

such as Deakin, who asserted that 'it is perhaps by a wise discretion that we have insufficiently and inadequately dealt with the difficulties'.⁹³ For O'Dowd was continually aware of the effect the Constitution would have on future generations, and of the judgement later Australians would pass on their founding fathers. Yet Cassandra-like, his warnings have hitherto gone unheeded. So, he said in 1899, 'we may therefore be excused in the future, when disaster begins unrolling her screech, if we are found saying "We told you so"'.⁹⁴

BRIAN O'CALLAGHAN*

POSTSCRIPT and FOOTNOTES

Another and even more famous Law School graduate than Bernard O'Dowd opposed the Draft Commonwealth Bill during 1897 and 1898: Henry Bournes Higgins.¹ He, too, slated it as undemocratic.² 'I cannot', he wrote, 'but be conscious that what I say will have little weight with those who do not value democratic principles. There are many persons, I feel, who ask only how the bill will immediately affect their pockets' —

⁹³ *Federal Convention Debates* (1898), Third Session, II; 2506-7.

⁹⁴ *Tocsin*, 20 August 1898, 4.

* B.A. The writer would like to thank Mrs Ruth Campbell, Lecturer in Legal History at Melbourne University, for her invaluable help and support in preparing this article for publication.

¹ For a feature article, 'Federation Forum', 6 May 1898, *The Argus* invited Messrs Higgins and Trenwith to present opposing sides in the Commonwealth Bill debate, and most of Higgins' views in this 'Postscript' derive from that article.

² Sir Henry Wrixon, who endorsed the Bill, stated at a meeting on 20 May 1898, that he was surprised by two things: that democrats opposed the Bill and that conservatives supported it. At the same meeting, Mr Hannah, speaking against the Bill, asked members of the audience 'had they ever seen Mr Murray Smith, Mr Frank Madden or Mr Staughton supporting a liberal measure in the Victorian Parliament, yet those gentlemen were all supporting the bill? . . . The democrats had to be grateful that they had Mr Higgins, at any rate, to consistently support their views'. *The Argus*, 21 May 1898.

The Argus stated its position on 10 September 1897: 'When we talk of federation, we mean the federation which the world knows, and not the federation which lives only in the brain of Mr Higgins in Victoria, Mr Carruthers in N.S.W., and the Trades Hall, the Yarra Wharves and the Domain Gardens of the respective colonies.' On 20 September 1897, *The Argus* pointed to Messrs Trenwith, Hancock and Higgins, and stressed that ' . . . their ultra democracy is not the national policy of this country'. (Mr Trenwith, however, supported the Bill in its final form.)

³ At a meeting held in May 1898 in the Fitzroy Town Hall, under the auspices of the Anti-Commonwealth Bill League, Mr W. Maloney M.L.A., claimed that 'there was not a banker out of Pentridge, not a "boomster" in the colony and not a swindler on the Melbourne Stock Exchange who would not vote "baldheaded" for this bill'. *The Argus*, 19 May 1898.

'The anti-federalists had the masses with them', stated Higgins, early in June 1898, 'while their opponents had the classes on their side. The federalists had the special interests and the money power on their side. . . The anti-Commonwealth Party had no money. . . The other side had the reactionary forces — the shire councils, thank God, the chicken and champagne party, the big names, and nominally the big newspapers'. *The Argus*, 3 June 1898.

The Argus editorial of 21 May 1898, immediately prior to 'Federation Sunday', thought it necessary to counter such arguments: 'The federal debate is being plucked

whether it will increase their taxation, diminish their trade, enhance their advantages in competition, lower the value of their property, ensure them against loss in the face of hostile attack. When you complain that the bill interferes with the rule of the people — that is to say (as people must differ in opinion) with the rule of the majority — these gentlemen will tell you, "So much the better". Should you urge that this interference with the will of the people is by this bill to be rendered permanent, and incapable of amendment, they will answer, "And a good job too". If you point out that the bill will permit a small minority of Australian to block legislation demanded by Australians generally, and still more effectively to prevent an adjustment of the constitutional machinery to meet new conditions which we cannot now foresee, they remain unconcerned.'

Further, complained Higgins, because of the triumph of the provincial over the federal spirit, the Bill failed to solve the three problems he saw as fundamental to the framing of a federal scheme: '. . . to settle what subjects can best be dealt with by Australia as a whole, and not separately, in the several colonies . . . to provide machinery whereby Australian public opinion on these subjects may, after due deliberation, be carried into effect; and . . . to enable the Australian people to alter that machinery from time to time as circumstances may require'.

Higgins' views on the Senate were forceful and critical. The immutable equal representation of the States in the Upper House he denounced as a particular evil, as a '. . . distinct invitation to powers behind the Constitution to interfere', as 'an incentive to revolution, to violence, to anarchy'. The nexus provision governing numbers in the House of Representatives he disapproved — an unprecedented and 'curious device', which would 'tend strongly to perpetuate the force of provincialism, as well as of toryism, in politics'. He pointed out also that 'the whole theory of a "States House" is the same in essence as that of the Tories in 1832, for they contended that the House of Commons was not meant to represent people, but communities or interests invited by the Sovereign to consult with him'.⁴

Nor, despite appearances, did the Bill 'give us responsible government resting on the House of Representatives'. For, 'having regard to the superior tenure by which the senators are to hold their seats, to the superior prestige of the senators arising from the fact that they are elected

down to an ignoble level by many speakers. They insist on treating it merely as a question of the pocket . . . of purely provincial jealousies, of selfish class interests, or bat-eyed party politics. The far-reaching scale and dignity of the whole subject are obscured by dust blown up from the streets, or fogs generated in the gutters. Let the pulpit tomorrow show the nobler issues at stake, and set federation in the light of moral ideas.'

⁴ *The Argus*, 29 March 1897, believed that 'Mr Higgins . . . like most other radicals is practically for a one House Government'.

by a whole colony, and to the obligation put upon the House of Representatives to devise some means whereby money may be found to meet the ordinary needs of the Government, there is little doubt that the sole power to originate money bills will have the same curious result in Australia as in the United States, of enabling the Senate to have the chief power in financial matters. Moreover, the power to "suggest" amendments given to the Senate is just the same as a power to propose amendments. The only difference is in name. The Senate can "suggest" amendments to any money bill, not once, but as often as it likes; and the only effect of the difference in verbiage is that we shall have continual disputes between the two Houses as to the form of messages which are interchanged. Who is to say what are the "ordinary annual services of the Government?" . . . It will be still more absurd', he warned, remembering that 'the states do not pay taxes equally', to find 'the Senate which even more control over the money of the tax-payers than the House of the taxpayers and becoming (as Sir Richard Baker prophesies) "the pivot on which the whole federal constitution revolves" '.

As for the machinery to settle conflicts between the Houses, Higgins considered it quite inadequate. 'The cumbrous provision for solving differences between the two Houses', he stressed, 'does not secure finality, and can hardly ever be, in practice, applied to money bills. Money bills will not wait; and the Ministry will generally be forced to yield to the Senate in a money dispute, as the Turner Government had to yield to the Legislative Council in 1885, owing to the urgency of financial needs'.

Higgins regretted, as a member of the Convention which had helped to frame the Bill, that he felt obliged to speak out against it.⁵ 'It should have accepted it with many defects', he declared, 'if it were more flexible, more capable of adjustment to meet new conditions as they arise; and I know full well that many votes will be cast for the bill in the mistaken belief that if we once "federate", we can put right afterwards what we find to be the wrong. . . .'⁶

⁵ 'The fault-finders have no sense of proportion about them', announced *The Argus*, 9 May 1898. 'Their objections when compared with the great result aimed at, are positively ludicrous. . . . Nothing in the federal campaign delights the feeble and foolish more than to prattle about technical trivialities or to exaggerate blots'. *The Argus* noted on 8 May 1898, that 'alleged blots on the Federal Bill are considered by others to be its brilliant points'.

⁶ and ⁷ Isaac Isaacs, on the other hand, speaking at a meeting organized by the Australian Natives' Association late in May 1898, believed 'it was better to accept the bill with whatever faults it possessed, rather than risk the perils of rejection'. He felt that 'when this constitution was adopted, the true bond of union that would knit the people together would be something higher and better than any mere dry act of Parliament — it would be the unwritten constitution that had grown with us and evoked the freedom we possessed . . .'. *The Argus*, 31 May 1898.

Mr Moule M.L.A., speaking at a meeting of professors, staff and students at Melbourne University, on 1 June 1898, (chaired by the Vice-Chancellor, Sir Henry Wrixon M.L.C.) claimed that 'the Mahdi of the anti-federal dervishes, Mr Higgins — (cheers and laughter) — was a false prophet. ("Boos" for Mr Higgins.) He, Mr

He urged delay.⁷ 'We all, I think, recognize how well it was that the 1891 bill was rejected. It would have meant the financial ruin of Victoria, and the permanent cramping of Australian liberties.' He deplored current attempts to stampede Australians into federation along 'the road of passion, of impatience, of hysterical impulse'. He favoured 'the road of deliberation, of forethought, of jealous adherence to the fundamental principles which conduct to peace, order and good government'. There was no question of abandonment: 'the pressure of our real exigencies will force the question of federation upon us, until it is solved'. Certainly deferment would be 'a bitter disappointment to us; but future generations will thank us for the delay', for among other things, a reconsidered bill would 'allow the future people of Australia as much power to vary the constitution as we claim power to make it'.

The Argus, whose opinion was 'that in federal matters the lack of knowledge of Mr Higgins is phenomenal',⁸ had no such thought for the

Higgins, would bid them rebel against this bill, to gain they knew not what at some dim, distant future they knew not when'. *The Argus*, 2 June 1898.

It was at this same meeting, incidentally, that Professor Harrison Moore, Dean of the Faculty of Law, seconding the motion of support for the Commonwealth Bill, 'regretted that his authority had been cited for the statement that this Federation Bill which the colonies were asked to accept was a bill framed by lawyers for the government of Australia by lawyers. Nothing he had ever said was in the least degree capable of supporting a statement so grotesquely untrue'. *Ibid.* (Mr Ben Tillett, opposing the Bill at an Anti-Commonwealth Bill Meeting on 2 June 1898, declared that 'the people here were lawyer-rigged. The supreme legal power had been handed over to three irresponsible men under three hair wigs. (Applause and disorder.)' *The Argus*, 3 June 1898.)

Higgins, urging reconsideration, recalled to readers that Deakin, in 1891, had 'reminded his hearers of the "tide in the affairs of men" which must be "taken at the flood"', and that Deakin had spoken in that year, of the opportunity of union which never would return. *The Argus*, 6 May 1898.

One who would brook no delay in 1898 was Mr Justice Holroyd, Chairman of a Meeting of the Imperial League, held in Melbourne on 7 May 1898. He supported the Commonwealth Constitution Bill on its merits, seeing it as 'the first great step towards Imperial Federation', and fearing that 'if this federation was postponed much longer . . . it would never come at all'. *The Argus*, 9 May 1898.

The Argus during 1897 and 1898 frequently pressed the need for speedy Federation: 4 March 1897; 22 March 1897; 25 March 1897; 29 March 1897; 3 May 1897; 3 July 1897; 16 July 1897; 8 September 1897; 6 December 1897; 6 July 1898; also, 3 May 1899. ('The Adelaide delegates may be reminded that the Quebec Convention did its work in eighteen days, and did its work finally.' *The Argus*, 29 March 1897.) The need for haste was often accompanied by *The Argus'* suggestion that contentious constitutional matters would be best left for resolution by the new Commonwealth Parliament, or to that vague thing, 'the future'. 'The golden rule, as we have said', wrote *The Argus*, 25 March 1897, 'is to leave things as they are, and to leave the decision of all vexed issues to the new Australian Parliament'. Again, 16 July 1897: 'We must federate Australia as it is today, leaving the future to deal with the future, if we are to federate at all.'

⁸ . . . the constitution proposed', averred *The Argus*, 25 May 1898, 'is the most easily amended federal constitution in the world. . .' (The knowledgeable *Argus* had pronounced, among other things, that 'a deadlock will never occur'. 13 September 1897.) Mr Ben Tillett did not agree that it was easily amended: 'Had we turned over the last leaf of progress?' he asked. 'Were we to say that humanity would stand still with the fetters upon it, such as this bill placed on the people?' *The Argus*, 3 June 1898.

morrow. 'Nothing is more childish', it scoffed,⁹ 'than to suppose that we can really fetter those who are to come after us. They will work out their destiny in their own way, and we are discharging our duty when, by instituting a Parliament with untied [*sic*] hands, we leave the people as masters of the situation'. A Professor Gosman was equally confident: 'The bill was not like a cast metal jacket, to be riveted on one, and preventing all possibility of growth; it was a pliable thing, loose, like a toga'.¹⁰

In the last years of the nineteenth century, Henry Bournes Higgins was certainly a constitutional prophet without much honour in his own country; but many of his predictions provide wry reading today.

RUTH CAMPBELL*

⁹ 4 August 1897.

¹⁰ *The Argus*, 9 May 1898. Professor Gosman represented the Australian Federation League at a meeting of the Imperial Federation League, 7 May 1898.

* B.A. (Hons), LL.B., Dip.Ed.; Senior Lecturer in Law, University of Melbourne.