



The Constitutional Founders Lecture:  
“A Founding Father- Sir Samuel  
Griffith and the Australian Constitution”  
Banco Court, Level 2  
Thursday 12 June 2008, 5.30 pm

# **The Hon Paul de Jersey AC Chief Justice of Queensland**

Your Excellency, Attorney-General, Your Honours, Chairman and members of the Council, ladies and gentlemen.

I at once express great pleasure at being here to speak with you this evening.

As one of the primary roles of our National Archives is to raise awareness of the rich content of the nation's historical collection, it is pertinent that we reflect for a time on matters surrounding the formulation of the Australian Constitution. While the contemporary relevance of that instrument is under increasing public focus, it is appropriate we pause to examine the efforts of those who played a pivotal role in its original construction.

## **Introduction**

It was recently announced that for 'personal and historic' reasons, the body of Charles Cameron Kingston, a leading figure in the Australian federation movement, is to be exhumed, more than a

century after his death. The reason, it turns out, is that because of a paternity dispute, DNA tests upon his remains had been authorised. I wonder what the response across the Pacific would be, were it announced that, in similar circumstances, George Washington's remains were to be raised. The lack of public reaction in Australia to this recent announcement serves to highlight a contrast. Unlike the founders of the US Constitution, our 'Founding Fathers' are rarely celebrated as revered figures. It is my intention this evening to pay tribute to the work of one of these men- Sir Samuel Griffith. Griffith was the key figure behind the creation of the draft Constitution bill. This draft bill provided the substantive framework for the Australian Constitution. Griffith's contribution to the creation of the bill left an indelible impact upon the constitutional foundations of the nation. I should add that unlike Griffith, who in one of his few less than effective public performances, addressed the Parliament continuously for more than 7 hours, I intend to exercise substantially more restraint tonight.<sup>1</sup>

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<sup>1</sup> I am indebted to my Associate, Mr Ben Hay, for his substantial preparation of this paper.

## Biography

Griffith's life was one of remarkable public service. In 1872, he began a distinguished career in state politics. He was Attorney-General from 1874-1879, and eventually served two terms as Premier, from 1883 to 1888, and then from 1890 to 1893. He left politics in 1893 and became the third Chief Justice of Queensland, following Sir James Cockle and Sir Charles Lilley. Griffith filled that role until his appointment as the first Chief Justice of the High Court of Australia in 1903. He was variously described as a "lean, impatient idealist", and "a correct and cautious man". While some may have criticised him as arrogant and aloof, this would not be the first time that a prominent Australian statesmen was so described.<sup>2</sup>

What we regard as the definitive official portrait of Sir Samuel Griffith hangs behind me in this courtroom. It was substantially damaged when the previous courthouse was burnt down in 1968. The repair and conservation work was then undertaken by the renowned Australian artist, Sir William Dargie who also, incidentally,

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<sup>2</sup> Kay Saunders. 'Sir Samuel Griffith and the Writing of the Constitution' in J Macrossan, K Saunders, S Berns, C Sheehan and K McConnel, 'Griffith, the law and the Australian Constitution, 1998 (Royal Historical Society of Queensland: Brisbane, 22)

produced the portraits of Sir Harry Gibbs and Sir Dormer Andrews which hang here.

When the High Court established its courthouse in Canberra in 1980, the then Chief Justice of the High Court, Sir Garfield Barwick, asked the judges of this Court whether they would permit this portrait to hang in the High Court in Canberra, on the basis that since Griffith was the first Chief Justice of Australia, Canberra was its natural home. The judges of this Court graciously and quite properly declined, but generously themselves commissioned a copy of the work, by Sir William Dargie. The judges paid for the copy from their own pockets, and it is that copy which now hangs in the number 1 courtroom in Canberra. Now here is a difference of opinion.

There is no question that the portrait hanging in the High Court is a copy of this one. The two works appear virtually identical. We have always taken the view that this original is the work of the well respected, renowned Queensland painter (though of English birth) Godfrey Rivers. Indeed, this original is apparently signed by

(Richard) Godfrey Rivers, and the signature on this original bears an uncanny resemblance to Rivers' signature on "Under the Jacaranda" which hangs in the Gallery over the river- both as to script and colour.

I understand the Queensland Art Gallery does in fact share the view that Rivers produced this portrait. So does the Australian Dictionary of Biography, which records that "Rivers' portrait of the Gallery's – that is the Queensland Art Gallery's – founding President, Sir Samuel Griffith...hangs in the Supreme Court of Queensland."

Yet in the Oxford Companion to the High Court, a contributor, Mr John McDonald, former Head of Australian Art at the National Gallery of Australia, asserts that the copy portrait hanging in the High Court is a copy of an earlier work by Percy Spence (1868-1933).<sup>3</sup>

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<sup>3</sup> A Blackshield, M Coper & G Williams, 'The Oxford Companion to the High Court of Australia' Oxford University Press, 2001 at 32

I stand absolutely by the attribution to Rivers. Our claim is unassailable. I imagine the Oxford University Press will be contemplating a correction!

I must say that although I am personally much attached to this portrait for its judicial significance, I have to acknowledge Godfrey Rivers' most popular work is probably "Under the Jacaranda" which hangs in the Queensland Art Gallery. As you may have noted from what I read of the Australian Dictionary of Biography's acknowledgement, Griffith was the founding President of the Queensland Art Gallery, which may itself go to explain why Rivers produced this portrait.

That concludes my self-indulgent diversion!

### **Social context within which the draft bill of 1891 emerged**

To appreciate the significance of Sir Samuel Griffith's contribution to the Australian Constitution, one needs to understand the social context in which the draft bill was prepared. The 1890's in Australia was a decade of social and political turbulence. The great land

boom of the 1880's had given way, in 1891, to the Great Crash, a decade long depression marked by high levels of unemployment. The period also saw the shearers' and maritime strikes.

Widespread social hardship not only highlighted the inefficiencies of the colonies, it galvanised the federation movement. It was during this time that a new strain of Australian nationalism emerged. There were however those who remained wary of any push towards unification. Much of the scepticism stemmed from concern that the interests of the smaller colonies would suffer at the hands of their more powerful siblings. There were those who had become increasingly dependent, for a large part of their revenue, on customs duties levied on inter-colonial trade. Without customs barriers, there was the fear that local trade would suffer through competition with the larger colonies.<sup>4</sup> The sentiments of both sides were expressed in 1890, at an informal conference in Melbourne, held to discuss the federation movement. It was attended by various representatives from the separate colonies. From New South Wales, Henry Parkes was arguably the most influential figure at the conference, foreshadowing a draft resolution which, in general terms, declared federation to be an achievable goal.

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<sup>4</sup> The Honourable John Macrossan AC. 'The 1890 Federation Conference: Essential Precursor to the 1891 Convention'



Griffith, as one of the two Queensland delegates, took a more cautious approach. By the conclusion of the discussions however, he too was convinced that unification was a distinct possibility. Ultimately, the central conclusion of this conference was that it would be in the best interests of the Australian colonies to unify under the Crown. While there were no concrete determinations on the form the federation should take, a strong platform for change had been established.

### **1891 Australasian Federal Convention**

On 2 March 1891, the first Australasian Federal Convention met in Sydney. Sir Henry Parkes was elected President of the Convention, with Griffith as Vice President. Following the 1890 conference, which served as an important precursor to the 1891 Convention, a high degree of optimism attended the federation movement. As Griffith himself asserted, the purpose of the Convention was to create a bill that would provide a “broad and just foundation upon which a commonwealth may be established in the southern seas that will dominate those seas, of which any man may be proud to be

a citizen, and which will be a permanent glory to the British Empire.”<sup>5</sup>

In January that year, the Queensland newspaper the ‘Boomerang’ asserted, with reference to the up-coming convention, that “the year 1891 will, if we do not greatly misinterpret the signs of the times, form a turning point in the history of Australia.”<sup>6</sup> The Sydney Morning Herald exclaimed, in its coverage of the opening of the Convention, that “the momentous nature of this meeting...may well be described as marking an epoch in Australian history.”<sup>7</sup>

Representatives from each of the colonies, as well as New Zealand, were now meeting to consider how best to formulate a Federal Constitution. At the Convention three committees were established, the Constitutional Powers and Functions Committee, the Judiciary Committee, and the Finance and Taxation Committee. Griffith, as Vice President of the Convention, and leader of the Queensland delegation, also chaired the Constitutional Powers and Functions Committee.

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<sup>5</sup> Sir Samuel Griffith in

<sup>6</sup> Boomerang, 3 January 1891, p4.

<sup>7</sup> Sydney Morning Herald, 3 March 1891

## **Griffith's role at the 1891 Australasian Federal Convention**

On 23 March, after tireless rounds of negotiations, the Constitutional Committee reached a stage whereby, once the suggestions of the other committees had been finalised, the process of framing a bill could begin. The speed with which this process was completed stands as testimony to the leadership injected by Griffith. While there can be no doubting that most delegates were committed to the cause, the debates required the determination of a number of complex issues. Fundamentally, delegates had to consider how to facilitate a federal union of States which combined a constitutional monarchy and dependence on Britain, with the American scheme for division of legislative powers.<sup>8</sup>

In line with the reflections of Alfred Deakin, it was while involved in the development of this draft bill that Griffith "...was seen at his best."<sup>9</sup> On the evening of 23 March, Griffith began drafting the bill.<sup>10</sup> On 24 March, there was a full meeting of the Convention. Griffith delivered an address in which he proposed that the Convention be adjourned until 31 March. Later that day, the Constitutional

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<sup>8</sup> J A La Nauze, *The Making of the Australian Constitution*. Melbourne University Press, 1972 at 49

<sup>9</sup> Ibid

<sup>10</sup> Ibid, 48

Committee continued its deliberations, before appointing a drafting committee comprising Griffith, the Tasmanian Attorney-General Andrew Inglis Clark (a member of both the Constitutional and Judicial Committee), and Charles Kingston (a member of the Judicial Committee). That night, following discussions with the drafting committee, Griffith completed the first 'official' draft.

### **Sources relied on by Griffith when drafting the bill**

In drafting the bill, Griffith had access to a range of sources. Of course, the Canadian and US Constitutions were instructive. They adopted contrasting approaches. The Canadian model gave residual powers to the central government, whereas the US proceeded in the opposite direction.<sup>11</sup> A miscellaneous collection of extracts and documents compiled by Mr Thomas C Just, and a 'Manual of Reference' produced by RC Baker also helped outline principal points needing attention.<sup>12</sup> It appears however that it was Andrew Inglis Clark's draft bill which afforded Griffith the greatest guidance. That draft had 7 parts, containing provisions extracted from both the British North American Act and the US Constitution.<sup>13</sup>

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<sup>11</sup> J A La Nauze, *The Making of the Australian Constitution*. Melbourne University Press, 1972 at 27

<sup>12</sup> Ibid, 23

<sup>13</sup> Ibid, 23

While it has been described as a cut and paste effort, a fact Clark himself acknowledged, there is no doubting it was skilfully constructed.<sup>14</sup> Kingston also provided the Convention with a draft bill, but it was essentially a rearranged version of Clark's, with some additions reflecting his stance as a radical democrat.<sup>15</sup>

## **The drafting process**

It appears that Griffith put Kingston's draft aside, and began by marking the clauses in Clark's draft which were most relevant. Indeed, for his contribution, it is generally accepted that Clarke did not receive the recognition he deserved. Griffith then proceeded to make some minor adjustments to include recommendations of the committees, as well as drafting some entirely new provisions. This was not an easy task. As La Nauze points out, Griffith still had to draft the new, substantial clauses, to scrutinize and adjust the wording of the whole text, and to give the Constitution its permanent form.<sup>16</sup> As an example of these difficulties, Griffith faced the considerable challenge of expressing, in suitable legal technology, the Finance Committee's detailed recommendations on the

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<sup>14</sup> Ibid, 26

<sup>15</sup> Ibid, 26-27

<sup>16</sup> Ibid, 75

distribution of surplus revenue.<sup>17</sup> Eventually, on the evening of 24 March, Griffith sent the first draft of the bill to the drafting committee. That committee undertook further revisions the following day, and again on 26 March, following recommendations from the Constitutional Committee.

The final changes to the 1891 draft were made aboard the Queensland Government's Steam Yacht *Lucinda*. At the invitation of Griffith, the drafting committee and several other delegates joined together for a cruise down the Hawkesbury River. Clarke, who had come down with influenza, was unable to attend. While there were few substantive variations to the text, some important corrections were made to ensure technical precision and clarity of expression. As La Nauze observed, reflecting on the state of the bill, "as English prose, appropriate for its dignified yet technical purpose, the evolving text of the Constitution was at its best after the *Lucinda* revisions."<sup>18</sup> Eventually, when the Convention re-convened on 31 March, Griffith introduced the first official draft of the Australian Constitution. While six sitting days followed, no major changes were made. The draft bill was eventually adopted by the National

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<sup>17</sup> J A La Nauze, *The Making of the Australian Constitution*. Melbourne University Press, 1972 at 50

Australasian Convention on 9 April 1891, signed by Sir Henry Parkes, and the Secretary of the Convention, FW Webb.

The drafting in the so-called 'upper deck gentlemen's smoking room' of the QGSS 'Lucinda' on Refuge Bay during Easter 1891, is commemorated in the replication of that smoking room in the public corridor outside. That was a Centenary of Federation project which has been of considerable interest to visitors, especially the thousands of school students who annually pass through these precincts- as visitors. To be precise, last year the students numbered 8,553.

You will also be interested to know that our Supreme Court Library's heritage collection includes hand-written Counsel's opinions provided by Sir Samuel Griffith, when at the bar, to leading solicitors' firms Feez Ruthing & Co. (now Allen Allen & Hemsley), and Flower and Hart. I am pleased to note the former senior partners of those firms, Mr Ken McDonald and Mr Max Lockhart, are present this evening.

## **Significance of Griffith's Contribution to the Draft Bill**

Now Griffith himself acknowledged that “the bill was not the work of any one man. It was the work of many men in consultation with one another...The first draft of the Bill proposed in Sydney was criticised in every detail by a small committee, consisting of Messrs Barton, Clark, Kingston and myself...To all of those gentlemen is due credit of whatever work was done in the preparation of the bill, and I am glad to have the opportunity of saying so publicly here today”<sup>19</sup>.

The purpose of my paper this evening is not to attribute single ownership of the drafting of the bill. The contribution of those delegates, especially Clarke, who were involved in the creation of the draft bill of 1891 cannot be underestimated. It is equally important however, to acknowledge that this was a remarkable achievement for Griffith, who in little under one month, had presided over the creation of a bill which was to provide the substantive political and legal framework for the unification of the colonies.

Alfred Deakin wrote in 1898, when reflecting on Griffith's contribution, that “there were few, even in the mother country or the

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<sup>19</sup> Griffith in La Nauze, 76



United States who could have accomplished such a piece of draftsmanship with the same finish in the same time.”<sup>20</sup>

## **The Second Australasian Federal Convention 1897-1898**

A second draft bill was drawn up during the second Federal Convention, which opened in Adelaide on 22 March 1897, and met for a second session in Sydney in September that year. The delegates met finally in Melbourne from January 1898 for two months. Because of his appointment in 1893 as Chief Justice of Queensland, Griffith was precluded from attending this Convention. While there were amendments made to the 1891 draft, there were very few substantive changes. For this reason, it is not necessary to discuss the second Federal Convention at any length. It is however worth acknowledging that although Griffith's judicial appointment prevented him from having any direct input, he remained an influential behind the scenes guardian of his 1891 draft bill.<sup>21</sup> He strongly criticised the attempts to re-draft the judicial clauses found within the 1891 draft, and often gave advice to delegates on a range of drafting issues. Following the conclusion of the second

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<sup>20</sup> Deakin in J A La Nauze, *The Making of the Australian Constitution*. Melbourne University Press, 1972 at 75

<sup>21</sup> Dr John Williams, 'Samuel Griffith and the Australian Constitution: Shaking Hands with the New Chief Justice, (1999) 4 *The New Federalist*, 37 at 39.

Federal Convention, the framework which had been established by the 1891 draft bill remained largely intact.

### **Griffith's role in the clause 74 compromise**

Griffith's connection with the drafting of the Constitution continued even after the end of the second Convention. Following ratification by the colonies (except Western Australian) the Bill was presented to the Westminster Parliament. For the unification of the separate colonies to be formalised, the Australian Constitution needed the authority of Imperial legislation. If the terms of the proposed Constitution were not acceptable to the Imperial Parliament, then there was the possibility a different model may be forced upon the colonies. Clause 74 of the draft Constitution provided that there should be no appeal to the Queen in Council in any matter involving the interpretation of the Constitution, or of the Constitution of a State, unless the public interests of some part of Her Majesty's Dominions other than the Commonwealth or a State were involved. Subject to that qualification, there was to be a right in the Judicial Committee of the Privy Council to grant special leave to appeal from the High Court to the Privy Council, but the Commonwealth Parliament was to have power to make laws limiting the cases in

which such leave might be sought.<sup>22</sup> The Colonial Secretary of the UK, Joseph Chamberlain, was strong in his opposition to this clause. What ultimately resulted was a compromise in which Griffith played a substantial role. In October 1899, in his capacity as Chief Justice and Lieutenant Governor of Queensland, Griffith wrote directly to Chamberlain, inviting those representatives of the Imperial Parliament to “[perfect] this most important instrument of government.” Ultimately, a compromise was reached with no appeals on any question as to the limits inter se of the constitutional powers of the Commonwealth and the States, or as to the limits inter se of the constitutional powers of the States, unless the High Court should certify that the question was one which ought to be determined by the Privy Council. Subject to that exception, there was to be a right of appeal by special leave from the High Court to the Privy Council, but the Commonwealth Parliament was to have power to make laws limiting the matters in which such leave might be sought.<sup>23</sup>

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<sup>22</sup> J A La Nauze, *The Making of the Australian Constitution*. Melbourne University Press, 1972 at 303

<sup>23</sup> The Hon Chief Justice Murray Gleeson AC ‘The Birth, Life and Death of Section 74’ (speech delivered at the Fourteenth Conference of the Samuel Griffith Society, Menzies Hotel, Sydney, 14-16 June 2002)

Some were upset by this compromise. It is important however, to place any criticism in proper context. It cannot be allowed to overshadow the remarkable contribution Griffith made to the Federation movement. As previously acknowledged, if a suitable compromise had not been reached, there was the very real risk the whole movement might be derailed. While some may argue Griffith had made an unnecessary concession to the Imperial Government, I am of the view that he was acting reasonably for the legitimate purpose of ensuring the safe passage of the Constitution. Such a compromise was necessary to secure the political survival of the Bill. As Deakin summarised, Griffith in effect provided a “golden bridge over which the delegates passed to union.”<sup>24</sup> The *Commonwealth of Australia Constitution Act* was enacted by the British Parliament in 1900. It came into effect in Australia on 1 January 1901.

## Conclusion

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<sup>24</sup> Alfred Deakin, ‘And be one people’: Alfred Deakin’s Federal Story, (Melbourne, Melbourne University Press, 164)

As Henry Parkes famously stated at the 1890 Melbourne Convention, any barriers to federation could be overcome by the “crimson thread of kinship that runs through us all”. That being said, this thread of kinship did not in itself guarantee that the separate colonies would naturally progress towards unification. The success of the Federation movement relied heavily upon the cumulative efforts of those men and women who worked tirelessly towards the union of the States. To solidify the sentiments of the Federalists, a Constitution was needed as the bedrock for a unified Parliamentary and legal system. Griffith’s lead role in the creation of the 1891 draft Bill, and his subsequent guardianship of it, provided the platform upon which the Constitutional foundations of this nation were built.