AN INDISSOLUBLE FEDERAL COMMONWEALTH? THE FOUNDING FATHERS AND THE SECESSION OF AN AUSTRALIAN STATE

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[*This article deals with the issue of secession as it was perceived at federation. The attitudes expressed in the basic texts read by the delegates to the National Australian Conventions are discussed. The author relates and analyses the opinions enunciated by the delegates and their ultimate resolution of the problem, namely, the insertion of the word 'indissoluble' into the Constitution's Preamble. He concludes that the delegates failed to resolve or adequately define the issue of secession.*]

1 Introduction

No student of Australian politics could long remain ignorant of the meaning of the term 'secession'. The threat that his State would withdraw from the Commonwealth has been played as either the ace or the joker by many a disgruntled State Premier in the course of his righteous battle with the insidious centralists from Canberra. Mercifully, Australia has been spared the actual execution of this threat, unlike some of her less fortunate sister federations. But the menace is still ritually made on what are thought to be the appropriate occasions, whether by way of whispered warning or bellicose intimidation.

This article does not seek to assess the legality of the secession of an Australian State; that would be the task of a much longer work. What it attempts is an outline of the problem of unilateral secession by a State as it presented itself to the men who framed the Australian Constitution, and an examination of their reaction to what was, in the light of the American Civil War thirty years before, a very real question facing the incipient Australian federation. This examination yields a fascinating insight into the thoughts of the founding fathers[1] upon an issue so fundamental that it rarely intrudes into discussions of Australian constitutional law, namely the very permanence or otherwise of the 'one indissoluble Federal Commonwealth' which they so diligently planned.

2 The Problem of Secession Facing the Founding Fathers

The founding fathers of the Australian Constitution were in an extraordinary position when they embarked upon their enormous task of drafting a constitution for a new nation. As one of their contemporaries remarked of the fruit of their labours:

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[1] By this expression is meant the delegates of the various Australian colonies to the National Australasian Convention, which met in Sydney in 1891 and 1897, Adelaide in 1897, and Melbourne in 1898.

> The Australian Commonwealth Bill embodies the political ideals of a Constitutional Assembly, convened in the closing years of the nineteenth century, and favoured by conditions which afforded a unique opportunity for the achievement of grand constitutional results. All history for precedent! All the world-wide literature of political science for a guide! . . . Freedom to legislate for the territories of a Continent![2]

These rhapsodic comments on the immediate ancestor of the Australian Constitution are clearly those of the enthusiastic nineteenth-century theorist rather than the present-day disgruntled citizen. However, they do approach the mark in describing the position of those who framed the Australian Constitution.

These men were possessed of remarkable opportunities, and subject to correspondingly grave responsibilities. Within the dual constraints of intercolonial tensions and the necessity to maintain the Imperial hegemony, they faced the task of devising the constitution which it seemed to them would best serve the coming nation, and most particularly, of framing a document which would meet the needs and solve the problems of that nation, into and beyond the foreseeable future.

This was the situation of the founding fathers, one of power and concern; for just as the possibilities were enormous, so the consequences of failure in a fundamental respect could prove disastrous. The founding fathers were aware, not only that they had to safely deliver the infant Commonwealth into the world, but that it was incumbent upon them to ensure that it survived beyond a potentially stormy adolescence. Constantly and harrowingly before their eyes in this respect was the appalling price paid by the United States of America in the form of its civil war for the vagueries of those who framed her Constitution.[3]

Given the existence of six separate colonies, each with its own Parliament and governmental policies, each possessed of a substantial degree of separate identity in the eyes of its citizens, federation rather than unification was quickly recognized as the only practical means of drawing the people of Australia into one nation.[4] Lent weight as it was by the views of such influential writers as A.V. Dicey,[5] by 1891 federation was the only proposal being seriously put forward as a means of the Australian colonies attaining some degree of unity.[6]

As a consequence of this, the specific problem facing the founding fathers was not merely that of devising a sound constitution for Australia, but of framing a sound federal constitution for Australia. In preparing this constitution they had, of course, to give thought not only to finding solutions to problems which face the draftsmen of constitutions generally, but also to the particular and very complex problems facing those who would draft a federal constitution. One such problem, which would necessarily go to the heart of any proposed federal constitution, was

[2] Browne J. W., 'The Australian Commonwealth Bill' (1900) 16 *Law Quarterly Review* 24.

[3] *Convention Debates*, Adelaide, 1897, 296. Deakin was only one of many of the delegates to refer with horror to the appalling loss of life suffered during the American Civil War.

[4] A scheme for unification was unsuccessfully sponsored by Sir George Dibbs of New South Wales in 1894: Quick J. and Garran R. R., *The Annotated Constitution of the Australian Commonwealth* (1901), 1976 reprint) 155.

[5] Dicey A. V., *Introduction to the study of the Law of the Constitution* (2nd ed. 1886) 127.

[6] It would be fair to say that by 1897, unification was not a possibility, and that federation had the field to itself.

the question of the permissibility of the unilateral secession of any of the constituent states from the mooted federation.[7]

This problem arose both conceptually, and as a matter of recent history. As a matter of theory, the very word 'federation' begged the question of indissolubility; was a colony, once having shouldered the burden of union, to be allowed in any circumstances to shrug it off, or was the federation to be permanent, immutable beyond the action of any individual colony? In providing for federation, the founding fathers were inevitably faced with the question of secession, just as a legislator in providing for marriage would be faced with the question of divorce.[8]

Prompted by history, however, the founding fathers had an even more compelling reason to exercise their minds over this question. Only thirty years before the National Australasian Convention met in Melbourne in 1891, the great federation of the United States of America had by the narrowest of margins avoided foundering upon this very constitutional rock. Only the bloodiest of civil wars had prevented the secession of these discontented states. The United States was, to a large extent, both the model and the guide for the men who built the Australian federation, and they were profoundly interested in, and impressed by, both its constitutional history and its constitutional problems.[9]

This, then, was the issue facing the founding fathers; whether or not a state should be permitted under the Constitution to leave the federation. The issue was both political and legal. Before detailing and analysing the response of the founding fathers to the issue, however, some brief examination should be made of the sources which they drew upon in their attempts to deal with it,[10] and the way in which these sources dealt with the question of secession, thus providing a context for the actions of the drafters of our Constitution.

If any work was the 'Bible'[11] of the Convention, it was Bryce's *The American Commonwealth*.[12] It was a large work of two volumes, and was treated with a profound respect which at times approached obsequiousness by the delegates.[13] It had, therefore, a profound influence upon the Convention.

Bryce was a critic, as well as an observer, of the American federation. He balanced his admiration for it with a keen ability to locate its deficiencies. Some of the more glaring of these deficiencies he collected in his book under the rubric of 'remarkable omissions in the Constitution of the American federation'.[14] The first that he lists is the failure of that Constitution both to grant the national government the power to coerce a rebellious state, and to prohibit the secession of a state.[15]

[7] Most contemporary works on federations devoted some time to the question as a matter of course. For example, see Garran R. R., *The Coming Commonwealth* (1897) 34.

[8] An apt analogy used by Glynn P. McM., 'Secession' (1906) 3 *Commonwealth Law Review* 193.

[9] For an excellent discussion of the influence of the American experience upon the founding fathers, see Hunt E. M., *American Precedents in Australian Federation* (1930, 1968 reprint).

[10] For a fuller discussion of the works used by the founding fathers, see La Nauze J. A., *The Making of the Australian Constitution* (1972) 273.

[11] *Ibid.*

[12] Bryce J., *The American Commonwealth* (2nd ed. 1890).

[13] *Convention Debates*, Adelaide, 1897, 288. *Cf.* La Nauze, *op. cit.* 273.

[14] Bryce, *op. cit.* i, 314

[15] *Ibid.*

Bryce clearly regarded this failure as a fundamental error in the federal constitution, at least in the American context. Bryce went on to note the annihilation of the American doctrine of secession at the sword's point, but trans-Atlantic context and successfully prosecuted civil war notwithstanding, the comment and its general implications must have given the delegates at least some food for thought. More particularly, this dour warning that constitutions ought provide for future contingencies in clear terms or suffer the consequences can have been neither new to them, nor particularly comforting.

Nor could their minds have been set at rest by Bryce's later statement:

> Everybody knows that it was the Federal system and the doctrine of State sovereignty grounded thereon . . . which led to the secession of 1861.[16]

Linked with his previous comments, this statement underlined both the conceptual and historical relevance of the issue of secession to the delegates' task in terms which could scarcely have been clearer. 'Federations have problems with secession', Bryce might be paraphrased. 'The Americans did not put the question beyond doubt, and suffered grievously for it.' The message for the Australians could hardly have been more clear.

For the framers of this new federal Constitution, no matter how hardened or disinclined to accept American experience, Bryce's concluding words must have been at least thought provoking:

> The doctrine of the legal indestructability of the Union is now well established. To establish it, however, cost thousands of millions of dollars and the lives of millions of men.[17]

Clearly, here was an important question, perhaps an obvious one, but one to be determined at the outset, indisputably, and for all time.

Bryce, while probably the most highly regarded source referred to by the delegates in their search for precedent and enlightenment, was by no means the only work so consulted.[18] Of the others, some did not refer to the question of secession. Many of the most thorough works, however, paid it at least passing attention.

The Law of the Constitution by the eminent English constitutional lawyer, A. V. Dicey, was another work highly regarded by the delegates.[19] Dicey's book, unlike that of Bryce, was not concerned exclusively with the constitutional law of a federal system, and his comments were thus both less helpful and less detailed.

Dicey did, however, devote some attention to federations, and in doing so posited the necessity for written federal constitutions to be closed to misapprehension. Descending into specifics, and casting about him for an example, Dicey lighted upon what he referred to as 'the great question unsettled' in the American Constitution, 'the gap which gave the opening' for the War of Secession.[20] Dicey,

[16] *Ibid.* 336.
[17] *Ibid.* 337.
[18] Bruce was, however, undoubtedly the author who exerted the most influence over the delegates.
[19] La Nauze, *op. cit.* 20, 134.
[20] Dicey, *op. cit.* 142.

therefore, was sufficiently impressed with the American experience to cite the question of secession as his example of an issue, indeed the issue, which should not be left open to question in a federal consitution, and in this sense, his view would seem to be at one with that of Bryce.

Not all the works consulted by the delegates were overseas publications of only general relevance to the task of framing an Australian constitution. *The Coming Commonwealth*, by R. R. Garran, published in 1897, was a small but informative book much read by delegates to the Adelaide (and subsequent) sittings of the Convention.[21] It was written by an Australian, and specifically addressed to the Australian public. This book was written less as a learned treatise on constitutional law than as a useful summary of 'what every Australian ought to know in order to understand Australian Federation'.[22] Indeed, written as it was by a rabid federationist, the book was as much a determined attempt to promote Australian federation, as it was to explain it.

Whatever his aims, Garran felt compelled to touch upon the question of secession at some considerable length in his book. As an avowed believer in the advantages of federation, he was concerned to remove the spectre of secession from Australian federation from the outset, and thus to guarantee its permanence. At the same time, he was at pains not to panic his readers in the different colonies by presenting federation as a tight prison, rather than a safe harbour, for the Australian colonies.

Garran laid his groundwork by drawing a fundamental distinction between 'federations' and 'confederacies'. The essential distinction, wrote Garran, was that whereas a right of secession might be conceded in a confederacy, such a right was inconsistent with the very nature of a federation.[23] It followed from this statement, the correctness of which is at the very least disputable,[24] that as the Australian colonies were proposing to unite in a federation rather than a confederacy, secession by one of the colonies after federation was necessarily impossible. In these terms, Garran put forward his argument of the conceptual impossibility of secession from a federation.

Garran was, however, concerned with practicalities as well as jurisprudence. He went on to frankly acknowledge that regardless of the legalities, secession would always be a particular problem facing federations; firstly, because a seceding state would already possess the necessary governmental machinery to allow it to immediately assert its newly claimed independence; and secondly, because a federal government would be less likely to offer effective resistance to a secession than the government of a unitary state.[25] Having recognised the problem, Garran did his best to dismiss it. A federal union, he wrote, 'must in its terms be

[21] La Nauze, *op. cit.* 273.
[22] Garran R. R., *The Coming Commonwealth* (1897) preface.
[23] *Ibid.* 26.
[24] Wheare K. C., *Federal Government* (4th ed. 1963) 86-7. Nor does Dicey include a prohibition of secession as one of the fundamental characteristics of a federation: Dicey, *op. cit.* 132.
[25] Garran, *op. cit.* 34.

indissoluble, else it carries within it the seeds of its own destruction'.[26] He drew on the American precedent, declaring that the indissolubility of that Union had been asserted 'at the swords point',[27] and seemed implicitly to warn any would-be Australian emulators of the Confederate States of America that they might meet with a similarly grisly fate.[28]

As something of a propagandist for federation, however, Garran seems to have realised that so forceful a line of argument might not have commended itself to any one who was open minded on the question of federation, but was wary of being committed to it for an unknown eternity. Consequently, he made two concessions. Firstly, he held out the prospect that a State might be allowed to leave the federation by an amendment of the Constitution in the prescribed form.[29] Secondly, he stated that unity, to be of value, must be voluntary. If a State really wished to leave the proposed Australian federation, it could do so by revolutionary means, which course 'would probably meet with little resistance';[30] a strangely unconvincing argument in view of his use of the American Civil War as an example in point.

From Garran's treatment of secession, we can draw a number of inferences. He certainly saw it as an issue facing the proposed new federation. He saw it as both a conceptual, and a practical issue. Given that he was writing a book explaining federation to the people generally, he also plainly felt it necessary or advisable to hold out some prospect of peaceful secession, though naturally with no enthusiasm. From Garran's work, the delegates would have been aware that secession was, then, an issue; but Garran's view that it was inherently and obviously unlawful may have prompted them to feel that it was not really necessary to consider a negativing provision when drafting their constitution.

It is not claimed that the three works discussed represented the sum of the delegate's reading on the question of federation. Numerous other works were read, and some of these made no mention of the question of secession.[31] What is submitted is that these works were the basic texts read by the delegates, and thus highly influential. A number of consequences follow from acceptance of this proposition.

Firstly, the framers of the Australian Constitution must have been aware that secession was one of those particular problems which faced federations, and one which would at least have to be squarely considered by men framing a federal constitution. Such an awareness would have been gleaned particularly from Bryce and Garran. Secondly, as previously stated, they would inevitably have known that the horrible losses of the American Civil War, losses of which they were

[26] *Ibid.*
[27] *Ibid.* 35.
[28] *Ibid.*
[29] *Ibid.*
[30] *Ibid.*
[31] For example, Sir Baker R. C., *A Manual of Reference to Authorities for the use of the Members of the Sydney Constitutional Convention which will assemble on March 2, 1891. For the Purpose of Drafting a Constitution for the Dominion of Australia* (1891). Baker never refers to the question of secession.

profoundly aware, were at least partly consequent upon the failure of those who wrote the American Constitution to deal adequately with the topic of secession. Bryce, Dicey and Garran would all support such a view. Finally, in view of the above, it is clear that secession must, or at least should have emerged as an issue of some weight in the minds of the delegates. In practical terms, it was their function to ensure that this problem was not grafted onto the Australian federation, alongside other more acceptable innovations from the United States. In short, the founding fathers were faced with a quite clearly posited issue, and the task of satisfactorily dealing with that issue.

3 The Resolution of the Issue; the Convention, Debates and their Outcome

To speak of the Convention Debates as they relate to the question of secession is to speak of the speeches given at the Adelaide sitting of 1897. Although that sitting was neither the starting point for Australian federation, nor the first sitting of the Convention, it was both the beginning and the end of the discussion of secession as an issue by delegates of the Australian colonies. The issue was not raised before Adelaide, and was not raised in the Convention thereafter.

It is not surprising that the issue did not surface at the meeting of the Convention in Sydney in 1891. A body whose primary concern was to ensure that federation was at least effectively conceived, if not actually delivered, would be naturally disinclined to canvas its demise. Neither in the opening resolutions of Sir Henry Parkes,[32] nor anywhere in the Commonwealth of Australia Bill[33] as it eventually emerged, nor indeed in any of the connected debates, is any reference made to the question of the right of secession, or to the indissolubility or otherwise of the Commonwealth.

A new Convention met at Adelaide in 1897, where it assembled to debate resolutions framed by Edmund Barton,[34] and to draft a new Constitution Bill.[35] It was during this sitting of the Convention that the issue of secession was discussed for the first and last time by the founding fathers.

The debate on the question of secession took place during discussion of Barton's general resolutions, partly because this was the logical place to discuss something so fundamental as the enduring nature of the federation, and partly because Barton had placed no statement asserting this enduring nature in the resolutions themselves, which was a significant omission.[36]

Barton himself was the first to advert, if indirectly, to the question of the secession of a state. Speaking on the role of the Federal Supreme Court, Barton stated that the strongest guarantee of an 'indestructible Union', was the existence of a just tribunal to which the States could bring their disputes, rather than 'flying

[32] *Convention Debates*, Sydney, 1891, 23.
[33] *Ibid.* 943-64.
[34] *Convention Debates*, Adelaide, 1897, 17.
[35] The Convention decided to draft a new Constitution rather than to work from the 1891 Draft. *Convention Debates*, Adelaide, 1897, 11.
[36] Although this omission was commented upon by other delegates, Barton never made any attempt to defend, or to explain it.

to secession'.[37] With the American Civil War clearly in mind, Barton said that he hoped that disputes would be settled by law, not war.[38] Barton made no comment as to the legality or conceptual validity of a unilateral secession, nor did he suggest the inclusion of any provision to put such an issue beyond doubt. Whatever his views on such matters, he apparently saw secession as a practical problem, and strove for a practical solution which would remove the danger of secession, rather than for a provision which would simply forbid it.

Sir George Turner, the Premier of Victoria, was the next to mention secession. He made the bold statement that no right of secession should be provided for in the Constitution,[39] and was clearly of the view that the issue could be settled in the negative by a legislative silence on the matter. Joseph Carruthers of New South Wales adopted a somewhat more considered position. He noted and deplored the absence of a reference to the indissolubility of the Commonwealth in the general resolutions.[40] He went so far as to call upon his fellow delegates to express their feelings as to the admissibility of a right of secession, and was met with cries of 'No!'.[41] Apparently satisfied with this response, he urged the Convention to draft a Constitution which would not provoke secessionist forces, and would be sufficiently elastic to allow any necessary amendments.[42] Other than his reference to the desirability of the inclusion of a statement of indissolubility in the resolutions, he made no suggestion as to how the apparent feeling of the Convention against secession might be implemented.

The most interesting and lengthy treatment of the issue came from Josiah Symon, Attorney-General for South Australia. Like Carruthers, he deplored the failure of the resolutions to assert the indissolubility of the Commonwealth.[43] But in contrast to Carruther's vague dislike of the idea of secession, Symon went on to make what amounted to an eloquent plea that the inadmissibility of secession be put beyond all doubt in the new constitution:

> We are all agreed . . . that we intend this Union to be permanent and indissoluble. But I do think that holding that view, as the Convention does, it would be well that it should be clearly and definitely expressed at every point wherever it is possible.[44]

Symon argued that one of the main causes of the American Civil War was that the right of secession was not expressly negatived in the United States Constitution,[45] and told the Convention:

> We should make, I think . . . a considerable mistake if we do not make it absolutely clear — and we cannot begin too soon, it seems to me — that this Union is to be permanent, and that there is to be no secession.[46]

[37] *Convention Debates*, Adelaide, 1897, 25.
[38] *Ibid.*
[39] *Ibid.* 48.
[40] *Ibid.* 93-4.
[41] *Ibid.* 93.
[42] *Ibid.* 94.
[43] *Ibid.* 128.
[44] *Ibid.*
[45] *Ibid.*
[46] *Ibid.*

Symon's words convey a recognition that secession was, to him, a very serious problem, and a conviction that this problem had to be dealt with determinedly and finally by the Convention.[47]

William Lyne of New South Wales stated simply that there should be no right of secession. Otherwise, problems similar to those which arose in America might arise in Australia.[48] He made no suggestion as to what course the Convention might adopt to avoid these problems.

His fellow New South Welshman, William McMillan, said that with regard to the indissolubility of the Commonwealth, he trusted 'that that which was left out of the preamble of the American Constitution will be included in ours',[49] and it was this brief suggestion which ultimately found expression in the preamble to the Commonwealth of Australian Constitution Act.

The brilliant Victorian lawyer, Isaac Isaacs, did not mention secession in his own speech, but somewhat characteristically, interrupted both Carruthers[50] and Symon,[51] to say that no provision prohibiting secession was necessary, on the grounds that the Constitution would be contained in an Imperial Act. Symon dealt with Isaacs' interjection with some asperity, and as a matter of convenience it may be noted at this stage that Isaacs' comment was not necessarily as well founded as he might have thought. While it is undoubtedly true that an act of a State Parliament which conflicted with the proposed Constitution, which would be contained in an Imperial Act, would be invalid, the question would always be whether there was in fact a conflict. Thus, the issue would be not the status of the Imperial Act, but whether or not that Act explicitly or impliedly granted a right of secession. All that Symon wished to ensure was that no such grant was made by default.

Other speakers referred more indirectly to the question of secession. Bernard Wise hoped that the assertion that it was 'the Australian people' rather than 'the Australian Colonies' who were the subject of the Constitution,[52] would render irrelevant arguments as to the seat of sovereignty in the Australian federation, and thus avoid the American experience.[53] Alfred Deakin, while arguing against 'State rights', referred to secession as 'the absolute State right', and noted that the United States had been forced to rewrite its Constitution 'in the blood of a million Americans',[54] but did not pursue the matter further.

It is notable that no delegate advocated a right of secession, though a number of delegates delivered speeches in which the powers of the States so far exceeded those of the Commonwealth that they could fairly be described as 'confederal'

[47] Symon also demanded an indissoluble union in a supplementary pamphlet to the *Observer* (Adelaide), 16 February 1897: Hunt, *op. cit.* 83.
[48] *Convention Debates*, Adelaide, 1897, 161.
[49] *Convention Debates*, Adelaide, 1897, 217.
[50] *Ibid.* 93.
[51] *Ibid.* 128
[52] Barton's resolutions began with the phrase. 'That, in order to enlarge the powers of self-government of the people of Australia . . .' *Convention Debates*, Adelaide, 1897, 17.
[53] *Ibid.* 115.
[54] *Ibid.* 296.

rather than federal in tone,[55] and these delegates were roundly scorned by some of their fellows for doing so.[56]

This, then, was the position at the conclusion of the debates of the Convention as a whole on Barton's general resolutions. The Convention then resolved itself into three committees,[57] of which the Finance and Judiciary Committees need not concern us.

It was the third committee, the Constitutional Committee, which was given the task of arriving at a basis for a constitution, which could then be entrusted to a Drafting Committee for translation into a draft bill. It was presumably this Constitutional Committee whose task it was to express the feeling of the Convention against secession. However, when the Constitutional Committee had finished its secret deliberations, and resigned the formal remainder of its task to the Drafting Committee, there had emerged no provision relating to secession.[58] It was finally left to the inconspicuous Drafting Committee to insert one word into the preamble of the Draft Bill, the word 'indissoluble' before the word 'Commonwealth'.[59] It was this word which represented the response of the Convention to the question of secession as it was presented to them. The word was agreed to by the Convention without comment, save by Deakin who went so far as to praise it as a 'decided improvement' upon the resolutions.[60] Its significance was not to be commented upon again in the Convention, either in Sydney, or in Melbourne, or indeed, in the Imperial Parliament in London.[61]

There was, however, a sequel to this unceremonious and rather clandestine entry into the Draft Bill. Although the Parliaments of Victoria, Tasmania, Western Australia and South Australia largely confined themselves to constructive criticism of the Bill,[62] the Parliament of New South Wales was not so reticent. The conservative Legislative Council, in particular, felt free to remove whatever it saw as objectionable from the Bill. Near the end of a stormy debate, after Barton had

[55] *Ibid.* 155.
[56] *Ibid.* 352.
[57] *Ibid.* 395.
[58] The *Advertiser* (Adelaide), 9 April 1897, reported the progress of the Constitutional Committee. There was no provision relating to secession in the body of the Act, nor was there a reference to the indissolubility of the Commonwealth in the Preamble when it was agreed upon on 8 April 1897. The *Argus* (Melbourne), 9 April 1897, confirms this absence.
[59] The Constitutional Committee completed its task on 8 April 1897, and passed its requirements to the Drafting Committee consisting of Barton, Downer, and O'Connor. As stated, there was at this stage, no provision relating to secession. On 12 April 1897, the Draft Bill was laid before the Convention and the Preamble included the phrase 'indissoluble Commonwealth'. It follows that the word, indissoluble, was inserted by the Drafting Committee. *The Advertiser* (Adelaide), 13 April 1897, noted the inclusion with approbation, stating that it was now clear that there was to be no right to secession, and that the troubles of the United States would now be avoided. It also stated, however, in phrases suspiciously similar to those used by Garran in his *The Coming commonwealth*, that nothing could 'take away from the sacred right of insurrection'.
[60] *Convention Debates*, Adelaide, 1897, 1184.
[61] The Preamble was agreed to without discussion of this point both at Adelaide (*Convention Debates*, Adelaide, 1897, 1189), and Melbourne (*Convention Debates*, Melbourne, 1898, 1741). The Preamble was not discussed at the Sydney sitting of the Convention.
[62] The Debates may be found as follows: New South Wales, *Parliamentary Debates*, 1st series, vols. 87-90; South Australia, *Parliamentary Debates*, 1897; Victoria, *Parliamentary Debates*, 1897, vols. 85-6; Western Australia, *Parliamentary Debates*, 1897, new series, vol. 10. The only particularly interesting discussion for present purposes occured in the Parliament of New South Wales.

already left the Chamber in fury, the Council with great relish struck the word 'indissoluble' from the preamble by 18 votes to 10, and the mover of the motion was barely restrained from moving the insertion of a provision giving the States an express right to secede.[63] But this was a mere flurry. When the Convention met in Melbourne, in 1898, the preamble, including the word 'indissoluble' was agreed to without discussion of the Council's destructive action, which was conveniently ignored.[64] It was this form of the preamble which was to precede the Commonwealth of Australia Constitution Act when it was enacted by the Imperial Parliament in 1900.

4 Analysis of the Debates and their Outcome

Perhaps the single most striking feature of the Convention Debates as they relate to secession is the very lack of detailed discussion of the issue. The question was raised only at Adelaide, at one out of four of the sittings of the Convention. This fact might not have been so obvious if the discussion at Adelaide had been fullsome, but this was simply not the case. Of the sixty delegates, only eight made direct references to secession.[65] Of these eight, four were New South Welshmen, three were Victorians, and one was a South Australian. Thus, perhaps ironically, no Tasmanian or Western Australian even addressed himself to the issue.[66] Queensland was not represented at the Convention. Nor was discussion impressive in terms of volume. If all the discussion at Adelaide relating to the question of secession were to be compiled, it would barely exceed one page out of over twelve hundred needed to record all that was said.

Again, this apparent lack of interest might be explicable if the point had been minor or obsure, but as was pointed out in the first section of this article, and as is suggested by the words of delegates such as Symon and Carruthers, the questions of secession and indissolubility were at least issues of the middle rank, and works which dealt with them were both available to, and read by, the founding fathers.[67] They had before them the awful example of the United States, and their speeches show that this weighed upon their minds; but on the very question that nearly wrecked the American Union, they were all but silent, and their response to that question consisted merely of inserting one word in the Preamble.

[63] New South Wales, *Parliamentary Debates*, Legislative Council, 26 August 1897, 3478. The motion was moved by L. F. Heydon, as part of a general campaign of what can only be described as wanton destruction. Heydon had previously proposed an amendment to clause 61 (6), to withdraw the power of the Commonwealth to call out the forces, on the grounds that such forces might be used against the States. He was persuaded by Barton to withdraw the motion. New South Wales, *Parliamentary Debates*, Legislative Council, 24 August 1897, 3288.

[64] *Convention Debates*, Melbourne, 1898, ii, 1741. Interestingly, the Preamble was simply agreed to without the specific issue involved ever having been raised.

[65] They were: Edmund Barton (N.S.W.), Sir George Turner (Vic.), Joseph Carruthers (N.S.W.), Josiah Symon (S.A.), William McMillan (N.S.W.), William Lyne (N.S.W.), Isaac Isaacs (Vic.), and Alfred Deakin (Vic.).

[66] This fact of itself was of little significance, however, as only one Tasmanian spoke following an agreement among their delegates, (*Convention Debates*, Adelaide, 1897, 308), while the Western Australians adopted the same approach (*Convention Debates*, Adelaide, 1897, 204).

[67] Even delegates known not to be widely read, such as Lyne, had apparently read Bryce: La Nauze, *op. cit.* 273.

Beyond noting the general point, this analayis of the Convention Debates and their outcome will have two objects. Firstly, it will classify the views of secession expressed at the Convention into their main schools of thought in order to gain some overview of the Convention's thinking on the subject. Secondly, it will ascertain what may be learned of the attitudes of the delegates, not from their speeches, but from their solution — not from what they said, but from what they did.

The first, and apparantly the school with the most adherents, was that which held that some unspecified acknowledgement of the indissolubility of the Union and the inadmissibility of secessions should be made somewhere in the Constitution Act. Lyne, McMillan, Carruthers and Deakin appear in varying degrees to have been united on this point. To none of them was the issue one of profound practical importance; rather, it would appear to have been as much a matter of rhetoric as anything else to assert the indissolubility of the proposed federation. Carruthers, who was sufficiently enthusiastic to call upon members to voice their rejection of secession,[68] and who repeated his comments in the Legislative Assembly of New South Wales,[69] was not moved to make practical suggestions as to how to implement the mooted prohibition of secession. Nor did Lyne,[70] or Deakin.[71] McMillan proposed a provision against secession in the Preamble, but did not suggest a provision directly prohibiting secession in the body of the Constitution.[72] To this group of delegates, secession was apparently a problem sufficiently inconvenient or remote (or both), that it could best be dealt with overall by some vaguely negative provision, probably to be placed outside the body of the Constitution Act. In view of the general indifference of the bulk of the other delegates, there is no reason to suppose that these delegates were exceptional in their views.

The second school of thought was that which held that there was no need to make any reference at all in the Constitution Act to the question of secession. This view was held decidedly by Isaacs,[73] and was probably also the view of Turner.[74] As previously mentioned, Isaacs twice interjected to say that as the proposed Constitution would be contained in an Act of the Imperial Parliament, secession of one of the States would be so clearly impermissible that there was no need to expressly provide against it. It has also been submitted that Isaacs' view was not self-evidently correct, for if an Imperial Act were by silence on the point, to arguably confer an implied right upon a State to secede — and that was the relevant issue — then Isaacs' argument would avail the Commonwealth not at all, but rather confound it. Turner's exact view is unclear, but he appears to have thought that secession would only be possible if expressly provided for, and it would seem

[68] *Convention Debates*, Adelaide, 1897, 93.
[69] New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 May 1897, 420.
[70] *Convention Debates*, Adelaide, 1897, 161.
[71] *Ibid.* 296.
[72] *Ibid.* 217.
[73] *Ibid.* 128.
[74] *Ibid.* 48.

to follow from this that he believed that the possibility of secession could be effectively precluded by silence.

Barton occupied a third position, and apparently occupied it by himself. As stated, Barton regarded secession as a practical problem rather than a legal one, preferring to prevent rather than to prohibit it.[75] Barton's device to achieve this end was a Federal Supreme Court which would impartially weigh the competing claims of state against state, and presumably of state against Commonwealth. The effectiveness of the High Court as a protector of the States is, perhaps, more open to question today than it was in Barton's mind.

Finally, Josiah Symon occupied his rather lonely pinnacle on this question. Symon certainly did not wish the Constitution to pass over the issue in silence, and the mere inclusion of the word 'indissoluble' in the preamble would hardly have been consistent with the spirit of his speech. Symon had urged that the rejection of any right of secession be expressed 'at every point and wherever it is possible',[76] and the logical conclusion to be drawn for this and his other statements on the topic is that he would have welcomed an express provision in the body of the Constitution prohibiting secession. Symon's view seems to have been couched in classic American terms: a constitution which was silent or ambiguous on the question of secession was a constitution which carried within it a latent danger. That danger should be expressly excised from the outset, clearly, and beyond dispute. Symon's was the strongest statement against secession, and on its own terns, it was not implemented by the Convention.

It should, of course, be noted that the only form of secession exercising the minds of the delegates was that of a State unilaterally seceding from the Commonwealth. They would have conceded that a secession could, in principle, have been effected by the superior power of the Imperial Parliament,[77] and some would have argued that secession would be possible through the amending power contained in the Constitution itself.[78] Neither of these possibilities, however, conjured up the visions of civil strife and dissension inherent in the notion of a unilateral secession.

We may now turn from this consideration of the opinions of the delegates to an assessment of the method chosen by them to express these views as part of the Constitution which they devised. What is undertaken here is not a discussion of the legal effect of the inclusion of the word 'indissoluble' in the Preamble, but rather an examination of what the adoption of this course of action reveals about the attitudes of the delegates to the question of secession.

The simple method of exploring the significance of the course of action chosen by the delegates is to consider the various options open to them, and thus to attempt to arrive at a conclusion as to why one, which might be called 'the preamble option', was preferred to the others which presented themselves.

[75] *Ibid.* 25.
[76] *Ibid.* 128.
[77] Certainly the logical implications of Isaacs' argument lead to this conclusion, and see Glynn, *op. cit.* 203.
[78] Glynn, *op. cit.* 203.

As has been shown, the delegates were confronted by a recognized and well documented problem which effectively faced all those who would frame a federal constitution. At hand, they had a variety of solutions, ranging from an absolute recognition of the right of secession on the one hand, to its absolute denial on the other. Given the general if vague feeling of the Convention against secession, which would necessarily preclude its recognition as a right, there were still at least four options open to the Convention in dealing with the issue. They were:

1 For the Constitution to say nothing, relying on the correctness of the view of Isaacs.
2 For the Constitution to recognize the indissolubility of the Commonwealth outside its substantive provisions, namely, in the Preamble.
3 For the Constitution to make this recognition in the Preamble, and to also expressly prohibit secession in one of its substantive provisions.
4 For the Constitution to make the recognition in the Preamble, prohibit secession, and arguably to put the matter beyond any doubt whatsoever by conferring upon the Commonweatlh the express power to coerce a rebellious state.

It is a matter of history that the Convention chose the second option, but this very act of choice tends to obscure the fact not only that other possibilities existed, but also the implications of the choice. For, regardless of the reasons for its adoption, one feature of this choice stands out: from four available courses of action the Convention chose the weakest stance against secession bar one.

On any analysis, the inclusion of a word in the Preamble aimed against secession was a less powerful approach than the pursuit of this option in conjunction with one of the other measures outlined. But it can also be very strongly argued that because the Preamble is only a group of words outside the body of the Act, and thus can only be referred to by a court in very exceptional circumstances,[79] that any alternative approach which involved making a statement against secession in the actual body of the Constitution Act would have been a far stronger measure.

The view that the Preamble is of itself an effective guard against secession has not been without eminent supporters,[80] but it can hardly be denied that had the Convention wished to do so, it could have expressed its rejection of secession in far more explicit and unequivocal terms. A question of some interest thus arises: why, given that the Convention had apparently decided against secession, and was aware of the consequences of the ambiguity of the American Constitution on the point, did it choose to express its decision merely by the insertion of one word into the Preamble, rather than by specifically and methodically annihilating the question of secession by explicit provisions in the body of the Constitution? While

[79] *Overseas of West Ham v. Iles* (1883) App. Cas. 386, 388. It was held by Lord Blackburn that if the meaning of the words of an Act is clear, the Preamble will not be taken into account. The relevance of the Preamble is as a tool to discern the intention of the Parliament in the case of ambiguity. Thus, while of some importance, the Preamble is clearly subordinate to the express words of the Act.

[80] *E.g.* Quick and Garran *op. cit.* 286. The authors of this work saw the Preamble as containing guiding principles for the new Commonwealth.

any answer to this question must to some extent be based upon conjecture, an attempt to answer it is vital to an understanding of the response of the Convention to the issue of secession.

The most obvious answer would be that at least some of the delegates felt that their addition to the Preamble did indeed effectively guard against the possibility of secession, and it is not difficult to find a certain amount of evidence to support this view. As noted above, McMillan of New South Wales specifically suggested that the proposed prohibition of secession be placed in the Preamble, and in doing so referred to the American example.[81] On the face of his speech, it seems clear that he believed such a prohibition would be effective. While campaigning against acceptance of the Constitution Bill, Henry Bournes Higgins was at pains to stress the inability of the colonies to extricate themselves from the proposed union once they were included inside it, and cited the Preamble as support for his view.[82] But such a statement may have been as much a matter of propaganda against acceptance of the Bill as the reflection of any real belief in the efficacy of the Preamble. Perhaps more significant was the comment of Bryce, who, when he came to consider the newly enacted Australian Constitution in 1901, briefly remarked that the Preamble 'enounced . . . that indissolubility of their union which the Americans did not enounce in 1788'.[83] Bryce thus made no direct comment upon the efficacy of the Preamble, but certainly betrays no sense of dissatisfaction, which was perhaps a little puzzling in view of the strength of his comments on the American Constitution.[84]

But there is also strong evidence that not everyone who read the Preamble, delegate or not, was so convinced of its effectiveness. Outside the Convention, there was considerable confusion as to the effect of the inclusion of the word 'indissoluble' in the Preamble. In urging its readers to vote for the Commonwealth Bill, the Sydney Bulletin suggested that the provision for the indissolubility of the proposed Commonwealth was not a problem, as Section 128 could be used to strike the word 'indissoluble' from the Preamble,[85] an ill-considered view which drove Higgins to despair.[86] In 1898, the Governor of Victoria rather surprisingly adopted a similar line of reasoning in his speech from the throne.[87]

Perhaps the most instructive insight as to the views of the actual delegates to the Convention comes from Patrick McMahon Glynn, himself a delegate. In 1906, Glynn wrote a since much neglected article on secession, in which he stated:

> The indissolubility of the Commonwealth of Australia is proclaimed in the preamble of the Constitution. The Union of course, is none the less dissoluble on that account.[88]

[81] *Convention Debates*, Adelaide, 1897, 217.
[82] Higgins H. B., *The Australian Commonwealth Bill. Essays and Addresses* (1900).
[83] Bruce J., 6-8. *Studies in History and Jurisprudence*(1901) i, 532.
[84] Bryce J., *The American Commonwealth* (2nd ed. 1890) 336.
[85] Bulletin (Sydney), 2 January 1897, referred to in Hunt *op. cit.* 78.
[86] Higgins, *op. cit.* 71.
[87] *Ibid.* 125.
[88] Glynn, *op. cit.* 203.

Glynn, presumably one of the delegates who cheered Carruthers' suggestion that there should be no secession, saw the words of the Preamble as little more than pious sentiment.

> The declaration, therefore, that the Australian Commonwealth is indissoluble, may be regarded as one of those preliminary flourishes addressed to the conscience, which are to be found in the preambles of instruments which suggest more that they accomplish.[89]

Glynn, the lawyer-delegate, was thus quite certain that the inclusion of the word 'indissoluble' in the Preamble was at best of negligible effect.

Glynn's view highlights one aspect of the action taken by the Convention in placing the prohibition of secession in the Preamble, rather than in the body of the Constitution Act. Glynn was one of many lawyers who were delegates to the Convention, which was able to draw upon a vast pool of legal expertise.[90] All of these men would have been well aware of the status of a preamble to a statute as being largely a 'preliminary flourish', only to be used as an aid to the interpretation of the statute in certain very limited circumstances.[91] They would all have been aware, as Glynn was aware, that there was a possibility which amounted virtually to a probability that the Preamble would be dismissed as mere high sounding language in the hopefully unlikely event that it became necessary for a court to interpret the Constitution on the question of secession.[92] It would, therefore, have been a most dangerous place in which to express any serious principle or provision of the Constitution. Furthermore, even if there was some possibility that the Preamble would prove an effective bar to a unilateral secession, the fact that this would be a possibility only would leave the Constitution open to that very charge of uncertainty which plagued the Americans. As we have seen, some degree of confusion already existed in the eyes of the public, even before the Bill was approved.

In the light of the discussion above, it is clear that the proposition that the bulk of delegates actually saw the Preamble as an effective means of prohibiting secession is, at the very least, hightly doubtful.

An alternative (and far more convincing) explanation of the course of action taken by the Convention, is that it chose merely to express its hopes for the future in the Preamble, rather than to attempt any actual prohibition of secession. Such an argument would be strongly based upon the fact that to many of the delegates, the negation of a right of secession was quite unnecessary, though an assertion of the immortality of the Commonwealth might have been seen as both seemly and proper.

To such delegates, the question of secession was rendered irrelevant by virtue of the Constitution being contained in an Imperial Act, a view already discussed. The best examples of such delegates are Isaacs and Glynn. Isaacs was profoundly

[89] *Ibid.* 204.

[90] Appendix 8 in La Nauze, 328, which includes the occupations of the founding fathers. Men such as Symon, Abbot, Barton, Quick and Downer were acknowledged experts.

[91] See the discussion relating to preambles, in Quick and Garran, *op. cit.* 286.

[92] Glynn, *op. cit.* 202, and it is possible that Symon's demands for 'clear expression' may have suggested a disinclination to merly place a prohibition in the Preamble.

unimpressed by the spectre of secession, but offered no opposition to the Preamble as it ultimately emerged. Likewise Glynn, who waxed almost jocular when discussing the Preamble's lack of substantive effect,[93] yet agreed to it without demur.[94]

Other delegates may have agreed with Garran that the intrinsic nature of a federation excluded the possibility of secession beyond any question.[95] Still others, like Barton,[96] would have seen the question as practical, rather than constitutional. To all these delegates, a substantive provision prohibiting secession would have been an absurdity, a tilting at non-existent windmills. But a dignified statement of the permanence of a great new nation would have been quite another thing, and the place for such a statement would have been in the Preamble, since the legal effect of such a statement would not be of importance.

Indeed, there was perhaps a link between those delegates who saw the Preamble as an effective prohibition of secession, and those to whom it was a mere flourish. To those who could conceive of no real difficulty, a substantive provision was inadmissible — but a reference to the indissolubility of the Commonwealth in the Preamble would have been acceptable as contributing to a dignified opening. To those who required a prohibition, the Preamble could be construed as giving them one. Thus the Preamble may have provided a middle ground, being all things to all men.

There is yet another possible explanation for the adoption of the 'Preamble option', though it arises more from an examination of the circumstances surrounding the federal movement than from any direct evidence from inside the Convention. While the Convention was formulating its draft constitution, it still had before it the exceedingly daunting task of convincing the people of the Australian Colonies to federate at all. It is well-known that the watch-word of the Convention was 'compromise', and the reason for this atmosphere of conciliation was the necessity of arriving at a package which would be acceptable to the people of all the Colonies. Given a population which was perhaps benignly interested in, but certainly not irrevocably committed to any scheme of federation which might be arrived at by the Convention, the last feature of such a scheme which would have recommended itself to anyone unsure of their position would have been a

[93] Glynn, *op. cit.* 203.

[94] Glynn proposed the recognition of God in the Preamble but made no comment as to the word 'Indissoluble'. *Convention Debates*, Adelaide, 1897, 1184.

[95] Garron, *op. cit.* 26. Interestingly, Quick and Garron, *op. cit.*, this argument is not raised at all, and the argument against secession (to the extent that it is raised specifically), is rested basically on the preamble: 293. It may also be as well to note at this stage the leading role played by Sir Robert Garran regarding the question of secession. Garran was virtually the first Australian writer to mention the possibility in his book, *The Coming Commonwealth*, where he determinedly raised the argument that it was impossible. He served as secretary to the Drafting Committee which inserted the word 'indissoluble' in the preamble. He appears to have inspired the complimentary references to that insertio in the Adelaide press, and was the only leading federalist present when the Legislative Council of New South Wales moved its deletion (New South Wales, *Parliamentary Debates*, Legislative Council, August 1897, 2808. In 1934, suitably Garran was joint author of *The Case for Union*, a reply to Western Australia (Joint Committee of Parliament), *The Case for Secession* (1934). Whatever the reason, Garran seems to have gone to some trouble to rule out secession from the Australian federation.

[96] *Convention Debates*, Adelaide, 1897, 25.

statement that once the union was formed it was for better or worse, and even if for worse, forever.

In this connection it must be noted that supporters of federation were quite often at pains to suggest that there would be an escape valve, whether by means of Garran's 'easy revolution',[97] or the Bulletin's prospect of constitutional amendment.[98] Correspondingly, opponents of federation, including the Australian Labor Party, were quick to attack the suggestion of indissolubility.[99]

Given this atmosphere, it may well have been the case that whatsoever the personal preferences of the delegates themselves, it was judicious to confine references to the permanence of the union to the Preamble, rather than to descend into almost certainly divisive specifics in the body of the Act. After all, even the comparatively innocuous Preamble had incurred the wrath of the Legislative Council of New South Wales.

It is tempting to speculate as to whether any of the delegates to the Convention might have desired a right of secession. To the extent that none of them said so, the answer must be no. But the Convention did not lack such statements as those of Holder of South Australia, who said:

> I do not want that the States should be dependent for their existence upon the Commonwealth. If there must be any dependency there would be less danger in making the Federation dependent upon the States . . .[1]

Holder was criticized for making so 'confederationist' a statement.[2] The implications of Holder's remark are intriguing for the purposes of this discussion, although he was, perhaps, speaking loosely at the time. The most that can be said in this connection, is that a delegate inclined to favour secession, or at least disinclined to prohibit it, might well have preferred to accept a word in the Preamble, rather than to oppose it and, so risk the inclusion of a more explicit and inconvenient statement in the body of the Constitution Act.

It is, of course, impossible to be sure of the dominant factors which influenced the delegates in reaching their decision. Presumably, their course was dictated by a number of factors. What does emerge quite clearly, however, is that the Convention, (for whatever reasons), adopted a 'soft-option' on secession.

5 Conclusion

Historically, therefore, the delegates of the Convention were faced with a clear issue — they were compelled to adequately consider the question of secession, if only to make clear their utter rejection of the concept. Yet their discussion of the issue was almost nugatory, and their undistinguished response to it was certainly not one of their more significant achievements.

[97] Garran, *op. cit.* 36.
[98] *Bulletin* (Sydney), 2 January 1897, referred to in Hunt, *op. cit.* 78.
[99] Clark C. M. H. *Select Documents in Australian History 1851-1900* (1955) 495.
[1] *Convention Debates*, Adelaide, 1897, 155.
[2] *Ibid.* 352

Further, for all its flourish, the history and origin of the Preamble casts grave doubts upon any claims it may have to be the Constitution's guardian against secession. For whatever reasons, secession emerged from the Convention as the same vague and ill-defined issue which continues to periodically provide the basis for half-meant and less well-perceived threats to the permanence of the Australian Federation.