

# Professional Development Seminar for parliamentary staff

January 2013

## Against the odds – Lessons from the framing of our Constitution

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Our Constitution was established by peaceful development, not by war or revolution. The agreement of the people of a number of separate, self-governing colonies to join in a federal union created a nation. Making that agreement required determination, patience, vision, and considerable political and legal skills.<sup>1</sup>

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The terms of Australia's Federation were negotiated at two Conventions in the 1890s. This paper deals with the story of those Conventions<sup>2</sup>. It is a compelling story. In it we see dedicated and skilled political leadership and we see both idealism and pragmatism. As well as debates about issues which had to be resolved if Federation was to proceed, such as the tariff<sup>3</sup> and the powers of the two Houses in a Federal Parliament, matters as diverse as the possibility of the Governor-General being elected and the Murray-Darling river system were debated.

This seminar is intended to help us all prepare for the challenges of the future. I suggest that the deeper our understanding of our heritage, the better placed we will be to help meet those challenges. Comments by Mr Stephen Gageler about those who practice in and administer constitutional law can be adapted to the more limited role of parliamentary officers: we are custodians for the present of traditions which we must help interpret, the issues with which we deal should be put in a long-term perspective, and this work is not a matter of science, it is a matter of responsibility: to the past and for the future.<sup>4</sup>

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<sup>1</sup> *The Rule of Law and the Constitution*, Boyer Lectures (2009), pp 20-1.

<sup>2</sup> This paper is based on one prepared for training purposes in the Department of the House of Representatives. Thanks are due to Professors Geoff Lindell AM and Anne Twomey, each of whom read a draft of the paper and made valuable suggestions for its improvement, and to Lynnette Eager for her great help. Professor La Nauze's *The Making of the Australian Constitution* (1972) has been recognised as a pioneering and authoritative work on the history of the Conventions. More recently Professor John Williams, in *The Australian Constitution: A Documentary History*, has done all interested in the development of the Constitution a great service by assembling and publishing many key documents, including successive drafts of the Constitution, and including very helpful explanatory essays. For the cultural forces and background that may be thought to have shaped the making of the Constitution, see also Professor Helen Irving, *To Constitute a Nation: A Cultural History of Australia's Constitution* (1997) and also Professor Irving (ed) *A Woman's Constitution?* (1996). Dr Hirst's *The Sentimental Nation* is also particularly helpful in outlining the wider context, including the events of 1891-97.

<sup>3</sup> At that time the main sources of government revenue were customs and excise duties and a key condition of Federation was free trade between the states. Tariff policy was also an issue – sentiment in New South Wales was considered to be 'free trade' and protectionist in Victoria.

<sup>4</sup> Stephen Gageler, *Beyond the text: A vision of the structure and function of the Constitution*, (2009), p 24. Mr Gageler was the Commonwealth Solicitor-General at that time.

The federation story is an important part of Australia's parliamentary heritage. It is interesting, and encouraging, to parliamentary officers for at least three reasons. First, because the *processes* that were followed contributed substantially to the eventual success of the great endeavour; secondly, because it shows how crucial the contribution of a small number of dedicated and skilled political leaders was, and finally because the way the Conventions were managed and supported is of special interest to parliamentary officers. We see much that is familiar in each of these aspects of the story.

This paper deals with three stages of the story of Federation; first with the Australasian Constitutional Convention that met in Sydney in 1891; secondly with the period 1891 to 1897, and thirdly with the second Convention that met in 1897-98. This is a selective approach to a long and complex story; the paper is even more selective in that it deals with aspects that are likely to be of particular interest to parliamentary officers.

### **SYDNEY – SIX WEEKS IN 1891**

In March 1891 45 delegates, seven from each of the colonies of New South Wales, Victoria, Queensland, South Australia, Tasmania and Western Australia, and three from New Zealand<sup>5</sup>, met at Parliament House in Sydney. All were Members of Parliament. Each colony was represented by what we would now call its Premier – in those days they were often referred to as the 'Prime Minister'. Some of the other delegates were or had been Ministers or Presiding Officers. Two groups were not involved – women and Aborigines. All the colonies were part of the British Empire, and it seems ironical to modern eyes that although the head of the empire, and one of the most powerful people in the western world at the time, was a woman, Queen Victoria, none of the delegates were women.<sup>6</sup> It was not to be until the later stages of the Federation movement that women would have an involvement.

The Convention commenced with the calling of delegates by name; each came forward and signed an attendance roll.<sup>7</sup> The first substantive decision was the election of Sir Henry Parkes, widely acknowledged as the most prominent advocate of Federation and 'Prime Minister and Colonial Secretary' of the 'mother colony', New South Wales, and the principal host, as President of the Convention. Sir Samuel Griffith (Qld) was elected as Vice-President.

After resolving to meet 'punctually' at 11.00 am daily, the Convention considered the rules it should follow. As Members of Parliament all delegates were aware of traditional parliamentary practice and resolved to follow 'the ordinary rules of the House of Commons'. Nevertheless, these rules were not adopted without qualification – a practical adjustment was to provide that the President of the Convention could move motions and take part in debates. Procedural aficionados will be pleased to note that the wisdom of adding the proviso 'unless otherwise ordered' at the end of resolutions was recognised more than once. The President was given a deliberative vote but an amendment to provide for a casting vote failed. A high quorum requirement was set – 25 members out of a total of 45.

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<sup>5</sup> Although only three, the New Zealand representatives were distinguished: Sir George Grey (twice Governor of New Zealand and former Prime Minister, also former Governor of South Australia), Captain William Russell (Leader of the Opposition) and Sir Harry Atkinson.

<sup>6</sup> Irving, *To Constitute a Nation*, p 171.

<sup>7</sup> *Minutes of Proceedings*, 2 March 1891, p i-ii.

Some delegates had come very well prepared. Messrs Inglis Clark (Tas) and Kingston (South Australia) each brought their own drafts of constitutions<sup>8</sup> and Mr Baker (South Australia) had prepared a manual on federal systems – according to Deakin at the time Baker was ‘in advance of all his colleagues in federal knowledge and in the federal spirit’.<sup>9</sup> All delegates were members of bicameral parliaments; all would have had some familiarity with Westminster style parliamentary practice. It is impressive that the understanding that was evident at the convention been acquired in a relatively short time. Some delegates combined parliamentary and legal skills. The influence of the United States model of Federation was very strong.<sup>10</sup> References were also to be made to the Canadian federation but although the terms of many provisions of the 1891 drafts were drawn from of the British North America Act, the Canadian model was regarded as too centralist (it was thought that the ‘Quebec resolutions’ which had set out the terms for the federation had been influenced by the belief that the relative weakness of the Federal government had been a factor in the then very recent Civil War in the US.<sup>11</sup>) References were also made to the Swiss and German Federations. James Bryce’s *The American Commonwealth* was quoted with approval frequently, it was ‘the great textbook for them all...quoted or referred to more than any other single work; never criticized, it was regarded with the same awe, mingled with reverence, as the Bible would have been in an assembly of churchmen’.<sup>12</sup> It is possible that the title of Bryce’s work even influenced the choice of the term ‘Commonwealth’ for the new nation.<sup>13</sup> Nevertheless some were to tire of the references to overseas experience: one lamented:

We have had the American Constitution, and the Swiss Constitution, and slabs of the Canadian Constitution, burlled at us from all sides *ad nauseum* ... I have come to the conclusion that the American Constitution is such a many-sided one that it can be used to back up every argument on every possible side of the federation question.<sup>14</sup>

An interesting early debate took place on whether the press and public should be admitted. Foreshadowing debates that were to occur on substantive provisions, overseas experience was cited: in this case the consequences of the secrecy said to have applied at key stages in the development of the United States and Canadian constitutional provisions.<sup>15</sup> Mr Rutledge (Queensland) spoke for the admission of the press:

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<sup>8</sup> The drafts brought by Inglis Clark and Kingston are reprinted in Williams, *op cit*, pp 80-111 and 117-33.

<sup>9</sup> Deakin, *op cit*, p 38; presumably Deakin meant that Baker was ahead of his South Australian colleagues – see *Biographical Dictionary of the Australian Senate*, Vol 1, p 140; and see below.

<sup>10</sup> Andrew Inglis Clark (Tas) was particularly well informed about the US system, which he admired greatly. He was not available for the second convention because he was visiting the US when it commenced.

<sup>11</sup> In speaking to the eventual introduction of the Constitution Bill in the House of Commons the Secretary of State for the Colonies, Joseph Chamberlain, referred to ‘the warning (to Canadians), afforded by the civil war in America, of the danger of exaggerating states rights’ House of Commons *Hansard* 14 May 1900, col 53. Professor Williams has pointed out that it had become clear at the Federation Conference in Melbourne in 1890 that there would not be support for the Canadian model. Professor Lindell has noted the irony that largely as a result of judicial interpretation the United States and Australian Constitutions are now seen as more centralistic and less federal than that of Canada. While the Canadian Constitution was rejected by most of the delegates on the basis of the belief that it was too centralistic, from an early stage Privy Council decisions showed a non- centralist tendency: see Professor Zines, ‘The Federal Balance and the Position of the States’ in G Craven (ed) *The Convention Debates 1891-1898: Commentaries, Indices, and Guide*, (1987) Legal Books, pp 75-9,87 and also ‘Judicial Review in Australia and Canada’ in Hodgins and Eddy (eds), *Federalism in Canada and Australia: The Later Years*, (1987), ch 4 esp at pp 104, 111; and see Irving *To Constitute a Nation*, chapters 3 and 4 (Imagined Constitutions and Models for a nation).

<sup>12</sup> La Nauze, *op cit*, p 273.

<sup>13</sup> Irving, *To Constitute a Nation*, p 76.

<sup>14</sup> *Hansard* 18 March 1897.

<sup>15</sup> And see Irving, *To Constitute a Nation*, 62-72.

I think the more daylight we can let in upon our proceedings the more advantageous it will be, and the more it will facilitate the work of this Convention. We have to cultivate the sympathy of the people whom we are sent here to represent, and we should suffer a very great disadvantage indeed if we allowed the idea to go abroad that there was any part of our proceedings as a Convention which it was desirable to shield from public conversation.<sup>16</sup>

A contrary view was put by Mr Shiels (Victoria):

The course being taken is, I think, a dangerous one, and will be dilatory in its action, the inevitable tendency of large bodies of representative men with the press before them, being to rhetorical displays, and also to the exhibition of a spirit the very opposite to that which is so necessary in our deliberations – the spirit of compromise. A spirit of stubbornness is induced. Men having committed themselves in the sight of the press and of the public to a certain view, it is human nature that they will contend for that view to the last, so that, instead of being ready, in a spirit of compromise, to give up for higher objects, they will be unyielding and resisting when they should yield ...<sup>17</sup>

The Convention agreed that the press and the public should be admitted to its proceedings, including committee of the whole proceedings ‘unless otherwise ordered’.<sup>18</sup> The meetings of committees were to be private. This was a full application of the normal parliamentary practice at the time. These issues were to be revisited during the second Convention.<sup>19</sup>

The substantive work of the Convention began on 4 March when Sir Henry Parkes moved a seven part resolution which set out high level conditions to be the basis of Federation.<sup>20</sup> The resolutions provided for the retention locally of all the powers of the existing colonies other than those surrendered to the national government, and for a bicameral federal parliament, with a Senate in which all the ‘provinces’ would have an equal number of representatives, and a House of Representatives elected on the basis of population and with sole power of initiating and amending bills appropriating revenue and imposing taxation.<sup>21</sup> The interests of the states were thus to be protected by two key provisions: by the fact that the federal Parliament would have strictly limited powers, with powers not specified remaining state responsibilities, and by a Senate in which each state would have equal representation.

These resolutions were debated over six days. The ‘Prime Ministers’ of each colony spoke first. Key issues that were to be debated at length later in the Convention, and again in 1897-98, including the relative powers of the two Houses, emerged quickly.<sup>22</sup> Sir Henry spoke in reply on 13 March. The resolutions were agreed to on the voices. This was a significant decision, and can be equated to agreement to the second reading of a bill. Committee of the whole consideration (detailed stage) then commenced.<sup>23</sup>

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<sup>16</sup> *Hansard*, 3 March 1891, p 18.

<sup>17</sup> *Hansard*, 2 March 1891, p 17.

<sup>18</sup> *Minutes of Proceedings*, 4 March 1891, p xi.

<sup>19</sup> *Hansard*, 1 April 1897, p 398-404.

<sup>20</sup> These had been prepared in informal discussions with leading delegates. Sir Samuel Griffith helped give the draft more detail: See La Nauze *op cit*, pp 35-8; Williams, *op cit*, pp 34-5, and Galligan and Warden, ‘The Design of the Senate’ in *The Convention Debates 1891-1898: Commentaries, Indices and Guide*, pp 92-3, and Deakin, *The Federal Story*, p 47.

<sup>21</sup> *Minutes of Proceedings*, 4 March 1891, p xii. Another important feature was the proposal that the Senate would have a continuous life which would be achieved by the regular retirement of one third of its members (the resolution did not specify how frequently the retirements would be, referring to ‘every\_\_\_\_years’.

<sup>22</sup> For example see *Hansard*, 16 March 1891, pp 362-3, 3852-7. And see Hirst, *op cit*, p 172.

<sup>23</sup> *Minutes of Proceedings*, 18 March 1891, p lxii.

The reconciliation of the principles of responsible government,<sup>24</sup> under which the executive drew its authority from the support of the majority in the popularly elected House, with the features of a federal system was a great challenge. This issue had a theoretical dimension (in terms of the principles of responsible government and the requirements of a federal structure), a practical dimension (in terms of the balance of power in a federation of states of very unequal populations and economic strength) and an ideological dimension (in terms of progressive or liberal and conservative thinking).<sup>25</sup>

Leading delegates from smaller colonies argued that the two houses should have what they called ‘co-ordinate’ or ‘co-equal’ powers. The powers of the Houses in respect of financial matters was at the heart of this issue. A key question was whether the Senate should have the power to amend ‘money’ bills. One of the most important debates took place on 16 and 17 March.<sup>26</sup> An initial amendment by Sir John Downer (SA) to the second part Sir Henry’s resolution which would have allowed the moving of a further amendment to give the Senate power to amend (in the sense of ‘veto in detail’) money bills, was agreed to. Sir John then moved his ‘veto in detail’ amendment. To this Mr Wrixon (Victoria) moved an amendment which would have given the Senate a power to reject but not amend money bills. It was clear that this was a major point of difference, with the potential to imperil further progress.<sup>27</sup> There were references that delegates ‘might as well pack their portmanteaux’ and go home. Eventually the merit of allowing the matter to stand for further consideration by the Constitutional Committee was recognised and the amendments were withdrawn.<sup>28</sup>

On 18 March three committees were appointed to do the detailed work necessary to give effect to the high level resolutions. The largest, with 14 members, and most important, was the Committee on Constitutional Machinery; the others were on Finance and a Federal Judiciary; each had seven members. The Finance Committee and the Judiciary Committee were required to report to the Constitutional Committee.

The committees got down to work, and the Finance and Judiciary Committees duly reported to the Constitutional Committee, but its work had not been completed as Easter approached. The prospect of committee meetings in a committee room at Parliament House over Easter was not appealing.<sup>29</sup> Fortunately the Queensland Government steamship *SS Lucinda* had been brought to Sydney and was available to Sir Samuel Griffith. What we would refer to as a sub-committee of the Constitutional Committee, a Drafting Committee, to which Sir Samuel, Mr Barton, Mr Kingston and Mr Andrew Inglis Clark had been appointed, continued its work on board the *Lucinda*.<sup>30</sup> This had the advantage of ensuring that not only were the drafters removed from the approaches of the media, they were also out of the reach of their fellow delegates.<sup>31</sup>

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<sup>24</sup> For a recent explanation of the understanding of responsible government at the time of federation, and of its continuing significance, see Gageler *op cit*, pp 11-13.

<sup>25</sup> See, for example *Hansard*, 3 April 1891, p 708-11 (Deakin); and see Galligan and Warden, *op cit*, pp 94-8 and Deakin *op cit*, p 38.

<sup>26</sup> *Hansard*, 16 March 1891, pp 375- 409, 17 March 1891, pp 409-463.

<sup>27</sup> See, for example, speech of Sir Henry Parkes, *Hansard*, 16 March 1891, pp 380-1.

<sup>28</sup> *Minutes of Proceedings*, 12 March 1891, p liv.

<sup>29</sup> La Nauze, *op cit*, pp 63-4.

<sup>30</sup> Sir Samuel invited Mr Thynne, Sir John Downer and Mr Wrixon to join them – Williams, *op cit*, p 163, and Inglis Clark was ill for part of the time.

<sup>31</sup> Williams, *op cit*, p 162.

It had been hoped that the Constitutional Committee would report to the Convention proper on 24 March. When the Convention assembled on 24 March, proceedings had some familiar features. Sir Samuel reported that the Committee had not been able to complete its work. He also called attention to 'the improper publication, by the daily press, of certain information as to the proceedings of the committees appointed by the Convention'.<sup>32</sup> Parliamentary officers will be interested to know that the President of the Convention, Sir Henry Parkes responded immediately that:

...every precaution had been taken by the Secretary and officers assisting him to prevent such improper publicity, for which they were not in any way responsible.<sup>33</sup>

The discussion about the need, when the committee reported, for members of the Convention to be given sufficient time to consider its report before being expected to debate it is also familiar.<sup>34</sup>

As noted, an early and fundamental condition which would protect the interests of the states was that authority of the new federal parliament should be restricted to a list of specified powers. A second protection of state interests was agreement that all states should have equality of representation in one of the houses of the federal parliament (although at least one reader of Bryce had noted his comment that the US House of Representatives had never been the organ of the large states nor prone to act in their interests, that neither had the Senate been the stronghold of the small states, and that the tendency to uphold states' rights had been no stronger in the Senate than in the House).<sup>35</sup> The question of the powers of the Senate in relation to legislation had assumed such significance that it was referred to as the 'lion in the path' towards Federation.<sup>36</sup>

The position agreed on by the Constitutional Committee was known as 'the compromise of 1891'. Consistent with the resolutions adopted, the less populous states would have equality of representation with the greater states in the Senate but the 'definite and unequivocal condition' was that the House of Representatives should have 'the predominating voice in finance and in the control of the Executive'.<sup>37</sup> The draft provided that:

Laws appropriating any part of the public revenue, or imposing any tax or impost shall originate in the House of Representatives (s 54).

and

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 annual 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. (s 55 (1)).<sup>38</sup>

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<sup>32</sup> *Minutes of Proceedings*, 24 March 1891, p lxvii.

<sup>33</sup> *Hansard*, 24 March 1891, p 512.

<sup>34</sup> *Ibid*, pp 513-9.

<sup>35</sup> James Bryce, *The American Commonwealth*, (London) 1888, Vol I, pp 247-8.

<sup>36</sup> A great and immediate issue facing delegates was that of the tariff. This was the original 'lion in the path'; Professor Gallighan and Dr Warden say it was soon replaced by the issue of the powers of the Senate but that by 1897 the lion had been 'metamorphised into a "Frankenstein monster" ready to destroy states rights in the form of the deadlock provisions' *The Design of the Senate* pp 105-6.

<sup>37</sup> Quick, J and Garran, R, 1901, *The Annotated Constitution of the Australian Commonwealth, Part 1 (1901)*, p 131.

<sup>38</sup> Document 15.2 in Williams, *op cit*.

Part of the compromise was the provision that the Senate could return a bill that it could not amend to the House with a ‘request’ for amendments – sub section 55(5) of the draft. This was a direct transfer of a provision that had been applied in South Australia since 1857.<sup>39</sup> It owed nothing to Westminster; it reflected local experience.<sup>40</sup>

The significance of the committee’s achievement is emphasised by Quick and Garran:

In those few days Federation came down from the clouds to the earth; it changed from a dream to a tangible reality. The idea was once and for all crystallized into a practical scheme, complete in all its details.<sup>41</sup>

On 31 March, Sir Samuel Griffith presented the report and it was ordered to be printed.<sup>42</sup>

The report was debated at length between the 1<sup>st</sup> and 9<sup>th</sup> April. The proposed provisions for the powers of the Senate were debated at length. Mr Richard Baker, who was to become the first President of the Senate, was a great champion of its rights. He later spoke of the Senate as ‘the sheet-anchor of the smaller states ... the pivot on which the whole Federal Constitution revolves’.<sup>43</sup>

Baker sought to overturn the compromise that had been agreed to by the Constitutional Committee. As well as opposing the limits that were to be placed on the Senate’s powers in respect of legislation, Baker was concerned about the power the British system of responsible government gave to the majority and advocated provisions that he believed better reflected federal principles. The Swiss Federation had drawn on the American model and, although Baker was well aware of the power and prestige of the US Senate, he thought that the US system had not worked well in all respects, saying that the ‘too great disassociation between the executive and the legislature’ there had worked so badly that it should not be followed.<sup>44</sup> Baker favoured the Swiss model in which members of the two houses elected the executive and argued that each House would choose three Ministers to form the executive, which would thus be accountable to each House.<sup>45</sup> Others, such as Deakin, were concerned that what they saw as the democratic principle of responsible government should not be eroded by the use of the Swiss or American models. Baker moved amendments to reduce the restrictions on the

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<sup>39</sup> Mark Leeming’s paper, ‘*Something that will appeal to the people at the hustings*’ Paragraph 3 of section 53 of the Constitution, University of Sydney Law School Legal Studies Research Paper No 10/59 – includes details of the South Australian Compact, notes that this had been explained by Mr Playford, a South Australian delegate, during debate on the initial resolutions, and refers to convention *Hansard*, 5 March 1891, p 56. See also Professor John Williams and Ms Gabrielle Appleby ‘A tale of two clerks: When are appropriations appropriate in the Senate?’ (2009) *Public Law Review*, pp 194, 196-9.

<sup>40</sup> The draft contained phrases that were found in some of the colonies’ own constitutional provisions. See also Anne Twomey, *Senate power in relation to money bills: an historical perspective*, Parliamentary Research Service Research Paper No. 5, June 1994. The 1995 report of the House Standing Committee on Legal and Constitutional Affairs on the third paragraph of section 53 also provides a useful historical perspective. And see Dennis Pearce, *The Legislative Power of the Senate in Commentaries on the Australian Constitution*, Leslie Zines (ed), (1977) p 119; and Paul Schoff (1996) “‘Charge or Burden on the People’: the Origins and Meaning of the Third Paragraph of Section 53 of the Commonwealth Constitution”, *Federal Law Review*, 24(1) at 43; and Galligan and Warden, *op cit*, pp 94-8.

<sup>41</sup> Quick and Garran, *op cit*, p 129.

<sup>42</sup> The report includes the reports of the Finance and Judiciary Committees, and is appended to the official minutes. The documents are also available in Williams, *op cit*, pp 315-7, 341-9, 358-62. Professor Williams also provides helpful explanatory notes about the work of each committee.

<sup>43</sup> *Hansard*, 17 March 1898, p 2843.

<sup>44</sup> *Hansard*, 18 March 1891, pp 464-6.

<sup>45</sup> Deakin, *op cit*, p 38. .

powers of the Senate but they were defeated and the compromise stood. The significance of this issue was recognised: at one point, Sir Henry Parkes made it clear that the whole federal cause would be at risk if an amendment was made to the compromise.<sup>46</sup> It is not surprising that discussions outside the chamber were important in fostering the ‘spirit of compromise’ that was so essential for success.<sup>47</sup>

One of the more interesting amendments to the draft bill was moved by Sir George Grey (New Zealand). It would have allowed the Governor-General to be elected. Sir Samuel Griffith spoke against the proposal:

... the practical result would be that at every election of the governor-general there would be a canvassing throughout the whole dominion or commonwealth by the representatives of respective parties, and the governor-general, when elected, would regard himself as the nominee or head of a party, and would devote a great part of his time and attention to securing his re-election.<sup>48</sup>

Deakin expressed concerns on that point a little differently: ‘younger democrats’ wanted no popularly elected rival to a prime minister; Sir John Downer was concerned that an elected Governor-General would have pretensions of real authority.<sup>49</sup> The amendment was defeated by 35 votes to 3.

The Convention was a significant event in the life of the colonies – and it was seen as such. It received many telegrams and messages of goodwill, including one from Queen Victoria,<sup>50</sup> many from community groups such as the Australian Natives’ Association and the Woman’s Christian Temperance Union, as well as from business groups, such as Chambers of Commerce. A letter from the Chamber of Commerce in Suva advised that although Fiji ‘has no representative among you, yet no less is she included among the colonies of the Australasia group’ and wished the Convention well.<sup>51</sup> A telegram from the Central Queensland Territorial Separation League protested that the proposed provisions for the creation of new states were too restrictive;<sup>52</sup> another from the Mayor of Warrnambool advised:

Meeting citizens held here yesterday, at which suggestion partly supported that Warrnambool excellently situated for being seat of Federal Parliament, and respectfully solicit support of Assembled Convention.<sup>53</sup>

Some delegates brought significant legal expertise to the task, others brought experience of government, some showed both scholarship and political experience. Sir Henry Parkes was recognised as the great leader of the movement towards Federation, but was not as involved in the detailed work of the Convention as Sir Samuel Griffith, who was a figure of considerable authority. Griffiths had the principal responsibility for developing the draft and then explaining it during its consideration by the wider membership of the Convention.

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<sup>46</sup> *Hansard*, 3 April 1891, p 721.

<sup>47</sup> La Nauze, *op cit*, p 44.

<sup>48</sup> *Hansard*, 1 April 1891, p 566.

<sup>49</sup> La Nauze, *op cit*, p 73.

<sup>50</sup> The Governor of NSW having telegraphed to advise her of the opening of the Convention – *Minutes of Proceedings*, p xv. This message was greeted with three cheers.

<sup>51</sup> *Minutes of Proceedings*, p cxxi.

<sup>52</sup> *Minutes of Proceedings*, p cxxiii.

<sup>53</sup> *Minutes of Proceedings*, p xxxvii.

There were many constructive exchanges during the debates, strong advocacy on matters of principle and on local interests. The use of language is notable, and it is restrained. Delegates were able to make their arguments skillfully and with imagination.<sup>54</sup> Some homely phrases and apt metaphors were used: to support an argument about the importance of state vis-a-vis federal interests, Mr Baker quoted a 'Swiss states' patriot' as saying 'My shirt is dearer to me than my coat'.<sup>55</sup>

Crucially there was a willingness to compromise. The processes followed - traditional parliamentary processes - facilitated this: first higher level debate, then detailed stage consideration, followed by work in smaller committees and then consideration of the committees' reports by the full membership. Nevertheless we should not have a totally idealistic impression of the Convention. There was that leak of committee proceedings; there were hints of mischief (one of the New South Wales delegates, Mr Dibbs, an opponent of Federation, seems to have been busy putting forward ideas that would irritate Sir Henry Parkes<sup>56</sup>) and there were moments of testiness - 'warm feelings' were said to have arisen at times.<sup>57</sup>

The proposed constitution was adopted and the Convention ended on 9 April. Very few amendments had been made to the draft prepared by the Constitutional Committee. The bill was not a document of perfect legal precision. It could not be - rather it was the product of a political process, with delegates compromising in an effort to agree on terms that would be acceptable in the various colonies they represented. The proposals in relation to the law making powers of the Houses were a good example of this - the 'compromise of 1891' was referred to as delicate.

A sense of pride by delegates in their achievements is evident in the final debates,<sup>58</sup> even of surprise.<sup>59</sup> Professor La Nauze wrote of the draft 'as the infant and innocent Constitution which momentarily so delighted its parents'.<sup>60</sup> The Convention thus ended on a positive note.<sup>61</sup> A quaint discrepancy between the official minutes and the *Hansard* record is evident. *Hansard* reports that Members 'rising in their places gave three cheers for the Queen' and that 'cheers were also given for the Hon the President of the Convention';<sup>62</sup> the *Minutes of Proceedings* record with sober precision that it was three cheers for the Queen and then one cheer more for the President.<sup>63</sup>

The intention was that the delegates would take the proposed constitution - referred to as the Constitution Bill - back to their own colonial parliaments to seek support for it.

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<sup>54</sup> And see LaNauze *op cit*, pp 83-4.

<sup>55</sup> *Hansard*, 6 March 1891, p 115.

<sup>56</sup> For example, on the second last day of the Convention, with the draft bill agreed, he moved that Sydney should be the capital of the new Federation - this amendment was lost 26 votes to 4, *Minutes of Proceedings*, 8 April 1891, p cxvi-cxvii. And see La Nauze, *op cit*, p 72.

<sup>57</sup> La Nauze, *op cit*, p 46; Quick and Garran, *op cit*, p 128.

<sup>58</sup> La Nauze, *op cit*, p 78.

<sup>59</sup> Hirst, *op cit*, pp 100-1; Quick and Garran *op cit*, p 128.

<sup>60</sup> La Nauze, *op cit*, p 78.

<sup>61</sup> Deakin, *op cit*, p 51.

<sup>62</sup> *Hansard*, 9 April 1891, p 940.

<sup>63</sup> *Minutes of Proceedings*, 9 April 1891, p cxx iii.

## 1891-1897

### 'DRAFTED IN 6 WEEKS, PUT ASIDE FOR 6 YEARS'

At a political level, it was no surprise that there was opposition from those who had good reason to be cautious about Federation; as well there were deep differences among potential supporters of Federation over economic policy, with conflict between free traders and protectionists. To the emerging Labor Party the draft bill was open to criticism as inherently conservative and undemocratic because of the great powers proposed for the Senate in which all states would be represented equally, regardless of their population, and because the draft appeared to give great power to the Governor-General. At a personal level, rivalry between local members of Parliaments was evident.<sup>64</sup> This was a problem in New South Wales, the mother colony, and the one to which the others looked to take a lead.

Understandably, and as is so often the case, other factors loomed large.<sup>65</sup> Drought, financial pressures, including the collapse of the land boom, and industrial unrest, commanded the attention of public figures and parliamentarians. Alfred Deakin was but one casualty of the harder times.<sup>66</sup>

This combination of policy and political differences, other pressures on the political leaders and personal rivalry between them, and the fact that in each colony the draft bill needed to be considered by two chambers, ensured that little progress was made – the bill was variously 'criticised, amended, put aside or rejected'.<sup>67</sup> Professor La Nauze characterised the problem at that stage as not so much whether the draft bill was acceptable as whether Federation itself was acceptable.<sup>68</sup>

Although the draft constitution had 'run into the shallows and the miseries of public indifference and economic depression',<sup>69</sup> as the decade wore on it appeared that the prospect of Federation could offer solutions to the very problems that had helped cause the movement to drift – 'strength in cooperation' was a popular phrase among federalists; proponents of Federation 'began to appeal to the pocket as well as the heart'.<sup>70</sup>

The Australian Natives' Association, which had been formed in Victoria in 1871, became more active, as did Border Leagues.<sup>71</sup> In 1893 the Australian Federation League held a two-day conference in Corowa. Strong support was expressed at the meeting for early action to achieve Federation, but there were complaints that this was all just 'talk, talk, talk'. The effect of such comments can be imagined. After some consultation a resolution was proposed by Dr John Quick that the colonial Parliaments should enact legislation to provide for the popular election in each colony of representatives to attend a new Convention to draft a

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<sup>64</sup> For example, in the conflict between Sir Henry Parkes and Mr George Reid.

<sup>65</sup> In fact these problems had started to emerge even before the Convention had commenced – Hirst, *op cit*, p 131.

<sup>66</sup> He reportedly lost his own savings and those of his father in the collapse of the land boom and was required to spend more time working as a barrister as a result – Hirst, *op cit*, p 111.

<sup>67</sup> Stuart McIntyre, 'Corowa and the Voice of the People', *Papers on Parliament* No. 32, p 1.

<sup>68</sup> La Nauze, *op cit*, p 89.

<sup>69</sup> John La Nauze, 'Other Like Services' in *No Ordinary Act – Essays on Federation and the Constitution*, Helen Irving and Stuart Macintyre (eds) MUP 2001, p 155.

<sup>70</sup> Quick and Garran, *op cit*, p 150.

<sup>71</sup> Associations centred on the boundary between NSW and Victoria where the effects of the separate customs duties were evident in daily life.

Federal Constitution, and that the draft prepared should be submitted to the people of the colonies for their approval.<sup>72</sup>

The Federation movement was regaining momentum. At a conference in Hobart in 1895 the Premiers agreed that a second Convention should be held, with ten representatives to be elected by the people of each colony. An important additional provision was that the draft developed at the Convention should be submitted to the colonial Parliaments for review before it was put to the people. Charles Kingston (South Australia) drafted a model bill to provide for the new Convention.<sup>73</sup> During 1895-96 enabling legislation for these purposes was passed in New South Wales, Victoria, South Australia and Tasmania. A bill was introduced in the Queensland Parliament but failed to gain support.

The enabling act passed by the Parliament of New South Wales has been included in *The Australian Constitution – A documentary history*.<sup>74</sup> The Act sets out a comprehensive framework for the election of representatives to be ‘charged with the duty of framing a Federal Constitution for Australasia’,<sup>75</sup> for the meeting of the Convention, for the adjournment of the Convention to allow the colonial parliaments to consider the proposed constitution, for the Convention to reassemble to consider any amendments suggested by the parliaments to the draft, and for the final draft to be submitted to the people ‘qualified and entitled to vote for the election of Members of the Legislative Assembly’.<sup>76</sup> This inclusion allowed women to contest the ballot in South Australia.<sup>77</sup> It was hoped that all of this was to lead to agreement to the detailed terms for Federation that could be transmitted to the imperial government and the British Parliament.

Elections for delegates were held in March 1897. Each colony voted ‘as a whole’.<sup>78</sup> Voters found many candidates competing for their support. Sectarian differences emerged in New South Wales.<sup>79</sup> Edmund Barton won first place, ahead of the Premier, Mr George Reid. The Labor Party had run ten candidates, but none was successful.<sup>80</sup> In South Australia one of the 33 candidates was a woman – Catherine Helen Spence. She was an expert on child welfare and an advocate of proportional representation, and stood on this policy rather than to advance women’s rights. Although she received 7,383 votes she was not successful.<sup>81</sup> Women’s organisations were to have their impact on the Convention through petitioning, and the franchise was to receive considerable consideration.

Nowadays we often hear concerns about the power, or the perceived power, of media organisations. In the 1890s Mr David Syme, publisher of the *Melbourne Age*, was a highly

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<sup>72</sup> There has been controversy as to whether the proposal for the popular election of representatives was in fact Dr Quick’s or that of Mr Henry D’Estre Taylor, McIntyre, *op cit*, p 4.

<sup>73</sup> Williams, *op cit*, p 465.

<sup>74</sup> Williams, *op cit*, pp 471-4.

<sup>75</sup> Section 3.

<sup>76</sup> Section 32.

<sup>77</sup> Williams, *op cit*, p 466.

<sup>78</sup> In Western Australia the Parliament selected the delegates.

<sup>79</sup> After a widely publicised and well received key-note speech at the People’s Convention at Bathurst in November 1896, the Catholic Archbishop of Sydney, Cardinal Moran, had stood for election as a delegate; sectarian differences soon emerged and a campaign was mounted against him, although his failure to win a place may also have reflected a wider sentiment about the separation between church and state. Deakin, *op cit*, p 67 and Hirst, *op cit*, pp 147-8.

<sup>80</sup> Hirst, *op cit*, p 145-6.

<sup>81</sup> Irving, *To Constitute a Nation*, pp177-8; Hirst, *op cit*, p 147-8.

influential figure in Victoria's public life.<sup>82</sup> Dr Hirst has described the election result as 'a terrifying demonstration of (*The Age's*) power'<sup>83</sup> – *The Age* had run a 'ticket' of ten candidates in Victoria, and each had been successful. These were great times for cartoonists – one in the *Melbourne Punch* portrayed Syme controlling a voter's hand as he marked the ballot paper.<sup>84</sup>

Although the candidates chosen were not very different in background to those chosen by the Parliaments in the colonies in 1891, they had each been elected, and the circumstances and the atmosphere were very different (*and see* below). Delegates from New South Wales travelled by train to Albury, where they were received by the Mayor before changing trains for Melbourne.<sup>85</sup> Delegates from Tasmania and Victoria joined them in Melbourne where they were given a civic reception, before they all departed for Adelaide on a special train. Gatherings along the way,<sup>86</sup> including one at Ballarat, a centre of support for Federation,<sup>87</sup> would surely have added to the sense of excitement, as well as to the sense of responsibility, that delegates would have felt.

## **ADELAIDE, MARCH-APRIL 1897, THEN SYDNEY AND MELBOURNE**

Adelaide was chosen to host the first session of the new Convention. The choice of Adelaide was seen as a victory for the less populous colonies and as a blow to Victoria.<sup>88</sup> The Convention met on 22 March, with ten representatives of each of New South Wales, Victoria, South Australia and Tasmania. West Australian representatives arrived on 26 March.<sup>89</sup> Queensland was not represented at all because enabling legislation had not been passed; neither was New Zealand.<sup>90</sup> All the representatives were men, as had been the case in 1891. Nevertheless, by 1897 the right of women to participate in political life was being raised, the Women's Christian Temperance Union had been established as had womens' philanthropic and discussion groups. Catherine Helen Spence's candidacy was referred to during the debates, and the issue of the franchise was gaining greater attention.<sup>91</sup>

The representatives met in the Legislative Assembly chamber. A proclamation by the Governor of New South Wales, the 'mother colony', convening the Convention was read by the Clerk; similar proclamations by the governors of the other colonies were tabled, together with copies of the enabling acts. Certificates of the election of representatives were read and representatives were called to sign the roll before taking the seats that had been allocated for

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<sup>82</sup> Syme had employed Alfred Deakin as a journalist.

<sup>83</sup> Hirst, *op cit*, p 144. Referring to its campaign that the Convention should be opened in Melbourne, Professor La Nauze wrote that *The Age* was 'not yet conscious that Victoria was not Australia', *op cit*, p 99.

<sup>84</sup> Reprinted in Hirst, *Sentimental Nation*, p 143.

<sup>85</sup> Hirst, *op cit*, pp 151-2.

<sup>86</sup> Bernhard Wise referred to the trip as a 'triumphal progress with cheering crowds meeting the train at every stop'. *The Making of the Australian Commonwealth 1889-1900*, p 229.

<sup>87</sup> It is possible that Ballarat's efforts were linked to the hope that it would be the site of the new capital – Hirst, *op cit*, p 152.

<sup>88</sup> La Nauze, *op cit*, pp 97-9; Hirst, *op cit*, p 150.

<sup>89</sup> *Minutes of Proceedings*, p 21. Its representatives were not chosen until 13 March, and, unlike the other colonies, Western Australia's representatives were chosen by its parliament.

<sup>90</sup> Although the Agent-General for New Zealand was active during later negotiations about the proposed Constitution in London.

<sup>91</sup> Helen Irving, 'Fair Federalists and Founding Fathers' in *A Woman's Constitution? Gender and History in the Australian Commonwealth*, pp 4-8.

each group. Mr Charles Kingston, the Premier of South Australia, was elected as President, consistent with the practice of 1891, although his opponents had tried to prevent this.

The following day the Convention settled its regular sitting hours and agreed that official minutes be kept and circulated and that a *Hansard* record be produced (*and see* below). The Convention resolved to follow the standing orders and practice of the South Australian House of Assembly, and agreed that its proceedings be open to the public 'except when otherwise ordered'.<sup>92</sup>

The familiar parliamentary procedure of orders for returns of information was employed so that the Constitution could be as well informed as possible about important matters. Orders were agreed to, on the motion of Mr Quick, in respect of the population of the colonies, naval and military expenditure, the cost of coastal and quarantine services, customs and excise revenue and postal and telegraphic services.<sup>93</sup> This practice had not been followed in 1891. Its use in 1897 suggests that representatives at the new Convention saw themselves as decision makers: decision makers who would not only need an understanding of systems and processes of government, but up-to-date facts about the economies and the work of government in Australia (*and see* below).

By agreement, Edmund Barton (New South Wales) became Leader of the Convention and was destined to have a critical role in its success. He had been asked by the ailing Parkes<sup>94</sup> to take responsibility for leadership of the cause of Federation and had worked hard, and at significant personal cost, to gather popular support for the cause. As Sir Henry Parkes had done in 1891, Barton's first official task was to propose a series of resolutions. In key details these were very similar to those of 1891. They commenced:

That, in order to enlarge the powers of Self-Government of the people of Australasia<sup>95</sup>, it is desirable to create a Federal Government which shall exercise authority throughout the Federated Colonies, subject to the following principal conditions:-

- i That the powers, privileges, and territories of the several existing colonies shall remain intact, except in respect of such surrenders as may be agreed upon to secure uniformity of law and administration in matters of common concern. ...

They went on

- (a) A Parliament, to consist of two Houses, namely, a States Assembly or Senate, and a National Assembly or House of Representatives: the States Assembly to consist of representatives of each colony,<sup>96</sup> ... the National Assembly to be elected by districts formed on a population basis, and to possess the sole power of originating<sup>97</sup> all Bills appropriating revenue or imposing taxation.<sup>98</sup>

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<sup>92</sup> *Minutes of Proceedings*, 23 March 1897, pp 7-8.

<sup>93</sup> *Minutes of Proceedings*, pp 8-9. *See also* later orders pp 13, 14, 22.

<sup>94</sup> Bolton, *op cit*, p 87.

<sup>95</sup> Mr Gageler has drawn attention to the significance of this phrase and linked it to words adopted by the colonial leaders at the Federation Conference of 1890 – Gageler, *op cit*, p 9.

<sup>96</sup> Unlike the resolution of 1891, it was not specified that each 'colony' would have the same number of places.

<sup>97</sup> Here too the resolution differed from that of 1891, which had stipulated also that the House had the sole power of amending such bills.

<sup>98</sup> *Minutes of Proceedings*, 23 March 1897, pp 9-10.

The resolutions were debated over seven days. Once again, a higher level debate allowed the most important issues to be discussed. Predictably, the relative powers of the two Houses was the subject of much debate. Sir Richard Baker<sup>99</sup> was the first to speak after Barton. He questioned again the appropriateness of the traditional system of responsible government in a Federation. Opposing the idea that the executive should be formed on the basis of support of only the House, Baker argued again for the model of the more recent Swiss Federation, in which each house elected an equal number of members of the executive, and repeated his call for the Senate to be given co-equal powers in respect of legislation.<sup>100</sup> After considerable debate Barton spoke in reply and the resolutions were agreed to – as in 1891, on the voices and without amendment (although Sir Richard made it clear later that he had been opposed to these key provisions but had not pressed the matter at the time on the assumption that they would be considered during the committee stage).<sup>101</sup>

Mr Barton then moved for the appointment of three committees, following the pattern set in 1891. The principal committee, with four members from each colony, was appointed to consider the ‘Constitutional Machinery and the Distribution of Functions and Powers’; the second, with three representatives of each colony, was to consider Finance, Taxation, Railways and Trade Regulation; and the third, with two representatives of each colony, was to report on the establishment of a Federal Judiciary. The ‘Prime Ministers’ of each colony were *ex officio* members of each committee. This meant that half of the Convention’s membership was appointed to the Constitutional Committee. As in 1891, the Finance and Judiciary Committees were instructed to report to the Constitutional Committee.

The Constitutional Committee was ‘to prepare and submit ... a bill for a Federal Constitution, such bill to be prepared with as much expedition as is consistent with careful consideration’.<sup>102</sup> Reflecting an awareness of media interest, Mr Barton was given leave to amend his motion to provide that the chairman of each committee have ‘leave to give publicity to its resolutions as arrived at from day to day’.<sup>103</sup>

These were fine parliamentary processes. As might be expected, there was some surprises. Mr Walker (New South Wales), whose significant experience in finance had been recognised, did not win a place on the Finance Committee. He was the only delegate who had not been a member of parliament. Perhaps his failure to win a place on the Finance Committee can be explained to his lack of political experience; instead, although not a lawyer, he was appointed to the Judiciary Committee.<sup>104</sup> More serious issues emerged on 8 April in respect of the appointment by the Constitutional Committee of a Drafting Committee, a (sub) committee of great practical importance and prestige.<sup>105</sup> The membership was determined by ballot.

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<sup>99</sup> He had become President of South Australia’s Legislative Council in 1893 and had been knighted in 1895. He produced a booklet on models for the formation of the executive.

<sup>100</sup> *Hansard*, 23 March 1897, pp 27-31.

<sup>101</sup> *Hansard*, 23 March 1897, p 28 and 30 March, p 261.

<sup>102</sup> *Minutes of Proceedings*, 31 March 1897, p 37. According to Professor La Nauze the notion that drafting was to have a ‘fresh start’ was a procedural fiction, the committee began with the bill of 1891 and ‘proceeded to confirm, reject or modify it clause by clause’ – *op cit*, p 277.

<sup>103</sup> *Minutes of proceedings*, 23 March 1897, p 37. Another sign of the approach to the press had been given when rail passes were made available to them.

<sup>104</sup> Mr Walker was eventually appointed to the Finance Committee at the Sydney session.

<sup>105</sup> Deakin, *op cit*, pp 76-7; La Nauze, *op cit*, p 129.

Sir John Downer (South Australia) and Mr Richard O'Connor (New South Wales)<sup>106</sup> were chosen, Barton was chairman. Victoria was not represented, yet New South Wales had two places. The exclusion of Messrs Isaacs (Vic) and Kingston (SA) was a humiliation for them and, in respect of Isaacs, for Victoria.<sup>107</sup> While the committee may not have had the legal or drafting strength of its predecessor of 1891, it had the benefit of easy and straight-forward relations between its members.<sup>108</sup> At the Sydney session a motion that the same three members form a Drafting Committee became a matter of debate when an amendment was moved to enlarge the membership by adding Messrs Kingston, Isaacs and Symon to it, but the amendment failed by one vote; Isaacs spoke on the proposal and referred to the advantages of a smaller membership before voting against the amendment.<sup>109</sup>

The Constitutional Committee considered the key provisions in detail. It reviewed the provisions of the draft from 1891 and made about 60 decisions, about half of them requiring a vote.<sup>110</sup> The issue that was again to prove most contentious was the powers of the Senate. Continuing his opposition to the 'compromise of 1891', which to him had 'very greatly weakened' 'the power, the dignity, and the importance the Senate', Sir Richard Baker moved a motion to reduce the authority of the House in respect of money bills.<sup>111</sup> This time he was successful - his motion was carried by 14 votes to 10, the three smaller colonies using their numbers to out-vote New South Wales and Victoria (although Kingston voted with the majors).<sup>112</sup> This key decision thus formed part of the brief for the Drafting Committee. Other delegates were able to enjoy a trip to Broken Hill while Barton, Downer and O'Connor worked on to draft provisions to give effect to the decisions that had been made by the three committees.<sup>113</sup>

A significant decision by the Constitutional Committee was that, instead of being chosen by the parliaments of the states, members of the Senate would be elected directly. This was an innovative and democratic development— at the time members of the model most frequently cited, the US Senate, were still chosen by the state Houses, and members of the Canadian Senate were appointed.<sup>114</sup> An interesting but less significant decision was that the Senate would be known as the 'States Assembly'. Barton preferred this title, but the proposal was soon reversed when the bill was considered by the full Convention.

Predictably, the Constitutional Committee's decision to reject the 'compromise of 1891' was a first order issue when the Convention proper resumed. In presenting the new draft, which was described as the *Commonwealth Bill*, to the Convention Barton said, in relation to the provisions about the powers of the Houses, '... if government is finance and finance is

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<sup>106</sup> O'Connor had been an officer of the Legislative Council for a short time from 1897; his father had been the Council's Librarian and was later Clerk of the Parliaments – *Biographical Dictionary of the Australian Senate*, Vol 1, p 27.

<sup>107</sup> La Nauze, *op cit*, pp 128-9; Deakin *op cit*, p 80-1.

<sup>108</sup> Bolton, *op cit*, p 149.

<sup>109</sup> *Hansard* 3 September 1897, pp 21-8; *Minutes of Proceedings*, 3 September 1897, p 2 (the vote was 20 to 21).

<sup>110</sup> Williams, *op cit*, p 483.

<sup>111</sup> The internal details of the committee meetings were not published at the time, but Sir Richard disclosed this during his speech at the conclusion of the Melbourne session – *Hansard*, 17 March 1898, p 2483, and details were later pieced together and explained by Professor Williams.

<sup>112</sup> Williams, *op cit*, p 483.

<sup>113</sup> Bolton, *op cit*, p 150.

<sup>114</sup> Although the merits of direct election were being urged in the US by the time of the conventions it was not until 1913 with the 17<sup>th</sup> amendment that its Senate was elected directly; and the members of the 'states houses' in Germany and Switzerland were the representatives of the states.

government these clauses must be amongst the most important in the bill ...'.<sup>115</sup> The new terms provided that the exclusive power of origination of the House was to be limited to bills 'having for their main object the appropriation of any part of the public revenue, or the imposition of any tax or impost' (proposed section 52)<sup>116</sup> (the 1891 draft had imposed a greater restriction on the Senate, requiring that laws 'appropriating any part of the public revenue, or imposing any tax or impost' originate in the House). The new draft also provided that the Senate would:

have equal power with the House of Representatives in respect of all proposed laws, except proposed laws appropriating the necessary supplies for the ordinary annual services of the government, which the States Assembly may affirm or reject, but may not amend...<sup>117</sup>

The Committee had thus reduced both the restrictions on the Senate in terms of the origination of bills and the Senate's right to amend bills – it would be able to amend bills imposing taxation.

Consideration of the committee's draft commenced on 13 April. An immediate indication of the centrality of the provisions about the powers of the Senate was agreement to a motion by Sir John Forrest (Western Australia) to suspend standing orders to allow clauses 52-54, which dealt with those matters, to be considered before any other provisions. The debate on those clauses ran over two days, on 13 and 14 April, and was described by Quick and Garran as 'certainly the most momentous of the Convention's whole history'.<sup>118</sup> According to Professor La Nauze, at this stage it became clear that the Convention was a negotiating, rather than a legislative, body.

Mr Reid (New South Wales) was determined to restore the compromise agreed to in 1891 saying that he would 'dare not submit that the Senate be able to amend taxation bills' to a referendum in New South Wales. The Convention was at a turning point, but rather than allow the matter to be voted on that evening (13 April), Mr Barton said he was unwell and suggested that the debate be adjourned. In words that have often been quoted Mr Barton's condition was described by Quick and Garran as a 'providential catarrh'.<sup>119</sup> Apparently consultation and lobbying on these matters had been underway for some time, including on the trip to Broken Hill that had been arranged for members.<sup>120</sup> Lobbying continued after the sitting adjourned on 13 April,<sup>121</sup> mirroring the course of events in Sydney in March 1891.

With 30 representatives the less populous colonies (South Australia, Tasmania and Western Australia) had a large majority. As Sir John Forrest (WA) pointed out rather gleefully – 'We have the numbers': if their representatives continued to vote as a group, as they had when voting on Sir Richard Baker's motion in the Constitutional Committee the week before, they would defeat New South Wales and Victoria. No doubt recognizing the likely fate of the bill at a referendum in New South Wales in particular (a colony 'reluctant about federation but essential to its success')<sup>122</sup> if the committee's draft was not amended, Messrs Kingston and Glynn (South Australia) and Henry, Lewis and Brown (Tas) voted with representatives of the

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<sup>115</sup> *Hansard*, 12 April 1897, p 441.

<sup>116</sup> Williams, *op cit*, Documents 25.1 and 25.2.

<sup>117</sup> Proposed subsection 53(1).

<sup>118</sup> Quick and Garran, *op cit*, p 172.

<sup>119</sup> Quick and Garran, *op cit*, p 173; Bolton, *op cit*, pp 151-2.

<sup>120</sup> Deakin, *op cit*, p 84.

<sup>121</sup> La Nauze, *op cit*, pp 144-5; Wise, *op cit* p 235; Bolton, *op cit* p 152.

<sup>122</sup> Hirst, *op cit*, p 176.

major colonies in support of Reid's amendment to add 'laws imposing taxation' to the statement of limitation on the Senate's powers of amendment. Reid's amendment was carried by 25 votes to 23.<sup>123</sup> This had been a turning point – if the vote had gone the other way the consequences would have been serious.<sup>124</sup> Further amendment was made at the Sydney session when the many amendments suggested by the houses of the colonies' parliaments were considered (and where proceedings were complex and possibly confused)<sup>125</sup> and again in Melbourne at the final and intensive session.<sup>126</sup> Included in the amendments was a broadening of the restriction on the Senate in respect of the origination of money bills; the words 'having for their main object the appropriation of any part of the public revenue' were replaced by 'appropriating revenue or moneys'.<sup>127</sup> According to Quick and Garran a condition of accepting the more broadly worded restriction on the Senate was the acceptance of the qualification on the restriction set out in the second sentence of the first paragraph of section 53.<sup>128</sup> The principle of the financial initiative of the executive was reflected in proposed section 54; such provisions having been included in all drafts from 1891.

The closely related issue of deadlocks between the Houses in respect of proposed laws received some mention at the Adelaide session. It was to attract a great deal more attention when the Convention resumed in Sydney in September, and when it met for its final session in Melbourne in 1898. This reflected concerns in New South Wales and Victoria that the great powers conceded in respect of the Senate would allow representatives of a small number of people to block legislation supported by representatives of the great majority of the population. These matters were not only of interest to the participants in the Convention (they were the subject of the longest debate), they attracted the largest attendance in the public gallery at the Sydney session. To Professor La Nauze this debate was a reminder that the constitution was seen by its framers as a treaty between States.<sup>129</sup> The provision eventually agreed to, with the ability of the Senate to be dissolved, was a radical innovation, and was described by Quick and Garran as 'the latest and greatest experiment in Federal government'.<sup>130</sup>

The conventions had spent a great amount of time on the question of the powers of the Houses, on the financial arrangements and the tariff and on the detail of particular federal powers. Writing about it many years later Garran thought it remarkable that there had not been more discussion of the list of powers to be granted to the federal parliament, saying the convention had accepted 'with only a few additions the century-old American list'.<sup>131</sup>

The fact that the convention adapted a federal structure drawn from the US did not mean that it had also adopted the American federalist view that federation was itself a means of

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<sup>123</sup> *Minutes of Proceedings*, 14 April 1897, p 63; La Nauze *op cit*, pp 139-47.

<sup>124</sup> *And see*, Hirst, *op cit*, p 172; Bolton *op cit*, pp 151-3.

<sup>125</sup> *Minutes of Proceedings*, 13, 14 and 15 September 1897, pp 31-35; Schoff, *op cit*, p 69.

<sup>126</sup> La Nauze, *op cit*, pp 218-9.

<sup>127</sup> The publication of successive drafts of the Constitution in Williams, *op cit*, is very helpful in showing the evolution of these provisions.

<sup>128</sup> Quick and Garran, *op cit*, p 666. The authors also link that qualification to the wording of section 56 – p 680. The rejection of the word 'for' was seen as significant and would, it was said, distinguish the House of Representatives from its counterparts in Washington and Ottawa – p 666. *And see* La Nauze, *op cit*, pp 139-49.

<sup>129</sup> La Nauze, *op cit*, p 190.

<sup>130</sup> Quick and Garran, *op cit*, p 687. In an effort to help win support in New South Wales a further amendment was agreed by the Premiers after the Convention had concluded.

<sup>131</sup> Garran, *op cit* p 114.

protecting rights by the division of power.<sup>132</sup> This basic difference was recognized by the High Court in a 1975 decision which referred to an underlying assumption of trust in the system of parliamentary government proposed for the new nation, in contrast to an assumption of suspicion or distrust of governmental authority.<sup>133</sup> The thinking of leading members of the Conventions on this matter may be explained in part by the fact that they would have been well aware of the significant evolution and reform of the British system of responsible government and the growth of constraints on the use of executive power as well as the extension of democratic features since the time of George III and the American revolution.<sup>134</sup> Between them leading delegates combined parliamentary and legal knowledge and experience, they understood both the principles and the practical working of responsible government and they agreed on terms which assumed the responsibility of the executive to the popularly elected House, which set out the composition and powers of each house, and which provided for the ultimate responsibility of the parliament, and of the government, to the people. In short, they had provided for a system of representative and responsible government for a federation.

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The submission of a large number of petitions and representations is evidence of the extent of wider interest in the work of the second Convention.<sup>135</sup> Fifty seven petitions were presented at the Adelaide session.<sup>136</sup> The first, from the Executive of the Woman's Christian Temperance Union, argued for of the 'provision that all voting by electors for Federal Parliaments be upon the basis of equal voting rights for both sexes'.<sup>137</sup> The largest number sought the recognition of God in the Constitution, a small number were against legislation affecting religion, others concerned the 'state right' to prohibit the importation of intoxicants and opium. A petition from the mayor and council clerk of Wentworth urged that it be the site of the Federal Territory; one from the Central Queensland Territorial Separation League prayed that provision be made for the present colony of Queensland to be 'admitted into the Federation as three separate autonomous Provinces or States'.<sup>138</sup> One citizen expressed support for unification rather than Federation: 'Why should a cook use six tin pots to cook the potatoes when one good iron boiler could cook the lot?'<sup>139</sup>

Like their predecessors in 1891 participants in the second Convention showed skill in the use of language and imagination in debate. In claiming that a proposal by a representative from New South Wales that the states should not have equal representation in the Senate would

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<sup>132</sup> Mr Gageler says that to him it is incontrovertible that federation was conceived not as a means of dividing and constraining government but as a means of empowering self-government by the people of Australia. He says that he is not aware of any intention to give effect to what he called the dominant American Federalist view that federation should be designed to achieve 'mutual frustration' or that 'federation itself should operate as a mechanism for avoiding majoritarian excesses by setting up rival institutions which would make ambition check ambition' Gageler, *op cit*, p 10. *And see* Irving, *To Constitute a Nation* pp 69-76 for comments on the nature of the American influence and perceptions about it.

<sup>133</sup> *Attorney-General (Cth) v McKinlay* (1975), 135 CLR at p 24.

<sup>134</sup> For example, *Hansard*, 14 September 1897, p 536. Despite its failings in a relative sense even the unreformed system in Britain was one of limited government.

<sup>135</sup> *And see* Irving, *To Constitute a Nation*, pp 56-7.

<sup>136</sup> *Minutes of Proceedings*, Index, p vii-viii.

<sup>137</sup> *Minutes of Proceedings*, 23 March 1987, p 7.

<sup>138</sup> *Minutes of Proceedings*, index, p 51.

<sup>139</sup> La Nauze, *op cit*, p 200.

amount to absorption of the smaller colonies, a South Australian delegate likened the action to the cassowary bird which

On the plains of Timbuctoo,  
Ate up the missionary,  
Body, bones and hymn-book, too.<sup>140</sup>

The quality of debate has also been praised.<sup>141</sup> Perhaps this reflects the perception by participants that they were elected representatives and negotiators, not the delegates that their predecessors had been in 1891;<sup>142</sup> perhaps it was an awareness of the momentum that had built towards Federation; perhaps it was evidence of more study, reflection and discussion. As noted the process has been likened to a treaty negotiation,<sup>143</sup> and the term most commonly used to describe the proposals during the public discussions at the time was the 'federal compact'.<sup>144</sup>

Robert Garran was well placed to see the evolution in attitudes:

It was notable how the federal spirit increased as the debates proceeded. Queensland not being represented, the lesser States had a majority of three to two; and at the outset there was a disposition to rely on their numbers in the Convention and force decisions in their favour; but it was soon realized that they were negotiators, not legislators, and that it was useless to carry any proposal in the Convention that would not be acceptable to all the States. So the spirit of compromise grew as members came to know one another better and to appreciate other points of view besides their own.<sup>145</sup>

The bill was reported from the committee of the whole on 22 April and adopted by the Convention the next day. In accordance with the enabling acts the Convention adjourned so that the colonial parliaments could consider the draft bill and report amendments for consideration by the Convention.<sup>146</sup> At the second session in Sydney in September 286 amendments from the colonial parliaments were considered; this was followed by a final and intense session in Melbourne in January-March 1898 (*and see* below).

The nature and the extent of the contributions of the 50 representatives varied considerably. Edmund Barton's leadership was very different to that provided by Sir Henry Parkes in 1891. He was the Convention's leader, and Chair of the Constitutional Committee. Barton was said to have been 'loved by most, respected by all',<sup>147</sup> his work at the Convention being 'the great labour of his life',<sup>148</sup> to Professor Bolton this 'was indeed the role for which the rest of his life had prepared him'.<sup>149</sup> Sir John Forrest referred to his work as that of a 'guide, philosopher and friend'.<sup>150</sup> After high praise had been heaped on him Barton referred to his efforts as a

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<sup>140</sup> *Hansard*, 10 September 1897, p 290. (Quoted by Professor Jack Richardson in *Resolving deadlocks in the Australian Parliament*, in *Parliament – The vision in hindsight*, ed Professor Geoff Lindell and Mr Bob Bennett (2001), p 298).

<sup>141</sup> Hirst, *op cit*, p 159.

<sup>142</sup> *And see* Deakin, *op cit* p 51.

<sup>143</sup> La Nauze, *op cit*, p 190.

<sup>144</sup> Irving, *To Constitute a Nation*, p 198.

<sup>145</sup> Garran, 1958, *Prosper the Commonwealth*, Angus and Robertson, p 119.

<sup>146</sup> And Premiers were invited to London to take part in Queen Victoria's Diamond Jubilee celebrations – Irving, *To Constitute a Nation*, p 207.

<sup>147</sup> Deakin, *op cit*, p 79.

<sup>148</sup> Hirst, *op cit*, pp 152-4.

<sup>149</sup> Geoffrey Bolton, *Edmund Barton - The one man for the job*, p 142.

<sup>150</sup> *Hansard*, 24 September 1897, p 1108.

‘labour of love’.<sup>151</sup> His leadership at the Convention has even been said to have earned Barton the right to be the new nation’s first Prime Minister.<sup>152</sup>

Professor La Nauze has made an authoritative study of the contributions of individuals to both Conventions. He may have been a follower of cricket, because he refers to himself as self-appointed and sole selector of his ‘team’ of Fathers of the Constitution.<sup>153</sup> Alfred Deakin, George Reid, Sir George Turner, Richard O’Connor, Isaac Isaacs and Henry Higgins were prominent representatives of New South Wales and Victoria, with O’Connor and Deakin (as well as Downer) working closely with Barton.<sup>154</sup>

As well as being a participant, Deakin recorded his observations.<sup>155</sup> He regarded the representatives from New South Wales as the most influential,<sup>156</sup> and the delegation from South Australia as the most able.<sup>157</sup> Mr Kingston, Sir Richard Baker, Sir John Downer, Mr Josiah Symon, Mr Holder<sup>158</sup> and Mr Glynn were active participants, although the positions Kingston and Baker occupied (President and Chairman of Committees respectively) imposed some constraints on them.<sup>159</sup> If Mr Barton’s role at the second Convention earned him the right to become the new nation’s first Prime Minister, it could also be said that Sir Richard Baker’s role as Chairman of Committees, presiding with distinction over long and complex proceedings, earned him the right to become first President of the Senate. Baker regarded the Senate as ‘the pivot on which the whole Federal Constitution revolves’<sup>160</sup> and although his views on the powers of the Senate and on its right to choose Ministers had not prevailed, as the Senate’s first President Baker was particularly influential in asserting its rights and in the establishment of its early practice and standing orders.<sup>161</sup>

Sir Edward Braddon (Tas) and Sir John Forrest (WA) were also active in debates. Deakin recognised the undoubted skills of his Victorian colleagues but felt that they did not have the effectiveness that they might have. He thought that the knowledge that they had been elected on a ticket had not helped their standing; he also wrote:

Unfortunately even the able among them had no gifts of humour, no social good fellowship and no distinction enabling them to win friends or followers.<sup>162</sup>

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<sup>151</sup> Bolton, *op cit*, p 161.

<sup>152</sup> Alfred Deakin, *Federated Australia – Selections from letters to the Morning Post 1900-1910* (ed JA La Nauze) MUP, pp 109-10, but *see also* Dr Hirst’s comments about the relative contributions of Barton and Reid – *op cit*, p 277.

<sup>153</sup> La Nauze, ‘Who are the Fathers’ in *No Ordinary Act: Essays on Federation and the Constitution*, p 87.

<sup>154</sup> Bolton, *op cit*, pp 154-5. O’Connor was to become Barton’s Leader of the Government in the Senate.

<sup>155</sup> The other representative who did so was Bernhard Wise (NSW).

<sup>156</sup> Deakin felt that the NSW representatives did not play a commensurate role at the Sydney session.

<sup>157</sup> Deakin, *op cit*, pp 61, 79. Wise shared Deakin’s assessment of the South Australian delegation – *op cit*, p 236, and commented that their effectiveness as a group was despite the fact that two members were not on speaking terms.

<sup>158</sup> Later first Speaker of the House.

<sup>159</sup> According to Professor La Nauze although precluded from the later debates Baker had been influential – *op cit*, p 278 and the later publication of records of the Constitutional Committee has confirmed this.

<sup>160</sup> *Hansard*, 17 March 1898, p 2453.

<sup>161</sup> *Biographical Dictionary of the Australian Senate*, Vol 1, p 139-43. *See also* G S Reid and Martyn Forrest *Australia’s Commonwealth Parliament 1901-188 – Ten perspectives* (1989), pp141-5 and Rosemary Laing, *op cit*, pp 4-8

<sup>162</sup> Deakin, *op cit*, p 79. Deakin has been referred to as ‘Affable Alfred’, but presumably his personable nature was not sufficient to make up for any failings on the part of his colleagues.

Professor La Nauze clearly did have a sense of humour, and nominated a favourite ‘non-Father’, Mr John Taylor. Taylor had had success in the mining industry in Western Australia, had been elected to the Legislative Council and was a representative of Western Australia at the second Convention. According to Professor La Nauze, Taylor uttered two words in the Convention: ‘Hear, hear’.<sup>163</sup>

Personal and political rivalry can be seen, at the beginning in connection with the presidency, and about committee membership; let alone in the approach and style of participants.<sup>164</sup> Just as in 1891, there was at least one case of unauthorised disclosure of committee proceedings: the difference this time was that a member admitted having innocently ‘spoken quite freely of the work done’ in committee.<sup>165</sup> These matters were minor, the results of the Convention spoke for themselves. The spirit of compromise prevailed, as it had at the first Convention;<sup>166</sup> there was much goodwill and attention was drawn to the constructive role played by the press.<sup>167</sup>

## LONDON 1900

By agreement of the Premiers, and apparently at the request of the Secretary of State for the Colonies, Mr Joseph Chamberlain<sup>168</sup>, after the referenda<sup>169</sup> leading representatives travelled to London to be available for discussions there and to explain and if necessary defend the terms. The Premiers chose Messrs Barton, Deakin, Dickson, Fysh and Kingston; Western Australia was represented by a lawyer, and New Zealand by its Agent-General. As well as negotiating with the government the Australians spoke at gatherings of clubs, guilds and public bodies. Deakin estimated that they spoke to some 3000 ‘influential persons’, and wrote that invitations had been showered upon them; and that ‘constituting themselves as missionaries (they had) preached the gospel of the Bill without amendment’.<sup>170</sup>

The Law Officers considered the bill and reported to the Colonial Office, which had been sent the records of proceedings of both conventions by the Governors. In connection with the proposed restriction on appeals to the Privy Council (clause 74) a member of the Colonial Office wrote that it was ‘an instance of the peculiar Australian jealousy of anything like Imperial interference in local matters and it would be useless to object to it’.<sup>171</sup> Nevertheless, Chamberlain believed that wider British interests were at stake in this matter and sought to negotiate an amendment, and the bill was introduced before the matter had been settled. After much discussion and communication (in part controversial)<sup>172</sup> between the British government and its representatives in Australia and between the representatives and their Premiers (because the representatives believed that they were not authorized to agree to any

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<sup>163</sup> La Nauze, John, ‘Who are the Fathers’ in *No Ordinary Act: Essays on Federation and the Constitution*, p 98-99.

<sup>164</sup> For example the criticism of Isaacs: Deakin, *op cit*, p 82; La Nauze, *op cit*, p 129, 151; Hirst, *op cit*, p 172; Garran, *op cit*, p 121.

<sup>165</sup> *Hansard*, 2 April 1897, p 404; Williams *op cit*, p 482.

<sup>166</sup> *Hansard*, 23 April 1897, p 1213.

<sup>167</sup> *Hansard*, 23 April 1897, p 1216.

<sup>168</sup> Williams, *op cit*, p 1160.

<sup>169</sup> Other than in Western Australia.

<sup>170</sup> Williams, *op cit*, p 1166.

<sup>171</sup> Williams, *op cit*, p 1161-2.

<sup>172</sup> For example see Williams, *op cit*, p 1166-8 (roles played by Sir Samuel Griffith and the Chief Justice of South Australia).

alterations), an acceptable amendment was agreed on.<sup>173</sup> The Australian representatives rejected representations on behalf of Western Australia and New Zealand that the terms be amended so that they could be admitted as original states after the new Commonwealth had commenced.<sup>174</sup>

The presentation of the bill was an event of some significance, and Mr Chamberlain was asked a number of questions about it both before and after its introduction.<sup>175</sup> In presenting the bill he said:

I am quite certain that no more important measure of legislation has ever been presented to Parliament, and that nothing throughout the whole course of the Queen's reign will be a more beneficent feature in that long and glorious history.<sup>176</sup>

Members spoke strongly in support of the bill and showed a detailed knowledge of the events that had occurred in Australia. The question of appeals to the Privy Council remained controversial, and the Government was criticized for seeking any change to the terms that had been negotiated. James Bryce, whose *The American Commonwealth* had been referred to so often during the conventions, and who had been a member of the House of Commons since 1880, spoke in support of the bill, although he argued that no change should be made to the Australian draft.<sup>177</sup> Sir William Anson, whose *Law and Custom of the Constitution* had also been cited, supported the bill.<sup>178</sup> There were hints that the bill could be the first step towards an imperial federation, and there were interesting indications of concern about wider matters: in outlining the development of the movement towards Federation, Chamberlain referred to 'the somewhat sinister activity of certain foreign powers in the Pacific';<sup>179</sup> after a Mr Haldane had said '...the mother of Parliaments does not coerce her children', Hansard records the following:

AN IRISH MEMBER: We do not accept that statement.<sup>180</sup>

Two Irish Members who spoke on the second reading supported the bill, but took the opportunity to point out the very different treatment that representations for home rule had been given. The bill was passed by the House of Lords on 6 July and given assent by Queen Victoria on 9 July.

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<sup>173</sup> House of Commons *Hansard*, 21 June 1900, col 639.

<sup>174</sup> Williams, *op cit*, p 1165. The significance being that that would guarantee equality of representation with the 'original original' states in the Senate.

<sup>175</sup> For example House of Commons *Hansard*, 17 May 1900, cols 404-5.

<sup>176</sup> House of Commons *Hansard*, 14 May 1900, col 86 (Chamberlain).

<sup>177</sup> House of Commons *Hansard*, 21 May 1900, cols 784-92. Later again Bryce corresponded with the first Clerk of the Senate, Mr Balckmore, about the interpretation of certain provisions – Rosemary Laing (ed), *Annotated Standing Orders of the Australian Senate* (2009), pp 666-7.

<sup>178</sup> House of Commons *Hansard*, 21 June 1900, col 646. Sir William Anson was also consulted by Mr Blackmore about the interpretation of some provisions – Rosemary Laing *op cit* pp 669-70.

<sup>179</sup> House of Commons *Hansard*, 14 May 1900, col 48.

<sup>180</sup> House of Commons *Hansard*, 14 May 1900, col 102. Coincidentally during those weeks a long-running controversy over the erection of a statue of Oliver Cromwell in the precincts of the Palace of Westminster without parliamentary approval resurfaced – this would have been of particular concern to at least some of the Irish members.

## SUPPORTING THE CONVENTIONS

Hosting the first Convention was a significant event for the Sydney of 1891. It would have been a great challenge for the hosts, the Parliament of New South Wales. As well as Sir Henry Parkes and other leading members, the Speaker of the Legislative Assembly, Mr Abbott, was a delegate.

When the Convention met on 2 March, Mr Frederick Webb, Clerk of the Legislative Assembly, was appointed Secretary.<sup>181</sup> The Convention agreed that official minutes should be produced and a *Hansard* record taken.<sup>182</sup> The demands of producing the usual documentation and the records can be imagined, as can the use that delegates would have made of the Library and other services. Standards were high: daily Hansards were delivered to delegates at their hotels each morning.<sup>183</sup> The work of the Drafting Committee over Easter was intense: Mr Webb, and no doubt other staff members, worked with Sir Samuel Griffith and his colleagues – 18 drafts were said to have been produced between 3 March and 9 April.<sup>184</sup>

The challenges faced by the hosts must have been considerable. This was no ordinary conference; it was a formal assembly of the most influential leaders of the colonies, an assembly convened for a unique and important purpose: to negotiate a constitution for the Federation of the colonies. The contribution of staff was acknowledged at the end of the Convention. Sir Henry Parkes replied on their behalf:

... although the performance of those services has diminished much of the time for enjoyment which during the parliamentary recess they would have had, they still have felt a sincere and high-toned pleasure in rendering their services to the Convention at this important epoch of our history.<sup>185</sup>

The staff of Macquarie Street were to be called on again to support the larger second Convention during its Sydney session in September 1897.

The Parliament of South Australia must have faced an even greater challenge in hosting the second Convention than its counterpart in New South Wales had faced in 1891. Again, the local 'Prime Minister', Mr Charles Kingston, was appointed President; Mr E G Blackmore, Clerk of the Legislative Council, was appointed Secretary to the Convention.<sup>186</sup> Mr Blackmore was said to possess 'the most sonorous voice in official Australia'; more importantly he was an expert in parliamentary law and practice.<sup>187</sup> He also served as Clerk of

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<sup>181</sup> The decision to hold the Convention had been made at a meeting of Premiers/Prime Ministers in Melbourne in 1890. The Clerk of the Legislative Assembly of Victoria, Mr George Jenkins, had served as Clerk of that meeting. He has been described as a person with a sense of occasion, and of his own part in it (La Nauze, *op cit*, p 33). He apparently aspired to be Secretary to the Convention, but Sir Henry Parkes supported Mr Webb for the role.

<sup>182</sup> *Minutes of Proceedings*, 3 March 1891, p vii.

<sup>183</sup> *Hansard*, 9 April 1891, p 939.

<sup>184</sup> Leeming, *op cit*, footnote 9.

<sup>185</sup> *Hansard*, 9 April 1891, p 940.

<sup>186</sup> *Minutes of Proceedings*, 22 March, p 3; Mr Blackmore later served at the inauguration of the new Commonwealth in Sydney and administered the oath of to the first Governor-General. He became the first Clerk of the Senate. *And see* La Nauze, *op cit*, p 197-9; Hirst, *op cit*, p 317. He can be said to have earned the right to be the first Clerk of the Senate – *and see Biographical Dictionary of the Australian Senate*, Vol 1, pp 380-2.

<sup>187</sup> La Nauze, *op cit*, p 197. Mr Barton described him as one of the most able authorities on parliamentary law and practice in the colonies – *Hansard* 24 September 1897, p 1110; in 1894 Blackmore had published *The Law of the Constitution of South Australia*. Harry Evans has seen Blackmore as a 'staunch upholder of the

the Constitutional Committee and remained Clerk of the Convention when it met in Sydney and Melbourne. Assistant Clerks were appointed: Mr Halcomb in Adelaide, Mr Webb in Sydney and Mr Duffy in Melbourne.<sup>188</sup> No doubt all available staff of the South Australian parliament would have been called on to support the great undertaking, as were others such as police constables. Rail passes were given to delegates, and to representatives of the press. An excursion to Broken Hill was even arranged for the visitors. The demands of all this can be imagined. The achievement was recognised at the time: at the close of the session Alfred Deakin said, with characteristic eloquence:

I desire to add only one other word of thanks, in which, without arrogance, I may claim to speak for every visiting representative to this city, for the superb hospitality, the unwearying kindness, the inexhaustible attention which we have received in this colony on every hand from our first hour to our last. I do not know how adequately to express the admiration I feel for your parliamentary organisation, its splendid chamber or its officers, from those who sit at the table of the House to the many in its antechambers. Never has it been my privilege to enter a public department in which the same efficiency was discoverable in every quarter.<sup>189</sup>

Professor La Nauze showed his admiration by entitling a chapter of *The Making of the Australian Constitution* 'Blackmore's Convention'.

No doubt reporters did their best, as they do now, to record speeches accurately for Hansard. In Adelaide newspaper reporters were used; at one stage complaints 'from several honourable members about the slowness with which they are receiving corrected copies of *Hansard*' were raised with the President. He replied that 'an endeavour (would) be made to prevent any reason for complaint in the future' but said it was 'not impossible that the delay ... may be attributable to some delay on the part of representatives in correcting and returning their proofs'.<sup>190</sup>

The Melbourne session, which sat for 41 days between 20 January and 17 March, was the last opportunity for settling the terms to be put to the people at the referenda. It was the longest and most intense of the Convention, and it coincided with a heatwave and bushfires near Melbourne: at one stage smoke from bushfires entered the Assembly chamber.<sup>191</sup> Then, as now, a sense of humour would have helped - Robert Garran wrote:

We spent a week in Melbourne,  
And it was warm, it wis.  
Pray Heav'n we shan't in Hell burn,  
If Hell's as hot as this.<sup>192</sup>

The pressure was on the representatives and on the staff. Sittings past midnight were common, one lasted until 4.00 am. The last working day, 16 March, saw over 400

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British parliamentary tradition (who) did not have a full appreciation of the modifications to that tradition required by the Australian Constitution' – *Biographical Dictionary of the Australian Senate*, Vol 1, p 11.

<sup>188</sup> Mr Duffy became Clerk Assistant of the Senate on 1 May 1901, but on 8 July was appointed as Clerk of the House of Representatives and served in that role until 1917, when he became Clerk of the Senate, and he held that office until 1920.

<sup>189</sup> *Official Record of the Debates of the Australasian Federal Convention*, Adelaide 1897, Vol II, 23 April 1897, p 1215. Formal thanks were given at the close of the Convention in Melbourne on 17 March 1898.

<sup>190</sup> *Hansard*, 29 March 1897, p 203. The Hansard index has an entry labelled helpfully 'Hansard – Observations upon'.

<sup>191</sup> La Nauze, *op cit*, p 203; Williams, *op cit*, p 794.

<sup>192</sup> Garran, *op cit*, p 120.

amendments made to the text.<sup>193</sup> It is easy to imagine what all this would have meant for the parliamentary staff – supporting sittings, supporting the frequent meetings of the Drafting Committee as it grappled with issues raised in debate, some of legal complexity and political sensitivity, processing decisions, preparing papers for the next day, and so on. We can also imagine the demands on others such as those responsible for printing and catering. Nevertheless motivation remained high, even after many late nights.<sup>194</sup> The disciplined record keeping of Mr Blackmore and his colleagues has been of great assistance to later scholars.<sup>195</sup>

Even the most gifted people can jump to the wrong conclusion. After the last substantive sitting, on 16 March, Robert Garran worked with Mr Duffy ‘feverishly till breakfast time at the proofs of the final schedule of amendments’. On leaving his hotel to walk across Spring Street to Parliament House for the formal end of the Convention Garran saw a large crowd in front of Parliament House. He was very pleased, assuming it was a ‘manifestation of interest in our work’. Only on getting closer did Garran see green ribbons on each coat and blouse, and realize that the crowd was gathering to celebrate St Patrick’s day at the Cathedral behind Parliament House.<sup>196</sup> Those of us who work close to the action in parliaments could take this as a caution against making too many assumptions about how things that we believe to be important may be perceived, or whether they will even be noticed.

There were good signs of inter-parliamentary cooperation during the Convention. Mr Webb went to Adelaide to assist. His experience would have been valuable and he served as Clerk to the Finance Committee.<sup>197</sup> When the Convention met in Melbourne Hansard staff from Sydney went to support their Victorian colleagues. Still, despite the significance of these meetings, the law was the law: a delay in the delivery of a box of papers sent by Blackmore from Sydney to Melbourne was said to have been caused by Victorian Customs staff.<sup>198</sup>

Robert Garran, a 30 year old Sydney lawyer, had travelled to Adelaide to assist the ‘Prime Minister’ of New South Wales, Mr Reid. His duties in that capacity were not demanding and he was soon seconded to work with Edmund Barton. Garran had sat in the public gallery during the first Convention in Sydney<sup>199</sup> and was a committed federalist. He was pleased to find that many representatives in Adelaide had read his *The Coming Commonwealth*.<sup>200</sup> Garran was to play an important role during the Convention. He found the Melbourne session particularly demanding.<sup>201</sup> In Melbourne he worked with Charles Gavan Duffy, who was to become Clerk of the House of Representatives in July 1901. With Dr John Quick, who had been a representative of Victoria at the Convention, Garran was able to write very detailed and authoritative two volume work: *The Annotated Constitution of the Australian Commonwealth* by December 1900, a remarkable achievement and a work still used by lawyers, historians and students of parliamentary law and practice. Garran went on to become the first Commonwealth public servant, Secretary of the Attorney-General’s Department and Parliamentary Draftsman. On his death in 1957 Prime Minister Menzies wrote ‘So ends one

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<sup>193</sup> Williams, *op cit*, p 801.

<sup>194</sup> Garran, *op cit*, p 121-3.

<sup>195</sup> La Nauze, *op cit*, pp 197-9; Williams *op cit*, p 482.

<sup>196</sup> Garran, *op cit*, p 123.

<sup>197</sup> La Nauze, *op cit*, 197.

<sup>198</sup> La Nauze, *op cit*, p 198.

<sup>199</sup> Garran, *op cit*, p 92.

<sup>200</sup> Garran, *op cit*, p 110.

<sup>201</sup> *Ibid*, pp 119-123.

of the most distinguished careers in the history of Australia. What a man he was, and how grateful we all are for his life and his kind!’<sup>202</sup>

Like the Convention of 1891, the second Convention ended on a very positive note. Warm thanks were expressed to all involved when it concluded on 17 March 1898. It is also notable, and not surprising, that, as their peers in Adelaide and Sydney had done, local members had taken their hosting responsibilities seriously and formed a Reception Committee.<sup>203</sup> There could hardly be a better illustration of the positive spirit demonstrated than the actions of Mr Isaacs. He had been excluded from the Drafting Committee but, according to Deakin, he had ‘with magnificent self-restraint subordinated his sense of personal injustice and won high appreciation by the keenness of his legal criticisms and the fullness of his general knowledge’.<sup>204</sup> Isaacs intervened at the close of the Convention to move a motion of thanks to the members of the Drafting Committee, and spoke warmly of their work:

... it will be universally admitted that those honorable gentlemen have performed with unswerving industry, with the utmost fidelity, with extreme ability, and with eminent success, the responsible and arduous duties which have devolved on them ...  
... the work of the Drafting Committee is worthy of the very highest praise.<sup>205</sup>

When presenting the Constitution, which was referred to as the *Commonwealth Bill*, to the House of Commons, Chamberlain called it ‘a monument to legislative competency’,<sup>206</sup> and spoke in similar terms about the wider membership of the Conventions:

... anyone who reads the history of debates which took place then will agree with me that it would have been absolutely impossible to have collected together more capable, more able, more efficient representatives of Australian feeling than met in that Convention ...<sup>207</sup>

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While in legal form an Act of the British Parliament, in all substance and important detail the Constitution was an Australian product.<sup>208</sup> The Conventions had succeeded in combing the requirements of responsible government with a federal system. The federal models were foreign but all the issues, and all the possibilities, were assessed, debated and applied through the prism of significant local legal, political and parliamentary experience. This achievement is all the more impressive given the relatively short parliamentary history of even the oldest of the colonies – the first elections for members in all the colonies had been held between 1843 and 1870.

Much has been written about the interpretation of the Constitution by the High Court and the Court’s role in relation to it. The Constitution was an important legal instrument; it was also a

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<sup>202</sup> Prefatory note to Garran’s *Prosper the Commonwealth* published posthumously in 1958.

<sup>203</sup> Members of parliament, and parliamentary staff, know that the tradition of attentive hosting and practical help by the Parliaments of New South Wales, South Australia and Victoria continues to this day.

<sup>204</sup> Deakin, *op cit* p 87. Others had been critical of Isaacs for the frequency of his interventions.

<sup>205</sup> *Hansard*, 17 March 1898, p 2518.

<sup>206</sup> House of Commons, *Hansard*, 14 May 1900, col 51.

<sup>207</sup> House of Commons, *Hansard*, 14 May 1900, col 50. According to Professor LaNauze ‘It would never have occurred to the Australians to doubt their own technical competence for the task’, La Nauze, *op cit*, p 39.

<sup>208</sup> *And see* Irving, *To Constitute a Nation*, pp 47, 50, 54.

political instrument.<sup>209</sup> As might have been expected, the Houses and their members were required to reflect even sooner than the courts on the meaning and application of particular provisions, as well as on some of the underlying principles, not all of which were spelt out in the terms agreed on.<sup>210</sup> The constitutional provisions and the principles underlying them are reflected in and complemented by the standing orders of each House, and the decisions of the Houses, and of generations of Presiding Officers, form a significant body of case law. As parliamentary officers we have responsibilities to give advice about these matters and to document and record the decisions that are made.<sup>211</sup> Section 53 has received its share of such attention. The use of the term ‘proposed laws’ in it was intended to help ensure that its provisions would be matters for determination by the Houses themselves, and not by the High Court.<sup>212</sup> This position has been accepted by the Court,<sup>213</sup> and it is submitted that this places an obligation on the Houses not to take advantage of the assumed absence of judicial review to act in a way that would be inconsistent with the provisions of the constitution and the principles reflected in it.

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Sir Robert Garran wrote that Federation was:

...a remarkable achievement. In time of profound peace, without the pressure of any great national achievement, six free communities had sunk their differences and agreed to come together, from a deep conviction of the advantages of union.<sup>214</sup>

Naturally, progress towards Federation was influenced greatly by the economic and political circumstances that affected the colonies. Divisions about Federation among the leaders reflected divisions within the wider communities, many had had good reason to be cautious about Federation. Some of the leaders, like many others, were no doubt also influenced by sentiment and by romantic or utopian ideals.<sup>215</sup> Nevertheless while the actions of leaders were necessarily circumscribed by many factors and by their other responsibilities, then, as now, they were also able to have a great influence on events. The roles of Messrs Reid, Barton and Deakin are good illustrations of this.

Professor Irving has suggested that the fact that the process occurred during the final years of a century was significant. She has argued that such times are highly charged symbolically, that they are times when change is both ‘possible and expected’ and that they allow ‘people to set aside the doubts and the suspicions that might otherwise have cautioned against change’.<sup>216</sup>

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<sup>209</sup> Williams, *op cit*, p xiv, quoting Sir Owen Dixon.

<sup>210</sup> The requirements of responsible government are a good example of this: *see* remarks of Mr Barton, Hansard 17 March 1898 pp 2469-70. The fact that the first Presiding Officers, Mr Holder and Senator Baker, and many leading members, such as Barton, Deakin, Downer, O’Connor, Playford, Reid and Symon, had been delegates at the conventions must have been very helpful.

<sup>211</sup> *See* especially *House of Representatives Practice* and *Odgers’ Australian Senate Practice*.

<sup>212</sup> *See Hansard*, 14 April 1897, 576.

<sup>213</sup> *Osborne v Cth* (1911) 12 CLR 321 and later *Western Australia v Cth*. And *see* Leeming, *op cit*.

<sup>214</sup> Garran, *op cit*, p 196.

<sup>215</sup> Irving, *To Constitute a Nation*, pp 212-3, 215.

<sup>216</sup> Irving, *ibid*, p 212.

According to Deakin, the success of the great cause was due to a series of miracles.<sup>217</sup> Deakin was a spiritualist, and so to him it may have been the case that miracles just happen. Those who may not believe in miracles are still likely to agree that in any endeavour the prospects of success, if not a miracle, can be increased substantially by the approach taken and by the abilities and personal qualities of those involved.

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At least three aspects of the story are of particular interest to parliamentary officers. The success of the Conventions in negotiating an acceptable federal compact is a great illustration of the way that traditional parliamentary processes can be adapted and used. They allowed different interests to be represented, different views to be expressed, ideas to be exchanged and possible solutions tested and debated. Perhaps above all the procedures allowed, and even encouraged, compromise. It was not a case of finding perfect formulations, but rather of negotiating provisions assessed as being reasonable and as capable of winning sufficient support by the people of the various colonies. Parliamentary processes allowed a political solution to be negotiated to a great legal and governmental challenge.

Success within this traditional framework was achieved because of the hard work and approach of many participants. The contribution of political leaders was critical. Sir Samuel Griffith had great influence at the first Convention and had a greater practical input than Sir Henry Parkes. At the second Convention, many participants played important roles, among them Messrs Reid, Deakin and O'Connor, and Mr Kingston as President, and Sir Richard Baker as Chairman of Committees. Special credit was given to Edmund Barton, who, as well as his leadership of the second Convention, had also done so much to explain the cause to the wider community.

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Parliamentary staff know better than most the burdens today's members carry; and we know that there is the weight of considerable expectation on our Parliaments.

Good fortune has allowed me to work close to the most senior national leaders since becoming Deputy Clerk in 1996. In that time there have been three Prime Ministers and seven Leaders of the Opposition. I have seen the pressures they have faced, and the expectations, in my view often unreasonable, placed on them. Happily in each of these leaders I have seen much idealism, personal integrity, considerable ability and deep commitment. I suggest that such leaders are worthy of the legacy of the Founders.

I suggest the same might be said of today's parliamentary staff – worthy inheritors of a great legacy: too wise to accept at face value much of the routine criticism directed at parliaments; wise enough to commit to helping our parliaments to adapt and improve.

An appreciation of our heritage must help us to discharge our current responsibilities; reflection on it can give us encouragement about the potential that parliamentary processes, parliamentary leaders and parliamentary staff have to meet the challenges of the future.

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<sup>217</sup> Deakin, *op cit*, p 173.