Chapter Five
South Australia and Federation

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When the Centenary of Australian Federation was being commemorated in Adelaide, public figures as different as Geoffrey Blainey and John Bannon pointed out that, in the great referendum of 1899, almost 80 per cent of the enfranchised South Australians who had expressed an opinion on the draft Constitution for an Australian Commonwealth had voted "Yes". Yet in their enthusiasm for celebrating the anniversary of what many regard as the birth of the Australian nation, virtually all speakers at Centenary of Federation activities in this part of the country either neglected or overlooked two important considerations.

First, as everyone should know, at the end of the 19th Century the people had voted for federation, not unification. Second, and this is less well understood today, disenchantment with what had been done set in very quickly in South Australia. Both phenomena merit attention. A third object of the present paper, included because I believe it helps illuminate the others, is to give an indication of some of the contributions South Australians made to the creation of the Commonwealth.[1]

In the last decades of the 19th Century, South Australians exhibited little of the anxiety Queenslanders felt about the establishment of a German colony in New Guinea. Nor did they share the paranoia many people in Melbourne and Sydney developed about the possibility of an influx of thousands of expirees and escapees from the French penal settlement in New Caledonia. For most South Australians, the main attraction of Federation was the prospect of free trade between the Australian Colonies.

Victorian protectionists had imposed a tariff of up to 450 per cent on South Australian wine, to compel all but the wealthiest of Melbourne's wine-lovers to imbibe nothing but their own Colony's product. Large-scale South Australian engineering works, such as Martin's at Gawler and Shearers' at Mannum, were securing significant sales of their locomotives and farm machinery to buyers in the other Colonies. Everyone having some connexion with those industries expected yet greater prosperity if the intercolonial tariff walls came down. It was also widely believed that, without Federation, if New South Wales should turn protectionist like Victoria, and then build its own railway line to Broken Hill, South Australia's very valuable trade with that promising new city would be lost.

For these and similar considerations, in 1888 the South Australian branch of the Australian Natives' Association, under the presidency of former Premier Sir John Bray, made the effort of persuading that organisation's branches in other Colonies to agree to the holding of an Australian Conference of ANA delegates to consider the best scheme for establishing a federal government and Parliament. Thus South Australians initiated Australia-wide discussions leading to a national conference (chaired by Bray) on the provisions that ought to be in a federal Constitution. They took this important step eleven months before Sir Henry Parkes, still revered in other places as "the Father of Federation", made his first moves along similar lines in New South Wales.[2]

Likewise, at a later gathering, the crucial Australasian Constitutional Convention of 1897-98, which settled most of the essential features of the draft constitutional instruments subsequently put to the voters in each Colony, all the delegates were for federation. Not one advocated unification. Indeed, it was resolved, without dissent, that the first condition for the creation of an Australian Commonwealth was:

"That the powers, privileges, and territories of the several existing colonies shall remain intact,

except in respect of such surrenders as may be agreed upon to secure uniformity of law and administration in matters of common concern".[3]

The ideas embodied in this resolution remained a central theme throughout the preparation of the Constitution. They show that when present-day Premiers claim that the federation process created a concept of States' rights, they are not guilty of "rewriting history", as Mr Paul Keating used to claim, but simply stating a fact.

Even the most militantly left-wing of all the Constitution-makers, South Australia's Dr John Cockburn, maintained that the preservation of States' rights "was the best guarantee of democracy", because "Government at a central and distant point can never be government by the people".[4] The founders of what became the South Australian branch of the Australian Labor Party shared his views. The first election manifesto issued by what was initially called the United Labor Party declared:

"With the idea of a federated Australia now so prominently before us we are in full sympathy".

It is worth noticing that in the next sentence of that document its authors went on to stress:

"No scheme proposed for the achievement of the great idea will receive our support unless the interests and principle of local self-government for South Australia are protected and conserved".[5]

Because the thinking of everyone participating in the Constitutional Convention of 1897-98 paralleled this, the Constitution of the Commonwealth gave the federal Parliament defined and limited powers. Only a very few of these, such as the power to levy customs and excise, and the power to coin money, were granted exclusively to the Commonwealth. The majority of the powers conceded, called concurrent powers, could be exercised by the State Parliaments as well, and in some fields, such as marriage and divorce, half a century passed before the federal legislature began to act. The new Constitution, however, provided that if an inconsistency emerged between federal legislation, on a matter duly within the Commonwealth's ambit, and State legislation on the same topic, the Commonwealth law would prevail (s. 109).

Because authority to legislate on everything else, such as

hospitals,
housing,
factories,
the pastoral industry,
schools,
roads,
wharves and jetties,
bridges,
government-owned enterprises such as saw-mills and railways,
other modes of transporting people and goods,
exploration for and the mining of metals, petroleum, coal and other minerals,
fisheries,
forests,
sewerage,
crime,
electricity and gas supplies,
most industrial matters,
the learned and other professions,
universities, and
national parks, public libraries, museums and art galleries,

remained with the States, the Commonwealth government was expected to be a relatively small operation.

As late as 1932, when delivering his judgment in the first *Garnishee Case*, Mr Justice Evatt claimed:

"The States have exclusive legislative authority over all matters affecting peace, order, and good government as far as such matters have not been made the subject of specific grant to the Commonwealth. And the authority of the States covers most things which touch the ordinary life and well-being of their citizens".[6]

That had certainly been the founders' intention. Yet this quotation shows that, even when he was a High Court Justice and still in his thirties, Evatt was not a source to be relied upon, for the point made in the first of those sentences had already ceased to be true. In 1929 a Royal Commission on the Constitution of the Commonwealth had found that federal authorities were already interfering in matters the Constitution had left to the States. For example:

- The Commonwealth had used its power to tax to pass an Act intended to bring about the subdivision of large estates;
- It had invoked its power to legislate on trade and commerce with other countries to claim a right to prohibit the export of goods unless they are manufactured according to conditions it approves;
- The Commonwealth could admit goods purchased by, and therefore the property of, State governments on condition that they be used in a manner prescribed by the Comptroller-General of Customs, and it could enforce such conditions by a bond;
- Using its power to legislate with respect to conciliation and arbitration, the Commonwealth had set up a Court which could override State laws and fix standard wages and hours;
- The Commonwealth had imposed unwelcome conditions on a loan to the State of South Australia for forestry purposes; and
- Believing its defence or its trade and commerce powers gave it sufficient authority, the Commonwealth had influenced policy in all the States by attaching a string of conditions to grants made under its *Federal Aid Roads Act* 1926.[7]

Those precedents, so strongly complained about in the 1920s, have been followed *ad nauseam*. This scarcely needs illustration, but one instance has given special annoyance in Adelaide: although the Constitution left mining exclusively to the States, the Commonwealth has used export controls and foreign investment rules to exert a major influence on the development of South Australia's mineral resources, especially in relation to uranium.

At the present time, there are hardly any areas left where the States can be said to have "exclusive legislative authority". Canberra has asserted power to regulate, to a greater or less extent, most of the matters which the makers of the Constitution, and the people who voted for its adoption, thought they had reserved to the States. Many federal politicians have claimed that the national interest demands centralised decision-making on all important matters. They also say that technological advances in transport and communications, together with a growing sense of national identity, legitimize the Commonwealth's rise to a dominant position.

Their pleas have been countered by complaints that the people of each State have already lost too much of their former capacity to manage regional affairs in their own way. Before the Australian federation was fifty years old, the second South Australian Premier to bear the name Thomas Playford (he was the one who held that office from 1938 until 1965, and who became Sir Thomas Playford, GCMG), drew attention to the problem in a dramatic way. In an address to the fifteenth Summer School of the Australian Institute of Political Science, meeting at Albury in January, 1949, he declared that the shift in the balance of the Constitution had:

"… gone beyond anything contemplated by those who created the Federation. It has gone to such an extent that the States, though still as a matter of law sovereign bodies within their appointed sphere, have, in fact, become completely subservient to the Commonwealth. The organisation which the States created is now devouring them. Australia is ceasing to be a federation of independent groups of people, and is being changed into a unitary State".

Playford offered many illustrations of these propositions, noting that federal politicians of all parties, with the support of the High Court, had shared in exploiting the central Parliament's powers, and seizing additional ones, to a degree no one had foreseen, with the result that they were "destroying our Federation". He was especially annoyed that prominent right-of-centre members of the House of Representatives, including Opposition Leader (Sir) Arthur Fadden, (Sir) Eric Harrison and Sir Frederick Stewart, plus four Opposition Senators, had assisted in passing the Curtin Labor government's legislation which gave the Commonwealth government a monopoly of collecting income tax. Curtin's was the federal Ministry that, during World War II, had raised the top marginal rate of income tax to nineteen shillings in the pound, that is, 95 per cent, thus making it politically impossible for the States to continue raising their own income taxes.[8]

Playford's complaint, uttered more than three years after the war had ended, was that Curtin, with his Treasurer and successor Ben Chifley, had not only contributed to the States' receiving a substantially smaller portion of the total revenue from taxation, but had also reduced the States' capacity to make their own decisions about spending. This second element in the diminution of regional independence had been achieved by extension of that practice of making loans, grants and subsidies to the States for specific purposes, and by making these handouts subject to conditions laid down unilaterally by the federal authorities.[9]

Many can recall Playford's grandstanding about the States' loss of their financial independence. Even more will recall our journalists' description of Premiers' Conferences as the annual performance of the Beggars' Opera. Yet Dr AJ (Jim) Forbes, a former University of Adelaide political scientist who became a Minister in the Menzies, Holt, McEwen, Gorton and McMahon federal governments, has illustrated the other side of the coin. He has reminisced:

> "It was Playford who developed into an art form the techniques of power without responsibility – [the] when-in-doubt-blame-the-Commonwealth syndrome – the very antithesis of the responsibilities which should be borne by a so-called sovereign State. Since Playford, it has become mandatory for successful Premiers to behave in the same way. Nothing has done more to undermine responsible government in Australia, and with it the status and standing of the political process and those who practise it".[10]

It must be added that some State Ministers have been too ready to abandon rational policies whenever a Commonwealth carrot has been offered them. Former front-benchers from both sides of politics have told me that they believed the rules South Australia's Parliament had approved for speed limits for cars on country highways (110 kph) and blood-alcohol levels for adults possessing an unrestricted driving licence (0.08) were not just eminently reasonable but, as far as they could tell, had been considered appropriate by most of their electors. Yet it took only a very modest (and in annual budgetary terms, an insignificant) financial inducement from Canberra for South Australian Ministers to agree to abandon those defensible home-made rules and conform to the lower limits deemed appropriate in the more densely populated eastern States, where highways are more congested.

Meanwhile, there are many fields where State Ministers have foolishly allowed Canberra to assume a large share of responsibility for raising and allocating the necessary funding for local institutions, such as hospitals and universities. I use the word "foolishly" because, in becoming dependent on loan and grant monies raised by another level of government, those Ministers have known full well that he who pays the piper calls the tune. The practice has also led to indefensible extravagances. In the case of South Australia, for example, it has yielded the absurdity of a State with little more than a million people having two fully fledged medical schools, two law schools and three engineering schools.

After thirty-five years of whingeing about the loss of the States' right to tax incomes, the Premiers were invited by Prime Minister Malcolm Fraser to resume that power in the late 1970s. Our then Premier, Don Dunstan, and all but one (Western Australia's Sir Charles Court) of his counterparts

elsewhere were not interested. While they managed to find all manner of excuses, their responses made it clear that, while they enjoyed being able to spend money, they did not want either the responsibility or the odium of having to raise most of it themselves. Twenty years later, their successors agreed to accept the proceeds of the federal government's Goods and Services Tax.

The result has been that Australia offers a stark contrast to Canada and the United States, in that our States are dependent upon handouts from Canberra for more than half their expenditure. The States and Provinces in North America still manage to raise more than 80 per cent of their annual budget outlays by their own revenue-raising measures. As well as giving the regional governments in those countries a far greater degree of autonomy, it makes them far more accountable to the people than our State governments are. Moreover, the only "growth" taxes left to the Australian States have been regressive forms of taxation, such as pay-roll tax (which has served not only to limit the competitiveness of Australia's exports, but also to discourage many employers from expanding their businesses if it means taking on more staff), and those most regressive of all taxes, the taxes on gambling, which economists have demonstrated impact most severely on the poor.[11]

It is a long time since South Australia produced a statesman. Matters stood very differently in the 1890s. Although, financially, that was an era of deep depression here, politically it was a golden age. This explains why, in the drafting of the Constitution of the Commonwealth, South Australia's representatives had a most significant impact, exercising an influence that was out of all proportion to their province's wealth and population. Their ascendancy sprang from their wide experience in public affairs and their involvement in previous movements towards Federation. Many of their achievements have been of lasting significance.

For example, the Thomas Playford who was South Australia's Premier in 1887-1889, and again in 1890-1892, secured an acceptable solution to what had seemed an irresolvable conflict between the more populous and the less populous Colonies on the vexed question of the Senate's powers when handling money Bills. Without that compromise the movement for Federation would have foundered.

Playford's protégé, Charles Cameron Kingston, QC, Premier from June, 1893 until December, 1899, had been one of the very first people to produce a draft for a federal Constitution. It was based on one from the pen of Tasmanian Attorney-General, Andrew Inglis Clark. Eighty-six provisions in Clark's draft found recognizable counterparts in the final Constitution. But Clark's expression was rather verbose and sometimes convoluted. Kingston's was relatively terse and straightforward. Thus it was his rewriting of many of Clark's proposals that ended up usefully in the Constitution as finally promulgated.[12]

But Kingston also introduced additional clauses. These, for example, gave the federal Parliament power to legislate on lighthouses, beacons and buoys; to make paper money legal tender; and to give federal judges original jurisdiction to determine disputes about property that involved the laws of more than one State. More importantly, he took up the ANA's idea that federal ministries be obliged to operate under the system of responsible government, and secured the constitutional provision ordaining that no one could be a federal Minister for more than three months without also being a member of the federal Parliament.

Kingston chaired the Constitutional Convention of 1897-98. Thus he could not participate in the debates at its plenary sessions. Yet he was especially active in the Committee stages (when his fellow South Australian, Sir Richard Baker, was in the chair), where the detailed clause by clause debates and decisions took place. In 1900 he went to London with Deakin (Vic), Barton (NSW) and Fysh (Tas) to ensure that the *Commonwealth of Australia Constitution Bill* was enacted by the Imperial Parliament with the least possible alteration. In 1901 he became the Commonwealth's first Minister for Trade and Customs. In that role he was responsible for two things which reflected the spirit of that age: he was the originator of the White Australia Policy and the architect of the protective tariff.

Sir Richard Chaffey Baker succeeded in inserting, in s.24 of the Constitution, the provision that the

membership of the Senate should in perpetuity be half that of the House of Representatives. This has often irked centralists, but it has been of great benefit to the people of the less populous States. Publicly, most Senators have failed to fulfil their expected role of championing the interests of the States they serve. Their performance behind the scenes has been rather better. In ministries of all colours, beyond the closed doors of the government's party room, the Senators from the less populous States have often been able to ensure that their constituents' needs are neither submerged nor neglected.[13]

President of South Australia's Legislative Council from 1893 to 1901 and appointed a QC in 1900, Baker was elected the first President of the Senate, and in the course of the next five years did a great deal to shape the way it has gone about its business ever since. Not satisfied with the Standing Orders that governed proceedings in the House of Lords or colonial upper houses, he won support for having his own presidential rulings accepted as the supreme common law governing Senate procedure. He resolved many problems by reference to the rationale for the Senate's existence. Because it was intended to be the States' House, he held that it had a higher responsibility than did second Chambers elsewhere in the Empire, and was therefore entitled to depart from their rules and practices. For these and similar achievements, the present Clerk of the Senate, Mr Harry Evans, has accorded him heroic status.[14]

Dr (Sir) John Cockburn,[15] who had been Premier for fourteen months in 1889-1890, firmly believed that the people must be sovereign. It was he who first insisted that the legitimacy of the proposed Constitution should be established by its being endorsed in a referendum. Furthermore, he was successful in arguing that the people must remain in control once the Constitution was promulgated. As a result, whenever federal governments seek to amend the Constitution, all who are enfranchised are allowed to express their views directly, without being obliged to delegate their power of voting to anyone else. Cockburn rejoiced that in South Australia women had gained the right to vote in 1894, and that, in the same decade, missionaries had been busily encouraging Aborigines to get on the electoral rolls. Cockburn argued that both these groups should carry those rights into the federal arena.

Yet it was Cockburn's fellow South Australian, (Sir) Frederick Holder, Premier in 1892 and again in 1899-1901, who must have the credit for overcoming vigorous opposition and succeeding in inserting what became s.41 of the Constitution. It enfranchised, for federal elections and referendums, and from the moment the Constitution came into operation, everyone who had a right to vote for the lower House of their State Parliament. Holder was elected the first Speaker of the House of Representatives. He did a superb job in that role until his sudden death (which abruptly terminated an all-night sitting) in July, 1909. It was a period when the Parliament was at least as fractious as it has ever been since. Nevertheless, in contrast to present practice, he was respected by all seven federal governments that held office in that time: the Barton and Deakin (2) Protectionist Ministries, the first two Labor Ministries, led by Watson and Fisher, the Reid-McLean Free Trade-Protectionist Coalition, and Deakin's third Ministry, a Protectionist-Free Trade-Tariff Reform fusion. Holder had been appointed KCMG in 1902.

Sir John Downer, QC, the son of an immigrant tailor, through brightness and application to study had won free secondary schooling and training for the legal profession. He served as Premier in 1885-1887, and again for eight months in 1892-93, accepting a KCMG when representing the Colony at Queen Victoria's Golden Jubilee celebrations.

As I mentioned briefly in a paper presented at this Society's seventh conference (June, 1996), as a Constitution-maker Downer played a major role in scotching a proposal that, in filling the office of Governor-General of Australia, the Monarch should be obliged to commission someone elected by the Australian people instead of a person recommended by a Minister. He realized that each candidate for election to the office would be asked to offer a policy, and that the successful person would consequently have a commitment to honour it. Thus an elected Governor-General, possessing a mandate from the people, could become a rival to the Prime Minister, developing pretensions to real power and authority instead of always acting on the advice of Ministers. This would militate against the *de facto* Head of State's

serving as the dignified element in the Constitution. The holder of the office should be someone who is, or who accepts that he or she is obliged to rise, *above* politics and be able to act as an impartial umpire if one is needed.

Downer's argument carried the day by thirty-five votes to three. Precisely the same concerns became central to debates at the Constitutional Convention held in Canberra 107 years later, about the appointment, role and powers of the President, if Australia were to become a republic. Downer was one of the three members of the Drafting Committee appointed at the Convention of 1897-98. Chaired by his friend Edmund Barton, it did its work in Sir John's North Adelaide home, which is now part of St Mark's University College.

James Howe had served as a Minister in the Downer and Cockburn governments. After a long struggle, which continued through the Adelaide, Sydney and Melbourne sittings of the Convention of 1897-98, he secured the insertion, in s.51 of the Constitution, of a clause empowering the Commonwealth to provide invalid and old-age pensions. He pointed out that a national government alone could meet the needs of the tens of thousands of mining, pastoral and fruit-harvesting workers, who had to move from Colony to Colony in pursuit of employment. Their migratory habits would continue to prevent them from acquiring pension entitlements within any one Colony or State.[16] His persistence in arguing along these lines finally won acceptance of his proposal.

At the time of Federation, South Australia was more than twice as large as it is today, because the region we call "the Northern Territory" had long been part and parcel of the central Colony. Its adults had been entitled to vote for both Houses of the South Australian Parliament. For more than fourteen years one of its two representatives in the House of Assembly was Vaiben Louis Solomon, the only Jew who has ever headed a Ministry in Australia, albeit briefly, in 1899. Since 1863, Empire-building parliamentarians in Queensland and New South Wales, coveting the tropical portion of South Australia, had kept airing doubts about the validity of the instruments by which the Queen had transferred control of it from Sydney to Adelaide.

To settle the matter once and for all, Solomon managed to have inserted into the definition of "the States", in what became s.6 of the *Commonwealth of Australia Constitution Act* 1900, a declaration that "South Australia" includes "the northern territory of South Australia".[17] The promulgation of this definition within the text of an Imperial statute put an end to all controversy on the point before the Commonwealth was inaugurated. Solomon also helped to shape the provisions for altering the Constitution by referendum (s.128) and for dealing with parliamentary deadlocks (s.57).

The youngest of the South Australians elected to the Convention of 1897-98 was a Catholic barrister, Patrick Glynn. He was dubbed "the encyclopaedia of the Convention", for sharing his learning not pompously but with wit. He is chiefly remembered for the insertion of a reference to Almighty God in the Preamble to the *Commonwealth of Australia Constitution Act*. However, he also merits honour for joining Kingston in helping to save, by the barest of majorities, Playford's celebrated compromise about the Senate's powers regarding money Bills, without which all hopes of Federation would have been wrecked for at least a generation.

(Sir) Josiah Symon, QC, leader of the South Australian Bar and a thorough conservative, chaired the Convention's Judiciary Committee, which prepared the constitutional provisions permitting the federal Parliament to set up a High Court and to restrict appeals to the Judicial Committee of the Privy Council in London. He contributed to the solution of many contentious issues, and fought a great battle to secure South Australia's right to a share of the waters of the Murray and its tributaries (after delegates from New South Wales had insisted that they were entitled to impound "every drop" of rain falling on their territory).[18] However, all that the South Australians could managed to achieve on this topic was a constitutional right to "the reasonable use of the waters of the rivers for conservation and irrigation" (s.100). Symon was also very active, as South Australian and federal president of the Federation League,

in campaigning for a "Yes" vote when the Commonwealth Bill was put to the people. He was appointed KCMG on the day the Commonwealth was inaugurated (1 January, 1901), served as a Senator from 1901 until 1913, and was Attorney-General in the Reid-McLean Ministry.

The South Australian delegates played an important role in ensuring that each State should continue to have a Governor. The Imperial government's then Secretary of State for the Colonies, Joseph Chamberlain, hoped that Federation would mean that in future he would only have to deal directly with one person in Australia, the Governor-General. Meanwhile, some Australian politicians had seen Federation as an opportunity of downgrading the importance of Governors by following the Canadian model and having them, not just redesignated "Lieutenant-Governors", but also commissioned by the Governor-General instead of by the Queen.

The radical liberals, Cockburn and Kingston, united with the conservatives, Downer and Symon, in vigorously opposing such a development. They supported an observation Sir Samuel Griffith had made in 1891, when he was still Premier of Queensland, that the title "Governor" should continue to be used because it was "the proper term to indicate that the States are sovereign". The South Australian Constitution-makers stressed that the Governors must not in any way be representatives of the Governor-General or subordinate to the national government. They should remain entitled to communicate directly with Imperial authorities. This would underline their independence from federal Ministers. Moreover, as in the case of the Governor-General, to save them from the Scylla of becoming dangerously powerful within their domain and the Charybdis of being mere party puppets, they must continue to be appointed, not given any mandate by being elected by the people. The Convention of 1897-98 accepted these propositions by very decisive majorities.[19]

Equally interesting was the South Australian response when the matter was re-opened in the early 1970s by Gough Whitlam. One of the many things that Labor Prime Minister did to upset all State governments was to hold unilateral discussions with what he used to call "the Palace" about Australian relations with the Crown. He suggested that the Queen should assign to the Governor-General her prerogative power to appoint State Governors. Another idea he canvassed was that, when advice on a State matter was being sent to the Queen, it should be forwarded neither through British Ministers (the former practice), nor directly to her (the present practice), but through federal Ministers.

Don Dunstan, who was Premier of South Australia at the time, was, just as much as his predecessors in that office had been, utterly opposed to State Governors being made subservient to anyone in Canberra. As for Whitlam's proposals regarding the line of communication with Her Majesty, Dunstan later reminisced:

> "This, of course, provoked a bitter reaction, and so it should. Since the executive powers of Government are divided between the States and the Commonwealth, it would be quite improper, and would make the Westminster System impossible to operate in the States, were the Federal executive to be privy to and advise consent to or refusal of the recommendations of the State executives".[20]

It must be acknowledged that, while South Australians achieved many worthwhile things during the inter-colonial debates of the 1890s, several of their contributions to the framing of the Constitution of the Commonwealth had disappointing outcomes. (Sir) John Gordon, sponsor of the *Women's Suffrage Bill* enacted in 1894, served in four Ministries before Federation.[21] As a Convention delegate his special interest was interstate trade. He initiated the moves which led to the inclusion in the Constitution of the Commonwealth of ss 101-103. They authorized the setting up of an Inter-State Commission, with wide powers to administer the trade and commerce provisions of the Constitution and all laws made under them. His intention was that the Commission would enforce the principles of equality of trade, regulate the river trade, and adjudicate disputes about railways and freight rates, not only to promote fair dealing, but also to ensure that the development of transport patterns took account of national considerations.

It was a very sensible idea, but one that was to be stymied, root and branch, by the High Court of Australia. In *New South Wales v. The Commonwealth* (the *Wheat Case*) (1915), handing down one of its most regrettable decisions, the Court by a majority of two (Justices Barton and Gavan Duffy strongly dissenting) so effectively emasculated the Inter-State Commission that it was allowed to become defunct when the terms of its original members expired in 1920.[22]

The majority judgment was the fruit, not of the Constitution-makers' intentions, but of the adoption, by three of the Court's newer Justices – (Sir) Isaac Isaacs, (Sir) George Rich and (Sir) Charles Powers – of the 18th Century Baron de Montesquieu's conceit that it was desirable to have a complete "separation of powers". As the best legal historian we have had in Australia, Professor Geoffrey Sawer, noted:

> "There is no evidence that the Federal Fathers in general had the slightest desire to imitate the French theory of separation of powers, which was based upon a misinterpretation of English practice, nor the American theory which was based upon a misinterpretation of the French".[23]

That conclusion has been cited with approval by a more recent law Professor at the Australian National University, Michael Coper.[24]

It should have been obvious to the majority on the bench, as it was to Justices Barton and Duffy, that any notions about a separation of powers were not merely contrary to the thinking of those who framed the Constitution, but also alien to the historical development of the Australian variety of democracy. It is, for example, of the essence of "responsible" government that most members of the Executive must be members of the legislature. Likewise, Supreme Court judges had sat in the upper Houses of the Tasmanian and New South Wales Parliaments, just as senior members of the judiciary still sit in the United Kingdom's House of Lords. Moreover, law-making has never been confined to Parliaments. Since the *Wheat Case*, the High Court itself has been an increasingly productive fount of judge-made law.

It should also be remembered that through the decades when Sir Alfred Stephen had served as Chief Justice and President of the Legislative Council of New South Wales, he had – in his third capacity as Lieutenant-Governor – presided in the Executive Council whenever the Governor was absent or ill. In the course of the 20th Century, many other individuals were to hold office concurrently as a State's Chief Justice and Lieutenant-Governor. Indeed, one long-serving judge, Sir Mellis Napier, showed such a nice contempt for the theory that judicial and executive power should never be exercised by one person that, between 1942 and 1967, he administered the government of South Australia on 126 occasions, totalling seven years.[25] And until 1996, every Governor of South Australia was required, on assuming office, to take the judicial oath as well as the oath of allegiance. But leaving aside the alien notions Isaacs, Rich and Powers tried to read into our fundamental instrument of government, the High Court's decision in the *Wheat Case* did more than nullify part of the Constitution. It limited the Commonwealth's capacity to ensure that national considerations were given adequate attention as transport patterns evolved.[26]

Again, the implementation of James Howe's hopes for an aged and invalid pensions scheme went awry. The contest about his proposal had not been about the desirability of giving pensions to the sick and the aged, for that was already being done at the colonial level, but whether such a power ought to be left to the States, as a branch of their charitable systems, or given to the national legislature, as was the case in Germany, where there were some 12,000,000 contributors to a national insurance scheme. Howe had argued for emulating the German model, submitting that it was the only effective means of ensuring that Australians "need never fear the pauper's lot". He declared:

> "I would compel every able-bodied man, in the heyday of youth, when he has the means, to make a compulsory contribution towards a fund, out of which provision would be made for his old age. That is another reason why the Federal authority should take it instead of the State, because within the boundaries of Federated Australia a law can be enacted compelling that individual, who is to

receive the benefit, to contribute to the fund in which he is to participate".[27]

As it happened, when the Commonwealth exercised its power to introduce a pension scheme, Prime Minister Alfred Deakin decided to play Santa Claus and fund it from the Commonwealth's surplus revenue, rather than by implementing Howe's plan that everyone who had an income should be required to contribute to a national insurance scheme.[28] The result was that Australian aged and invalid pensions have always been means-tested and very modest.

There were other disappointing outcomes. As chairman of the Finance Committee at the Convention of 1897-98, Holder had been the principal author of the crucial constitutional clauses governing the Commonwealth's financial arrangements. In the first years of Federation, many South Australians thought these provisions a great achievement. Subsequent events have given a different perspective. By 1961 a South Australian Crown Solicitor, Albert Hannan, QC, could brand the financial clauses:

> "… a fatal flaw in the Constitution ... a tragic error, fruitful of much avoidable hostility between the Commonwealth and the States, and leaving a serious maladjustment in their financial relations".[29]

Why the change in opinion? Customs and excise duties had been the major source of revenue for the colonial governments. To achieve uniformity in them, and the still greater goal of intercolonial free trade, the Convention delegates had agreed that those duties would in future be set by the federal Parliament and collected by the federal Government. All the Constitution-makers believed that the resultant revenue would be far greater than the central administration would need. They had also agreed that there must be some mechanism for preventing federal extravagance. Moreover, it was clear that the States could not continue to fulfil their obligations if deprived of most of their income.

Proposing that the Commonwealth should return to the States a minimum percentage of the customs duties collected, Holder initiated what became s.87 of the Constitution. His suggestion was that the proportion to be handed over should be 70 per cent. That was accepted at the Adelaide session of the Convention of 1897-98. At the next session, in Sydney, Tasmanian Premier Sir Edward Braddon, strongly supported by Holder (whose Finance Committee had by then completed further work estimating the federal government's financial needs), succeeded in lifting the States' minimum share from 70 to 75 per cent. Political leaders and journalists in New South Wales, which had the lowest tariffs, consistently attacked this clause, rightly fearing it would prompt federal politicians from other States to set the required uniform tariff higher than the people of New South Wales would wish. But, because of Sir Edward's amendment to it, they now dubbed it "the Braddon Blot".

In the campaigning leading up to the first New South Wales referendum on the draft Constitution, this clause was the main target of criticism from the "Anti-Billites" in that Colony. The result was that the number of "Yes" votes, although a majority of those cast, did not meet the target prescribed by the New South Wales Parliament. When the Premiers met in secret conference in Melbourne early in 1899, to consider what to do in view of the outcome of the New South Wales poll, South Australia was represented by Kingston. He went along with those who held that Premier Reid should be pacified by limiting the compulsory operation of s.87 to the first ten years of the Commonwealth's existence. After that, it would be up to the federal Parliament to decide what to do with the customs and excise revenue.

After Federation, Liberal and Labor Prime Ministers began thinking about ways of currying favour with electors by using the revenue for their own, Commonwealth, purposes. To help meet the problems which a loss of the States' entitlements, after 1910, would cause, especially in the less populous States, in 1899 the Premiers had inserted a new clause, which became s.96 of the Constitution. It authorized the federal Parliament to "grant financial assistance to any State on such terms and conditions as the Parliament thinks fit". These two changes removed the principal constitutional guarantee of each State having the financial resources to continue to be able to settle local matters in its own way. But everyone

who queried the Premiers' alterations, before the final round of referendums was held, was told that the Senate would ensure that a federal distribution of power and resources would always be upheld. The South Australian whose reputation must bear some responsibility for the unhappy long-term outcome of s.87 was clearly not Holder, but Kingston.

The second string to Holder's bow had been to secure acceptance of what became s.94 of the Constitution, authorizing the monthly payment to the States "of all surplus revenue of the Commonwealth". This led State governments to believe they had a constitutional right to receive regular distributions of all federal revenue not actually expended for Commonwealth purposes. But by 1908, Prime Minister Alfred Deakin and his Treasurer, Sir William Lyne, perceived that there was a way of evading the obligation. In that year they managed to persuade the federal Parliament to pass a *Surplus Revenue Act*. This purported to permit the Commonwealth's surplus revenue to be put aside into a trust account, with the object that it would ultimately be used for federal rather than State purposes, that is, for Deakin's aforementioned invalid and old-age pensions. The validity of the *Surplus Revenue Act* 1908 was immediately challenged in the High Court, but the Justices upheld it. They all agreed that putting money aside in a trust fund was "expenditure". Consequently, that device has been in use ever since.

In the first eight years of Federation, South Australia had received, on average, 80 per cent of the customs and excise revenue that the Commonwealth collected in the State. For the next two years, each State's share fell to the minimum specified in s.87. That reduced allocation amounted to 50 shillings per head of population. Thus it had remained a significant element in the State's budgeting. The Price-Peake Labor-Liberal Coalition Ministry in South Australia became as anxious as all the other State governments about what was to happen after 1910.

By March, 1909, when the Premiers met in Hobart for what had by then become their annual conference, they had the purpose of organizing resistance to what they called "the encroachments of the Commonwealth". Andrew Fisher, heading the second Labor federal government, reassured them that it was not his intention to seize the whole of the customs and excise revenue when the Braddon Clause expired. But he would give no clue as to what he had in mind, and left early. This stirred the Premiers to reach the first definite proposal they had been able to agree upon since Federation. Five of them were Liberals, as was Peake, representing South Australia as Acting Premier. They demanded that the States should receive a fixed proportion of the customs and excise revenue after 1910, but proposed that it should be not 75 but 60 per cent. Their modesty was an acknowledgment that their responsibility for social welfare had been diminished by the Commonwealth pension scheme.

When the Premiers next met in conference, in August, 1909, Deakin was again Prime Minister and Peake had become the Premier of South Australia. Deakin offered a grant of 23 shillings a head. After much haggling, the Premiers were given no option but to settle for 25 shillings, only half the amount they had been receiving since the passing of the *Surplus Revenue Act*. Deakin represented that without this savage cut, the new Commonwealth pensions system could not continue in operation. He threatened that, unless the Premiers yielded, the onus of providing those pensions would be thrown back upon the States – South Australia having been one of the three that had only ever paid pensions to retired judges and certain other people who had been on the public pay-roll.

Now that the eligible needy had been led to expect that they had a right to a pension, the Premiers had no wish to take up the burden of satisfying those expectations. Nor did they want to be seen as having precipitated a termination of a popular social welfare measure. Fear for their own political futures led them to abandon all further efforts to preach the merits of Howe's plan that pensions should be funded by a compulsory contributory national insurance scheme. Thus they accepted Deakin's offer, and the federal Parliament approved the deal.

The second of the Premiers' Conferences held in 1909 can be regarded as the commencement of what advocates of States' Rights call the era of coercive federalism, with all handouts from the

Commonwealth being offered on a take it or leave it basis. It was soon followed by the Commonwealth's entry into the fields which had provided the States with their other main sources of revenue – land tax, income tax, and the taxing of deceased estates – which most of the Constitution-makers had presumed would remain State preserves. Federal Ministers ignored State protests about this development, and Senators lent no support to the representations from all the Premiers. A decade later the attaching of conditions to handouts from federal funds commenced.

The resultant position was nicely encapsulated in an often-told story about Prime Minister Chifley. He is reputed to have ruled, after a vote on one of his proposals at a Premiers' Conference in the 1940s: "Ayes 1. Noes 6. I think the Ayes have it!".

It is ironic that all those talented South Australians who had shared in the framing of the Constitution of the Commonwealth had believed, so far as one can discern from their public statements, that the States, collectively, would be the dominant partners of the Federation, able to curb Commonwealth profligacy. Yet Kingston must have grasped the long-term implications of what he had agreed to at the secret Premiers' Conference of January, 1899, especially after the alarm bells the proprietor of the Adelaide *Advertiser*, Sir Langdon Bonython, rang when the outcome of that meeting became known. For nine decades after 1909, the pre-Federation Premiers' time limitation on the compulsory operation of Holder's and Braddon's s.87, and the Deakin-Lyne device for evading the intent of s.94, were widely regarded as the underlying source of most of South Australia's periodic financial difficulties.

From our various individual perspectives, we are all aware that there are flaws in the way Australian federalism operates at the present time. What has almost completely faded from the public consciousness is the reality that most South Australian voters became disenchanted with Federation even more quickly than did State politicians. It seems that no one – with, once again, the probable exception of Kingston – had anticipated that the first federal Ministry would impose so high a protective tariff on goods imported from overseas.

The price of hundreds of basic commodities, from clothing to pots and pans, matches, rainwater tanks, wire netting and fencing wire, rocketed. Everyone resented the introduction of a far higher impost on tea. And from 1902 onwards, South Australians had to pay more than six times as much for their sugar as they had been used to paying for sugar imported from Java. That startling new impost was the price Queensland's sugar producers had exacted for agreeing to the repatriation of the South Sea Islanders who had been working on the northern canefields. Even so, it was another twenty years before the output of Australia's sugar producers could meet domestic demand. As a result, sugar still had to be shipped in from overseas, but the tariff meant that private consumers now had to pay dearly for it. In this way, the federal Parliament compelled southern families to subsidize the canegrowers and, more particularly, the white cane-cutters who, through industrial action, were most successful in obtaining wage increases.

As Adelaide's foremost creative writer, C J Dennis observed, the burden of that first batch of new imposts fell most heavily on the poor. He was moved to pen a lament expressing second thoughts about Federation. It began:

"When I went fer Federation I was led to understand,
If the States into a Commonwealth was turned,
It was sure to make Australier a peace an' plenty land
An' a sorter paridise fer all concerned.
There's some sees the advantage uv the union, I suppose,
But all thet Federation's done fer me
So fur as I kin see it, is to 'ave the dooty rose
On me baccy an' me sugar an' me tea.

CHORUS

Then it's hi for Federation!
An' a dooty on yer weed,
An' it's one united nation!
An' a tax on all you need.
Oh, it's fewer smokes o'nights!
An' it's drinkin' tea that bites
An' it's raise the price o' lights
With Federation".

With characteristic hyperbole, Dennis went on to suggest that white pastoral workers would be reduced to going about carrying firesticks and smoking gum-leaves. But there was some seriousness in his complaint that "they've done me fer me pleasures, an' it's gettin' past a joke".[30]

In 1902, Patrick Glynn, who had become a Member of the House of Representatives, observed that if the people were again asked to vote on the question of Federation, after twelve months experience of it, it was likely that there would be a majority against it. Lady Tennyson, the wife of the State Governor, in a letter to her mother written in March, 1902, reported several persons telling her more forthrightly that if electors could be allowed an opportunity of reconsidering the matter, "there would not be one single vote in favour" of the Commonwealth. "The people", she added, "say they have been entirely deceived & that Federation is absolutely different from what they were promised".[31] When general elections for the second federal Parliament were held in December, 1903, only 32 per cent of the South Australians on the rolls voted, a sharp difference from the 52 to 53 per cent who voted in Victoria and New South Wales, the States where secondary industry had burgeoned enormously under the protection afforded by the new tariff.

Minority groups were disadvantaged too. A new *Posts and Telegraph Act* 1901 decreed that "only white labour shall be employed … [in] the carriage of mail". There was no attempt to mask the racism that inspired this piece of discrimination. It slipped through both Houses without remark. It slighted not only Aboriginal Australians, but also the Asian camel drivers who had done so much to open up communications in the outback. From Hergott Springs (now Marree, the starting point for the still-famed Birdsville track) alone, they were still operating teams totalling over 2,000 camels in 1901. Even more worked from the northern railhead at Oodnadatta. We can only assume that the Postmaster-General, Queenslander Jimmy Drake, was unaware that one outstanding cameleer and mailman, former Indian Army Sergeant Bejah Dervish, had lately been honoured with a reception and presentation at Adelaide's Government House for his heroic exploits – which had included saving the life of Penola-born white explorer Lawrence Wells – in the Western Desert.

I have mentioned Holder's insertion of s.41 of the new Constitution, guaranteeing the federal franchise to everyone who had a right to vote for the lower House of their State Parliament. Nevertheless, after the first federal election had been conducted – by the States' electoral officers, as the Commonwealth had none at that stage – the Commonwealth's first Solicitor-General, (Sir) Robert Garran, ruled that s.41 meant that only those Aborigines who were actually registered on the electoral rolls on 1 January, 1901 could vote in future federal elections. He ordered that no additional Aboriginal people were entitled to have their names added to the lists. The matter rested there until the 1940s, when the Chifley Government legislated to confirm that Aboriginal people had the right to enrol and vote in federal elections. By that time, of all the "full-blood" Aborigines who had possessed the federal franchise from 1901, there was only one (a South Australian woman) left alive.

For reasons that need not detain us here, the British Empire's supreme appellate tribunal, the Judicial Committee of the Privy Council, was going through a bad period in the 1890s. Sir Josiah Symon was the most outspoken of those who had believed that a better final court of appeal could be established

in Australia. He was bitterly disappointed at the outcome. The first High Court was full of contradictions. Its Justices veered dramatically from a strict legalism that had almost no precedents in Australian judicial practice – thus resulting in judgments of the State Supreme Courts being set aside left, right and centre – to a subjective reliance on their personal understanding of the essential nature of the Constitution they had shared in drafting. This threw, not just State judges, but also the nation's barristers into turmoil and confusion for several years.[32]

Symon believed that too many of the new Court's judgments were wrong. He was especially upset when, in 1911, it determined the long-running dispute about the boundary between South Australia and Victoria. In that case the Justices held, to the astonishment of most of the nation's lawyers, that a boundary defined as a meridian of longitude has no meaning until it is marked on the ground. Hence, they maintained, the line the early surveyors Wade and White had erroneously marked, several kilometres to the west of the boundary specified in two Imperial statutes, two Imperial Orders in Council, and Royal Letters Patent, was the true boundary. Ever since, many have thought that this reasoning was bizarre and indefensible.

By the early 1910s, South Australia's then Governor, Sir Day Bosanquet, an elder brother of leading British moral and political philosopher Bernard Bosanquet, was reporting to the British Secretary of State for the Colonies that, because the High Court's Justices' States of origin could affect their perception of federal issues, justice might be done, but it was unlikely to be seen to be done whenever the State of South Australia failed in any litigation against its eastern neighbours or the Commonwealth, until such time as a South Australian had a seat on the High Court.[33] More than ninety years later, similar grumbles can still be heard, because no South Australian has ever gained a place on that tribunal.

Many parliamentarians who, in the 1890s, had striven earnestly to uphold the principle that everything that could be managed locally ought to be managed locally, became centralists after their move to the federal arena. And as a result of the dominant position federal governments have asserted, centralism has yielded a long list of broken promises. Since 1903, federal politicians have tended to look first to their particular party's interests, which they all too easily claimed were the nation's interests, rather than to their constituents' needs and interests. Meanwhile, others have displayed a genuine though sometimes excessive concern about national interests. Sir John Downer affords a striking example.

After three years in the Senate, Downer returned to South Australia and served as a Legislative Councillor from 1905 to 1915. His performance in that role showed he had been profoundly influenced by his time in the federal Parliament. The change was clearly apparent, for example, in his attitude towards an obligation the Commonwealth had entered into regarding completion of the Transcontinental Railway, to link Adelaide and Port Darwin. In 1907, when South Australia's first Labor Premier, Tom Price, negotiated a transfer of the Northern Territory to the Commonwealth, it was written into the agreement, and into the subsequent South Australian and federal legislation ratifying the transfer, that the Commonwealth would pay the full cost of finishing the construction of that link, by building a line either from Oodnadatta (1,107 km by rail from Adelaide), or from Hergott Springs (further south, but closer to the New South Wales border) to Pine Creek (235 km by rail from Palmerston – the town that was renamed Darwin in 1911).

South Australian Ministers had tried very hard to have written in to the agreement a date for commencement of the work, for they were well aware that construction of the long-promised Trans-Australian Railway (across the Nullarbor, to link Kalgoorlie to Port Augusta) had still not commenced.[34] Prime Minister Deakin, however, refused to be bound to a starting date. The consumptive Tom Price accepted this, in defiance of a House of Assembly resolution that he should not.

Most Legislative Councillors responded by expressing such indignation that it seemed certain that their Chamber would veto the whole package. But Downer delivered an impassioned and remarkably sentimental speech in defence of the Premier's conduct. He suggested that safeguarding South Australia's

interests was less important than letting the "Federal spirit" shape the local Parliament's decision-making. State legislators had no right to dictate terms to a government which must consider the needs of the whole continent. If the Commonwealth accepted the burden of completing the Transcontinental Railway, it must be allowed to choose the starting date in its own good time. He went so far as to insist that people "must trust" the federal government. "It was upon the good faith of the Commonwealth that they had to rely", said Sir John. The Premier's agreement with Deakin was "a national engagement founded on honour". It should be assumed that "honour would be preserved!".

Fatally for the many who wanted the railway, two of Downer's fellow Legislative Councillors accepted his reasoning without perceiving its naivety, and so the legislation scraped through. That was in 1907. Downer must have eaten his words before he died in 1915. The Commonwealth did not commence any work on the railway until 1927. The section from Oodnadatta to Alice Springs was completed in August, 1929, but the Depression then became the excuse for proceeding no further.

While serving on a national committee in 1979-81, I drew the relevant documents recording the State's surrender and the Commonwealth's acceptance of the transfer of power to the notice of our chairman, Mr Justice Rae Else-Mitchell, who also headed the Commonwealth Grants Commission. He took up the cause with zest, and in the Commission's next report he urged that the line must be completed. In 1983, Prime Minister Malcolm Fraser managed to accept that the Commonwealth had a legal as well as a moral obligation to finish the job, but he lost office shortly afterwards. Now that the railway is at last being carried forward north from the Alice, the Howard Government is contributing a mere 10 per cent of the cost – a very strange way indeed of fulfilling "a national engagement founded on honour".

Sir John Downer's main fault had been to assume that a significant number of those who had served with him in the federal Parliament shared the high standards he had set for himself. Sadly, in the century that has elapsed since he left the Senate, not enough have done so.

At the beginning of the 1990s, many citizens who had always preferred federalism to centralism were dismayed when levels of ministerial corruption we had never previously witnessed in this country became manifest in the governments of several States. That era of disillusionment stimulated some healthy reactions, but South Australia's recovery has been painfully slow in many areas. Despite all the faults that can still be found in the operation of Australia's present constitutional arrangements, I believe the federal character of those arrangements should be maintained. The reasons are:

- Our federal system more than adequately sustains national unity;
- There is no alternative constitutional arrangement which would permit the same degree of diversity, flexibility and experimentation in public policy as a federal system does;
- The Commonwealth's financial dominance not-withstanding, the States have remained strong enough to be the most effective available organs for defending the needs of the people each State serves;
- Any new system of regional governments (such as the one proposed by former Prime Minister Gough Whitlam), which possessed only such functions and authority as might be delegated to them by a central government, would mean that those new subordinate governments would have nothing like as much bargaining power as the present State governments can exert in policy making and the distribution of resources;
- Because they are closer to the communities they serve, the States are more responsive to local needs than any national government can be, and they have been less susceptible to domination by powerful interests indifferent to the welfare of small to medium-sized businesses, let alone the welfare of individuals.

I am glad to be able to add that in 1996, when I was chairing the South Australian Constitutional Advisory Council, a broadly representative body of people from a variety of ethnic backgrounds and a

variety of occupations, all but one of its members agreed with these propositions.[35]

Endnotes:

1. Several of the matters canvassed in this paper are explained more fully in the author's recent book, *South Australia and Federation*, Wakefield Press, Adelaide, 2002.

2. Janet Pettman, *The Australian Natives' Association and Federation in South Australia*, in *Essays in Australian Federation*, ed. A W Martin, Melbourne University Press, 1969, pp. 122-36.

3. *Official Report of the National Australasian Convention Debates, 22 March to 5 May 1897*, Government Printing Office, Adelaide, 1897, p. 17.

4. *Ibid.*, pp. 338-45.

5. *The Advertiser*, 25 April, 1891.

6. 46 CLR 155.

7. *Report of the Royal Commission on the Constitution*, Government Printer, Canberra, 1929, pp. 86-7.

8. It seems an astonishing impost now, but they got away with it on the ground that it was necessary to help fund the costs of the war with Japan, on which Canberra was spending the then staggering sum of a million pounds a day. If one takes into account the rise in average wages since 1942, that federal expenditure is equivalent to $90 million a day at the present time.

9. T Playford, *The Case for Restoring the Balance of the Federal System*, in *Federalism in Australia*, ed. G S Reichenbach, F W Cheshire, Melbourne, 1949, pp. 64-88.

10. Stewart Cockburn and John Playford, *Playford: Benevolent Despot*, Axiom Books, Adelaide, 1991, p. 151.

11. *The Australian Financial Review*, 13 September, 1996; *The Advertiser*, 16 November, 1996.

12. A C Castles, *Two Colonial Democrats*, in *An Australian Democrat*, ed. Marcus Hayward and James Warden, University of Tasmania, Hobart, 1995, pp. 19-36.

13. Sir Percy Joske, *Australian Federal Government*, Butterworth & Co, Sydney, 1967, pp. 90-1.

14. *The Biographical Dictionary of the Australian Senate*, Vol. 1, ed. Ann Millar *et al.*, Melbourne University Press, 2000, pp. 2-3.

15. Cockburn was appointed KCMG in 1900, when serving as South Australia's Agent-General in London.

16. *Official Record of the Debates of the Australasian Federal Convention Second Session, 2 to 24 September 1897*, Government Printing Office, Sydney, 1897, p. 1086.

17. On the use of lower case letters for "northern territory", see the author's *South Australia and Federation*, pp. 181-2. Section 6 of the *Commonwealth of Australia Constitution Act* has never been amended, although South Australia's northern territory was transferred to the Commonwealth in 1911.

18. *Official Record of the Debates of the Australasian Federal Convention third session, 20 January to 17 March 1898*, Government Printing Office, Melbourne, 1898, Vol. 2, pp. 50-2 and 135.

19. *Official Report of the National Australasian Convention Debates,* Adelaide, 1897, pp. 993-7, and *Official Record of the Debates of the Australasian Federal Convention third session,* Melbourne, 1898, Vol. 2, pp. 1706-15.

20. D A Dunstan, *The State, the Governors and the Crown*, in *Republican Australia*, ed. Geoffrey Dutton, Sun Books, Melbourne, 1977, p. 208.

21. Gordon was appointed QC in 1900, and was knighted in 1908, a quarter of the way through his twenty years' service as a Justice of the Supreme Court of South Australia.

22. *New South Wales v. The Commonwealth*, (1915) 20 CLR 54. G Sawer*, Australian Federal Politics and Law*, 1901-1929, Melbourne University Press, 1956, pp. 153 and 193 n. 81. Under fresh legislation passed by the last Whitlam Ministry in 1975, but not proclaimed during the Fraser years, the Inter-State Commission was reconstituted by the Hawke government in 1983-84, but killed off again – this time by Paul Keating – five years later. M Coper, *The Second Coming of the Fourth Arm: the role and functions of the Inter-State Commission*, in *Australian Law Journal*, Vol. 63 (1989), pp. 731-750.

23. G Sawer, *Australian Federalism in the Courts*, Melbourne University Press, 1967, p. 152.

24. Michael Coper, *Encounters with the Australian Constitution*, CC Australia LAW, Sydney, 1987, p. 90.

25. Sir Mellis retired from the bench in 1967. By the time he also relinquished the Lieutenant-Governorship, in 1973, he had administered the government on a further 53 occasions, making his total service as South Australia's acting Head of State nearly nine and a half years – longer than any Governor of the State.

26. U R Ellis, *Trade, commerce, transport and the Inter-State Commission*, in *Rural Research*, Canberra, 1957, p. 2. C A Maskell, *Changing perceptions of the Australian Inter-State Commission*, Centre for Research on Federal Financial Relations, Canberra, 1982, pp. 26-43.

27. *Official Record of the Debates of the Australasian Federal Convention third session*, Melbourne, 1898, Vol. 2, p. 1992.

28. A contributory national insurance scheme, to fund the payment of social services, was made part of the policy of the Liberal Party and its successors from 1913 onwards. The necessary legislation was finally enacted in 1938, when RG (afterwards Lord) Casey was Commonwealth Treasurer, but it has never been proclaimed – initially because the Lyons Cabinet decided that the then threatening international situation meant that defence preparations must have top priority. Robert Menzies resigned from the Lyons Ministry in protest at the postponement. However, on the death of Lyons, Menzies agreed to say nothing more about national insurance as a condition of his becoming the new Prime Minister. G Sawer, *Australian Federal Politics and Law, 1901-1929*, Melbourne University Press, 1956, p. 111. G Sawer, *Australian Federal Politics and Law*, *1919-1949*, Melbourne University Press, 1963, p. 102.

29. A J Hannan, *Finance and Taxation*, in *Essays on the Australian Constitution*, ed. R Else-Mitchell, 2nd edn, Law Book Co, Sydney, 1961, p. 249.

30. Published in the *Critic*, Adelaide, 19 October, 1901. As far as I can ascertain, it had never been reprinted before I came across it in 2001.

31. *Audrey Tennyson's Vice-Regal Days*, ed. (Dame) Alexandra Hasluck, National Library of Australia, 1978, p. 207.

32. J M Bennett, *Keystone of the Federal Arch*, AGPS, Canberra, 1980, pp. 25-9.

33. I came across this passage in the Public Record Office, London, in September, 1976, when reading the private, secret and confidential despatches Bosanquet had written in 1909-1915 to the Earl of Crewe and Lewis Harcourt at the Colonial Office. Sadly, as it had no relevance to the matters I was investigating at that time, I did not note its date.

34. It was not built until 1912-1917.

35. The South Australian Constitutional Advisory Council, *Second and Final Report: The Distribution of Power between the Three Levels of Government in Australia, and the Importance of Education and Consultation in Constitutional Reform*, AGPS, Adelaide, 1996, pp. 30-1.