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TOWN HALL, HOBART, TASMANIA

9 OCTOBER 2014

INAUGURAL A.I. CLARK LECTURE

REVIVING THE MEMORY OF ANDREW INGLIS  
CLARK: AN UNFINISHED FEDERAL PROJECT

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UNFINISHED FEDERAL PROJECT\*

The Hon. Michael Kirby AC CMG\*\*

*A.I. CLARK REMEMBERED*

We have it on the authority of Peter Heerey<sup>1</sup> that a person described as “one of Australia’s leading Silks, a man with a huge High Court practice” admitted to him “cheerfully” that he had never heard of Andrew Inglis Clark. This is a shocking gap in legal awareness. Sadly, it would be far from unique.

I hope to demonstrate why it is shocking. And from that realisation should grow a resolve to repair our individual and national oversight. A people who do not honour the contributions of such an important, influential and interesting founder of the Commonwealth, are bound out of their ignorance to repeat the errors of history. Moreover, they are destined to walk in darkness, lacking a proper appreciation of the near

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\* Adapted from the author’s address “A Great Tasmanian’s Relevance Today – The Vision of Andrew Inglis Clark, Hobart Town Hall, 9 October 2014.

\*\* Justice of the High Court of Australia (1996-2009); Honorary Professor, University of Tasmania (2010- ).

<sup>1</sup> The Hon. Peter Heerey AM, Judge of the Federal Court of Australia (1990-2009) was educated at St Virgil’s College, Hobart and the University of Tasmania. See P. Heerey, *Excursions in the Law* (Federation Press, Sydney, 2014), “Andrew Inglis Clark: the Man and His Legacy”, 10.

miracle that was the achievement of Australia's federal Commonwealth.<sup>2</sup> A.I. Clark was one of the handful of miracle-makers.

Clark is not only a most important Tasmanian,<sup>3</sup> in terms of his lasting influence on the design of the constituent powers of our federal constitution, his mind and work still operate powerfully on Australia's governance today. Australians should take steps to overcome their historical amnesia. Leadership in this enterprise must be initiated from Tasmania.

Given the admission of the unnamed Silk ("he comes from the Mainland"<sup>4</sup>) it is appropriate to begin with a reminder of the life of Clark, so that, in the context of my appeal for initiatives worthy of his name those who are curious can become aware of the broad outline of his life and times.<sup>5</sup>

A.I. Clark was born on 24 February 1848 in Hobart Town, just prior to the end of convict transportation.<sup>6</sup> The shadow of the convict caste,<sup>7</sup> and its impact and divisiveness in society, played an important part in the evolution of the values of the young Clark as he was growing up. His father, Alexander Russell Clark, was an engineer who built some of the facilities later used for the penitentiary at Port Phillip. Unlike most

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<sup>2</sup> Attributed to Alfred Deakin: D Headon and J. Williams (Eds), *Makers of Miracles: the Cast of the Federation Story* (Melbourne Uni Press, Melbourne, 2000) xiii. The fourth chapter, by John Williams, is "Andrew Inglis Clark: 'The Republican of Tasmania'", 44.

<sup>3</sup> M.D. Kirby "Three Tasmanian Law Reformers" (2004) 23 *U Tas L Rev* 1 at 1.

<sup>4</sup> Heerey, above n.1, 10.

<sup>5</sup> Some details of the life of A.I. Clark appear in Heerey, n.1 17-22 and Headon and William, n.2, 44.

<sup>6</sup> Kirby n.3, 1. Cf H. Reynolds, entry on "Clark, Andrew Inglis" in *Australian Dictionary of Biography* (vol. 3, MUP, Melbourne, 1969), 399-401.

<sup>7</sup> Heerey, above n.1, 17-18. Transportation to Tasmania was ended in 1855. Large proportion of transported convicts were sent to Van Diemen's Land, estimated at 42% of the total: V. Burgmann, *In our Time* (1985), 137 cited J.W. Williams, "With Eyes Open: Andrew Inglis Clark and the Republican Tradition" (1995) 23 *Federal Law Review* 149 at 172.

colonial employers of the time, the older Clark never used flogging to keep his conscripted labour under control. A.I. Clark grew up with an antipathy for class divisions; a dislike of inherited power; and a belief in the “abolition of every institution that confers political power or personal privilege as an appendage of birth from a particular parentage”.<sup>8</sup>

Clark’s early education was given to him by his mother who had been born Ann Inglis.<sup>9</sup> Eventually, he attended Hobart High School; undertook articles of clerkship, having turned away from qualifications as an engineer secured when apprenticed to his father’s business.<sup>10</sup> He was called to the Tasmanian Bar in 1877. He thereupon commenced a lifelong engagement with the law as a vehicle for social organisation, control and improvement. A year after his admission to the Bar, he married Grace Patterson daughter of a Hobart ship builder. With her, he moved to a family home, “Rosebank”. It still stands in Hampden Road, Battery Point, Hobart, a fact to which I will return. The couple were to raise 7 children: 5 sons and 2 daughters, all of whom survived their father.

The gruesome conflict of the Civil War in the United States of America captured the attention of the British settler communities in Canada and Australia. In each place, they hastened the Federalist movement, stimulated by a belief that divisiveness amongst adjacent English speaking colonies, established in alien soil, might lead to brutality of the type of conflict that had been witnessed in the American Civil War. In Hobart, an American Club was formed of “young, ardent republicans”.

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<sup>8</sup> A.I. Clark, “Why I am a Democrat”, cited M. Roe in M. Haward and J. Warden (Eds), *An Australian Democrat: The Life and Legacy of Andrew Inglis Clark* (1995), 90.

<sup>9</sup> Clark’s parents had emigrated from Scotland to Van Diemen’s Land in 1832. They were to have 9 children of whom A.I. Clark was the second youngest.

<sup>10</sup> Heerey, above n.1, 18.

They met regularly for debates and reflection on the lessons that the “Anglo-American republic”, as Clark described the United States of America, might have for the governance of the newer British colonies in the antipodes.<sup>11</sup>

Contemporary Australian republicans have seen in this alignment a commitment by Clark to a termination of the links of the Australian colony to the British Crown. That conclusion might be correct; and it is reinforced to some extent by his expressed distaste for the hereditary principle. On the other hand, it is important to avoid imputing contemporary conclusions to attitudes expressed so long ago. Other writings of Clark are consistent with his embrace of ‘republicanism’ as basically a non-hereditary view of governance. As this was to be secured in the original dominions of the British Crown (Canada, Australia, New Zealand and South Africa) it was easy to reconcile the notion of republicanism, so understood, with a residual allegiance to the monarch beyond the seas. Certainly, at the time in which he lived, Clark would have recognised the virtual impossibility of ending allegiance to the Queen whose naval and military forces were the ultimate defenders of the survival of the colonies in the case of foreign challenge.<sup>12</sup>

In the 1878, Clark was elected for the first time to the Tasmanian House of Assembly. He used his role there to introduce legislation and he enjoyed a little success. However, he was defeated in the election in 1882 and failed to return to Parliament in later elections in the 1880s.

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<sup>11</sup> Reynolds, *ADB*, above n.7, 399.

<sup>12</sup> Professor John Williams and Professor Helen Irving express no doubts that Clark was a Republican in the modern use of that term. See Williams (1995) 23 *Federal Law Review*, 149 at 172 and H. Irving, “The Over-rated Mr Clark? Putting Andrew Inglis Clark’s contribution to the Constitution into perspective” in Australian Parliament, Senate, papers on Parliament, ‘The Truest Patriotism’; *Andrew Inglis Clark and the building of an Australian Nation* (number 61, May 2014) (hereafter “Papers on Parliament”) 73 at 80.

This fate allowed him to build up his practice at the Bar. He was one of the first political aspirants to actively support the Hobart Trades and Labor Council.<sup>13</sup> He won a by-election for East Hobart in 1887. He was later returned as member for South Hobart and appointed Attorney-General in the Government of P.O. Fysh. Because the Premier was in the Legislative Council, Clark took a great responsibility for introducing government legislation. He introduced a record number of 150 Ministerial Bills. This was only one less than Sir Henry Parkes had introduced in his long legislative experience.

Clark's legislation bore the mark of his progressivist and humanitarian values. The laws he sponsored included legalisation of trade unions; the prevention of cruelty to animals; providing allowances to members of parliament; and reforming the laws on lunacy and the custody of children.<sup>14</sup> In one dispute over a railway line, which the government had lost before the colonial Supreme Court, he advised an appeal to the Privy Council in London. He travelled to England in 1890 to conduct the case. His experience in seeing most of the Law Lords asleep during the appeal reinforced his view that appeals to the Privy Council should be terminated. Pursuing both his political and spiritual interests (he was a Unitarian), Clark made the first of three visits to the United States where he became increasingly familiar with the Constitution: a subject on which he wrote frequently to Oliver Wendell Holmes Jr. also a Unitarian.<sup>15</sup> Clark returned to Hobart convinced of the relevance and utility of the *United States Constitution* for Australian's future federal governance.

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<sup>13</sup> Reynolds, *ADB*, above n.6, 399.

<sup>14</sup> Reynolds *ibid*, 400.

<sup>15</sup> Reynolds *ibid*, 400.

Clark's return to Australia coincided with the early serious stirrings of the federal movement. Whereas most saw this as a means of solving the inter-colonial rivalry over tariffs, Clark perceived in it wider and larger objectives, concerned with the pursuit of social values and providing an antidote to the classist elements in colonial society that he saw as a residue of the convict system. In the 1880s and 90s, Clark was elected a delegate to the Federal Council of Australasia. This had been established under an Act of the Imperial Parliament of 1885.<sup>16</sup> The Council met intermittently; always in Hobart.<sup>17</sup> Some colonies rarely or never participated.

A new effort was gathering momentum in the 1890s to breathe life into the earlier desultory endeavours to bring together the Australasian colonies in a federal union. To this end, in 1890, a constitutional committee was established, which Clark joined. Indeed, he became the chairman of the Judiciary Committee. A first draft constitutional document had been prepared by Samuel Griffith of Queensland. Clark laboured on this document. He proposed many amendments in a revision that was debated on board the Queensland Government's steam yacht *Lucinda*, in a few days spent in the Brisbane Waters north of Sydney. Clark was unable to join others on the *Lucinda*. He was recovering in a Sydney hotel from influenza. Nevertheless, his draft became the basis for most of the discussion by the delegates. Whereas Griffith preferred, in many respects, the model for Australian federation offered by the *British North America Act 1867* (Imp.), which had established the Canadian Confederation, Clark worked hard to put the stamp of the *American Constitution* on our document, especially in the

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<sup>16</sup> *Federal Council of Australasia Act 1885* (Imp.)

<sup>17</sup> Heerey above n.1, 15.

draft chapter on the Judiciary. In this respect, and in a manner greatly defensive for the rule of law in Australia, Clark was to prove singularly effective. I shall also return later to this story for it was to be perhaps Clark's greatest contribution to governance in Australia. Clark came to represent Tasmania at the conference on Federation held in Melbourne in 1890 and at the first Sydney Convention held in 1891.

Clark lost office as Attorney-General for Tasmania in the election of 1892. However he returned to that post in 1894 in the government of Edward Braddon. On his fourth attempt, in 1896, he succeeded in amending the *Electoral Act* of Tasmania. This amendment introduced a form of proportional representation that has become known as the Hare-Clark system after its authors, including himself. It introduced a system, still controversial, designed to overcome the fear of the tyranny of electoral majoritarianism that Clark shared. In the 1890s, he had warned that "power wielded by a majority can be used as oppressively as if [it] were exercised by a despot or an oligarchy".<sup>18</sup>

Clark resigned from the Braddon Government in 1897. He continued to encourage the Tasmanian Federation Leagues, whose young leaders became known as "Clark's Boys". He did not attend the 1897 Federal Convention. However, Peter Heerey has unearthed an important extra, and little known, part that Clark played in reviving the impetus to Federation in 1895, after it had fallen into inertia. Taking advantage of the presence in Hobart of all of the colonial premiers, at the 6<sup>th</sup> Session of the Council of Australasia, Clark, as Tasmanian Attorney-General, suggested they all be summoned to a meeting at the Tasmanian Club. They all duly attended and made the Tasmanian Premier, Braddon, the

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<sup>18</sup> Reynolds, *ADB*, above n.7, 400.



chairman of their conference. The New South Wales Premier, late in the evening, announced to the press that a new Constitutional Convention would be held, comprising ten representatives, chosen by the electors, from each colony. Their sole task would be to agree on a federal constitution that could be submitted to the voters for acceptance or rejection. This step was important because, at the stage at which it happened, the earlier federal impetus had “gone off the boil”.

By the time the Constitutional Convention assembled in 1897, Clark was travelling in the United States. The exact reasons for his absence, when he had done so much to bring the meeting about, are a source of dispute. Especially so because Clark had won an important victory in insisting that the delegates should be elected not appointed and because he would have had no difficulty in securing election. Nevertheless, it was at the Convention in Sydney in 1897 that important steps were taken to advance Clark’s ideas for the shape of the *Australian Constitution*, especially in Chapter III.

By 1898, Clark had been appointed a judge of the Supreme Court of Tasmania. His public life largely receded into the anonymity of the Bench. He watched as the faltering steps were taken that brought Australia to a federation whose shape he had greatly influenced. By 1901, he was the senior judge in a small court, busy with judicial duties and with his responsibilities to his large progeny with their rich family life.

In 1901, Clark participated in the establishment of the University of Tasmania. He even held the position of Vice-Chancellor until 1903. Also in 1901, he wrote his book, *Studies on Australian Constitutional Law*. This represented his last effective effort to influence the way in

which the new national constitution would be interpreted by the courts and applied to the diverse challenges that would inevitably confront the Commonwealth.

When the first members of the High Court of Australia were appointed in October 1903, Clark was disappointed not to receive the call. Initially, it had been expected that there would be 5 justices; but the Federal Parliament reduced the complement to 3. When that number was enlarged to 5 in 1906, he again expected that his time had come. Again, he was passed over for Isaacs and Higgins. Perhaps mindful of his already fragile health, Clark's friend, Professor Harrison Moore, wrote with consolation:<sup>19</sup>

“Well, for many reasons I am sorry. But I fear you would have taken it too hard and that the constant journeying, the want of any permanent settlement, and the break up on your family life would have left you little of joy in the office.”

Clark became a critic of the new national court. However, he sank his energies into the activities of the University of Tasmania, the fourth to be established in the nation (after the University of Sydney, Melbourne and Adelaide). He wrote many essays for publication in the United States. He was an early supporter of female suffrage. He watched with pride the diverse successes of his children. He died at his home on 14 November 1907 and was interred in the Queenborough Cemetery below a headstone which, in its new site in Peel Street, Sandy Bay, near the University, reads:

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<sup>19</sup> Reynolds, *ADB*, above n.7, 401.

“Andrew Inglis Clark. Judge of the Supreme Court of Tasmania... and Grace Clark his wife”

Nothing besides remains in the contemporary record concerning his role in the Australian federal story.

### *A.I. CLARK AND THE CONSTITUTION*

The foregoing historical account will already have demonstrated the significant role that Clark played in the evolution of the Australian Constitution and in bringing to bear upon it the influence of its United States predecessor.<sup>20</sup> However, it is perhaps symbolic of the way of acknowledgement in Australia that we now have a much more detailed analysis of Clark’s role in the emerging constitutional document not from the pen of an Australian lawyer or historian<sup>21</sup> but in the writing of a United States professor of law, William G. Buss.

In a recent part of the *Melbourne University Law Review* in 2009, Professor Buss was permitted nearly a hundred pages to share with his (mostly) Australian audience the product of years of his research on Clark that was undertaken in Australia, the United States and in New Zealand.<sup>22</sup> The interest for Professor Buss, as an American lawyer, was the way in which American constitutional doctrines became inextricably woven into the Australian constitutional debates, especially about federal courts, federal judicial power and federal jurisdiction.

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<sup>20</sup> *Theophanous v Herald and Weekly Times Limited* (1994) 182 CLR 104 at 172 per Deane J, referring to Clark as “the primary architect of our constitution”.

<sup>21</sup> Reynolds *ADB*, above n.7, 401.

<sup>22</sup> W.G. Buss, “Andrew Inglis Clark’s Draft Constitution, Chapter III of the *Australian Constitution* and the Assist from article III of the *Constitution of the United States* (2009) 33 MULR 718-801.

Professor Buss commenced his investigations with the draft that Clark prepared in 1890. He then examined the way in which Clark's knowledge of United States text, and the jurisprudence that had already gathered around Article III in the Supreme Court of that country, came to influence the shape of the emerging Australian constitutional text. To whet the appetite of Australian lawyers, and to entice them out of the darkness into the light that Professor Buss has spread, it is appropriate to quote the opening words of his extended essay:<sup>23</sup>

“Anyone who cares about constitutional law and constitutional rights, about individual liberty and the rule of law, would be drawn powerfully to Andrew Inglis Clark. Clark was a romantic and sometime poet. He was also a man of the world who got things done – as a politician, as Attorney-General of Tasmania, as a Justice of the Tasmanian Supreme Court, as a significant force in the founding, and later as the Vice-Chancellor, of the University of Tasmania, and as an intellectual and a writer. Australians should be especially drawn to Clark because he was one of the great framers of the Australian Constitution. He was also a loyal British subject who believed the Empire would be best served by an Australia which was fundamentally independent though technically part of the Empire.”<sup>24</sup>

Professor Buss offers a particular insight for an Australian audience because of his understanding, as a United States legal historian, of the deep wells of inspiration that are to be found in the circumstances that gave rise to the painful separation from the mother country of the British

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<sup>23</sup> (2009) 33 MULR 718 at 719 (citations omitted).

<sup>24</sup> Professor Buss refers to A.I. Clark, “The Future of the Australian Commonwealth: A Promise for a Nation?” in R. Ely, M. Haward and J. Warden (Eds) *A Living Force: Andrew Inglis Clark and the Ideal of Commonwealth* (2001) 240.

settlements, plantations and colonies in what became the United States of America. Also the forces that gave rise to what was, in effect, a first civil war. The bitterness of it (as expressed in the *Declaration of Independence*) derived from the British conception of the sovereignty of their Parliament and the American conception of the basic constitutional rights belonging to them as British subjects.

From American soil, the democratic element gave rise to the colonists' insistence on the principle that been a chief cause for the conflict the Stuart Kings – that there should be no taxation without representation. It also helped to explain their feeling of frustration over the immovability of the British Parliament. This even led some of the American colonists to toy with the idea of appealing to the King, over the head of Parliament to use his 'reserve' powers to veto the Acts of the British Parliament in so far as they were seen as unjust by the settlers. This demand, voiced in loyalty to King George III, occasioned shudders in the British Parliament at the time because it revived notions of absolute monarchy which the British, in England, thought they had put to rest finally in the Glorious Revolution of 1688.<sup>25</sup>

Clark understood, and was close to the reality occasioned in the Australian colonies by the successful achievement of the independence from the Crown. It was that revolution that sent convicts, who would earlier have been destined for North America, to Australia and Van Diemen's Land. It was the very success of the American Revolution that occasioned new policies on the part of the British Government in the 19<sup>th</sup> century, that speedily offered a high measure of responsible government to the Australian colonies and eventual endorsement of the move of the

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<sup>25</sup> Buss (2009) 33 MULR 718 at 721 citing J. La Nauze, *The Making of the Australian Constitution* (1972), 24.

colonies to dominion status successively in Canada, Australia, New Zealand, South Africa, and (more belatedly) India, Pakistan and Ceylon.

For Clark, Australia was more than a historical outgrowth from the American Revolution. In his view, the written constitution adopted in that country, following their revolution, was singularly appropriate for the conditions of Australia. Moreover, in his view it was preferable to the other models (Canada and Switzerland) that were on offer.<sup>26</sup> Professor Buss's special attention is addressed to the similarity between the final form of the Parts of the United States and Australian Constitutions dealing with the Judicature, namely Article III (US) and Chapter III (Australia). However, he is aware of the way in which, in both constitutions, the notion of popular sovereignty is given voice.

In the United States Constitution in the opening words it is said:

“We the people of the United States, in order to form a more perfect Union, establish Justice insure domestic tranquility, provide for the common defence, promote the general Welfare and secure the Blessings of Liberty to ourselves and our Posterity do ordain and establish this constitution for the United States of America”.

Both by action and words, Clark had given a foothold for the same notion. He did so by his action in 1895 in persuading the colonial Premiers to move from a confederation model, by which the colonial parliaments would appoint their delegates to a second Sydney Convention. Instead an election was held and the participants were chosen by the electors. This produced in the covering clauses of the

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<sup>26</sup> (2009) 33 MULR 718 at 721.

Imperial Statute that formally created the Commonwealth of Australia, the opening assertion of the role of the people of Australia in the creation of the Commonwealth:<sup>27</sup>

“Whereas the people of New South Wales, Victoria, South Australia, Queensland; and Tasmania, humbly relying on the blessing of Almighty God have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established: ... be it therefore enacted... the Commonwealth of Australia Constitution Act.”

The popular will is expressed throughout the somewhat sparse and unexciting language of the Australian Constitution: Finances and the legislature are the main business in hand. But in addition, in Chapter III, the rule of law is established by a Judicature which was to have the last word in any dispute affecting the constituent parts of the Commonwealth. The conduct of referendums as the condition precedent to the adoption of the constitution, and to provide for its further formal reform, despite its enactment by the Imperial power, was another demand that reflected Clark’s values. Although, in the end, he did not approve of the financial settlement enshrined in the Constitution, he left his mark on the division of powers of Commonwealth and the States. It followed the United States and not the Canadian model, on this topic and on much else besides. This too was reflected in the Bill which Clark had drafted for the original conference for the first 1891 Convention<sup>28</sup>. It was this draft (there was another draft by Charles

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<sup>27</sup> *Commonwealth of Australia Constitution Act* 1900 (Imp), 63 & 64 Vic, c12 (9 July 1900).

<sup>28</sup> Buss (2009) 33 MULR 718 at 721 citing J. La Nauze, *The Making of the Australian Constitution* (1972), 24.

Kingston from South Australia) that was to prove highly influential, especially on Ch. III. Of it, Clark wrote:<sup>29</sup>

“I have, therefore, drafted the accompanying Bill in accordance with the distinctive feature of the *American Constitution* as contrasted with the *Constitution of the Canadian Dominion*.”

Concerning the content of his Constitution, Clark continued:

“I have followed very closely the *Constitution of the United States*.”

Clark was not alone in admiring the United States model. Sir Henry Parkes, Josiah Symon, Sir George Reid and others saw much to follow in the American model. Still, it was the fact that Clark put pen to paper and that his draft, and later actions in defence of it, had a great impact on the Australian Constitution that gives him his special claim to be one of the five most influential persons who shaped the form and content of the instrument eventually adopted.

It is not my purpose here to repeat the well informed and scholarly analysis provided by Professor Buss. That would be needless; and anyhow I do not have a hundred pages at my disposal. However, there are four particular aspects of Clark’s constitutionalism (in addition to his treatment of popular sovereignty; his support for providing defined powers to the federal legislature, with the residue to the States; and his endorsement of the amendment model derived from Switzerland) that I wish to mention. These are:

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<sup>29</sup> Inglis Clark’s *Memorandum to Delegates*, reproduced in J. M. Williams, *The Australian Constitution: A Documentary History* (2005) 65, 66-67.



## 1. *Vesting of Judicial Power*

The first sentence of Chapter III of the Australian Constitution provides for the explicit vesting of the judicial power of the Commonwealth in “a Federal Supreme Court, to be called the High Court of Australia, and such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction...”<sup>30</sup>

This notion of “a Federal Supreme Court”, created by the constitution itself, was expressly included in Clark’s draft. In his temporary absence that was the draft that was placed before the delegates, sailing on the *Lucinda*. Yet, by the time that vessel had picked up Clark two days later, Chapter III had been given a fundamentally different content. It then began “The Parliament of the Commonwealth shall have power to establish a Court, which shall be called the Supreme Court of Australia.”<sup>31</sup>

Clark was greatly distressed by this change. Professor Buss quotes his complaint that he had seen no explanation for the shift towards leaving creation of the proposed national Supreme Court to the discretion of Parliament.<sup>32</sup> The change had come about because of the dominating influence of Griffith; his highly traditional view of parliamentary supremacy; and his tendency to favour the Canadian model (which so provided) over the American (which did not).

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<sup>30</sup> *Australian Constitution*, s.71.

<sup>31</sup> *Proofs for Printer* 18 March 1891 in J.M. Williams, *Documentary History* above n. 32, 199.

<sup>32</sup> Buss (2009) 33 MULR 718 at 730.

It was not until the Adelaide Convention in 1897 that the draft returned to the form that Clark had proposed. As Sir George Reid, the Premier of New South Wales explained, in words that Clark would have approved:<sup>33</sup>

“The Supreme Court of the United States is not a court created by Parliament as the [1891] draft Bill proposed our Federal Court should be. It is a court embedded in the Constitution itself, and it is essential to the just exercise of federal powers that this Supreme Court should be strong enough to do what is right – strong enough to act as the guardian of all rights and liberties of the States and people of Australia.”

Later, in the Tasmanian Parliament, Clark was to express his approval of the Adelaide draft Bill of 1897 and his pleasure that on the foundation of the highest court, his view had prevailed.

This was not a theoretical difference. There were some in the colonies, (soon to be States) who preferred that their local courts should remain with full power, allowing fully the possibility of appeals to the Privy Council on matters of transcending importance. But the permanency of the Australian apex court and the tenure of its judges were issues far too important to leave to the vicissitudes of future parliamentary debates. Although it does not often happen, it has been known in the days of Australian federation, for legislatures to abolish courts they once

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<sup>33</sup> Cited F.M. Neasey and L.J. Neasey, *Andrew Inglis Clark* (2001) 191; La Nauze, above n.31, 164-165; Williams above n.38, 705.

established.<sup>34</sup> Clark's form of section 71 of the Australian Constitution means that this can never happen to the High Court of Australia. At least it cannot happen without a profound change to the Constitution itself by formal amendment – an alteration intended to be very difficult to achieve.

## 2. *The Constitutional Writs*

Another point upon which Clark's view prevailed concerned the inclusion in Chapter III of the *Australian Constitution* of the explicit provision for constitutional writs that would render each and every officer of the Commonwealth (a term that was, and was intended to be, widely construed) answerable to the original jurisdiction of the High Court of Australia. That provision would uphold the rule of law throughout the land. The relevant provision, as it now appears in Section 75(v) of the Australian Constitution, reads:

“75 In all matters (v) In which a writ of Mandamus or prohibition or injunction is sought against an officer of the Commonwealth:  
... The High Court shall have original jurisdiction.

In his draft to establish the original jurisdiction of the proposed Australian Supreme Court, Clark in 1890 had provided for this in all cases:

‘In which a Writ of Mandamus or Prohibition shall be sought against a minister of the Crown for the Federal Dominion of Australasia.’”

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<sup>34</sup> M.D. Kirby, “The Abolition of Courts and Non-Reappointment of Judicial Officers in Australia” (Ronald Wilson Lecture, Perth, 1994).

This provision had no exact parallel in the United States Constitution. It enshrined a particular form of legal procedure. To some it appeared to be getting into matters of detail inappropriate to the general approach of the sparse Australian text. It was this consideration that led Edmund Barton, at the Melbourne Convention, in January 1898, to propose its deletion. He did not see why it was necessary to refer to some writs only. Might this not be taken as a limitation on the generality of the means of relief that the new court could grant? Why, for example, should the new court not be able to grant an injunction or a writ of Habeas Corpus?<sup>35</sup> The transcript records that the subsection was struck out. The discussion to this end took less than a single page of the record of the Convention Debates.

Clark, in Hobart, was following closely the debates in Melbourne. When he learned of this deletion, he immediately sent a telegram informing Barton that the removal of section 75 (v) was a serious mistake. He drew attention to the decision of the Supreme Court of the United States in *Marbury v Madison*.<sup>36</sup> That is the early decision of the Supreme Court of the United States asserting its power and function to strike down laws found by its judges to be incompatible with the *Constitution*.

Barton went back to examine the case which Clark had drawn to notice. There followed, in his later explanations, a measure of confusion in the way he read the decision. However, Barton

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<sup>35</sup> Official record of the debates of the Australasian Federal Convention, Adelaide, 31 January 1898, 321.

<sup>36</sup> 5 US (1 Cranch) 137 (1803).

ultimately came to the right result, although for reasons that were partly erroneous. To Clark he wrote that he and others at the Convention, if they had ever known of the importance of *Marbury v Madison*, had forgotten what it said. Although not grounded in an explicit provision of the *United States Constitution*, like s. 75(v) of the *Australian Constitution*, that holding of the Supreme Court of the United States, demonstrated the importance of having specified writs that could be invoked to provide swift access in the new constitutional court to the judicial power designed to uphold the Constitution.

In fact, *Marbury v Madison* resolved one of the greatest issues inherent in any federal system of government: which organ of government (court, legislature, executive or officials) should have the last word in resolving disputes as to where the respective powers of all the other organs should lie where it is claimed that the boundaries of power have been crossed and must be halted. In the United States, the *Marbury* decision, in the earliest days of the republic, held that the power lay with the courts. In a federation (perhaps in any form of government) there must be an independent umpire. The umpire must be neutral. The courts alone can fulfil such requirements. Clark knew this. He also knew the case in which that power had been asserted and never thereafter been successfully questioned. In establishing the Australian Commonwealth, it was, in his judgment, vital to include the constitutional writs in the text of the basic law. This would ensure that no legislation could prevent, or exclude, the provision of relief. It is the provision of the facility of relief that gives effectiveness and bite to the invocation of judicial power.

Chief Justice French, in an essay on Clark subtitled “A Living Force”<sup>37</sup> recounts the terms of the exchanges between Barton and Clark and the comments of other leaders in at the Melbourne Convention in 1898 when they decided to restore the deleted clause. By the time he got to that point, Barton had understood – as he expressed - correct reasoning:<sup>38</sup>

“The object of it is to make sure that where a person has a right to ask for any of these writs he shall be enabled to go at once to the High Court, instead of having his process filtered through two or more courts... This provision is applicable to those three special classes of cases in which public offices can be dealt with, and which it is necessary that they should be dealt with so that the High Court may exercise its functions of protecting the subject against any violation of the Constitution, or of any law made under the Constitution.”

The proposed respondents to the writs were broadened from Ministers of the Crown to the larger concept of “officers of the Commonwealth”: an expression that extends even to federal judges, certainly those below the High Court. Moreover, addressing Barton’s earlier concern, the remedy of injunction was added to the Australian constitutional list. The importance of this change, upon which Clark was insistent, has been emphasised many times over by recognition of the central role that s.75(v) of the *Australian Constitution* plays in the defence of the rule of law.

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<sup>37</sup> R.S. French, “Inglis Clark: A Living Force” in Papers on Parliament, above n.21, 107.

<sup>38</sup> Official record of the debates of the Australasian Federal Convention, Melbourne, 4 March 1898, vol. 5, 185.

Chief Justice Dixon said as much in *Bank of New South Wales v the Commonwealth*.<sup>39</sup> More recently, in a decision in which I participated, the High Court of Australia explained the crucial importance of s.75(v). It did so in the powerful language set out in *Plaintiff S.157 v The Commonwealth*.<sup>40</sup>

“The reservation to this Court by the Constitution of the jurisdiction in all matters in which the named constitutional writs or an injunction are sought against an officer of the Commonwealth is a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed or neglect any jurisdiction which the law confers on them. The centrality, and protective purpose, of the jurisdiction of this court in this regard places significant barriers in the way of legislative attempts (by privative clauses or otherwise) to impair judicial review of administrative action. Such jurisdiction exists to maintain the federal compact by ensuring that propounded laws are constitutionally valid and ministerial or other official action lawful and within jurisdiction. In any written constitution, where there are disputes over such matters, there must be an authoritative discussion-maker. Under the constitution of the Commonwealth, the ultimate decision-maker in all matters where there is a contest, is this court. This court must be obedient in its constitutional function. In the end, pursuant to s.75 of the Constitution, this limits the powers of the Parliament or of the Executive to avoid, or confine judicial review.”

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<sup>39</sup> (1948) 76 CLR 1 at 363.

<sup>40</sup> (2003) 211 CLR 476 at 513-514 [104], per Gaudron, McHugh, Gummow, Kirby and Hayne JJ; [2003] HCA 2 at [104].

A great debt is owed to Clark for preserving this facility for all in the Australian Commonwealth. Anyone in doubt, should contrast the difficulties that have arisen in the United States of America in bringing important challenges against the actions of officers of the United States to the Supreme Court for attention. The Guantanamo Bay cases are illustrations of what I have in mind. In Australia, such cases could all be brought, on urgent motion within the day if needed, before a Justice of the High Court of Australia in chambers. It would then be dealt with at once, either by scheduling a further hearing; or by referring the matter into a Full Court; or by remitting the matter to another court, federal or State. Thanks to A.I. Clark the jurisdiction to grant immediate relief is never in doubt.

### *3. Privy Council Abolition*

As I have mentioned, Clark was unimpressed by his experience appearing as Attorney-General for Tasmania before the Privy Council. As an Australian nationalist, long before witnessing the Imperial Court in action, Clark was strongly minded to terminate all appeals to London so that the final court of the Australian Judicature would be the new proposed Federal Supreme Court. He was familiar with the way in which the United States Supreme Court had quickly replaced the Privy Council and had won national respect and trust. A particular character, as a court, could also be stamped on the High Court of Australia by conferring upon it jurisdiction to hear appeals both from federal courts and from State Supreme Courts.



Clark's views were assailed by retentionists. They referred to the quality of Privy Council decisions; its attractions to business investors; and its integral role in the British Empire, then nearing the height of its power. Griffith, for example, was for retention. But, as Professor Buss describes, there many opponents. Clark's recommendation that the High Court of Australia should totally replace the Privy Council was not realised in the draft adopted and finally given effect in 1901. Clark had proposed, at the least, the abolition of appeals from any judgment or order of the new Supreme Court to any court of appeal created by the Parliament of Great Britain and Ireland to which appeals or petitions to Her Majesty in Council might be ordered to be heard.<sup>41</sup>

Although Clark's proposal was not adopted, as time was to prove, the same outcome ultimately was enshrined in Ch. III of the *Australian Constitution*. There followed successively a large reduction in the residual jurisdiction of the Privy Council in Australian appeals from the High Court by virtue of section 74 of the Constitution.<sup>42</sup> Eventually, (with in my view a dubious involvement of the British Parliament<sup>43</sup>), the last avenue for appeal to the Privy Council was terminated by the *Australia Act* 1986 (UK and Cth), s.11.<sup>44</sup> In my capacity as President of the Court of Appeal of New South Wales, I presided, by chance, in *Austin v Keele* in the last appeal from a State Supreme Court in Australia

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<sup>41</sup> Buss (2009) 33 MULR 718 at 795-796.

<sup>42</sup> Thus the Federal Parliament successively enacted the *Privy Council (Limitation of Appeals) Act* 1968 (Cth) and *Privy Council (Appeals from the High Court) Act* 1975 (Cth). See *Kirmani v Captain Cook Cruises Pty Ltd* [No.2]; *Ex Parte Attorney-General (QLD)* (1985) 159 CLR 461.

<sup>43</sup> *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at 612; [2003] HCA 67 at [203].

<sup>44</sup> "Termination of Appeals to Her Majesty in Council". This provision repealed the *Australian Courts Act* 1828 (Imp.), s.15; the *Judicial Committee Act* 1833 (Imp.); the *Judicial Committee Act* 1844 (Imp.); the *Australian Constitutions Act* 1850 (Imp.) s. 28 and the *Colonial Courts Admiralty Act* 1890 (Imp.), s.6 as applied to Australia.

directly to the Privy Council.<sup>45</sup> The appeal was dismissed. Thus ended 150 years of the role of that Imperial court as part of the Australian Judicature.

#### 4. *Constitutional Interpretation*

Finally, there is the contribution that Clark made outside the role he played in achieving the text of the *Australian Constitution*, and specifically the text of Ch. III dealing with the Judicature. Clark was a legal writer who gave great thought to the task of interpretation. He did so especially after the Australian constitutional text was adopted, enacted and recognised as the constituent law of the Commonwealth. For some, the interpretation of the *Constitution* was basically an historical task. The role of the judges was no more than to ascertain what those who had founded the Commonwealth meant: sometimes expressed as what they “intended”, by adopting the words contained in the *Constitution*. Interpretation was to be found in the language of the text; but with assistance, where appropriate, from other material, especially historical material. For lawyers of this view, the search for constitutional meaning commenced with the text. Light had to be shone on the text by reference to dictionaries of 1900 and to what the founders (including Clark) had said was their objective when they adopted the language of the *Constitution*.

Clark regarded this approach as fundamentally flawed. He said as much in his *Studies in Australian Constitutional Law*.<sup>46</sup> For him,

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<sup>45</sup> (1987) 10 NSWLR 283 (PC).

<sup>46</sup> Inglis Clark, *Studies in Australian Constitutional Law* (1901 ed; 1997 reprint), 21

such a power was neither claimed, nor possessed, by the founders of the Australian Commonwealth. For him, the Constitution was akin to a living tree. By its nature, it was intended to continue in its application to circumstances that were not known, and could not even be dreamed of or imagined, by the gentlemen (and they were all men) who wrote the Australian constitutional document.

Throughout the history of the High Court of Australia, there have been Justices who have shared the general approach to construction assisted by Clark. They have cited his book and his words. I have myself done so on many occasions.<sup>47</sup> An instance may be found in a decision of the High Court of Australia in the *Grain Pool of Western Australia v The Commonwealth*.<sup>48</sup> That was a case concerned the meaning of s.51(xviii) of the *Constitution* empowering the Federal Parliament to make laws with respect to ‘copyrights, patents of inventions and designs and trademarks’. A question arose in the case as to whether that provision fixed the content of the power of the Federal Parliament today by reference to an ascertainment of what, in 1900, would have been regarded as “copyright, patent, design or trademark”. This was a view that rejected. I did so in language that expressly invoked Clark’s views:

“[T]hose who were present at the conventions which framed the Constitution are long since dead. They did not intend, nor did they enjoy the power, to impose their wishes and understanding of the text upon contemporary Australian’s for whom the Constitution

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<sup>47</sup> *Re Wakim; Ex Parte McNally* (1999) 198 CLR 511 at 600-661; [1999] HCA 27 at [190].

<sup>48</sup> (2001) 202 CLR 479; [2000] HCA 114.

must, to the full extent that the text allows, meet the diverse needs of modern government.<sup>49</sup>

Once the *Constitution* was made and brought into law, it took upon itself the character proper to an instrument for the governance of a new federal nation. A constitution is always a special law. It is quite different in function and character from an ordinary statute. It must be construed accordingly. Its purpose requires that the heads of law-making power should be given an ample construction because their object is to afford indefinitely, and from age to age, authority to the Federal Parliament to make laws responding to different times and to changing needs.”

“Although it is sometimes helpful, in exploring the meaning of the constitutional text, to have regard to the debates in the constitutional conventions that led to its adoption and other contemporary historical and legal understandings and presuppositions, these cannot impose unchangeable meanings upon the words. They are set free from the framers’ intentions. They are free from the understandings of their meaning in 1900 whose basic relevance is often propounded to throw light on the framers’ intentions. The words gain their legitimacy and legal force from the fact that they appear in the *Constitution*; not from how they were conceived by the framers’ a century ago.”

There are, of course, opponents of the “living tree” view and defenders of the search for the original intention. They exist in the

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<sup>49</sup> Including reference to Inglis Clark, *Studies in Australian Constitutional Law* (1901 ed; 1997 reprint), 21. (Other references omitted).

courts.<sup>50</sup> They also exist amongst constitutional scholars.<sup>51</sup> However, in my view, the prevailing view (not always openly acknowledged) is the view propounded by Clark. In this sense, he contributed not only to the constitutional text; but also to the way in which it has been viewed in the generations since it came into force.

## *ASSURING MODERN RELEVANCE*

Most Australians of today, certainly on the Mainland, have not heard of Andrew Inglis Clark. When even a leading silk with a large High Court practice has never even heard of him, never stumbled upon the references to him by the Justices and never read of his luminous role in our constitutional development, what can we expect of students and ordinary citizens?

There are a number of steps that Australians should take to correct this ignorance and to repair the indifference to the work of such a contributor to our nation's governance. Without pretending to a complete list, the steps that should be taken include:

1. An improved instruction in schools and for citizens about Australia's constitutional story. This should encourage an increased engagement with the *Constitution*, its provisions, history and famous cases. In any revision of the national curriculum in civics (as task of high urgency in my opinion) a

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<sup>50</sup> See e.g. the reasons of Callinan J in *New South Wales v the Commonwealth (WorkChoices Case)* (2006) 229 CLR 1 at 277; [2006] HCA 57 at [696].

<sup>51</sup> "A Public Conversation on Constitutionalism and the Judiciary between Professor James Allan and the Hon. Michael Kirby" (2009) 33 MULR 1032.

proper place should be found for instruction about constitutionalism. That instruction should include appropriate honouring of the founders of our Commonwealth. They certainly include Andrew Inglis Clark;<sup>52</sup>

2. Attempts have been made in the past to improve awareness of Clark in his home State of Tasmania. Even in Tasmania, and not only on the Mainland, there is insufficient recognition of his role. One step which has been proposed in recent years is the renaming of the federal electorate of Denison after Clark. In the opinion of many, it would more appropriate to name an electorate of our Federal Parliament after one of the founders of the Constitution and of the Federal Parliament rather than after a Lieutenant-Governor of Van Diemen's Land (later Tasmania) from 1847-1855. Denison, was doubtless an important figure in the early colonial history of Australia. Twice the appropriate committee established under the *Commonwealth Electoral Act* 1981 (Cth)<sup>53</sup> has considered a proposal for such a change but it has twice rejected it. The first explanation offered was that "boundaries or socio-demographic nature of proposed divisions" should not be changed except in clearly justifiable cases, did less than justice to Clark's role as an important architect of the *Constitution*<sup>54</sup>. The statement that "in the main, divisions should be named after deceased Australians who have rendered outstanding service to their country" is hardly applicable to Sir William Denison. He was not Australian by birth nor by

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<sup>52</sup> The National Museum of Australia has instituted in 2014 a Defining Moments Project to stimulate debate on the important turning points in Australian History. The telegram sent by A.I. Clark to Barton on s.75(v) might be such a moment.

<sup>53</sup> *Australian Constitution*, s.68.

<sup>54</sup> Heerey, above n.1, 23.

identification. Certainly, in my respectful view, there is no comparison between him and A.I. Clark in our nation's history and governance. A second explanation offered by the Committee appealed to what it said was a familiar and long accepted division of the name of Denison. Yet no Tasmanian can justly claim, on objective evidence, a greater claim of influence in the shape of Australia's constitutional arrangements than A.I. Clark. Use of his name would not have been appropriate in 1901, for he was still then living. But after his death, no Tasmanian can be suggested who had a greater claim of influence on our constitutionalism. More than a century has passed and the renaming of the seat of Denison after Clark is now long overdue;

3. A step that could be taken by the Federal Government, or by the Legislative Assembly of the Australian Capital Territory, would be renaming of a suburb of Canberra after Clark. Each of the other principal contributors to the story of the Commonwealth and of its Constitution, has given their name to a suburb in the nation's capital: Barton, Deakin, Forrest, Griffith, Isaacs and Kingston. Clark has been overlooked. Can this simply be because of the divide of water in Bass Strait? Is this Mainland indifference to such an important man, simply because he comes from beyond the continental landmass? It would be timely if this omission too were repaired. It would be symbolic and appropriate. It would also be conducive to fostering contemporary Australian awareness about their history and about one of the founders of their Commonwealth;

4. In other ways, it would be in the gift of the Commonwealth itself, or of its agencies, to honour Clark. Stamps, coins and currency notes could bear his name, in due course, as a reminder of his role in our history. On the centenary of the Federation in 2001, a primary currency note contained the images of five founders of the Commonwealth. One of these was Clark. The future issues of the currency note for \$100 – likely to be joined in due course by a \$200 or \$500 note - would be opportunity to celebrate many of the Commonwealth's founders. Clark's claim should not be overlooked;
  
5. A report has suggested that "Rosebank", the Clark family home in Battery Point, a suburb of Hobart, is currently available for purchase. There is no museum in Hobart to the memory of Clark. What better place could there be to celebrate his remarkable career than the beautiful Georgian home in Hampden Road, Battery Point? I realise that these are hard economic times. It seems we never lose them. However, at the occasion at the Hobart Town Hall when I delivered the lecture upon which this article is based, a spontaneous and unanimous resolution was adopted to urge that the State Government to explore the acquisition of the Clark home. The then Lord Mayor of Hobart was asked to present the resolution of citizens to the Government of the State and to the City Council. The opportunity to acquire a place so appropriate to an historical museum that honours a famous son of Hobart and Tasmania does not come around every time it is wished for. It should be seized;



6. Tourism is a major service that Hobart, and Tasmania, offer the nation and the world. Increasing numbers of tourists today are eco-tourists and historical tourists. Tasmania should be encouraging interest in both such spaces of reflection and scholarship. What better place for a museum on Clark than the very home in which his spirit lived with his wife and children? Where he and his children breathed and lived the earthly life? In Clark's case, it was a life full of action, adventure and concern for his fellow man and woman. It would not be difficult to create an interesting museum recording his life and times. If Clark's home is not available, it should be possible to create a museum in some other historical edifice of the era. The aid of historians and civil society should be invoked;
7. Finally, there is his grave and headstone. A photograph of his gravestone appears in the papers of a conference held at Parliament House, Canberra in November 2013 on A.I. Clark's contributions to the building of an Australian nation.<sup>55</sup> The gravestone was originally positioned above his grave in old Queensborough Cemetery. Then it was shifted to Sandy Bay. It stands there in Peel Street, unremarked and uncelebrated. It is discouraging to see the way Australians do not appropriately honour, and reflect upon, those who helped to found their nation. I am not aware of whether the actual graves of Andrew Clark and his wife Grace were moved at the time the headstone

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<sup>55</sup> Papers on Parliament, 106.

was repositioned. But, at the least, the headstone is now in an out-of-the-way place. It would not be noticed by anyone who is uninformed in its current location. It is a kind of neglected symbol of the way Australians too often neglect their history.

The headstone of Clark and his wife could be replaced in St David's Park, behind the Supreme Court of Tasmania (on which Clark served as a judge) and near the Parliament of the State (in which, in colonial times, he also served). This park was itself originally a cemetery now largely cleared of headstones. However, it still has the grave and headstone of Lieutenant-Governor David Collins. To construct a "Pioneer headstone walkway" would be a way of encouraging reflection and instruction upon the past of the State and of the nation. Appropriate and discreet signs could give the passer-by a reminder of those who are remembered. Some of those memorialised should be convicts, the principal initial cause of the settlement in the first place. Living means should be found to enliven interest and to encourage awareness. Students, tourists, lawyers and historians could help.

Clark has his detractors. It is sometimes said that he was too radical. Too fond of the Americans. Too liberal. Too Republican. Each of these labels can be criticised. But, in the end, they are not adequate to explain the neglect. Nor to restrain belated proper respect. Our country is made up of a multitude of opinions and millions of voices. Some stand above the throng. One does not have to agree with everything about a person to honour their contribution to our nation's history. For example, I am not a

Republican. But I do believe in the republican notion of the sovereignty of the people. As I consider (and as Professor Buss demonstrates) Clark also did. After more than a century since his passing, it is time to let the controversies of past times rest. And to see the magnificent contributions of this man in their full grandeur.

No doubt Tasmanians could think of further steps that might be taken. One thing is sure. More needs to be done than we have done to this time to recall the life, to remember the service and to honour the contribution of Andrew Inglis Clark: a founder of the Australian Commonwealth. He was a powerful guardian of the rule of law that is amongst the greatest blessings of our much blessed nation.