

CHAPTER 9 **Disaster for Higgins**

Clause 109, which provided that ‘A State shall not make any law prohibiting the free exercise of any religion’, came up for further consideration on 7 February 1898. It had been recommended by the constitutional committee at Adelaide, and so far had attracted little comment or criticism. At Adelaide the Convention had simply accepted the recommendation, while in the colonial legislatures it was criticized but once. The only positive recommendation was the proposal made by the Tasmanian House of Assembly, but rejected by the Legislative Council, that there be added the words ‘nor appropriate any portion of its revenue or property for the propagation or support of any religion’.

On 7 February however, the picture startlingly changed. Higgins, as noted, had proposed to extend the reach of Clause 109 to the Commonwealth, and to strengthen its terms by making it also prevent either the Commonwealth, or a state, from imposing any religious observance or test. However, at about this time he evidently became dissatisfied with this proposal too. It emerged, by 8 February, that he wished for the moment to drop the reference to religious tests, perhaps to introduce it later. He also wished to add a further prohibition, binding on states and Commonwealth, which would prevent the establishment of any religion. The Tasmanian, Sir Edward Braddon, had an amendment too. He wished to add to Clause 109 ‘some such words’ as ‘but shall prevent the performance of any such religious rites as are of a cruel or demoralizing character or contrary to the law of the Commonwealth’. Finally, Josiah Symon from South Australia wished to scrap Clause 109 altogether and to replace it with ‘No religious test shall be imposed as a qualification for any public office of trust in the Commonwealth or in a state.’

Higgins, perhaps because his initial amendment had been on the notice paper longest, introduced the debate. What followed was, for the participants, rather confusing. Partly this can be explained by the sheer variety of the ideas that had emerged as to what the Convention should do about the clause, partly by certain tensions relating to the ‘states rights’ issue which had arisen during the days immediately preceding, and partly by the imprecise and confusing way in which Higgins introduced his own amendment.¹

Higgins began by claiming that Clause 109 did not go ‘far enough’. ‘[T]he matter’ needed to be dealt with ‘because a strong effort has been made to have a reference to the Almighty inserted in the preamble’. While to some the notion of prohibiting the establishment of a religion was ‘idle at this time of day’, it was ‘not idle in the eyes of a number of people whose votes we would like to secure for the Constitution’. If God were ‘recognized’, a large number of good people would need to be reassured that ‘their rights with respect to religion [would] not be interfered with’. The South Australian John Gordon here interjected, asking Higgins what his amendment was and Higgins surprisingly, since a moment earlier he had referred to the need for a ‘no establishment’ provision, replied by citing without any explanation his *original* amendment – the one which contained no reference whatever to establishment.

Higgins then alleged, ‘[T]he recognition of God was not proposed merely out of reverence; it was proposed for distinct political purposes under the influence of debates which have taken place in the United States of America.’ In 1892 the United States Supreme Court had

declared that country ‘a Christian country’, and this declaration had given rise to an intense political campaign to ‘impose... a compulsory Sabbath all through, in, and upon every state, and a lifting of the banner of those who opposed that movement’. He would have preferred to rest on the fact that the powers of the federal parliament were limited, and that parliament had no power to do anything except that which was expressly permitted or, by implication, necessary. Yet experience showed that the presence of a declaration of a religious character in the preamble might form the basis for attempts to pass legislation ‘of a character which I do not think we intend to give the Federal Commonwealth power to pass’.

Higgins thereupon made a statement, whose motivation and sincerity is difficult to gauge. ‘I think’, he said, that ‘whatever is done in this matter, if anything is done, ought to be done by the states. I do not think that we ought to interfere with the right of the states to do anything they choose, if they think fit to do anything.’ On the surface no difficulty exists. Higgins was saying that it only was the Commonwealth, and not the states, which he really was concerned to prevent from passing laws to prohibit the free exercise of religion, or to establish any religion, or to impose any religious observance. It is a point which Higgins was to make several times in this debate and also in the 2 March debates. The difficulty however is that Higgins, in a letter to the Adventist W. A. Colcord a few weeks later, suggested that it *would* have been desirable had the clause (by then accepted by the Convention) which prevented the Commonwealth from legislating in relation to religion, also prevented the states from doing so.² The problem is, did Higgins, despite frequent Convention statements to the contrary, really wish to prohibit only the Commonwealth from legislating in respect to religion? Possibly Higgins was seeking to mislead Colcord, although it is hard to see why. However, if one assumes for argument’s sake that Higgins *did* wish to apply his amendment to the states as well as the Commonwealth, and if one asks whether any particular circumstance on 7 and 8 February might have discouraged him from pushing the application to the states, light perhaps dawns. During the preceding few days, specifically in the debates concerning conciliation and arbitration in relation to interstate commerce, and the ‘rights’ of New South Wales and Victoria to the Murray River waters, a distinct anxiety had emerged among many delegates over endangering states rights.³ On 7 and 8 February, Clause 109, a clause placing a prohibition on the states, would have been likely to provoke ‘states rights’ fears. The *Age* indeed remarked that there was at this point a ‘general hostility’ to attempts to limit the existing rights of the colonial governments.⁴ So perhaps Higgins, by indicating willingness to allow the application to the states to slide, had thereby been hoping to save the prohibition on the Commonwealth.

To return to Higgin’s speech, moving from his effort to conciliate the ‘states rights’ element, Higgins made a friendly overture to the recognitionists. He reiterated the offer made a few months earlier in Geelong, that if proper safeguards were included, he was himself willing to vote for ‘recognition’. He then suggested that ‘in these days’ there was a tendency for governments more and more, and in all sorts of directions, to interfere with a man’s actions. ‘[I]t is not at all clear’, he added, ‘where the line will be drawn.’ ‘If we interfere with a man’s action in his economical relations, it will be hard to draw the line and say that he is not bound to act in a certain way with regard to religious observances.’ Therefore, to reassure those who objected to ‘recognition’, let the Convention draw that line now. He concluded by suggesting that his original amendment would need to be

qualified in some way because the prohibition on ‘any religious test’ was in one respect defective: it would voice the imposition of the ordinary oaths in the courts and elsewhere.⁵

The day’s discussion was now drawing to a close and, in the few minutes remaining, Braddon announced that he had a Tasmanian amendment, Inglis Clark’s, and also one of his own – the one he had foreshadowed at the beginning of the debate.⁶ Braddon was concerned at the possibility, on his reading of the ‘free exercise’ provision, that ‘it might make lawful practices which would otherwise be strictly prohibited’. He cited as examples the ‘suttee’ and the ‘churuck’ of the ‘Hindoos’, ‘one meaning simply murder, and the other barbarous cruelty to the devotees who offer themselves for the sacrifice’. Braddon may genuinely have been concerned. But when one notes that he later in the debate made no attempt whatever to support Clark’s amendment, that the original ‘free exercise’ clause had also been Clark’s, that in October of the previous year Clark had resigned from Braddon’s cabinet, alleging among other things improper conduct by Braddon, and that shortly afterwards Clark became leader of the opposition, it is possible to wonder whether Braddon was also moved by personal considerations.

The next day Higgins produced no modification to solve the difficulty over the ‘religious test’ provision. He brought forward instead a substantially altered amendment containing no reference to religious tests, but to which a ‘no establishment’ provision had been added. These alterations made the proposed clause read,

A State shall not, nor shall the Commonwealth, make any law prohibiting the free exercise of any religion, or for the establishment of any religion, or imposing any religious observance.

This chopping about could scarcely have helped Higgins. After the tiring days recently spent by the Convention on the rivers question, Higgin’s rambling approach may well have caused irritation.

As soon as Higgins announced his new amendment, Richard O’Connor, the New South Wales Roman Catholic delegate, introduced in an interjection what soon became one of the main criticisms of Higgin’s proposal. O’Connor indirectly suggested that the application of the clause to the Commonwealth was unnecessary, since the Commonwealth lacked any power to make laws relating to religion anyway.⁷ Higgins in reply said it was not uncommon in the United State for ‘inferential powers’ to be deduced very largely from ‘single expression’, and suggested that a ‘recognition’ declaration might be used in the same way in Australia. Then planning to put his amendment part by part, he formally moved ‘That the words, “nor shall the Commonwealth” be inserted after the word ‘not’.⁸

Now the attack began in earnest. As Colcord, who may have been a spectator, wrote to Higgins a couple of days later, ‘[It] seemed you stood almost if not quite along.’⁹ The first critic was the South Australian, Gordon. ‘So long as the prohibition only extends to the mere mental exercise of faith’, he said, ‘I am with Mr Higgins.’ But then, developing Braddon’s criticism, he suggested that some exercises of faith were objectionable from a sociological point of view. He cited the case of certain faith-healers in Wales who, properly in his view, had been punished by a United Kingdom court for acting on the belief that the cure of the sick should be made, not a matter of medical advice and medicine, but a matter of faith and prayer.¹⁰

Symon, the next speaker, another South Australian, agreed with Gordon and developed further criticisms. More precise than Gordon, he pointed out that, strictly speaking, Gordon's fears would only be realized if the prohibition applied *both* to the Commonwealth and the states. But in neither case, he considered, as a prohibitory clause desirable. With respect to the states, the clause was objectionable in that it was 'an interference with the legislative authority of the state itself'. As regards the Commonwealth,

We are living in a very advanced age, not in medieval times, and there is no necessity for a prohibition of this kind, but if there be a prohibition there should also be a provision stating what is meant by religion, what is meant by free exercise.

It would, he said, be better to do away with this clause altogether and limit the prohibition to the prohibition of any religious test. Higgins, thinking no doubt of the Adventists, then asked Symon if he would support a prohibition on imposing any religious observance. Symon, without explanation but possibly because he considered that they were not living in 'medieval times', replied that this went 'too far'. He concluded by affirming that his own amendment effectively committed the Commonwealth to the principle that

[R]eligion or no religion is not to be a bar in any way to the full rights of citizenship, and that everybody is to be free to profess and hold any faith he likes; but the Commonwealth must be the judges of when it is proper to interfere with its open exercise.¹¹

Symon was followed by a third South Australian, Dr John Cockburn, who regarded the 'whole clause as an anachronism' and argued that the states, under the Commonwealth, should have 'the same rights of self preservation' as the colonies then had. There was 'no atrocity which the human mind can devise which has not at some time or another been perpetrated under the name of religion'. He then in effect claimed that if the prohibition on the states in regard to religious observance were inserted in the Constitution, 'it would prevent a state from making laws against Sunday trading'. Higgins replied, 'No; it would only prevent the making of laws for a religious reason'. Cockburn then wondered how the state's intentions could be discovered, and suggested that the amendment 'would simply prohibit the enactment of these laws'. Higgins, presumably seeking to cut his losses, replied that it was his 'desire' to 'prevent the Federal Parliament from dictating to the state in these matters'.¹²

Edmund Barton, the leader of the Convention, spoke next, and he spoke strongly against both the original clause and Higgins's proposed amendments. It can be inferred from Barton's speech, especially from his reference to a handbook Higgins had loaned him, that Higgins before the debate had sought and failed to obtain Barton's support. It can also be suspected, on the basis of some remarks of Higgins in an address to the electors of Geelong a couple of months later, that it was in fact Barton, who in his way was quite as resolute a separationist as Higgins, who was chiefly responsible for Higgins's defeat in this debate. Higgins two months later told the Geelong electors,

I even succeeded in carrying, on my own motions, clauses which I am amused to find Mr Barton now referring to as inducements to accept the Constitution. But he spoke against them, and he voted against them. I refer, for instance, to the power given to the Federal Parliament to legislate for conciliation and arbitration in labour disputes extending beyond the limits of any one State. I was beaten in Adelaide, but I succeeded in Melbourne, in the face of Mr Barton's opposition; and I now find Mr Barton referring to the clause as a valuable and attractive provision. I may also refer to the clause which prohibits the Federal

Parliament from imposing religious observances or interfering with religious liberty. Mr Barton did all that he could against it, and he could do a great deal as Leader of the Convention.¹³

Higgins here is referring not to the debates on 7 and 8 February but to the 2 March debate on the clause (then 109A) which now stands as Section 116. But if that was Barton's attitude on 2 March, it certainly would have been his attitude on 7 and 8 February and during the days immediately preceding. Part of the basis of Barton's antagonism may have been Higgin's increasingly evident hostility towards the Bill.

Barton declared that it scarcely was conceivable that the insertion of a provision in the preamble acknowledging the existence of the power of the deity 'could ever induce the High Court or the Court of Appeal' to hold that that imported a power to do anything. He added that 'under a Constitution like this, the withholding of a power from the Commonwealth is a prohibition against the exercise of such a power'. Then, puzzlingly, he stated in reply to a question that if Higgin's amendment were accepted, the clause would read, 'A State shall not, nor shall the Commonwealth, make any law prohibiting the free exercise of any religion, or imposing any religious test or observance',¹⁴ which makes one wonder whether the Hansard reporter was dreaming, or whether Barton came late to the session that morning!

However nothing was said, and Barton returned to the prohibition on the states. Here he saw no unfortunate consequences although he warned that 'humanity has a habit of throwing back to its old practices'. He then pointed out, but not altogether clearly, a difficulty involved in any attempt to guarantee the free exercise of religion:

[T]rouble arises when you try to insert a proviso modifying this prohibition. For instance, if it were desired to prevent the application of the clause to any fiendish or demoralizing rite, that might be done by inserting the words 'so long as these observances are [not?] inconsistent with the criminal laws of the state,' because if there were no criminal law in existence at the time with which these observances were inconsistent, it would be impossible for the State to pass such a law, and so, to use a common expression, euchre the whole business.

'I think, however,' he concluded, 'that we can do remarkably well without the clause at all.'¹⁵

Sir John Downer broadly followed the lines of Barton's argument. The main interest of his speech was that he provoked Higgins categorically to say that he was 'willing that the prohibition should extend only to the Commonwealth'. Braddon then briefly spoke, declaring that, even with the qualifications he earlier suggested, some deplorable religious excess might 'make us regret that the clause was ever put in the Bill'. He preferred to see it struck out.¹⁶

Higgins again addressed the Convention. All he sought now was the prohibition on the Commonwealth: '[The] importance of preserving to the state the residuary power is overwhelming.' He repeated his former arguments and added a brief analysis of how the terms 'promote the general welfare' in the preamble of the United State Constitution, coupled with certain statutory powers, 'have extended the power of the [American] Commonwealth hugely'. In conclusion he stated that the prohibition on religious observances would not prevent the imposition of a day of rest. It would 'simply prevent the imposing of a day of rest for religious reasons'.¹⁷

That perhaps seemed straightforward. The trouble was, from a debating viewpoint, that it was not the view the Adventists themselves took. In their view it was beyond the *province* of the State to direct a person not to work on the Sunday.¹⁸

The right to work, they believed, like the right to life, liberty, and the pursuit of happiness, was God-given. Human governments were instituted solely to protect people in the enjoyment of their rights. A person might *choose* to rest on that day, or any other, but the State had no business penalizing him if he didn't. Unfortunately for Higgins, the last speaker, Sir Joseph Abbott, was aware of the Adventists' by now well publicized views on this matter. 'I believe they are earnest, good people,' he said, 'but, in defiance of our laws, they persist in working on the day we set aside and call Sunday.' With effective brevity he represented the Adventists as having set at defiance both the sovereignty of parliament, and also those concerned to preserve the 'sanctity' of the Sabbath.¹⁹ The *Sydney Morning Herald* correspondent claimed that this speech 'sealed [the] fate' of the amendment.²⁰

Higgin's amendment was put, and negatived on the voices. The Tasmanian amendment (Clark's) – such perhaps was the strength of 'states rights' feeling – found not a single supporter among the Tasmanian delegates. It also was negatived on the voices. Braddon and Symon declined to put the amendments they had foreshadowed on the previous day. Finally Clause 109 itself was put and was rejected on the voices.²¹

So Higgins failed totally. Partly this must have been the effect of a 'states rights' backlash, partly, one must suspect, a result of Barton's manoeuvring behind the scenes, and partly a consequence of Higgins's ineffective management of his own amendment. Except in Abbott's speech, there was almost no suggestion of clerically inspired opposition to Higgin's proposal to prohibit the Commonwealth, and perhaps originally the states, from imposing any religious observance, or establishing any religion. One can assume that this opposition was in some degree present and that it showed itself in the final vote. Yet why *should* it display itself when a powerful *anti*-recognitionist group was so vigorously opposed to Higgins? Among Higgin's critics, Barton, Braddon, Cockburn, Downer, Gordon, O'Conner, and Symon had all voted against 'recognition' in Adelaide. It was a prominent section of the federal-level *separationist* group which, perhaps inspired by Barton and differing from Higgins over means rather than ends, defeated Higgins.

The clerics of course were hardly displeased. The *Presbyterian Monthly*, commenting on the Convention's refusal constitutionally to prevent the imposition of religious observances, remarked (giving a clue to the thinking of some of the Convention 'recognitionists' who so discreetly and effectively kept silent on 7 and 8 February) that,

It was felt that [the prohibition on imposing religious observances] might be used to prevent a State Parliament, or the Federal Parliament, from opening their meetings with prayer, or arranging on suitable occasions for acts of public worship. By the rejection of the clause a Christian nation is left free to given expression to its religious convictions as may from time to time seem best.

The *Presbyterian Monthly* went on to 'observe with pleasure' that Higgins declared himself in favour of inserting an acknowledgement of God in the Constitution. 'This', it purred, 'is all that is necessary.'²²