

APPENDIX 1

Clark's Publications on Constitution Bills, The Constitution, and Constitutional Law

- 1 'Our Australian Constitutions', *Quadrilateral*, no. 1, 1874, pp. 56–60 (Part 1), pp. 81–6 (Part 2), pp. 107–9 (Part 3).
- 2 Presidential Address to the American Club (Hobart) at the Annual Dinner which honoured the Centenary of the Declaration of Independence (4 July 1876), Clark Papers, University of Tasmania Archives, Hobart, C4/F33 (reproduced in J Reynolds, 'A I Clark's American Sympathies and his Influence on Australian Federation', *Australian Law Journal*, 32 [1958]: 62-63).
- 3 Australasian Federation (6 February 1891) [14 page memorandum accompanying Clark's Bill no. (4) below] in B R Wise's bound volume of documents, Federal Convention 1897 in the National Library of Australia, Canberra and in D Eastman, *The Founding Documents of the Commonwealth of Australia*, Canberra, 2000 (documents in set no. 1).
- 4 A Bill for the Federation of the Australasian Colonies ... and the Government thereof; and for Purposes connected therewith (February 1891) Clark Papers, University of Tasmania Archives, C4/E19. The Bill is reprinted in *Australian Law Journal* 32 (1958): 67–75 and in D Eastman, *The Founding Documents of the Commonwealth of Australia*, (documents in set no. 1). It is reproduced as the fifth document in S W Griffith, 'Successive Stages of the Constitution of the Commonwealth of Australia 1891' (bound collection of draft constitutions) (Griffith Papers, Dixon Library, Sydney, Ms.Q. 198, CY Reel 221), pp. 26-44. The Bill is partially reprinted in J A La Nauze, *The Making of the Australian Constitution*, Melbourne, 1972, pp. 292-94 and in S Bennett (ed.), *The Making of the Commonwealth*, Melbourne, 1971, pp. 143-5.
- 5 Report of the Committee appointed to consider Establishment of a Federal Judiciary; Its Powers and Functions (24 March 1891), in *Official Record of the Proceedings and Debates of the National Australasian Convention Held in the Parliament House, Sydney*, Sydney, 1891) clxiii–clxiv (reprinted in E M Hunt, *American Precedents in Australian Federation*, New York, 1930, pp. 260–2).
- 6 'Introduction' to R M Johnston, *Australian Federation: The Financial Data of the Problem*, Hobart, 1891.
- 7 Observations on the letter of Mr. Justice Richmond to Sir Henry Parkes, G.C.M.G., on the proposal to establish a Federal Court of Appeal for Australasia, and to abolish Appeals from Australasian Courts to the Privy Council (23 March 1891) in *Official Record of the Proceedings and Debates of the National Australasian Convention*, Sydney, 1891, pp. cxv–cxvi [reprinted in A Butterworth, *Australian Federation and the Privy Council*, London, 1900, pp. 50–1].

- 8 Proposed Amendments to the Draft of a Bill to Constitute the Commonwealth of Australia (1 September 1897) (Records of the Australasian Federal Convention 1897–1898: Commonwealth Archives Office: Accession AA 1971/506, item series 12/9, F159–F163).
- 9 ‘Introduction’ to R M Johnston, *Federal Finance: Observations on the Difficulties of the Problem*, Hobart, 1897.
- 10 Notes on the Proposal to Provide in the Constitution of the Commonwealth of Australia for the Regulation of the Use of the Waters of the River Murray and its Tributaries (1 February 1898) in *Proceedings of the Australasian Federal Convention Held at Parliament House, Melbourne*, Melbourne, 1898, pp. 285–7 (Partially quoted in *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1898, vol. 1, pp. 603–4.)
- 11 Federal Government: The Commonwealth of Australia (24 October 1900) *Daily Telegraph* (No. 1); (31 October 1900), p. 6, *Daily Telegraph* (No. 2) p. 6. On the latter see Clark Papers, C4/C205. The latter is partially reproduced in S Bennett (ed.), *The Making of the Commonwealth*, Melbourne, 1971, pp. 101–2.
- 12 The Appellate Provisions of the Constitution of the Commonwealth of Australia [Letter of 26 July 1900 ‘To the Editor of The Herald’], *Sydney Morning Herald*, 2 August 1900, p. 4. [Also published in *Daily Telegraph* (Launceston), 22 August 1900.]
- 13 ‘Introduction’ and ‘Appendix B’ to R M Johnston, *The Federal Finance Problem: Further Observations*, Hobart, 1900, pp. v–viii, 36–42.
- 14 *The Federal Finance Problem and Its Solution*, Hobart, 1900, (16 pages) Clark Papers C4/E24.
- 15 The Federal Suffrage, *The Commonwealth*, 8 April 1895.
- 16 The Federal Suffrage, *The Commonwealth*, 7 June 1895.
- 17 ‘Machinery and Ideals in Politics’, *The Commonwealth*, February 1895. (Reproduced in this volume),
- 18 ‘Natural Rights’, *Annals of the American Academy of Political and Social Sciences*, vol. 16 (Publication no. 282), 24 July 1900, pp. 212–26.
- 19 ‘The Supremacy of the Judiciary Under the Constitution of the United States and Under the Constitution of the Commonwealth of Australia’, *Harvard Law Review*, 17 (1903): 1–19. The unpublished version in the Clark Papers C4/D322 is partially reproduced in S Bennett (ed.), *The Making of the Commonwealth*, Melbourne, p 172.
- 20 *Studies in Australian Constitutional Law*, Melbourne, 1901 Reviewed J T[hayer] in *Harvard Law Review* 15 (1902): 419–21.
- 21 *D’Emden v. Pedder* (1903) 2 Tasmanian Law Reports 146; (3 November 1903) 9 Argus Law Reports 77.
- 22 *Studies in Australian Constitutional Law*, Melbourne, 2nd edn, 1905 (reprinted Sydney, 1997). Reviewed in *Commonwealth Law Review* 3 (Sept–Oct 1905): 43–4; E W[ambaugh] *Harvard Law Review* 19 (1906): 319; *Columbia Law Review* 6 (1906): 370–1.

- 23 'The Location of the Federal Capital in the United States', *Commonwealth Law Review* 3 (Jan–Feb 1906): 115–23.
- 24 'The Supreme Court of the United States During the First Half Century of its Existence', *Commonwealth Law Review* 1 (Oct 1903): 3–12 (Part 1); *Commonwealth Law Review* 1 (Dec 1903): 69–78 (Part 2).
- 25 'The Inapplicability of Decisions under the British North America Act to Cases Arising Under the Constitution of the Commonwealth', *Commonwealth Law Review* 1 (June 1904): 193–202.
- 26 'Federal Jurisdiction of State Courts', *Commonwealth Law Review* 7 (Nov–Dec 1908): 49–61.
- 27 'The Preamble to the Constitution of the Commonwealth of Australia' (undated 12 page manuscript in Clark's handwriting) Clark Papers, University of Tasmania Archives, Hobart, C4/H13 (reproduced in R Ely, 'Andrew Inglis Clark on the Preamble of the Australian Constitution', *Australian Law Journal* 75 (2001): 36, 37-9). R Ely suggests it was written in 1901.
- 28 'Why I am a Democrat', Clark Papers, University of Tasmania Archives, Hobart C4/D38. Reproduced in M Haward & J Warden (eds), *Australian Democrat: The Life, Work and Consequences of Andrew Inglis Clark*, Hobart, 1995, pp. 200-07. [This essay is also reproduced in R Ely [with M Haward and J Warden] (eds), *A Vital Force: Andrew Inglis Clark and the Ideal of Commonwealth*. [In the 1995 volume R Ely, 'Clark's Essays: An Introduction' at p. 199 suggested that this essay was written 'circa 1887'. However, Ely now considers it likely that Clark wrote this essay in the middle third of the 1890s or even a little later.]
- 29 'The Commonwealth v. Cromwell', Clark Papers, University of Tasmania Archives, Hobart, C4/F25. There are two manuscript versions of this paper in the Clark Papers at C4/F25-6. The first may have been a contribution to a debate on 12 October 1874, at the St John's Debating Society, on the question: 'Do the career and character of Oliver Cromwell deserve the gratitude and admiration of the English nation?' (See Carrel Clark, 'Draft Life of A I Clark' [unpaginated] in the Crowther Library, State Library of Tasmania. Reference Q920/CLA.) Clark took the negative side in that debate, and lost. The second version of the essay has some textual variations, and lists reference books. Clark also appended his signature ('A Inglis Clark'), which makes this second version unique among his manuscript essays. The second version is reproduced in M Bennett, 'Clark's "Commonwealth versus Cromwell": Clark, Cromwell, and the English Republic' in R Ely [with M Haward and J Warden] (eds) *A Vital Force: Andrew Inglis Clark and the Ideal of Commonwealth*.
- 30 'The Future of the Australian Commonwealth: A Province or a Nation?' (undated manuscript in Clark's handwriting). Clark papers, University of Tasmania Archives, C4/F4(a) Ely, 'Andrew Inglis Clark and Church-State Separation', *Journal of Religious History*, vol. 8, 1975, 271, p. 273 note 8 suggests it was written early in the twentieth century. It is reproduced in M Haward & J Warden (eds), *Australian Democrat: The Life, Work and*

Consequences of Andrew Inglis Clark, Hobart, 1995, pp. 208-21, and also in R Ely [with M Haward and J Warden] (eds), *A Vital Force: Andrew Inglis Clark and the Ideal of Commonwealth*.

- 31 'Reasons why the High Court of Australia should consist of not less than five Judges', Deakin Papers, National Library of Australia, Canberra, Ms no. 1540/14/627. Referred to on p. vi of J Williams' 'Introduction' to the 1997 Reprint of Clark's 1901 *Studies in Australian Constitutional Law*. Clark's 'Reasons' are also reproduced in R Ely [with M Haward and J Warden] (eds), *A Vital Force: Andrew Inglis Clark and the Ideal of Commonwealth*.

Unpublished

- 1 'The Constitution of the United States of America' (undated 82 page manuscript in Clark's handwriting: being part of Clark's lectures on the evolution of federalism), Clark Papers, University of Tasmania Library, C4/F1.
- 2 'Observations on the subject of Naturalization under the Constitution of the Commonwealth', Deakin Papers, National Library of Australia, Canberra Ms no. 1540/14/617. xxxiv-v. Referred to and partly quoted on pp. xxxiv-v of J Williams' 'Introduction' to the 1997 Reprint of Clark's 1901 *Studies in Australian Constitutional Law*.
- 3 'The Evils of Monarchy', Clark Papers, University of Tasmania Library Archives, Hobart, C4/F4b. Referred to and partly quoted on pp. x-xi of J Williams, 'Introduction' to the 1997 reprint of Clark's *Studies in Australian Constitutional Law*, and partially reproduced in S Bennett (ed.), *The Making of the Commonwealth*, Melbourne, p. 139.
- 4 Drafts and copies of various legal studies and essays. Clark Papers, University of Tasmania Archives, Hobart, C4/D19-D48.

Other Legal Publications

- 1 'Short Studies in the Common Law':
Commonwealth Law Review 2 (May-June 1905): 193-204 (crime);
Commonwealth Law Review 2 (July-August 1905): 250-62 (torts);
Commonwealth Law Review 4 (July-August 1907): 245-54 (possession);
Commonwealth Law Review 7 (September-October 1907): 12-17 (possession).
- 2 'Penalties for Failure to Perform Within a Limited Time Under a Substituted Contract', *Law Quarterly Review* 62 (April 1900): 117-28.
- 3 'Our Electoral Districts', *Quadrilateral*, no. 1, 1874, pp. 75-7.
- 4 'Manhood Suffrage', *Quadrilateral*, no. 1, 1874, pp. 199-103.
- 5 'Hare's System of Representation', *Quadrilateral*, no. 1, 1874, pp. 249-51.
- 6 'A Study in the Law of Torts', *Harvard LR* 20 (1906): 46-55.

Clark's Participation in Debates on the Draft Constitution

- 1 *Official Record of the Proceedings and Debates of the Australasian Federation Conference Held in the Parliament House Melbourne, Melbourne, 1890 (1990 Centenary Edition: Debates of the Australasian Federation Conference 1890 [Sydney, 1990]).*
- 2 *Official Report of the National Australasian Convention Debates, Sydney, 2 March to 9 April, 1891, Sydney, 1891.*
- 3 Speech in Hobart Town Hall, 'Australasian Federation', *Mercury*, 16 June 1891.
- 4 Debate in Tasmanian House of Assembly on the Commonwealth Submission Bill, *Mercury*, 22 July 1891, 26 August–16 September 1891.
- 5 Debate in Tasmanian House of Assembly on the Constitution Bill approved by the 1897 Adelaide session of the Australasian convention, *Mercury*, July–August 1897.
- 6 Debates in Tasmanian House of Assembly on the Constitution Bill approved by the 1898 session of the Melbourne session of the Australasian convention and the proposed referendum, *Mercury*, 6 May 1898, p. 6 (partially reproduced in S Bennett (ed.), *Federation*, Melbourne, 1975, pp. 62-3).

APPENDIX 2

Clark's Letters

1 *Clark — Henry Parkes*

Letter 12 February 1891 in Parkes Correspondence, Mitchell Library, Sydney, vol 9, CY Reel 31, A897, pp. 461–2 (enclosing Clark's Constitution Bill and Memorandum).

2 *Clark — Edmund Barton*

Letter 19 June 1889 in Sir Edmund Barton Papers, National Library of Australia, Canberra, Ms 51/1/147 (partially reproduced in J Williams, 'Andrew Inglis Clark: "The Republican of Tasmania"', in D Headon & J Williams (eds), *Makers of Miracles: The Cast of the Federation Story*, Melbourne, 2000, pp. 44, 54) (noting that Henry Parkes had not advanced the cause of federation but that, when Parkes was no longer NSW Premier, Barton would 'then be in a position to effectively assist the cause of Australasian federation') (More fully reproduced in S Bennett (ed.), *The Making of the Commonwealth*, Melbourne, 1971, pp. 67–8) (describing various cases which 'illustrat[ed] the necessity of some Federal Legislative authority').

Letter 12 February 1891 in Miscellaneous Barton Papers, Mitchell Library, Sydney, Q 342.901BB (enclosing Clark's Constitution Bill and memorandum).

Telegram February 1898 mentioned in J La Nauze, *The Making of the Australian Constitution*, Melbourne, 1972, p. 234 (referring to *Marbury v Madison* (1803) 5 U.S. 137).

3 *Clark — Bernhard Wise*

Letter 28 February 1898 in Wise Papers, National Library of Australia, Canberra, MS no. 708 (defending, against attacks made in the Melbourne session of the 1897-98 Constitutional Convention, Clark's proposed clause 110) (letter reproduced in J Williams, 'Race, Citizenship and the Formation of the Australian Constitution: Andrew Inglis Clark and the '14th Amendment'', *AJPH*, vol. 42, 1996, pp. 10,16).

Letter 13 February 1898 in National Library of Australia, Canberra, MS no. 1708 (discussing US Constitution's Fourteenth Amendment and why a similar clause should be in the Constitution Bill 1897) (partially reproduced in J Williams, 'Race, Citizenship and the Formation of the Australian Constitution', p. 15.)

4 *Clark — Samuel Griffith*

Letter 3 March 1891 in Griffith Papers, Dixson Library, Sydney, MSQ 187 pp. 824–827 (enclosing Clark's seven resolutions pp. 816–18) (reproduced in Appendix 3).

Letter 9 January 1900 *ibid.* at MSQ 190 pp. 199–202 (appointment of High Court Justices).

Letter 4 November 1904 *ibid.* at MSQ 191 pp. 167–70 (High Court's refusal to grant leave to appeal to the Privy Council in *D'Emden v Pedder* (1904) 1 CLR 91) (reproduced in J Williams, 'The Great Constitutional Swindle', *Constitutional Law and Policy Review*, vol. 3, no. 1, 2000), pp. 18,19; and in J Williams, 'Andrew Inglis Clark' "The Republican of Tasmania"', in D Headon & J Williams (eds), *Makers of Miracles: The Cast of the Federation Story*, Melbourne, 2000, pp. 44, 50-1).

Letter 11 January 1907 *ibid.* at MSQ 191 pp. 289–92 (discussing *Webb v Outrim* [1907] AC 81).

Letter 3 June 1907 *ibid.* at MSQ 191 pp. 309–17 (discussing *Deakin v Webb* (1904) 1 CLR 585 and *McCulloch v Maryland* (1819) 17 US 316 and enclosing a seven page memorandum: 'Some reasons why the High Court of Australia ought to adhere to its decision in the case of *Deakin v Webb*', pp. 319–21).

5 *Clark — Alfred Deakin*

Letter 22 January 1901 in Deakin Papers, National Library of Australia, Canberra, MS 1540/14/568 (discussing executive power).

Letter 3 June 1901 *ibid.* at 1540/14/600 (discussing State debts and enclosing observations on the 'financial problem') (reproduced in J Williams, 'The Great Constitutional Swindle', *Constitutional Law and Policy Review*, vol. 3, no. 1, May 2000, pp. 18,19.)

Letter 20 October 1901 *ibid.* at 1540/14/611 (discussing tariffs and free trade).

Letter 18 February 1902 *ibid.* at 1540/14/615 (discussing sections 108, 117 and 118 of the Constitution and enclosing 'Observations on subject of Naturalization under the Constitution of the Commonwealth').

Letter 27 February 1902 *ibid.* at 1540/14/622 (discussing effect of sections 108, 117 and 118 and enclosure).

Letter 24 March 1902 *ibid.* at 1540/14/626 (discussing appointment of High Court Justices and enclosing 'Reasons why the High Court of the

Commonwealth should consist of not less than five Judges'. Reproduced in R Ely [with M Haward and J Warden] (eds), *A Vital Force: Andrew Inglis Clark and the Ideal of Commonwealth*.

Letter 27 March 1902 *ibid.* at 1540/14/109 (discussing High Court appointments and State debts).

Letter 4 March 1903 *ibid.* at 1540/1/850 (suggests Patrick Glynn's proposal to have a High Court constituted by State Supreme Court Chief Justices is unconstitutional and discusses Wollaston's case (1902) 28 VLR 357) (reproduced in J Williams, 'Andrew Inglis Clark: "The Republican of Tasmania"', in D Headon & J Williams (eds), *Makers of Miracles: The Cast of the Federation Story*, Melbourne, 2000, pp. 44,50).

Letter 1 May 1903 *ibid.* at 1540/14/633 (advising Deakin of *Carter County v Sinton* (1887) 120 U.S. 517).

Letter 23 March 1903 *ibid.* at 1540/14/1031 (discussing and enclosing proposed amendments to the Judiciary Bill 1903 (Cth)) (enclosure is missing).

Letter 27 August 1903 *ibid.* at 1540/10/638 (indicates Clark would 'be very pleased to accept' a High Court appointment and hopes the Justices will follow Chief Justice Marshall's interpretation of the US Constitution, not the Privy Council's decisions on the Canadian Constitution).

Letter 28 September 1903 *ibid.* at 1540/1/910 (sending copy of his judgment in *D'Emden v Pedder* (1903) 2 Tasmanian LR 146 and indicating a 'hope' for a future High Court appointment).

Letter 22 April 1904 *ibid.* at 1540/15/353 (discussing Deakin's intended resignation as Prime Minister).

Letter 6 July 1905 *ibid.* at 1540/15/390 (congratulations on Deakin's reappointment as Prime Minister).

Letter 28 August 1905 *ibid.* at 1540/15/443 (discusses copyright and monopolies).

Letter 2 August 1906 *ibid.* at 1540/1/1487 (returns to the Tasmanian Supreme Court after six months illness).

6 *Clark—Harrison Moore*

Letter 3 October 1906 in William Harrison Moore Papers, University of Melbourne Archives, Group 1/4/4/1 (noted in J Williams, 'Introduction to the 1997 Reprint', in A I Clark, *Studies in Australian Constitutional Law*,

Melbourne, 1901, [Reprint, Sydney, 1997], p. vii n. 16) (discussing Clark's view that the law is not a metaphysical entity but an expression of the people's will as enacted by their Parliament and, therefore, that the High Court's decision in *Enever v King* (1906) 3 CLR 969, that the Crown Redress Act 1891 (Tas) did not include actions against the Tasmanian Government for wrongful arrest by a police constable, was wrong, and that the High Court should have adopted Clark's dissenting opinion in *Enever v King* (1905) 1 Tas. L.R 70).

Letter 22 October 1906 *ibid.* at Group 1/4/4/1 (noted in J Williams, 'Introduction to the 1997 Reprint', in A I Clark, *Studies in Australian Constitutional Law*, Melbourne, 1901 [Reprint, Sydney, 1997], p. vii n. 16) (discussing the Crown's liability for torts committed by its servants and agents. Clark indicated that he would 'make the Crown liable for the tort committed by any officer who was acting for the State, [that is, for] the community collectively' and, again, criticised 'the metaphysical infection which taint[ed] the courts' approach to the Crown).

7 Clark – Edward Ivey

Letter 31 March 1891 in Clark Papers, University of Tasmania Archives, C4/C218 (partially reproduced in J Williams, 'Andrew Inglis Clark: "The Republican of Tasmania"', in D Headon & J Williams (eds), *Makers of Miracles: The Cast of the Federation Story*, Melbourne, 2000, pp. 44, 52 (indicating that Clark remained committed to 'the true democratic and republican ideal' despite the fact that he 'might differ' from others, including his friends, as to 'the best methods of realising' that ideal).

8 Clark – Thomas Bavin

Letter 12 February 1901 in Thomas Bavin Papers, National Library of Australia, Canberra, MS 560: Series 3: General Correspondence: item 4 (indicating Clark was 'working under pressure to finish a book on Australian Constitutional Law' which would 'not be in any sense a competitor for public favour with Quick and Garran's monument of industry' but rather 'a series of studies on separate subjects, some of which have not any connection with federalism').

Letter 21 July 1904 *ibid.* at items 7-9 of General Correspondence (indicating Clark had written to Bernhard Wise 'urging him to bring a bill into the parliament of N.S. Wales to provide for the admission of the practitioners of the courts of other States' and suggesting that 'legislatures of the separate States of the Commonwealth [were] in the same position as the legislatures of the separate States of the American Union in regard to extra-territorial powers' and warning Bavin 'not [to] be led away by the myth of an original, separate and absolute sovereignty in each of the original thirteen States of the American Union prior to the adoption of the Constitution of 178[7]'. The result, for Clark, was that '[t]he legislatures of the separate States of the American Union have therefore, like the

legislatures of the separate States of the Commonwealth, derived their powers from one and the same sovereign power' and, therefore, 'the American cases are applicable').

Letter 27 October 1904 *ibid.* at items 11-12 (suggesting that '[l]arge parts of the [2nd edition of Clark's] book [would] be substantially rewritten and there [would] be one entirely new chapter' which Clark wanted Bavin to review 'for the Sydney Morning Herald or Daily Telegraph').

Letter 17 November 1904 *ibid.* at item 15 (indicating that Clark was correcting 'proofs' of his book and would make the 'new index ... much fuller than the old one').

Letter 3 December 1904 *ibid.* at item 18 (indicating that Clark was still pressing the NSW Attorney-General to introduce legislation enabling 'reciprocity of admission to the bars of the several States').

Letter 21 December 1904 *ibid.* at items 19-20 (indicating that Wise had written to Clark and that NSW no longer favoured 'a 'more open door' for the admission of legal practitioners of other States to the bar of N.S.W.' and Clark's view that '[d]amnably provincialism has been doing all it could up to the present time to mar federation in both the Federal and Local Legislatures, but it will be ultimately defeated and [Clark would] be sorry to find the mother State more tainted with it than any of the other States in this particular matter').

Letter 6 January 1905 *ibid.* at items 26-7 (continuing to advocate reciprocal admissions, Clark indicated that his 'only wish [was] to secure to the members of the legal profession in all the States the privileges which ought to accompany a truly national federation, and which are enjoyed by the members of the legal profession throughout Canada and the United States').

Letter 3 February 1905 *ibid.* at item 28 (indicating 'that the point of federal constitutional law to which [Bavin referred was] dealt with incidentally in the [United States Supreme Court] case of *Osborn v Bank of the United States*' (1824) 22 U.S. (9 Wheaton) 738).

Letter 21 July 1905 *ibid.* at items 33-4 (discussing 'new feature[s] of Clark's second edition including criticism of Chief Justice Griffith's observations ... on the use of the word 'prerogative'' in section 75(v) of the Commonwealth Constitution).

Letter 1 September 1905 *ibid.* at item 36 (acknowledging receipt of Bavin's review in 'the Daily Telegraph' of Clark's book and Clark's indication that there might be 'an enlarged edition').

Letter 26 July 1906 *ibid.* at items 44-8 (referring to Clark's article 'in the Daily Telegraph' and lamenting the prospect that appointments of the proposed two additional High Court Justices would 'become the subject of political bargaining between the several parties and sections represented in the federal parliament' and indicating that Clark had 'become disillusioned about the higher and more patriotic level of political life and conduct which [he] expected to see under a federation'. Indeed, Clark 'deplore[d] the prospect of making the seats on the Bench of the High Court the rewards of political services and the objects of a political scramble in the future. Two Ministers were provided for when the first batch of Judges were appointed, and if two more Ministers, or a Minister and another member of the Federal Parliament, are provided for now, it will set an example for all future Ministers to follow.' Clark compared this Australian situation unfavourably with appointments to the United States Supreme Court which 'always contains three or four members who have been promoted from the Supreme Courts of the States by virtue of their judicial record and without any reference to political connections.' Clark named 'Justices Brewer, Peckham and Holmes' as examples).

Letter 7 September 1906 *ibid.* at item 49 (enclosing 'a letter from Dr Hale of Boston' and indicating that Clark wanted 'very much to be able to gratify Dr Hale's wish' for information).

Letter 10 January 1907 *ibid.* at items 56-8 (indicating that Clark was sending 'to [Bavin] under separate cover a copy of the *Harvard Law Review* for last December [1906 which contained] an article by [Clark] on a case (or rather six cases) which I tried in Launceston in the year 1905') (A I Clark, 'A Study in the Law of Torts', *Harvard LR* 20 (1906): 46-55).

Letter 6 May 1907 *ibid.* at items 63-8 (indicating that Clark had sent Bavin, who was 'retained for the Commonwealth in the income tax cases' [*Baxter v. Commissioner of Taxation* (NSW) (1907) 4 CLR 1087], a telegram in the afternoon of 6 May 1907 'suggesting an argument for the High Court's right to adhere to its own decision' and referring to the U.S. Supreme Court's overturning of its 'own decisions' as exemplified by 'the *Legal Tender case*' [*Knox v. Lee* (1871) 79 US (12 Wallace) 457 (overruling *Hepburn v. Griswold* (1870) 75 U.S. (8 Wallace) 603)]. Clark could not 'refrain from saying that [he had] always thought that the judgment of the High Court in *D'Emden v. Pedder* [(1904) 1 CLR 91] was a much weaker production than my dissentient judgment in the same case in our Court [*Pedder v. D'Emden* (1903) 2 Tas. LR 146, 147-59]. Clark indicated that he 'was much disappointed with it [the High Court's judgment], and [that] the future [had] proved that the line of argument it followed played right into the hands of the enemy. [He meant] the argument founded on the knowledge of the provisions of the Constitution of the United States possessed by the members of the Convention that framed the Constitution of the Commonwealth. [Clark thought] that Lord Halsbury's criticism of that line of argument [was] well founded.' Clark proceeded to discuss constitutional

implications of the imposition of a State income tax upon a Commonwealth officer's salary and criticised the High Court's reasoning in *Deakin v Webb* (1904) 1 CLR 585 and *Lyne v Webb* (1904) 1 CLR 585. Finally, Clark indicated that he had 'sent to the type writer an article for the *Law Quarterly Review*' and thanked Bavin 'for drawing [his] attention to the slip that [Clark had] made on page 352 of the second edition of [Clark's] book'.

9 *Clark — Oliver Wendell Holmes*

Letter 4 October 1890 in Clark Papers, University of Tasmania Library, C. 211 and in The Papers of Oliver Wendell Holmes, Jr, Harvard Law School Library, Box 39 Folder 19 and American Legal Manuscripts, The Oliver Wendell Holmes, Jr Papers (University Publications of America, 1985) (Microfilm Project, reel 29, serial numbers 0576–0621) (referring to O W Holmes, *The Common Law*, Boston, 1881).

Letter 20 January 1892 *ibid.* (acknowledging receipt of O W Holmes' *Speeches*, Boston, 1891, and Holmes, 'Agency', *Harvard LR* 4 (1891): 345 (Part I); *Harvard Law Review* 4 (1891): 1 (Part II)).

Letter 3 November 1899 *ibid.* (congratulations on Holmes' appointment as 'Chief Justice of Massachusetts').

Letter 26 October 1901 *ibid.* (sending Holmes a copy of A I Clark, *Studies in Australian Constitutional Law*, Melbourne, 1901) Partly reproduced in J Williams, 'Andrew Inglis Clark: "The Republican of Tasmania"', in D Headon & J Williams (eds), *Makers of Miracles: The Cast of the Federation Story*, Melbourne, 2000, pp. 44, 53.

Letter 4 October 1902 *ibid.* (congratulations on Holmes' appointment to the United States Supreme Court) Partly reproduced in J Williams, 'Andrew Inglis Clark: "The Republican of Tasmania"', in D Headon & J Williams (eds), *Makers of Miracles: The Cast of the Federation Story*, Melbourne, 2000, pp. 44,54.

Letter 7 September 1905 *ibid.* (sending Holmes a copy of A I Clark, *Studies in Australian Constitutional Law*, Melbourne, 2nd edn, 1905, and expressing 'pleasure' in Holmes' opinion in *Lochner v New York* (1905) 198 US 45).

APPENDIX 3

Letter from Clark to Griffith, with Enclosures, re Parkes resolution to federal convention 1891

(Griffith Papers, Dixson Library, Sydney MSQ 187 pp 824–7)

Grosvenor Hotel
Sydney

3 March, 1891

My dear Griffith,

I came away from the meeting in Parkes' office yesterday afternoon convinced that if two or three of us did not draw up a set of resolutions in a form satisfactory to ourselves we should ultimately be committed to whatever Parkes put upon paper and I think that you agree with me that he has very misty emotions about the whole business of federation. I therefore attempted yesterday afternoon to draw up some resolutions in a form which I thought would define properly the ground on which the federal constitution must be built. I could not recall the exact language of any of your resolutions and therefore you must not regard the variation from the wording of them which you will see in those which I here enclose as intended amendments, but simply attempts to express from memory the same proposals that are embodied in yours.

I have proceeded on the assumption that the five necessary subjects to be included in the resolutions are -

1. Federal Executive
2. Federal Legislature
3. Federal Taxation
4. Federal Defence
5. Federal Judiciary

If we travel beyond these five points we shall have no rule to determine what additional subjects shall be included or excluded.

I have drafted No. 3 to meet the objection raised by Gillies that the principle assertion of inter-colonial freetrade without any reference to a federal tariff would create misconceptions and dissatisfaction in some quarters.

The resolution referring to the Federal Judiciary is longer than the one proposed by Parkes because I think it necessary that we should go beyond the point of creating a court of appeal and should affirm the necessity of a complete

Federal Judiciary to administer federal law independently of the local courts of the Several Colonies.

I intend to send a copy of the resolutions to Gillies and a copy to Kingston and I shall be pleased to discuss them with you and Kingston at the first favourable opportunity.

I am
very sincerely yours,

A Inglis Clark

Enclosures

[MSQ 187 pp 816–18 (no. 817) 2 pages — hand-written by Clark]

- 1 All the powers now possessed by the respective Parliaments of the colonies shall continue to be possessed and to be exercisable by such Parliaments after the Federation excepting only such of the powers aforesaid as the Federal Parliament shall require to possess for the purpose of performing the functions specifically delegated to it.
- 2 After the establishment of the Federation, all Trade and Commercial intercourse between the Several Colonies whether by transit or land or by Coastal Navigation shall be free and exempt from all Customs Duties whatever.
- 3 The Customs and Excise duties now levied and collected in the Several Colonies respectively shall continue to be levied and collected after the Federation in the same manner and to the same extent as such duties are now levied and collected until the Federal Parliament shall cause uniform Customs and Excise duties to be levied and collected in all the Colonies of the Federation.
- 4 The Executive Power of the Federation shall be vested in a Governor-General and an Executive Council the members of which may be members of either House of the Federal Parliament.
- 5 The Federal Parliament shall consist of a Senate composed of an equal number of Representatives from each Colony, one third of whom shall retire every third year, and a House of Representatives composed of members elected in each colony in numbers proportionate to population.
- 6 The Military and Naval Defence Forces of Federation shall be raised and maintained and controlled by the Federal Parliament.

- 7 The Judicial power of the Federation shall be vested in one Supreme Court and such inferior courts as the Federal Parliament shall from time to time establish, and the Federal Supreme Court shall have jurisdiction to hear and determine appeals from all final judgments decrees and orders of the highest Court of resort in each of the Colonies, and the Judgment of the Federal Supreme Court shall in all Cases be final and conclusive.