be seen s.51(xx) has given rise to a great divergence of opinion as to its meaning and purpose.

## THE DEBATES IN THE CONVENTIONS

The issue did not take up a great deal of time in the Convention Debates. However, there is sufficient material to indicate precisely the sort of evil which, in the contemplation of the framers of the Constitution, the section was intended to cure.

The second Constitutional Convention in its Committee stage dealt with s.51(xx) on April 17, 1897. The section as it was introduced was as follows:

Sub-Section 22: Foreign corporations and trading corporations formed in any State or part of the Commonwealth.

Sir George Turner (Premier of Victoria) referred to the fact that the Convention had already given power to the Commonwealth to deal with banking. He said that he failed:

to see why we should limit the sub-section to trading corporations. There are financial institutions which are not banking institutions, and if we are going to give the Federal Parliament power to legislate with regard to banking, and with regard to trading corporations, we should go a step further and give it power also to legislate with regard to financial institutions.<sup>15</sup>

Sir George also referred to Building Societies in the context of financial institutions. Edmund Barton QC, the leader of the Convention, referred to the amendment, by Isaac Isaacs (Attorney General, Victoria), of the original provision as it was adopted at the 1891 Convention the provision as adopted in 1891 was as follows:

Section 52 (20).

The Status in the Commonwealth of Foreign Corporations, and of Corporations formed in any State or part of the Commonwealth.

S.52, and its *placita*, were discussed on 3 April 1891. Sub-clause 13 dealing with “Banking, the incorporation of banks, and the issue of paper money.” was adopted with little discussion, with the exception of suggestions from Andrew Joseph Thynne (MLC Queensland) that all matters relating to civil rights in property should be left in the hands of the States. He agreed that paper money should be in the hands of the Commonwealth,

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<sup>15</sup> *Convention Debates*, Adelaide, 1897, p.793.

but argued that the States should retain control of banking, bills of exchange, promissory notes, bankruptcy and insolvency. His fellow delegate from Queensland, Thomas MacDonald-Paterson, on the other hand, argued for uniformity of laws touching all these subjects. In the end no change was made to the sub-clause as drafted.

The discussion on the corporation power in 1891 was opened by James Munro (Victoria), who said that having passed the sub-clause in relation to banking, he could see no reason why similar provision should not be made in relation to the incorporation of companies. He pointed out that the laws of the States in relation to incorporation all differed. He suggested that there should be added, at the commencement of the sub-clause, the words, “The registration or incorporation of companies.” Sir Samuel Griffith demurred to this suggestion:

There are a great number of different corporations. For instance, there are municipal, trading, and charitable corporations, and these are all incorporated in different ways according to the law obtaining in the different states.<sup>16</sup>

James Munro suggested “trading corporations.” Sir Samuel said that it was sometimes difficult to say what was a trading corporation. He went on:

What is important, however, is that there should be a uniform law for the recognition of corporations. Some states might require an elaborate form, the payment of heavy fees, and certain guarantees as to the stability of members, while another state might not think it worth its while to take so much trouble, having regard to its different circumstances. I think the states may be trusted to stipulate how they will incorporate companies, although we ought to have some general law in regard to their recognition.<sup>17</sup>

Sir John Bray (South Australia) also supported the call for the sub-clause to include provisions for the registration of financial corporations doing the business of banks.

Notwithstanding these calls for wider powers to enable all-Australian uniformity to be achieved in relation to company, banking, and financial institutional law, the sub-clause was adopted in its original form.

It must be concluded that the intention of the framers of the Constitution at this stage contemplated a very narrow scope for the power over corporations, notwithstanding the fact that the sub-clause, as adopted in 1891, did not limit the word corporations to trading or financial corporations. It was clearly intended that this sub-clause would not facilitate

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<sup>16</sup> *Convention Debates*, Sydney, 1891, p.686.

<sup>17</sup> *Ibid.*, p.686.

uniform law in relation to the incorporation, internal management, and operations of “foreign corporations, and of corporations formed in any state or part of the commonwealth.”

The notion of “The status in the Commonwealth” of these corporations was to support laws made to give them “uniform recognition,” in the words of Sir Samuel Griffith.

It is important to keep in mind the use of the words “The status in the Commonwealth.” The High Court in its later decisions referred to the omission of these words as evidence that a wider meaning for the power, as finally drafted in 1897-8, was intended.

In opening the debate on this sub-clause in 1897, Edmund Barton commented on the proposal of Sir George Turner to extend the provision to financial institutions:

I think the present wording of the sub-section covers as nearly as may be the intentions of the Constitutional Committee, and really for the amendment, which is a desirable amendment, in the sub-clause as it stood in the Bill of 1891, we are indebted to my Hon. friend, Mr Isaacs, who put it in its present form.<sup>18</sup>

In relation to the word “trading,” Isaac Isaacs said that he “suggested the word for temporary consideration.” Barton then asked for arguments in favour of Isaacs’ suggestion.

Deakin (MLA Victoria) joined the discussion by pointing out that in Victoria they had recently passed a law placing a strict limitation on the meaning of the word “banks,” excluding from it particular kinds of financial companies, which had hitherto been called banks, or treated as banks.

Barton commented:

You mean the that kind of financial company that went down so often.

Deakin continued:

We distinguish them from banks on the one hand and trading corporations on the other. We want to include all limited companies because the class of companies I am speaking of deal with lands and with deposits, and they require to be carefully regulated.

Mr McMillan (MLA New South Wales) You want to include everything outside private companies.

Mr Deakin: Especially land and finance companies which caused so much litigation in the past.<sup>19</sup>

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<sup>18</sup> *Convention Debates*, Adelaide, 1897, p.793.

<sup>19</sup> *Ibid.*, p.793.

Josiah Henry Symon QC (South Australia) asked why it was that the original sub-clause merely stated “corporations,” and did not restrict them to trading or financial corporations. Barton explained the reason as follows:

The reason of making the difference was this: It having been seen that the word “corporations,” as it existed, covered municipal corporations, the term was changed to “trading corporations.”<sup>20</sup>

Symon then suggested leaving out the word “trading,” to which Barton countered with the suggestion “or add the word financial.”

Sir Joseph Abbott (NSW Speaker of the Legislative Assembly) then moved the addition of the word “financial.” This was reduced by Barton to the words: “Any trading or financial Corporation,” “So as to separate that branch from foreign corporation.”

On this basis, the sub-clause was agreed to without a division.

It would seem from a consideration of the context, and the short discussion surrounding the passage of the sub-clause, that some positive conclusions can be drawn as to what was the purpose and intention of this provision.

Entities such as municipal corporations appear not to have been contemplated, perhaps for the reason that, in relation to financial affairs they would ultimately be backed by government in the event of loss being caused to members of the public.

Deakin clearly had in mind the land and financial bodies which had given rise to great damage, when so many of them had recently failed. It was not the failure of the companies as such that was the evil, but it was the fact that people who trusted in them lost their deposits, and failed to get what they had been induced to believe they would obtain. In modern parlance, what was sought to be regulated was the solvency and conduct of these entities towards the public and those who invested in them.

This view is supported by a consideration of the major role played by Sir Isaac Isaacs when Attorney General for Victoria, in the aftermath of the great financial collapse in that State, in attempting to legislate in the field of company law to ensure that financial insecurity of companies did not ruin the fortunes of ordinary people.

Isaacs entered Victorian politics in 1892, when elected to the Legislative Assembly of that State. He was thirty-six years of age at the time, and had been a very successful Barrister for ten years. At that time:

the Colony was floundering in the depth of the depression of that difficult decade.

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<sup>20</sup> *Ibid.*, p.793.

<sup>21</sup> Zelman Cowan. *Isaac Isaacs*. O.U.P. London, 1967, p.26.

There had been very heavy overseas investment, a great expenditure on railways and a remarkable expansion in manufactures. There was much speculation in urban land and a vast increase in residential construction. Much of this had a very unsound credit base in which the whole banking system became involved.<sup>21</sup>

These conditions were not solely limited to Victoria. A large number of land and finance companies in New South Wales had also failed with huge unsatisfied liabilities.

In office Isaacs became concerned to seek solutions to these problems:

He strongly supported company law reform to deal with misleading and deceptive prospectuses and to impose stricter controls over the activities of directors and officers of companies. Company law reform was a major concern of Isaacs when he later became Attorney-General.<sup>22</sup>

He at first became Solicitor-General in the Patterson Government, after only one year in Parliament. He only held this position for a short time before he was forced to resign. He had pressed for the indictment of the Chairman of the failed Mercantile Bank, Sir Matthew Davies. The Bank had failed in 1892. Isaacs had continued to press for criminal proceedings to be instituted against Sir Matthew for his personal dealings in the Bank, after the Attorney-General had decided that no prosecution should be made. Isaacs embarrassed the Government, not only, by resigning his office, but also, in re-contesting his seat over the issue.

On his return to Parliament he criticised the government for its failure to prosecute the bank's officers, and for failing to introduce legislation to control company promoters. Despite the fact that legal proceedings ultimately failed against the bank officers:

Isaacs was hailed as a popular hero for his part in the Mercantile Bank case.<sup>23</sup>

The government fell in 1894 when defeated on a no confidence motion moved by Mr (later Sir) George Turner, supported by Isaacs. In the Turner Government Isaacs was appointed Attorney-General and held that office from 1894 until December 1899. After a short period out of office, he again became Attorney-General, a position he held until he resigned to enter the first Federal House of Representatives.

Company legislation at the time was clearly ineffective to deal with people such as those involved in the Mercantile Bank collapse. More so were they ineffective to deal with persons such as James Munro, Premier of Victoria from November 1890 to February 1892,

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<sup>22</sup> *Ibid.*, p.28.

<sup>23</sup> *Ibid.*, p.35.

himself a member of the 1891 Federation Convention, but not of the 1897 Convention. James Munro had:

lent most of his bank's money to his friends and relatives in the knowledge that it would be used for speculation. Few could be found to defend his actions. But he could not be charged in the criminal courts, for such offences were not recognised by the Companies Act of the day. Munro and others like him, simply extended the common practice of nepotism to a remarkable degree where millions of pounds of other people's money was involved.

These were only some of the loopholes for the cunning, the unscrupulous, or the hypocritical; for the general state of the law almost begged company promoters to defraud the public.<sup>24</sup>

One of the greatest evils in existence was the right of failing companies and banks to make secret compositions with their creditors, often to the grave detriment of investors, and depositors in those institutions.

Soon after his appointment as Attorney-General in the Turner Government, Isaacs introduced into the Legislative Assembly a wide ranging company law which contained numerous provisions to protect creditors and the public:

A minimum amount of capital was required to be subscribed before the company could register, directors were required to keep proper books, the title 'Bank' could be used only in prescribed circumstances, there were provisions for the protection of a company's capital structure, civil and criminal penalties were imposed for fraud and for grossly negligent misstatements, directors were made liable to make good their defaults, a special audit could be ordered of a company's accounts by the Governor-in-Council, and auditors were to be licensed and their duties regulated. Other provisions dealt with prospectuses, and with transfers of shares to avoid legal liabilities.<sup>25</sup>

In order to get his proposals onto the Statute Book, he was forced to accept a degree of emasculation of its provisions. These matters are listed solely to illustrate the sort of situation at which provisions in the Federal Constitution relating to corporations were likely to have been aimed.

It is strongly suggested that the use of the corporations power to support the action of the Federal Government in the *Tasmanian Dam case*<sup>26</sup> was completely outside the scope intended by the framers of the Constitution. The views of some of the Justices of the High Court in the various cases were consistent with a more restricted interpretation of the

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<sup>24</sup> Michael Cannon, *The Land Boomers*, M.U.P. Melbourne, 1966, pp.201-2.

<sup>25</sup> Cowan, *Op. Cit.*, p.41.

<sup>26</sup> *The Commonwealth v Tasmania*, (1983) 158 CLR.1.

power, and would have been strengthened by reference to the matters discussed in relation to the actual proceedings of both Conventions.

In the light of these considerations, the views of Menzies and Gibbs J.J. in the St George County Council case were more in line with the intention of the founders than those of Barwick and Stephen J.J. who dissented. McTiernan J. joined the majority, but did not consider the Section 51(xx) matter, holding that the Act which was under review was not in any case intended to apply to any institution other than a free enterprise corporation. It would be consistent with this view that a statutory corporation such as the Tasmanian Hydro-electric Commission would have been outside the power.

The removal of the words “The Status in the Commonwealth” from the final form of the section does not support the expansive inferences which Justices, such as Barwick, Mason and Jacobs J.J. drew from the history of the successive drafts of the sub-clause. The even wider view of Murphy J. finds no support in the speeches of the delegates in the Conventions, and the progress of the particular debate.

The major revolutionary change of approach, resulting from the rejection of the basic views of the Griffith Court by the *Engineers’ case*, shows that major alterations in the Court’s approach to interpretation can occur when circumstances, or a change in the Court’s personnel, provoke a complete reconsideration of particular interpretations. The history of the Court’s approach to the corporations power since *Huddart Parker and Co v Moorehead* <sup>27</sup> has demonstrated great diversity of opinion amongst the Justices. This divergence has extended to the question of what entities are to be regarded as trading corporations, and also what type of activities of such corporations can be prohibited or controlled by Commonwealth legislation. The particular problems which surfaced in the *Tasmanian Dam case* highlights the issue of whether, or not, the scope of the power can be extended by reference to treaty obligations undertaken by the Commonwealth. Earlier cases considered the applicability of the power to Commonwealth legislation in relation to trade practices. The *Tasmanian Dam case* brought into the field of discourse the power of the Commonwealth in relation to environmental and cultural protection. It is certainly arguable that, without treaty obligations, the Commonwealth could not legislate in the way that it did in prohibiting the construction of the dam. In terms of the intentions of the framers, the purpose of the section was to enable the Commonwealth to legislate to protect

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<sup>27</sup> *Huddart Parker & Co, Pty. Ltd. v Moorehead* (1909) 8 CLR.330.

<sup>28</sup> *Ibid.*, Note 26.

the public and investors or depositors in the specified trading corporations from actions by these corporations to the detriment of the interests of the public, and investors and depositors. The protection envisaged was a protection against the possibility of individual financial ruin. The view of the dissenters (Gibbs C.J. Wilson and Dawson J.J.) in the *Tasmanian Dam case*<sup>28</sup> was summarised by Coper:

In their Honours' view, the prohibitions simply lacked a substantial connection with the subject of corporations; they did not relate to corporations in any way that was relevant to the characteristics of those corporations. The Act simply used corporations as a peg on which to hang the prohibitions; it provided an exact example of a law with no connection with corporations other than the fact that it was addressed to corporations generally, but the World Heritage Act prohibited much more specific activities; it was a law only with respect to these activities.<sup>29</sup>

A much narrower interpretation of the section would be more in keeping with the view of the members of the Griffith Court, the members of which had taken part in the Conventions which drafted the section. Whilst Isaacs J. dissented, his view in *Huddart Parker v Moorehead* would not be inconsistent with the basic reason for his promotion of the need for company legislation to protect investors and the public from financial loss resulting from their activities. He would extend the power to a wider field of economic activity than the majority in that case. However, his central stipulation was that the power extended to regulate:

The conduct of the corporations in their transactions with or as affecting the public.<sup>30</sup>

It is certainly the contention of this thesis that the scope of the corporations power, like that of the “external affairs” power, is not as wide as it was held to be in the *Tasmanian Dam case* and cannot be increased merely because the Commonwealth legislation purports to carry out international obligations undertaken under treaties made by the Executive.

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<sup>29</sup> Michael Coper. *The Franklin Dam Case*, Sydney, 1983.

<sup>30</sup> *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330.



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# PART V



## Conclusions

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## CONCLUSIONS

### 1. RESPONSIBLE GOVERNMENT.

Whilst following the principles of responsible government inherited from the British Constitution, the framers of the Australian Constitution were well aware that there were difficulties in the way of adapting these principles to a Federation. The central problem was that part of the principle of responsible government which involved the supremacy of the Lower House. In the United Kingdom the key characteristic of the system of responsible government was that the House which controlled the purse was supreme over the House of Review. The government of the day could only operate if it controlled the power of the purse, but its control was subject to its responsibility to the Lower House. It was the Lower House alone which could call the government to account by denying it the necessary Supply to carry out the normal functions of Government.

In the federation, which was created by the Constitutional Convention of 1897-8, the system of responsible government which it incorporated differed materially from the system of responsible government as practiced in the Parliament at Westminster. Unlike the House of Lords, the Senate of the Commonwealth Parliament was an elected Chamber. Also it could reject Supply and, indeed, all money Bills. With its power to reject Supply, it could bring down an elected government which still retained the confidence of the Lower House. By making it impossible for a government to carry on the normal services and functions of government, it could force it to an election. In all matters other than money bills it had co-ordinate legislative power with the Lower House. Other aspects of the system of responsible government were adopted, namely, the system of Cabinet government, the position of Prime Minister, the necessity of Ministers to have seats in the Parliament, and the central position of the Crown in the structure of government.

There is no doubt that the framers of the Constitution foresaw the possibility of a government, still possessing the confidence of the House of Representatives, being forced to an election by the rejection of Supply by the Senate.

## 2. DOUBLE DISSOLUTION AS A SOLUTION FOR DEADLOCK OVER SUPPLY: S.57.

The framers of the Constitution were well aware of the seriousness of a deadlock over Supply. They were aware that such a crisis required urgent solution. Disputes between the two Houses, even over money bills, could be debated at leisure, but a dispute over Supply could not wait. Despite this awareness, the framers did not devise a speedy constitutional method to resolve a supply deadlock. In so far as s.57 was intended to apply to a deadlock over Supply, it was clearly unsuitable and ineffective. As intended by the framers, double dissolution under s.57 was solely designed to enable a government of the day to overcome the frustration of its policies by the intransigence of the Senate. Such use would be consistent with the principles of responsible government as understood by the framers. It was never intended that the Governor-General could seek advice to dissolve both Houses from a caretaker Prime Minister whose party had been responsible for rejecting the very bills on which the advice was based. The Appropriation Bills, themselves, could not comply with the provisions of s.57, not only because they were not the bills of the Opposition, but also because they had not been rejected under the required conditions set out in that section. The only immediate result of a blockage of Supply by the Senate was that the government could be forced to an election of the Lower House (the House of Representatives) despite the government's retention of the confidence of that House.

## 3. INDISSOLUBILITY OF THE FEDERATION UNDER THE CROWN.

It is concluded that, if any change were sought to be made which would remove the characteristic of indissolubility from the Constitution, such change would involve the creation of a totally different polity than that prescribed by the Constitution. This could only be achieved with the consent of each and every State electorate, in the same way as the original Constitution was formed and agreed to. It is also concluded that the removal of the Crown from the Constitution would be in the same situation, and would require the agreement of the people of each and every State; it could not be achieved by means of a referendum under Section 128, with a lesser majority of States.

#### 4. MISCONCEPTIONS AS TO THE PURPOSE OF SECTION 41.

The protection given to persons who had or acquired a vote for the Lower House of any of the State Parliaments was only intended to apply to those persons who had or acquired such rights up until the time when the Federal Parliament legislated for a federal franchise. It preserved only the voting rights of those who had such rights at the date when the Federal Parliament legislated. Any person who acquired a right to vote for the Lower House of a State after the date when the Commonwealth Parliament enacted a federal franchise would not be entitled to vote at a federal election, unless the new federal franchise legislation gave such a right.

Women and certain aborigines had voting rights in some States at the time the Constitution was enacted. Their rights were protected by s.41. The exclusion of all aborigines from the federal franchise by the Federal Franchise legislation in 1902, other than those protected by s.41, was not a consequence of the Constitution but of the action of the Commonwealth Parliament. The exclusion was based upon a total misconception of the meaning and purpose of s.41 as intended by the framers. It was wrongly assumed that the exclusion of aborigines from the right to vote in federal elections could be reversed at any time by action by a State to extend the right to vote for the Lower House of the State to aborigines. As carefully explained by Senator O'Connor, during the debate on the Federal Franchise in 1902, this was not the meaning and purpose of s.41 as understood by the framers of the constitution when the section was adopted. The Senator had been an active member of the Convention of 1897-8.

#### 5. THE SPECIAL LAWS PROVISION: S.51(xxvi).

The "special laws" power in s.51(xxvi) was intended to be a power to enable the Commonwealth Government to make laws restrictive of the activities of specified racial groups after their arrival in Australia, to ensure that they complied in all respects with the laws and customs of the local community. The exclusion of aborigines from the effect of this provision was not in fact a discriminating provision. The suggestion that it was, in the 1967 referendum proposal to remove the words of exclusion from s.51(xxvi), meant that the referendum was conducted on a false premise. The removal of the words has given rise to a number of conflicting views as to its present meaning. If it is now to be interpreted as a

provision under which beneficial laws can now be made in favour of aborigines, it does not exclusively confer benefits on aborigines. They are in no better or worse position than any other race in respect of which the Parliament may consider special laws to be necessary. It also raises the question of whether or not laws under this provision could conflict with other legislation based on treaty obligations such as the Racial Discrimination Act.

## 6. THE EXTERNAL AFFAIRS POWER: S.51(xxix).

This power was finally included in the Constitution completely divorced from any obligation that might result from a treaty because, at the commencement of the Commonwealth, the power to make treaties binding upon Australia rested with the Imperial Parliament. The extent of the power as originally intended was not as wide as the area which could be encompassed by the acceptance of treaty obligations. It was not intended to confer additional power on the Commonwealth Parliament to legislate in respect of the domestic affairs of any of the States over and above any power it might have so to legislate under any of the other specific powers enumerated in s.51. The matters covered by the original provision were matters involving the relation of Australia to other countries on subject matters external to Australia. The view held by some of the Justices of the High Court, and, on one view, now binding on all other Justices, that the “external affairs” power can be used to expand indefinitely the scope of power of the Commonwealth by the action of the Executive in entering into treaties on any subject matter whatsoever, is contrary to the intention and purpose of s.51(xxix). However much it may be legitimately argued that the circumstances of the modern world had expanded the scope of the power in the absence of a treaty, it is contrary to the intended scope of the section that its operation can be infinitely expanded by the action of the Executive in entering into an international treaty.

In particular, it is concluded that the High Court was wrong in upholding the action of the Commonwealth in prohibiting the construction of the Gordon below Franklin Dam on the basis of the “external affairs” power. Such action was contrary to the intentions of the framers of the Constitution.

## 7. CORPORATIONS POWER: S.51(xx).

It is concluded that this power was not intended to be as wide as it was held to be by the majority of the High Court in the *Tasmanian Dam Case*. It was designed in the context of the widespread company failures of the 1890s for the purpose of protecting investors and the public from the unrestrained activity of corporations of the type covered by the section. The financial protection of the public was no part of the basis of the decision in the *Tasmanian Dam Case*.

## 8. THE FINANCIAL CLAUSES: S.90; S.91; S.92; S.93; S.94.

It is concluded that it was not intended by these clauses to give the Commonwealth Government generalised power over the whole economy of Australia. They were designed solely for the purpose of underpinning the exclusive power of the Commonwealth to institute and maintain a single tariff. Likewise, s.92 was designed to prevent the States from circumventing the non-discriminatory tariff policy of the Commonwealth by legislating to impose taxes or exemptions which would protect the trade and commerce of the particular State, and thereby discriminate against those of other States. To the extent that the High Court, or individual Justices, have adopted this approach, they have acted consistently with the intentions of the framers of the Constitution.

## 9. THE USE OF THE CONVENTION DEBATES IN CONSTITUTIONAL INTERPRETATION.

The intentions of the framers of the Constitution, in the sense of their understanding of the meaning and purpose of the various sections of the Constitution which they were debating, and upon which they were called upon to support or oppose, can be ascertained from the Convention Debates without the great difficulty that some Justices and many commentators and academics assert.<sup>1</sup> The suggestion that the application of the original intention of the framers to the interpretation of the Constitution would involve a reliance on what the “founding fathers subjectively intended”<sup>2</sup> raises a false issue. The Constitution was framed in the context of debates, by largely elected delegates, on the form and content of specific sections of the Constitution, after which the delegates voted to accept or reject the specific proposals. It is unrealistic to reject any attempt to ascertain what the framers

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<sup>1</sup> Michael Coper, “The place of history in constitutional interpretation,” *Convention Debates 1897-1898 Commentaries*, p.22.

“The problems of ascertaining the so-called original intent—both factual and conceptual—are not insubstantial”; Sir Daryl Dawson, “Intention and the Constitution = Whose Intent?” *Australian Bar Review*, Vol.6, 1990. P93, at p.95.

<sup>2</sup> *Cole v Whitfield* (1987-1988) 165 CLR 360, at 385.

of the Constitution understood to be the meaning and purpose of the specific provisions which they were asked to support or reject.

Now that the High Court has permitted reference to the Debates of the Constitutional Conventions of the 1890s, it should be permissible to argue that the meaning and purpose of the various sections of the Constitution, as understood by the framers of the Constitution, is relevant to the interpretation of the Constitution itself.

It should be accepted that the intentions of the framers are important, not merely as a part of the background history of the Constitution, but also as an important and relevant matter in the interpretation of the Constitution.

It is concluded that the use of such information should not be restricted when the Constitution is being interpreted. It would make for greater consistency with the whole framework of the Constitution if such intentions were treated as of major, if not paramount importance in such interpretation.

# APPENDIX

## REPORT ON THE CONDITIONS OF THE CHINESE POPULATION OF VICTORIA (17/9/1868)

In 1868 a Report on the Conditions of the Chinese Population in Victoria (17/9/1868)<sup>1</sup> was prepared by the Rev W. Young at the request of the Hon. S.H. Bindon, Minister for Justice of Victoria. Two of the worst evils involving Chinese which required special legislation were said to be gambling and opium smoking. Chinese interpreters claimed that 90 out of 100 Chinese smoked opium and 80 out of 100 gambled in the Ballarat district while, similar levels obtained in other districts.

The Report quoted from the Ballarat Star:

The Eastern Police Court yesterday was the scene of revelations touching the hideous immoral condition of a section of this young community that call for something more than the verdict of a jury, or even the verdict of public opinion. Something ought at once to be done by legislative enactment, if found needful, to put a stop to a wholesale system of debauching, by Chinese, of girls of tender years, which promises, if allowed to continue, to bring down infamy on the name of the colony.

The writer fairly blamed this situation on the abnormal condition of the great mass of Chinese, who were alone in the colony without their wives and families. The Report suggested that the only solution was to encourage the return of the Chinese to China. To effect this, the twin evils of gambling and opium needed to be suppressed, so that the Chinese would have the financial means to return, rather than squandering their earnings on gambling and opium:

As before stated, exceptional legislation must be provided for this exceptional people, to save them from ruining themselves and society around them.<sup>2</sup>

As petty larcenies and robberies have, of late years, been greatly on the increase, it seems necessary to make the laws more stringent in dealing with Chinese criminals.<sup>3</sup>

After an interview with the committee of the Ballarat Chamber of Commerce, the Police Magistrate, Mr Clissold, made the following remarks:

In my opinion our laws are not sufficiently stringent to deal with the Chinese. From the information I have at different times obtained from the interpreters, I believe that the

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<sup>1</sup> Report on the conditions of the Chinese Population in Victoria. Printed in *"The Chinese in Victoria — Official Reports and Documents,"* by Ian F. McLaren, Red Rooster Press, 1985.

<sup>2</sup> Ian McLaren, *Op. Cit.*, pp.54.

<sup>3</sup> *Ibid.*, p.55.



majority of Chinamen regard a few months' imprisonment as a period of relaxation from work, with the additional advantage of being boarded and lodged at the expense of the Government. Their own laws, I believe, are much more severe than those of any other country, and they laugh at our notions of punishment. In fact, the only way to at all check their thievish propensities, will be to enact some law inflicting a punishment that will disgrace them in the eyes of their fellow countrymen; such, for instance, as on a second conviction, in addition to the imprisonment, making it legal to shave their heads, which, I believe, is the most disgraceful punishment that can be inflicted on a Chinaman. Until this, or somewhat similar punishment is resorted to, I think the Chinese will, as hitherto, form a very large per percentage of the criminals convicted in his colony.<sup>4</sup>

Mr Clissold's view was that they should flogged as this form of punishment was used in their own country. In contrast to this, the Rev. Young, in his report, urged more civilised methods of spreading education and the Christian religion amongst the Chinese.

It is clear that all the above suggested laws would have been "special laws" of the type contemplated by Section 51(xxvi) of the Constitution.

A more specific Report was prepared by the Factories Act Inquiry Board appointed on 1st June 1893, "To inquire and report as to the working of the Factories and Shops Act 1890 with regard to the alleged existence of the practice known as "sweating", and the alleged insanitary conditions of factories and work-rooms." This report was concerned solely with the furniture trade.

Evidence was taken on 14 June and 29 August, 1893 from William Henry Ellis, Inspector of Factories and on 13th October, 1893 from Charles Powell Hodges, official Government Interpreter to the Chinese, and from 23 other witnesses.

This evidence disclosed that Chinese first started to work in wood when they made simple boxes for their countrymen to export gold to their homeland. They then began to employ Europeans in the furniture trade, and, after learning the elements of the trade began to employ solely Chinese:

They are said to be imitators not designers, and that, while outwardly copying European work, they ignore the thorough manner in which the details of that work are carried out, and simply turn out an inferior article which will not last. This, combined with their way of living, and the peculiar conditions under which they exist, enables them to undersell their European rivals, and in effect to drive them out of the trade. The public, it is pointed out, do not profit by the competition, as Chinese work is dear at any price, and will not last like the European-made furniture... But it agreed on all sides that the best Chinese work is much inferior to European, and that it is only in the commoner

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<sup>4</sup> *Ibid.*, p.55.

class of furniture that the former can compete with our workers in quality of workmanship.

The conditions of the Chinese furniture industry is very bad indeed. There is such keen competition that prices are cut down almost to starvation point... A deplorable state of affairs followed. The prices received for the furniture sold at auction in most cases barely pays for the price of the material used in its manufacture, and, as the first call on the proceeds of the sale is devoted to paying for the timber, the cabinetmaker is often left with little or nothing to reimburse him for his labour. This condition of affairs cannot last, and Mr Ellis thinks it is only a question of time when the Chinese, who commenced by ruining the Europeans, will end by ruining themselves.<sup>5</sup>

**Further allegations were that many Chinese slept on the premises where they worked, and allegedly worked long hours and into the night.**

Another complaint was against the Chinese was that they worked very long hours, sometimes far into the night. As Europeans generally worked for eight hours a day, and factory hours were practically limited to 48 a week, it was pointed out that unless the working hours of Chinese were also curtailed the European artisans could not hope to compete against their alien rivals.<sup>6</sup>

**The Factory Inspector did not entirely agree with these allegations, pointing out that Chinese customs were very different from European. Chinese workers often stopped working during daylight hours for recreation and, because they largely worked on piece work, could make up their day by working at night.**

Representations were made that Sunday work should be strictly prohibited, and that the Chinese should only be allowed to work during recognised factory hours. In order to permit of this being done, it was also urged that the Act should be altered, so as to bring any place in which one Chinese worked at his trade under its provisions. Recent prosecutions prove that there is still some foundations for the allegation that working on Sundays has not yet ceased.<sup>7</sup>

Strong representations were made to the Board by both masters and journeymen cabinetmakers as to the necessity, in the interests of the European artisans, of making it compulsory that all furniture should be stamped with the name and address of the actual maker, as well as with the words "European" or "Chinese" manufacture. It was urged that the public sympathised with the local workers, and would show this practically by refusing to buy Chinese-made articles if there were any method by which they could distinguish them, but at present purchasers were at the mercy of the dealers, many of whom, it was asserted, deliberately sold Chinese furniture as of European

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<sup>5</sup> *Ibid.*, p.74

<sup>6</sup> *Ibid.*, p.74.

<sup>7</sup> *Ibid.*, p.74.

manufacture, and although experts allowed they could tell almost at a glance the difference, they admitted that the general public could not be expected to do this.<sup>8</sup>

Dealers argued that the public would buy the cheapest item, irrespective of who made it. The economic aspects of what was regarded as unfair competition from Chinese as against local artisans was foremost in the submissions on behalf of the latter:

On behalf of the Cabinetmakers Society it was urged that the conditions of every contract (for the supply of furniture to Government) should specify a minimum rate of wages to be paid by the contractor to those employees who were engaged in working for him on that contract. The evidence adduced showed that this system was adopted by the Imperial Government in dealing with certain contracts, and that the establishment of a similar practice in Victoria would have a tendency to lift the furniture and other trades out of the present undue competition.<sup>9</sup>

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<sup>8</sup> *Ibid.*, pp.74-75.

<sup>9</sup> *Ibid.*, p.76A.

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