

Andrew Inglis Clark and Australian Federation

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

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

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

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

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

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

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

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

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

detail is combined with zeal, its influence on a deliberative body becomes irresistible. That our Constitution so closely resembles that of the United States is due in a very large degree to the influence of Mr. A.I. Clark. His speech at this Conference [1890] ...is interesting as containing the germ of the ideas which dominated the Convention of 1891.⁴

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

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

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

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

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

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

7 *Ibid.*, at p 78.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14 *Ibid.*, p 261.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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