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ESSAYS IN AUSTRALIAN FEDERATION

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PREFACE

Reflecting in 1898, at the close of the last Convention, on the mass of public records which must exist to document Australia's federation debate and its results, Alfred Deakin wrote blandly—and perhaps, as one who has been through the mill, with a touch of irony—of the task that now lay ahead of scholars:

> Ample material lies open to the student of the future to comprehend and criticise their work and it asks but patience, together with some acquaintance with the political methods and social and material conditions of the period to enable him to digest and comprehend its significance and the circumstances of its adoption.[1]

But half a century later Manning Clark was still asking for a scholar to tell him 'why the second nibble at federation became a bite, and how the bite developed into the Commonwealth of Australia',[2] while Geoffrey Blainey had justly described the federation movement as 'a subject that has been a no man's land in Australian history for almost a generation'.[3] Today, at the end of the sixties, as men born in the days of the early Commonwealth pass into old age and die, we still lack a comprehensive modern work to answer Clark's question. One can imagine Deakin's shade, on the sidelines, drawing wry amusement from it all.

Ironically enough, Deakin's own contemporaries supplied the closest approach to the kind of History he seems to have had in mind. His palm—'students of the future'—could well be awarded to John Quick and Robert Garran, not on the technical quibble that their *Annotated Constitution* appeared after 1898,[4] but as a way of doing homage to their remarkable achievement. If the most enduring part of that achievement lies in the core of the work—those 700-odd pages of massive 'Commentaries on the Constitution' which display extraordinary historical and legal scholarship—no less impressive is the long 'Historical Introduc-

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THE COLONIAL OFFICE AND THE COMMONWEALTH CONSTITUTION BILL

B. K. de Garis

In March 1897 fifty delegates representing five colonies gathered in Adelaide for the opening of the National Australasian Convention, charged with the responsibility of framing a new constitution which it was hoped would provide a basis for the federal union of the Australian colonies. The first session lasted for four weeks and broke up on 23 April, in time for the premiers of the colonies concerned to sail for England to participate in the celebration of Queen Victoria's Jubilee and to attend the associated Colonial Conference. By that time the first draft of a constitution had been completed, and this was referred to the parliaments of the participating colonies for consideration.[1]

The four month adjournment also gave the Colonial Office in London an opportunity to scrutinize the Draft Bill and to decide what part the British government should play in the constitution-making process. For several decades the staff of the Colonial Office and successive Secretaries of State for the Colonies had watched the fitful progress of the federal movement with keen interest. From 12,000 miles away the jealousies and rivalries which preoccupied the colonists seemed trivial compared with the benefits which federation would confer upon the colonies, and those who were responsible for British colonial policy and administration were uniformly anxious that Australia should be united. Memories of the failure of Grey's attempt to federate Australia and Carnarvon's attempt to confederate South Africa, together with the notorious touchiness of colonial leaders, made the British officials reluctant to interfere, but they lost no oppor-

tunity to encourage any spontaneous movement in Australia towards federation.[2]

In 1890–1 the Colonial Office followed the proceedings of the Federal Conference in Melbourne and the National Convention in Sydney with close attention. The Draft Commonwealth Constitution Bill of 1891 was analysed and there was some discussion of how to 'bring the Imperial factor into play' to help the Australians work out their federation.[3] The Permanent Under-Secretary, Sir Robert Herbert, suggested that it would probably be necessary for the colonies to send delegates to London to settle their own differences of opinion and to hear any imperial objections, but he warned that 'no chickens are hatched yet on the other side'.[4] Herbert's pessimism soon proved all too justified. The colonists temporarily lost interest in federation and nothing further came of the 1891 Bill. Curiously enough, although Herbert retired not long after writing this minute, he made a temporary return to the Colonial Office nine years later and had thus to participate in negotiations with Australian delegates along the lines he had foreseen.

As reports of the proceedings of the 1897 Convention reached London, the Colonial Office began once again to consider how it could hasten the consummation of the federal movement, and in this it received some encouragement from Australia. Alfred Deakin, who had done his most valuable work at the Convention behind the scenes as a mediator between conflicting groups, carried on with this role in a wider setting. Evidently fearful that the smaller colonies would not accept the limitations which had been placed on the financial powers of the Senate, Deakin wrote to two former Governors of his colony, Sir Henry (now Lord) Loch and Lord Hopetoun, now both resident in England, asking them to exert their influence to convince the Premiers of Western Australia, Tasmania, and Queensland of the necessity for this arrangement.[5] Loch and Hopetoun both forwarded Deakin's letter to Joseph Chamberlain, the Secretary of State for the Colonies, with strong recommendations that he should attempt to influence the Premiers as Deakin requested and offers of their own help if it could be useful.[6] A despatch from the Governor of Western Australia, Sir Gerard Smith, also prompted the

Colonial Office to consider what use might be made of the visit to London of the colonial premiers. In the previous year Smith had hinted that the only certain way to arouse enthusiasm for federation in his colony would be a personal visit by the Secretary of State.[7] He now suggested that the attitude towards federation of the Premier of Western Australia, Sir John Forrest, was swinging in the balance and would rest largely upon the arguments which Chamberlain might address to him when he visited London.[8] In his minute on this despatch John Anderson of the Australasian Department at the Office doubted the wisdom of putting pressure on individual premiers but suggested that some good might be done by emphasizing to them as a group that their position was weakened by their disunity and lack of a strong central authority.[9]

Further discussion was sparked off by the arrival at the Colonial Office of a copy of the Draft Constitution Bill as it stood at the end of the Adelaide session of the Convention; in a series of minutes a number of possible amendments were canvassed, but there was no agreement as to how these should be brought to the attention of the Australians.

Sir John Bramston, the Assistant Under-Secretary in charge of Australasian affairs, noted that prior to the passing of the British North America Act and the creation of the Canadian Dominion, a constitutional conference of colonial and imperial delegates had been held in London under the presidency of the Secretary of State for the Colonies.[10] It would be desirable to repeat this procedure, Bramston felt, 'in order that the Colonial Governments might understand how far they can go without infringing on the essential attributes of H[er] M[ajesty] and her Government here', but he reluctantly concluded that the great distance between England and Australia made the scheme impracticable. As an alternative he urged that an eminent constitutional lawyer such as Lord Herschell, the Lord Chancellor, or Sir Henry Jenkyn or Sir Courtenay Ilbert, the Parliamentary Draftsmen, should be sent out to explain the views of the British government to the next session of the Convention. Unless some action along these lines was taken, Bramston warned, there was likely to be trouble later when the Constitution Bill was sent 'home' for submission to Parliament. It is significant that the idea

of a conference like that which had preceded the confederation of Canada was not taken up by Bramston's superiors; quite apart from the practical difficulties involved, it is unlikely that the colonists would have been willing to participate. However both the Permanent and Parliamentary Under-Secretaries, Sir Edward Wingfield and Lord Selborne, were impressed by the suggestion that a constitutional authority should be sent out to the Convention. Wingfield proposed that the premiers should be sounded out whilst in London to ascertain whether this would be acceptable to them, and whether the colonies would be willing to meet the expenses of the mission.[11] The only alternative, he felt, was to embody the views of Her Majesty's government in a despatch which might be laid before the Convention. Selborne deprecated the idea that the colonies should be asked to bear the costs involved, but he warmly supported the plan to send out a representative and suggested Sir Robert Finlay, the Solicitor-General, as another possibility.[12]

All these proposals were weighed up by Chamberlain, who concluded that the Solicitor-General could not be spared, and that in any case it would be useless to send anyone of lesser standing than Lord Herschell, who was unlikely to be available.[13] Nevertheless Chamberlain instructed his staff to prepare two memoranda; one firmly expressing the views of Her Majesty's government on aspects of the Draft Constitution which affected the rights of the imperial Parliament and the unity of the Empire; the other containing friendly suggestions which it seemed useful to make towards improving the Constitution on matters which were of no direct relevance to imperial interests. These memoranda could then be given to the premiers or used as a brief for a delegate to the Convention, as seemed best. In either case, Chamberlain pointed out, even if the Australians did not accept the advice of Her Majesty's government, they would be acquainted with its views and prepared for argument if a protest was subsequently necessary.

Following this instruction not two but three memoranda were prepared in the Colonial Office, with the assistance of the Crown Law Officers.[14] Memorandum A contained a list of suggested amendments to the Draft Constitution on matters concerning imperial interests; Memorandum B gave reasons for these sug-

gestions; and Memorandum C contained all the other criticisms of the Bill which had occurred to those examining it. When the memoranda had been completed Chamberlain departed from both his earlier plans for using them and passed them on in strict confidence to the Premier of New South Wales, George Reid, whilst Reid and his fellow Premiers were in London for the Jubilee celebrations. Having first sounded Reid out in conversation, Chamberlain forwarded the memoranda to him with a personal letter in which he pointed out that the first two were the important ones so far as Her Majesty's government was concerned. Unless the Bill was amended along the lines suggested, objections to it might be raised when the imperial Parliament was asked to confirm it, Chamberlain hinted. He added:

> I must earnestly ask you for your personal attention to these two papers, as I am anxious to avoid the possibility of friction hereafter. I do not think that any of the amendments are important from your point of view, and if so it may be possible beforehand to deal with them and so to prevent any questions being raised in the British Parliament.
>
> Memorandum C contains what I may call friendly suggestions which have occurred to our draftsmen in the course of their examination of the Bill. They may be useful to you in repairing omissions, or making difficult points clear, but they are forwarded for your private and independent consideration and with no desire on our part to press you to adopt them if they do not need this to your own judgement.[15]

Chamberlain obviously hoped that Reid would be able to secure a fair proportion of the changes to the Constitution desired by Her Majesty's government, without the risk of imperial affront to colonial susceptibilities which a more open intervention would have run.

The choice of intermediary was in some respects a clever one; Reid was Premier of the senior Australasian colony and the immediate initiator of the 1897 Convention, so that any suggestions he put forward for the amendment of the Constitution would receive serious attention, but he did not belong to the inner circle of committed federalists who might be expected to resent any British criticism of their Bill. Chamberlain's decision to take Reid into his confidence may also have been influenced by the thought that apart from the cumbersome and potentially explosive possibility of sending an imperial delegate to the Convention, the most obvious alternative was to act through Charles Cameron Kingston, who was not only Premier of South Australia, but President of the Federal Convention. Kingston was also in London for the Jubilee and was the logical person to bear any formal communication between the British government and the Convention, but he was a fiery radical and vehement nationalist who was greatly distrusted in the Colonial Office. A few years earlier the Governor of South Australia had warned in a despatch that 'in dealing with Kingston you are dealing with an able but absolutely unscrupulous man. His character is of the worst; he is black hearted and entirely *disloyal*'.[16] It seems unlikely that Chamberlain would have relished asking a man with a reputation of this kind to help the British government influence the shaping of an Australian constitution.

On the other hand the great disadvantage of working secretly through Reid was that the Convention as a whole, and the Australian public, were not made aware of the objections held by the British government to some provisions of the Constitution. Chamberlain had previously stressed the importance of preparing the ground for future intervention, if such became necessary, by openly expressing the views of Her Majesty's government now; the course of action he decided upon threw away this chance, and he paid the price three years later.

Chamberlain appears to have made only one other serious approach to the Australian premiers about the Draft Constitution Bill. In his opening statement to the Colonial Conference which followed the Jubilee celebrations he alluded briefly to the restrictions on appeals to the Judicial Committee of the Privy Council contemplated by the Adelaide session of the Convention, and urged that uniformity of law throughout the Empire ought to be preserved by an unrestricted right of appeal to this common tribunal.[17] This lead was not taken up until late in the Conference, when Sir Edward Braddon of Tasmania proposed that Privy Council appeals should be discussed.[18] Reid immediately countered with the opinion that any discussion of the subject by the Conference might be seen as an attempt to influence the Convention sitting in Australia;[19] his view prevailed, and the discussion trailed off into an inconclusive debate about the

possible reorganization of the Judicial Committee. This argument comes strangely from a man who, at much the same time as he expressed it, accepted a secret brief from the British government to influence the Convention on their behalf, but clearly few of the Australian premiers were anxious to discuss the matter and Chamberlain did not press it. The general question of Australian federation was also discussed by the Conference in connection with imperial federation and the political relations of England and the self-governing colonies. The movement for federation in Australia was applauded by Chamberlain, though he disclaimed any desire to interfere unless asked,[20] and a Resolution was passed in favour of the federal union of any groups of colonies which were geographically united.[21] There is no evidence to suggest that Chamberlain made any other attempt to influence the attitudes of the premiers towards the federal movement, though no doubt there must have been some informal discussion of the subject at the multifarious festivities associated with the Jubilee and the Colonial Conference. The Secretary of State was evidently content to wait and see how successful Reid's unofficial activities on behalf of the Colonial Office would be.

The memoranda entrusted to Reid represented a very thorough review of the Draft Commonwealth Constitution Bill as it stood at the end of the Adelaide session of the Convention. In Memorandum A seventeen amendments were listed, all of them related to provisions in which the imperial government felt entitled to take an interest. These suggested amendments were explained and justified in Memorandum B.[22] Some of the seventeen were clearly intended to protect the prerogatives of the Queen and her representatives; some to preserve uniformity of law and practice throughout the Empire; some to protect the interests of private individuals and groups in Britain or other parts of the Empire. In a few instances the Colonial Office apparently wished to bring the Australian Constitution into conformity with Canadian precedents or to eliminate what were considered to be unduly 'American' provisions. However in most cases an assortment of justifications was offered, and it is difficult to classify the suggested amendments in terms of motive or effect.

The first amendment suggested was the deletion of the provision that all treaties made by the Commonwealth should be

binding on the courts and people of all States, even where contrary to the laws of the States, from the seventh covering Clause, which defined the extent of the operation of the Constitution and laws of the Commonwealth. It was pointed out that this provision had probably been copied from the American Constitution but was not applicable in British countries where treaties technically were made by the Crown rather than the State, and did not have the force of statute law unless specific legislation was passed. The last section of the same covering Clause extended the operation of Commonwealth laws and treaties to all British ships 'whose last port of clearance or whose port of destination' was in the Commonwealth. Notwithstanding the fact that an almost identical provision had been inserted as an amendment in the Federal Council Act of 1885 by the imperial government itself, the omission of the provision was now urged on the grounds that British ships throughout the Empire were covered by the Imperial Merchant Shipping Act of 1894. The preservation of uniformity of shipping laws was alleged to be a matter of great importance to all connected with the trade. Moreover it was argued that the imperial government was responsible for maintaining the privileges and exacting fulfilment of the duties associated with the British flag, and ought therefore to have legal control over all British ships.

The first amendment proposed to the Constitution proper, as distinct from the preliminary covering Clauses, was the omission of Clause 2 respecting the appointment of a Governor-General, on the grounds that this was adequately provided for elsewhere in the Constitution. Not only was the Clause unnecessary, and without parallel in the British North America Act, it was asserted, but it was likely to arouse objections when it came before the British Parliament by purporting to give the Queen powers she already possessed, and to compel her to act constitutionally when she must already do so. The British North America Act was also invoked in support of an amendment to Clause 8, regarding the powers of the Commonwealth Parliament, which were to be equivalent to those of the House of Commons until such time as it declared its own powers. The Colonial Office memoranda proposed that, following the Canadian precedent, words should be inserted in the Clause to specify that even then the Common-

wealth should not give itself greater powers than those possessed by the House of Commons at the time of the declaration.

A rather more important point was raised in connection with Clauses 52 and 53 in which the powers of the Commonwealth were enumerated. Clause 52 gave the Commonwealth full power to make laws on thirty-seven different subjects, Clause 53 gave exclusive powers to make laws on four more; but included in these lists were several matters such as external affairs and treaties, or fisheries beyond territorial limits, which were still imperial concerns, since the imperial government was responsible for the relations of the Empire with foreign powers. It was believed in the Colonial Office that the form of these Clauses had been borrowed from the American Constitution and that their purpose was to specify the division of powers between the Federal and State Parliaments. However Australia, unlike the United States, was a part of the Empire and the use of words like 'full' and 'exclusive' in connection with powers over external affairs might be taken to limit the powers of the imperial Parliament. To remove any possibility of confusion on this point, it was recommended that the opening phrases of each of the two Clauses should be reworded to make it clear that the powers listed were conferred only as between the Commonwealth and the States.

Another thorny problem arose in connection with the exercise by the Governor-General on behalf of the Queen of the power of Royal Assent to Bills passed by Parliament. There had been much debate between the British and Canadian governments as to whether the Governor-General must always exercise this power on the advice of his ministers, or whether in exceptional cases he might act in accordance with instructions from the Queen. The upshot of this was that the Governor-General in practice always followed the advice of the local government, but that the door remained open to instructions from the Queen. In the Australian Draft Bill, however, the relevant Clause, number 57, followed the British North America Act in the main but omitted the phrase which directed that the Assent should be exercised subject to instructions from the Queen. The Colonial Office scented in this alteration an attempt to make the Governor-General a local rather than an imperial officer, and proposed

the addition of the appropriate phrase to make the Australian Constitution follow the Canadian example. If the Governor-General could not be instructed by the imperial government to withhold assent from any proposed law, the more extreme and unpopular power of disallowance of Commonwealth Acts would be used more freely, it was argued, and the risk of friction between the governments would be increased. For similar reasons an increase from one year to two years in the period during which a law assented to by the Governor-General might be disallowed by the Queen-in-Council was suggested. Otherwise the imperial government might be forced to disallow an Act where some other arrangement might have been reached had more time been available for negotiation between the governments.

The ninth and tenth amendments suggested in the memoranda were of a largely formal character and concerned Clauses 60 and 68, both relating to the powers of the Governor-General as the Queen's representative. In each case a change of wording was requested to make the Clauses purely declaratory of the existing powers of the Queen and to avoid any inference that the ability of the Queen to exercise her powers through the Governor-General depended upon statute. With regard to Clause 60 it was also submitted that the Clause as it stood created unnecessary confusion between the military powers of the Governor-General and of the General Officer Commanding; these were matters which would be better regulated through the Queen's commissions and instructions.

One important general aim of the Draft Bill was of course to transfer to the new Federal government control over various matters which had hitherto come under the jurisdiction of the separate colonies. Hence in Clause 70 it was provided that any powers regarding these matters which were vested in the governor of a colony with or without the advice of his council, should be transferred at the establishment of the Commonwealth to the Governor-General with the advice of the federal Executive Council. Here once again the Colonial Office suspected an attempt to change the nature of the office of governor, for there was no provision for the Governor-General to act without the advice of his council. Yet, if the Governor-General was to be an imperial officer, there clearly must be some occasions when

he would have to do so, for example when dismissing a ministry. The memoranda therefore proposed the amendment of the Clause to restore the Governor-General to a constitutional position comparable with that of colonial governors. 'The constitutional rule that the Governor must, in almost all cases, act by the advice of his Council, is sufficient without a statutory enunciation of the rule', it was argued.

The twelfth and fourteenth amendments proposed in Memorandum A were relatively straightforward suggestions that the words 'public ministers, consuls, or other representatives' in Clauses 73 and 77 should be replaced by 'consuls or other agents', as the latter was a more correct description of those classes of foreign officials who were in the colonies. Though these were put forward as technical corrections requiring no further justification, they were of course based on the assumption that Britain would continue indefinitely to handle diplomatic matters on Australia's behalf.

Vastly more significant than these were the proposals contained in the memoranda for the alteration of Clause 75 regarding appeals from Australian courts to the Judicial Committee of the Privy Council, the only issue about which Chamberlain had openly spoken at the Colonial Conference. Chapter 3 of the Draft Constitution provided for the creation of a Commonwealth High Court, competent to decide appeals from other federal and State courts. Dissatisfaction had long been felt in the colonies with the expense and the long delays attendant upon Privy Council appeals, and the new court appeared to provide a convenient opportunity for ending these. After several close divisions the Adelaide Convention had thus resolved to abolish Privy Council appeals as of right, and to allow them only by special leave of the Queen, in cases involving the 'public interests of the Commonwealth, or of any state, or of any other part of Her dominions'. This change was quite unacceptable to the British government, and a completely re-drafted Clause 75 was proposed, leaving open the possibility of appeals in all types of cases from the High Court, or any State or federal court from which there was an appeal to the High Court, by leave of the High Court itself or the Queen-in-Council. Even this would mean the end of automatic appeals to the Privy Council, but it was a great deal less restrictive than the Australian draft.

In support of its amendment the Colonial Office quoted extensively from two earlier self-justifications prepared by the Privy Council in response to criticism of the appeal system in Australia in 1871 and in Canada in 1875. The right of every subject of Her Majesty to approach the Throne for redress of grievances was stressed, as was the value of uniformity of legal interpretation. The value of the Privy Council as a tie binding the Empire together was also emphasized. In addition to these arguments borrowed from the Privy Council itself, several new ones were advanced by the Colonial Office, notably that a continued right of appeal was a necessary form of protection to the investors of British capital in Australia against judicial decisions influenced by 'local prepossessions'. With what reads as something almost like a threat, Memorandum B pointed out that: 'It cannot be for the benefit of the colonies to alarm those investors. They are also very numerous and powerful and the amount invested is very large. They will no doubt oppose any proposal to abolish the appeal to the Queen in Council.' It was also stressed that leave to appeal would be granted only in cases where there was an important issue of principle at stake, or where there were *prima facie* reasons for believing that there had been a miscarriage of justice.

Protection of the British investor was also a major reason for the amendments which were suggested to Clauses 82 and 98, regarding the transfer of customs and excise revenue to the Commonwealth. These duties had always provided the lion's share of the revenue of each colonial government and might be regarded as the main security for their respective public debts. The Colonial Office therefore proposed that these Clauses should be amended to ensure that, despite the transfer of customs and excise duties to the Commonwealth, the holders of the public debt of each colony should continue, if necessary, to have a prior charge upon them. The memoranda contended that, although there was little practical danger that the stockholders' rights would be impaired, it was desirable to protect the credit of the colonies by clarifying the point.

Finally, a very minor alteration was suggested to Clause 102, which dealt with the powers which would be retained by the governors of the States after the establishment of the Commonwealth. The purpose of the amendment was to avoid any con-

fusion between the powers vested in a governor by the laws of a State and those vested in him by the Queen's Letters Patent.

These then were the seventeen amendments suggested in Memorandum A and explained in Memorandum B. In addition, Memorandum C contained criticisms of five of the eight covering clauses and seventy-five of the one hundred and twenty-one clauses of the Constitution proper. A preamble to this memorandum explained:

> The following criticisms are made on the draft Bill on the same lines as they would be made upon a Bill which had passed through a hard fight in the House of Commons and was beginning its course in the House of Lords.
>
> Many points are no doubt the result of a fight or a compromise and cannot well be altered, and their effect must be left to the course of events.
>
> In other cases, especially where the difficulties will arise before the Federal Government and Parliament are fully constituted, amendments are required.[23]

Very few of the criticisms or suggestions in this memorandum directly concerned matters of policy or principle; almost all of them were intended to clarify the meaning of clauses in the Constitution, or to improve the machinery which the Constitution was to set up. Many examples of imprecise or inconsistent use of terminology were pointed out; some Clauses, numbers 12, 16, 25, 48 and 111, for example, were alleged to contradict or cut across others. In covering Clause 7 and Clauses 86, 108 and 110 instances were discovered of phraseology borrowed from the Constitution of the United States which was technically inappropriate in its new context. Another common criticism, made of Clauses 6, 9, 10, 41, 50 and 63 among others, was that many of the general arrangements covering different aspects of elections, ministries, and parliaments, did not provide adequately for the special circumstances which might arise at the inauguration of the Commonwealth.

Perhaps the most important part of Memorandum C was its preamble, in which the form in which the Constitution should be presented to the imperial Parliament was discussed. As the Bill stood at the end of the Adelaide session, the first eight Clauses were numbered separately from the Clauses of the Constitution itself; these covering Clauses were clearly intended for enactment by the imperial Parliament and defined some important terms used in the Constitution, as well as describing the character and purpose of the Bill, the extent of its operation, and its relationship with previous legislation. It was not clear, however, whether the Constitution itself was to be a schedule to the Bill, in the manner of the Australian Constitution Acts of 1855 and 1890, or a part of the Bill, in the manner of the British North America Act of 1867. The difference between these alternative procedures was of more than nominal significance, for in the latter case every clause in the Constitution would be open to amendment by the imperial Parliament, and the Colonial Office was of the opinion that changes would almost certainly be made. However, if the Bill consisted of the eight initial covering clauses with the Constitution scheduled to it, it would be more difficult for Parliament to make amendments. The Colonial Office therefore recommended that further thought should be given to the form of presentation of the Bill.

Whilst the Colonial Office busied itself preparing its three memoranda and deciding how they should be used, the Draft Constitution was also under close scrutiny in Australia. By the time the Convention assembled in Sydney on 2 September 1897 for its second session, the premiers had returned from London and the parliaments of the five participating colonies had considered the draft and suggested amendments to it. Altogether some 286 amendments had been proposed,[24] and though many of these overlapped or cancelled each other out, it was considered essential that the Convention should give due attention to all of them so that none of the parliaments could feel affronted. Almost at once it became apparent that the business could not be completed in time for the Victorian delegation to return home for the general election which was pending, and arrangements were made for a third session, to be held in Melbourne early in 1898. The Sydney session therefore confined itself to dealing with the amendments proposed to the first seventy clauses of the Draft Bill, and to particular consideration of the composition and powers of the Senate and the solution of deadlocks between the two houses. The remaining clauses and the amendments proposed to them, together with all other unresolved questions, were

dealt with in Melbourne at the last and longest meeting of the Convention, which began on 20 January 1898 and did not end until 17 March. By the conclusion of the Melbourne session finality had been reached, and a Bill to Constitute the Commonwealth of Australia was ready to be submitted for the approval of the Australian people through a referendum.

During the Sydney and Melbourne sessions a number of the amendments desired by the Colonial Office were unobtrusively incorporated into the Constitution, and it is clear that Reid must have made use of the memoranda which Chamberlain had entrusted to him. So discreetly did he do this however, that the other members of the Convention were quite unaware of what was going on. The secret did not come out until 1900, when delegates from the colonies went to London for further negotiations with Chamberlain prior to the enactment of the Constitution Bill. Even then the matter was kept as quiet as possible and an impression created that the memoranda had dealt only with the Privy Council appeal question, so that the episode remained shrouded in obscurity. Few memoirs or histories of the federal movement mention the Colonial Office memoranda, none give details; such references to them as there are seem generally to be based on the limited disclosures made in 1900, rather than on any direct knowledge of the original memoranda of 1897.

For example, Quick and Garran note in their comprehensive narrative of the federal movement that in 1897 Chamberlain gave Reid a 'confidential memorandum of the criticisms of the Crown Law Officers which included an objection to the almost total abolition of Privy Council appeals', and cite as evidence the limited extract made public in 1900.[25] Their account goes on to say that the memorandum was handed by Reid to the Drafting Committee and that as a result several amendments were made, the Privy Council appeal Clause in particular being considerably modified. Few could be in a better position to know the facts than Garran, for he attended the Conventions as private secretary to Reid, who lent his services to the Drafting Committee; but there are several surprising features about this account. The memoranda are not mentioned by Quick and Garran in connection with the Convention, but only in the context of the

negotiations in London in 1900. Only one memorandum is referred to rather than three, and no indication is given of its content other than the objection to the abolition of Privy Council appeals. Also the alterations made to the appeal Clause at the later sessions of the Convention are attributed to the influence of the memorandum, which is almost certainly untrue.

There are thus reasons for doubting whether Quick and Garran had much first hand knowledge of the memoranda, but they are probably correct in suggesting that Reid passed them on to the Drafting Committee. The most direct evidence on this point arises out of the visit of the Australian delegates to London in 1900 to see the Constitution Bill through the imperial Parliament. Edmund Barton, the former Leader of the National Convention and Chairman of the Drafting Committee, was appointed as the New South Wales delegate, and he sailed for England in company with two of the delegates from other colonies. Fearing that Chamberlain had asked for a delegation to be sent only because he intended to tamper with the Bill, Barton took with him the Colonial Office memoranda given to Reid three years before, so that he and his colleagues could study them during the voyage for clues to the objections which might now be raised.

Barton appears to have led the others to believe that the documents were as new to him as to them. In writing from Colombo to Sir Samuel Griffith, the Queensland delegate, Dickson, mentioned the memoranda and expressed regret that he had not seen them earlier, but added that 'even Barton did not get them till he was leaving'.[26] However, in a letter to the Victorian delegate, Alfred Deakin, who had gone ahead by an earlier ship, Barton himself had bemoaned the fact that if only they had travelled together they could have discussed 'the many questions we may be expected to answer, as to some of which I possess important information which was confidential at one time, but which our position as colleagues would have entitled us to examine together'.[27] The implication that Barton had had the memoranda for some time but had not been at liberty to show them to Deakin is reinforced by the tone of some notes on them which Barton made at this time.[28] In regard to one suggested amendment he commented that 'The Drafting Committee could

not imagine how this extraordinary suspicion was generated.'[29] Of another he wrote that 'In redrafting the clause the Drafting Committee embodied the suggestion made for the avoidance of discussion.'[30] The weight of evidence is thus clearly in favour of the view that Reid not only made use of the Colonial Office memoranda himself at the later sessions of the Convention, but that he passed them on to Barton and the Drafting Committee. In misleading some of his fellow delegates on this point in 1900, Barton was only maintaining the secrecy which Reid had established from the beginning.

An examination of the Convention Debates and of the changes made in the Constitution at Sydney and Melbourne strengthens this conclusion. The first amendment requested by the Colonial Office, the deletion of the words 'and all treaties made by the Commonwealth' from the seventh covering Clause, had also been suggested by the Legislative Council of New South Wales, and as a member of that House Barton formally moved it in the Convention, though without much personal enthusiasm.[31] Reid then supported the amendment strongly and advanced in its favour precisely the same arguments as had been used by the Colonial Office.[32] The amendment was then passed without further debate. Later in the Convention Reid himself moved the amendment to Clause 60 desired by the Colonial Office, a simple matter of substituting the word 'exercisable' for 'exercised' to make the Clause declaratory in form, and secured this without debate.[33] Similarly, Reid was successful in amending Clause 70 to enable the Governor-General to act with or without the advice of his Executive Council, rather than always with it as the Adelaide draft required, in exercising powers transferred to him from the governors of the colonies.[34]

More controversy was aroused by the second amendment to covering Clause 7 suggested by the Colonial Office, that is the complete omission of the provision extending the operation of the laws and Constitution of the Commonwealth to all British ships visiting Australia. Reid moved this amendment and argued for it at some length,[35] although his understanding of the arguments put in his mouth by Memorandum B was somewhat imperfect and he was not well acquainted with the background to the Clause. The main reasons he gave for his amendment were

precisely those of the memorandum, that shipping throughout the Empire was already covered uniformly by the Imperial Merchant Shipping Act, and that the phrase 'whose last port of clearance or whose port of destination' was so wide as to require the application of Australian laws to a ship not simply whilst in Australian waters but throughout the whole of its voyage to and from Australia. Unless this Clause was expunged, Reid assured an interjector, the Constitution would never be accepted by the imperial Parliament.

Most members of the Convention found this claim very difficult to believe, and one speaker after another reminded Reid that the Clause he wished to delete was exactly the same as a Clause inserted in the Federal Council Act of 1885 by the imperial Parliament itself. Sir John Downer went so far as to suggest that as the imperial Parliament had forced the Clause upon the colonies in 1885, it was far more likely to object to the deletion of the Clause than to its retention.[36] In the course of discussion Reid was led into a revealing exchange:

Reid May I tell hon. members that I do not speak idly in the remarks I am making. I hope hon. members will give me credit for making these observations knowing what I mean. I tell the Committee that these words will be a source of embarrassment in the consideration of the bill, that they conflict with the laws of the British Empire, and seek to establish a jurisdiction which we shall not get, a jurisdiction beyond our limits.
Fysh We have got it already in regard to beche-de-mer fishing for instance!
Reid I do not know whether beche-de-mer fishing comes within the limit of the general navigation law. It may be so. I have nothing more to say, except that I speak advisedly.
Clark Has the right hon. gentleman been talking with 'Joe' [Chamberlain]?
Reid My hon. friend is entirely wrong: but I have taken advantage of my visit to the mother country to get all the information I can with reference to matters of this kind, and I shall tell the Committee advisedly that difficulty may arise if these words are left in the clause.[37]

It was an exasperating situation for Reid, since he was unable to convince the Convention that he had correctly gauged Chamberlain's views short of disclosing that he had been briefed by him, and this he was not free to do. When challenged directly he was

forced into an oblique lie, but it is obvious that he had been using the Colonial Office memoranda. Eventually Reid withdrew his motion to omit the entire provision and accepted amendments changing the application of the Clause from ships 'whose last port of clearance or whose port of destination is in the Commonwealth' to those whose 'first port of clearance and whose port of destination are in the Commonwealth', and completely excepting naval vessels.[38] This compromise went some distance towards meeting the objections expressed in Memorandum B, but did not do so entirely.

Only a few hours after this incident Reid laid before the Convention the objections of the Colonial Office to another Clause, number 8, which allowed the future Commonwealth Parliament to confer upon itself powers greater than those of the House of Commons. This time however, Reid was careful to avoid any suggestion that he had inside information, indeed he did not move any amendment but contented himself with pointing out the possibility of making a change.[39] The suggestion was ignored and the Clause passed as it stood.

The other British suggestions and arguments for them do not appear to have been brought forward publicly by Reid. An amendment to Clause 57 identical to that proposed in the memoranda had been suggested by the Legislative Assembly of Victoria, but Reid remained silent when it was discussed, and the amendment was negatived.[40] When Clauses 82 and 98 were under consideration, Reid not only refrained from putting the British case for giving the bondholders of the colonies a charge upon the customs revenue collected by the Commonwealth, but expressed views on the Clauses which were incompatible with the wishes of the Colonial Office.[41] On the all important Privy Council appeal question too, Reid took up a position rather different from that advocated at such length in the memoranda,[42] though he was not so strongly opposed to appeals as he had been at Adelaide. This Clause was the subject of some of the fiercest battles of the Convention, the chief protagonists being Sir George Turner, Sir Joseph Abbott and J. H. Symon, rather than Reid or Barton. After many amendments and counter-amendments the final version of the Clause was considerably less restrictive than it had been after the Adelaide session, though it still did not meet the wishes of the British government.

The remaining amendments suggested in Memoranda A and B were of a relatively trivial character, and in most cases the Clauses concerned or the relevant parts of them were not discussed at all by the Convention. Nevertheless by the time the Constitution Bill was completed at the end of the Melbourne session, several more of the amendments had been wholly or partially included in it. This was no doubt the work of the Drafting Committee, which from time to time presented the Convention with long lists of small changes, most of which were accepted without challenge by blanket Resolution. In this way the words 'public ministers, consuls, or other representatives' were replaced in Clauses 73 and 77 by 'consuls or other representatives', and Clauses 60 and 68 were made declaratory, though other suggested modifications to them were not made. Clause 102, which the Colonial Office had claimed could be interpreted in a misleading way, did not appear at all in the final version.[43]

Of the seventeen amendments advocated in the first two British memoranda Reid had argued for five, with complete success in three instances and partial success in a fourth; five more of the desired changes were introduced by drafting action. In three instances Reid expressed views tending towards incompatibility with British proposals, and four suggestions were neither mentioned in debate nor otherwise effected. In sum, approximately half the suggested amendments had found their way into the Constitution by the end of the Convention; on all the more important questions at least some concessions to British wishes had been made. It is clear that the memoranda were largely responsible for this.

Virtually all of the many criticisms, queries and suggestions contained in Memorandum C were of a technical character, more suited to consideration by the draftsmen than debate by the Convention. Reid was more interested in broad principles than technical minutiae and does not seem to have brought any of these proposals before the Convention, though on a few occasions members of the Drafting Committee did. For example, O'Connor successfully moved to extend from six months to a year the period after the enactment of the Bill within which the Queen was to proclaim the establishment of the Commonwealth.[44] At least thirty-five or forty similar small changes were made by the Drafting Committee without challenge or discussion.

Many other suggestions contained in the memorandum were not taken up. The Australians were much less concerned than the imperial authorities about the inapplicability of some general regulations to the inaugural period, preferring to trust to the good sense of the first cabinet and Governor-General rather than to clutter up the Constitution with complicated special provisos. Barton and his colleagues were also unrepentant about their use of phrases, borrowed from the American Constitution, which their British critics felt to be unsuited to a British country. In some cases valid points of good draftsmanship made in the memorandum had to give way to political considerations; in others the Colonial Office and British Law Officers had misunderstood the Adelaide draft or were unaware of the way phrases were commonly used in the colonies. However, when due allowance is made for all these limitations, it is clear that the British memoranda were not only used by the Drafting Committee, but were of value to them. The imperial intervention in the constitution-making process did not affect the basic character of the Constitution, but it did help to make it a better Constitution.

The Draft Bill, as it stood at the end of the final session of the Convention, had next to be submitted to a referendum, and New South Wales, Victoria, South Australia and Tasmania agreed to hold this in early June 1898. In each colony groups and individuals at once began to campaign for and against the Bill.[45] In the three southern colonies those who supported the Bill were more numerous and better organized than those who opposed it, but in New South Wales the 'Billites' and the 'Anti-Billites' were evenly matched, and the equivocal attitude of the Premier accentuated this. Reid announced that as the immediate initiator of the federal movement and a member of the Convention he intended to vote for the Bill, but that as the Premier of New South Wales he must express doubts as to whether the interests of the colony were safeguarded adequately.[46] Federalists in all colonies were alarmed by Reid's declaration, and this led to a further curious minor episode involving the Colonial Office. The Chief Justice of Victoria, Sir John Madden, who was administering the colony in the absence of the Governor, cabled

to Chamberlain the novel suggestion that the Colonial Office should ask the Premiers of Canada and South Africa to send the Premier of New South Wales their good wishes for the success of the Federal Bill. 'The Premier of New South Wales himself and the Colony are doubtful supporters, and it is believed that the cause both in New South Wales and elsewhere would be greatly helped by what I suggest', Madden cabled.[47]

In the Colonial Office, John Anderson deprecated the idea of coercing Reid and New South Wales, but felt that it would do no harm to pass Madden's cable on to the Governors of Canada and South Africa without any endorsement. The Permanent Under-Secretary, Wingfield, and Chamberlain himself, both accepted this suggestion and the message was duly passed on,[48] though it does not appear to have evoked any response.

The result of the referendum was an anti-climax. The Bill was approved by Victoria, Tasmania and South Australia, but in New South Wales the affirmative vote, though a majority, did not reach the quota required by the Enabling Act for the colony to federate. However, after a delay of a few months a Premiers' Conference in Melbourne agreed to make a few amendments to the Bill to meet the wishes of New South Wales, and the Bill thus revised was submitted to a further referendum. This time Reid supported it in a less ambiguous fashion and the referendum was carried in each of the four south-eastern colonies. At this stage Queensland, which had not been represented at the Convention, decided to give its people an opportunity to vote on the Constitution Bill, and here too an affirmative majority was recorded. Western Australia still could not make up its mind, but by the end of 1899 the other five colonies had requested the British government to submit to the imperial Parliament their Bill for the Constitution of an Australian Commonwealth.

In the meantime the Colonial Office had followed the deliberations of 1897–9 with close attention. As reports of the proceedings of the Sydney and Melbourne sessions of the Convention reached London, they were analysed by the clerks of the Department responsible for Australasia; variations from the Adelaide draft were noted, particularly in those Clauses to which the British government had suggested amendments. After the Sydney session John Anderson wrote approvingly, 'They appear to be

trying to meet us to some extent',[49] and on receipt of the proceedings of the final session he minuted, 'nearly all the vital amendments put before Mr. Reid have been carried—a strong proof of the commanding position acquired by him amongst Australians'.[50] In October 1899 a confidential memorandum was prepared analysing the extent to which the objections made in 1897 were met by the final Draft Bill, and summing up the views of the Colonial Office at that stage.[51]

The prevailing tone of this document was one of restrained satisfaction. The covering Clauses, which had formerly contained the 'most serious blots', were held to be innocuous in their revised form except for the latter part of Clause 5, regarding the powers of the Commonwealth over British shipping. The partial improvement of this provision secured by Reid was judged insufficient and further amendment was suggested. The memorandum also questioned whether the Colonial Laws Validity Act would apply to Commonwealth laws as things stood. Numerous doubts and queries were voiced about Clause 74, the Privy Council appeal Clause, but the final verdict was that the jealousy of the colonists towards imperial interference made it useless to offer further objection on this matter. A few other points were raised when the memorandum came before the senior officials in the Office, but no final decisions were reached.

The Parliamentary Draftsman and the Crown Law Officers were also invited to examine the Bill and their comments reinforced the doubts already expressed about the power of the Commonwealth over British shipping, the status of Commonwealth legislation, and judicial appeals, as well as opening up several other issues. However, the Law Officers were careful to state that, although they regarded at least five amendments as desirable, it was up to the Colonial Office to decide whether or not it was expedient to press these.[52]

The process of examining the Bill proceeded desultorily for some months whilst the colonies were busy with their referenda, but by the end of 1899 it became necessary to decide what should be done.

The general consensus of opinion among Chamberlain's advisers seems to have been that, although the Bill was much better than it had been when the 1897 memoranda had been drawn up

and it would be unwise to irritate the colonists by interfering at such a late stage in proceedings, it would probably be necessary to make one or two alterations before the Constitution was enacted. To facilitate this, it was suggested that the colonies should be invited to send delegates to explain the Bill, though it was recognized that since the Constitution had been ratified by popular referendum, such delegates might claim that they had no authority to accept alterations. Nevertheless, Chamberlain decided after a conference with his senior officials to broach the question of delegates with the colonial governments.[53]

The telegraphic despatch which followed this decision did not directly invite or command the sending of delegates, nor did it indicate that amendments to the Bill were under consideration. Instead, the hope was expressed that it was true as reported that delegates would be sent to England 'to assist and explain when Parliament is considering the Federation Bill'. Consultation between delegates and the Crown Law Officers on constitutional and legal questions might, it was stated, 'avoid any protracted discussion and opposition on technical points in Parliament'.[54] This less than candid 'invitation' was received in Australia with a good deal of suspicion but after some intercolonial wrangling five delegates were appointed: Edmund Barton from New South Wales, Alfred Deakin from Victoria, Charles Kingston from South Australia, James Dickson from Queensland, and Phillip Fysh from Tasmania. As noted above, Barton anticipated that the Colonial Office would try to introduce amendments to the Constitution and went armed with the memoranda of 1897, which he thought might give some insight into Chamberlain's intentions. In due course these forebodings proved entirely justified, for although the officials at the Colonial Office finally came to the conclusion that, of the many alterations to the Australian Bill which might be desirable, only two were essential, Chamberlain informed the delegates that four amendments would be necessary. In particular, he insisted on the retention of an unrestricted right of appeal from Australian courts to the Privy Council. A protracted battle followed before a compromise was at last reached and the Constitution Bill enacted. That battle, and the reasons for Chamberlain's insistence on amending the Bill more severely than his advisers deemed wise, form a sepa-

rate story. What should be noted here is the manner in which the means adopted by Chamberlain in 1897 to influence the shaping of the Australian Constitution rebounded on him in 1900.

When the Adelaide Draft Bill was first under consideration in the Colonial Office, Chamberlain himself stressed that Her Majesty's government should state its views plainly on matters of imperial concern, so that if it later became necessary to press for alterations, the ground would be prepared. However, by confiding his views only to Reid, Chamberlain failed to heed his own advice. Apart from Reid and the three members of the Drafting Committee none of the Convention delegates, nor the colonial governments, had any inkling that the British government was not entirely happy with their Draft Constitution, apart from Chamberlain's passing reference to Privy Council appeals at the 1897 Colonial Conference. Thus, when the idea that delegates should be sent to London to discuss the Bill was brought forward, at the very moment when it seemed that the last obstacle to federation had been overcome, the leaders of the federal movement were outraged.

A few months before this Sir Charles Dilke, an erstwhile colleague of Chamberlain with an interest in colonial affairs and many friends in Australia, had warned Alfred Deakin that an attempt to amend the Commonwealth Bill was probable, especially in regard to judicial appeals.[55] Deakin replied indignantly that if the British government objected to any of the provisions of the Constitution, it ought to have said so while the Convention was sitting. The premiers had visited London after the Adelaide session, Deakin pointed out, but nothing had been said to them. Deakin went on to say,

> we have been permitted to draft our own Constitution in our own way in perfect freedom and without even the assistance of suggestions from any Imperial authority unless Mr. Reid in the early part of the Sydney session referred to some such hint when supporting an alteration which was at once made on the control proposed to be vested in the Commonwealth over British ships trading to and from Australia. Under these circumstances to alter our work after we have finished it (without giving us the opportunity of knowing of any objections and of meeting them as we probably should have done most cordially) by a mere exercise of overlordship would be an inconsiderate, impolite and offensive act of supremacy. There ought not now to 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.[56]

This outburst was typical of the reaction of leading federalists in all colonies when Chamberlain's cable regarding delegates, guarded though it was, was made public. J. H. Symon, a South Australian Convention delegate who had had much to do with the shaping of the judicial appeal Clause, wrote directly to Lord Selborne, Chamberlain's Parliamentary Under-Secretary, to say that the suggestion that delegates should be sent was unfortunate and inopportune, as any amendment of the Bill would make another referendum necessary and play into the hands of those who were opposed to federation.[57]

In the course of the negotiations in London the point was repeatedly thrown at Chamberlain that he ought to have voiced his objections to the Draft Constitution much earlier, and eventually the secret trickled out that the Colonial Office had in fact prepared a memorandum on the subject in 1897 and that this had been confidentially entrusted to the Premier of New South Wales. In his speech introducing the Commonwealth Bill in the House of Commons, Chamberlain explained that during the Jubilee celebrations of 1897 he had discussed the Draft Constitution with the premiers, and had handed to Reid, as the 'Dean of the representatives from Australia', a memorandum on the amendments desired by Her Majesty's government.[58] Following this disclosure Chamberlain was asked to table the memorandum in the House, and in response he produced an extract from Memoranda A and B dealing with the question of judicial appeals.[59]

Chamberlain's explanation was summarily dismissed by Sir Henry Campbell-Bannerman, the Leader of the Opposition, who took the Secretary of State to task for proposing amendments to the Bill at such a late state in proceedings:

> If what is proposed was to be done, it surely is not now, it should have been done, but two or three years ago. A prudent and careful Minister would have set himself to bring about a harmonious understanding and arrangement upon the points of difference which existed. The right honourable Gentleman spoke of conferences in the Jubilee year, and quoted from a memorandum, but that is not enough. Negotiations went on in Australia, conventions were held,

and proceedings were reported at great length, draft Bills were published, different amendments were published, and the arguments by which they were supported or rejected were published, and everyone knew all about it, but the Government did nothing. They reserved action until the people of Australia had committed themselves by solemn plebiscite to the provisions of the Bill, and then they insist on a change, thus—in effect, though I agree not in intention—giving an open rebuff to the Australian people.[60]

Outside Parliament the Australian delegates added fuel to the flames. Kingston was particularly scathing about the secrecy with which Chamberlain had cloaked his attempt to secure amendments to the Constitution. In a strongly worded letter to *The Times* the South Australian delegate rhetorically enquired of his readers whether it would be believed that, despite his position as a colonial Premier and as President of the Convention, he had never heard of the Colonial Office memoranda until after his departure for England in 1900. Much of this was merely the froth and bubble of political controversy, but it is clear that the means Chamberlain had chosen in 1897 of seeking to ensure that the Australian Constitution would be satisfactory to the imperial government seriously weakened his position in 1900.

In retrospect it does seem that Chamberlain would have been wiser and more prudent to have discussed the Draft Constitution with the Australian premiers, openly and in detail, while they were in London for the Jubilee, or alternatively to have informed the Convention by despatch of the views of Her Majesty's government. Of course such a move would probably have evoked howls of protests from some Australian nationalists. Despite Deakin's assertion to Dilke that if Chamberlain had announced his objections earlier they would have been met most cordially, Deakin's own relations with the Colonial Office were never smooth, and some of the other federalists were a good deal more aggressive than he. But any friction which might have been caused by a frank approach to the question from the beginning, could not have been greater than that which was aroused by the indirect procedure which was, in fact, adopted. That Chamberlain should have employed such backdoor tactics is perhaps an indication of the exaggerated fear which many British officials in the late nineteenth century had of colonial nationalism.

The incident is also interesting for the light it throws on George Reid and his relationship to the federal movement, though the evidence can no doubt be interpreted in different ways. To those who see Reid as an unprincipled opportunist, his acceptance of a secret brief from Chamberlain might be explained as an attempt to curry favour with the imperial authorities, perhaps with an eye to selection as the first prime minister of the Commonwealth; his deception of the Convention as yet another example of his devious untrustworthiness. Those who take a more favourable view of Reid might argue that he was but performing his duty to the Queen and her advisers in seeking to reconcile local and imperial interests, and his duty to the federal movement in smoothing the way for a ready acceptance of the Constitution when the time came for its enactment. Throughout his association with the federal movement Reid had difficulty in reconciling conflicts of loyalty. It can now been seen that at the Convention that conflict was even more complex than has previously been recognized. It must be said in his favour that although he co-operated with the Colonial Office to the extent of moving a number of their amendments, and laying their memoranda before the Drafting Committee, he did not compromise with his own views on any important question.

26 J. Quick and R. R. Garran, *The Annotated Constitution of the Australian Commonwealth* (Sydney, 1901), pp. 84, 86. The sentence is quoted from a despatch by Denison, Governor of Tasmania, 28 Dec. 1849.
27 *Debates* (Melbourne, 1890), p. 56. My italics.
28 *Debates* (Sydney, 1891), pp. 24-5.
29 Ibid., p. 30. 30 Ibid., p. 50.
31 Ibid., p. 89. 32 Ibid., p. 528.
33 Ibid., p. 802.
34 As is shown in a paper by Mr Justice Neasey, of the Supreme Court of Tasmania, which I hope will be published.
35 Copy in 'Successive Stages'.
36 Copy in 'Successive Stages', Document 7.
37 'Successive Stages', Documents 9 and 10.
38 Ibid., Document 11.
39 For this and the Draft Bill ordered by the Convention on 31 March to be printed, 'Successive Stages', Documents 13 and 14 and, for the latter, also *Official Record of the Proceedings and Debates of the National Australasian Convention,* printed in the Parliamentary Papers of N.S.W., Victoria and Queensland for the session of 1891, and also separately.
40 Samuel Walker Griffith, *Some Conditions of Australian Federation* (Brisbane, 1896).
41 Samuel Walker Griffith, *Notes on Australian Federation: Its Nature and probable Effects* (Brisbane, 1896)—dated July at end of text.
42 Op. cit., p. 29. 43 Op. cit., pp. 30, 31.
44 By Augustus Mongredien (London, 1881), p. 175.
45 This, and not the complete absence of tariffs, was what Parkes (*Fifty Years,* p. 268) meant by 'pure' free trade, in a passage referred to by Professor G. Sawer, *Australian Federalism in the Courts* (Melbourne, 1967), p. 175.
46 *Debates* (Adelaide, 1897), p. 16. 47 Ibid., p. 17.
48 Ibid., p. 273. 49 Ibid., p. 300.
50 The Report is Paper no. 1, in the appendix to *Proceedings of the Australasian Federal Convention* (Adelaide, 1897).
51 W. McMillan to Barton, 10 Apr. 1897 (originally dated 9 Apr.), Barton Papers, MS. 51/1194 (A.N.L.).
52 'Draft of a Bill prepared by E. Barton, Esq., Q.C.; Hon. Sir John Downer, K.C.M.G., Q.C., M.P.; Hon. Mr O'Connor, M.L.C., Q.C.'. Barton Papers, MS. 51/1194 (A.N.L.). The Bill is dated 12/4/97.
53 *Debates* (Adelaide, 1897), p 830. The substance of Deakin's amendment ultimately became S. 113 of the present Constitution.
54 Ibid., p. 875. 55 Ibid., p. 876.
56 Ibid., p. 1141. 57 Ibid.
58 Ibid., p. 1144.
59 See the documents in CO 13/152 (P.R.O.). The Colonial Office's secret offensive, between the first and second sessions of the Convention was first discussed in detail by Dr B. K. de Garis in an Oxford D.Phil. thesis. See his contribution to this volume.
60 The debates were long drawn out and, in N.S.W., particularly unsystematic. See the various colonial *Parliamentary Debates* for June to Aug. 1897. There is a tabular statement of amendments suggested by the legislatures in *Proceedings of the Australasian Federal Convention held at . . . Sydney* (Sydney, 1898), pp. 81-153.
61 *Debates* (Adelaide, 1897), p. 1142.
62 *Parl. Deb.* (W.A.), vol. 10 (new series), pp. 296-7 (25 Aug. 1897).
63 *Notes on the Draft Federal Constitution framed by the Adelaide Convention of 1897. A Paper presented to the Government of Queensland by the Honourable Sir Samuel Walker Griffith, G.C.M.G., Chief Justice of that Colony.* Queensland, *Journals of the Legislative Council,* vol. 47, part 1, 1897 [June, 1897].

64 Ibid., p. 12. Griffith's italics.
65 Ibid., p. 1. 66 Deakin, op. cit., pp. 81-3.
67 *Official Record of the Debates of the Australasian Federal Convention. Second Session. Sydney 1897* (Sydney, 1897), p. 1038.
68 Ibid. (Sydney, 1897), p. 1041.
69 Ibid., p. 1053.
70 Ibid., p. 1058. 71 Ibid., p. 1064.
72 *Debates* (Melbourne, 1898), vol. 1, pp. 649-51.
73 These documents are printed in the Melbourne *Proceedings* (Melbourne, 1898), pp. 241-8.
74 *Debates* (Melbourne, 1898), vol. 1, p. 1015.
75 Ibid., p. 1018.
76 See F. R. Beasley, *Annual Law Review* (University of W.A. Law School), vol. 1 (1948-50), pp. 273-80. The above paragraph was inserted after reading his article. I had noticed the references to Clause 89 in the railway rate debate (*Debates,* Melbourne, 1898, vols 1 and 2, pp. 1250-512) but had not intended to give them in an already long article; I had not realized their importance as illustrating conceptions of the meaning of the Clause. After reading Professor Beasley's articles, however, I would draw attention to Downer's opinion that 'if trade and commerce between the states is to be absolutely free, then neither Commonwealth nor state should be able to make any law interfering with it', and to the interchange between Isaacs ('Clause 89 also prohibits the Commonwealth') and Barton ('It prohibits the Commonwealth too, perhaps'). (*Debates,* Melbourne, 1898, vol. 2, pp. 1335-7.).
77 *Debates* (Melbourne, 1898), vol. 2, p. 2365.
78 Ibid., p. 2367. 79 R. R. Garran, op. cit., p. 123.
80 *Debates* (Melbourne, 1898), vol. 2, pp. 2369-71.
81 Ibid., pp. 2373-4. He did not suggest any amendment; but was his promised re-consideration responsible for the insertion of the word 'commerce'?

3 *Colonial Office and the Constitution Bill*

1 For a copy of the Draft Bill as it stood at the end of the Adelaide session see the *Official Report of the National Australasian Convention Debates. Adelaide March 22 to May 5, 1897* (Adelaide, 1897), pp. 1220-43.
2 See B. K. de Garis, 'British Influence on the Federation of the Australian Colonies, 1880-1901', unpublished D.Phil. thesis, University of Oxford, 1965. For Grey's federal activity see J. M. Ward, *Earl Grey and the Australian Colonies 1846-1857* (Melbourne, 1958) and for Carnarvon and South Africa, C. F. Goodfellow, *Great Britain and South African Confederation, 1870-1881* (Cape Town, 1966).
3 The phrase is Bramston's, see CO 201/610, p. 281. For further discussion of the Constitution see the minutes on Jersey to Knutsford, 20 Apr. 1891, CO 201/612, p. 37.
4 Minute of 17 July on Hopetoun to Knutsford, 17 July 1891 (telegram), CO 309/136, p. 229.
5 e.g., Deakin to Loch, 6 May 1897, Chamberlain Papers, 9/1 (Birmingham University Library).
6 Loch to Chamberlain, 15 June 1897; Hopetoun to Chamberlain, 13 June 1897. Chamberlain Papers, 9/1.
7 Smith to Chamberlain, 30 July 1896, CO 18/221, pp. 269-77.
8 Smith to Chamberlain, 7 May 1897, CO 18/223, pp. 129-55.
9 Minute, 9 June 1897, on ibid.
10 Minute, 26 June 1897, CO 13/152, p. 171.
11 Minute, 29 June 1897, ibid.
12 Ibid. 13 Ibid.
14 Memorandum A, 'Australian Federal Constitution, Suggested Amendments';

Memorandum B, 'Australian Federal Constitution, Notes on Suggested Amendments'; Memorandum C, 'Australian Federal Constitution, Criticisms on the Bill', CO 13/152, pp. 208 ff.

15 Chamberlain to Reid (Confidential), July 1897 (copy), CO 13/152, pp. 206-7.

16 Kintore to Meade, 24 July 1893, CO 13/148, p. 150.

17 'Report of a Conference between Rt. Hon. J. Chamberlain, M.P. (Her Majesty's Secretary of State for the Colonies) and the Premiers of the Self Governing Colonies of the Empire at the Colonial Office, Downing St., London SW, June and July 1897', Misc. Confidential Print no. 111, CO 885/6, p. 4.

18 Ibid., p. 118. 19 Ibid.

20 Ibid., p. 2. 21 Ibid., pp. 99 ff.

22 The following summary and analysis of the seventeen amendments desired by the imperial government is based on Memoranda A and B, CO 13/152, pp. 208 ff.

23 Memorandum C, CO 13/152, pp. 208 ff.

24 The amendments suggested by each colony are conveniently set out in a parallel table in *Proceedings of the Australasian Federal Convention held at Parliament House Sydney, September 2nd to September 24th, 1897* (Sydney, 1897), pp. 81-153.

25 J. Quick and R. R. Garran, *The Annotated Constitution of the Australian Commonwealth* (Sydney, 1901), p. 229.

26 Dickson to Griffith, 21 Feb. 1900, Griffith Papers, Add. 452 (Dixson Library, Sydney).

27 Barton to Deakin, 20 Jan. 1900, Deakin Papers, MS. 1540/432 (A.N.L.).

28 These comprise marginal notes on Memoranda A and B and nineteen pages of notes on Memorandum C. Barton Papers, MS. 51/1196 (A.N.L.). In addition to the light they throw on the incident under discussion, these notes give valuable insight into the work of the Drafting Committee and their understanding of the meaning of many clauses in the Constitution.

29 Note on Memorandum B, regarding Clause 58, Barton Papers, MS. 51/1196.

30 Note on Memorandum B, regarding Clause 70, ibid.

31 *Official Record of the Debates of the Australasian Federal Convention. Second Session. Sydney 1897* (Sydney, 1897), p. 239.

32 Ibid., p. 240. 33 Ibid., p. 782.

34 Ibid., pp. 806-7. 35 Ibid., pp. 240-2, 251-2.

36 Ibid., p. 242. Downer was a member of the Drafting Committee. It seems unlikely that he would have made this remark if he had seen the Colonial Office memoranda at this stage; however this debate occurred soon after the resumption of the Convention and the most likely explanation is that Reid did not pass the memoranda on to the Committee until he had made some use of them himself.

37 Ibid., pp. 241-2. 38 Ibid., p. 253.

39 Ibid., p. 256. 40 Ibid., pp. 778-9.

41 *Official Record of the Debates of the Australasian Federal Convention. Third Session. Melbourne, 1898* (Melbourne, 1898), pp. 1611-16.

42 Ibid., pp. 336-7.

43 For a copy of the Bill as it stood at the end of the Melbourne Convention, see ibid., pp. 2523-44.

44 *Debates* (Sydney, 1897), p. 228.

45 For a brief account of the campaign and result in all colonies see Quick and Garran, op. cit., pp. 206-12.

46 *S.M.H.*, 28 Mar. 1898.

47 Madden to Chamberlain, 24 May 1898 (telegram), CO 309/147, p. 185.

48 Minutes of 25 May 1898, on ibid.

49 Minute: 3 Nov. 1897, CO 418/4, p. 319.

50 Minute: 31 May 1899, CO 13/153, p. 22.

51 'Notes on the Commonwealth of Australia Constitution Bill', Confidential Print, Australian no. 169, CO 418/6, pp. 409 ff.

52 Sir C. I. Ilbert's Memorandum on the Commonwealth Bill, 17 Nov. 1899; The Law Officers' Memorandum on the Commonwealth Bill, 21 Dec. 1899, CO 418/6, pp. 86-90, 101-15.

53 Minutes on Griffith to Chamberlain, 19 Oct. 1899, and on Griffith to Chamberlain, 14 Dec. 1899 (telegram), CO 234/69, pp. 83, 247.

54 Chamberlain to Beauchamp, 22 Dec. 1899 (telegram). Cd. 124, p. 26. *British Parliamentary Papers*, 1900, vol. 55.

55 This may be inferred from Deakin to Dilke, 14 Sept. 1899, Dilke Papers, Add. MSS 43877, f. 132 (British Museum).

56 Ibid.

57 Symon to Selborne, 17 Jan. 1900, CO 13/155, p. 399.

58 *Hansard's Parliamentary Debates*, 4th series, vol. 83, pp. 64-5.

59 Ibid., p. 404. 60 Ibid., pp. 77-8.

4 *A.N.A. and Federation in South Australia*

1 Brian Fitzpatrick, *The Australian Natives' Association 1871-1961* (Melbourne, 1961), p. 19.

2 James Hume-Cook, *The Australian Natives' Association* (Melbourne, 1931).

3 *Observer*, 6 Jan. 1890.

4 Ibid., 28 Jan. 1899. 5 Ibid., 9 Feb. 1901.

6 The Australian Natives' Association, S.A. Branch, *Valuable Facts* (Adelaide, 1907).

7 The following information is drawn from J. Hollinsworth [Pettman], 'The Australian Natives' Association in South Australia: The study of Nativist Nationalism 1887-1902', unpublished B.A. thesis, University of Adelaide, 1965, ch. 2.

8 See, for example, W. J. Sowden, *An Australian Native's Standpoint* (London, 1912).

9 Sowden in *Observer*, 5 Oct. 1901.

10 A.N.A. Board of Directors Minutes, 12 Nov. 1888.

11 Ibid. 12 Ibid., 21 Nov. 1889.

13 *Observer*, 23 Nov. 1889. 14 Hume-Cook, op. cit., p. 11.

15 Fitzpatrick, op. cit., p. 30. 16 *Observer*, 21 July 1900.

17 *South Australian Chronicle*, 25 Jan. 1890.

18 *Observer*, 25 Jan. 1890.

19 '1849' in *Chronicle*, 1 Feb. 1890.

20 'Volapuk', ibid. 21 Sowden, op. cit., p. 58.

22 *Observer*, 28 Jan. 1899.

23 Board Minutes, 30 June 1890.

24 Adelaide A.N.A. Committee Minutes, 6 Nov. 1893.

25 Adelaide A.N.A. General Minutes, 2 July 1894.

26 Adelaide A.N.A. Committee Minutes, 19 Nov. 1894.

27 Adelaide A.N.A. General Minutes, 3 Dec. 1894.

28 Australasian Federation League of South Australia, Provisional Committee Minutes, 25 Jan. 1895.

29 Ibid., 18 Jan. 1895.

30 *Rules* of the Australasian Federation League of South Australia (Adelaide, 1895).

31 S.A. Archives Research Note 364, G. N. Pitt, 1945.

32 Ibid.

33 R. S. Parker, 'Australian Federation: the Influence of Economic Interests and Political Pressures', in J. J. Eastwood and F. B. Smith (eds), *Historical Studies, Selected Articles* (Melbourne, 1964), p. 178.

34 Ibid.