

Andrew Inglis Clark: Our Constitution and His Influence

John Williams*

Introduction

When Ronald Williams objected in 2010 to the provision of ‘chaplaincy services’ to his four primary school aged children I doubt he knew that Andrew Inglis Clark would be called in aid of his constitutional argument. *Williams v. Commonwealth*¹ or *School Chaplains Case*, as it is now known, involved not only the politically contentious issue of state funding of religious instruction, but the more fundamental question of the limits of the Commonwealth’s executive power. As Cheryl Saunders noted, the case is the latest in a series of High Court decisions that review the authority of the Commonwealth’s executive power by reference to the ‘text and structure of the written Constitution’.²

The Chief Justice Robert French commenced his 2012 judgment in *Williams* with the following comments:

In 1901, one of the principal architects of the Commonwealth Constitution, Andrew Inglis Clark, said of what he called ‘a truly federal government’:

‘Its essential and distinctive feature is the preservation of the separate existence and corporate life of each of the component States of the Commonwealth, concurrently with the enforcement of all federal laws uniformly in every State as effectually and as unrestrictedly as if the federal government alone possessed legislative and executive power within the territory of each State.’³

Citing Inglis Clark’s *Studies in Australian Constitutional Law*⁴ the Chief Justice considered the drafting history of the executive’s power and the current capacity of government to enter into agreements to provide services within the federal structure. He concluded that:

The Executive has become what has been described as ‘the parliamentary wing of a political party’ which ‘though it does not always control the Senate ... nevertheless dominates the Parliament and directs most exercises of the legislative power.’ However firmly established that system may be, it has not resulted in any constitutional inflation of the scope of executive power, which must still be understood by reference to the ‘truly federal government’ of which Inglis Clark wrote in 1901 and which, along with responsible government, is central to the Constitution.⁵

The purpose of this foray into contemporary constitutional adjudication is to underscore the continued relevance of Andrew Inglis Clark, his draft Constitution and constitutional writings, in our understanding of the fundamental document of Australia’s governance.

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1 *Williams v. Commonwealth* (2012) 248 CLR 156.

2 Cheryl Saunders, ‘The scope of the executive power’, *Papers on Parliament*, vol. 59, April 2013, p. 25.

3 *Williams v. Commonwealth* (2012) 248 CLR 156, 178.

4 A. Inglis Clark, *Studies in Australian Constitutional Law*, Charles F. Maxwell, Melbourne, 1901, pp. 12–13.

5 *Williams v. Commonwealth* (2012) 248 CLR 156, 205–6 (references omitted).

This paper will briefly outline the structure of Andrew Inglis Clark's draft Constitution prepared in advance of the 1891 Convention, its theoretical and practical importance and his ongoing contribution to Australia's constitutional deliberations. It will also attempt to address the question of Inglis Clark's place in Australian constitutional history. Before launching into an account of the constitutional issues it is worth pausing to note some biographical details of this remarkable Tasmanian.

Background

Writing to his intellectual hero Oliver Wendell Holmes Jr in October 1901 Inglis Clark noted that:

I often wish that Australia was as near to California as Massachusetts is to England. I should then see Boston every three or four years, and would probably be preparing now for a journey there early next year. But I must bow to the geographical configuration of the earth and all its consequences and wait in patience until my time to cross the Pacific Ocean again arrives.⁶

While Inglis Clark may have keenly felt the distance from what he perceived to be an intellectual centre, there can be little doubt that he conquered the divide as he engaged with literary and legal trends. The intellectual influences on Inglis Clark were many and in his youth he tested and forged a progressive outlook on social, political and legal issues.

Born in Hobart on 24 February 1848 he was the youngest son of the local engineer Andrew Russell Clark and his wife Ann, née Inglis. After training to join the family business Inglis Clark turned his attention to the study of law.⁷ As his biographers note there is little known about his early education.⁸ The Hobart *Mercury* outlined Inglis Clark's background as part of its discussion of the 1888 Federal Council. Highlighting that he was the 'first native-born' to sit in the Federal Council, it further stated that:

Mr A.I. Clark is one of the many prominent public men who were educated by the Rev. R.D. Poulett-Harris at the High School, Hobart, now Christ's College, where he studied for the A.A. [Associate Arts] degree with a view of adopting the legal profession. An illness which attacked him just prior to the period of his examination caused his removal from school and an interruption in his studies. For the next six years he was engaged in his father's workshops and office, but he never gave up his original intention or his love of study, and was then articled to Mr. Justice Adams, who held the office of Solicitor-General. After serving his articles in Mr. Adams' office he was admitted to practice as a barrister and solicitor in January, 1877. Prior to this he had gained some reputation as a scholar and a clever debater, and within a very short time of his admission was looked upon as a rising man, particularly as he took a lively interest in political questions.⁹

Inglis Clark's entry into politics was not without comment from *The Mercury*. Having been admitted as a lawyer for less than 18 months, Inglis Clark did not have a significant public profile. Notwithstanding that fact *The Mercury* was quick to peddle its conclusions on the man. With the support of the colourful Thomas Reibey, the Leader of the Opposition, Inglis Clark embarked on convincing the electors of Norfolk Plains to put him into the Assembly. The election for the seat came with the retirement on C.H. Bromby. After speculating whether Bromby's resignation had been conveyed to the responsible minister by the Governor, *The Mercury* cautioned the electors that:

6 Clark to Holmes, 26 October 1901, Oliver Wendell Holmes Jr Papers, Harvard Law School Library, Hollis 13193511, General correspondence, file drawers: box 15, folder 12.
7 H. Reynolds, 'Clark, Andrew Inglis (1848–1907)', *Australian Dictionary of Biography*, vol. 3, Melbourne University Press, Carlton, Vic., 1969, pp. 399–401.
8 F.M. Neasey and L.J. Neasey, *Andrew Inglis Clark*, University of Tasmania Law Press, [Hobart], 2001, p. 19.
9 *The Mercury* (Hobart), 16 January 1888, p. 3.

In connection with this vacancy it is understood that Mr. A. I. Clark, barrister, will be a candidate as the nominee of Mr. Reibey. Mr. Clark is a rising young lawyer—very young, some 17 months standing, and is credited with holding such very extreme ultra-republican, if not revolutionary, ideas that we should hardly think he will prove acceptable to the electors of Norfolk Plains. And how he should have found favour with Mr. Reibey is one of the inconsistencies of public men in Tasmania . . . Now he stands sponsor for a candidate who is maligned if his views would not fit him for a place among Communists. It seems a case of the lion and the lamb lying down together.¹⁰

Inglis Clark responded to the claims of *The Mercury* at a public meeting in Longford the next week. Addressing a ‘moderately filled’ Assembly Room, but welcomed with ‘considerable applause’, Inglis Clark rejected the report that he was a ‘nominee of Mr Reibey’ and that he held ‘extreme revolutionary views, and was one who would find his proper place in a band of Communists’.¹¹ Such ideological revelations, he said, were ‘new both to him and his friends’. In his address Inglis Clark outlined some of his basic philosophy regarding government, including his commitment to law reform. He said that he:

believed in the theory of Government which was propounded by the late A. Lincoln—‘Government of the people, for the people, and by the people’. Government moreover should not be for the benefit of any particular class, and that idea would not correspond with the opinion held by Communists.¹²

After a long address, and following questions, Inglis Clark resumed his seat to ‘loud and prolonged applause’. His candidacy presumably was well received as he was elected unopposed. While successful in his first election he did not have an uninterrupted parliamentary career and would have a lengthy period out of parliament.¹³

Inglis Clark became the Attorney-General in 1887 and held the office until October 1897. This was an exciting time for the reform-minded Tasmanian. As Stefan Petrow has outlined he had an ambitious legislative program introducing into parliament 228 bills on a range of subjects.¹⁴ In summing up his significance Petrow concluded that Inglis Clark was ‘foremost among the nineteenth-century Tasmanian politicians who sought to break the conservative and propertied stranglehold on that colony’s politics, and work towards a vision of an independent and progressive federated Australia’.¹⁵

Undoubtedly Inglis Clark was a republican by inclination¹⁶ and inspired by the United States of America and its constitutional system. ‘A country’, to which Alfred Deakin said, ‘in spirit he belonged, whose Constitution he revered and whose great men he idolized’.¹⁷ Inglis Clark’s connection with America was established during trips there and correspondence with some of its leading intellectuals including Oliver Wendell Holmes Jr.

10 *The Mercury* (Hobart), 15 July 1878, p. 2.

11 *The Mercury* (Hobart), 27 July 1878, p. 3.

12 *ibid.*

13 See discussion of the five years out of Parliament in Neasey and Neasey, *op. cit.*, pp. 60–8.

14 Stefan Petrow, ‘Clark as Attorney-General’, in Richard Ely (ed.), *A Living Force: Andrew Inglis Clark and the Ideal of Commonwealth*, Centre for Tasmanian Historical Studies, University of Tasmania, Hobart, 2001, p. 47 and see Appendix pp. 68–70.

15 *ibid.*, p. 67.

16 John M. Williams, ‘“With eyes open”: Andrew Inglis Clark and our republican tradition’, *Federal Law Review*, vol. 23, 1995, p. 149.

17 Alfred Deakin, *The Federal Story: The Inner History of the Federal Cause, 1880–1900*, Robertson & Mullens, Melbourne, 1944, p. 30.

Inglis Clark would leave politics at the end of 1897 and on 1 June 1898 was appointed to the Supreme Court of Tasmania. He was considered for the High Court in 1903 and again in 1906. He was overlooked, in part because of the decision of the Commonwealth Parliament to reduce the size of the original court from five to three, and because of the politics of judicial appointment. Inglis Clark expressed his bitter disappointment to Thomas Bavin in 1906. He said:

I have seen that the House of Representatives has passed the new Judiciary Bill with a provision for the appointment of two additional judges of the High Court. At one time I would have believed that the enactment of such a law with Deakin for Prime Minister of the Commonwealth meant the representation of Tasmania in the composition of the enlarged Court. But I have an impression now that all federal positions have become the subject of political bargaining between the several parties and sections represented in the federal parliament. I am very sorry to come to this conclusion, but I must confess that I have become disillusioned about the higher and more patriotic level of political life and conduct which I expected to see under federation. If I were free to ventilate my opinions in the press I would deplore the prospect of making the seats on the Bench of the High Court the rewards for political services ...¹⁸

The 1906 appointments were Isaac Isaacs and H.B. Higgins. Australia would not have the benefit of Inglis Clark's views on the Constitution as a member of the High Court. However, he was an early author on the meaning of the Constitution, and it is these views that have been cited with approval by the High Court and legal scholars in recent times. It is this that has raised his status amongst the framers.

Australian federation

While Inglis Clark made a significant contribution to Tasmanian politics and law it is his role on the national stage, and in particular the federal movement, for which he is largely remembered. Inglis Clark was a firm believer in the federation of the Australian colonies. However, this was not to be a union at any price. He was, for instance, determined that Tasmania should not subject itself to any financial disadvantage. Thus the question of the Commonwealth takeover of the debts of the states was for Inglis Clark an essential component in the granting of exclusive control of custom and excise duties. It was his dissatisfaction with the ultimate fiscal arrangements that caused him to qualify his support for the final Constitution Bill.¹⁹

It is worth considering briefly some of Inglis Clark's contributions to the federal meetings. At the Melbourne 1890 national conference, called to discuss whether the time was indeed 'ripe' to advance the federation of the colonies, Inglis Clark played a significant role in directing the discussion as to the type of federal model. Unlike many delegates Inglis Clark was willing to engage in detailed discussion as to the merits of the Canadian and American federal systems. He quickly nailed his colours to the American alternative. As he told delegates:

The question of the Canadian Constitution has been several times mentioned in the course of our proceedings, and its difference from that of the United States has been somewhat touched upon. On this point I would say that I think it would be well were each of us to state more or less precisely what kind of confederation we would individually advocate, and also what kind of confederation each colony represented by us would respectively

18 Clark to Bavin, 26 July 1906, Sir Thomas Bavin Papers, National Library of Australia, MS 560/3/43.

19 F. Neasey, 'Clark and federation after 1891', in Ely, op. cit., pp. 258–9.

be satisfied with. For my part I would prefer the lines of the American Union to those of the Dominion of Canada. In fact, I regard the Dominion of Canada as an instance of amalgamation rather than of federation, and I am convinced that the different Australian Colonies do not want absolute amalgamation. What they want is federation in the true sense of the word.²⁰

Lest it be thought that Inglis Clark was a constitutional technocrat it is important to acknowledge that he, like many of the framers, highlighted the sentimental aspects of the federal movement. As one of the few 'native-born', Inglis Clark was inspired by the development of a national sentiment that drove the union of the colonies. In doing so he inevitably pointed to similar independence and autonomy in Italy and the United States. Reflecting on those developments he said that:

It is political autonomy which we are now asking for Australia as a whole. We have political autonomy in the several colonies, but we have come to the conclusion, I believe, upon the sentimental side of the question, that the several colonies are not large enough in their territory and population to produce that national life which we believe can be produced upon the wider field of a United Australia. We are asking now for the political autonomy of a United Australia, in order that that national life, which we believe will exist under those conditions, may be produced and may bear the best fruits. I believe this national life can exist without political independence, and without political autonomy, as a germ, or even as more than a germ. But it will never be satisfied, it will never do that which it ought to do, until it obtains political autonomy.²¹

Thus with Inglis Clark there is a combination of the sentimental and the technical. He, like many of the framers, had to negotiate the difficult terrain of maintaining the inspiration behind the union, while distilling to a written form the details of an agreement. By necessity the details obscure the sentimental.

The decision to hold a second Constitutional Convention in Sydney in 1891 prompted Inglis Clark to make his major contribution to the process of drafting the Constitution. He arrived again prepared to advance the American approach to federalism and the judicature. Prior to the Convention he had circulated a draft constitution bill and memorandum to the Tasmanian delegates, as well as to Sir Henry Parkes,²² George Higinbotham,²³ Edmund Barton²⁴ and perhaps others he knew for their consideration.²⁵ Inglis Clark had opened up communications with Barton two years before over the need for New South Wales to have greater involvement in the Federal Council. Writing in 1889 he shrewdly determined that Barton would be critical to the federal movement:

You will remember that I told you how Parkes treated me in reference to the question [of NSW involvement in the Federal Council] and you will therefore immediately understand why I do not open communication with him upon it. But I presume that his day of authority and obstruction will come to an end like that of other Ministers, and as I have no doubt that you will then be in a position to effectually assist the cause of Australasian federation ...²⁶

20 *Official Record of the Proceedings and Debates of the Australasian Federation Conference*, Melbourne, 12 February 1890, Government Printer, Melbourne, 1890, p. 33.

21 *ibid.*, p. 36.

22 Parkes to Clark, 18 February 1891, Sir Henry Parkes papers, Mitchell Library, A879 vol. 29, p. 143.

23 Higinbotham to Clark, 8 March 1891, A.I. Clark papers, University of Tasmania Library—Special and Rare Materials Collection, C4/C206.

24 Clark to Barton, 12 February 1891, Sir Edmund Barton Papers, Mitchell Library, Q 342.901BB.

25 J.A. La Nauze, *The Making of the Australian Constitution*, Melbourne University Press, Carlton, Vic., 1972, p. 24.

26 Clark to Barton, 19 June 1889, Sir Edmund Barton Papers, National Library of Australia, MS 51/1/147.

Parkes' response to receiving Inglis Clark's draft Constitution in 1890 would have confirmed many of the Tasmanian's fears about his engagement in the process. Parkes wrote:

I am really much obliged by your courtesy in sending me your draft Constitution Bill. I fear I cannot find time to look at it just now, and I must confess I have some dread of literary Constitutions.²⁷

In Inglis Clark the federal movement not only had a scholar of constitutional law but also an individual deeply committed to the creation of the nation. In the next section of this paper I will briefly consider some features of his Constitution.

The 1891 draft Constitution

The influence Inglis Clark has had on the drafting of the Australian Constitution is multifaceted. It covers both the content and the structure of the current Constitution as well as its interpretation. Beyond this it is interesting to review the constitutional phrases or areas on regulation that he added or omitted when drafting his Constitution.

Inglis Clark's draft Constitution Bill has been the subject of much academic consideration and its influence over the ultimate structure of the Australian Constitution has been confirmed.²⁸ As F.M. Neasey has demonstrated only eight of Inglis Clark's ninety-six clauses failed to find their way into the final Australian Constitution, a testimony to his influence on the process.²⁹ Two initial points may be made about Inglis Clark's draft Constitution.

First, it is clear that it was heavily influenced by the American Constitution. As is well known, Inglis Clark was arguably the leading Australian expert on American jurisprudence at the time of federation. Writing to Barton during a visit to Tasmania in 1893 Bernhard Wise could give firsthand testimony to Inglis Clark's study of the American Constitution. As he said:

For the last three weeks we've been at a farm house half way up Mt Wellington where I have a shelf full of Clark's American constitutional literature. I hope the result of the shifting may be usefully felt when we have to discuss the Bill in detail.³⁰

It should be remembered that the question of whether the American design or the Canadian template was to be the preferred approach was not settled as the delegates assembled in Sydney in 1891. By advancing the American Constitution in the form of his draft Constitution Inglis Clark was making a bold attempt to shape the agenda of the Convention. Undoubtedly, following his lead Inglis Clark's Constitution was influential.

A second point can be made about the basic content and style of his Constitution. It is easy to point to the document and dismiss it as a mere 'cut and paste' from known provisions. While there is some

27 Parkes to Clark, 18 February 1891, Parkes papers, A879 vol. 29, p. 143.

28 John Reynolds, 'A.I. Clark's American sympathies and his influence on Australian federation', *Australian Law Journal*, vol. 32, July 1958, pp. 62–75; F.M. Neasey, 'Andrew Inglis Clark senior and Australian federation', *Australian Journal of Politics and History*, vol. 15, no. 2, 1969; James Thomson, 'Andrew Inglis Clark and Australian constitutional law', in Ely, op. cit., pp. 59–81; A.C. Castles, 'Andrew Inglis Clark and the American constitutional system', in Marcus Haward and James Warden (eds), *An Australian Democrat: The Life, Work and Consequences of Andrew Inglis Clark*, Centre for Tasmanian Historical Studies, University of Tasmania, Hobart, 1995, pp. 15–18; and Williams, '“With eyes open”', op. cit.

29 Neasey, 'Andrew Inglis Clark and Australian federation', op. cit. pp. 7–8.

30 Wise to Barton, 13 January 1893, Barton Papers, National Library of Australia, MS 51/1/190.

validity in such observations it does tend to overlook the fact that there are very few variations to be added once the basic structure is agreed. So for instance, there was always going to be parts dealing with the executive, the parliament and the judiciary in any Australian constitution. The fact that Inglis Clark modelled his on the American Constitution is no surprise once that basic decision was made. Issues of the respective legislative powers, the role of the states, the power of amendment and financial questions were the detail of the debate that the framers were about to address in 1891. Moreover, a basic jurisprudential point which Inglis Clark would have been aware of was the fact that in importing the language of the United States Constitution the jurisprudence of the Supreme Court would follow. In the preface to the second edition of his *Studies in Australian Constitutional Law*, Inglis Clark made the point that:

When the first edition of this book was published there were not any decisions of the High Court of Australia in existence; and decisions of the American Courts upon particular questions that had arisen under the Constitution of the United States could not be quoted as more authoritative than enunciations of doctrines and principles which appeared to the author to be equally applicable to the interpretation and exposition of particular provisions and features of the Constitution of Australia.³¹

Inglis Clark proceeds to note happily that the High Court had now ‘authoritatively declared’ that the principles of the United States Supreme Court ‘are equally applicable to the interpretation of the Constitution of the Commonwealth of Australia’.

In terms of style there can be little argument that Inglis Clark’s Constitution is not as crisp or clean as Kingston’s 1891 draft Constitution. This is not so much a reflection on Inglis Clark, but an acknowledgement of the talents of Charles Kingston and Sir Samuel Griffith as drafters. They were direct and economical with words. The same cannot always be said of Inglis Clark.

With these preliminary observations I would now wish to turn to the Inglis Clark Constitution.³² The draft 1891 Constitution Bill is divided into seven parts with 96 clauses. It was a combination of his own drafting, and adaptations of the British North America Act of 1867 and 1871 as well as the United States Constitution. Obviously the temptation to review *all* 96 clauses must be resisted for this publication. There are some clauses, and omissions, that can be highlighted in this brief survey.

In terms of the basic structure Inglis Clark divided the Constitution into the following parts: i.—Preliminary; ii.—Formation of the Federal Dominion of Australasia; iii.—Federal Executive Power; iv.—Federal Parliament; v.—Federal Judicatory; vi.—Provincial Constitutions and vii.—Miscellaneous.

The new union would be known as the ‘Federal Dominion of Australasia’ reflecting its constitutional status and arguably keeping open the prospect of New Zealand joining the other Australian colonies (and the ‘Province of South Australia’).

In terms of the Federal Parliament there are some basic things to note. Each province would have six senators ‘who shall be chosen by the Houses of the Parliament of the Province for a term of Nine years’ (clause 18). The fact that they were not elected by the people reflected the timing of the federation movement. After 1895, with the election of the next convention, the appointment of senators would

31 A. Inglis Clark, *Studies in Australian Constitutional Law*, Charles F. Maxwell, Melbourne, 1905, Preface.

32 Inglis Clark’s draft Constitution is reproduced in John M. Williams, *The Australian Constitution: A Documentary History*, Melbourne University Press, Carlton, Vic., 2005.

be removed as the democratic sentiment was rising. Senators would, after the first sitting, be divided into three classes who would, by rotation, retire every three years. The House of Representatives would have terms of three years (clause 29) with the initial parliament having 158 members (clause 30).

The Federal Parliament would have legislative power to deal with the array of issues that would confront the new nation (clause 45). As well as those familiar issues of taxation, defence and weights and measures the parliament would have power:

- viii. To define and punish Piracies and Felonies on the high seas, and offences against the Laws of Nations:
- xix. To provide for the enforcement of Criminal Process beyond the limits of the Province in which it is issued, and the extradition of offenders, including deserters of wives and children, and deserters from the Imperial Naval and Military Forces:

While some of these matters might have been covered by other powers (such as defence) these examples demonstrate the details incorporated into Inglis Clark's draft Constitution.

Exclusive to the Federal Parliament was the capacity to make laws for the seat of government so long as such area was 'not exceeding Ten miles square' (clause 45(XXIX)). The size of the future capital—consistent with the Washington model—would have been much smaller if Inglis Clark had been followed on this point.

The contribution for which Inglis Clark is best remembered is the judicial clauses. This was especially the case after the 1891 Drafting Committee removed the constitutional entrenchment. For Inglis Clark the 'Judicial power of the Federal Dominion of Australasia shall be vested in one Supreme Court ...' (clause 59). As with today's High Court, the 'Supreme Court' would have both an original jurisdiction and an appellant jurisdiction.

In terms of trial by jury Inglis Clark provided in clause 65 that:

The trial of all crimes cognisable by any Court established under the authority of this Act shall be by Jury, and every such trial shall be held in the Province where the crime has been committed, and when not committed within any Province the trial shall be held at such place or places as the Federal Parliament may by law direct.

The revision by future drafters of the phrase 'all crimes cognisable by any Court' to merely a guarantee for 'trial on indictment' would diminish the section of much of its operation.³³ As Chief Justice Barwick would later note when discussing the final section 80, 'What might have been thought to be a great constitutional guarantee has been discovered to be a mere procedural provision'.³⁴

As discussed Inglis Clark dedicated a part of his draft to the 'provincial constitutions'. This would be stripped out during the revision process in 1891. Of interest is his democratic approach to the selection of the Governor. Under Inglis Clark's model (clause 67):

33 *R v. Federal Court of Bankruptcy; ex p. Lowenstein* (1938) 59 CLR 556; *Spratt v. Hermes* (1965) 114 CLR 226; *Zarb v. Kennedy* (1968) 121 CLR 283; *Li Chia Hsing v. Rankin* (1978) 141 CLR 182.

34 *Spratt v. Hermes* (1965) 114 CLR 226, 244.

In each Province of the Federal Dominion of Australasia there shall be a Governor, who shall be chosen by the Houses of the Parliament of the Province for a period of Six years.

Keeping with Inglis Clark's views on religious tolerance he would have extended the prohibition on the regulation of religion to the states. In clause 81 he states that: 'No Province shall make any law prohibiting the free exercise of any religion'.

Similarly in the First Schedule to his Constitution he made provision only for an Oath of Allegiance. Rather than calling on any deity Inglis Clark merely required that:

I, *A.B.*, do swear that I will be faithful and bear true Allegiance to Her Majesty Queen VICTORIA, Her Heirs and Successors, according to Law.

Similarly the Preamble of Inglis Clark's draft Constitution did not call upon the 'blessing of Almighty God'. Mindful of his concerns for the financial situation of the colonies he included clause 83 that stated that: 'The Federal Dominion shall be liable for the debts and liabilities of each Colony existing at the date of the federation'.

There are many counterfactual questions to be asked with respect to Inglis Clark's Constitution. Perhaps the most intriguing would be the amending provision. Australia has famously been described by Geoffrey Sawer as constitutionally speaking to be a 'frozen continent'.³⁵ The record of unsuccessful constitutional amendment has informed this description. The amending provision suggested by Inglis Clark was in clause 93. It required that:

This Act may at any time be amended by the Federal Parliament, but no amendment made by the Federal Parliament shall have any force or effect until it has been confirmed by the Parliaments of not less than two-thirds of the Provinces included in the Federal Dominion of Australasia at the time such Amendment is made.

Undoubtedly this formula for constitutional amendment lacks the democratic authority of section 128 which requires the electors to endorse any proposed change. However, it is arguable that many technical amendments to the Constitution may have fared better under Inglis Clark's amending provision. However, other more fundamental changes—such as becoming a republic—would obviously require the direct involvement of the people to have legitimacy.

There are two additional areas of Inglis Clark's constitutional deliberations that warrant discussion given their ongoing interest. The first relates to the attempt to include an amendment to provide greater protection of rights in the Constitution. As I have written elsewhere Inglis Clark's belief in rights protection prompted him to suggest a version of the 14th Amendment.³⁶ This was moved through the Tasmanian Parliament to be considered by the 1898 Convention. It read:

The citizens of each state, and all other persons owing allegiance to the Queen and residing in any territory of the Commonwealth, shall be citizens of the Commonwealth, and shall be entitled to all the privileges and immunities of citizens of the Commonwealth in the several states; and a state shall not make or enforce any law abridging any privilege or

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

36 Williams, ' "With eyes open" ', op. cit. and John M. Williams, 'Race, citizenship and the formation of the Australian Constitution: Andrew Inglis Clark and the "14th Amendment" ', *Australian Journal of Politics and History*, vol. 42, no. 1, January 1996.

immunity of citizens of the Commonwealth, nor shall a state deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of its laws.³⁷

Inglis Clark explained his interest in the provision in an accompanying memorandum that he circulated amongst some delegates to the 1898 Convention. He wrote to Wise to further emphasise the need to include the proposed amendment in the final Constitution. As he stated:

I have been consulting some additional authorities upon the scope and utility of the 14th amendment of the Constitution of the United States and they have confirmed me in my opinion as to the desirability of adopting the whole of the amendment which was carried on my motion in our House of Assembly. If the Constitution of the Commonwealth does not provide for a national citizenship and for equality of privilege and immunities for every citizen in each of the States the door will be left open for a large amount of discriminatory legislation which the 2nd section of Article IV and the 14th Amendment of the Constitution of the United States have conjointly frustrated in some of the American States.³⁸

Undoubtedly as a disciple of the rule of the law, Inglis Clark would have joined with E.P. Thomson in describing its role as an ‘unqualified human good’.³⁹ One can only speculate what he would have done with this section if he had been appointed to the High Court of Australia in 1903.

A second significant issue that Inglis Clark considered was the so-called ‘rivers question’. As is well known the 1890s constitutional conventions debated at length the question of the control of interstate rivers. This pitted the South Australian delegation against its upstream colleagues. It has been estimated that a fifth of the Melbourne 1898 Convention was devoted to attempting to solve the seemingly insoluble question.⁴⁰ In his 1891 draft Constitution Inglis Clark had not considered the question of the control of the Murray River. This is to be contrasted with Charles Cameron Kingston who, as a South Australian, was well aware of the issue. Kingston would have given the Federal Parliament the capacity: ‘To fix the right of any colonies with reference to the user of the water of any river or stream’.⁴¹

Inglis Clark watched the debate over interstate rivers from afar having decided not to be a delegate to the 1897–98 conventions. From Tasmania he made a number of interventions dispatching legal opinions on the matter. The critical question for Inglis Clark was the effect of federation. Prior to federation the upstream and downstream colonies had detached legal relations. An upstream colony could enforce its right to water at the cost of its downstream neighbour. However, for Inglis Clark the federation of the colonies under the Constitution would change this situation. As he stated:

Under the Constitution of the Commonwealth all the federated colonies will be constituent parts of the same nation, and any act on the part of the Legislature or citizens of one

37 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 8 February 1898, Legal Books, Sydney, 1986, vol. 4, p. 667.

38 Clark to Wise, 13 February 1898, B.R. Wise Papers, National Library of Australia, MS 1708.

39 As Thompson famously declared: ‘But the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power’s all-intrusive claims, seems to me to be an unqualified human good’. E.P. Thompson, *Whigs and Hunters: The Origins of the Black Act*, Allen Lane, London, 1975, p. 266.

40 N. Kelly, ‘A bridge? The troubled history of inter-state water resources and constitutional limitations on state water use’, *University of New South Wales Law Journal*, vol. 30, no. 3, 2007, p. 644. For a discussing of recent issues relating to section 100 and the river question see John M. Williams and Adam Webster, ‘Section 100 and state water rights’, *Public Law Review*, vol. 21, no. 4, 2010.

41 John M. Williams, *The Australian Constitution*, op. cit., p. 130.

State which would be a ground for national complaint on the part of another State, and of ultimate war if the two States were separate and independent nations, would be a violation of the Constitution of the Commonwealth, and would therefore be a matter for redress by the Supreme Court of the Commonwealth.⁴²

So for Inglis Clark the price of the union for all colonies was that they lost their right to unilateral actions that would impair the continued existence of another state. Of note is how Inglis Clark approached the problem by recourse to fundamental principles of federalism. Moreover, Inglis Clark saw the establishment of the High Court as essential to the resolution of any interstate dispute as to access to the resources of the Murray River. As to the content of the right that the High Court might apply Inglis Clark settled upon the common law riparian rights. As he stated:

The riparian rights of the owners of land abutting on the River Murray in the colony of South Australia are rights of property in South Australia, and if those rights shall be infringed by any private person or any public body professing to act under colour of the authority of an Act of the Legislature of New South Wales, when both colonies are constituent parts of the Commonwealth of Australia, the citizen of South Australia whose riparian right has been violated will have a remedy in the federal courts of the Commonwealth, either for damages or for a writ of injunction to restrain the continuance of the injury, or for both.⁴³

In his 1901 *Studies in Australian Constitutional Law* Inglis Clark dedicated a chapter to the ‘Federal Control of the Rivers of the Commonwealth’.⁴⁴ While focusing on the navigability of the interstate rivers he again restated his view as to the capacity of the Commonwealth to regulate the rivers. Following the United States precedent he concluded that the Constitution was not so restrictive so as to allow one state to exercise its unrestrained rights against the residents of *all* the states.

The ongoing concern about the allocation of water within the Murray–Darling Basin is something that, without a comprehensive agreement between the states and irrigators, will find its way into the High Court. Inglis Clark will no doubt again be consulted.

Inglis Clark’s legacy: Asking the right question

Inglis Clark’s place in Australian federation and constitutional history has been mixed over the century. Arguably his reputation suffered, like many of those who attended the 1890s conventions, by not publishing an account of his role in the venture. As Fin Crisp has observed a number of federation figures did not obtain the notoriety they deserved because the early federation historians, such as Deakin, Robert Garran and Wise, systematically diminished the role of those who were other than the ‘ultra-federalists’.⁴⁵ Inglis Clark remained greatly concerned that the Constitution did not provide enough support for the economic viability of the smaller colonies. He was thus placed amongst the doubters.

However, his reputation as a significant figure in Australian federation history has largely been revived by the diligent work of mainly Tasmanian historians and constitutional lawyers.⁴⁶ J.A. La Nauze, in 1972 was able to include Inglis Clark and Samuel Griffith as ‘honorary members of the second Convention’.⁴⁷

42 Andrew Inglis Clark, *Notes on the Proposal to Provide the Constitution of the Commonwealth of Australia for the Regulation of the Use of the Waters of the Murray River and its Tributaries*, 1 February 1898, reproduced in John M. Williams, *The Australian Constitution*, op. cit., p. 844.

43 *ibid.*, pp. 844–5.

44 Clark, *Studies in Australian Constitutional Law* (1901), op. cit., pp. 103–17.

45 L.F. Crisp, *Federation Fathers*, Melbourne University Press, Carlton, Vic., 1990, pp. 2–5.

46 In particular the work of Richard Ely, Marcus Howard, Frank and Lawrence Neasey, Henry Reynolds and James Warden.

47 La Nauze, op. cit., p. 276.

The recent interest in Inglis Clark stems from his relevance to contemporary debates. His perceived republican sympathies and discussion of constitutional interpretative methods has meant that his scholarship can be analysed in ways that are directly relevant to Australia. When Justice Deane famously described Inglis Clark as ‘the primary architect of our Constitution’ it was in the context of a sophisticated debate about how the Australian Constitution should be interpreted to meet the challenges of modern Australia. Justice Deane’s pronouncement was not within the pages of a learned historical journal, rather it was the *Commonwealth Law Reports* and in a judgment that turned on the interpretation of the Constitution. He was advancing his jurisprudential approach to the Constitution. As he stated:

The present legitimacy of the Constitution as the compact and highest law of our nation lies exclusively in the original adoption (by referenda) and subsequent maintenance (by acquiescence) of its provisions by the people. While they remain unaltered, it is the duty of the courts to observe and apply those provisions, including the implications which are legitimately to be drawn from their express terms or from the fundamental doctrines which they incorporate and implement ... Moreover, to construe the Constitution on the basis that the dead hands of those who framed it reached from their graves to negate or constrict the natural implications of its express provisions or fundamental doctrines would deprive what was intended to be a living instrument of its vitality and its adaptability to serve succeeding generations. Indeed, those errors of such a dead hands theory of construction were made plain by Inglis Clark in explaining why the Constitution was ‘to be construed as having reference to varying circumstances and events’.⁴⁸

Justice Deane reached back to Inglis Clark because his scholarship was relevant to a contemporary question. Similarly Justice Kirby, who was no friend of constitutional interpretation based on the original intentions of the framers, likewise could embrace Inglis Clark. For Justice Kirby, Inglis Clark offered an insight into how changes in meaning can be explained. As he concluded:

When an old line of authority is overturned, this may sometimes be explained not by reference to an error in the perception of the Justices who propounded that authority at the time of its invention and first applications, but rather by the fact that the eyes of new generations of Australians inevitably see the unchanged language in a different light. The words remain the same. The meaning and content of the words take colour from the circumstances in which the words must be understood and to which they must be applied.⁴⁹

Thus Inglis Clark’s relevance is not as some long since dead framer, but as an important standard bearer in a fundamental debate about how our Constitution is to be interpreted. This question is as relevant now as it was when Inglis Clark first considered it in 1901.

Whether Inglis Clark was a significant framer in the 1890s is really asking the wrong question. While understanding the man and his influence on the drafting of the Constitution after 1891 is an interesting academic exercise it only provides a limited account to why he is important for contemporary Australians. The issue that places Inglis Clark at the forefront of the framers of the Constitution is his continued relevance to our understanding of the fundamental document of the polity.

48 *Theophanous v. Herald & Weekly Time Ltd* (1993) 182 CLR 102, 171 (Deane J).

49 Michael Kirby, ‘Constitutional interpretation and original intent: a form of ancestor worship?’, *Melbourne University Law Review*, vol. 24, no. 1, 2000, pp. 11–12.

Conclusion

How then do we understand Inglis Clark and his legacy? There is always a temptation to succumb to absolutes when reflecting on the life. Complexity is overlooked in favour of strong conclusions. Undoubtedly Inglis Clark was not without his limitations.

Yet today his legacy is assured. It is found in the ongoing interest in his desire for a dynamic federation. It is to be found in his scholarship that speaks to new generations of lawyers and historians. Inglis Clark was an individual who sought to improve the communities within which he lived and imagined a new country that was his own. In a draft essay entitled 'Machinery and Ideals in Politics' Inglis Clark stated that:

We do not habitually recognise the existence of any connection between things which are usually described as mechanical and those which we designate as ideal.⁵⁰

We are fortunate that Inglis Clark strove to implement in very practical ways his ideals.

50 Andrew Inglis Clark, 'Machinery and ideals in politics', Clark Papers, University of Tasmania Library—Special and Rare Materials Collection, C4/F24.