

**Senate Occasional Lecture**

**Friday 27 August 2010**

***The Disillusionment of Sir John Downer***

***Senate Occasional Lecture***

***Delivered by J C Bannon***

***On Friday 27 August 2010***

*Abstract: Sir John Downer was one of the prime architects of the Australian Constitution. His political career, which included two terms as Premier of South Australia, culminated in his election to the first Senate in 1901. He believed the Senate would be the guarantor of the federal compact and protector of States rights. As an intimate friend and supporter of Prime Minister Barton he had high but reasonable expectations of a Cabinet post or appointment to the High Court. He was to be sadly disappointed.*

*Dr John Bannon is an Adjunct Professor in the Adelaide University Law School and was until recently Master of St Mark's College at that university. His earlier political career included being Premier of South Australia from 1982 to 1992. As an historian he has researched and published widely on the politics of the federation era and federal/state relations. His biography of Sir John Downer *Supreme Federalist* was published last year by Wakefield Press.*

The scene is the third day of the National Australasian Convention in Sydney in March 1891 under the chairmanship of Henry Parkes. General speeches are being made on the principles to be embodied in a federal constitution for the Australasian colonies, and Edmund Barton of New South Wales has just spoken at length and eloquently on the subject. He is followed by a delegate, who has already had an influence on the procedural debates of the convention, drawing not just on his experience as a former colonial premier and attorney-general but also as a delegate to the Imperial Conference of 1887 in London.

This is Sir John Downer of South Australia, who congratulates Barton on a speech that 'will be of very great service to us in this discussion – a speech most

admirably conceived, most logical in its construction, and one which, as it to a large extent falls in with my own views, not unnaturally carries the greatest conviction to my mind.’<sup>1</sup> It was, as Barton’s biographer Geoffrey Bolton comments, ‘the beginning of a lasting friendship’.<sup>2</sup>

It was a friendship that saw Barton make regular journeys to Adelaide over the following decade to stay with his friend, often during the Christmas/New Year period, to get some much needed rest and recreation in congenial and like-minded company. Sir John in turn visited and stayed with Barton. In 1896, after the untimely death of his wife, who had been seriously ill during a crucial (and unsuccessful) election campaign and died a week or so after, Downer sought solace with his friend in Sydney. A couple of years later as a guest of Barton he was introduced to a young woman friend of the Barton’s, Una Stella Russell, who was present at a dinner as company for his son, sat between father and son and favoured the father. In December 1899 she became Sir John’s second wife. The marriage took place from Barton’s house with Edmund as best man.

Downer was elected as a delegate to the new Constitutional Convention of 1897-8. Over three strenuous sessions Barton and Downer with their mutual NSW colleague Richard O’Connor and secretarial services provided by Robert Garran, after the delegates had retired for the day, had laboured into the night over the detailed drafting of the Commonwealth Constitution. With federation accomplished at the end of 1900, as Barton fretted over what course to take when Lord Hopetoun had by-passed him in favour of the anti-federal Premier of New South Wales William Lyne to form the first federal Cabinet Sir John was on the spot to give advice and support. And he would do so again as a member of the first Senate in support of the Barton Government and its measures, remaining on intimate terms with the Prime Minister. But by late 1903 the relationship came under severe strain and fractured for many years. Sir John’s disillusionment with the public course of events was matched by a personal feeling of betrayal by his closest friend and colleague.

Before examining this I should explain some more about Downer himself. He was born in 1843 in Adelaide, like Barton a ‘native-born’ Australian, the fifth child of

---

<sup>1</sup> *National Australasian Convention Debates*, Government Printing Office, Sydney, 1891; 6 March 1891, p.100.

<sup>2</sup> Geoffrey Bolton *Edmund Barton: The One Man for the Job*, Allen & Unwin, 2000, p.77.

six (five boys and a girl) of a tailor Henry Downer and his wife Jane, who emigrated from England in 1838, just eighteen months after European settlement was established. Henry never really prospered, either at his trade or when trying his hand as an importer of groceries, as a hotelier, or chancing his luck on the Victorian goldfields. But the next generation ensured he was well looked after. Four of the five brothers qualified as lawyers. George, five years older than John, became a very wealthy solicitor, financier and pastoralist. John went into partnership with him soon after being admitted to the bar in 1867, effectively becoming a full-time barrister in what was an undivided profession, and handling the firm's court work. The profitable and highly successful association lasted until John's death in 1915. George died the following year.

John was a brilliant scholar and quickly became a leader of the profession in South Australia becoming a QC on his own merits not, as was often the case by means of political or Crown office, at the age of 34. This coincided with him taking his place in the House of Assembly. He accepted nomination for the regional seat of Barossa from a sense of public duty; he consistently opposed payment of members on the grounds that service in politics should be because people 'wanted to do something for a mere sense of honour and not for personal emolument.'<sup>3</sup> He was to be a member of Parliament – colonial, federal and State for all but one year of the rest of his life – a total of thirty seven years service, undefeated in eleven elections. He quickly achieved ministerial office and was a successful and progressive Attorney- General from 1881 to 1884 in the Bray government, Premier on two occasions (1885-7 and 1892-3) and Leader of the Opposition for much of the 1890s.

His views were a mixture of the socially liberal (for instance, he was an early champion of women's rights and opposed a racially-based immigration policy) and the broadly conservative, with sometimes equivocal policies on the issues of the day such as free trade and protection. But there was one cause he espoused and pursued relentlessly – the federation of Australia. When he entered the first Commonwealth Parliament as a Senator he could claim a longevity in the cause of federation unmatched by any of his colleagues in either House. He was the only member who had been present as a delegate at the initial significant federal gathering, the Australasian Intercolonial Conference held in Sydney in 1883, which resulted in the

---

<sup>3</sup> *South Australian Parliamentary Debates (SAPD)* 24 June 1881, p. 139.

establishment of the precursor of federation, the Federal Council of Australasia (1885-1899).

In 1887, the first Imperial Conference was summoned to London, and Downer, by this time Premier of his colony, was a delegate and, as one of only two Australian Premiers present, played a significant part in the proceedings. This had earned him a knighthood at the age of forty two. In 1891 he was part of the seven man delegation from the South Australian parliament to the Constitutional Convention chaired by Sir Henry Parkes in Sydney. Here he was among the select group of passengers on the famous voyage of the Queensland motor launch *Lucinda* aboard which the first constitution was drafted. In 1897 he was elected by the South Australian people to its ten man delegation to the Convention, which drew up the final version of the Constitution, and at which he had been elected to the three man Drafting Committee which gave substance and legal form to the document.

With federation achieved, the period from 1901 should have been one of fulfilment and personal satisfaction for Downer. But it was not to be. His protectionist credentials and personal association with Barton made him a possible ministerial candidate, if, as expected Barton was called on to form the first Government. In the last days of 1900 Downer went to Sydney for the inauguration celebrations, staying as was his custom, at his friend Barton's house. He was thus a close witness and confidant during the period of the well-named 'Hopetoun Blunder' when the newly arrived Governor-General decided to ignore advice that Barton should be asked to form a Government and instead commissioned the anti-Federal Premier of New South Wales, William Lyne. Lyne sought the support of a number of the key players from the various colonies. Kingston of South Australia had been adamant that Barton should be chosen and declared he would not serve under Lyne. Alfred Deakin had been similarly committed to Barton, but his Premier George Turner and the SA Premier Frederick Holder were now contemplating the possibility of joining a Lyne ministry and Deakin began to waver. Lyne had attempted to recruit Barton as a member of his Cabinet but Barton had made it clear that he was not interested. Downer was there to support his friend in the decision and help him make clear to Deakin that he must get Turner to hold the line. Barton telegrammed Deakin on 24 December 1900, asserting that Lyne 'won't succeed ... my succession inevitable unless possibly Turner'. Downer followed up with a succinct message to Deakin: 'If

you are firm your best desires certainly assured'.<sup>4</sup> I found a letter from Barton to Downer written following the death of Holder, then Speaker of the House of Representatives in 1909 when Barton was a judge and not in a position to comment publicly. There was speculation that Holder had been the person to 'break the chain' and resolve the issue in Barton's favour. In J A La Nauze's fine account of the Blunder, he notes the meetings Lyne held with Turner and Holder in Sydney at which he offered them places in his ministry and reports that they held firm and refused to serve, but does not seem to be aware that they were initially inclined to accept.<sup>5</sup> As Barton reminded Downer:

In Sydney Turner and Holder came over (if I remember it was at Lyne's request). They came to see me at Miandetta and told me he had offered them office. They asked what I would do. I rather think they wanted me to take office under Lyne anyhow. If I had done so they would have followed suit. I told them ... that I had refused in writing and by word to serve under any opponent of Federation. ... When I told them that nothing would induce me to alter my resolve they too refused to join Lyne. Deakin was then in Melbourne. He had suggested to me by letter that it would be better I should do so, but I said it could not be. ... Deakin after my answer did all he could to hold the others together.' ... "The Chain" - if there was one - did hold, but it was never in Holder's power to break it. Had I not stood my ground the chain must have broken if there was one.<sup>6</sup>

Lyne was forced to return his commission and recommend that Barton be asked to form the first Government.

Despite their close association Downer was realistic about the limitations on Barton's ability to offer him a ministerial place. Apart from the Prime Minister, there were eight posts to be allocated and it was generally understood that each colony would be represented. In practice this meant that the ministry would comprise two from NSW and Victoria and one from each of the small states. Places would be offered to those premiers or leaders who were making the transition to the federal parliament. In South Australia's case, Holder the Premier, and Kingston, the Convention President and delegate to London, were both available. As a small state

---

<sup>4</sup> Tel Downer to Deakin 24 December 1900, NLA MS1540/14/41

<sup>5</sup> J A La Nauze 'The Hopetoun Blunder' in Helen Irving & Stuart Macintyre (eds.) *No Ordinary act: Essays on Federation and the Constitution*, MUP, Melbourne, 2001, pp. 36-81.

<sup>6</sup> Barton to Downer, 12 September 1909, NAA/M1002/281.

South Australia could only claim one position, and Barton commented on his choice in the letter to Downer cited above.

The fact about Kingston was that I offered him his choice between ministerial office and (so far as I could influence the matter) the Speakership, intending to offer Holder office if Kingston refused it, and to do my best to get my friends to vote for Holder for the Speakership if Kingston preferred office. Personally I hoped Kingston's answer would enable me to ask Holder to be my colleague, but it was the other way.'

A revealing comment, given that the volatile Kingston had been the most adamant supporter of Barton to become PM – and interesting in the light of Kingston's resignation from the Ministry in 1903 which was the first of a number of events that caused Barton to relinquish office.

The election of the first Parliament was set for 30 March 1901. In South Australia both the Senate and the House of Representatives were to be elected on a whole-of-state or single constituency basis. Downer opted to stand for the Senate rather the House of Representatives, not surprisingly, given his advocacy of its role and fundamental importance. He saw it as the guarantor of true federalism – a body he had done much to bring into existence and clothe with appropriate powers.

When nominations closed there were eleven candidates for the six Senate places. It was a strong field. Ten of them were sitting members of the South Australian Parliament, six in the Legislative Council, including its President, and four in the Assembly. The exception was Josiah Symon who had not sat in Parliament since his defeat in the 1887 elections but had been an influential delegate to the Convention. Seven of them had held ministerial office, two as Premier. Four had been delegates to Australian Constitutional Conventions.

The various combinations among the South Australian Senate candidates were intriguing. A simple colonial party or faction alignment was not really possible. The election was broadly fought between free-traders, who could be expected to support George Reid and his allies, and protectionists, comprising not only some of the conservatives and liberals but also Labor candidates, who could be expected to support the incumbent Barton Ministry. There were five declared free-traders and six protectionists on the ballot. Downer's protectionist leanings were one reason for him to support the ministry, but an overriding factor in this first parliament would be his personal affinity with Barton. Each elector could vote for up to six candidates. For

free traders with only five choices, Downer could be seen as an acceptable non-doctrinaire choice among the others. Based on colonial parliamentary reputation and contribution to federation Downer had a considerable advantage. On this first occasion the term of the first three elected would go to the end of 1906 and the second three to the end of 1903. Downer was confident of the long term.

The campaign was short and intense. The Senate result was an even division between the supporters of free trade and protection. The protectionists gained 52% of the vote and three seats, divided between non-Labor (35%) with two seats and Labor (17%) with one. The free traders gained 48% and also three seats. This was no great surprise, although the free traders had done better than expected. What was a surprise was the order of election. The poll was topped by Symon, the non-Parliamentarian, although a leading lawyer with a reputation as an active federalist who had chaired the Judiciary Committee of the Convention (37,642 votes). Second elected was Thomas Playford, a former Premier and Agent-General and mentor of C C Kingston. Richard Baker, conservative President of the Legislative Council and Chairman of Committees of the Convention was next elected. Then followed Downer (30,493 votes) with 60.6%, ahead of a dissident Labor free-trader Charleston 57.9% and the United Labor Party's Gregor McGregor.

Symon's success was largely attributable to Kingston, who had decided to endorse his old foe, despite once having called him 'a forensic compound of squid and skunk' and other less kind things. This support was in acknowledgment of his vigorous opposition to amendments to the Constitution sought by the UK Government to make the High Court secondary to the Privy Council. Downer had also supported Kingston in this matter, but for Kingston, Symon was like a prodigal son who had returned to the fold. As a member of Barton's Cabinet Kingston should have owed some loyalty to those who supported the ministry, but the fact that Symon supported George Reid's free trade was overtaken by Kingston's feelings of gratitude to his new-found ally. Kingston had even managed to secure an endorsement of Symon from a very sceptical Labor party. Downer was understandably disappointed and annoyed by the result. He wrote bitterly to both Barton and to Alfred Deakin, Barton's Attorney-General. His letter to Barton is not preserved, but he told Deakin:

I am glad to hear from Barton that you have a good working majority.

That your ministry has the support and influence of myself and my friends is in no way due to any action of your Government – on the contrary your colleague

Mr Kingston has succeeded by his intrigues against your principal supporter here – myself – in placing that support low on the list instead of being on top – and in electing the principal opponent of your policy here to the leading position.<sup>7</sup>

For Downer the disappointment was compounded by the fact that his old enemy Thomas Playford had also come in ahead of him, and that in coming fourth he had been relegated to the short term, expiring in 1903.

What were Downer's expectations on entering the Senate? It was his house of first choice: his concern throughout the Constitution-making process was to ensure that the Senate had the power and authority to play its role in protecting the states from federal domination. A state needed to be able to look to its senators to safeguard its rights and authority. His proposal that it be called the 'States Assembly' had been unsuccessful, but there was no question in his mind that this was what it was, and what the majority of delegates to the Conventions believed they had created. There were at least three assurances that this would be its role.

Firstly, its claim to be a House of democratic representation. The advocates of popular democracy had asked how an 'upper house' whose members were drawn in equal numbers from the states without regard to the population discrepancies between them could claim authority against the popularly elected lower house? Ninety years later this argument was most colourfully expressed as the Senate being comprised of 'unrepresentative swill'. In response to it being seen as unrepresentative, Downer had always been careful to distinguish the Senate from the upper houses of the colonies. In the colonies, Legislative Councils were there to protect particular landed or property interests and were comprised in some cases (such as New South Wales) of appointed members and in others of members elected under a limited franchise. Early drafts had the Senate appointed by the State Parliaments but this was rejected in favour of election directly by the people of the state under the same voting qualifications as applied to the House of Representatives. This gave the Senate special authority making it totally democratic on a State basis. It is arguable that a state-wide electorate and proportional representation have made it even more so in the present day – it has after all been the only Chamber in recent times to consistently provide an opportunity for minor parties and independents to be represented.

Secondly, Downer believed the quality of its members would ensure that the equality of the Senate with the House of Representatives as expressed in the

---

<sup>7</sup> Downer to Deakin 2 April 1901 NLA MS1540/14/67



Constitution would be sustained as intended by the founders. While he saw no analogy with the British House of Lords nor desired to preserve or create a form of aristocracy, it is also true that Downer hoped the Senate would attract senior statesmen with authority and status similar to that of their United States counterparts. He acknowledged that the Australian Senate did not have the same sweeping powers as the US Senate, but believed it would at least match the House in authority and be seen as a place to which the most able politicians of the States would aspire. Ideally it should, at least initially, be comprised of men who had been part of the making of the Constitution. As it happened, of the thirty six members of the first Senate only nine of the former delegates were elected in 1901. Four of them were South Australians, and it was noted by Langdon Bonython, proprietor of the Advertiser and himself standing for a seat in the Representatives, that in that state ‘surprisingly the best of the candidates’ had stood for the Senate.<sup>8</sup> This was not to last, indeed some key retirements from the first two Senates, including that of Downer himself saw the quality of Senate representatives begin to lower very early. The concept of ‘swill’ in unrepresentative swill’ was in large part directed to the first seventy years or so of pre-selections by the major parties that had tended, with a few outstanding exceptions, to use the Senate for ‘placemen’ and loyalists who might not succeed in a representative contest but could shelter under a Senate ballot. This has changed somewhat with the advent of the tighter and less predictable contests of contemporary times, but such candidates have not yet disappeared from major party tickets.

Thirdly, a very few delegates had presciently suggested that party loyalty would prevail over state affiliation among Senators. Downer was of the old school of factional government. He accepted that candidates would have broad party affiliations, but did not believe that they would or should override their responsibility to the state. Liberals and conservatives could find themselves in either the free-trade or protectionist camps, while Labor favoured protection. The first federal ministry was protectionist but contained conservatives such as Prime Minister Barton, as well radical liberals such as Kingston. In this situation Downer felt that it would be impossible for party whips to enforce a discipline when state interests were at stake. The opposing view was put to the test quite early, and it was quickly apparent that party rather than state lines would be the hallmark of Senate divisions.

---

<sup>8</sup> Bonython to Cockburn, 10 April 1901, SASA PRG 979/1

At this point the future national political career of Downer looked bright indeed. His seniority and prominence in the federal movement gave him high eminence and authority. His reputation for a mixture of liberal and conservative values, and his independence cast him as a statesman rather than a political operative. The *Bulletin*, basically hostile to his politics and a champion of Kingston, nonetheless provided an interesting portrait of him as the Senate assembled for the first time. It described him as

‘perhaps the homeliest-looking man in the Federal Legislature’ whom ‘nature built for a champion bruiser but circumstances made him, like three other brothers, a lawyer. John has been a prominent SA politician for 23 years, representing the same district from the very start and became a QC in 1887. An absolutely straight man of great grit, he never loses a personal friend. ... Though just on 60 Downer married a handsome and charming Sydney girl two years ago and has fully determined to live on until he is 100.’<sup>9</sup>

He was in the Senate to ensure that the federal compact was realized as he had envisaged. But apart from a role as a senior statesman of the Senate, there were in prospect two further avenues for his talents. Both of them became achievable in 1903, but, as will be seen, by then the timing was wrong for all sorts of reasons.

Firstly was the Ministry. Apart from the Senate another sphere of influence for the smaller states of the federation was through membership of the Cabinet, firstly by ensuring that each state had a minister of origin and secondly that the Senate had representation. Barton’s first Cabinet of nine contained three from NSW, two from Victoria and one from each of the other colonies. Two of his ministers were Senators: Richard O’Connor, who became Government leader of the Senate and James Drake from Queensland.

Downer’s claim to a cabinet post has been referred to earlier. Kingston’s presence as the South Australian in the initial ministry precluded Downer from initial consideration by the Prime Minister. At the time it was noted that Downer had some claims, but, as the *Review of Reviews* put it, although Downer and Kingston were both protectionists, Downer ‘does not represent dominant opinion in the state, and politically he is, if not an extinct, at least a slumbering volcano’.<sup>10</sup> Two events in 1903 opened up the possibility of the volcano waking. The first was Kingston’s

---

<sup>9</sup> *Bulletin*, 27 April 1901, p. 13.

<sup>10</sup> *Review of Reviews* November, 1903, p.576

resignation in July 1903, which provided an opportunity for another South Australian, while the second, O'Connor's appointment in September to the High Court, created a senate ministerial vacancy. His friend Barton had also resigned and departed to the Court, so the incoming Prime Minister Alfred Deakin could have found a place for Downer.

It would have been a seamless and appropriate change for Downer to take the South Australian spot as well as O'Connor's role in the Senate. Of the South Australians, Holder and Baker were both Presiding Officers (and, as it happened free traders), and Symon, also a judicial rival, was leader of the opposition in the Senate. The other SA members who had been founding fathers, Glynn and Solomon, were both free trade. Poynton and Charleston were free traders while McGregor and Batchelor as Labor members were bound by policy not to enter the ministry. The choice therefore came down to Senators Downer and Playford. Deakin and Downer had been associated in the federal movement since their voyage to the Imperial Conference together in 1887. They had been allies there, but had later clashed on a number of issues. Keen on stamping his government as strongly liberal protectionist, Deakin chose Playford, Kingston's ally and Downer's long term opponent.

Secondly was membership of the High Court of Australia. It was not until 1903 that the Attorney-General Deakin introduced a bill to create the High Court as provided by the Constitution. As the Judiciary Bill made its progress through the processes of Parliament there was considerable speculation about who would be asked to serve on its inaugural bench. It was no secret that Downer's name was high on the list. He had outstanding qualifications for the post as a principal draftsman of the Constitution and one of the country's leading barristers. But more than that, he had always been a great advocate for the court's prime place in the Constitution and had always seen it as a fundamental part of the Federation. He saw it as the only guarantee that the Constitution could not be arbitrarily flouted by any government however popular. Typical of his feeling on the issue was his interjection in the course of consideration of the draft constitution in the House of Assembly in 1897 – 'I think the Supreme Court is the one protection of the Constitution'. When the value of its establishment was questioned by the Labor leader McPherson he again interjected 'It is to prevent the evasion of the Constitution!' Impatient with attacks on the Court on the grounds of that it was just a way for lawyers to make money, he pointed out at the Adelaide convention session that this was a court analogous to the American Supreme

Court in its constitutional role. 'It is a not a paltry question of lawyers and lawyers fees.'

He was concerned that the judges should be protected from arbitrary dismissal by a hostile parliament or government. 'The Bench ought to be placed in the highest independent position'. It had to be 'noble and lofty.' This was particularly so because of the type of conflict that could arise, where the Court would need to be strong enough to stand its ground against the Legislature and the Executive. He felt there should not be authority to remove judges 'without the greatest cause and the gravest trial'. For this reason he opposed the system favoured by Kingston and others of a motion of both houses of Parliament. He insisted the procedure must ensure that there was a trial, conducted 'in the most solemn circumstances', and not by way of political debate where the judge 'might be accused on account of all sorts of causes and prejudice apart from the merits.' The best method he felt was that of the United States, where the two Houses had a separate role in the process. Accordingly he moved for an impeachment process to be conducted by the House of Representatives, which would then be tried before the Senate, with the further safeguard of a two thirds majority being necessary for conviction. He was not able to gather support for this, and did not press it to a division.

The other matter of debate on the Court was the question of appeals to the Privy Council. Some members argued that this right should be maintained. It would ensure that there was uniformity of laws and high standards of decision. If there was no appeal from its rulings the Australian court would do just as it liked. Downer rejected this, arguing strongly that the High Court should be the final court of appeal. Here he showed himself as an Australian patriot in common cause with radicals like Kingston and at odds with a number of fellow conservatives. To him it was a logical consequence of the creation of the Commonwealth. The following passage of debate shows this clearly.

Downer: 'I would like to ask ... when do we get out of our swaddling clothes? What are we here for?'

Mr Fraser (Victoria): Not to cut the painter [with Britain].

Sir Edward Braddon (Tasmania): Not to deprive the British subject of a right.

Downer: We have come to the conclusion that we must cease to be provincial and form the foundation of a nation. [While remaining loyal to the

Crown] we think we can make laws which will suffice us; in other words, to put it colloquially, we can manage our own affairs.’<sup>11</sup>

In the Senate four years later Downer took the opportunity of his maiden speech to argue for the importance of establishing the Court as soon as possible. ‘The Constitution is incomplete without it ... Woe betide those who call themselves true federalists who interfere or seek to postpone the establishment of this tribunal.’<sup>12</sup> Using the United States as precedent he argued that the Court, through its role of interpreting the Constitution, ‘is a superior body and can keep both houses in their proper places.’

On 5 August 1903 Downer addressed the Senate at length on the Judiciary Bill. After recapitulating the history of the proposal in the Conventions and its relationship to the American and Canadian models, he repeated his view that the High Court was ‘the very basis of the Constitution’ which was virtually inoperative without it. ‘The constitutional machine will not be complete until the judiciary is appointed.’ He quoted with approval Alexander Hamilton’s description of the US Supreme Court as ‘the living voice of the Constitution.’ He regretted that there was a constitutional requirement to have recourse to the Privy Council in some instances, maintaining his strong support for the High Court as the highest and final Court of Appeal in Australia. ‘With a High Court in Australia we should have justice administered in the broad light of day instead of practically in a back room 13,000 miles away and really inaccessible to persons acquainted with all circumstances of the cases.’<sup>13</sup> Nevertheless the Court had ‘immense jurisdiction’ and its business would grow in importance and volume over time. Issues surrounding the River Murray were an example of matters waiting to be resolved which could only be done by the Court. Downer’s views were not shared by all, as there still a feeling that there was insufficient work for the court, and that it would be expensive in terms of servicing and judges salaries, and a better alternative might be to appoint State judges in a joint capacity. In the end these objections were overcome, but not without a compromise that would have a major impact on Downer.

Downer was of the view that those appointed should be not only of the highest calibre, but ‘much more than lawyers. They ought to be great constitutional lawyers

---

<sup>11</sup> *National Australasian Convention Debates*, Adelaide Session 20 April 1897, pp. 971.

<sup>12</sup> CPD 1901 pp 250-1

<sup>13</sup> CPD 1903 p 3052

from a federal point of view'. It was, of course, the Government, not the Parliament's task to appoint the judges. In its view, appointees would need to have practised in legal jurisdictions which had reputation and standing, which would therefore probably have excluded WA from consideration at this time. Five jurisdictions could provide the five judges provided for in the Constitution. The leading candidates for the first High Court included those in judicial office in the States, as well as those who had been involved in the drafting of the Constitution and were, in most cases, members of Parliament in their own right. Of the early convention delegates with great influence, two were already state justices. The first was Sir Samuel Griffith of Queensland. He had not taken part in the 1897/8 convention but his mark as the leading draftsman of 1891 was on the Constitution, and on this basis he was a prime candidate. On the other hand in 1900 he had supported reserving the right of appeal from the Court to the British Privy Council which many saw as devaluing the court's constitutional status. He had earned the wrath of Barton, Deakin, Kingston, Downer, and Symon among others for taking this course. The second was Andrew Inglis Clark of Tasmania, who had done an early and influential draft of the Constitution and been prominent in the debates of 1891 and was the acknowledged expert on the US Constitution. He was however absent from the 1897/8 convention and had been a critic of its work. To these could be added Barton himself although still PM, O'Connor, and the state attorney-general Bernhard Wise from NSW; Higgins and Isaacs from Victoria; Downer, Symon and possibly Kingston from SA. The press called for a balanced bench. So the appointments would be made from NSW, O'Connor; Victoria, probably Isaacs, Queensland, Griffith, South Australia, Downer and Tasmania, Inglis Clark. Barton, as could be expected, was a strong supporter of the claims of Downer and O'Connor, and both men had high expectations that they would be appointed.

The attack on the costs of the judiciary resulted in a vigorous attempt to reduce the number of judges. Downer had no time for these arguments. As far back as 1891 he had said that the importance of a national court overcame any questions about its cost. He was certainly consistent – twelve years later speaking on the Judiciary Bill he said that questioning the expense of the Court was 'beneath contempt'.<sup>14</sup> At the

---

<sup>14</sup> CPD 5 August 1903 p 3056

Convention in 1897 he had also rejected proposals to limit the court's numbers, which again was being argued on the grounds of economy.

If the Constitution is to have stability we must take care of this court that protects the constitution. Look at its power. Both Houses may pass an Act and the Court can upset it if it is unconstitutional. Surely if a court is to have such an excessive power it must be strong in numbers.

Numbers would give weight and authority to its decisions. He did not prevail then nor later. To get support of those who felt there would be little business for the court to do and were concerned at its cost, the Government was forced to accept that the number of judges to be appointed initially would be reduced from five to three.

The reduction need not have spoiled Downer's own chances of appointment. A bench comprising O'Connor, Griffith and Downer would have suited the temperament and geographical spread of the government. But the Prime Minister, facing political difficulties and wanting a quieter life reserved a place for himself, while still persisting with O'Connor (although this meant that there would be two from NSW) and the third place went to Griffith ahead of Downer. Incidentally, O'Connor was the only Senator to serve on the High Court until Lionel Murphy was appointed seventy two years later.<sup>15</sup> The decision was a devastating one for Downer, particularly as he had been let down by his close friend and ally who had given him every encouragement on the matter. The Chief Justice of South Australia, Sir Samuel Way, who knew Downer well, wrote to an acquaintance two days after the announcement that 'Poor Sir John Downer is very disappointed. There is no doubt that Barton had committed himself to him.' A month later he corresponded with the former Governor of South Australia Lord Tennyson, who was now acting as Governor-General of the Commonwealth.

Downer I think is now getting over his disappointment, but he could hardly expect to be one of three. When Barton committed himself to him it was expected that five Judges would be appointed.

There may have been another factor working against Downer which was hinted at in earlier correspondence by Way. By this stage Downer was feeling uncomfortable and frustrated in a Senate that was increasingly operating on party lines against his loftier expectations. He was unhappy spending much futile time in

---

<sup>15</sup> Thirteen justices, of which Murphy was the last, had parliamentary experience. O'Connor and Murphy in the Senate; Barton, Isaacs, Higgins, Latham and Barwick in the Representatives, and Griffith, Powers, Piddington, Knox, Evatt, and McTiernan in State jurisdictions.

Melbourne at the sittings away from his family, his home and his legal practice. His young wife accompanied him in Melbourne on occasions but it was not much of a life for her. During one session they were involved in a nasty carriage accident and suffered some injury. It seems it was the only time in his life that he suffered bouts of depression. Way had heard that he was spending too much time in the parliamentary bar, in contrast to his friend Barton, who had been renowned for enjoying the good life to excess, but now was very disciplined. 'Sir John Downer has Barton's very strong support but he is constantly [word inked out – but probably 'drunk'] so it is questionable if any Government would dare to appoint him.' At this stage, Way felt that if Downer was not appointed it would be 'through his own folly in not having become a total abstainer soon enough.' Bonython also writing to Cockburn in London commented enigmatically but significantly on the preference for Playford for the ministry that 'we guess here, and I am afraid you will be able to guess too, why Downer was passed over. I am sorry for him, but he has himself to blame'.<sup>16</sup> On the High Court decision he commented that 'John Downer is terribly disgusted although for a reason you may guess he has not for a very long time even been in the running'.<sup>17</sup> It is worth remembering that both Way and Bonython were teetotallers and somewhat censorious of those who weren't, but clearly at this stage there was a problem.

He may have been putting a good face on it, but relations between Downer and Barton were now very strained, and it took some years to repair the friendship. The new High Court went on its first circuit to Adelaide in November 1903 and Way took charge of their welcome. Griffith stayed in Government House during the visit, and O'Connor with Sir Samuel at his mansion Montefiore. But significantly, for the first time in many visits to Adelaide over more than a decade, Barton was not resident at Sir John's Pennington Terrace house just down the road from the Chief Justice, but lodged with Griffith at Government House. Way hosted a banquet for the Court at the Adelaide Club but he noted: 'Sir John wouldn't come'.

Three years later during the second Deakin ministry a further two High Court places were added for appointment by the Government. Victoria clearly had claims to one and Isaac Isaacs, Deakin's Commonwealth Attorney-General, was first choice. There was a strong claim for a South Australian appointee. Downer however was now

---

<sup>16</sup> Bonython to Cockburn, 1 September 1903,

<sup>17</sup> idem 30 September 1903.



without the patronage of Barton. He had an uneasy if not hostile relationship with Deakin, although he would not have been aware of Deakin's then unpublished negative view that he was 'reserved and indolent'. In Cabinet Downer would have had the support of Sir John Forrest, but that would be more than matched by the opposition of William Lyne and the solid veto of his oldest political opponent Thomas Playford. He was again put at the rear of the queue. Chief Justice Way was offered the other place, but refused, seeing it as a demotion from his joint appointments as Chief Justice of South Australia and a Privy Councillor. Way's refusal resulted in the appointment of a second Victorian, the radical Henry Higgins. Sir John's claims lapsed at this point for ever. There has still not been a South Australian appointee.

There had been other disappointments in Downer's public life, including the bleak years of opposition in the 1890s and being denied an opportunity to serve with his friend and colleague Barton in a Federal Cabinet, but not being appointed to the High Court of Australia was the greatest. Nearing the end of its first term in 1903, the Senate was showing signs of very partisan behaviour and failing to live up to the standards of independence from the executive and Representatives he had expected. He announced that he would not be standing for a second term in the election, but would return to full-time legal practice in South Australia. His federal disillusion was underlined a year later when he became a South Australian elder statesman by entering the Legislative Council in which he served until his death in 1915.

In retrospect it is easy to see why Downer became disillusioned. His concept of federalism was based onto a system of factional organisation which did not properly account for the rise of the parties and was no longer possible. The Senate was not able to live up to his expectations of a United States model as Australian federation was grafted onto the Westminster system. His hopes of office or the bench were not to be fulfilled. And politics generally now wearied him. To bow out of the federal scene almost exactly twenty years after he had made his first major contribution and where he had been so important was the right thing to do – and he lived on to enjoy an Indian summer, blessed by the unexpected birth of a son in 1910 – the future Federal Minister and diplomat, Sir Alexander Russell Downer.