

# South Australia and the Australian Constitution

## John Bray Oration

Chief Justice Robert French AC

14 October 2013, Adelaide

### Introduction

There is no shortage of persons ready to believe that the life of the lawyer is antithetical to the creative spirit. Such beliefs are part of that larger set of attitudes by which human beings label each other for easier processing. They are beliefs regularly confounded by the complexities of real life. Even poets can sometimes show a lack of imagination about their fellow human beings. Carl Sandburg, in a well-known poem entitled 'The Lawyers Know Too Much', written in 1920, compared lawyers with really creative and useful people whom he described as:

Singers of songs and dreamers of plays

[who] build a house no wind blows over.

His poem ended with the famous question:

tell me why a hearse horse snickers hauling a lawyer's bones?

Perhaps he was embittered because lawyers earn more than poets. That is a reality of life. As John Jefferson Bray, poet, lawyer and judge might have told him, in words he used in a lecture about the history of poetry in South Australia:

Poetry lacks social cachet.<sup>1</sup>

This would have been the sympathetic lament of a fellow poet, rather than a riposte from an aggrieved lawyer. The lawyers' putdown to Sandburg came from Karl Llewellyn in his Bramble Bush Lectures at Columbia University in 1930. In an eloquent rejection of Sandburg's verbal cartoon he pointed to the creative role of lawyers:

To produce out of raw facts a theory of a case is prophecy. To produce it persuasively, and to get it over, is prophecy fulfilled. *Singers of songs and dreamers of plays* — though they be lawyers — *build a house no wind blows over.*<sup>2</sup>

So too the judge, who each time he or she delivers judgment, affirms publicly, for the benefit of the whole community, the rule of law and the values it embodies. Some judges of course express themselves better than others. The good judge engages the minds of others with the power of words. John Bray was such a judge. Michael Kirby, explaining the influence of his judgments beyond South Australia, said:

Some people have the power to express themselves in vivid word pictures. Not all of them are poets. Only a small proportion of them are lawyers. But when to discontent with verbal formulae alone is added a very considerable power in the use of language, you have a judicial writer of rare talent. Such was Bray.<sup>3</sup>

It is a privilege to have been asked to deliver the 15th John Bray Oration. My topic is 'South Australia and the Australian Constitution'. It is an occasion to celebrate some of those South Australians of the 19th century whom we can place in the category of founding fathers,

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<sup>1</sup> John Bray, 'The History of Poetry in South Australia; in Barbara Wall and Douglas Muecke (eds) *The Emperor's Doorkeeper: Occasional Addresses 1955-1987 John Bray* (The University of Adelaide Foundation, 1988), 3, 3.

<sup>2</sup> Karl Llewellyn, *The Bramble Bush: Some Lectures on Law and its Study* (New York, 1930) 153.

<sup>3</sup> Michael Kirby, 'Bray's impact on Australian jurisprudence' in Wilfrid Prest (ed), *A Portrait of John Bray: Law, Letters, Life* (Wakefield Press, 1997) 93, 108.

whom we can call singers of songs and dreamers of plays, and whose intelligence, vision, creativity and energy helped to build a house no wind has blown over..

There are some names from among those early leaders which seem to recur in South Australian public life. Playford and Downer are two prominent examples. Another is Bray. John Cox Bray was part of the South Australian delegation to the first Australasian National Convention, which met in Sydney in 1891. He was South Australia's first native born Premier, holding that office from October 1892 to June 1893. His entry in the *Australian Dictionary of Biography* was written by his grandson, the Chief Justice. The entry contained a quotation from a eulogy, delivered in 1894, by another of the South Australian founding fathers, Sir John Gordon. Gordon described John Cox Bray as one who showed the world how to be 'earnest without being acrimonious: ambitious without being unjust: and successful without becoming arrogant.'<sup>4</sup> From all accounts, the virtues of the grandfather were reflected in the grandson.

## **A brief pre-history of the Federal movement**

The Federal movement in the Australian colonies in the late 19th century really originated with the colonists and their leaders. Top down proposals from the Imperial authorities had not been well received as evidenced by colonial responses to proposals from Earl Grey in 1847 and from a Privy Council Committee in 1849.

The concerns that brought representatives of the colonies together in the 1890s to consider an Australian federal constitution included foreign affairs, immigration, defence, trade and commerce and industrial relations. The great powers of France and Germany were moving in the region. The French had begun to colonise New Caledonia and Vanuatu. Germany colonised a portion of New Guinea. There was a perceived need for an Australian Defence Force, a desire to keep Australia white, and a desire to reduce the impact of inter-colonial industrial disputes. Then there were the trade barriers between the colonies — the subject of much debate between free traders and protectionists. Another factor of importance was described by the Constitutional Commission in its Report in 1987:

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<sup>4</sup> John Jefferson Bray, 'Bray, Sir John Cox (1842–1894) in *Australian Dictionary of Biography* (Melbourne University Press, 1969) Vol 3, 220, 221.

There was also a self-confidence in Australia which was probably a factor in the push for Australia to become a nation. This self-confidence was largely due to economic prosperity. It was reinforced by Australian cricketers who showed they could beat Great Britain at her own game, and by Australian artists, writers and poets and agricultural investors.<sup>5</sup>

In 1867, the Premier of New South Wales, Henry Parkes, had secured the passage through the New South Wales Parliament of a Bill for the establishment of a Federal Council. It never came into force as a law. He tried again in 1880 and 1881 without success. However, while he was overseas in 1883 an Inter-colonial Convention was held in Sydney which led to the establishment of a Federal Council supported by an Imperial Statute, the *Federal Council of Australia Act 1885*. The Federal Council formally consisted of the Australian colonies, together with New Zealand and Fiji. It was not a success. Parkes, it seems, may have been miffed because he was not its midwife. He called it a 'rickety body' which would impede the path to federation.<sup>6</sup> Neither New South Wales nor New Zealand attended any of its meetings. Fiji came to one. South Australia only took part between 1889 and 1891. It was branded as a Victorian invention foisted on the other colonies.<sup>7</sup>

In 1889, Parkes, in part inspired by Lord Carrington, the Governor of New South Wales, made a number of speeches in support of the federation of the Australian colonies. One of these, delivered at Tenterfield on 24 October 1889, became famous as the 'Tenterfield Oration'. Following that speech he wrote to Lord Carrington and with a singular lack of modesty, and a grain of truth, said:

I think I have made history within the last six days.<sup>8</sup>

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<sup>5</sup> 'Australian Constitution — Time to Update', Summary of the Reports of the Advisory Committees to the Constitutional Commission 1987, 7–8.

<sup>6</sup> Robin Sharwood, 'The Australian Federation Conference of 1890' in Gregory Craven (ed) *The Convention Debates Commentaries, Indices and Guides* (Legal Books, 1986) Vol 6, 41, 42.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid 44.

Parkes followed up with a proposal to his fellow premiers for a national convention for the purpose of devising and reporting upon an adequate scheme of federal government. Some complicated politics followed.<sup>9</sup> Ultimately, an Australasian Federal Conference was convened in Melbourne in February 1890. That led to the great drafting Conventions of 1891 and 1897–1898. It would take a good deal longer than this lecture to describe the contributions of the various South Australians engaged in that process. It is possible to get a flavour of the debates by focusing on some of the exchanges at the 1890 Conference. Those exchanges expose some of the large issues that had to be confronted in the Conventions that were to follow, as well as some key personalities in the federation movement.

## **The beginnings — Melbourne 1890**

The 6 February 1890, in the oppressive heat of a Melbourne summer, was the occasion for the Australasian Federation Conference to consider the formation of an Australian Federation. Its prime mover, Sir Henry Parkes, had enlisted the cautious support of Duncan Gillies, the Premier of Victoria who cohosted the event with his Chief Secretary, Alfred Deakin. South Australia was represented by two men whose names are deeply embedded in its history as Colony and State. They were its Premier, John Cockburn, and its former Premier, Thomas Playford.

*John Cockburn* was born in Scotland in 1850 and migrated to South Australia at the age of 25 to establish a medical practice. In 1884, he was elected to the House of Assembly. He was Minister for Education in Sir John Downer's ministry from 1885–1887. In June 1889, when Playford's government was defeated, Cockburn formed a ministry, became Premier and held government until Playford successfully moved a motion of no-confidence in August 1890. *The Melbourne Argus* newspaper, covering the 1890 Melbourne Conference, called him 'the sensational man in South Australian politics' and 'a strong protectionist, with advanced liberal views'.<sup>10</sup> He was described by John Playford in the *Australian Dictionary of*

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<sup>9</sup> Ibid 45–52.

<sup>10</sup> Ibid 59.

*Biography* as 'an advanced liberal', an 'ardent federationist', and one who wanted a strong Senate to support State rights.<sup>11</sup>

*Thomas Playford* wanted to be a lawyer, but his father said to him:

I would just as soon article you to the devil.

So Playford became an orchardist.<sup>12</sup> He was elected to the South Australian House of Assembly in 1868, but lost his seat in 1871 having made a joke about Germans, which was politically incorrect and politically unwise given that his electorate included the towns of Lobethal and Handorf. Playford's sharp tongue got him into trouble on more than one occasion. He was re-elected in 1875, lost his seat again in 1887, and then was elected a month later for the northern electorate of Newcastle. He was Premier and Treasurer of the Colony from June 1887 to June 1889.

On the afternoon of 6 February 1890, the conference convened briefly and elected Duncan Gillies, the Premier of Victoria as President of the conference. The conference delegates had dinner that night. Two speeches were made in which memorable phrases were used, which were to be repeated later on, particularly the first of them. That was the work of James Service, a former Premier of Victoria, who told the delegates that the question of the common tariff was 'the lion in the way' of federation and that 'the conference must either kill the lion, or the lion will kill the conference'.<sup>13</sup> The second phrase came from Parkes who spoke to a standing ovation and said:

The crimson thread of kinship runs through us all ...<sup>14</sup>

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<sup>11</sup> John Playford, 'Cockburn, Sir John Alexander (1850–1929)' in *Australian Dictionary of Biography* (Melbourne University Press, 1981) Vol 8, 42, 43.

<sup>12</sup> John Playford, 'Playford Thomas (1837–1915)' in *Australian Dictionary of Biography* (Melbourne University Press, 1988) Vol 11, 245, 246.

<sup>13</sup> Sharwood, above n 6, 53.

<sup>14</sup> *Ibid* 54.

Those metaphors, 'lions in the path' and 'the crimson thread' reflected important strands of the debates to come — economic unity and white nationalism.

On the first substantive day of the conference, on 10 February, Parkes moved a motion that the conference declare its opinion that the development of the national life of Australasia in population, in wealth, in the discovery of resources and in self-governing capacity justified the union of those colonies under one legislative and executive government on principles just to the several colonies.<sup>15</sup> He spoke at length to his motion. He was seconded by Alfred Deakin, the Victorian Chief Secretary. Samuel Griffith, the Premier of Queensland, supported the motion as one which summed up in a happy manner 'the present position of affairs'.<sup>16</sup> Tri-state harmony was abundant between the three Eastern mainland colonies. It fell to South Australia to sound a discordant note, which it did with relish.

Thomas Playford began by expressing his disappointment with the motion. He, in effect, dismissed it as motherhood. He had expected a series of more substantive resolutions covering the important details of a proposed federation. He pointed to the difficulty of enlisting popular support for federation. He drew a distinction between the circumstances of the Australian colonies and those which attended the creation of the United States of America and the Canadian Federation. He argued that the United States Federation was formed in the setting of its rejection of British rule and, in particular, British taxes. He thought Canada was driven to federation because of a fear of invasion from the United States during the Civil War. There were no such urgent pressures on Australia. It was necessary, Playford said:

to build up slowly and carefully a public opinion in the colonies, without being able to appeal to any catastrophe that might occur through war.<sup>17</sup>

Another leading figure in the federation movement was Andrew Inglis Clark, the Attorney-General of Tasmania. He accepted Playford's assertion that the Canadian Federation movement was accelerated by fear of invasion from the United States. However, when the American colonies were moving to federation they had achieved their independence

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<sup>15</sup> *Official Record of the Proceedings and Debates of the Australasian Federation Conference*, Melbourne, 10 February 1890, 1.

<sup>16</sup> *Ibid* 12.

<sup>17</sup> *Ibid* 16.

and were at peace with the whole world. Playford interjected as he was wont to do 'No'. Clark, who was familiar with American history and the United States Constitution saw similarities between the position of the American colonies at Federation and that of the Australian colonies in 1890.

Whatever the rights and wrongs of that debate, there were no pressing existential threats facing the Australian colonies. Absent such threats, the movement of the Australian colonies towards federation was slow, episodic and notably undramatic, if not even a little boring. It is perhaps because of the nature of the process that the men who drove it are not figures in a widely known pantheon of founding Australian heroes. Few Australians could name more than a few of them. And they would be a very small subset of those who know we have a Federal Constitution. Yet they brought into existence one of the most stable and enduring representative democracies that the world has seen.

John Bannon, a former Premier of South Australia in his biography of Sir John Downer, observed:

In other nations such as the United States it is a sine qua non that those chiefly responsible for the birth and constitutional shape of the polity are recognised and commemorated. This has been less so in Australia, partly through a healthy reticence to overtly celebrate our nationalism, except on the sporting field, coupled with a less commendable failure to acknowledge the extraordinary achievement of Australian federation.<sup>18</sup>

The proponents of federation had to deal with the reality that the populations of two of the colonies were considerably larger than the populations of the rest. Quick and Garran, picking up on James Service's metaphor, added those differences to the pride of serious 'lions in the path'.<sup>19</sup> South Australia was definitely in the small colony camp. That perspective may have underpinned the way in which Playford turned his fire upon New South Wales, which he saw as embodied in Henry Parkes, and Victoria whose colours he pinned to Alfred Deakin. While still speaking to the Parkes' motion at the 1890 Conference, he said:

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<sup>18</sup> John Bannon, *Supreme Federalists: The Political Life of Sir John Downer* (Wakefield Press, 2009) vii–viii.

<sup>19</sup> John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Australian Book Company, 1901), 131.

I believe it has been said, that harmony is sometimes improved by inserting a little note of discord now and again into the music. Perhaps I shall insert one or two notes of discord regarding the colony of New South Wales on the one hand and the colony of Victoria on the other hand. I do not wish to do that in any offensive manner, or with any other object than that of enabling me to answer questions which have been and will be again asked in South Australia.<sup>20</sup>

The use of the 'my constituents have concerns' device as a way of appearing to distance oneself from one's own unwelcome opinions, is probably as old as politics. In the name of his concerned constituents, Playford accused Parkes, and through him colonial New South Wales, of serial inconsistency. Parkes had proposed the Federal Council Bill in 1881, but then New South Wales had refused to join it and, according to Playford, Parkes himself had opposed the joinder. There had been a conference of the colonies to discuss the exclusion of the Chinese from Australia. Parkes had promised that New South Wales would legislate along the same lines as the other colonies, but never delivered. As a coup de gracie, Playford suggested that Parkes was less than sentimental about the United Kingdom:

During the whole of his address he did not say a single word about our relations with the mother country. Whatever happens I intend to remain loyal to the mother country, and so does the colony I represent.<sup>21</sup>

Playford then turned his attention to Victoria, whose relaxed approach to free trade, he opined, was due to the benefits it had reaped from its long-term use of protectionist barriers, which had enabled it to build up its own industries and skilled workforce. Those benefits would insulate Victoria from competition from the other colonies when the barriers came down. Again, invoking constituency concerns, Playford said:

Speaking plainly and straightforwardly that is what the people in South Australia say and I ask the representatives of Victoria to give us one or two answers to this.<sup>22</sup>

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<sup>20</sup> *Official Record of the Proceedings and Debates of the Australasian Federation Conference*, Melbourne, 10 February 1890, 16.

<sup>21</sup> *Ibid.*

Provocatively he invited Deakin to respond with 'no beating about the bush'.

Deakin, using the techniques of a good martial artist, rolled with the blows. He remarked that despite the antagonism with which Playford had tried to infuse his remarks and manner, he still adhered to the principle embodied in the resolution before the Conference. Playford interjected his agreement. He could surely have done little else. Deakin also suggested that what Playford had said implied that the people of the different colonies were as separate from each other as residents of adjoining but different nationalities. The colonies, he said, had sprung from one stock and as one people would be strong enough to remove barriers of their own creation. Again, Playford interjected with a concurrence as he no doubt had to. Deakin, having secured concurrence from his antagonist, said: 'Well then let us brace ourselves to the task.'<sup>23</sup>

Parkes was having none of diplomacy. When he stood to speak on the 13th February it was as a victim of unprovoked South Australian aggression. He described himself as 'the lamb with whom the South Australian wolf is trying to quarrel on account of some imaginary act which I have never committed.' He rejected the suggestion that he was anything other than loyal to the Mother Country and asserted his 'resolute opposition to the introduction of the Chinese into Australia'.<sup>24</sup> He took aim at Playford's conjuration of 'concerned constituents', saying:

Then the honourable gentleman said he had a command to satisfy the people of South Australia on one or two things concerning my public character. Sir, I take the liberty of doubting that he had the command of any ten men in South Australia to do any such impertinent thing.<sup>25</sup>

In these exchanges there may be seen, apart from the clash of egos a number of important strands in the federation movement. One was the big colony small colony divide which was to inform elements of the Constitution, particularly the structure of the Senate.

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<sup>22</sup> Ibid 17.

<sup>23</sup> Ibid 20.

<sup>24</sup> *Official Record of the Proceedings and Debates of the Australasian Federation Conference*, Melbourne, 13 February 1890, 79.

<sup>25</sup> Ibid 77.

Another was a nationalist spirit underpinned by concepts of racial unity or common stock, coupled with the view that the United Kingdom was home. And on the other side of that spirit, was a degree of racial prejudice. Concern about racial issues was ultimately reflected in the troublesome power conferred by the Constitution upon the Commonwealth Parliament to make laws with respect to the people of any race for whom it is deemed necessary to make special laws.

Cockburn was the last speaker on the second day of the conference. He disagreed with Clark's view of the causes of the American Federation. He referred to Hamilton and Madison and the Federalist Papers, in which stress had been laid upon the need for closer union because the loose federation which had previously existed was not equal to the demands made upon it by a prolonged war.

On the question of tariffs, Cockburn said that the attitude of South Australia in considering whether the time was ripe for a customs union was informed by the fact that its manufacturing industries were in their infancy. Echoing Playford's concerns about Victoria, he said:

If a customs union obtained between the colonies, they would at once be brought into direct competition with the long established industries of their powerful neighbours.<sup>26</sup>

He was not opposed to a customs union, but some time would have to pass for South Australian industries before they faced competition which had been too severe for them in the past.

Cockburn wanted a union of strong colonies each with its own local traditions, its own local affections, its own peculiarities. He called it 'a brotherhood of infinite diversity'. He saw a Constitution, which would embody responsible government and a principle of elasticity and development in contrast with what he called 'the rigidity and finality of the American Constitution.' He said:

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<sup>26</sup> *Official Record of the Proceedings and Debates of the Australasian Federation Conference*, Melbourne, 11 February 1890, 44.

federation should be a growth, and, as with all growths, anything like forcing is to be deprecated.<sup>27</sup>

He also foreshadowed what was to be a dominant feature of later Convention Debates: 'the question of navigation and riparian rights of the Murray waters.' Here he thought there was an opportunity for colonies adjoining the Murray to exhibit the true federal spirit.<sup>28</sup>

Cockburn's speech was well-informed and statesman-like. Bernhard Wise thought it was 'one of the most interesting in the debate'. Sydney and Melbourne newspapers, however, were unenthusiastic. The Melbourne Argus suggested it left the Conference 'more in the dark than ever as to the exact attitude of South Australia'. The Melbourne Daily Telegraph, loftily said: 'his speech was not quite so provincial in tone as Mr Playford's'<sup>29</sup> — which perhaps goes to show that there is no provincialism quite like that to be found in a large city.

The outcome of the debate was that Parkes' resolution was passed.<sup>30</sup> Deakin then moved that the members of the Conference should persuade their colonial legislatures to appoint delegates to a National Australasian Convention to consider and report upon an adequate scheme for a federal constitution.

There followed discussion about the Convention venue. Playford and Parkes couldn't stop themselves from playing verbal Ping-Pong. Playford said Melbourne had lost all its credit for a decently cool climate. He suggested that they meet in Hobart early in 1891. Parkes suggested Auckland. Playford said Auckland was too warm. Parkes suggested Lord Howe Island. Playford suggested the top of the Blue Mountains. Parkes said:

Why not the Crown of Mont Blanc, if you want a really cool place?<sup>31</sup>

In the event, the Premier of Victoria was requested to act as convener of the proposed National Australasian Convention of Delegates to be appointed by the legislatures of the

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<sup>27</sup> Ibid 46.

<sup>28</sup> Ibid 46–47.

<sup>29</sup> Sharwood, above n 6, 59.

<sup>30</sup> *Official Record of the Proceedings and Debates of the Australasian Federation Conference*, Melbourne, 13 February 1890, 95..

<sup>31</sup> Ibid 100.

Australasian colonies. He was to arrange the time and place of the meeting of the Convention. The Conference finally adjourned at 12:35 pm on Friday, 14 February 1890. The first session of the 1890 Convention, as it turned out, was to be held in Sydney.

## **The 1891 and 1897–1898 Conventions**

Before turning to the South Australian delegates at the Conventions of 1891 and 1897, it is helpful to outline briefly the history of those Conventions.

Each of the colonial parliaments appointed delegates, from both sides of their politics, to attend the first National Australasian Convention to 'consider and report upon an adequate scheme for a federal constitution.' The Convention met in Sydney on 2 March 1891. Henry Parkes was appointed as President of the Convention. Samuel Griffith was the Vice-President.

Andrew Inglis Clark and Charles Cameron Kingston from South Australia had both prepared draft Constitutions, modeled to a significant degree upon the Constitution of the United States. Committees were established. The Constitutional Committee included Playford and Downer from South Australia. Sir John Bray sat on the Finance Committee. Charles Kingston sat on the Judiciary Committee. The constitutional drafting process and associated debates during the 1891 Convention culminated in an intense weekend redrafted process carried out on board the SS *Lucinda* on the Hawkesbury River on 27-29 March 1891 by a sub-committee consisting of Griffith, Kingston, Barton and Clark.<sup>32</sup>

It appears to have been common ground from the outset that the States should be equally represented in the Senate. That was on the basis, however, that the House of Representatives would have the predominant voice in finance and in the control of the Executive.<sup>33</sup> The tariff question was dealt with on the basis that the Federal Parliament would have the full power of raising money, not only by customs and excise, but by every other mode of taxation. The conditions imposed upon that power were that the federal

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<sup>32</sup> Quick and Garran, above n 19, 130.

<sup>33</sup> Ibid 131.

taxation must be uniform in all the colonies and that, on the adoption of a uniform tariff, trade between the colonies should be free.<sup>34</sup>

Quick and Garran called the framing of the Constitution Bill, which was adopted by the 1891 Convention, a notable advance in the federation movement. As they said:

In place of vague abstractions, federationists had now a definite rallying ground, anti-federationists, a definite line of attack.<sup>35</sup>

The Constitution Bill failed to gain acceptance in the colonies. Quick and Garran record that it soon became clear that neither the colonial parliaments nor their people would accept the work of the 1891 Convention as final. They attributed the failure to gain popular acceptance to a vague feeling of distrust of the Constitution as the work of a rather conservative body, only indirectly representative of the people and with no very definite or detailed mandate even by the parliaments which had set up the Convention.

The process was restarted by a Conference at Corowa in 1893, organised by the Australian Federation League and the Australian Natives Association. John Quick moved a motion at that conference in the following terms:

That in the opinion of this Conference the Legislature of each Australasian colony should pass an Act providing for the election of representatives to attend a statutory convention or congress to consider and adopt a Bill to establish a Federal Constitution for Australia, and upon the adoption of such Bill or measure it be submitted by some process of referendum to the verdict of each colony.<sup>36</sup>

The Corowa Plan was considered by a Premiers Conference held in Hobart in 1895. That conference resolved that each colony would pass enabling Acts to choose ten delegates to meet in a Convention to draft a Federal Constitution for consideration by each colonial parliament. The Convention would then reconvene to consider proposed amendments and

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<sup>34</sup> Ibid 132.

<sup>35</sup> Ibid 143.

<sup>36</sup> Ibid 153.

the Constitution would be put to the people at a referendum before being submitted to the Crown.

The South Australian, Charles Kingston, was closely involved in the restarting of the federation process. It was he who enlisted George Reid, the Premier of New South Wales into supporting the 'Corowa Plan'. He also drafted the enabling Act which each colony would pass to make the new Conventions a reality.<sup>37</sup>

The process began again in Adelaide in March 1897. This led to a draft considered by all colonial parliaments, with suggested amendments to be referred back to the Convention. The Convention reconvened in Sydney in September 1897. Its work was unfinished and it resolved to convene its final session in Melbourne on 20 January 1898. There the whole Bill was reconsidered and revised by the drafting committee. A referendum process followed and the Bill was ultimately given legal force by the *Commonwealth of Australia Constitution Act 1900*, an Act of the Imperial Parliament which came into effect on 1 January 1901. As Quick and Garran commented about this long road to federation:

The Commonwealth, as few dared to hope it would, comes into existence complete from the first— 'a nation for a continent, and a continent for a nation.' The delays at which federalists have chafed have been tedious, and perhaps dangerous, but they have been providential; they have given time for the gradual but sure development of the national spirit in the great colonies of Queensland and Western Australia, and have prevented the establishment of a Commonwealth of Australia with half the continent of Australia left for a time outside.<sup>38</sup>

A number of leading South Australians contributed greatly to that process. It is now time to see who they were.

## **South Australia's delegates to the Conventions**

On 26 June 1890, John Cockburn moved a motion in the House of Assembly, supported by the Leader of the Opposition, Thomas Playford, that the Parliament appoint

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<sup>37</sup> John Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2004) 465.

<sup>38</sup> Quick and Garran, above n 19, 251.

delegates to the 1891 Convention. Cockburn recounted the history of the federal movement to that point. He set out his views about the shape of the federation which he had foreshadowed in his Melbourne speech. He emphasised the importance of retaining State autonomy and said that a Canadian-style constitution would be disastrous for Australia. He and Playford were *ad idem* on that point, saying of the grant of powers to the central government:

They should take away as little as possible from local parliaments having due regard to the powers necessary for the sovereign authority of the federal parliament.<sup>39</sup>

Playford also assured the House that federation would not lead to separation from the United Kingdom.

Five delegates were appointed by the House of Assembly and two by the Council. They were: Richard Baker, John Bray, John Cockburn, John Downer, John Gordon, Charles Kingston and Thomas Playford. Mention has already been made of Bray, Cockburn and Playford. The other delegates to the 1891 Convention were, like them, people of considerable achievement who made important contributions to the formation of the Commonwealth.

*Richard Chaffey Baker*, described as a barrister, pastoralist and politician, was born in Adelaide in 1841. He was educated at Eton and Cambridge. He was elected to the House of Assembly in 1868 and became Attorney-General in 1870. He resigned for a time to manage his father's affairs. He stood again and was elected to the Legislative Council in 1877, where he remained until Federation, when he stood successfully for the newly created Senate and became its first president. He died in 1911. John Playford, who wrote Baker's entry in the *Australian Dictionary of Biography*, commented that he deserved to be better remembered as one of the founding fathers of federation. He attended the Federal Conventions of 1891 and of 1897–1898. He prepared a resource book for the delegates entitled '*A Manual of Reference to Authorities for the use of the Members of the National Australasian Convention*'. The book contained an analysis and discussion of federal systems, the main issues which had

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<sup>39</sup> Frank McGrath, *The Framers of the Australian Constitution: 1891-1897 Their Intentions* (Frank McGrath, 2003) 28 and references therein.

to be decided and copies of the American and Canadian Constitutions and other documents.<sup>40</sup> Deakin regarded Baker as in advance of all his colleagues in federal knowledge and in the federal spirit.

Baker did not get on with Kingston. Their antipathy led to a rather dramatic incident in 1892. Kingston made some disparaging remarks about Baker. Those remarks triggered off a chain of insults which culminated in Kingston challenging Baker to a duel and sending him a pistol accompanied by a note appointing a time for the duel in Victoria Square. Kingston turned up with a loaded revolver. The police turned up instead of Baker who had tipped them off. They arrested Kingston, who was then put on a bond to keep the peace for twelve months.<sup>41</sup> The times were more robust. In these days, such an incident would no doubt spell the end of any political career.

*John Downer*, who was born in Adelaide in 1843, was the son of a migrant tailor from England. He was a scholarship student at St Peters in Adelaide. He obtained admission to legal practice through articles and, with his brother George, founded the law firm G & J Downer. He was appointed Queens Counsel in 1878 in which year he was elected to the House of Assembly as the Member for Barossa, which he represented until 1901. He served as Attorney-General in Bray's ministry in 1881–1884 and became Premier of South Australia in 1885. He played a leading role in the Conventions. At the Sydney Convention he focused attention on the future of the Senate as a State's House.<sup>42</sup> He wanted to name the Senate the 'States' Assembly'.<sup>43</sup> He served on the Drafting Committees at the 1897–1898 Convention and was a 'great advocate for the High Court's prime place in the Constitution'.<sup>44</sup> As his biographer, John Bannon, wrote: 'he could claim a longevity in the cause of Australian federation which was unmatched by any other member'.<sup>45</sup> He was the only member of the parliament who had been present as a delegate at the Australasian International Conference held in Sydney. He was opposed to the white Australia policy and favoured women's suffrage. He was a candidate for appointment to the High Court and had Barton's support. However, his appointment was not to be. According to Peter Bartlett's entry in the *Australian*

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<sup>40</sup> See John La Nauze, *The Making of the Australian Constitution* (Melbourne University Press) 23.

<sup>41</sup> John Playford, 'Baker, Sir Richard Chaffey (1841–1911) in *Australian Dictionary of Biography* (Melbourne University Press, 1979) Vol 7, 152, 152–153.

<sup>42</sup> Peter Bartlett, 'Downer Sir John William (1843–1915)' in *Australian Dictionary of Biography* (Melbourne University Press, 1981) Vol 8, 330,331.

<sup>43</sup> Bannon, above n 18, 184.

<sup>44</sup> Ibid 188.

<sup>45</sup> Ibid 1.

*Dictionary of Biography* his appointment was opposed in Cabinet by certain members who disapproved of what they considered his self-indulgent habits.

It is a striking feature of the drafting of the Commonwealth Constitution that the delegates who drafted it knew that they were writing a document for the future. That awareness was no better evidenced than by Sir John Downer at the 1898 Convention when, speaking of the future judiciary of the Commonwealth, he said:

With them rests the obligation of finding out principles which are in the minds of this Convention in framing this Bill and applying them to cases which had never occurred before, and which are very little thought of by any of us.<sup>46</sup>

What he said accorded with what Inglis Clark later wrote in his well-known work *Studies in Australian Constitutional Law*, when he said of the Constitution:

It must be read and construed not as containing a declaration of the will and intentions of men long since dead, and who cannot have anticipated the problems that would arise for solution by future generations, but as declaring the will and intentions of the present inheritors and possessors of sovereign power, who maintain the Constitution and have the power to alter it, and who are in the immediate presence of the problems to be solved.<sup>47</sup>

*John Hannah Gordon* was born in 1850 in Scotland and migrated with his family to South Australia in 1859. He was admitted to the Bar in South Australia in 1876. He was elected to the Legislative Council as a member for the Southern District in 1888. He became leader of the Government in the Council and Minister for Education and for the Northern Territory, which were offices he held in the Cockburn Government until April 1890. As a delegate at the 1891 Convention, he sought a 'loose confederate type of union'.<sup>48</sup> He spoke of the proposed Constitution at the 1891 Convention as 'a mere commercial treaty' on the basis that 'we are not here to raise a national standard, but to enter into a bargain, colony with

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<sup>46</sup> *Official Record of the Debates of the Australasian Federal Convention ("1898 Proceedings")*, Melbourne, 28 January 1898, 275.

<sup>47</sup> Andrew Inglis Clark, *Studies in Australian Constitutional Law* (Legal Books, 1901) 21.

<sup>48</sup> Graham Loughlin, 'Gordon Sir John Hannah (1850–1923)' in *Australian Dictionary of Biography* (Melbourne University Press, 1983) Vol 9, 53, 53.

colony, on terms which we think advantageous to each other.<sup>49</sup> He became Chief Secretary in the Kingston ministry in 1893. Rather against the current sentiment that the people of the colonies were ultimately one people and perhaps reflecting some of what was attributed to Playford at the 1890 Conference, Gordon said in 1897:

We have different peoples here. This is not a homogenous State. My people are not necessarily thy people?<sup>50</sup>

Gordon was a delegate to the 1897 Convention and served on the Constitutional Committee. He is credited, in conjunction with Patrick Glynn, with leading and winning the case for South Australia's equal access to River Murray water.

Gordon was appointed to the Supreme Court of South Australia in December 1903. In February 1913 he declined an invitation from Prime Minister Hughes to take an appointment to the High Court. He had long suffered from a rheumatic heart condition. He died in December 1923.

*Charles Cameron Kingston* has been described as 'one of the chief founders of Australia and one of the half dozen most significant politicians of the federation era'.<sup>51</sup> He was born and educated in Adelaide and admitted to the Bar in 1873. He was elected a member of the House of Assembly in 1881 and served in that position until 1900 when he was elected to the newly formed Federal Parliament. He was committed to federation from the beginning of his political career. He was Premier of South Australia from June 1893 until December 1899. His government was credited with extension of the franchise to women, a legitimisation act, a conciliation and arbitration act, the establishment of a State bank, a high protective tariff, regulation of factories and a progressive system of land and income taxation.<sup>52</sup>

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<sup>49</sup> *Official Record of the Debates of the Australasian Federal Convention*, Sydney 3 April 1891 451; See. Nicholas Aroney, *The Constitution of the Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009) 299.

<sup>51</sup> John Bannon, 'Bonhomie, tenacity, vindictiveness: The force of Charles Cameron Kingston' in David Headon and John Williams (eds), *Makers of Miracles: The Case of the Federation Story* (Melbourne University Press, 2000) 21, 21.

<sup>52</sup> John Playford, 'Kingston Charles Cameron (1850–1908)' in *Australian Dictionary of Biography* (Melbourne University Press, 1983) Vol 9, 602, 602–603.

Professor Leslie Crisp, writing of Kingston in 1984, spoke of his 'forward-looking, radical-liberal outlook and his vision of a dynamically-developing Australian continent-wide nation responsive to that outlook'.<sup>53</sup> As Professor John Williams has pointed out, with the exception of the Melbourne 1890 Conference, he was a member of every significant discussion or meeting on federation from 1887 until 1901.<sup>54</sup> The Index to the Convention Debates records his contributions across pages 301–304. Only Edmund Barton is recorded as having made more contributions.<sup>55</sup>

Kingston's first draft Constitution in 1891, balanced democratic and State's rights tendencies. Through it he influenced the Griffith draft Bill. He served as President of the 1897–1898 Convention, proposed the use of referendums to change the Constitution, and drafted the formula for the composition of the Houses of Parliament.<sup>56</sup> He was a great believer in the importance of one vote, one value in the House of Representatives. He was also prepared to permit a referendum on any Bill passed by the Parliament. It was Kingston who went to London with Deakin and Barton after the Commonwealth of Australia Bill was agreed to by the colonies to ensure that it passed the Imperial Parliament with as little amendment as possible. John Playford has written:

The delegation gained several peripheral concessions from the British colonial secretary, Joseph Chamberlain, but lost the most important point when Chamberlain insisted that appeals to the Privy Council not be deleted from the bill. After tenaciously arguing their case, Kingston and the others had no choice but to give in, though Deakin called the whole affair 'A Drawn Battle'.<sup>57</sup>

Kingston served in the first Federal Parliament as Minister for Trade and Customs and guided the first tariff through Parliament. His name completes the roll call of the South Australian delegates to the 1891 Convention.

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<sup>53</sup> Leslie Crisp, *Charles Cameron Kingston: Radical Federationist* (Australian National University Press, 1984) 17.

<sup>54</sup> Williams, above n 37, 113.

<sup>55</sup> Gregory Craven (ed), *The Convention Debates 1891–1898 Commentaries, Indices and Guide* (Legal Books, 1986) Vol 6.

<sup>56</sup> Parliament of South Australia, 'South Australia's Contribution to Federation' date accessed 16 October 2013.

<sup>57</sup> Playford, above n 52, 604.

South Australia was represented at Adelaide and Sydney in 1897 and Melbourne in 1898 by Baker, Cockburn, Downer, Gordon, Kingston and, in addition, Patrick Glynn, Frederick Holder, James Howe, Vaiben Solomon and Josiah Symon. Bray had died in 1894. Playford had succeeded him as Agent-General for South Australia in London until 1898 when he asked to be relieved of his duties, finding that 'the English climate provoked his rheumatism.'<sup>58</sup>

*Josiah Symon*, the leading light among the new members of the delegation, was born in Scotland in 1846. He migrated to Australia in 1866. He did articles with Sir Samuel Way's firm and was admitted to the Bar in 1871. He joined Way in partnership in 1872. He took over the practice when Way became Chief Justice in 1876. He took Silk in 1881. In March 1881, he became Attorney-General in the Morgan ministry and was elected to the seat of Sturt in April. He remained in the Legislative Assembly until 1887 when he contested the seat of Victoria and was defeated.

Symon became President of the Australasian Federal League of South Australia in 1895. He chaired the Judiciary Committee of the 1897–1898 Convention. He was described by Professor La Nauze as the 'ablest' of the new names in the South Australian delegation to the 1897–1898 Conventions —. 'a leading barrister, eloquent in formal contexts, acute and alert in debate, vindictive and scarifying in controversy.'<sup>59</sup> He and Kingston did not get on. In the *Adelaide Advertiser* of 27 February 1896, Kingston was reported as having said of Symon, that:

He [Kingston] had more humanity in his little finger than Mr Symon had in his whole carcass. Even in the courts of justice Mr Symon had spat malice on all and sundry ... they might as well search for the milk of human kindness in a glass eye as in Mr Symon or for bowels in a billard ball.<sup>60</sup>

Despite this and even more extreme attacks it was Symon who, in 1900, defended Kingston's candidacy for the Legislative Council during Kingston's absence in London with the delegation overseeing the Constitution Bill. As David Headon and John Williams observed

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<sup>58</sup> Playford, above n 12, 246.

<sup>59</sup> La Nauze, above n 40, 102.

<sup>60</sup> Bannon in Headon and Williams, above n 51, 28, citing the *Advertiser* (Adelaide) 27 February 1896, 5.

in their book *Makers of Miracle — The Cast of the Federation Story*, '[t]hey were reconciled in the cause of Australian nationalism.'<sup>61</sup>

Another of the 1897-1898 additions was *Patrick Glynn* who was born in Ireland where he took an Arts Degree followed by the study of law at Middle Temple in London. He was called to the Irish Bar in 1879, but decided to migrate to Australia in 1880. He went to the Victorian Bar but wanted for briefs. He took up work as an insurance salesman and a salesman of sewing machines. Ultimately, he was offered a job with the Adelaide law firm of Hardy and Davis to open a branch office at Kapunda. He was admitted to practice in South Australia in 1883. In April 1887, he was elected to the House of Assembly. He was a free trade advocate, but also supported payment for members of parliament, female suffrage and the reform of the Upper House. He lost his seat in 1893 but was elected at a by-election in 1895, lost again in 1896, won again in 1897 and became Attorney-General in the Vaiben Solomon government in 1899. He was a knowledgeable participant in the 1897 and 1898 Conventions. He led the Judiciary Committee with Higgins and Symon and was involved in the preparation of the draft Constitution Bill. Perhaps his best known contribution to the Constitution is the inclusion of the reference to 'God' in the Preamble.<sup>62</sup>

*Frederick Holder* who was born at Happy Valley, near Adelaide in 1850 was not a lawyer. He was a journalist. He became the first Managing Editor of the *Burra Record* of which he was later proprietor. He became Mayor of Burra in 1885 and 1886. He was elected to the House of Assembly in 1887. He supported free trade. He was Treasurer in the Cockburn ministry in 1889 and became Leader of the Opposition after the fall of the Cockburn government in August 1890. In 1892 he defeated Playford in the House on a motion of confidence and became Premier and Treasurer, but his ministry lasted only a few months. He became Premier again in 1899 when the Kingston government was defeated and Solomon was unable to form a ministry.

It was Holder who submitted the draft for a federal constitution to the South Australian Parliament on 6 July 1897 and was instrumental in its acceptance in the referendum held in South Australia.

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<sup>61</sup> Ibid 29.

<sup>62</sup> Gerald O' Collins, 'Glynn, Patrick McMahon (Paddy) (1855–1931) in *Australian Dictionary of Biography* (Melbourne University Press, 1983) Vol 9, 30, 31.

He was elected to the House of Representatives in March 1901, an election which was held for South Australia as a single constituency. He became the first Speaker of the House of Representatives in May 1891. He and Richard Baker, who had become the first President of the Senate, had responsibility for developing the forms and practices of the parliament.<sup>63</sup> This was a notable South Australian double.

*James Howe* was a farmer and politician. He was born in 1839 in Scotland and migrated to South Australia at age 17. He joined the Mounted Police and served in a number of country locations. He was elected to the House of Assembly in 1881. He held ministerial office on four occasions under the premierships of Sir John Downer and Cockburn. Howe pushed successfully for the inclusion of old age and invalid pensions among federal powers at the 1898 Convention. He argued that because Australia's population was migratory the matter could not properly be left to individual States.<sup>64</sup>

Finally, *Vaiben Solomon* who was born in Adelaide in 1853, was a businessman involved in agency work in connection with the mining and shipping industries as well as general commission work. He was elected to represent the Northern Territory in South Australia's House of Assembly in 1890. He was Government Whip in the second Playford administration in 1890–1891 and for the Downer government in 1893. Because he became insolvent in 1891 he had to resign, but was re-elected in May of that year. He became Premier and Treasurer on 1 December 1899 following the fall of the Kingston administration, but his government only stood for a very short time. He was another supporter of inter-colonial free trade. After federation he was elected to the Federal Parliament in 1901 but was defeated at the election in 1903.<sup>65</sup>

## The drafting of the Constitution

The South Australian delegates at the National Australasian Conventions played a prominent role in the formulation of Australia's Constitution. Kingston's contribution to the

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<sup>63</sup> Ralph Harry, 'Holder, Sir Frederick William (1850–1909)' in *Australian Dictionary of Biography* (Melbourne University Press, 1983) Vol 9, 333, 334.

<sup>64</sup> Rob Van Den Hoorn, 'Howe, James Henderson (1839–1920)' in *Australian Dictionary of Biography* (Melbourne University Press, 1983) Vol 9, 378, 378.

<sup>65</sup> Peter Donovan, 'Solomon, Vaiben Louis (1853–1908)' in *Australian Dictionary of Biography* (Melbourne University Press, 1990) Vol 12, 11, 12.

drafting process, Symons' work as Chairman of the Judiciary Committee and the role of all the delegates in supporting female suffrage in the Commonwealth Parliament meant that their contribution was out of proportion to their small colony status.

The Tasmanian Attorney-General, Andrew Inglis Clark, has been described as the primary architect of the Constitution.<sup>66</sup> Only eight of his 96 clauses were not included in the final document.<sup>67</sup> Samuel Griffith's first draft was based primarily on the work of Inglis Clark. However, Kingston brought his skill and expertise in legislative drafting into the process. His own draft informed Griffith's work. His contribution to the drafting process made him one of the critical delegates to the Conventions.<sup>68</sup> As Professor Williams has said of both Inglis Clark and Kingston:

The fact that these two representatives from the 'smaller' colonies had prepared complete draft constitutions prior to the Sydney Convention reflected not only their capacities as constitutional lawyers, but also their skills as practical politicians seeking to set the agenda at the Convention.<sup>69</sup>

South Australia had a significant influence on the inclusion of s 41 of the Constitution, which provides that all citizens with the right to vote in the Lower House of a State may vote for both Houses of the Commonwealth Parliament. Its inclusion occurred in the context of a vigorous debate about female suffrage.

The battle carried on into the early years of the new Commonwealth. The Commonwealth *Franchise Act 1902* (Cth) granted non-indigenous women the vote in Commonwealth elections, while simultaneously denying that right to all Indigenous peoples. It was not until 1908 that all non-indigenous women enjoyed the right in all State elections.<sup>70</sup>

South Australia can also take credit for introducing God into the Australian Constitution. At the Melbourne Convention in 1898, Patrick Glynn proposed introducing a

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<sup>66</sup> *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 172 (Deane J).

<sup>67</sup> Williams, above n 37, 64.

<sup>68</sup> Ibid 115.

<sup>69</sup> Ibid 62.

<sup>70</sup> See *Constitution (Female Suffrage) Act 1895* (SA); *Constitution Act Amendment Bill 1899* (WA) and *Electoral Act Amendment Bill 1899* (WA); *Women's Franchise Act 1902* (NSW), s 2; *Constitution Act Amendment 1903* (Tas), s 2; *Elections Amendment Act 1905* (Qld), s 9; *Adult Suffrage Act 1908* (Vic), s 3(1).

reference to God into the Preamble of the Constitution. Those were the words 'humbly relying upon the blessing of Almighty God'. He described them as 'simple and unsectarian ... expressive of our ultimate hope of the final end of all our aspirations, of the great elemental truth upon which all our creeds are based and towards which the lions of our faith converge.'<sup>71</sup>

There were strong views for and against this insertion. The inclusion of the words led to the present form of s 116 of the Constitution. At the time of the amendment to the Preamble, cl 16 of Chapter 5 of the Commonwealth Bill had provided that:

A State shall not make any law prohibiting the free exercise of any religion.

Henry Higgins argued that additional words might be necessary to prevent an implication arising out of the recognition of 'Almighty God' in the Preamble that the Commonwealth had power to legislate upon religious matters. Higgins' amendment was defeated and the clause itself was then negatived. However, Higgins later proposed a new clause substantially in the form of what became s 116.<sup>72</sup>

As noted earlier, the South Australian delegates were prominent in the various committees that preceded debate on the drafts of the Constitution Bill. Symon, as Chair of the Judiciary Committee, had quite an important impact on the shape of the federal judicature. He favoured the creation of an Australian Court of Appeal and the abolition of Privy Council appeals. He rejected the notion that Australia could not produce able judges, observing:

It was said so in relation to our cricketers, but we have shown pretty conclusively what we can do in that line of life.<sup>73</sup>

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<sup>71</sup> *Official Record of the Debates of the Australasian Federal Convention*, Melbourne 2 March 1898, 1732.

<sup>72</sup> *Ibid* 1769.

<sup>73</sup> *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, 985-86.

He also opposed Patrick Glynn's proposal to confer jurisdiction on the High Court in relation to any matters that the Parliament may prescribe. Symon argued that Parliament should have no power to alter the definition of judicial power which was an element of the Constitution that 'exists quite irrespective of the procedure under which it is exercised'.<sup>74</sup>

The jurisdiction of the High Court and Federal court is defined in the Constitution by reference to the concept of 'matters' in relation to particular topics. Symon argued for a broad understanding of the concept, which is reflected in its development by later decisions of the High Court. He said:

The word 'matters' merely indicates the scope within which the judicial power is to be exercised, but no matter can be dealt with until it comes before the authorities in the form of a case or some judicial process which we regulated by the Judiciary Acts. It does not strike me that the word is too wide.<sup>75</sup>

## **South Australia in the new Commonwealth**

After Federation, 13 of South Australia's political leaders, including six former Premiers, moved to the new Federal Parliament, many of them to hold prominent positions. They were Playford, Glynn, Downer, Solomon, Bachelor, Bonython, Poynton, Charleston, McGregor and Symon. Of the surviving delegates to the 1891, 1897 and 1898 Federal Conventions only James Howe, Cockburn and John Gordon did not serve in the Federal Parliament. Many of those who did make the move held senior ministerial portfolios, including Thomas Playford, who was Leader of Government in the Senate, Vice President of the Executive Council and Minister for Defence, Patrick Glynn who became Attorney-General, Minister for External Affairs and Minister for Homes and Territories, Alexander Poynton, Treasurer, Minister for Homes and Territories and Post-Master General, and Symon, Attorney-General.

In the creation of the Commonwealth of Australia, the small colony of South Australia played a role out of all proportion to its size. That role was attributable to the vision, the intelligence, the energy and the practical political skills of those South Australians

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<sup>74</sup> Ibid 964–65.

<sup>75</sup> *Official Record of the Debates of the Australasian Federal Convention*, Melbourne 31 January 1898, 319.

who put their shoulder to the federation movement. It is a record of which all South Australians can be proud.