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AUSTRALIAN CONSTITUTION CENTRE

Unit 5: Australian identity, federation and the Constitution including the intentions of the framers – Year 6 - Civics and Citizenship (C & C) Strand: Citizenship, Identity & Diversity

Topic 6.1: How and why the Australian Constitution came to be

Overview of how the Constitution came to be

The first attempt at a loose federal system, the Federal Council of Australasia, occurred in 1885. It was sparked by defence concerns about French and German interests in the Pacific, including the prospect of the transportation of French convicts to New Caledonia. It failed. This was in part because it was only a legislative body – there was no executive government, no policies and no money – so it was not a full federal system. But it also failed because the colony with the biggest population and economy – New South Wales – refused to join.

The Premier of New South Wales, Sir Henry Parkes, ignited the federalism movement again with his **Tenterfield speech** in 1889. He recommended a more complete federal system and the holding of a Convention to devise a Constitution. The other Premiers were at first reluctant and only agreed to an 'informal meeting'. This became the **Melbourne Conference** of 1890. It met for seven days and delegates became enthused by the idea of federation. It agreed to establish a National Australasian Convention to draft a federal Constitution.

Before the 1891 Convention began, two of its delegates, Andrew Inglis Clark from Tasmania and Charles Kingston from South Australia, distributed draft Constitutions. They drew on provisions from the Constitutions of the Australian colonies, Canada, the United States and British statutes. Kingston threw in the Swiss idea of the referendum.

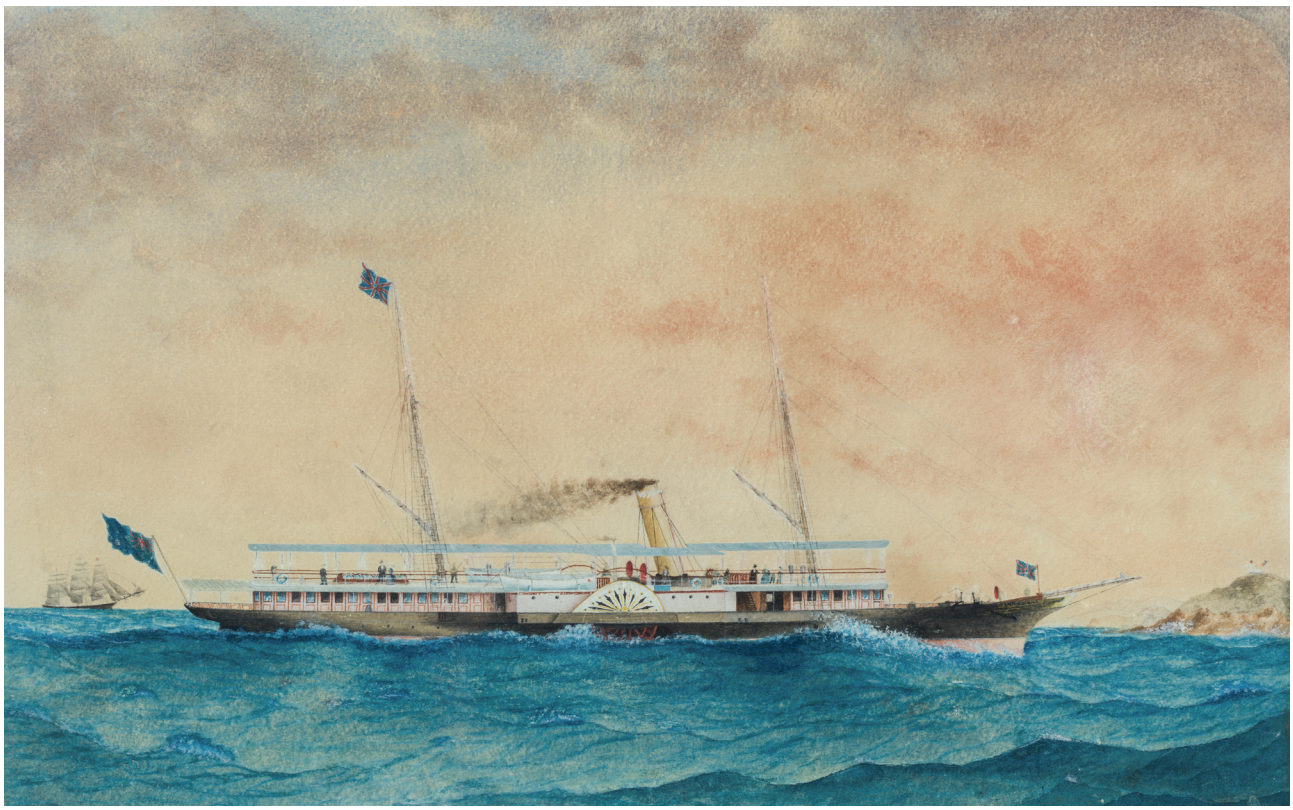
The **1891 Constitutional Convention** sat in Sydney in March and April 1891. It was comprised of seven representatives of each of the Australian colonies appointed by the colonial Parliaments. They included senior Members of the Government and the Opposition.

Australasian Federation Conference delegates | 1890 Source: State Library of South Australia

Three New Zealand representatives also attended. Only 35% of the delegates had been born in Australia. Most of the rest were born in Britain. They were all male.

The 1891 Convention sat for around a month. It started by debating the general principles and basic structure of the proposed federal system. A draft was then prepared, which the Convention debated in detail.

Much of the drafting work was revised during the Easter break on 27-29 March. Sir Samuel Griffith, from Queensland, had arrived on the Queensland Government's steamship, ***The Lucinda***. He took the drafting committee out on *The Lucinda* so they could do concentrated work on revising a preliminary draft. The sea was rough, so they took refuge on the Hawkesbury River at Refuge Bay and spent days of intense work preparing a full draft. The main drafters were Samuel Griffith, Charles Kingston and Edmund Barton from New South Wales (who replaced Andrew Inglis Clark, who was sick and did not join until the last day). They were also joined by John Downer, Andrew Thynne, Henry Wrixon and Bernhard Wise.



Q.G.S.Y. Lucinda | 1897
Source: State Library of Queensland

After Easter, the Convention reconvened and debated the revised draft Constitution, settling on an agreed version.

The Convention agreed that the draft Constitution should be sent to the colonial Parliaments and that once it had been adopted by at least three of them, the British Government should be requested to bring it into effect for those colonies. But for various reasons, it was not adopted by any colony. Victoria was suffering a financial crisis. The New South Wales Government needed the support of the newly formed Labor Party to survive, and Labor opposed federation. With the most populous States not proceeding, the others dropped it too.

Federation was revived by a popular movement. Federation Leagues were created, especially along colonial borders where people were frustrated by having to pay taxes on goods every time the goods crossed the borders. They agitated for federation at meetings and conferences.

The **Corowa Conference of 1893** was pivotal. There John Quick devised a plan to get federation back on track. He proposed that each colony enact legislation in advance, which would require the election of a new Constitutional Convention and a process for dealing with the new Constitution once it was agreed upon. This would involve putting it to the approval of the people in a referendum in each colony, before it went to the United Kingdom for enactment.

Legislation was passed in five of the colonies. Queensland, however, could not agree upon it and did not participate in the 1897 Constitutional Convention. It was preoccupied with internal divisions about whether it should divide into separate colonies. Western Australia agreed to participate, but decided to have its delegates elected by Parliament, rather than the people. In New South Wales, South Australia, Tasmania and Victoria, delegates were directly elected by the people of the colony on 4 March 1897. Each colony was represented by 10 delegates. New Zealand chose not to participate, as it was not interested in joining the federation.

The 1897 Convention first sat in Adelaide on 27 March 1897. Various committees were formed. The critical one was the drafting committee, which comprised Edmund Barton, John Downer and Richard O'Connor. Robert Garran served as its Secretary. The Convention agreed to draft a new Constitution, but drew substantially on the 1891 version. Major changes that it made included requiring that Senators be directly elected (rather than being elected by State Parliaments) and that the Constitution be changed by way of referendum (rather than State Conventions). In doing so, it moved further away from the United States model, towards a more democratic one.

Invitation for the opening of Parliament in the Exhibition Building | Melbourne | 1901
Source: State Library of Victoria

The Adelaide Convention produced a revised draft Constitution, which was then sent to the colonial Parliaments for review and recommended changes. This break allowed the Premiers to travel to London for Queen Victoria's Diamond Jubilee. The British also made suggested changes, which were secretly given to the NSW Premier, George Reid, and then proposed as NSW recommendations. The Convention resumed in Sydney in September 1897 for three weeks. Another break was then needed because the Victorians had to return home for a general election. The final session of the Convention was held in Melbourne from January to March 1898. It approved a new draft Constitution.

Legislation in most colonies required that the draft Constitution be put to a **referendum**. A referendum was held in New South Wales, Victoria and Tasmania on 3 June 1898 and in South Australia in 4 June. While majorities approved it in each of the colonies, the referendum still failed in New South Wales because it required at least 80,000 'Yes' votes before it could pass. The other colonies decided there was no point in proceeding with federation without New South Wales.

Some changes were agreed to the draft Constitution at a Premiers' Conference in Hobart in 1899. Referendums were again held, and passed in all four colonies between April and July 1899. Queensland also agreed to join and passed its referendum on 2 September 1899. This only left Western Australia outstanding. The other colonies decided to proceed without Western Australia, if necessary (but Western Australia later passed its referendum in 1900 and joined).

The Constitution Bill was taken to the United Kingdom, to be enacted as part of a British Act of Parliament. The British wanted to change some parts. There were intense negotiations and in the end, only minor changes were made. The *Commonwealth of Australia Constitution Act 1900* was passed by the British Parliament and given royal assent on 9 July 1900. The Commonwealth Constitution was set out in section 9 of that Act.

Getting the British to pass the Constitution

> *'We danced hand in hand in a ring around the room' – jubilation at getting the British to pass the Constitution*

After the Constitution was approved by the Australian people in referendums in 1899, it still needed to be passed by the British Parliament (to give it a status higher than a local Australian law). The British Government asked each of the colonies to send one representative to London to assist with its enactment. The delegation was made up of Edmund Barton (NSW), Alfred Deakin (Vic), Charles Kingston (SA), Philip Fysh (Tas) and James Dickson (Qld). At this stage Western Australia had not yet agreed to join the federation, but it sent a delegate, along with New Zealand.

The Australian delegation was determined that the Constitution should not be changed. When a British Member of Parliament alerted them to the fact that the British Government would require some changes, Deakin was furious. He fired back a letter saying:

> 'To alter our work after we have finished it… by a mere exercise of overlordship would be an inconsiderate, impolite and offensive act of supremacy. There ought not now be the least tampering with a measure which has run such a gauntlet of criticism and secured at last such an overwhelming verdict in its favour from our Parliaments and peoples.'

Changes proposed by the British

Unimpressed by these objections, the responsible British minister, the Secretary of State for the Colonies, Joseph Chamberlain, proposed four main changes. Three were directed at the 'covering clauses' (i.e. the first eight provisions of the British Act that encases the Constitution) and the fourth was in the terms of the Constitution itself.

The three proposed changes in the covering clauses were directed at what the British perceived as attempts by Australia to become independent. They thought that a definition of 'colony' in the covering clauses was intended to prevent the new federation from being treated as a 'colony' and being bound to comply with British laws that applied by 'paramount force'.

Under the existing doctrine of 'repugnancy', the colonies had no power to make laws that were repugnant to (ie inconsistent with) British laws which applied expressly to the colonies or were clearly intended to do so.

Portrait of Joseph Chamberlain | 1900
Source: National Library of Australia

Portrait of Edmund Barton and Alfred Deakin | 1900
Source: National Library of Australia

These British laws applied by 'paramount force' in the colonies, meaning that they overrode all local colonial laws, and were used by the British to keep control over their colonies. The British were not prepared to let the Australians slip free of them.

British laws of paramount force included laws concerning constitutional matters and laws about shipping and trade across the Empire. The British were worried that another provision in the covering clauses would allow Australian laws to override British laws about shipping. They were also suspicious about another provision that said that the Constitution Act bound the Crown, as it might limit the executive powers of the British Government.

The delegation played the issue quite cleverly. They said, with innocent faces, that they had never intended that the colony of the Commonwealth of Australia be independent or free from the British laws of paramount force, but that now that the British had raised the issue, perhaps there ought to be a debate about releasing Australia and Canada from these colonial shackles. The British really did not want to get into a broader fight on this issue and backed off. Both sides agreed simply to drop the definition of 'colony', the reference to binding the Crown and the provision about shipping from the covering clauses.

For the Australian delegates, these were not significant matters, and cutting them out did not involve any substantial change. What they wanted to avoid was any express provision that would prevent future independence.

The Privy Council

The key fight was about appeals from Australian courts to the British Privy Council. Its full name is the 'Judicial Committee of the Privy Council', and it is the highest British court for appeals from colonies and some former colonies that wish to keep it. The Australians wanted full judicial control over Australian matters. They were doubtful that a British court would fully understand the federal system in Australia or would interpret the Constitution in a way that properly took into account local circumstances in Australia. The British do not have an entrenched written Constitution. Their constitutional system was in many ways quite different from what was being proposed in Australia. So there was a real risk that in appeals to the Privy Council, the Constitution would be misunderstood and misapplied, and that Australians could do nothing about it.

The British, on the other hand, wanted to protect their commercial interests in the colonies. They wanted the security of knowing that a British court would ultimately control such matters, especially when it came to trade, shipping and other commercial issues.

When the Constitution Bill was introduced into the British Parliament at Westminster, section 74, which dealt with final appeals, was removed altogether by the British, and a new covering clause was included which said that regardless of what was in the Constitution, there could be appeals to the Privy Council from the High Court and all State Supreme Courts. The Australian delegates were horrified. They reminded Chamberlain that if he made substantial changes to the Constitution it would have to go back to the people in the colonies for approval in referendums.

Eventually, Chamberlain offered a compromise. The High Court could be the final court of appeal for local constitutional questions concerning the respective powers of the Commonwealth and the States, while other cases – including the ones concerning trade, shipping and commercial matters – could be heard by the Privy Council.

The Australian delegation was elated at this compromise. Their main concern was about constitutional integrity, so this was far better than the Privy Council having ultimate judicial control. They agreed and section 74 was re-drafted by Sir Samuel Griffith to reflect this change.

Victory

Once this compromise was reached, the delegates waited until they could be alone in a room together. According to Deakin, who was there, once the door was shut they 'seized each other's hands and danced hand in hand in a ring around the centre of the room to express their jubilation'.

The relief was enormous. Ten years of negotiations, drafts, battles, referendum campaigns, losses and victories, and finally they had won it. They had succeeded in getting six separate Australian colonies to federate, becoming one nation. Even though that nation would still be a colony of Britain and still be subject to British laws that bound it by paramount force, there was always the likelihood that this would change over time, and Australia would grow into independence.

As these serious statesmen did their little jig of joy, they knew they had achieved a momentous thing, and laid the foundations for a great country in the future. It was certainly something to celebrate.

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Topic 6.1: How and why the Australian Constitution came to be

Why is the Constitution in a British Act of Parliament?

Australia's Constitution was drafted in Australia by people from the different Australian colonies who met in Constitutional Conventions to complete this task. But it was then sent to the United Kingdom to be enacted by the British Parliament in Westminster. Why?

There are a two possible reasons. First, Australia was still a colony of the British Empire. Federation involved turning six separate colonies into one bigger colony. Despite people referring to Australia as a 'nation' in 1901, there was no intention at the time of giving Australia independence. So one argument is that it was fitting for its new Constitution to be enacted in London. This showed that it remained part of the Empire and subordinate both to the Crown and the power of the British Parliament.

But this argument is not wholly convincing. As far back as the 1850s, the British had been happy to let the South Australian and Tasmanian colonies enact their own Constitutions locally. The only reason why the New South Wales and Victorian Constitutions were given effect by British legislation instead was because they included provisions that would otherwise impermissibly clash with British laws.

A stronger argument is that a federation was being created. This meant that the Commonwealth and the States would have competing interests. Control over the Constitution therefore could not be given to one side or the other, or they could alter the careful distribution of powers between them. It would be like playing a sporting match, when one side could change the rules in the middle of the game. A separate ruling body is needed to impose the rules.

This wasn't an issue, for example, when the South Australian Constitution was enacted in 1856. It only dealt with one Parliament and one Government and could be treated in the same way as other legislation enacted by the South Australian Parliament without any problem.

For a federation, what was needed was a Constitution that was 'entrenched' by a higher power, so that it could not be controlled or directly amended by either the Commonwealth or the States. That's where the United Kingdom Parliament came in. It was the superior Parliament of the British Empire, and regarded as a 'sovereign' Parliament, meaning it was all-powerful. If British laws expressly stated they applied to a colony, or were necessarily intended to apply to the colonies (e.g. laws about overseas shipping and defence), then those laws applied by 'paramount force' (i.e. they were legally binding and had to be complied with). Any law that was inconsistent with a law that applied by paramount force (known as a 'repugnant law') was treated by the courts as invalid.

All of this meant that both the Commonwealth and the States were legally obliged to obey a Constitution enacted by the British Parliament and couldn't get out of that by enacting their own legislation.

The way the Constitution was constructed

Accordingly, the framers of the Constitution drafted the Constitution itself. Then they drafted a British Act that would hold it in place and give it legal force. This British Act is the *Commonwealth of Australia Constitution Act 1900*. It contains a preamble, eight introductory sections (known as the covering clauses) and then section 9 says: 'The Constitution of the Commonwealth shall be as follows:'. That's where we find the Australian Constitution – in section 9 of this British Act.

Amending the Constitution

While the framers of the Constitution wanted the Constitution to be legally binding on the Commonwealth and the States, they did not want that to mean that the British controlled all amendments to the Constitution. This is what had happened to the Canadian Constitution of 1867, and the Australians wanted to avoid the humiliating prospect of having to having to ask the British for constitutional change.

Ordinarily, if a Constitution was imposed by a British Act of Parliament, only the British Parliament could change it. But the framers of the Constitution cleverly structured the Act so that there was an internal mechanism within the Constitution itself which permitted its amendment by a special method. This was section 128 of the Constitution, which requires an amendment bill to be passed by both Houses (or in some cases one House) of the Commonwealth Parliament, and then approved in a referendum by a majority of voters overall and a majority in a majority of States. Section 128 says: 'This Constitution shall not be altered except in the following manner…' It only deals with the provisions of the Constitution as set out in section 9 of the British Act. It does not say that it permits the amendment or repeal of the covering clauses or the preamble of the British Act (although some have argued it does).

What happens if Australia becomes a republic?

If section 128 does not permit the amendment or repeal of the preamble or the covering clauses in the British Act, how could Australia alter or repeal those provisions, particularly if Australia became a republic? In the past, we would have had to ask the British Parliament to do so. But since the enactment of the *Australia Acts 1986*, there is a mechanism under which the Commonwealth and all the State Parliaments can enact cooperative legislation that would amend or repeal the preamble and covering clauses of the British Act. The *Australia Acts* also prevent future British laws from applying in Australia. This means that even if the British amended or repealed the *Commonwealth of Australia Constitution Act 1900*, including section 9, this would have no legal effect in Australia.

Alternatively, the Australian people could vote to re-enact the Constitution as an exercise of their collective will. This would make it clear that sovereignty in Australia is not held by a Crown or the British Parliament, but instead by the Australian people.

Queen Victoria | c. 1900
Source: State Library of Victoria

So what was proposed to be done about the preamble and the covering clauses when the republic referendum was held in 1999? Were they to be repealed? The States offered their assistance to achieve this under the *Australia Acts*. Was the revised republican Constitution instead to be re-enacted as an act of popular sovereignty?

The answer was neither. The Commonwealth Government decided to leave the Constitution of the new Australian Republic in section 9 of a British Act of Parliament. It would dispose of the embarrassing problem of having the Constitution of an independent country sitting in the statute of another country, simply by not re-printing the preamble and the covering clauses, so that people would forget about them.

As the referendum was not successful, no one had to give effect to this peculiar approach. Australia's Constitution remains in section 9 of a British Act of Parliament, but fully under the control of Australians.