

It is a striking feature of Australia's historical consciousness that it lacks a general recognition of those who were instrumental in the federation movement which brought the Australian nation into existence. As John Bannon wrote in his biography of Sir John Downer:

In other nations such as the United States it is a *sine qua non* that those chiefly responsible for the birth and constitutional shape of the polity are recognised and commemorated. This has been less so in Australia, partly through a healthy reticence to overtly celebrate our nationalism, except on the sporting field, coupled with a less commendable failure to acknowledge the extraordinary achievement of Australian Federation.<sup>1</sup>

That is perhaps because the process leading to federation was, as Quick and Garran commented, 'tedious, and perhaps dangerous, but ... providential'.<sup>2</sup> It gave time for what they called 'the gradual but sure development of the national spirit in the great colonies of Queensland and Western Australia' and 'prevented the establishment of a Commonwealth of Australia with half the continent of Australia left, for a time, outside'.<sup>3</sup>

The magnitude of the achievement of federation and the qualities of those who brought it about are not easily brought to life for contemporary Australians. The existence of Commonwealth and state governments in one nation is, for many, a given which does not stimulate inquiry into its origins. Conferences such as the one you have had today, identifying leaders in the federation movement, and examining their life, and works and legacies, provide a basis upon which a greater awareness of their part in Australian history may be more widely disseminated.

At a recent event, organised by the Faculty of Law at the University of Western Australia, I spoke to lawyers and community members in Mandurah, a regional town to the south of Perth, about the work and contribution to the federation movement of Sir John Forrest, the Premier of Western Australia who led the Western Australian delegation to the National Conventions. I was greatly encouraged to hear from a teacher at one of the local schools that she had organised her class into a simulated convention to debate the pros and cons of federation and then to take a vote on whether Western Australia should join. I think they may have decided not to.

Education about the federation process and its leading lights at a variety of levels, including, perhaps, popular dramatisation of aspects of it, would enhance a greater awareness of the importance of the achievement and the workings of the federation today. Many of the characters who participated in the federation movement were people who were inherently interesting. It would be hard to imagine a more colourful character than Charles Cameron Kingston who at one stage became Premier while still on a good behaviour bond for having challenged another leading South Australian to a duel.<sup>4</sup> So too,

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\* Conference dinner speech delivered by The Hon. Robert French AC, Chief Justice of the High Court of Australia on 8 November 2013.

1 John Bannon, *Supreme Federalist: The Political Life of Sir John Downer*, Wakefield Press, Kent Town, SA, 2009, p. vii.

2 John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth*, Angus and Robertson, Sydney, 1901, p. 251.

3 *ibid.*

4 John Playford, 'Kingston, Charles Cameron (1850–1908)', *Australian Dictionary of Biography*, vol. 9, Melbourne University Press, Carlton South, Vic., 1983, p. 602.

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Sir Josiah Symon ‘a leading barrister, eloquent in formal contexts, acute and alert in debate, vindictive and scarifying in controversy’.<sup>5</sup>

The particular focus of interest today has been Andrew Inglis Clark whose role as a leader in the drafting of the Australian Constitution has sometimes been insufficiently acknowledged.

You will no doubt all be familiar with his personal history. It is an interesting aspect of that history that Clark’s early management of his family’s firm apparently contributed to an interest in federation as a way of overcoming intercolonial tariff rivalry. It is another interesting feature of his personal history that the intensity of his republican and liberal sentiments was evident from his earliest days in politics. Indeed, when he first stood for the electorate of Norfolk Plains in 1878, the Hobart *Mercury* called him a ‘very extreme ultra-republican’, and a person of ‘revolutionary ideas’ and said that his proper place was among ‘Communists’. Regional parochialism was apparent in the *Launceston Examiner’s* denunciation of him at the time of that election as ‘a mere fledgeling’ and a ‘stranger’ from Hobart.<sup>6</sup> Notwithstanding, Clark was elected unopposed and became a member of the opposition.

The intensity of his work ethic was marked from the time he took office as Attorney-General in 1882 under Philip Fysh as Premier. He initiated 150 ministerial bills, apparently only one less than Sir Henry Parkes during his whole career. Professor Reynolds in his entry relating to Clark in the *Australian Dictionary of Biography* has pointed to the progressive and humanitarian legislation which he introduced—the Master and Servant Amendment Act, the legalisation of trade unions, laws preventing cruelty to animals, reform of the laws relating to lunacy and the custody of children. He had a commitment to manhood suffrage and was ultimately successful in extending the franchise in 1896.

Clark was a poet and had a poetic spirit. His book *Studies in Australian Constitutional Law*, written in 1901, reveals the presence of that spirit, not least in the well-known passage in which, writing of the interpretation of the Constitution he said:

[I]t must be read and construed, not as containing a declaration of the will and intentions of men long since dead, and who cannot have anticipated the problems that would arise for solution by future generations, but as declaring the will and intentions of the present inheritors and possessors of sovereign power, who maintain the Constitution and have the power to alter it, and who are in the immediate presence of the problems to be solved. It is they who enforce the provisions of the Constitution and make a living force of that which would otherwise be a silent and lifeless document.<sup>7</sup>

His poetry reflected his political values. Dr Richard Ely from the University of Melbourne, who has written about his poetry, said of him:

In any ‘genuine democracy’, he declared, three factors must be found. First, an elected legislature representative of all opinions; second, recognition that the composition of all majorities be transitory; and third, that fundamental laws protect the natural rights of the individual from the majority of the hour. In the poems which read as if intended to be shared with friends, a closely similar set of values is expressed.<sup>8</sup>

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5 J.A. La Nauze, *The Making of the Australian Constitution*, Melbourne University Press, Carlton, Vic., 1972, p. 102.

6 *The Mercury* (Hobart), 15 July 1878, p. 2; *Launceston Examiner*, 20 July 1878, p. 2; H. Reynolds, ‘Clark, Andrew Inglis (1848–1907)’, *Australian Dictionary of Biography*, vol. 3, Melbourne University Press, Carlton, Vic., 1969, p. 399.

7 A. Inglis Clark, *Studies in Australian Constitutional Law*, Charles F. Maxwell, Melbourne, 1901, p. 21.

8 Richard Ely, ‘The poetry of Inglis Clark’, in Richard Ely (ed.), *A Living Force: Andrew Inglis Clark and the Ideal of Commonwealth*, Centre of Tasmanian Historical Studies, University of Tasmania, Hobart, 2001, p. 204.

A poem of Clark's setting out his vision is reproduced in Ely's article:

A vision of a people set free  
From the bonds and the toys of the past  
Never bending the head or the knee

To the shadows of the rank and caste.  
A people whose flag shall be void  
Of all traces of sceptre or crown  
The flag of a people too proud.

Australia one and undivided  
Let that vision seen afar  
Mark with light the path provided  
By it as thy guiding star.<sup>9</sup>

Clark's poetic talents could also be used for rather sharper polemical purposes. He had been appointed a puisne judge of the Supreme Court of Tasmania in 1898. He was given reason to expect that he would be appointed to the first High Court bench, but that expectation was thwarted when parliament cut the number of judges from five to three. He was embittered by that outcome and directed his anger in poetic form at Alfred Deakin:

... clothed in bold yet unctuous disgrace  
Of broken faith—so cunningly devised  
That none could safely say that he had lied.<sup>10</sup>

Clark's poetic effusions were not unusual for the time. Sir Henry Parkes was given to writing verse and quoting verse in his speeches. Sir Samuel Griffith translated the *Divine Comedy* according to principles of literal translation in the original metre—an approach which yielded some odd results.<sup>11</sup> Indeed, verse was a frequent form of discourse in the context of the federation movement. The opponents of federation, particularly those who contributed to the radical journal *Tocsin*, used verse as a weapon. Their utterances, both prosaic and poetical, often focused upon the threat posed on the Australian national judiciary. Three verses from a poem called 'The Federal Plot', published on 5 May 1898, give a flavour of their poetic polemics. In conspiratorial speech, which was attributed to the proponents of federation, the versifier wrote:

You've made them choose our minions  
To mutilate their rights;  
Surrender all they fled for  
In Armageddon fights.

In new vice-regal velvet you've wrapped a Caesar's paw  
You've perched upon their future  
The vultures of the law.

Heed not the ghosts of 'Judas'  
That dog you while you live,  
For coroneted women and judge-ship fair we give.

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9     *ibid.*, p. 199.

10    *ibid.*, p. 185.

11    'The Divina Commedia of Dante Alighieri, translated by Sir W Griffith', *The Bookfellow: The Australasian Review and Journal of the Australasian Book Trade*, no. 4, 1 March 1912, pp. 76–7.

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It takes little imagination to identify the metaphor which refers to the High Court. As one of the vultures of the law foreshadowed in that verse, I can say that we have much to be grateful to Inglis Clark for his contribution to the formulation of the judicial power and a national judiciary.

Eighty eight years after the historic decision of the Supreme Court of the United States in *Marbury v. Madison*,<sup>12</sup> Inglis Clark, as Attorney-General of the Colony of Tasmania, was preparing his draft Constitution. He believed in natural rights. He was a republican. He was a great admirer of the democracy of the United States. In explaining ‘Why I Am a Democrat’, he claimed in his own words ‘for every individual in a community the right to share in the distribution of the power by the exercise of which the makers and executors of the laws are appointed’.<sup>13</sup> He had read and could quote long passages from the works of Hamilton, Madison, Jefferson, Webster, Clay and Sumner. He had travelled to the United States and met Oliver Wendell Holmes, with whom he became friends and established a lifelong correspondence. He was a believer in judicial control of official power:

The supremacy of the judiciary, whether it exists under a federal or a unitary constitution, finds its ultimate logical foundation in the conception of the supremacy of law as distinguished from the possession and exercise of governmental power.<sup>14</sup>

Clark admired the Supreme Court of the United States as a model of judicial supremacy. It could, in his words, ‘restrain and annul whatever folly or the ignorance or the anger of a majority of Congress or of the people may at any time attempt to do in contravention of any personal or political right or privilege the Constitution has guaranteed’.<sup>15</sup> He explained his vision of a proposed federal judiciary at the 1891 Constitutional Convention. He sought a distinct federal judiciary, which would allow the state judiciaries to remain in existence under their own governments. He looked to a complete system of federal courts distinct from what he called the provincial courts. He proposed distinctive functions for the Australian High Court, which were not conferred on the Supreme Court of the United States. He said:

I hope that in addition to a separate federal system of courts we shall have a court of appeal, as the resolution contemplates. That will be an innovation, and a wholesome innovation, upon the American system. The American Supreme Court cannot hear appeals from the supreme courts of the various states except in matters of federal law. I hope our Supreme Court will take the place of the Privy Council, and hear appeals upon all questions of law.<sup>16</sup>

It is an important consequence of that innovation that we can say that there is one common law of Australia.<sup>17</sup> This may not be what Clark had intended. Indeed Callinan J in dissent in *Lipohar v. The Queen*<sup>18</sup> invoked Clark’s writing for the contrary proposition.

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12 5 US 1 Cranch 137 (1803).

13 Andrew Inglis Clark, ‘Why I am a democrat’, in Ely, op. cit., p. 32.

14 Andrew Inglis Clark, ‘The supremacy of the judiciary under the Constitution of the United States and under the Constitution of the Commonwealth of Australia’, *Harvard Law Review*, vol. 17, no. 1, November 1903, p. 18.

15 Andrew Inglis Clark, ‘The Constitution of the United States of America’ (1897) quoted in John M. Williams, ‘“With eyes open”: Andrew Inglis Clark and our republican tradition’, *Federal Law Review*, vol. 23, 1995, p. 164.

16 *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 11 March 1891, Legal Books, Sydney, 1986, vol. 1, p. 253.

17 *Lipohar v. The Queen* (2000) 200 CLR 485.

18 (2000) 200 CLR 485, 578–79 [245].

The influence of the United States Constitution on Clark's draft of Chapter III was also reflected in his use of the term 'cases' or 'controversies' to characterise the categories of federal jurisdiction. This was later replaced with 'matters', but its ancestry has been recognised repeatedly in the High Court.<sup>19</sup> His strong democratic and republican zeal was reflected in his lobbying for the jurisdiction and position of the High Court of Australia.

One of his more important legacies, which has been described as a 'basic guarantee of the rule of law', is s. 75(v) of the Constitution.<sup>20</sup> Because of his concern about the deficiency in the original jurisdiction of the United States Supreme Court which was exposed in *Marbury v. Madison*, he included in his draft Constitution for the 1891 Convention a clause conferring original jurisdiction of the High Court of Australia designed to avoid that deficiency. The jurisdiction was to be conferred 'in all cases ... in which a Writ of Mandamus or Prohibition shall be sought against a Minister of the Crown for the Federal Dominion of Australasia ...'<sup>21</sup> His clause was accepted by the 1891 Convention with the substitution of the words 'an officer of the Commonwealth' for 'a Minister of the Crown for the Federal Dominion of Australasia'.

Surprisingly, at a Convention session in Melbourne in 1898, at which Clark could not be present, his proposed provision was dropped. Those who moved its exclusion had apparently not read *Marbury v. Madison* and misapprehended what was in the US Constitution. The primary opposition to the provision seems to have come from Isaac Isaacs. He said:

I think I am safe in saying that the power is not expressly given in the United States Constitution, but undoubtedly the court exercises it.<sup>22</sup>

He was not safe in saying that. He suggested that the proposed provision might have the effect that if an injunction were asked for in the High Court, the court might ask why the words 'mandamus or prohibition' had been inserted in the clause.<sup>23</sup> His argument seems to have been that specific reference to mandamus and prohibition might by implication have excluded other remedies. Henry Higgins also spoke on the provision and said:

This provision was in the Bill of 1891, and I thought it was taken from the American Constitution.<sup>24</sup>

Clark, who was in Hobart, was informed of what had happened and sent a telegram to another leading delegate, Edmund Barton, who became the first Prime Minister and later a Justice of the High Court of Australia. He reminded Barton of the decision in *Marbury v. Madison*. Barton, who may well have been embarrassed by the errors that led to the omission of the provision, wrote back to Clark:

I have to thank you further for your telegram as to the striking out of the power given to the High Court to deal with cases of mandamus & prohibition against officers of the Commonwealth. None of us here had read the case mentioned by you of *Marbury v. Madison* or if seen it had been forgotten—It seems however to be a leading case. I have given notice to restore the words on the reconsideration of the clause.<sup>25</sup>

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19 See for example *Collins v. Charles Marshall Pty Ltd* (1955) 92 CLR 529, 544; *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372, 388–389 (Gleeson CJ); *Truth About Motorways Pty Ltd v. Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591, 610 (Gaudron J).

20 Murray Gleeson, *The Rule of Law and the Constitution*, ABC Books, Sydney, 2000, p. 67.

21 John M. Williams, *The Australian Constitution: A Documentary History*, Melbourne University Press, Carlton, Vic., 2005, p. 106.

22 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, Legal Books, Sydney, 1986, vol. 4, p. 321.

23 *ibid.*

24 *ibid.*

25 La Nauze, *op. cit.*, p. 234.

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At the continuation of the Melbourne Convention in March 1898, Barton moved the reinsertion of a subsection conferring upon the High Court of Australia original jurisdiction in matters '[i]n which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth'.<sup>26</sup> He said:

It will be remembered that in the former committee this sub-section was left out. Now, I have come to the conclusion that it was scarcely wise of us to leave it out.<sup>27</sup>

Barton posed the question whether without an express authority given in the Constitution to entertain such cases, the High Court could grant a writ of mandamus or prohibition or an injunction against an officer of the Commonwealth. He referred to *Marbury v. Madison* and quoted from the judgment. Nowhere in his speech, as recorded in the Convention debates, was Clark given credit for the intervention that led to the restoration of the clause. Perhaps everybody remembered that Clark had proposed it in the first place. Barton acknowledged that absent the inclusion of the provision it might be held in Australia that the courts should not exercise the power and that even a statute giving them the power would not be of any effect. He then said:

... I think that, as a matter of safety, it would be well to insert these words.<sup>28</sup>

Another delegate, Josiah Symon, said: 'They cannot do any harm'.<sup>29</sup> Barton responded in terms which in the light of history may be seen as masterly understatement: 'They cannot do harm, and may protect us from a great evil'.<sup>30</sup>

There was some opposition to the reinsertion of the provision on the basis that it might give the High Court a power to exercise control over the executive. Isaacs, who had originally moved that the provision be dropped, was unrepentant in his opposition, but appears to have misapprehended the position in the United States under which mandamus could be issued in the exercise of the appellate jurisdiction of the Supreme Court. Concluding debate, Barton summed up the purpose of the provision:

The object of it is to make sure that where a person has a right to ask for any of these writs he shall be enabled to go at once to the High Court, instead of having his process filtered through two or more courts ... This provision is applicable to those three special classes of cases in which public officers can be dealt with, and in which it is necessary that they should be dealt with, so that the High Court may exercise its function of protecting the subject against any violation of the Constitution, or of any law made under the Constitution.<sup>31</sup>

Following his speech the amendment was accepted.

The purpose of s. 75(v) was described by Sir Owen Dixon in *Bank of New South Wales v. Commonwealth* as being to 'make it constitutionally certain that there would be a jurisdiction capable of restraining officers of the Commonwealth from exceeding Federal power'.<sup>32</sup> In *Bodruddaza v. Minister for Immigration*

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26 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, Legal Books, Sydney, 1986, vol. 5, p. 1875.

27 *ibid.*

28 *ibid.*, p. 1876.

29 *ibid.*

30 *ibid.*

31 *ibid.*, p. 1885.

32 (1948) 76 CLR 1, 363.

and *Multicultural Affairs*<sup>33</sup> the judges elaborated upon what Dixon J had said linking the purpose of s. 75(v) to the essential character of the judicial power. The object of preventing officers of the Commonwealth from exceeding federal power was not to be confined to the observance of constitutional limitations on the executive and legislative powers of the Commonwealth:

An essential characteristic of the judicature provided for in Ch III is that it declares and enforces the limits of the power conferred by statute upon administrative decision-makers.<sup>34</sup>

Section 75(v) was seen as furthering that end through the control of ‘jurisdictional error’.

The importance of s. 75(v) as an aspect of the rule of law was underlined by an observation in the judgment of the High Court in *Plaintiff S157 v. Commonwealth*:

The reservation to this Court by the Constitution of the jurisdiction in all matters in which the named constitutional writs or an injunction are sought against an officer of the Commonwealth is a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them. The centrality, and protective purpose, of the jurisdiction of this Court in that regard places significant barriers in the way of legislative attempts (by privative clauses or otherwise) to impair judicial review of administrative action. Such jurisdiction exists to maintain the federal compact by ensuring that propounded laws are constitutionally valid and ministerial or other official action lawful and within jurisdiction. In any written constitution, where there are disputes over such matters, there must be an authoritative decision-maker. Under the Constitution of the Commonwealth the ultimate decision-maker in all matters where there is a contest, is this Court. The Court must be obedient to its constitutional function. In the end, pursuant to s 75 of the Constitution, this limits the powers of the Parliament or of the Executive to avoid, or confine, judicial review.<sup>35</sup>

There have been many cases over the years in which references have been made to Clark’s work and his influence on the shape of the Constitution. In the *Boilermakers’ Case*, Dixon CJ, McTiernan, Fullagar and Kitto JJ cited Clark, a man ‘entitled to speak with authority’, as evidence for ‘the contemporary view’ that the division between Chapters I, II and III ‘confirms the inference’ that judicial power may only be exercised by Chapter III courts.<sup>36</sup> In *Polyukhovich v. Commonwealth*<sup>37</sup> both Deane J and McHugh J drew upon Clark’s writing to support conflicting positions as to whether the Constitution precludes the enactment of ex post facto criminal laws.<sup>38</sup> In *Theophanous v. Herald and Weekly Times Ltd*, Deane J quoted at length from Clark’s *Studies in Australian Constitutional Law*, because ‘it is of such importance and contemporary relevance’,<sup>39</sup> and described Clark as the ‘primary architect of our Constitution’.<sup>40</sup> Finally, in *Sue v. Hill*, the majority cited Clark not just for his views on constitutional interpretation<sup>41</sup> but also for his understanding of the meaning of ‘the Crown’, as found in the Preamble to the Constitution.<sup>42</sup>

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33 (2007) 228 CLR 651.

34 *ibid.*, 668 (footnote omitted).

35 (2003) 211 CLR 476 513–514 [104].

36 *R v. Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254, 276–78.

37 (1991) 172 CLR 501.

38 *ibid* 619 (Deane J); 720–21 (McHugh J).

39 (1994) 182 CLR 104, 171.

40 *ibid* 172.

41 (1999) 199 CLR 462, 487–88 [51].

42 *ibid* 497–99 [83]–[85].

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The recent decision of the High Court in *Kirk v. Industrial Relations Commission of New Wales*<sup>43</sup> has also entrenched, as an implication from Chapter III, the supervisory jurisdiction of the state Supreme Courts over decisions of state officials. The court has also held that the states cannot abolish their Supreme Courts.<sup>44</sup> Those decisions, which flow from implications drawn from Chapter III, mean that the rule of law is pervasive throughout Australia in the sense that there is no exercise of official power that is not limited by law and whose limits are beyond challenge in the courts.

Clark's contribution is difficult to sum up in a few words. He was, as Richard Ely said, a remarkable man—poet, philosopher, sawmill engineer, political scientist, barrister, politician, Vice-Chancellor and judge whose influence on us throughout our system of government continues. He wanted to insert a bill of rights in the Constitution and in this he failed. However, the legacy of his work in relation to the provisions of the Constitution concerning the judiciary, the protections that have been derived expressly and by implication from Chapter III, show him to have been in his time and in this day, a true living force.

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43 (2010) 239 CLR 531.

44 See *Kable v. Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 103 (Gaudron J), 111 (McHugh J), 139 (Gummow J); *Gould v. Brown* (1998) 193 CLR 346, 425 [127] (McHugh J), 446 [194] (Gummow J); *K-Generation Pty Ltd v. Liquor Licensing Court* (2009) 237 CLR 501, 543–44 [151]–[153] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ). See further *Fardon v. Attorney-General (Queensland)* (2004) 223 CLR 575; *Forge v. Australian Securities and Investments Commission* (2006) 228 CLR 45; *International Finance Trust Co Ltd v. NSW Crime Commission* (2009) 240 CLR 319; *South Australia v. Totani* (2010) 242 CLR 1; *Wainobu v. New South Wales* (2011) 243 CLR 181; *Assistant Commissioner Michael James Condon v. Pompano Pty Ltd* (2013) 87 ALJR 458.