

CHAPTER 1

The Emergence of the Commonwealth Constitution

John Williams

On 13 April 1897, Edmund Barton, the 48-year-old New South Wales delegate to the Adelaide session of the Australasian Federal Convention, rose to his feet. He prayed for the indulgence of the assembled: 'I am scarcely in a condition to speak to-night', he told his fellow delegates, 'because I am suffering from a bronchial cold. I do not wish to delay the Committee, but I feel that this is a question on which I have some right to be heard'.¹ Out of respect to the leader of the Convention, the South Australian John Hannah Gordon withdrew his motion calling for a division and the Convention adjourned at 9.34 p.m. to reconvene at 10.30 the following morning.

This 'providential catarrh', as Quick and Garran later described it, in all likelihood saved the Australian Federation from yet another misadventure.² This incident, like so many others along the road to Centennial Park, was a moment when the emerging Commonwealth stood at a crossroads. Decisions, compromise, procrastination, hard politicking and gentle persuasion were all part of the progression towards Sydney on the first day of January 1901. The story of Federation is one that has been told and scarcely needs repeating. This chapter will however outline some of the events that marked the unification of the six colonies into the new Commonwealth. It will explore the role of critical individuals and controversies that were associated with the federal movement.

Crises and controversies

The notion of crisis and controversies relating to the drafting of the Australian Constitution is one of perspective. Not only in determining what *is* a controversy but *when* such controversies emerged. Before



'To be swallowed whole.' 'Parkes says that the present Provincial Parliaments cannot alter a single word or comma of the Constitution Bill.' Parkes, often called the 'Father of Federation', holding the resolutions of the 1891 Federal Convention, insists that the Australian colonies must accept the Convention's resolutions in their entirety.
(Cartoon by Livingstone Hopkins 'Hop'. *Bulletin*, 9 May 1891.)

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engaging in a discussion of the categories of controversies that may be associated with the Constitution, it is well to reflect briefly on the process. For the framers the process of drafting the Constitution was more than a mere technical debate. It was in the broadest sense a political process, with its players having loyalties and motives beyond the mere search for succinct constitutional phraseology. Dixon J's opinion that the 'Constitution is a political instrument ... deal[ing] with government and governmental powers' can be extended to encompass not only the governance of a political community, but also the method under which that community was constitutionally created.³

Unlike parliamentary drafters who have a professional disinterest in the proposal before them, the Australian framers were wholly enmeshed in the decisions and their ramifications for their own particular interests. For some, such as the Victorian H. B. Higgins, the democratic imperative imbued much of their posturing during and after the Convention.⁴ George Reid, the wily politician, arguably played a deeper strategy protecting the interests of New South Wales, seemingly the imperial connection and his own prime ministerial ambition. Reid, however, was not alone in directing debate in a provincial and personal direction.

Personal enmity was also to play its part. The Victorian Alfred Deakin, in his private account of the federation process, made no secret of his loathing for Reid. He described Reid as being even more cunning than Henry Parkes. Reid was 'inordinately vain and resolutely selfish, a consummate tactician even more cunning, if anything excelling him [Parkes] in variety and violence of vituperation'.⁵

So too, Charles Cameron Kingston was to suffer the rebuff of his fellow South Australians when it came to his choice as a member of the 1897–98 Drafting Committee, a position he could rightly have expected to be appointed to. A similar fate befell Isaac Isaacs, whose talents were evident to all but whose style tended to irritate his fellow delegates.⁶

The first perspective when considering the drafting of the Constitution must be that of the framers in the 1890s. Informed by their own personal and colonial agendas, the delegates were to debate the form and substance of the Constitution. Some issues such as the rivers question and railway rates, and even the role of the Senate, were to drag on for days of discussion to the point of tedium. What appeared like a crisis to the delegates leaves those with the advantage of more than a century's hindsight to wonder what all the fuss was about. For instance, at the very time that the South Australians and New South Wales delegates were locked in debate on the rights over the River Murray, the trade along its length was coming to an end.⁷ 'The mighty bush with iron rails', as Henry Lawson lamented in 1896, was now 'tethered to the world'.⁸ Yet the delegates were to spend weeks debating this in Adelaide and

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Melbourne in 1897–98. Their ultimate compromise, s. 100 of the Constitution, was to be tested not from a dispute arising between New South Wales and South Australia but between Tasmania and the Commonwealth.⁹ In Melbourne in 1898 the Tasmanians were, in the words of their Premier, ‘wholly unconcerned with this matter’.¹⁰

Similarly, the powers of the Senate had been debated at all the conventions of the 1890s. However, as John Murtagh Macrossan from Queensland insisted at the 1891 Sydney Convention, the issue was not as critical as delegates may have thought.

Then there is a question which I think hon. gentlemen have overlooked, which will in a great measure modify the action of both the senate and the house of representatives. Do not let us forget the action of party. We have been arguing all through as if party government were to cease immediately we adopt the new constitution. Now, I really do not see how that is to be brought about. The influence of party will remain much the same as it is now, and instead of members of the senate voting, as has been suggested, as states, they will vote as members of parties to which they will belong. I think, therefore, that the idea of the larger states being overpowered by the voting of the states might very well be abandoned.¹¹

The question of the powers of the Senate provides a useful example of changing perspectives. For many delegates, with the exception of Macrossan and perhaps one or two others, this was an issue that could, as Barton realised in 1897, derail the federal movement. However, by 1972 the accuracy of Macrossan’s prediction that the Senate was a ‘Party’s House’ had lulled John A. La Nauze into making one of his rare miscalculations. He wrote that the framers’ concern about the power of the Senate amounted to a ‘storm in a teacup’.¹² Such a conclusion would not have been made if La Nauze were writing after 1975 with the dismissal of the Whitlam Government.

For contemporaries the controversies surrounding the drafting of the Constitution are usually ones of omission: the framers’ ‘failure’ to consider or express a satisfactory opinion on issues such as a bill of rights, or an imprecise definition of ‘excise’ in s. 90 or ‘absolutely free’ in s. 92. Others have argued that the Constitution was biased towards one particular political outlook, and that this was a calculated decision on the part of the framers.¹³ Subsumed in the question of the limitations of the Constitution is a larger one of the role of the framers. What should be done with the views of these Victorian gents in an internet age?

In highlighting the differing perspectives related to the constitutional process I wish to demonstrate the obvious point that what may appear to be a crisis or controversy in one age may be of little or no interest in another.

Turning to the construction of the Constitution, a number of points can be made that continue the theme of perspective as well develop

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some other frameworks of discussion. The Federation story is one of multiple forces or attitudes that were often pulling in the same direction but at other times were in conflict. For instance, Australian nationalism,¹⁴ a critical element in the ultimate success of Federation, had to be tempered by imperial sentiment. Ultimately the two attitudes were reconciled. However, the divergent approaches were at the heart of many issues of substance. These included the role of the Privy Council in Australia's judicial hierarchy, the nature of the 'union under the Crown', and the need to placate imperial interests during the drafting of the Constitution. This imperial sensitivity was evident in such trivial debates as the name of the 'Commonwealth' with its republican hue, which some believed threatened the link with the Mother Country.¹⁵

Closely shadowing the nationalist/imperialist divide was the greater uncertainty of the framers' reluctance to diverge from the well-worn path of their colonial experiences. The fear of the unknown, as against the certainty of the familiar, was another divide within the federation movement. For many of the framers 'knew little more about federalism than that it was a system of government'.¹⁶ Yet federalism needed to be grafted onto the familiar institution of responsible government. For some this was an impossible task. As John Winthrop Hackett from Western Australia famously told the 1891 Sydney Convention: 'If ... responsible government ... [is] graft[ed] upon our new federation, there will be one of two alternatives – either responsible government will kill federation, or federation in the form in which we shall, I hope, be prepared to accept it, will kill responsible government'.¹⁷ While Hackett was proved incorrect in his assessment of the incompatibility of the two systems, the fact that he raised the outcome of their fusion in such dramatic terms speaks to the leap into the unknown that he and his fellow delegates were taking.¹⁸

The process of dispelling myths and familiarising themselves with other systems is one of the hidden stories of the federal movement. In what was perhaps the first instance of comparative Australian constitutional research, the delegates digested major texts, and in the case of framers such as Richard Chaffey Baker, wrote a manual for the use of fellow delegates.¹⁹ The most influential work that the delegates were to consult was, however, James Bryce's *The American Commonwealth*. This work would be studied and quoted, as La Nauze states, 'as the Bible would have been in an assembly of churchmen'.²⁰ Armed with these and other texts, the delegates navigated through the uncharted waters of federalism.

By way of introduction I have attempted to highlight the sensitivity that needs to be brought to the study of the history of the drafting of the Constitution. The notion of what is a 'crisis' must be a matter of perspective, not only within a particular historical moment but also

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between any particular eras. In retelling the story of Federation and the constitutional controversies that arise, I will draw out those forces that were shaping the direction that the federal compact would take.

Early attempts at federation

The federation of the Australian colonies could only take place after they were first granted independence from one another. Thus one of the many ironic twists in the Federation story is that the union of the colonies under the Crown was achieved only after the single administrative entity, New South Wales, was divided into the constituent parts that were to be once again reassembled in the federal union.

The break with the 'Mother' colony took place first with Van Diemen's Land in 1825, South Australia in 1836, Victoria in 1851 and Queensland in 1859. Western Australia, the last colony to enter the federal fold, had been established independent of New South Wales as a Crown Colony in 1829.²¹ The reunion was a 'long, slow courtship', with the federation issue being raised spasmodically during the evolution of the colonies.²²

With the establishment of the colonies and their grant of some administrative independence, the inevitable variation in economic and social policy occurred. In 1846, for instance, Van Diemen's Land had decided to abolish its customs preference for New South Wales.²³ A year later, the third Earl Grey, Secretary of State for the Colonies, proposed the establishment of a general assembly to deal with issues of common interest between the colonies.²⁴ Grey's bold proposal was met with a 'storm of indignation' from the colonists.²⁵ A more detailed version of the plan was advanced by the Privy Council in its report of 1 May 1849. The report noted that the establishment of new colonies there would 'aggravate' the inconvenience of diverging tariff policies. It recommended the establishment of a Governor-General for the Colonies who 'should be authorized to convene a body to be called the General Assembly of Australia'. The General Assembly was to consist of a single House, called the House of Delegates. The Assembly, it was proposed, would have the power to legislate with respect to ten areas including the provision of basic infrastructure and matters referred to the Assembly. There would also be a 'General Supreme Court' to be a court of appeal from the 'provinces'.²⁶

The Privy Council report, like the Grey proposal that prompted it, was poorly received in Australia. Notwithstanding the obvious need for a co-ordinated tariff policy and greater intercolonial services, 'Australians were disinclined to embrace any constitutional proposals which they themselves had not initiated, or at least on which they had not first been consulted'.²⁷

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If proposals from the Empire were poorly received, indigenous initiatives at union fared little better. During the early 1850s, as the movement for self-government in the colonies gathered pace, the issue of federation was considered, though not acted on. The Grey proposal drew the attention of W. C. Wentworth, who chaired in June 1853 a select committee of the Legislative Council of New South Wales on the issue of constitutional reform.

As with the Privy Council report, the Wentworth Committee placed the issue of 'Inter-colonial tariffs, and coasting trade' at the top of its issues for greater consideration.²⁸ Similarly, in Victoria the question was being discussed. The Legislative Council established a select committee to draft a new constitution. As in New South Wales, the Bill contained no federal provisions and gave little encouragement to the cause of federation.²⁹

The larger question of Australian independence was being considered at the same time as others were tentatively putting forward the notion of federation. In 1852 the radical Presbyterian clergyman John Dunmore Lang declared that the system of British colonisation was rotten to the core.³⁰ In *Freedom and Independence for the Golden Lands of Australia* he conceived of a united federal republic of Australia.³¹ This followed a theme that Lang had developed in his 1850 lecture series *The Coming Event!; or, the United Provinces of Australia*.³² As with many of Lang's ideas, the initial enthusiasm was not enough to carry the project to completion.

With self-government achieved in New South Wales, Wentworth had his final attempt to advance the matter of federation in 1857. At the London meeting of the General Association for the Australian Colonies, held on 31 March of that year, he produced a 'Memorial'.³³ The Memorial repeated many of Wentworth's earlier arguments about the necessity of a federal union and included as an appendix a Bill to establish a union of the colonies. The Memorial failed to excite the Secretary of State for the Colonies, Henry Labouchère, who would have been well aware of the fury that had greeted Earl Grey's proposal.³⁴

The last push for federation in this period came from Gavan Duffy, the future Premier of Victoria, who arrived in Australia in 1856. His reputation as an Irish rebel preceded him but was no bar to his advancement.³⁵ In November 1856 he became a member of the first Legislative Assembly of Victoria and committed himself to the cause of federation, establishing a Select Committee into the issue. In 1857 the Select Committee reported offering an account of the need for union and the options available to the colonies.³⁶ The report was emphatic as to the need for federation.

Gavan Duffy failed to capture the enthusiasm of either the other colonies or his own. The decade between the late 1870s and the late

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1880s saw a number of attempts by the colonies to maintain uniformity in their economic policies. However, as was predicted by the various reports and committees, the granting of greater autonomy to the colonies inevitably led to variations in tariff policy. The list of dutiable goods, as well as the rate of duty, provided arguments for greater co-ordination between the colonies. As well as this, the question of free interstate movement across the Murray, and along its length, brought New South Wales, Victoria and South Australia into conflict.

The push for federation in this period had its last gasp in 1870 when Gavan Duffy appointed a Royal Commission to expedite the matter. The Commission's first and only report, written by Gavan Duffy, was delivered in October 1870 and repeated many of his previous arguments about the need for a federal union and how it was to be achieved.³⁷ The third and controversial section of the report outlined a plan for securing the neutrality of the colonies during British wars. As the report stated, this was 'a cognate question', though in reality it was poor political judgement by Gavan Duffy and could have been avoided.³⁸ This last part of the report proved to be 'quite explosive' and destroyed the other two-thirds.³⁹ For Gavan Duffy this would be his last attempt at federating the colonies. He later confided to Henry Parkes that his twenty years of committees, reports, and correspondences amounted to very little: 'The flowers gathered from so much seed made but a scanty bouquet'.⁴⁰

The early efforts at federation proved to be of limited success. The imperial initiatives were received with distrust and the local ones failed to excite support. The reasons for the stumbling advances towards Federation in this period can be explained by a number of conflicting attitudes. The push for greater self-government within the colonies ran counter to the notion of creating a larger administrative body. For those who agitated for greater self-government, federation was at best a secondary concern.⁴¹

Further, the economic dislocation caused by the independent tariff and regulative approaches within the colonies was not yet so profound as to add weight to the need for an economic union.⁴² Lastly, and perhaps more elusive, was the lack of a discernible national identity. One of the pillars of the late Federation campaign was the association of national spirit, which was undoubtedly to be placed within the imperial family, with the call for union. At this point of Australia's development the 'Australian Natives', as they were called, were not yet a vibrant rallying force. That would come. As Irving has argued:

The idea of a special, formative relationship between the Australian environment and the individuals of the British race, one that gave rise to a new form of person, a new type of society that would be the seedbed of social

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experiment, was persistent in nineteenth-century Australia. The strange native environment stamped its character on the settlers. Their children became a new kind of 'native'.⁴³

The Federal Council and the Federal movement

The description of Melbourne as 'the greatest city of this hemisphere' is to be expected when uttered by a Victorian, but when Henry Parkes took the platform in March 1867 and drew it to the attention of those assembled at the banquet of the Intercolonial Postal Conference, something was definitely up. Parkes, then Colonial Secretary of New South Wales, took the opportunity at one of the many intercolonial conferences to press for greater co-operation between the colonies. As he informed his audience, 'the time has arrived when these colonies should be united by some federal bond of connexion'.⁴⁴

The history of the Federal Council is often relegated to a passing footnote on the way to the Constitutional Conventions of the 1890s.⁴⁵ While it is easy to dismiss it for its failures, the events surrounding the Council highlight many of the forces surrounding the movement towards Federation, not the least of these being the antics of Henry Parkes.

After the Postal Conference Parkes introduced a Bill for the establishment of a Federal Council into the NSW Parliament. The Act was sent to the Secretary of State for the Colonies, the Duke of Buckingham, who rejected it because of its lack of generality. The Bill limited itself to a narrow band of federal issues and would not provide the basis for a larger union of the colonies.⁴⁶

Parkes continued his push for the Federal Council at two intercolonial conferences held in 1880 and 1881 in Melbourne and Sydney respectively. At the Sydney conference he introduced a Bill and a Memorandum on the issue of the Federal Council. As in Melbourne fourteen years earlier, Parkes cautioned that 'the time [has] not come for the construction of a Federal Constitution with an Australian Federal Parliament'. However, the time *was* ripe, he believed, to take an intermediate step and establish a Federal Council.⁴⁷ When the conference discussed the Bill it ended in deadlock. Minor procedural amendments were put by South Australia that resulted in New South Wales, South Australia and Tasmania supporting them and Victoria, Queensland and New Zealand rejecting them.⁴⁸ As had been predicted, the divergent economic policy of the colonies became a stumbling block. To demonstrate the lack of support for uniformity of fiscal policy between the colonies, Victoria proposed that the revenue from the sale of land should be transferred to the Council. The resolution was lost, with only Victoria supporting the motion.

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The idea of a Federal Council, however, was not dead. In Queensland the fear of the territorial aspiration of the French and the Germans sparked concern about the safety of the New Hebrides.⁴⁹ In March 1883 Henry Majoribanks Chester, the north Queensland magistrate, was dispatched by the Queensland Premier, Sir Thomas McIlwraith, to annex New Guinea.⁵⁰ This audacious move was later to be disowned by the British Government, but it initiated yet another intercolonial conference.⁵¹ This conference debated the strategies needed to counter the perceived threat of foreign powers. Samuel Griffith proposed that a 'Federal Australasian Council should be created' to deal with matters such as 'Marine Defences', 'Matters affecting the relations of Australasia with the islands of the Pacific', 'The prevention of the influx of Criminals', 'Quarantine', and 'matters of general interest ... referred to it' by the colonial legislatures.⁵² A committee was established and Griffith drafted a Bill to constitute the Federal Council of Australasia.⁵³ The conference successfully petitioned the Imperial Parliament to enact the *Federal Council of Australasia Act 1885*.

Just as the prospects of the Council were looking up, New South Wales ensured that it would be wrecked from its inception: it ensured that it had limited powers and then refused to join it.⁵⁴ The arguments against joining the Council were put by no other than Sir Henry Parkes. As Hirst notes, '[h]e was out of office and had played no part in the 1883 Convention. He himself had proposed the federal council in 1881, but now he claimed that the Federal Council would impede the formation of a true federation'.⁵⁵

The Federal Council was a small body having two representatives from each of the participating colonies. Between 1886 and 1899 it met eight times in Hobart and debated and passed legislation of mutual interest such as civil process, fishing, naturalisation and testamentary Acts.⁵⁶ Lacking the support of New South Wales and South Australia (the latter joining briefly between 1888 and 1890) and weakened by having no permanent secretariat or revenue-raising powers, the Council met without great success. However, it did provide some important signposts on the way to Federation. The means by which the Council was established endorsed the continuing role the Imperial Parliament would have on the development of Australia's constitutional landscape. It provided an opportunity for federalists from around the country to meet and exchange ideas and maintain links as a means of assisting the ultimate goal of a large union. Ironically, its failure also 'provided a useful model of how *not* to go about federating'.⁵⁷

In the terms of the *Federal Council of Australasia Act* the Australian drafters established a number of powers dealing with their 'common interest' which would be replicated in the Commonwealth Constitution.