

## Andrew Inglis Clark: A Dim View of Parliament?

Rosemary Laing

The draft Constitution that Andrew Inglis Clark brought to the 1891 National Australasian Convention in Sydney was federalist in character. It brought together the existing colonies in a federation with a national government that would possess specified legislative powers after the US model, leaving all residual powers to the new states which would not be subordinate polities, but partners. Also following the US model, the states would have equal representation in a Senate that would have sufficient powers to protect their interests.

It had republican features, consistent with Clark's lifelong interest in such matters, ranging from a clear separation of powers providing checks and balances on the exercise of power, to a provision for state legislatures to elect state governors. The question of whether ministers should sit in parliament and, therefore, the degree to which the Constitution should entrench a system of responsible government, was left open and not prescribed. While not suggesting an alternative to responsible government, Clark wanted the Constitution to be flexible enough to allow one to emerge in future.

The draft Constitution was broadly democratic, providing for the representation of each 20,000 head of population by a member of the popular assembly or House of Representatives. The Senate was to be elected by the state legislatures but there were few at this time, except perhaps for Alfred Deakin,<sup>1</sup> who advocated direct popular election of what looked like being a very powerful second chamber. Clark was still defending indirect election as late as 1897, citing the quality of US senators in the early years as evidence of the success of that method (although he conceded that the US Senate had gone downhill recently with too many millionaires).<sup>2</sup>

Clark's big idea was for a federal supreme court entrenched in the Constitution. As a delegate to the 1890 Australasian Federation Conference in Melbourne, he had led the drive towards the ultimate preference of delegates for a US-style federation, where states retained plenary legislative powers, over the Canadian model that was more of an amalgamation under a central government, leaving only specified powers to the provinces. It was thought that the US model was likely to produce more successful results for those striving to achieve federation in Australia.<sup>3</sup>

Notwithstanding its incorporation of features of the US Constitution, Clark's draft reflected the reality that federation in Australia could only be achieved by an Act of the British Parliament. It would be a federation under the imperial Crown and, as Clark pointed out in his introduction to the 1891 draft, the Colonial Laws Validity Act made colonial law-making subject to the imperial parliament. This was the basis of the final, rather esoteric, argument in his introduction that the parliament should consist of the two Houses and the Governor-General, not the Queen, because it would derogate from the dignity of the Crown to have the Crown as part of the colonial law-making process which was subordinate to imperial power. That might leave the Crown party to an invalid Act or even to two contradictory laws.<sup>4</sup> Such fine points about the nature of imperial and executive power did not, however, excite the delegates to the 1891 Convention.

---

1 See, for example, J.A. La Nauze, *The Making of the Australian Constitution*, Melbourne University Press, Carlton, Vic., 1972, p. 47.

2 *The Mercury* (Hobart), 29 July 1897, supplement, p. 2.

3 See Clark's introduction to his 1891 draft Constitution, reproduced in John M. Williams, *The Australian Constitution: A Documentary History*, Melbourne University Press, Carlton, Vic., 2005, p. 66.

4 *ibid.*, pp. 73–4, 76.



**National Australasian Convention delegates, Sydney, 1891, photographed by Laura Praeger, Empire Galleries, Sydney. Image courtesy of National Library of Australia, an14293711**

While Clark had succeeded in putting down on paper a scheme that reflected the thoughts of the 1890 Conference, he did so using the language and framework of the *British North America Act 1867*, particularly ‘in providing for such matters as the location, nature and the exercise of the Executive power under the Federal Constitution’.<sup>5</sup> Perhaps he thought such an approach would least frighten the horses, but it also reflects his habitual approach to drafting, which was to find an appropriate model and adapt it to his purposes.<sup>6</sup> It did the job without setting the world on fire.

Clark thought deeply about the nature and exercise of executive power and about the role of a supreme court under the Constitution. He had a creditable stab at enumerating the various heads of legislative power that would be appropriate for the national legislature to exercise. These and other aspects of the draft Constitution, including the electoral provisions, the financial powers of the Senate<sup>7</sup> and the financial arrangements for the new Commonwealth have received much scholarly attention.

For a parliamentary officer, there are interesting questions that have not received much attention.<sup>8</sup> Clark was a member of the Tasmanian House of Assembly from 1878 to 1882 and again from 1887 to 1898. During the period in the 1880s when he was not a member of parliament, he made three attempts to get back in, unsuccessfully in 1884 and 1886.<sup>9</sup> It was clearly a career he wanted to pursue. He was a

5 *ibid.*, p. 67.

6 La Nauze, *op. cit.*, p. 26 refers, not disparagingly, to the ‘scissors-and-paste’ job that Clark did on his draft Constitution, but see F.M. Neasey and L.J. Neasey, *Andrew Inglis Clark*, University of Tasmania Law Press, [Hobart], 2001, chapter 5 *passim* for numerous examples of Clark drafting by cutting and pasting.

7 In clause 52 of his draft, Clark provided for money bills to originate in the House of Representatives but for the Senate to have the power to reject or amend them, subject to a prohibition on increasing the overall amount.

8 It is interesting to note that one of Clark’s sons, Carrel, was a parliamentary officer, becoming Clerk of the Tasmanian Legislative Council in 1946.

9 Neasey and Neasey, *op. cit.*, p. 65.

backbencher from 1878 to 1882 (the first few months in opposition), in opposition from August 1892 to April 1894 and again, briefly, in 1898, but for the remainder of the time he was Attorney-General, first in the Fysh Government and then in the Braddon Government. He was therefore a key member of the executive government. During the period he was out of parliament, he was the inaugural chair of the Southern Tasmanian Political Reform Association which was established to pursue electoral reform.<sup>10</sup> The work of the Association notwithstanding, parliament was really the only forum in which Clark could pursue the ideals that were so dear to him.

### **Clark's parliamentary experience and his 1891 draft Constitution**

But how, if at all, did his experiences as a member of parliament shape the choices he made in the 1891 draft? Did he think as deeply about the institution of parliament as he did about the roles of the executive and the judicature? In particular, if the Senate was to be so important as the bastion of state interests, did Clark give any thought to what it might need, apart from financial powers, to carry out its functions? What might the Federal Parliament look like today if Clark's initial thoughts on the machinery provisions for the operation of parliament had survived as first proposed?

These machinery provisions became sections 49 and 50 of the Constitution. They provide:

49. The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

50. Each House of the Parliament may make rules and orders with respect to:

- (i.) the mode in which its powers, privileges, and immunities may be exercised and upheld;
- (ii.) the order and conduct of its business and proceedings either separately or jointly with the other House.

They provide the Federal Parliament, particularly the Senate, with significant powers and immunities and with the procedural independence to function effectively, to undertake the duties it was established to carry out on behalf of the constituent parts of the federation.

Clerk's parliamentary career is chronicled in the pages of the Journals of the Tasmanian House of Assembly<sup>11</sup> and, in the absence of an official Hansard service, the Hobart daily newspaper, *The Mercury*. Clark embraced his parliamentary duties after being sworn in as the Member for Norfolk Plains on 30 July 1878<sup>12</sup> and was active in using the various parliamentary procedures available to him, quickly grasping the forms and some of the fundamentals. For example, he presented petitions calling for the passage of a bill regulating the Presbyterian Church, but he voted against a motion that would have allowed a representative of the church to appear at the bar and address the House in support of the petition.<sup>13</sup> That would have involved the inappropriate usurpation of a representative's proper role

---

10 *ibid.*, p. 66

11 Minutes of the House of Assembly, individually known as Votes and Proceedings, were bound into annual volumes, collectively known as the Journals of the House of Assembly.

12 Journals of the Tasmanian House of Assembly (hereafter referenced as J), 30 July 1878, p. 15.

13 3 September 1878, J.41; 12 September 1878, J.83; the bill was passed on 12 September 1878, J.65.

---

which Clark would no doubt have contemplated as he sat on the Assembly's green benches. He was appointed to numerous select committees during his first period as a backbencher including on the present system of electing members of parliament,<sup>14</sup> oyster fisheries and the preservation of forests,<sup>15</sup> the destruction of fruit by the Codlin Moth,<sup>16</sup> and the operation of the *Customs Duties Act 1880* (which he initiated).<sup>17</sup> For most of his parliamentary career, he was a member of the Library Committee, allowing him to influence the purchase of works for the Tasmanian Parliamentary Library.

Clark made regular use of orders for production of documents, an exercise of the House's powers to obtain information from government. For example, in 1881 he sought, and obtained, legal advice from the government on the rates of intercolonial postage.<sup>18</sup> Clark's orders over the years covered a wide range of matters from public policy and administration to the affairs of individuals. They were routinely complied with by the government of the day. One curious matter in 1892, when Clark was in opposition, appeared to involve a matter of private concern to the Clerk of the House, Frederick A. Packer, who had apparently been unable to register the name of his infant son. On 11 October, Clark moved an order for the tabling of all correspondence between Packer and the Registrar-General's Department and Chief Secretary's Department.<sup>19</sup> The correspondence was tabled on 18 October<sup>20</sup> and a few days later Clark successfully moved a motion calling for Crown Law advice on whether the Governor could direct the Registrar-General to register a child's name more than seven days after the registration of the birth and, if not, calling for amendment of the relevant law. The episode not only provides a window into the occasional intimacies of parliamentary life but shows Clark using classic parliamentary tools to address a matter of concern.

As early as three months after his election, Clark can be seen using a deadly parliamentary tactic to kill off a bill. The bill was the Hobart Town Corporation Act Amendment Bill which put rate collection in Hobart on the same footing as in Launceston, including by making landlords liable for the rates of small tenancies of less than 20 pounds per year. Clark found the provision objectionable and moved a second reading amendment for the bill to be read a second time 'this day 6 months'.

When parliamentary sessions lasted for six months or less, as was the case in Tasmania, and bearing in mind that all business lapses at the end of a session, such an amendment, if successful, effectively cast a bill into oblivion, assigning it to be considered on a date on which the parliament would have been long prorogued. It was fatal to a bill and prevented its revival, other than by reintroduction in a new session.<sup>21</sup> By employing such a device, Clark can be seen as eager to apply the tactics at his disposal to achieve his goals but it was nonetheless an unusual tactic, perhaps designed to demonstrate Clerk's alacrity in embracing his new role. He was only 31.

Clark witnessed his first no-confidence motion on 17 December 1878 and a new ministry formed under Premier William Crowther on 20 December.<sup>22</sup> He was later to denounce this method of changing

---

14 12 September 1878, J.66.

15 2 May 1879, J.215.

16 8 May 1879, J.215.

17 18 August 1881, J.56.

18 21 July 1881, J.11–12.

19 J.78.

20 J.97.

21 The same tactic remains in the Senate's standing orders and is regarded as finally disposing of a bill. It is seldom used, perhaps because it requires majority support and there are other, easier ways of defeating a bill on an equally divided vote. However, a bill defeated by this method is not necessarily dead, although it is usually considered to be so. It may be revived, for example, by motion on notice, if a majority wishes to proceed with it.

22 J.164; J.168.

government and it appeared to lie at the heart of his dislike of the system of responsible government. In his speech on the resolutions at the 1891 Convention in Sydney, Clark quoted Victoria's Chief Justice George Higinbotham's disparaging assessment of the state of affairs in Victoria at a particular time, and the 'feelings of distrust and disapproval ... almost entirely occasioned and generated by the accursed system under which the party on this side of the House are always striving to murder the reputations of the party on the other side, in order to leap over the dead bodies of their reputations on to the seats in the Treasury bench'.<sup>23</sup> When challenged by Deakin that the strength of parties in the US was just as great without responsible government, Clark riposted, 'But it cannot upset the ministry for the time-being simply for the purpose of upsetting them and getting their places, and for no other reason whatever'.<sup>24</sup> We do not know, of course, how he would have viewed US-style gridlock and government shutdown as a consequence of party posturing.

Clark's career as a legislator took off when he was appointed Attorney-General in March 1887, although he had some experience of introducing private member's bills in his first term.<sup>25</sup> Out of parliament for nearly five years after being defeated at the general election in May 1882, Clark won the seat of South Hobart at the election on 4 March 1887. Tasmania followed the Victorian practice whereby a member of parliament appointed to the ministry had to resign and recontest his seat, which Clark did, being re-elected on 7 April 1887.

As Attorney-General, he was responsible for introducing and seeing through the parliament numerous bills, many of which he drafted. He was a very methodical lawmaker who made sensible use of the parliamentary timetable. He tended to introduce multiple bills early in the session, allowing time for them to be considered by select committees, if required, for debate to proceed in due course, and for amendments to be negotiated with the Legislative Council before the session ended, whether by the usual exchange of messages or the occasional conference. He was the man most likely to be nominated as a member of any committee of reasons appointed to draw up reasons for disagreeing with amendments made by the Legislative Council. He continued these habits in opposition when he routinely introduced half a dozen private member's bills at the beginning of a session, proposed select committees in appropriate cases and shepherded the bills through the various stages in the chamber, including negotiations with the Legislative Council before the session ended. (He had a success rate of around 50 per cent in having his private member's bills passed into law.)

This is significant because he had plenty of experience of how routine bicameral negotiations almost always produced an outcome. Failure of a bill was simply an indication that it lacked parliamentary support. In 1897, when he was taking through the committee stages the draft Constitution Bill as it had emerged from the Adelaide session of the Convention, with a view to proposing amendments to be considered at the next session in Sydney, Clark put forward his version of a deadlock provision as an alternative to less acceptable versions that he expected would be proposed by Isaac Isaacs and Bernhard Ringrose Wise. His preference, however, was for no such provision. If it were up to him, he would prefer to see the two Houses fight it out and eventually come to some agreement, without interference. If there were to be a deadlock provision, however, he urged his colleagues to consider his alternative in preference to other proposals which either ignored or coerced the Senate.<sup>26</sup>

It was shortly before these exchanges that Clark recollected some of the important events of the 1891 Convention. Clark had not attended the Adelaide session. He was undertaking his second visit to the

---

23 *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 11 March 1891, Legal Books, Sydney, 1986, vol. 1, p. 245.

24 *ibid*

25 See Neasey and Neasey, *op. cit.*, pp. 53–8. The Neaseys' biography of Clark provides detailed information about the bills he introduced and the business he transacted in the Assembly, as well as about the political context.

26 *The Mercury* (Hobart), 12 August 1897, supplement, p. 2.

---

US but had followed the debates while there and, on his return, had stopped in Sydney to spend an afternoon with Edmund Barton and Wise, catching up on what had happened. He was thus prepared to lead the debate, beginning with a comprehensive speech on a motion for the House to resolve into a committee of the whole to consider the Constitution Bill. According to *The Mercury*, he was greeted with cheers. It was in this speech, six years after the event, that he let fly about the ‘picnic’ that had taken place over Easter 1891 on the ‘pleasure yacht’ *Lucinda* and that while he was in bed with flu, the picnic party had ‘messed’ his Supreme Court provisions, now restored by the Adelaide session.<sup>27</sup>

By the time Clark came to draft his Constitution in preparation for the 1891 Convention, he had several years’ experience of parliamentary methods and practices, and had become a respected and effective legislator. He had practical experience of parliamentary procedure but had not had to contemplate the standing orders and their implications in isolation. The Assembly did not embark on a revision of its standing orders until 1892 when it spent several days early in the session revising various standing orders before agreeing to them on 17 August 1892 and sending them off to the Governor for approval, a quaint colonial custom that lingers on in some state constitutions (including Tasmania’s). Anyone could be forgiven for missing this otherwise significant event. On the same day, Henry Dobson formed a new government, taking over from Philip Fysh as Premier, after yet another no confidence motion and Clark, too, was out of office.

The other significant aspect of parliamentary practice that Clark appears to have had little exposure to before 1891 was parliamentary privilege. Cases were rare and one did not crop up till October 1891, after the Sydney Convention. It involved a question of contempt by defamation.<sup>28</sup> Walter Scott Targett, a former member of the NSW Legislative Assembly (who therefore should have known better according to participants in the debate), was reported as having made defamatory remarks about the Speaker and other members. The House resolved that its Clerk write to Mr Targett to ascertain if the reported remarks were correct but, having received a response confirming the accuracy of the reported remarks, the House found that there was nothing it could do about it. It lacked the necessary powers to punish what it considered to be a contempt. As Clark informed the House, the Tasmanian Parliamentary Privileges Act did not provide any remedy for such a case because defamation of a House or member was not one of the contempts specified in the 1858 Act which had been enacted to empower the Houses to punish several other contempts. He recommended that he be instructed to prepare a bill to address the matter.<sup>29</sup> Clark referred to three cases in which the Privy Council had found that colonial legislatures had no inherent power to punish contempts committed outside their doors. Later in the debate, he conceded that it was the first time he had heard of such a thing and was taunted for this gap in his knowledge.<sup>30</sup>

The gap is surprising because one of the three cases was a Tasmanian case decided by the Privy Council in 1858 (*Fenton v. Hampton*).<sup>31</sup> In 1855, the Legislative Council established a select committee to inquire into certain alleged abuses in the convict department, with power to send for persons. John Hampton, comptroller-general of convicts, was served with a summons to appear but refused to do

---

27 *The Mercury* (Hobart), 29 July 1897, supplement, p. 2.

28 Formerly a very commonly pursued contempt, the contempt of defamation of a House or member was abolished at the Commonwealth level by section 6 of the *Parliamentary Privileges Act 1987*, predating by some years the High Court’s identification in the Constitution of an implied guarantee of freedom of political communication.

29 7 October 1891, J.220–1; *The Mercury* (Hobart), 8 October 1891, p. 4; 23 October 1891, J.278; *The Mercury* (Hobart), 24 October 1891, supplement, p. 1. In the event, Clark was out of office before he could introduce such a bill and no amendments proceeded.

30 *The Mercury* (Hobart), 24 October 1891, supplement, p. 1.

31 (1858) 14 ER 727.

so. The refusal being reported to the Council in accordance with normal parliamentary practice, that body resolved that Hampton should attend at the bar of the Council to explain himself. Again, he refused and the Council resolved that he was guilty of contempt, despatching the Serjeant-at-Arms with a warrant from the President to apprehend Hampton and commit him to custody at the Council's pleasure. Hampton won an action for trespass in the Supreme Court on the grounds that the Council, President and Serjeant did not have the authority to take such action against him. The President and Serjeant appealed to the Privy Council which affirmed the Supreme Court's decision.<sup>32</sup>

The Privy Council in this case followed its earlier decision in *Kielley v. Carson*<sup>33</sup> which denied to colonial legislatures the inherent power to punish contempts committed outside their doors. The UK House of Commons certainly had that power as part of the *lex et consuetudo Parliamenti* (the law and custom of parliament) but that was no justification for ascribing it to every colonial assembly which, as a matter of common law, possessed only those powers considered reasonably necessary for them to perform their functions.<sup>34</sup>

Tasmania's response was to enact the *Parliamentary Privileges Act 1858* which gave both Houses powers to summon and examine witnesses and to punish specific contempts for which the relevant Presiding Officer would issue a warrant for the apprehension and imprisonment of the person judged guilty of the particular contempt. The Act authorised those executing such a warrant to break down doors 'in the daytime' if necessary, a power which still exists.

The response was different in other colonies which, instead of specifying in statute the sanctions for particular contempts, had adopted House of Commons powers, privileges and immunities for their legislatures in total, as at the date of the relevant Constitution, thus removing any doubts about the powers of those legislatures to punish for contempt, whether committed inside or outside their doors. The Victorian Constitution, for example, adopted House of Commons powers, privileges and immunities at 21 July 1855. South Australia followed with a similar formula in 1856. Both constitutions provided for subsequent modification of the adopted powers, privileges and immunities by later statute.<sup>35</sup> As we have seen, Tasmania took a different route in 1858 in response to a particular case.

### **How then did Clark deal with the rules and privileges clauses in his 1891 draft?**

The relevant clauses are as follows:

14. The privileges, immunities and powers to be held, enjoyed, and exercised by the Senate and the House of Representatives, and by the Members thereof respectively, shall be such as are from time to time defined by Act of the Federal Parliament.
51. The Senate and the House of Representatives from time to time and as there may be occasion shall prepare and adopt such Standing Rules and Orders as shall appear to the said Senate and House of Assembly (sic.) respectively best adapted—
  - I. For the orderly conduct of the business of the Senate and House of Representatives respectively:

---

32 Report of the case in *The Argus* (Melbourne), 26 June 1858, p. 6.

33 (1842) 12 ER 225.

34 See Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice*, Federation Press, Annandale, NSW, 2008, pp. 52–3, 56–7.

35 Enid Campbell, *Parliamentary Privilege*, Federation Press, Sydney, 2003, p. 2.

- 
- II. For the mode in which the Senate and House of Representatives shall confer, correspond, and communicate with each other relative to Votes or Bills passed by or pending in the Senate or House of Representatives respectively:
  - III. For the manner in which Notices of Bills, Resolutions, and other business intended to be submitted to the Senate and House of Representatives respectively at any Session thereof may be published for general information:
  - IV. For the manner in which Bills shall be introduced, passed, numbered, and intituled in the Senate and House of Representatives:
  - V. For the proper presentation of any Bills passed by the Senate and House of Representatives to the Governor-General for his assent thereto: and
  - VI. Generally for the conduct of all business and proceedings of the said Senate and House of Representatives severally and collectively:

All of which Rules and Orders shall by the Senate and House of Representatives respectively be laid before the Governor-General and being approved of by him shall become binding and of force.<sup>36</sup>

### Where did they come from?

Clause 14 was based on section 18 of the *British North America Act 1867* which provided for the powers, privileges and immunities of the Canadian Parliament to be defined by Act of Parliament from time to time, provided that they did not exceed those of the UK House of Commons at that date. The latter provision was based on the pseudo-doctrine that ‘a stream cannot rise higher than its source’, a notion that Clark was happy to abandon. That left him with the uncertainties of precisely what powers, privileges and immunities the parliament would enjoy before making such an enactment but, being unaware at this stage of the line of cases from *Kielley v. Carson* on the inherent powers of colonial legislatures, Clark was apparently untroubled. If it had worked for Canada, then it should surely be adequate for another dominion parliament.

In fact, it had not quite worked for Canada and in 1875 the British Parliament had repealed and re-enacted section 18 of the *British North America Act 1867* because of doubts that had arisen over the Canadian Parliament’s powers to legislate in this field, at the same time validating an 1868 Act of the Canadian Parliament providing for the administration of oaths to parliamentary witnesses (a power not then enjoyed by the UK Parliament and only acquired, by statute, in 1871).<sup>37</sup>

While Sir Samuel Griffith included in his first draft of the Constitution Clark’s clause 14 as drafted,<sup>38</sup> it did not survive the ‘picnic’ (as Clark referred to it in 1897) on the *Lucinda* which replaced it with

---

36 Williams, op. cit., pp. 97, 104–5. When annotating Clark’s draft, Griffith made no mark next to clause 14, but scored a heavy double line next to clause 51, indicating that this was a matter to return to.

37 38-39 Victoria, Chapter XXXXIII, reproduced in R.C. Baker, *A Manual of Reference to Authorities for the Use of the Members of the National Australasian Convention, which will assemble at Sydney on March 2, 1891 for the Purpose of Drafting a Constitution for the Dominion of Australia*, W.K. Thomas and Co, Printers, Adelaide, 1891, pp. 252–3. For background, see A. O’Brien (ed.), *House of Commons Procedure and Practice*, 2nd edn, 2009, chapter 3, under Privilege since Confederation, <http://www.parl.gc.ca/procedure-book-livre/Document.aspx?Language=E&Mode=1&sbid=ABBC077A-6DD8-4FBE-A29A-3F73554E63AA&sbid=7AB38482-E14C-4656-857B-419DAD8AEB0E#9D315269-42D1-4B57-B0DE-F737414A783D>, accessed 22 October 2013.

38 Williams, op. cit., p. 156, and see insert A2, p. 138.



a clause adopting UK House of Commons powers at the date of the adoption of the Constitution, and authorising subsequent legislative revision, provided that House of Commons powers etc. were not exceeded. The first part of the replacement clause can surely be attributed to Charles Kingston who included such a clause in his own draft Constitution, no doubt following the model of the South Australian Constitution of 1856. The second part was scrubbed out at the meeting of the Constitutional Committee on 30 March 1891.<sup>39</sup> Clause 14, as significantly modified by the drafting committee in 1891, went through to become section 49 of the final Constitution with only minor subsequent tweaking.

Clause 51 was based on the Tasmanian Constitution<sup>40</sup> to which Clark added paragraph III about publishing proposed business. While the level of prescription is unnecessary, the most egregious feature of the clause is the requirement for the standing orders of each House to be approved by the Governor-General. Clark may have justified keeping the requirement for external approval on the basis that the Federal Parliament would nonetheless be subordinate to the imperial parliament, as he had argued in the introduction to his draft Constitution, but he was confusing the issues and revealing his lack of familiarity with the subject.

Along with inquiry and disciplinary powers, the exclusive right of a House to control its internal affairs is one of the fundamental elements of parliamentary privilege. The rules and orders of a House regulate its practices, preserve its independence and may be changed to meet new or changing circumstances or requirements; the establishment of a committee system to scrutinise executive performance, for example. For such practices to be subject to external approval is a potential fetter on the exclusive jurisdiction of a House over its own affairs, a possible deterrent to innovation and change, and particularly problematic for an upper house with the function of protecting the interests of the federation partners, interests which may be at odds with those of the government of the day. The degree to which approval by the Governor-General might involve executive input was another question raised by the clause.

Fortunately, the drafting ‘picnic’ on the *Lucinda* also dealt with this potential blunder by deleting the requirement for approval by the Governor-General.<sup>41</sup> The clause was to remain in its highly prescriptive form, however, through successive Conventions and drafts, until the final reconsideration of the draft Constitution by the Drafting Committee in Melbourne in 1898, after the bill had been reported four times with amendments. Only then was it trimmed to its current form and the powers, privileges and immunities clause relocated to immediately precede it.<sup>42</sup>

## **Conclusion**

The form in which Clark included these machinery clauses in his draft Constitution shows that he had not given any great thought to such fundamental matters. Given his history and his lack of acquaintance with their importance, there is no reason that Clark should have done so. His parliamentary experience from 1887 was as a member of the executive government. While he fully accepted and worked within the traditional parliamentary framework which included the Houses exercising their inquiry powers and the government responding respectfully, he had witnessed no great clashes between government and opposition, other than those political clashes which led to changes of government on votes of confidence.

---

39     *ibid.*, pp. 120, 169, 190, 217, 266, 736. Comments by the Colonial Office on the 1897 draft show that the Office wanted to restore the ‘stream cannot rise higher than its source’ principle, but these were ignored.

40     See s. 17, *Constitution Act 1934* which re-enacts section 29 of the 1855 Constitution.

41     Williams, *op. cit.*, pp. 173–4, 194–5, 222–3.

42     *ibid.*, pp. 1010–11, 1024–6, 1079.

---

There was nothing in Clark's experience to demonstrate the need for a House of Parliament to have robust and enforceable inquiry powers and the means to take on the executive if that was the will of the House. There was nothing like a loans affair or children overboard or Australian Wheat Board scandal or, looking through another prism, a scandal over supplies and support for the troops fighting and wounded in the Crimea or over the incompetence of the Royal Navy in allowing the Dutch fleet to sail up the Medway and set the fleet alight while it wallowed at anchor. The Codlin Moth inquiry of 1879, important though it was, was in a different league. While Clark's reading and scholarship were vast, we cannot criticise him for not knowing everything about everything.

It is ironic that Clark took such care to design a Senate that would be structurally appropriate and powerful enough to protect the interests of the states and other minorities yet, in neglecting the machinery provisions, he could have bequeathed us a Senate that was quite hamstrung in practice, without the powers and independence required to fulfil its functions. His view of parliament was not a dim one; it just had some limitations. Fortunately for us all, the Australian Constitution was the product of a great team effort.