

PROCLAIMING A CONSTITUTION

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At 5 p.m. on Saturday 18 October 1890 Sir William Robinson stepped ashore from the RMS *Orient* at the Land Company's jetty at Albany. From there he was conveyed by special train to the town to make the first speech of his third term as Governor of Western Australia.¹

Sir William Cleaver Francis Robinson GCMG had been Governor of the Falkland Islands and King Edward Island (part of the Dominion of Canada) before his first appointment to the vice regal post in Western Australia in 1874.² This made him the second Governor after Francis Weld to preside over the colony since the expansion of the Legislative Council in 1870 to include two-third elected members. Three years later he moved on to be Governor of the Straits Settlement in which post he was succeeded by Weld in 1880 who had been in Tasmania in the interim. Robinson, for his part, then returned to the West for a second term and in 1883 moved on to South Australia and in 1889 to Victoria before being appointed for a third term in Western Australia succeeding Sir Frederick Broome. The latter, after a controversial six year tenure in the vice regal post, went to the United Kingdom in 1889 as one of a delegation accompanying the proposed Western Australian Constitution Bill, leaving the Colonial Secretary Sir Malcolm Fraser to administer the colony until Robinson's arrival at Albany in October 1890.³

I have not had the opportunity to survey all the records but one wonders whether Robinson's record in serving as Governor in three different Australian States, and for three terms in one of them, is unique in Australian constitutional history. Certainly this was to be his last such appointment: he retired in March 1895 and died two years later in his 63rd year.

Two months before Robinson reached the colony the Western Australian colonists had received word that Queen Victoria had granted the Royal Assent to the colony's draft constitution and it was Sir William's task to convey the constitution to the colony for proclamation and implementation. The fact that the existing Western Australian constitution (as was also the case with the Constitution of Tasmania) was

derived in part from imperial enactment does serve to underpin the series of events and the enthusiasm with which Robinson's arrival and subsequent activities was to be received by the colonists.

Western Australia can be said to have its constitutional origin in an Imperial Act of 1829 that provided for 'the government of Her Majesty's settlement of Western Australia on the west coast of New Holland'.⁴ The subsequent establishment in the early 1830s of a Legislative Council and Executive Council (initially consisting of exactly the same members) took place by means of both an Order-in-Council on the one hand and instructions to the Governor on the other, and this remained the situation for more than three decades. The problem was that Western Australia, because of its relatively small population (less than 6000 after over twenty years of settlement) and its decision to accept convicts, did not share in the benefits conferred on the other colonies by the Australian Constitutions Act of 1850 in terms of the right to proceed with drawing up their own constitutions.

Under Section 9 of the 1850 imperial act Western Australia could not exercise the right to establish a Legislative Council consisting of members of whom two thirds might be elected until after the colony ceased to rely on imperial financial grants, and then only upon the presentation of a petition from not less than one-third of the householders of the colony. Such a petition was presented in 1865 and was rejected at the time. However, a quick-moving series of steps followed culminating in the establishment in 1870 of representative government in the form of a Legislative Council of eighteen members, twelve of whom were to be elected. In turn it was not until 1889 that the partly elected Legislative Council, drawing on powers granted under Section 32 of the 1850 Imperial Act, passed a constitution bill which was reserved for royal assent.

The passage of this bill, first through the Legislative Council in the colony and then through the Imperial Parliament, makes for a very interesting story. The first draft was prepared by Governor Broome with the assistance of his executive⁵, resisting along the way pressure from the UK Secretary of State for a single chamber Parliament. After further negotiations with the UK Government, for example, on whether to have a nominated or elected upper house, the bill was placed before Parliament following which an election was held in January 1889: this produced a decisive vote for responsible government. After controversy over whether land north

of the 26th parallel should be under colonial control, the bill went to London as it had been reserved for the Royal Assent.

At this stage, an important additional hurdle had to be surmounted arising from the fact that the 1889 Constitution Bill included provisions relating to control of waste lands which went beyond the powers legally available to the colony under the terms of the 1850 Act.⁶ As a consequence, it was first necessary for the Imperial Parliament to pass enabling legislation before the Queen could assent to the Constitution Bill itself. While the enabling Bill passed quickly through the House of Lords it was held up for many months in the House of Commons and the colonial representatives, including Governor Broome, had to undertake a tortuous series of negotiations including overcoming a continued effort by the Colonial Office to subdivide the colony allowing control of the waste lands only for the area south of the 26th parallel. It was not until July 1890 that all the parliamentary obstacles were overcome and the reserved constitution bill was included in a schedule to the imperial statute with the colony given full power to alter its provisions subsequently. Interestingly, news of the completion of the parliamentary process evoked little enthusiasm in the colony: rather preparations were already under way for the actual proclamation and implementation of the document that had finally cleared the way for the colony to 'govern herself at her own pleasure'.⁷

In the time available to me I would like to deal with three issues. Firstly, I intend to describe briefly the process of proclamation and the manner in which it was received by the colonists. Secondly, I would like to outline what I see as the major achievements and limitations of the constitution that was proclaimed on 21 October 1890. And, finally, I wish to make a brief attempt to account for the public enthusiasm displayed on and around the first Proclamation Day.

First there is the sequence of events dating from late afternoon on Saturday 18 October 1890 when Robinson stepped ashore at Albany. At 9.30 that evening he addressed a large welcome meeting in the Albany Town Hall during which time he told his audience 'At last she moves...with one hand and one voice the colonists should use their best energies to launch the ship of State in deep waters'.⁸ Robinson cannot claim any credit for his turn of phrase for it was Weld who had first suggested 'At last she moves' when representative government was inaugurated in 1870 and Broome used the same expression in the 1880s when turning the first sod of the railway line from Perth to Albany.⁹

At 7p.m. on the Sunday evening Robinson boarded the Great Southern Railway train to travel first to Beverley and then by government train via York to Perth. There were bonfires alongside the track every one and half miles all the way to Beverley and at eight separate stopping places there was a substantial welcoming crowd, the presentation of an address to the Governor and a speech from Sir William in reply. Breakfast was taken in York and the train reached Perth at noon on Monday 20th. Not surprisingly, after being officially sworn in at the Perth Town Hall and presented with yet another address the Governor suggested he did not have 'very much fresh to say'. Even then, and despite his sleepless night on the train, he attended a performance of Gilbert and Sullivan's 'The Sorcerer' that evening.

Proclamation Day itself fell on the Tuesday, the first of two consecutive gazetted holidays for the event. The ceremonies, decorations around the city (despite the inclement weather the town was described by historian Tom Stannage as 'gay and colourful'), the various festivities and the like have all been described at length in *The House on the Hill* and in Tom Stannage's *The People of Perth*.¹⁰ It is estimated that as many as 6,000 people 'something like one-eighth of the total population of the colony' crowded on to reclaimed ground near the jetties at William and Barrack Streets to hear the Proclamation itself read by Sir Henry Wrensfordsley, the Acting Chief Justice of the colony. While the senior dignitaries dined at the Perth Yacht Club there was a huge picnic for 2,500 schoolchildren, and processions and two balls were features of the evening. On both the Tuesday and the Wednesday, ceremonies were held in various centres throughout the colony with the most imaginative perhaps being that at Geraldton where there was a ritual burial of 'the old Constitution',

What then was the significance, both immediate and in the decade that followed, of the constitution that was proclaimed? Essentially the purpose of the document read out by Wrensfordsley, after all its various 'whereases', was firstly to proclaim Her Majesty's assent to the Imperial Bill and thereby to the Constitution Bill passed by the Legislative Council of Western Australia in 1889, and, secondly, as a consequence, to declare that the Constitution (other than Section 42 which referred to the future composition of the Legislative Council) would take effect as from 21 October 1890. And indeed action followed immediately for on 22 October writs were issued for the election of thirty members to constitute the first Legislative Assembly, these elections to take place variously between 27 November and 12 December

inclusive. Once the outcome was known the Governor proceeded to commission the first members of the new political executive and John Forrest and his four ministers were sworn in on 29 December and the First Parliament under the new Constitution assembled for swearing in and their first meeting on 30 December.

Let me now attempt to summarise the nature of the Constitution and the changes which resulted from the 21 October Proclamation.

First, and perhaps foremost, Western Australia achieved what can best be described as internal self government with the transfer of authority from the British-appointed Governor to colonial elected representatives. Under Section 1 of the new Constitution the Parliament including Her Majesty (or her Representative) had the power to make laws for the 'peace, order and good government of Western Australia and its Dependencies'. Leaving aside the question of Aboriginal welfare and the issue of Section 70 which will be discussed later this afternoon and also the issues pertaining to international relations with the coming of federation and the evolution of dominion status culminating in Australia's ratification of the Statute of Westminster and the complementary legislation in the form of the Australia Acts, in 1890 Western Australians gained the right to control their own affairs. These powers included autonomy concerning such major issues as the control and the right to revenue derived from the waste lands; tariff policy (though importantly under Section 59 not so as to differentiate between goods coming from all other countries and places); and the right to borrow money on the overseas (London) money market. In this respect of course Western Australians were only to enjoy their new found autonomy for eleven years before the coming into force of the Constitution of the Commonwealth of Australia which placed substantial constitutional (and subsequent political) limits on Western Australia's financial and legislative autonomy.

Secondly, in the Westminster tradition, and following the example of the other five colonies, there was to be a bicameral legislature including Western Australia's first ever fully elected House of Parliament, the Legislative Assembly with initially thirty members. Members of the Legislative Council were temporarily to be nominated by the Governor in Council but within six years, or when the population (exclusive of Aboriginal natives) reached 60,000 whichever occurred first, the Council would then become an elective house with at the first election fifteen members representing five separate Divisions—Metropolitan, North, Central (Gascoyne and Geraldton), East and South (meaning South West and Great

Southern). This would then bring Western Australia into line with all the other colonies except NSW and Queensland where the upper House still remained as a nominated chamber.

One should note in passing that the original constitution provided for four year Parliaments, a provision that was amended in the 1899 Constitution Acts Amendment Acts to provide for triennial Parliaments. These in turn survived until legislation passed in time for the 1989 election returned the Assembly to four years while reducing Council terms from six years to four and with the whole Upper House membership facing the electors at the one time. Interestingly, the Council members had six years terms from 1894, and with one-third of the members required to face the electors before 22 May every second year it was not until 1965 that the elections for the two houses were effectively brought into alignment with provision for half of the Council members to retire every three years.

Thirdly, and this was regarded as especially significant, the system of responsible government would come into operation. Thus, for example, Lumb in discussing the New South Wales Constitution Act of 1855 observed that 'the most important feature of the act was that it ushered in an era of responsible government which was implicit in those provisions of the act relating to the retirement of officers on political grounds'. This had the effect that 'when a change in attitude of the legislature towards the government occurred (as, for example, after an election) the members of the government who did not have the confidence of the majority of members of the [lower house of] the legislature were to resign and make way for ministers who did have this confidence'.¹¹ Similarly the terms of the Western Australian constitutional legislation implied that the Governor, from the meeting of the First Parliament onwards, would choose as his advisers (i.e. members of the political executive) from the ranks of those commanding the support of the majority of the Legislative Assembly. As was the case for the Earl of Hopetoun eleven years later when he had to commission Australia's first prime minister and in the process made the wrong choice initially.¹² Sir William Robinson needed to make a choice which was less obvious than would be the case with the developed party system of the twentieth and twenty-first centuries. As it was Robinson, unlike the Earl of Hopetoun, clearly got it right when he commissioned John Forrest even though the latter had been an official member of the old Legislative Council and not an elected

member, nor had he been at the forefront of agitation for the adoption of responsible government.

As is invariably the case in the Australian polity the constitutional provisions underpinning this system are a mixture of formal constitutional enactment and constitutional convention. The wording in the WA Constitution, as in the three of the other colonies, was that the Governor under Section 74 had the power to commission members of the executive 'liable to retire from office on political grounds', those described in the Commonwealth Constitution as Ministers of State. Sections 6 and 28 also cleared the way for Members of Parliament not to be disqualified under the office of profit under the Crown rule if they held executive offices 'liable to be vacated on political grounds'. Significantly, the Western Australia Constitution did not provide (as was the case with the Commonwealth Constitution and three of the other five colonies) that such persons had to be MPs, though under Section 6 it did specify that at least one of those offices 'shall always be held by a member of the Legislative Council'. In any case, the understanding was clearly by convention that only MPs would be so appointed to the political executive and, in the case of WA, those appointed from the Assembly had to resign their seats and recontest them at ministerial by-elections. Indeed, the fact that this provision existed under Section 29 and that the ministers were declared specifically as eligible for reelection, makes it quite clear that the intention was that the ministers would in fact be MPs at the time of appointment. This cumbersome ministerial by-election procedure served an occasional political purpose before the party system solidified¹³ but then became an obvious anachronism and was abolished soon after the end of the Second World War.

It should be added at this point that the failure to make any mention of the role of Premier in the Constitution (though this situation has been partly modified by the wording of the Australia Acts)¹⁴ is one of the more extraordinary though standard features of Australian constitutional enactments: similarly there is still no reference to the prime minister in the Commonwealth Constitution either.

Arising from the above, a major assumption under responsible government was that the Governor was no longer an agent of the British Government but would henceforth act only on the advice of his chosen advisers, namely his ministers, except (and this is a contentious issue) where particular reserve powers or prerogatives are involved. To date the extent of these has never been fully tested

(supply for example has never been blocked by an upper House in WA) and the Australia Acts may well have made a difference. I leave this issue for the experts to discuss.

One question which can be posed here concerns when exactly responsible government actually came into operation in Western Australia. Former Legislative Assembly Speaker Hugh Guthrie has argued that in its 'correct legal and historical sense' responsible government began not with the Proclamation of the Constitution but with the swearing in of the MPs and the appointment of the Executive body.¹⁵ As already indicated it was not until 29 December that the new ministry took office and Parliament then assembled and members were sworn in on the following day.

Finally, of course, Western Australia after 21 October was to be governed under the terms and conditions of the 1889 constitution which, initially at least, provided that Parliament itself could amend the Constitution without consulting the people directly or any other Parliament. Under Section 73, the requirement was for the 'concurrence of an absolute majority of the whole number of members for the time being of the Legislative Council and the Legislative Assembly respectively'. Problems which arise include firstly, the question of what exactly comes under the definition of 'constitutional' and secondly, the double entrenchment provision subsequently written into the Constitution in 1978 which requires also a referendum for certain specified measures including those seeking to reduce the membership of either house, abolish either house, or abolish the position of Governor (and also to amend Section 73 itself).¹⁶ The capacity of one parliament to bind its successors has been upheld on more than one occasion under the 'manner and form provisions', an issue that was central to the recent controversy over the Gallop Government's proposed Electoral Districts legislation.

Putting the situation into a wider setting one needs also to refer to the existence of the Letters Patent relating to the Office of Governor. It is to the Letters Patent rather than to the Constitution Act that one must look for the creation of the position of Governor (and of Lieutenant Governor and Administrator when required) and the establishment of the Executive Council, the members of which 'shall hold office during the Governor's pleasure'. By contrast, these matters, in the case of the Commonwealth, are all included in the Constitution Act itself.

Further to all this there is the complication of the existence of the Constitution Acts Amendment Act of 1899 as a separate act rather than in the form of

amendments to the 1889 Act. The periodic campaign since the early 1990s to consolidate the Constitution is centred around the desire to restore the single document status and also to remove numerous outdated and redundant provisions which still exist in both the 1889 and 1899 Acts.

Before turning to the last of my questions which is to try to explain the enthusiasm aroused by what today would seem like dry constitutional developments, it is worth commenting on one or two points made by Professor Campbell Sharman concerning the Western Australian Constitution. While at one level the constitution bore a strong resemblance to the English system of government (and in the first four years even to the extent of having a non-elected upper house) Sharman has pointed out that there are some very significant differences, not the least of which is the fact that the constitution itself has a higher status than ordinary law (and the amendment of 1978 made it even more so).¹⁷ The constitution can be invoked by individuals 'acting through the courts to limit government action' something which is more akin to the US system. Secondly, the constitutional provisions pertaining to the Legislative Council as a second chamber elected from 1894 from 'different-sized election aggregates', and (until 1965) with a different franchise, has meant bicameralism has become a key feature of the system.¹⁸ This is all the more so since there are no constitutional provisions allowing the upper house to be overridden by the lower house as can be done to the House of Lords in the United Kingdom through the mechanism of the Parliament Act. Indeed, there are not even the double dissolution mechanisms that John Howard finds so cumbersome these days. Initially, too, the dominance of ministers was limited both by the provision for ministerial by elections and by limiting the number of ministers, initially to five. In this sense Sharman considered the constitution enshrined several features of limited government and while some of the relevant provisions were modified during the twentieth century, the 'double entrenchment' amendment to Section 73 in 1978 has meant that the Constitution Act is now even more of a higher or fundamental law than it was in 1890.¹⁹ Sharman finds such developments an important counterweight to growing executive dominance over the legislature as epitomised by the impact of firm party discipline and the fact that there were at least for a time three times as many Ministers of the Crown as in 1890 (and now several parliamentary secretaries) compared with less than twice as many MPs.²⁰

Finally, how can we explain the fact that 'No other event in Western Australia's constitutional history has come close to capturing the popular imagination in the manner demonstrated on the first Proclamation Day'.²¹ As I have already indicated about one in eight of the total population of the colony assembled to hear the Proclamation read and there were also ceremonies in regional areas. And how does one explain in 2003 the crowds waiting alongside the railway track at each of the eight stopping points on the way from Albany to Beverley?

It may seem obvious that the coming of self government and responsible government was a major turning point and one which had only come after a long wait for the old colonists in Western Australia compared with their colleagues in the east. Yet, on the other side of the coin, 'the impact of Proclamation Day was to be relatively short-lived'.²² It remained a gazetted public holiday until 1919 but from as early as 1894 it was clear that those wishing to commemorate the achievement of the eight hours day were starting to gain the upper hand and after many years serving the dual purpose the holiday simply became Labour Day (and then was subsequently shifted to March).²³

A number of points are relevant: Firstly, within a few years of the first Proclamation Day the so-called 'old colonists' were being swamped by thousand of 'othersiders' who saw the 1890 Constitution as a conservative document entrenching the power of the existing rural interests and were opposed to the Forrest Government on a whole range of issues. In this sense the transformation to Labour Day is readily explicable.

Secondly, debate over the entry of the colony into the proposed federation made the State's Constitution of less consequence even though the actual pace of reform in many respects was quite rapid, a point made by John Hirst in his recently published study of Australian democracy.²⁴

Thirdly, it is easy to read too much into the enthusiastic participation by the colonists in the events of 21 October and the days before and after. Jack Honniball's study of the two-day celebrations of Queen Victoria's Golden Jubilee in June 1887²⁵ suggests strong similarities both in terms of the pattern of celebrations and the response crowds of 3,000 plus were observed even then. And a few years after the first Proclamation Day 'a tremendous crowd' witnessed the departure of a special train to inaugurate the Perth to Kalgoorlie railway service. In the pre-television, pre-

movie, pre regular night lighting era enthusiasm about gala day-time celebrations is perhaps not so difficult to explain.

It is difficult today to create widespread enthusiasm about Proclamation Day, the more so when the indigenous people can see little to celebrate about a document the intentions of which as embodied in Section 70 were to be so obviously ignored and bypassed. It also entrenched a dominant Upper House and a massive extent of malapportionment that remain controversial issues to this day. At the time, however, it marked a major advance in the constitutional status of the colony and as Sir William Robinson told the elected members of the first Parliament under responsible government 'it may be said that the Reign of your new Constitution has been fully established'.²⁶

Endnotes

¹ David Black, "'At Last She Moves': The Advent of Responsible Government in Western Australia, 1890' in David Black (ed.), *The House on the Hill. A History of the Parliament of Western Australia 1832–1990*, Perth: Parliament of Western Australia, 1991, p.9.

² See *Governors and Premiers of Western Australia*, West Perth: The Constitutional Centre of Western Australia, 2002, p.10.

³ Representations had been made for Broome to return to the colony for a second term but the Secretary of State did not accede to the request. He did, however, delay sending out the new Governor 'so as not to deprive Sir Frederick Broome of his official standing during the negotiations' (J. S. Battye, *Western Australia. A History from its Discovery until the Inauguration of the Commonwealth*, facsimile edition, Nedlands: University of WA Press, 1978, p.390).

⁴ R. D. Lumb, *The Constitutions of the Australian States*, fifth edition, St Lucia: University of Queensland Press, 1991, pp.36–37.

⁵ Battye, *Western Australia. A History...*, p.384.

⁶ Lumb, *The Constitutions of the Australian States*, p.45.

⁷ *West Australian*, 21 October 1890.

⁸ See Black, 'At Last She Moves...', p.9. The material in the next few paragraphs is largely drawn from this source.

⁹ *ibid.*, p.18.

¹⁰ C. T. Stannage, *The People of Perth. A Social History of Western Australia's Capital City*, Perth: Perth City Council, 1979, see esp. pp.207–208.

¹¹ Lumb, *The Constitutions of the Australian States*, pp.21 and 18.

¹² The so-called 'Hopetoun blunder' refers to the decision by Australia's first Governor-General, John Adrian Louis Hope, 7th Earl of Hopetoun, to offer the prime ministership of the about-to-be inaugurated Commonwealth of Australia to the then Premier of New South Wales but avowed anti-federalist, Sir William Lyne. After Lyne returned his commission Hopetoun instead sent for Edmund Barton from the same colony who was widely accepted as leader of the federal movement.

¹³ For example, on 21 November 1901 three out of six ministers were defeated in ministerial by-elections causing the downfall of the one-month-old Morgans Government.

¹⁴ Thus, for example, Section 7 (5) of the Australia Act 1986 provides that 'The advice to Her Majesty in relation to the exercise of the powers and functions of Her Majesty in respect of a State shall be tendered by the Premier of that State'.

¹⁵ See Black, 'At Last She Moves...', pp.14 and 19.

¹⁶ See, for example, P Johnston, 'Freeing the Colonial Shackles: The First Century of Western Australia's Constitution' in Black (ed.), *The House on the Hill...*, pp.325–326.

¹⁷ Campbell Sharman, 'The Constitution of Western Australia 1890 and 1990', in Black, *The House on the Hill*, p.292.

¹⁸ *ibid.*, p.293.

¹⁹ *ibid.*, p.297.

²⁰ *ibid.*, p.296.

²¹ Black, 'At Last She Moves...', p.16.

²² *ibid.*

²³ See Stannage, *The People of Perth*, pp.211–212.

²⁴ J. B. Hirst, *Australia's Democracy: a short history*, Crows Nest, NSW: Allen & Unwin, 2002, p.96.

²⁵ J. H. M. Honniball, 'The Celebration of Queen Victoria's Jubilee in Western Australia', *Early Days*, 9, 5, 1987, pp.30–41.

²⁶ *Western Australian Parliamentary Debates*, I, 20 January 1891, p.5.