A WATCHFUL ATTITUDE TOWARDS FEDERATION: TOCSIN'S APPROACH TO THE DRAFT CONSTITUTION BILL 1897-1900

We are making a Constitution for all time, and we're entitled to consider all the possibilities of danger to liberty when we are doing so, no matter how extravagant and far-fetched they may appear to those whose historical horizon is confined to a fifty years range.[1]

Recent Australian political experience has brought the Commonwealth Constitution under possibly its closest scrutiny since Federation. The constitutional confrontations of three years of Labor Government, culminating in the events of Remembrance Day 1975 raised serious questions about the nature and bias of its structure. The result of the May Referendum Vote on simultaneous elections, in which a clear majority of Australians was thwarted by a minority and a 'technicality',[2] has only served to reinforce the contention held by many that the Constitution is a major barrier to the exercise of democratic authority in this country.

This belief is not new. In the debate that preceded Federation it was the battle cry of the nascent Victorian Labor Party (and of liberal-radical supporters such as Henry Bournes Higgins[3]) that the Draft Constitution Bill[4] embodied a host of provisions which did not protect against 'capitalist spoliation', or which directly contravened principles of popular Government. These men had no doubt as to the democratic features that were surrendered in order to gain Federation, and no doubt as to their irrevocability.[5]

[1] *Tocsin*, 19 May 1898, 3.

[2] The Federal Leader of the Opposition, Mr Whitlam's term for the States' majority limb of s. 128 of the Commonwealth Constitution.

[3] (1851-1929), politician and lawyer; M.L.A. (Vic.) 1894; M.H.R. 1901, Minister; Justice of High Court, 1906 and President of Commonwealth Arbitration Court; Victorian Delegate to Federal Convention of 1897-98. See also Palmer N., *Henry Bournes Higgins*, (1931).

[4] The Draft of a Bill to Constitute the Commonwealth of Australia as adopted after the Melbourne Federal Convention in March 1898. It was amended slightly in 1899, and enacted without significant alteration (except with regard to the Privy Council, clause 74) as the Commonwealth of Australia Constitution Act, 63 & 64 Vict., 1900. However, most of the main provisions were well known during 1897, which is when this account begins. For more information regarding the various Drafts, beginning with those of Kingston and Clark in 1891, see La Nauze J. A., *The Making of the Australian Constitution*, (1972), generally, and at 289-327. Throughout the article I have used the contemporary terms 'Federal Bill' and 'Commonwealth Bill', if only for the sake of variation.

[5] Little has been published on the debate *pro* and *con* Federation. Historical scholarship has tended to concentrate on the fact of Federation itself, largely ignoring the vociferous anti-Federation movements that existed in the colonies, and

By far the most coherent and articulate voice representing the vanguard of Labour during the anti-Federal Bill Campaign in Victoria in the last three years of the nineteenth century was the radical journal *Tocsin*. Its name inspired by the bells of St. Antoine which heralded the French Revolution, *Tocsin* wished to play its part in ushering in a new social millenium.[6] Though strongly influenced by the British socialist trade unionists Ben Tillet and Thomas Mann, and by the Fabians Sydney and Beatrice Webb (also to a lesser extent by the collectivist Henry George), *Tocsin's* platform — an extensive seventy-four planks which sought to establish social-democracy by law reform — was developed in response to local experience.[7] Both publicist and educator, *Tocsin* attempted to develop a working class political consciousness — a fertile ground for the growth of a 'democratic' Labor Party — which hitherto had been stultified by the Deakin-Syme *Age* middle class hegemony that dominated Victorian political life.[8]

Naturally enough this concern for the future of Labor spilled over into *Tocsin's* treatment of the Federal Bill. First published in October 1897 amid the ferment of the conclusion of the Sydney Convention, it was *Tocsin's* bone of contention that no 'Labor' men — except for the apostate Victorian Trades Hall leader Trenwith[9] — were involved in the

by-passing their role in the Referendum Campaigns of 1898 and 1899. While not wanting to denigrate what has obviously been a valid field of historical endeavour, this approach has led to *ex post facto* reasoning as to the validity of the anti-Federationist's case. And it has helped perpetuate the absurd fallacy, begun by *The Argus* and others, that it was the men of vision who supported Federation, and it was only a few ultra-radicals out of touch with reality and bucolic provincialists who opposed it. As contemporary and later examples see: Deakin A., *The Federal Story*, (1963) (2nd Edition, by J. A. La Nauze), and, La Nauze J. A., *op. cit.* Notable exceptions to the trend have been; Hewett P., 'Aspects of Campaigns in South Eastern New South Wales at the Federation Referenda of 1898 and 1899', in Martin A. W. (ed.), *Essays in Australian Federation,* (1959), Scott Bennett, *Federation,* (1975), a collection of documents on both sides of the Federal issue. To date there is still no definitive work on the 'anti-Billites' as they were called. After this article was written, Hugh Anderson published a book of documents, *Tocsin: Radical Arguments Federation: 1897-1900,* which consequently, I have been unable to consider.

[6] *Tocsin*, 31 March 1898, 2.

[7] *Tocsin's* working programme encompassed Parliamentary and Industrial reform, and showed the importance it placed on education, cultural life and social conditions generally. It ranged from abolition of the Victorian Legislative Council, to the nationalisation of Victorian Shipping and the establishment of a 'democratic' University. It appeared in each weekly issue until 24 February 1898.

[8] *Tocsin*, 2, 9, 16 October 1897. Virtually no edition of the journal was complete without another salvo fired at the influence of the wicked *Age* and its dupes. For an indication of the effect the 'Labor-Capital' hegemony had upon the formation and later history of the Victorian Labor Party, see McQueen H. 'Victoria', in Murphy D. J. (ed.), *Labour in Politics,* (1975).

[9] (1847-1925) William Arthur Trenwith, politician and unionist; Secretary and founder Bootmakers' Union 1879, President Trades Hall Council 1886-87; M.L.A. 1889-1903, Senator 1904-10 *Tocsin* castigated him for his credulous support of Federation. See the *Age*, 6 May 1898; *Tocsin* 7 April 1898, 4; 14 April 1898, 5.

It might be worthwhile, at this point, to indicate the nature of *Tocsin's* connection with the labor movement. It had no official ties with the Party, though two of its original founders, G. M. Prendergast, and E. Findley were members of the Parliamentary Labor group in the Legislative Assembly. Another two, Tom Tunnecliffe

making of the Constitution.[10] Explanations were not hard to find. Not all the colonies had a manhood suffrage election for the Adelaide Convention. Tasmania's delegates were the product of 'cooked electoral rolls', its plural system giving a man 'as many votes as he deserves'.[11] Queensland sent no representatives at all. Western Australia did not even vote, Premier Forrest appointing himself and 'nine others to vote solid Tory'.[12] Higgins, the representative of 'true Democracy', and to a lesser extent Reid the N.S.W. Premier, *Tocsin* saw as embattled figures against the conservative delegates from their own colonies.[13] Deakin and other sham liberals — normally seen as progressives in the Convention debates — *Tocsin* reviled as men prepared to sacrifice principle to the intransigent small colonies for the kudos of being remembered to their electors, and an awe-inspired posterity, as 'Australia's founders'.[14] Given such circumstances, it was no surprise to *Tocsin* that the work of the three Conventions — Adelaide, Sydney and Melbourne — was a 'disgraceful compromise': a 'plutocratic device to stifle the infant . . . Labour'.[15]

Tocsin's truculent stand on the Draft Constitution Bill was given an added dimension of analytical precision by the writings of Bernard O'Dowd, a young Melbourne lawyer and poet.[16] Apart from occasional treatment in his regular column 'The Forge', between April and the Victorian referendum vote in June 1898, O'Dowd wrote an exhaustive section by section commentary (entitled 'Federation Dissected') on the explicit and hidden dangers in the Draft Constitution. It is the most extensive contemporary critical examination of the proposed terms of Federation. The importance of O'Dowd's contribution was that he was able to articulate in legal and constitutional terms what his Labor Party and *Tocsin* colleagues felt as objections of a general political nature.

In the past, Labor's objections to Federation have been largely disregarded by historians, who have found them spiced with an unpalatable

and Frank Anstey would become prominent politicians in the post-Federation Labor Party. *Tocsin's* view of unionism, emphasising the need for large industrial unions and collective strength through Trade Union Confederation, differed from the older craft-union structure of the Trades Hall Council; the conservative master craftsmen, of whom Trenwith was probably the best example. See *Tocsin*, 6 April 1899, 5; also McQueen H., *op. cit.*, 294. This divergence did not, however, prevent the Trades Hall secretary, Barret, from announcing the Council's opposition to the Draft Constitution in March 1898. *Tocsin*, 24 March 1898, 3.

[10] *Ibid.*, 21 October 1897, 4.
[11] *Ibid.*, 24 February 1898, 6.
[12] *Ibid.*, 17 February 1898, 6.
[13] *Ibid.*, 9 October 1897, 7; 17 March 1898, 4. Though Reid often attacked the small colonies over their parochial interests, in the end he supported the Draft Constitution Bill in his famous (and misunderstood) 'Yes-No' Speech.
[14] *Ibid.*, 21 April 1898, 3; 26 July 1899, 2.
[15] *Ibid.*, 21 October 1897, 4; 7 August 1899, 4.
[16] For further biographical information on O'Dowd, see Kennedy V. and Palmer N., *Bernard O'Dowd* (1954) (both authors were personal friends of O'Dowd, which has limited the thoroughness of their study); and for some treatment of his poetry see Anderson H., *The Poet Militant: Bernard O'Dowd,* (1969), Anderson's bibliography and commentaries are quite comprehensive.

motive or tenor. One has suggested that the Labor Party opposed Federation out of spite.[17] Another has found *Tocsin's* attack on the Draft Constitution 'frenzied', based on a 'fanatical' suspicion and an 'extravagant' distrust of the founding fathers.[18] It is true that some of *Tocsin's* reasoning employed excessive language and some of the possibilities it predicted have so far not been realised.[19] It is also true in O'Dowd's analysis of the Commonwealth Bill, that some of his criticisms strike the reader as over-zealous 'nit-picking'.[20] Yet, as Professor La Nauze points out,[21] O'Dowd's commentary contains many valid criticisms of the loose draftsmanship of the Bill.

O'Dowd called the framers 'lazy' and 'incompetent', and their work 'crude'.[22] On occasion he recognized his own 'sheer quibbling', but justified it because 'traces of cunning are so visible in this Constitution that all possibilities must be considered'.[23] O'Dowd was particularly qualified to undertake criticism of the Draft Constitution. In addition to his legal training in the Crown Solicitor's Office and then at Melbourne University, he was at the time Assistant Supreme Court Librarian, having access to modern British and American legal periodicals, cases and writings, and in the last category, especially to those of the great English constitutional lawyer A. V. Dicey.[24] O'Dowd had co-authored some of the standard law texts of his day. And he was later to become Victoria's Chief Parliamentary Draftsman.[25] To this sound legal knowledge he added a poet's vision, and a militance sharpened by his sense of the social injustice wrought by: '. . . [lurking] cannoneers of Vested Rights, Juristic Ambuscades'.[26]

[17] Apparently because it was left out of the constitution making process in the Conventions. See Parker R. S., 'Australian Federation: The Influence of Economic Interests and Political Pressures', *Historical Studies,* Selected Articles, First Series, (1964), 152-99, at 163.

[18] Vercoe H., 'The Opposition to Federation in Victoria (1897-1900)', Unpublished B.A. (Hons) Thesis, Melb. University 1959 at 11, 12, 27.

[19] For example, the fear that the person appointed Governor-General would be an ambitious prince who would set up an independent kingdom or satrapy in Australia; and the anxiety lest the Inter-States Commission could become the 'dictator of the trading and commercial policy of Australia'; also the concern that the industrial power of clause 51 (XXXV) allowed a Federal army to 'squelch a big strike'. *Tocsin,* 5 May 1898, 3; 20 July 1899, 2; 2 June 1898, 7.

[20] Witness the tortuous reasoning of one of his extrapolations of clause 24, which said that the members of the House of Representatives were to be 'directly chosen by the people': 'As a matter of fact, the senators will not be chosen by the "people", but by the electors. So the process is not really a direct one at all. And if on the face of it "directly" means "indirectly" what is there really to prevent a zealous Supreme Court treating the word "directly" as surplusage? If they do treat this word as surplusage, will it be impossible to substitute a system of election by Conventions, representing the people, for direct elections by the people?' *Ibid.,* 19 May 1898, 3.

[21] La Nauze J. A., *op. cit.,* 272.

[22] *Tocsin,* 5 March 1898, 3.

[23] *Ibid.,* 19 May 1898, 3.

[24] Dicey had published his seminal essay, 'Federal Government' in (1885) 1 *Law Quarterly Review,* 80. He also authored major works on the Conflict of Laws, and his *Introduction to the Law of the Constitution* was in its sixth edition by 1902.

[25] For the above details of O'Dowd's legal career, Kennedy and Palmer, *O'Dowd, op. cit.,* pp. 64-5, 73-4, 87, 88-92, 164.

[26] O'Dowd B., *Dawnward?,* (1909).

In examing *Tocsin's* arguments against Federation, a balance must be struck between its extreme formulations and its more sober reasoning. Due weight must be given to its significant postures — those that brand themselves as astute observations of legal and political reality. *Tocsin's* assertions cannot be characterised, in the final assessment, as simply jaundiced or irrational tirades against the Federal Bill. Even some of its wildest claims have more than a grain of substance to them.[27] It will become clear that many of O'Dowd's criticisms have cogent bearing on the operation of constitutional provisions today.

The cardinal point from which stemmed all of *Tocsin's* objections to the Commonwealth Bill was that it believed the proposed Federation to be 'indissoluble'. Unlike Harrison Moore[28] who thought the amendment provisions in the Constitution sufficiently flexible to allow for the expanding needs of nationhood, *Tocsin* felt there was not to be a Federation but a 'Fetteration'. A 'cast-iron' structure was characteristic of all written Federal constitutions: this much O'Dowd owed to Dicey. The perception of American constitutional experience confirmed this axiom: 'In the United States it is not the living people who govern; it is the men of Washington's day', and *Tocsin* feared that Convention delegates in Australia would similarly 'bind posterity in bonds of paper'.[29]

Not content with enunciating broad statements of belief, O'Dowd pointed to the inadequacies of clause 128 of the Draft Constitution Bill, which contained the provisions for its alteration. The first restriction he noted was that before the proposed amendment could be put before a referendum of the people, it had to be passed by both Houses of Parliament. This meant that an 'obstinate senate could block an amendment forever'. He did not see how this situation could be remedied, because the deadlock provisions in clause 57 did not apply to constitutional amendments.[30] *Tocsin's* own solution to this problem was the 'initiative' — a

[27] It is difficult to know how to take some of the more extravagant assertions. Some, as with the ambitious Vice-Regent comment, have the quality of a throw-away line not to be taken seriously, but containing at its base the valid realisation that, on paper, 'dangerous powers' did indeed lie in the Governor-General's hands. Others, such as the Federal army fear, probably were firmly believed on the basis of past experience. Troops were used in the Great Maritime Strike of 1890-1, a fact which burned itself into the memory of the *Tocsin* radicals.

[28] Moore, William Harrison, Third Dean of Law, Melbourne University. See, Campbell Ruth, *A History of the Melbourne Law School,* (1977), 105-23. As the 'ablest academic lawyer of the time' (La Nauze, *op. cit.,* 287), Moore surveyed the Constitution with a sometimes uncritical eye: 'So great indeed are the facilities offered by section 128 for altering the Constitution, that very competent expositors have suggested that, in the event of a difference between the Houses, it may be more convenient to pass ordinary legislation as an alteration of the Constitution under section 128 than to resort to the more elaborate "deadlock" machinery of section 57.' *The Constitution of the Commonwealth of Australia,* (1902), 332. See also his 'Four Lectures on the Constitution Bill' 1897.

[29] *Tocsin,* 2 October 1897, 5; 10 February 1898, 6.

[30] *Ibid.,* 2 June 1898, 7-8. It is extremely doubtful whether O'Dowd would have been enamoured of the solution to this problem arrived at in the Premiers' revisions of 1899. The Governor-General was given the discretion whether to allow the referendum proposal to go ahead. See text below.

process where, if a statutory minimum of electors supported it, an amendment proposal would be put before a referendum of all electors.[31] But even if under the terms of clause 128 a national vote was held, O'Dowd gave it no hope of success, because of the 'majority of the States' requirement, which, he felt, enabled a minority of conservatives, principally in the small States, to deny the expressed will of the majority of the people.[32] So rigid was the amendment clause thought to be, that *Tocsin* could claim, with some justice, that '[t]here will be no escape from the Federal Constitution except by Revolution'.[33]

Nowhere did *Tocsin* more clearly demonstrate the consequences of establishing an unalterable power structure in the Commonwealth Bill than in its criticism of the function of the proposed Governor-General. The framers of the Constitution seemed to regard the Governor-General as simply fulfilling the traditional role of the monarch, and did not seriously question his office. Indeed they rejected the idea of electing him, because they thought it would give the crown representative claim to too much power.[34]

But O'Dowd, on the other hand, was concerned with the effect of putting the form of vice-regal authority into a written constitution:

> The powers given to the Governor-General, though they may be in words the same as those given to State Governors . . . may assume a dangerous character when exposed to the influence of an environment unknown to British Constitutional experience.[35]

O'Dowd contrasted the 'studied vagueness' of Britain's unwritten and flexible constitution with the proposed Australian document, in which powers were to be permanently vested in the Governor-General, and could not be narrowed as the royal prerogative was in England by the evolution of Parliamentary supremacy. 'The figurehead would become a proconsul, and the paper constitution a justification of his usurpation.'[36] The

[31] *Ibid.*, plank 72 of the journal's working programme.

[32] *Ibid.*, 3 August 1899, 1. 'I[f], under the Federal Bill, a referendum for an amendment of the constitution, abolishing Kanaka slavery, Victoria were to poll 145,000 to 1, New South Wales 167,000 to 1, Queensland 50,000 to 50,001, South Australia 40,000 to 40,001, and Tasmania 8,000 to 9,000, the 9,000 Tasmanians would be able to absolutely prevent the realisation of the Australian wish'.

[33] *Ibid.*, 17 February 1898, 6. *Cf.* Professor Sawer's assessment: 'Constitutionally speaking, Australia is the frozen continent'. *Australian Federalism in the Courts*, (1967), 208. O'Dowd further postulated that Australia's federal status could not be altered by the amendment procedure under clause 128, because the word 'indissoluble' appeared in the preamble to the Act to Constitute the Commonwealth. 'The preamble is the preamble of an Imperial Act of Parliament, and is not a part of the Constitution at all. It can influence the interpretation of the Constitution, but it is not in the Constitution. The Constitution begins in s. 9 of the Bill, and not one word before that section can be amended under s. 128.' *Tocsin*, 5 May 1898, 2.

[34] La Nauze, *op. cit.*, 73.

[35] *Tocsin*, 5 May 1898, 3.

[36] *Ibid.*, 14 April 1898, 5. The journal's hero, Ben Tillet, gave speech in similar, fiery vein, 'The people would have no control over the Governor-General. He was to be given the most arbitrary powers, which were not known of in Great Britain. The Queen would not dare to ask the English people for such powers as were to be conferred on the Governor-General. (Cheers and cries of "Rot".).' Reported in the *Argus*, 3 June 1898.

theoretical powers of the monarch exercisable on ministerial advice, became, in O'Dowd's view, *absolute* powers of the Governor-General in the Draft Constitution, legally enforceable by a court.[37]

In these circumstances, O'Dowd thought it necessary that some specific reservation protecting responsible government be made in the proposed Constitution. Apparently Sir Henry Parkes had thought so too. In his resolutions for the 1891 Convention, Parkes provided for an Executive consisting of a Governor-General and 'such persons as may from time to time be appointed as his advisers . . . *and* whose term of office shall depend upon their possessing the confidence of the House of Representatives expressed by the support of the majority'.[38] By way of contrast, Barton's resolutions to the 1897 Adelaide Convention contained no qualifications on the appointment of the executive, and this was the form that the Constitution finally took.[39] To O'Dowd it was a major fault of the Draft Bill that there was no safeguard on the use of Executive power, nor a standard by which the government of the day was to be ascertained.

The Federal Bill used the words 'Governor-General' alone, and 'Governor-General in Council' at various points and in differing contexts. This was noted by O'Dowd, who argued that the first clearly conferred an independent discretion upon the Governor-General, while the second, at least on its face, indicated recognition of 'the Cabinet system of Government . . . he must either be guided by the advice of his ministers or dismiss them'.[40] O'Dowd did not believe this to be an effective control, and though he did not specifically treat clauses 62 and 64, which dealt with the appointment and tenure of Executive Council and Ministers of State, he was aware of their possible effect.[41] He held that it was within the ability 'of a Governor-General to flout the advice of his responsible ministers in a crisis'.[42] This was probable, O'Dowd felt, where the vice-regal authority was in 'the hands of . . . a man . . . out of sympathy with . . . a Labor Ministry'.[43] In these circumstances, he could choose a ministry from outside the House of Representatives, or from a minority within it, and 'the Ministers of State would be the mere tools of the Governor-General'.[44] This scenario, O'Dowd said, made 'the addition of the words "in Council" meaningless'.[45]

[37] O'Dowd captured 'The Federal Plot' in verse:
'In new vice-regal velvet
You've wrapped a Caesar's paw;
You've perched upon their future
The Vultures of the Law.'
Tocsin, 5 May 1898.
[38] Cited in La Nauze, *op. cit.*, 37-8.
[39] *Ibid.*, 112-3.
[40] *Tocsin*, 12 May 1898, 3.
[41] Both clauses stated that the executive officers of the Crown (*i.e.* Cabinet Ministers) were to hold their position 'during the pleasure of the Governor-General'.
[42] *Tocsin*, 24 March 1898, 3.
[43] *Ibid.*, 14 April 1898, 5.
[44] *Ibid.*, 5 May 1898, 3; 14 April 1898, 5.
[45] The defenders of the Draft Constitution Bill hotly denied that the Governor-General had any independent powers. Sir George Turner, Premier of Victoria, and

Not only did a future Governor-General not have to choose his cabinet from the majority in the Lower House, O'Dowd argued, but also he held an unchallengeable mastery over its duration. Clause 5 of the Draft Constitution, O'Dowd noted with some concern, gave a Vice-Regent complete discretion to dissolve the House of Representatives at any time, without advice, and whether or not there was a deadlock between it and the Senate. He also recognized that a Governor-General did not, under this clause, dissolve the Senate at the same time, and that, additionally, there did not exist any correspondingly wide power with regard to the Senate.[46]

Of similar import for O'Dowd was the 'infamous deadlocks clause [57] which Trenwith is unblushingly trying to foist on a democracy as the equivalent of the referendum'. This, too, was fraught with pitfalls which were not immediately obvious. One was its impracticability. O'Dowd thought that the Bill in question would probably be a taxation or appropriation Bill, that could not afford to wait the three month delay between passings, which was necessary before the machinery of the clause could come into operation. Also he maintained that the wording of the deadlock section need not necessarily lead to the supremacy of the Lower House, as the joint-sitting provision seemed to indicate. O'Dowd pointed out clause 57's use of not the mandatory 'shall' but only the directory 'may'. He commented that after the necessary formalities had been fulfilled, the Governor-General '*may* dissolve both Houses. But he needn't do so. He may dissolve the House of Representatives as often as he likes, and probably would dissolve it, if he leaned to the Senate'. On his interpretation of clause 57, there was no compulsion on the vice-regent to convene a joint-sitting at all, nor to take the preliminary measure dissolving the

member of the Conventions said: 'Wherever in the bill action by the Governor-General was mentioned, it meant that he acted according to the advice of his responsible ministers.' (*The Argus*, 23 May 1898.) The Australian Natives Association was told by Mr Cook M.L.A. that: 'Nothing could . . . be done by the Governor-General without the advice of his Ministers', and he assured his listeners 'The bogey which had been raised by the opponents of the bill as to the autocratic power of the Governor-General was all moon-shine'. (*The Argus*, 31 May 1898.) Just as heatedly, those who were against the Constitution, claimed large powers for the Governor-General, casting about for examples to support their argument: 'It had been said that the Governor-General was merely the mouth-piece of his advisers, but in Canada it had been proved that the Governor-General exercised power in defiance of Parliament'. (Speech of Mr W. D. Flinn, Melbourne Town Hall, *The Argus*, 21 May 1898.) Occasionally the racial bias of the Labour movement crept into their anti-Federation pleas, as it did in the speech of the somewhat prejudiced 'free thought lecturer' Mr J. Symes, 'It was not only an undemocratic bill, but an intensely tyrannical one. There was nothing to prevent the Governor-General under this constitution appointing an Executive Council of kanakas, black fellows, or Chinese. The Governor-General and the Executive were alike irresponsible, and could practically do what they pleased.' (*The Argus*, 19 May 1898.) O'Dowd, a fervent anti-racist, most certainly would not have approved. 'Democracy is colour-blind' was a favourite saying of his.

[46] *Tocsin*, 5 May 1898, 3. This, he said, 'adopted the odious Conservative Principle of continuity of existence of the [Upper House]', *ibid.*, 19 May 1898, 3.

Senate. Instead O'Dowd envisaged him dissolving 'the popular House again and again', until a satisfactory conservative majority was elected.[47]

There were other undemocratic features in the power of the proposed Governor-General. He could not be called to account. O'Dowd postulated that if the Governor-General acted independently of Parliament, but within the wide scope that the formal words of the Constitution allowed him, then nothing short of an Imperial Act could prevent him from doing so, since he was virtually undismissible because of his power to install compliant cabinets.[48] Further, his refusal to assent to a Bill was final; O'Dowd observed in an ominous tone that 'there are no provisions in this Constitution for the solution of a deadlock between the Governor-General and both Houses of Parliament'.[49] Another argument O'Dowd used against the Governor-General clauses was that they were unprecedented; that the power they gave him to dismiss the Lower House and act apart from ministerial advice could not have been exercised by a Governor under Victorian constitutional law.[50]

Where the power to make and unmake governments would lie in the future Constitution was clearly one of O'Dowd's central pre-occupations: he felt that this aspect of a Governor-General's power was matched, or rather, complemented, by the controls given to the proposed Senate:

> The money powers given to the Senate . . . will probably enable an unscrupulous or coup d'etat Ministry, aided by the Banks, to carry on the Government without responsibility to the House of Representatives or the People. It is also possible to have, with the assistance of tools in the House of Representatives, a Ministry composed of Senators.[51]

[47] *Ibid.*, 2 June 1898, 7. It is pertinent to indicate, at this point, O'Dowd's perception of the future role of clause 57 in other matters: 'Read the precious 57th section. In every line a question for decision by the Federal High Court. Fifty years hence when the interpretation of the maze of words is perhaps completed, what a perfect problem of obstruction it will present! Meantime what an opportunity for political dogfights to draw off the attention of parties from social reforms! And it must not be assumed that it is only in questions involving state rights that this section will thus be used. The Conservative parties in both Houses will unite their ingenuity in spelling all kinds of difficulties into its hybrid provisions for the purpose of blocking all radical reform.' *Ibid.*, 20 July 1899, 4. Questions of interpretation involving section 57 were used by two coalition Senators in an attempt to prevent the last Labor Government bringing certain reform bills before a joint-sitting: *Cormack v. Cope* (1974) 3 A.L.R. 419. See also *Victoria v. Commonwealth* (1975) 7 A.L.R. 1.

[48] *Tocsin*, 5 May 1898, 3.

[49] *Ibid.*, 2 June 1898, 7.

[50] *Ibid.*, 14 April 1898, 5. It would seem to be undoubted that he derived this view of Victorian constitutional convention from Higinbotham. O'Dowd revered the former colonial politician and Chief Justice as one of the gods of 'Victorian Democracy'. (*Ibid.*, 2 October 1897, 4: Kennedy and Palmer *op. cit.* 74, 107.) Higinbotham judicially expressed his view of Victorian government in the case of *Toy v. Musgrove* (1888) 14 V.L.R., 348. After deciding that the Victorian Constitution Act established a complete system of government by responsible advisors (at 396) his Honour expanded: 'The Executive Government of Victoria, consisting of Ministers of the Crown are responsible to the Parliament of Victoria for the exercise of all the powers vested by the Constitution Act in the Governor as representative of the Crown in Victoria; and that they alone have the right to influence, guide, and control him in the exercise of his powers' (at 396-7) Kerferd J. gave a similar judgment in the case, while the other two on the bench did not express the same view. When the case went on appeal to the Privy Council, it was decided on other grounds without reference to the reasoning of Kerferd and Higinbotham.

[51] *Tocsin*, 24 March 1898, 3.

Implicit in the above is the notion that the usurpation of the Lower House cabinet by the second chamber could only be achieved with the active connivance of the Vice-Regent. Though this contention is nowhere spelt out in *Tocsin*, in the context of clause 57 O'Dowd showed that he was aware of the possibility of co-operation between the Governor-General and the Senate.[52] He probably thought it so obvious that the Crown representative, who would in most cases be a political reactionary, could find friends in a 'Fatman's' Senate, that it need go unmentioned. One can only speculate as to the 'assistance' the 'tools' in the popular House would render. Presumably they would also be conservatives. Since *Tocsin* canvassed the suggestion made by a Sydney law professor, Pitt Cobbet, that the 'minority house' would insist on at least an equal share in all available portfolios, it is possible that O'Dowd meant that the presence of such 'tools' in a cabinet with senators would give some superficial legitimacy to a Senate 'government'.[53] This is O'Dowd's strongest expression that the Senate could govern *positively*, that resources supplied by capitalist financiers would enable the Senate, presiding over a muffled Lower House, to operate in *ad hoc* administrative capacity.

What then were the 'powers' by which O'Dowd thought the Senate could achieve pre-eminence? The provision in the Draft Constitution Bill which set out the Senate's capabilities *vis à vis* the popular House was clause 53. Its wide scope, giving the Upper Chamber 'equal powers with the other house in *all* legislation', indicated to O'Dowd a further, more likely, role of the Senate than active government. Like the notoriously arch-conservative Victorian Legislative Council, with which it was compared, the Senate could act negatively, blocking progressive legislation by exercising its power of rejection.[54]

But it was the Senate's power over appropriation or Supply Bills which most outraged O'Dowd's sense of constitutional democracy. 'This section [referring to clause 53] gives up . . . the results of hundreds of years of fight between the Lords and Commons regarding Money Bills, and is a treasonable surrender of valuable liberties to masked conservative highwaymen'.[55] It was not so much the ability to reject that O'Dowd was concerned with here, but that the Upper House had 'full power to *amend* money bills and thus dictate the financial policy of the Ministry'.[56] At first thought it might appear that O'Dowd simply misconceived this point,

[52] *Ibid.*, 2 June 1898, 7.
[53] *Ibid.*, 6 July 1899, 2.
[54] *Ibid.*, 19 May 1898, 3.
[55] *Ibid.*, 2 June 1898, 7. Ben Tillet also 'regretted that the people of Australia were proposing to degrade . . . the grand and glorious British Constitution which their fathers had fought for (Applause.) Britons under their monarchy were freer than Americans under their republic — (cheers) — because the people in England had robbed the Upper House of any power of the purse. (Cheers.) The people of Australia were now proposing to hand over to their Upper House powers which Britons had refused to give to their House of Lords. (Cheers and dissent.) The reason for this was that the people here were lawyer-rigged'. (*The Argus*, 3 June 1898).
[56] *Ibid.*, 19 May 1898, 5.

since clause 53 imposes a prohibition on amending ordinary supply or any tax bills. However, he believed that what the Senate could not do directly, it could achieve by utilising the 'request' machinery in clause 53:

> *Tweedledum* — 'The Senate cannot amend an ordinary Appropriation Bill'. *Tweedledee* — 'Of course not . . . it would be a fool to bother about writing in an amendment itself, when its got the power to request the other House to write in the amendment it wants. It's to save clerical work you know'.[57]

In the circumstances of political strength from which the Senate would purport to exercise this power, O'Dowd felt that there was very little the House of Representatives could do but comply, because, though clause 53 nominally gave it a discretion to 'make any of such omissions or amendments' suggested by the Senate, the consequences of delay (keeping 'the public service waiting for their salaries in the meantime') were too great. This *de facto* power of amendment, he argued, would be more persuasive and effective than outright rejection or positive government by the Senate, which had inherent difficulties. Since the Upper House could 'make as many requests as it wishes' (clause 53 specifying no limit), it did not have to interfere with the make-up of a cabinet, but could control the most socialist of governments by 'ordering' piecemeal alterations with the intention of nullifying any radical sections — leaving uncontroversial parts untouched — of not only money bills but of all legislation.[58]

Throughout *Tocsin's* argument against the proposed Senate runs the basic supposition that it would be a conservative force in the Constitution, both because of its structure and also because it was believed that it would be largely composed of 'Tory' politicians.[59] The presence of any second chamber at all was a 'serious blot' from O'Dowd's point of view; especially so since it signified 'an acceptance of a system for Australia which Democrats abhor and fight against in their own colonies'. His ideal was a single House subject to a referendum veto by the people. If a bicameral parliament was necessary, he argued that there should not be a 'States' House' representing bare map divisions, since this detracted from the principle of a unified Australia. 'As the Commonwealth is expressly stated to be a union of the people of Australia, the States, as States, have no right of representation at all.'[60] Clearly O'Dowd favoured a unitary form of government, and probably *Tocsin* was using the term 'Federation' loosely in its working platform when it called for the fulfilment of the nation's future in a federation.

However, the States were entrenched in the Draft Constitution Bill by the 'Equal Representation' provision. This was regarded by *Tocsin* as the most blatantly anti-democratic section of the Federal Bill, because it placed 'a permanent veto on the legislation of the vast majority of the

[57] *Ibid.*, 2 June 1898, 7.
[58] *Ibid.*, 19 May 1898, 5; 2 June 1898, 7; 6 August 1898, 2.
[59] *Ibid.*, 21 October 1897, 4.
[60] *Ibid.*, 19 May 1898, 7.

people of Australia in the hands of the smaller States'.[61] It was a blot O'Dowd felt could not be removed, because the agreement of the State concerned was necessary under clause 128 to have its representation reduced.[62] He singled out clause 10 which imported State electoral laws for the election of Federal senators, until the Parliament of the Commonwealth otherwise provided. This, O'Dowd believed, would mean that the restricted franchises of those colonies which elected conservative oligarchies would send similar representatives to the Senate.[63] They would, he thought, be part of a 'reactionary ticket party', along with 'Tories' from the larger colonies, whose desire to protect conservative interests would cut across state boundaries and unite them in common cause.[64] So it would not be true to say that O'Dowd had no conception that the Senate would form on party lines, as both Deakin and the *Argus* argued during the Federation debate.[65] Rather, he underestimated the part the Labor Party was to play in the emergent Commonwealth, which was understandable in view of some calls made at the time to introduce property qualifications for the Senate.[66]

A strong force in any written constitution lies in the position of the Judicature. The proposed High Court was the linchpin upon which the 'anti-democratic' provisions would turn, because O'Dowd felt its role could be used to legitimise the 'evil' operation of the Governor-General, the Senate, and the 'Deadlocks' clauses.[67] Chapter III of the Federal Bill:

> . . . place[d] a NOMINEE, IRRESPONSIBLE, IRREMOVABLE FEDERAL SUPREME COURT composed of men drawn from classes inimical and generally inaccessible to progressive ideas, over Parliament and the people, Victoria and Australia.[68]

The first aspect of *Tocsin's* discontent with the proposed High Court was that its interpretive role could supplant the authority of a democratic legislature. O'Dowd recognized the potential of the judiciary to limit the competence of government by noting that '[t]he words "subject to This

[61] *Ibid.*, same reference.
[62] *Ibid.*, 2 June 1898, 8.
[63] *Ibid.*, 21 October 1897, 4. 'Of course the Tories are pleased with the idea [of "Equal Representation"]. They see the sort of Government that is tolerated in three out of four small states, and they hope that such material may be sent to the Senate by the adoption of "equal representation" that an eternal Tory conclave may be put in charge of Australia, and rule it for the benefit of those that usually favour the obstructiveness of Upper Houses.'
[64] *Ibid.*, 19 May 1898, 3.
[65] *The Argus*, 7 May 1898 (Deakin reported); 9 April 1897 (Editorial).
[66] *Ibid.*, 4 May 1897. Further cause for concern was given by this conservative newspaper in its editorials. A strong supporter of Federation, it consistently condemned the One Man, One Vote system which it said might leave rural representatives and 'The professional and trading classes' in a minority; 21 July 1898. It must be remembered that the Labour Party itself was still only in its formative stage. The controversial 'Pledge' — binding its parliamentary representatives to party platform — had only recently been introduced; and Trenwith, its leader, had refused to take it. See McQueen H. Victoria *op. cit.* 295 *et seq.*
[67] *Tocsin*, 5 May 1898, 3; 12 May 1898, 3.
[68] *Ibid.*, 2 June 1898, 7.

Constitution"' meant 'subject to the interpretation by the Supreme Court'.[69] Though the power of the High Court would be equivalent to a 'legislative body', it was not elected, and a judge who continually made reactionary decisions could only be dismissed by the impossible task of proving his 'misconduct' before brother judges, he claimed.[70] The use of specious legal reasoning to flout the clear words of the Constitution, as the analogous American Supreme Court was seen to have done, was feared;[71] and the view of Sir John Downer that if the High Court objected to a proposed Bill it could issue a prerogative writ disallowing its introduction, was felt by O'Dowd to be the final abrogation of the sovereignty of a democratic Parliament, which should find the only limitation on its authority in the will of the people.[72]

Secondly, radical groups have traditionally had a deep distrust of the legal system, often with good reason, and *Tocsin* was no exception. It was axiomatic that the law, as applied by judges, discriminated against the poorer classes and was a device for the protection and benefit of the sons of 'barristers' and 'knights'.[73] Again, the United States Supreme Court, 'the sworn protector and upholder of . . . pernicious rings, trusts, monopolies and millionaires', was seen as a clear example of what the High Court could become.[74] In fact O'Dowd so feared the partisanship of a 'stacked' local judiciary, that he proposed retaining the Privy Council as the final avenue of appeal, in order to mitigate the oppressiveness of High Court decisions.[75] Though he stood alone on this amongst his colleagues (to Higgins the Privy Council was anathema[76]), he doubted the judicial calibre of the home-grown judges, especially the 'untrustworthy', Griffith,[77] thinking that the Judicial Committee would dispose of the iniquitous American precedents, whereas a 'weak Federal Court' could slavishly follow them.[78]

O'Dowd may be said to have miscued his attack on the extent of the reactionary bias of the High Court, as the facts have turned out.[79] It would on the other hand, take no large acquaintance with High Court decisions on constitutional matters, to find that the substance of his charge has, in the main, been borne out: its judicial decision *have* tended to construe provisions of the Constitution on restrictively legal grounds

[69] *Ibid.*, 5 May 1898, 3.
[70] *Ibid.*, 2 June 1898, 7-8.
[71] *Ibid.*, 17 February 1898, 7; 20 August 1899, 2.
[72] *Ibid.*, 2 June 1898, 8.
[73] *Ibid.*, 3 August 1899, 1.
[74] *Ibid.*, 2 June 1898, 7.
[75] *Ibid.*, 3 March 1898, 2 'Uncertain justice is better than certain injustice'.
[76] La Nauze *op. cit.* 219.
[77] Sir Samuel Griffith, former Premier of Queensland, was at the time Chief Justice of that colony, and was later to be Chief Justice of the High Court in 1903.
[78] *Tocsin*, 3 March 1898, 2.
[79] Sawer G., *Federalism in the Courts, op. cit.*; see final chapter 'Evaluation'.

and with insufficient relationship to the developing exigencies and necessary conventions of national government.[80]

In its attack on the Draft Constitution *Tocsin* was not objecting to the concept of Federation itself, but to the terms of the particular Bill at hand. Its own platform called for the 'consummation of [a "democratic"] Federation'. In the contemporary terminology, the Federation debate, including *Tocsin's* contribution, may be correctly characterised as one between 'Billites' and 'anti-Billites'. In proposing his own political solution to the contemporary debate, O'Dowd spoke of the need to ensure scope for future social reform either by federating without some of the small colonies (who demanded constricted Commonwealth power as a precondition of entry) in the hope that they would later join; or by delaying federation until the least advanced polities improved their political structures by effluxion of time; or by conditionally federating subject to a probationary period.[81] 'If Parliament were really fit to be trusted', he said, 'there is no adequate reason why they should not have been entrusted with all matters',[82] But *Tocsin* believed that the present Bill was a 'Fatman's trick to clam back the ocean of Democratic State Legislation', pointing to Dicey's assertion that federations tended to prevent social innovation.[83] The failure to provide for basic safeguards — such as 'One Man One Vote' or 'Equal Electorates' — as well as the establishment of a Crown officer with 'dangerous powers', and of a second chamber threatening to the popular House (all of these being unalterable), was no mere mistake, but the 'intended, plotted for and prayed for result of the work of those enemies of ours [that is, the "Labor Party's"] who are called the Federal Delegates'.[84] Support for this contention comes from the contemporary politician and historian, the New Zealander W. Pember Reeves, who cited as a cause of Federation, 'the uneasiness and bewilderment caused by the labour struggle in 1890, and thereafter by the apparition of Labor unfolding revolutionary programmes in the State Parliaments. Unquestionably' he claimed, 'many middle-class politicians turned to Federation as a counter-attraction, and thought to find in it a

[80] *Ibid.*, 10 March 1898, 2 O'Dowd was concerned that the Constitution Bill left a 'hazy borderland between Commonwealth jurisdiction and State jurisdiction'. In a bill which had 'highly technical language', he argued that the result must have been 'the intrusion of courts of Law into the decision of matters of political policy'. Accord: 'It was thus a period of intense judicial activity [that is, 1946-49], during which government policy was frustrated by judge-made doctrine rather than by clear constitutional restrictions to an extent not equalled since the Deakin period.' Sawer G., *Australian Federal Politics and Law 1929-49*, (1963), 216.

[81] *Tocsin*, 21 October 1897, 5; 2 December 1897, 6; 28 April 1898, 3.

[82] *Ibid.*, 2 June 1898, 7.

[83] *Ibid.*, 20 July 1899, 7; 2 June 1898, 8. Accompanying the British academic's stricture that Federations had proved unfavourable to government activity was the explanation: 'Listen to this, Socialists and other advocates of Government for the benefit of the people. . . This perhaps explains the enthusiastic support given to the Federal Bill by the capitalists and laissez faire politicians.'

[84] *Ibid.*, 26 May 1898, 3; 31 March 1898, 2.

steadying influence'.[85] Certainly the twin aim of the Australasian National League, a conservative political organisation, was, in the 1890s to campaign for Federation, and in doing so to defeat 'dangerous socialistic and class legislation'.[86]

There is neither time nor space to mount a detailed argument on this question, so I have been merely content with raising what appears to be a valid topic in the hope of prompting much necessary research. Neither is there space to explore many other of O'Dowd's objections to provisions in which he saw a deliberate hand at work. Such was the clause providing for casual Senate vacancies to be filled, which 'tolerate[d] the vicious undemocratic method of State Legislators electing senators' and encouraged 'Federal Party engineering' into State politics to secure the return of a 'Party senator'.[87] Or the provision that an equal vote in the Senate was to pass in the negative which gave 'the party of stagnation an additional and compulsory vetoing unit'.[88] The 'nexus' clause tying the membership of the Lower House to twice that of the Senate was also criticised.[89]

Again, we cannot here indicate O'Dowd's arguments against each of the concurrent heads of power under clause 51, referred to as the 'Thirty-nine Shackles'.[90] These turned out to be burdens of a different nature than O'Dowd originally predicted, because he argued that the Parliament had been granted too much power owing to its anti-democratic structure, though they are shackles nevertheless. O'Dowd did, however, correctly identify the intense litigation that each of these heads of legislative power would be subject to.[91]

If the value of *Tocsin's* arguments is to be assessed in contemporary terms, then their worth would be dismal indeed. The spark of hope given by the twenty thousand Victorians who voted against the Commonwealth Bill in the 1898 Referendum, was extinguished in 1899 when the proposed Constitution was overwhelmingly endorsed by 145,000 voters to nine thousand. That the voice of the people had spoken so clearly was a bitter blow to the 'democratic' journal, nevertheless, its opposition to the terms of Federation was unremitting to the end.[92] And time has proved O'Dowd's recognition of the Constitution's potential for obstruction to be substantially valid. His penetrating study has exposed the shortsightedness — and perhaps the venality — of greater contemporaries,

[85] Reeves W. Pember, *State Experiments in Australia and New Zealand*, 2 Vols., first published 1902, reprinted in 1968 by Macmillan. Vol. 1, 150.
[86] *The Argus*, 3 March 1897; 26 March 1897. See also Rickard J., *Class and Politics: New South Wales, Victoria and the Early Commonwealth 1890-1910*, (1976), 52-67.
[87] *Tocsin*, 26 May 1898, 3.
[88] *Ibid.*, see above reference.
[89] *Ibid.*, see above reference.
[90] *Ibid.*, 2 June 1898, 7.
[91] *Ibid.*, 26 May 1898, 3. 'Almost every noun in this section will be the centre of myriads of legal decisions, involving limitations of a serious nature in domestic State legislation, in directions hardly contemplated by the most acute legal theorists.'
[92] *Ibid.*, 3 August 1899, 4.

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

BRIAN O'CALLAGHAN*

POSTSCRIPT and FOOTNOTES

Another and even more famous Law School graduate than Bernard O'Dowd opposed the Draft Commonwealth Bill during 1897 and 1898: Henry Bournes Higgins.[1] He, too, slated it as undemocratic.[2] 'I cannot', he wrote, 'but be conscious that what I say will have little weight with those who do not value democratic principles. There are many persons, I feel, who ask only how the bill will immediately affect their pockets[3] —

[93] *Federal Convention Debates* (1898), Third Session, II; 2506-7.
[94] *Tocsin*, 20 August 1898, 4.
* B.A. The writer would like to thank Mrs Ruth Campbell, Lecturer in Legal History at Melbourne University, for her invaluable help and support in preparing this article for publication.

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

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

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

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

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

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