

CHAPTER 11 'The Commonwealth Shall not...'

Because the delegates were anxious to hasten the conclusion of the Convention, they decided at the close of the morning session on 2 March to revise a previous arrangement not to sit during that afternoon and evening.¹ Accordingly Higgins's proposed replacement for Clause 109b came on for discussion a little sooner than expected. Its text, which differed slightly from the present Section 116, was,

The Commonwealth shall not make any law prohibiting the free exercise of any religion, or for the establishment of any religion, or imposing any religious observance, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.²

Higgins had placed the new amendment on the notice paper shortly after his defeat on 8 February,³ and no doubt had spent some time canvassing support. The prospect of even partially reversing the Convention decision may have seemed bleak, even to someone as obstinate as Higgins often was about getting his way on matters of principle. As far as 'recognitionist' churchmen were concerned, the religious issue could reasonably be regarded as settled. 'If any group of "cranks" is to be allowed to set up its Sabbath', remarked the *Southern Cross* contentedly on 11 February,

It is certain that the general Day of Rest will run some danger of vanishing. It is pleasant to note that when it was seen that under the proposed law it would be impossible to enforce the law against Sunday trading, the Convention promptly rejected Mr Higgins's entire amendment.

On the ecclesiastical front all seemed well. In its 18 February issue the *Southern Cross* reported that on the previous Sunday the Protestant churches of Victoria had prayed for rain to ease the drought and 'already the rain had come'.

The Adventists by contrast were appalled, and probably a little surprised. 'Heretofore', Colcord wrote to Higgins on 10 February,

some of the Federal delegates have, in conversation with us, told us we need have no fears over a religious declaration of faith being inserted in the preamble; that there was a clause in the proposed Constitution, clause 109, which would prevent anything like religious legislation.⁴

This letter may have contributed to Higgins's resolve to persevere. In it, Colcord presented the Adventist reply to the main arguments urged on 7 and 8 February against Clause 109 and Higgins's amendment. On the actual letter, which was typewritten, appears some penciled underlining and sidelining. Presumably this was added by Higgins himself.

Colcord contested the argument that protecting the free exercise of religion prevented a State from legislating against barbarous and immoral acts committed in the name of religion. His reply was that governments

have a perfect right, and it is their duty, to suppress any act of incivility or crime under *whatsoever cover or plea it may be committed*; but they do not need to enact *religious* laws to do this, even though the act involved had behind it the sanction or demand of some religion. They should deal with *everything with which they have a right to deal from the standpoint of civility*, and not *religion*. Everything which properly comes within the scope of this term they have a right to deal with; all else is beyond their proper limits.

[‘Religious’, ‘civility’ and ‘religion’, were underlined in the typescript by Colcord. The other words emphasized were either underlined, or sidelined in pencil, presumably in each case by Higgins.]

Concerning the fear that prohibiting the imposition of religious observances might prevent the state and Commonwealth legislatures from making Sunday a day of rest, Colcord was more diffuse but less accommodating. God not only called upon man to rest on the seventh day, the Saturday, but He also enjoined man to labour on the other six. Christians could not in good conscience *not* work on the Sunday. Provided a man’s conscientious Sunday labour was neither uncivil nor criminal, in the commonly accepted meaning of those terms, the State had no right whatever to prohibit such divinely sanctioned labour.

It was of course unlikely that the secularist Higgins would have been impressed by the latter argument. It was a view he explicitly rejected on 8 February. However, the former argument may have held some appeal. It may be, too, that Higgins was a little moved by the impassioned benediction Colcord bestowed upon him at the close:

I am glad and thankful to my God, whom I serve night and day, that there was even *one* man in the Convention who would stand up for principles. May God bless you, and the peace of Heaven rest rightly upon you.

This scarcely was the kind of letter Higgins received often.

In the *Bible Echo*, and in the *Southern Sentinel* (which since January, 1898, in view of the heightening of the ‘religious liberty’ crisis, had been changed from a quarterly to a monthly),⁵ the Adventists sounded a loud and clear alarm. On 23 February Mrs White herself arrived in Melbourne, ostensibly to attend an Adventist Conference at Balaclava during the next month, but certainly also, one would think, because of the ‘religious liberty’ crisis.⁶ However, precisely what communications passed between Higgins and the Adventists in these busy days is not clear

Nor does direct evidence survive as to how Higgins in the period between 8 February and 2 March set about his persuasive task. Yet it was in general terms clear which delegates he needed to convince, and what argument he would have employed. His target was the secularist group which on 7 and 8 February, probably on Barton’s inducement, had opposed him. Higgins no doubt pointed to the threat to the secularity of the Commonwealth which, in the light of American precedents, ‘recognition’ might pose. Probably he suggested that, if no neutralizing clause were placed in the Federation Bill, many electors would refuse to vote for it. He may have threatened – a point at which he hinted on 2 March⁷ – that he personally would be unwilling to recommend a Federation Bill that lacked such a clause.

In his introductory speech Higgins spent some time stressing that what he wanted was to make it clear that, although the Constitution now ‘recognised God’ in a way which on some American precedents would involve ‘certain inferential powers’, there was no intention on the part of the Convention to confer, even indirectly, such powers on the federal parliament. Previously, ‘according to the views of the members of the Convention,’ he had gone too far in saying that ‘neither a state nor the Commonwealth was to have this power.’ He had however done this, he explained, because the existing Clause 109 referred only to a state.

He then read out the text of his proposed new clause, and stated that ‘most of this clause, with regard to the making of laws, is already in the American Constitution, either in the original Constitution or by way of an amendment of the Constitution.’ The only difficulty therefore was ‘[the] words about imposing religious observances’. These were ‘rendered necessary’ by the Convention’s inclusion that morning of ‘words which they have not got in the American Constitution’. He wished to make it clear, he concluded, ‘that there [could not] be an overriding Commonwealth law’ that would interfere with the power of the states to legislate regarding religion.⁸

As Higgins was closing his speech, Reid interjected, asking whether Higgins ‘could point out in the Bill any subject allied with religion which would make it necessary to put a clause such as this in the Bill’. If Higgins could, Reid declared, ‘[he] would vote with him’. Higgins replied ‘The preamble.’⁹

Reid’s question is of special interest, indicating as it does his understanding of the prohibitive scope of Higgins’s clause. Evidently to Reid the prohibitive power of Higgins’s clause was such that, if there *were* ‘any subject allied to religion’ with respect to which the Commonwealth could legislate, then Higgins’s clause would prohibit the Commonwealth from using that power to legislate with respect to religion.

Barton then spoke at length. Clause 109, he said, had been struck out ‘partly on the ground that we did not desire to interfere unnecessarily with the states’. But it was also struck out on the more ‘solid ground’ that

there was no likelihood of any state ever prohibiting the free exercise of any religion – that there had been nothing of the kind in the past, and that there was not the slightest reason to expect the occurrence of any such thin in the future; that the more the institutions under which we live expanded, the less likelihood there was of any religious persecution of any kind.

However, if that was the view the Convention held on the states, why should they hold such a fear in regard to the Commonwealth?

At this point Bernhard Wise interjected, stating that they might say the same about the United States Congress. Barton in reply said that the Supreme Court decision that the United States was a ‘Christian country’ was probably an affirmation that the institutions of England at the time of the revolution were, under the common law, Christian institutions, ‘which, so far as they are not interfered with by any written Constitution, belong to citizens of the United States’. If that was so, ‘the same thing applies in some of these colonies’. But even if it is ‘part of the common law of England that we shall be regarded as a Christian community’, what danger would that present of their suffering any of the difficulties referred to in the amendment? ‘I do not see any danger of the kind to be anticipated.’ ‘I think’, he stated, with a play on the word ‘Christian’,

that because we are a Christian community we ought to have advanced so much since the days of State aid and the days of making a law for the establishment of a religion, since the days of imposing religious observances or exacting a religious test as a qualification for any office of the State, as to render any such dangers practically impossible, and we will be going a little too far if we attempt to load this Constitution with a provision for dangers which are practically non-existent.

Higgins interjected, 'That is the question. Are those dangers non-existent?' Barton however saw no need for concern.

The whole of the advancement in English speaking communities, under English laws and English institutions, has shown a less and less inclination to pass laws for imposing religious tests, or exacting religious observances, or to maintain any religion. We have not done that in Australia. We have abolished state religion in all these colonies; we have wiped out every religious test, and we propose now to establish a Government and a Parliament which will be at least as enlightened as the Governments and Parliaments which prevail in various states...

If there were 'any – the last – probability or possibility' of '... any of these various communities utterly and entirely retracing its steps', he 'might be with' Higgins. But he was confident that that would not happen. If, he said,

As this progress goes on, the rights of citizenship are more respected; if the divorce between Church and State becomes more pronounced; if we have no fear of a recurrence of either the ideas or the methods of former days with respect to these colonies,

Then Higgins's fear would prove unfounded. Certainly this was a question begging argument, but it does at least show clearly what Barton saw as the prohibitive reach of Higgins's new clause.

Barton shifted to another tack. He thought that preventing the Commonwealth making any law prohibiting the free exercise of any religion gave rise to certain dangers. The Commonwealth under the Constitution could legislate with regard to immigration and emigration, to naturalization, and to special races other than the aboriginal race. In these areas it might be necessary for the Commonwealth to regulate religious practices, since sometimes these were of a kind abhorrent to any civilized community. However, the effect of the 'free exercise' provision would be to prevent this. Higgins, at this point, apparently agreeing with Barton that the 'free exercise' provision *would* prevent the Commonwealth from legislating against 'abhorrent' religious practices, interjected that he wished to leave such regulation to the states. Barton replied not so much with an argument but with the dictum that, when a power to make laws in regard to any subject is given to the Commonwealth, 'we should take care not to take away an incident of it which it may be necessary for the Commonwealth to use by way of regulation.'

Barton then reiterated his claim that the establishment of any religion was 'entirely not to be expected'. Symon interjected, 'It is part of the unwritten law of the Constitution that a religion shall not be established', and Barton, echoing so to speak his own echo, declared, 'it is so foreign to the whole idea of the Constitution that we have no right to expect it'. He added that 'whatever may be the result of any American case', he doubted whether any member of the United States Congress would suggest that Congress had the power to establish any religion. He was sure that the United States Supreme Court would not say so. He concluded by saying that the only part of the clause on which he had any doubt was that prohibiting religious tests. On reflection, he had decided that such a test was not possible. Therefore he would vote against the whole clause.¹⁰

When Barton finished, Reid, evidently following up his question to Higgins as to whether there was any subject 'allied with religion' with respect to which Commonwealth could make laws, asked Barton, 'I suppose that money could not be paid to any church under this

Constitution?’ Barton replied, ‘No, you have only two powers of spending money, and a church could not receive the funds of the Commonwealth under either of them.’¹¹ This question, no less than Reid’s previous one, is of considerable interest, since it clearly presupposes that one thing which *would* be prohibited to the Commonwealth by the proposed clause – presumably by the ‘no establishment’ provision – was the paying of money ‘to any church’.

Wise spoke next. No subject, he asserted, was more fit for state control than that of religion observance. There should be no opening to doubt that the Commonwealth was excluded from this area. He wished he could share Barton’s optimism as to the death of religious persecution, ‘but we have seen in our own time a recrudescence of that evil demon, which, I fear, is only scotched and no killed.’ He knew of a large body of New South Wales people, *not* represented by petitions, who were alarmed at the insertion of a ‘recognition’ clause in the preamble, and who feared that behind it lay an ulterior design by some people to give the Commonwealth power to interfere with religious observances. Higgins at this point interjected: ‘We had 38,000 signatures to a petition from the people in Victoria against the inclusion of these words in the preamble.’ Wise naturally enough said he was glad to hear it, and asked the Convention why they could not ‘meet the scruples of these gentlemen as we met the scruples and feelings of another class in the community’. Furthermore, he suggested, Higgins’s speech that morning had shown that the fears of those who opposed ‘recognition’ had legal substance. ‘In a matter of religious feeling’, he added, ‘a minority are entitled to the utmost respect and should have their feelings guarded.’

Simon Fraser interjected, ‘Is not the majority entitled to respect?’ Wise replied, ‘Certainly.’ Fraser then declared, ‘A very small minority might shock the great majority of people.’ Wise retorted, ‘Let everyone follow his own religious observances without shocking anybody, and do not let him impose his rule on anyone else.’

Wise then, after repeating that they should make clear in the Constitution that ‘the Commonwealth shall not interfere in any way with the rights of the states to regulate religious matters’, suggested that the observance of Sunday was largely a matter of climate, one rule tending to prevail in the tropics and another in the south. It should be made clear that people in one part of the Commonwealth could not impose on people in another in the matter of Sunday observance, or in any other religious matter.¹²

Wise was followed by Cockburn, who asked Higgins whether there was any other power whose exercise by the Commonwealth was forbidden. Higgins said he thought not. Cockburn then suggested that, while he was ‘very much in sympathy’ with Higgins, his proposal would open up any ambiguous area ‘between the powers specially vested in the Commonwealth, and the powers forbidden’. Specifically it raised a doubt as to whether the Commonwealth might not have more powers than those vested in it.¹³

Fraser then spoke. He agreed with Barton that the clause was unnecessary, adding, ‘We are a homogeneous people, and the safer plan is to leave us so.’ Higgins interjected that that was what ‘we want to do’. Fraser however was not sure. He asserted that if they agreed to Higgins’s new clause, all sorts of practices might be resorted to which would shock the whole people. Wise, thinking perhaps of Fraser’s recent interjections to his own speech,

interjected that if Higgins's new clause was *not* passed, the Commonwealth might be able to pass a law permitting Sunday newspapers in Victoria. He was presumably extending the 1892 American precedent to non-religious Sunday observance. Isaacs, an astute lawyer, then came to Fraser's rescue, and a brief but sharp interchange between Isaacs, Wise and Fraser followed, in which Wise's knowledge of the United States Constitution was shown up as less than perfect. But then probably Wise at this point was more concerned to bait Fraser than to make a serious legal point. Fraser concluded, after a fierce denunciation of the public men of New South Wales for not 'putting down' that colony's Sunday newspapers, by repeating that the acceptance of Higgins's clause might lead to results that would 'offend the susceptibilities of a homogeneous people'.¹⁴

At this point Symon moved, by way of amendment, that all words down to 'and' be omitted, and that the clause as a whole read instead,

Nothing in this Constitution shall be held to empower the Commonwealth to require any religious test as a qualification for any office of public trust under the Commonwealth.

On 8 February Symon had suggested that Clause 109 be replaced by a clause similar to this, but applying also to the states. Hence this clause, like Higgins's own, was substantially a carryover from that debate.

Symon began by saying that he had changed his mind, since the 7 and 8 February debate, on the question of the prohibitive scope of the 'free exercise' provision. Then he had thought it would protect inhumanities and cruelties committed in the name of religion. Now he was satisfied that, 'under the ordinary operation of the common law', either state or federal parliament could legislate to stop inhuman or cruel acts. He still opposed the 'free exercise' provision, but not on the same grounds. Essentially his argument now was not that the provisions he wished to remove were dangerous but that they were unnecessary. On the one hand, the Commonwealth would have no power to restrict the free exercise of religion, to impose religious observances or to establish any religion. On the other, he was satisfied that 'it is embodied in the Constitution as a part of the unwritten law that no church establishment shall prevail and that religious shall be observed.' However, he thought the 'recognition' clause in the preamble might enable the Commonwealth to impose a religious test in appointing its officers. His own amendment would prevent this and would make it clear that 'recognition' would not overspread the Constitution. It would also, being of the nature of a 'counterblast' to 'recognition', satisfy those whose worries had been expressed by Higgins. Fraser interjected that there was 'no necessity for it', but Symon disagreed.¹⁵

Kingston then spoke. He supported Higgins. Only the states, he believed, should be able to legislate in regard to religion. The new amendment to the preamble made necessary a declaration 'in the broadest possible terms'. His particular concern was that, now that God had been 'recognized', the Commonwealth would use its power to legislate with respect to the affairs of special races in order to pass laws relating to their religion. However, this was 'purely a domestic concern', with which the states were particularly qualified to deal. If they accepted Higgins's proposal, they would 'secure to the states the power which they at present possess', and 'prevent any unnecessary interference by the Federal Parliament'.¹⁶

Kingston was followed by Lyne, who had been impressed by what Higgins had said in the discussion of Glynn's amendment. Higgin's proposal would 'get rid of the possibility of danger'. 'Sunday observance', he thought, 'was to a very large extent a matter of climate', and it varied from colony to colony. The 'recognition' clause might allow the Commonwealth to decide how Sunday was to be observed, and to prevent that taking place, Higgins's new clause should be inserted. Symon's proposal, by contrast, would in this respect be ineffective.¹⁷

Wise followed Lyne. He invited Symon to express his view as to whether, if the 'Commonwealth Supreme Court' accepted the arguments which prevailed in 1892 in the United States Supreme Court, 'the Commonwealth Authority would have an implied power to administer the common law in respect to the observances of Christianity'. Symon did not comment. Wise then appealed to Symon to withdraw his amendment.¹⁸

However, O'Connor, the next speaker, another who had voted against Glynn at Adelaide, said he hoped Symon would not withdraw his amendment since he intended to support it. Higgins's proposal, he considered, was more likely to run them into danger than avoid it. 'Upon the face of the Constitution', he said (making clear incidentally his conception of the scope of Higgins's clause), 'the Commonwealth has certainly no power whatever to deal with religion, either directly or indirectly.'¹⁹

Higgins here interjected, asking O'Connor to explain why the provisions in the first amendment were placed in the United States Constitution. O'Connor replied that they were inserted because the powers given to the United States Congress were less 'definite' than those which the Convention was allocating to the Federal Parliament. Higgins interjected again, pointing out that the United States Constitution contained no reference to deity. In reply, O'Connor maintained in effect that the powers allocated to the Federal Parliament were so definite that he could not imagine it dealing with religion 'in any way'. However then, replying to an interjection from Kingston, he qualified this by agreeing that, as the Constitution stood, the Commonwealth was able to make laws respecting the religion of 'special races'.

O'Connor then analysed the 'danger' he saw in Higgins's proposal. His main point was a development of one Cockburn already had made. By preventing the Commonwealth 'from making certain specified laws', O'Connor asserted, 'you create the implication that the Parliament has power to deal with in other respects with religious observances.' If they examined Higgins's proposal, they would find that

It deals expressly with Sunday observance, with the exercise of religion, with the establishment of religion, and with the imposition of religious observances. But it might very well be argued that the closing of places of public amusement on Sundays does not rest upon any of these grounds; and if you inserted a provision of this kind in the Constitution, there would be the strongest possible implication that the Federal Parliament would have the power to legislate in regard to social questions which had a religious aspect other than those expressly excluded from its jurisdiction by this provision.

However he agreed with Symon that the Commonwealth might, under the present Constitution, 'impose any form of oath which it thought fit'.²⁰

Frase then spoke briefly, asserting bleakly that

if we give the right to an infinitesimal minority to come here and indulge in extraordinary practices, under the pretence that this is a new religion, we may have all the theatres and all the music halls in Australia open on Sundays. If that is possible, we ought to do what we can to provide against it.²¹

The final speaker was Higgins. He first hinted that he might not be able to support the Federation Bill if his proposed clause was not carried. Then he briefly repeated or alluded to his previous arguments. However, there was one small but interesting change: he referred this time not to 38 000 signatures from Victoria alone, but simply to '38 000 distinct signatures'.²²

The first question to be considered was whether Symon's clause should replace that of Higgins. By 22 votes to 19 the Convention decided that the clause on which it would vote would be that of Higgins. This really was the crucial vote. Braddon, Downer and Gordon, each of whom had spoken against Higgins on 7 and 8 February, now supported him. It is of more than passing interest to note that among other supporters of Higgins was Glynn.²³

The next question put was whether Higgin's proposed new clause should be inserted. This time Higgins won comfortably by 25 votes to 16.²⁴ Moore from Tasmania, and Peacock and Isaacs from Victoria, changed sides. While they preferred Symon's clause to Higgins's, evidently they preferred Higgins's clause to nothing. Glynn once more supported Higgins, and that night in his diary explained why:

To prevent any doubt as to whether [the words of the 'recognition' amendment] authorized the imputation of Christianity as the law of the land, or religious intolerance in legislation, Higgins succeeded in getting in a Provision against any legislation either establishing or suppressing a Religion, or imposing a religious test.²⁵

One probably can deduce from Glynn's sarcastic attack on Inglis Clark's 'free exercise' provision during the preceding August²⁶ that Glynn felt little enthusiasm for Higgins's clause as such. However, a handwritten note by Glynn, from the time of the Adelaide Convention, stating that 'Negative provisions in a Constitution are safe because they [?have] stood the test of historical experience', suggests that he saw little danger either.²⁷ So, by little more than a whisker, those who had wanted a constitutional guarantee of strict Church-State and Religion-State separation in the Commonwealth sphere, made their point against those, such as Barton, who considered such separation desirable but did not wish to achieve it that way; and also against those, such as Fraser, who did not think separation desirable at all.

Finally, an attempt will be made to draw together precisely what, on the basis of what was said in the debates, the Convention delegates thought Higgins's new clause actually prohibited. Clearly the clause as a whole was thought of as designed to keep the Commonwealth entirely out of the religious field. It was also – a point reiterated time and again – intended to secure to the states *alone* power to legislate regarding religion. There was, in the debates of 7 and 8 February, and 2 March, some doubt as to the extent to which the Commonwealth would be prevented by the 'free exercise' provision from interfering with 'abhorrent' religious practices. Symon at first doubted, but came later to accept, that the 'free exercise' provision would not prevent the Commonwealth from outlawing inhuman or cruel acts committed in the name of some religion. Higgins tended at one point to imply that the Commonwealth was in fact so prevented. However he did not develop the

point. As to the ‘religious observance’ provision, there can be no doubt that in the minds of most delegates the Commonwealth was prohibited from legislating with respect to the observance of Sunday. However Higgins on 8 February, and O’Connor on 2 March, took something close to the view that it only was those Sunday observance laws which embodied a religious intention which were prohibited. O’Connor, indeed, suggested that a prohibition on the Commonwealth imposing religious observances in itself carried a strong implication that the Commonwealth had power to legislate in regard to *non*-religious observances.

It was only with respect to the ‘no establishment’ provision and the prohibition of religious tests for Commonwealth trusts or offices, that one finds unanimity. However, the unanimity over the ‘religious test’ provision related to the fact that no one thought it worthy of explicit definition, while the unanimity over the ‘no establishment’ provision stemmed rather from the fact that those who *did* discuss its scope and meaning expressed or implied concordant views. Higgins indicated at the outset that his ‘no establishment’ provision duplicated the one in the first amendment of the United States Constitution; and, to the delegates, that would have meant – as argued in the next chapter – that it was to be understood as strictly separationist. Barton, in his speech, made it clear that the ‘no establishment’ provision prohibited the Commonwealth from recognising any religion of the State, and from giving financial support to any religion. Reid in his interjection made it clear that he believed that the ‘no establishment’ provision prevented the paying of money to any church. O’Connor assumed that it prevented ‘indirect’ (in an unspecified sense) as well as ‘direct’ dealing by the Commonwealth with religion. Quick, some time *later*, advanced a less strictly separationist interpretation. However, the view as to the scope and meaning of the ‘no establishment’ provision stated or assumed in the debate by Higgins, Barton, Reid and O’Connor must be accorded considerable weight in any attempt to assess the mind of the Convention on this point. Each was an able lawyer; each was a leading figure in the Convention proceedings. Barton, O’Connor and Higgins later became judges of the High Court of Australia. It is safe to assume that, where these men agreed over the meaning and scope of a Constitutional provision, that almost certainly would be what most of the other delegates thought, or wanted to think, too.