Chapter Three

Sir Samuel Griffith and the Making of the Australian Constitution

The Honourable Justice J. D. Heydon

Julian Leeser explained earlier the reasons why tonight's topic has been chosen. There is another reason why it is apposite. It emerged this morning.

Shakespeare's play, *Macbeth*, is thought by actors to be unlucky. They think that whenever it is performed something goes wrong. So they commonly call it, not *Macbeth*, but "the Scottish play". By that grey and vague expression they hope to dilute unpleasant associations and avert unforeseeable perils. For the same reason there is a recent case which was much discussed this morning which will be called below only "this morning's case". There are two things to be said about it.

The first concerns the fact that this morning's case was suggested to be a great friend to federalism. Every time it was mentioned a warm purr of pleasure rose up around the room. It may actually be a grave error to treat it as a friend to federalism. There may be reason to think that it is actually the greatest threat to federalism since the *Engineers* case. It may be that the plaintiff, and the State solicitors-general whose arguments succeeded in this morning's case, whether they realised it or not, are in the same position as the Japanese when they attacked Pearl Harbour: they have woken up a drowsy tiger which will take a grim and terrible revenge. This morning reference was made to a remark by Alfred Deakin – whose glittering career is very prominent in our history, but contains some regrettable deeds and utterances – which is quoted in this morning's case but is open to question: "wherever the executive power of the Commonwealth extends, that of the States is correspondingly reduced". It is questionable because s 109 of the Constitution suspends the validity of State legislation which is inconsistent with Commonwealth legislation. But there is no s 109A suspending the validity of State executive action, or State legislation, in the face of Commonwealth executive action.

With that gnomic utterance, I turn to the second point. The majority construction of the Constitution given in this morning's case, taken at its simplest, is completely inconsistent with what Sir Samuel Griffith, at the 1891 Convention, explicitly said was its construction. A famous judge of the early 14th century, Bereford, CJ, on hearing counsel propound a construction of a statute which Bereford, CJ, had drafted, said menacingly: "Sir, do not gloss the statute. We know better than you, for we made it." To use an expression which Ian Callinan used this morning, it was shocking to hear a case praised which states a construction of the Constitution flatly contradictory of the opinion of the man who made it – the man after whom this Society is named. Griffith is no longer treated in the Court he presided over as an authority on the meaning of the very words in the Constitution he drafted. Any doctrine of "original intent" or "original meaning" in construing the Constitution thus now appears to be dead. That means that Griffith has moved from legal doctrine into legal history.

The Constitution was a creature of the 19th century. The 19th century was an age of nationalism. In many ways nationalism was a destructive force. It gravely weakened

both the Hapsburg and the Ottoman empires, with terrible consequences for the world. It fostered a dream of unification – the unification of nations, sub-continents, half-continents and continents. In some respects the dream was self-contradictory. In many places the dream was unfulfilled. Bolivar spent his life unsuccessfully trying to unify South America: he said it was like ploughing the sea. In Africa the attempt was not even made. China was actually breaking up. In some places appalling force had to be employed – in Russia to acquire the lands of disparate nationalities; in the United States to keep them together. In India, British military power and diplomatic skill from Clive to Curzon created a unity which not even the Mughals could achieve, and which had not existed since the time of the great Emperor Ashoka three centuries before Christ. After a series of engineered wars, Germany and Italy attained unification in 1870. Only Canada, in 1867, and ourselves, in 1901, achieved continental unity by non-violent means. As Lorraine Finlay said in her paper, our Constitution did not come out of any revolution, or any dark moment like a civil war.

In our fortunate and peaceful, but not easy, path to unification, the life of Sir Samuel Walker Griffith is one bright thread. He was born at Merthyr Tydfil, Wales. He was the son of a Congregationalist Minister. The family came to Australia in 1854. They lived in Ipswich, Maitland and Brisbane. Griffith left Brisbane to enter the University of Sydney in 1860. He was 15 years old. In 1863, he completed a Bachelor of Arts degree with first class honours in mathematics and classics. Then 18 years old, he applied to be Headmaster of Ipswich Grammar School. This event is but one manifestation of the powerful ambition and self-confidence which marked his whole career. The application failed, and he became an articled clerk and studied law.

In 1866, he undertook a "grand tour" of Europe. He visited England, France, Switzerland, Germany, Belgium and Italy. He was in Italy just before the start of the Austro-Prussian War – a key event in German and Italian unification, and Bismarck's second war of aggression. That crafty Prussian statesman will re-enter our story some years later. That Italian visit began Griffith's life-long interest in the Italian language and in Italian literature.

In 1867, he completed his articles. After passing the examinations, he was called to the Bar. He was the 26th practising barrister in Queensland in order of seniority. He started slowly. But by 1870 his practice became busy. That year, he married and obtained a Master of Arts degree from the University of Sydney.

In 1872, he was elected to the Queensland legislature. He quickly came to prominence. In 1874, he drafted a long private member's bill on insolvency. After some vicissitudes in the Legislative Council, it was enacted. It remained law until superseded by Commonwealth legislation 50 years later. That was a significant achievement for so junior a member of Parliament.[1] He drafted other legislation as well.[2] It was valuable training for his great drafting achievements of the 1890s. In 1874, he became Attorney-General. He also took on the Education and Public Works portfolios in 1876 and 1878 respectively. In these offices he continued to draft legislation. In 1876, he took silk. He worked extremely hard at his double career. He was disappointed at not becoming Premier in 1877, though he was still only 32. In 1879, he refused appointment to the Supreme Court of Queensland. In the same year, the ministry fell, and he was elected Leader of the Opposition. He was the Leader of the Liberal Party for his remaining 13 years in politics.

At this point, Bismarck, now Chancellor of a united Germany, enters the federation

story. It is still unclear whether Bismarck himself favoured colonial expansion. On being urged to expand in Africa, he said, pointing to a map of Europe: "On the left is France. On the right is Russia. Here we are, in the middle. That is my map of Africa." There is no equivalent anecdote about Bismarck's map of Papua, but Queenslanders became worried about German occupation of Papua, whether Bismarck himself favoured it or not. The Premier of Queensland, Sir Thomas McIlwraith, attempted to annex the non-Dutch half of Papua to forestall the Germans. The Colonial Secretary, Lord Derby, repudiated that action on the ground that "no colony could be permitted to enlarge the Empire in this spontaneous fashion".[3] Because of McIlwraith's conduct, Alfred Deakin described him as "perhaps the most masterful political leader of the continent."[4] Deakin also compared Griffith to McIlwraith in these words: "Sir Thomas was a man of business, stout, florid, choleric, curt and Cromwellian; Griffith, the leading barrister of his colony, was lean, ascetic, cold, clear, collected and acidulated."[5]

In 1883, Griffith defeated McIlwraith in a general election and became Premier. He went at once to an Inter-colonial Convention in Sydney. According to Deakin, it met because of "[d]read of German aggression in New Guinea and of a French annexation of the New Hebrides coupled with the alarm occasioned by the arrival of escaped criminals from the penal settlement in New Caledonia".[6]

The 1883 Convention marks the first contribution Griffith made to the framing of the Constitution. He proposed a motion to create a Federal Australasian Council. The motion passed. He then drafted the Bill which the Imperial Parliament later enacted as the *Federal Council of Australasia Act* 1885. While New South Wales and New Zealand did not join the Federal Council, the other Australian colonies and the Crown colony of Fiji did. The Council had two representatives from each participating colony, though the South Australian representatives had only a brief tenure. Since New South Wales, and, for most of the Council's life, South Australia, were not members, the participating colonies were not contiguous, but were separated by the sea or by non-members.

The Council met eight times between 1886 and 1899. It had legislative power. In this, it was like the modern Senate. But it shared no legislative power with a directly elected lower house. Its decisions were not enforceable by the power of any executive responsible to it. Under section 31 of Griffith's Act, any colony could secede. And one member of the Council, Fiji, did not enjoy responsible government. The Council's legislative power depended on the assent of the Governor of the colony in which the Council was sitting. There was vice-regal power to reserve Bills for signification of Her Majesty's pleasure or to assent subject to amendments being made.[7] Deakin said of this Act:

> Unique as the platypus, like that extraordinary animal it is a perfectly original development compounded from familiar but previously unassociated types. It remains singular even among all the brood of local Governments of which the House of Commons has been the prolific parent.[8]

Deakin also said of the Federal Council:

> How far it has travelled from the customary British model may be gathered from the circumstance that it transacts its business without a Ministry or a department, without a leader or an Opposition, without a party or a programme, that there is no necessary continuity of representation, or similarity in the mode of appointment of representatives, or fixed area within which its legislation has force, that it is vagrant in domicile, and without a roof to shelter it, without a foot

of territory to rest upon, without a ship or a soldier to protect it, without a single man in its service, or a shilling of its own to pay one.[9]

It was thus very different from the post-1901 Commonwealth. But it looked forward to section 51 of our Constitution in certain respects. Section 15(a)-(f) and (h) of the 1885 Act granted the Council powers similar to those granted to the Commonwealth by section 51 – (xxx), (xxviii), (x), (xxiv) and (xxxvii) (that is, using s 51 terminology, relations with the islands of the Pacific, the influx of criminals, fisheries in Australian waters beyond territorial limits, the service and execution of process and judgments, and powers referred to the Commonwealth legislature by a State legislature.)

On the strength of the fisheries power, Deakin made the perhaps technically correct but exaggerated claim that the Council had been "endowed with an extra-territorial sphere of legislation wider than that conceded to Canada, or, indeed, to any other local Government under the Crown."[10] But the Council had further powers. Section 15(h) gave the Council power over any matter which, following a request by the colonial legislatures, the Queen by Order in Council thought fit to refer to it. Section 15(i) gave the Council a wider legislative authority still. It granted power over matters referred by the legislatures of two or more colonies. Those matters corresponded completely or to some degree with the following placita in section 51 – (vi), (ix), (xviii), (xvi), (xv), (xxi), (xxii), (xix) and (xx). That is, they included or foreshadowed the powers relating to defence; quarantine; intellectual property; bills of exchange and promissory notes; weights and measures; marriage and divorce; aliens; and corporations.

There was one power in the 1885 Act which was not replicated in 1900: a power to legislate on "any other matter of general Australasian interest with respect to which the legislatures of the several colonies can legislate within their own limits, and as to which it is deemed desirable that there should be a law of general application". If that vague power had been transferred into the Constitution, and made available to federal politicians with an appetite for the centralisation of government – of specific names it is tactful not to speak – this country would by now have ceased in large measure to be a federation.

The Council's actual legislative achievements, though far from negligible, were not large. Like the Confederation of the American ex-colonies before 1789, it was only an indirect precursor of federation. But in some of its underlying conceptions the 1885 Act was a significant dummy-run for the approach the Constitution takes to the distribution of legislative power in a federal system.

In the course of Griffith's career as Premier of Queensland after 1883, one event took place with some significance for his constitutional work. Griffith was, de facto, the senior Australian representative at the 1887 Colonial Conference in London.[11] That role confirmed him as a prominent advocate of a federated Australia within the Empire. On that visit he also travelled to the United States. There Griffith had dealings with Mr Justice Field of the United States Supreme Court and his brother, a celebrated codifier.

In 1890, although New South Wales was not a member of the Federal Council, its Premier, Sir Henry Parkes, organised an informal meeting of the colonies to discuss a closer union. Among those he consulted were Griffith and McIlwraith. The informal meeting took place in Melbourne in February 1890. Griffith was by then again the Leader of the Opposition in Queensland. He addressed the meeting on the *British*

North America Act 1867 (Imp). That Act had created a federal system of government in Canada. In relation to legislative power, the Canadian federation and its United States counterpart reflect different approaches. In Canada, specific powers were given to the provinces, other specific powers were given to the central government, and the balance were given to the central government.[12] In the United States, specific powers were given to the central government and the balance to the States. In that respect, our Constitution was to follow the United States model. But in his address Griffith pointed out how extensive the powers left to the central government in Canada were. His enumeration of them finds many counterparts in section 51 of our Constitution.

In August 1890, Griffith became Premier of Queensland for the second time. He succeeded in defeating a proposal by J. M. Macrossan, his colleague at the February 1890 meeting, for the separation of North Queensland from Queensland. In November, Griffith proposed instead that Queensland be divided into three provincial legislatures. He drafted a constitution for this sub-federated Queensland. The central legislature for this body was called the "Legislature of the United Provinces" – a romantic name, whispering echoes of the Dutch struggle against the tyranny of Spanish kings, with their dwarves, buffoons and dogs. It was given many of the powers of the Canadian central legislature. That draft constitution was Griffith's second dummy-run at drafting a federal constitution. The idea of sub-federating Queensland survives in the Constitution of 1900. Section 7 permits the Queensland legislature to divide the State into divisions and determine the number of Senators for each division. But in 1890 Griffith's proposal for a Federal Constitution of Queensland was defeated.

Having reached the end of 1890, it is convenient to pause. Griffith's life was to witness many further distinguished achievements. One was his drafting of the *Defamation Act* 1899 (Qld). Another was his drafting of the *Criminal Code* 1899 (Qld), which was copied in many parts of Australia, all over the British Empire, and later in some Commonwealth countries. Another was the drafting of the *Judiciary Act* 1903 (Cth). Yet another was his outstanding judicial career. But, as 1891 dawned, Griffith's greatest days were about to arrive. His colony had grown quickly since its separation from New South Wales in 1859. The population of Queensland was approaching 500 000. The population of Brisbane was about to reach 100 000.[13] He was an experienced Premier, toughened by the youthful boisterousness and vitality of local politics. He had had two experiences of constitutional drafting, in 1885 and in 1890. At the age of 45 he was in the prime of life. He had seen men and cities. He enjoyed a high reputation across the continent. His intellectual powers were at their peak.

Some people like to speculate on what the most crucial period in Australian history was. One candidate is the period in which the First Fleet reached Port Jackson just before Admiral La Perouse. Another is the autumn of 1942, with its vital naval victories. But a candidate which is not contemptible is the period 2 March to 9 April 1891. Those five weeks saw the 1891 Constitutional Convention produce the 1891 draft of the Constitution. And the most crucial days in that period were the three days from 23 to 25 March. In those three days Griffith, in an astonishing spurt of creativity, working late into the night, single-handedly produced the draft off which he and others thereafter worked.

There are two key groups of records which reveal the events of that five week period. First, Griffith himself collected various documents so as to record the genesis of the 1891 draft. That collection is called *Successive Stages of the Constitution*. It was

bound and now lies in the Mitchell Library, part of the State Library of New South Wales. It was not a complete collection of the relevant documents, but it has remarkable value. Griffith organised and numbered the 18 most important of them. Many of them contained detailed annotations and amendments in Griffith's handwriting.[14] In 2005, John Williams published a facsimile reproduction as part of a larger work. The second group of records is the Convention Debates for 1891. Those debates were recorded over 964 pages, and Griffith participated in them extensively.[15]

What were the key events of the 1891 Convention?

On 6 February, the Attorney-General for Tasmania, Andrew Inglis Clark, circulated a long memorandum to the delegates to the Convention. The Convention was to begin meeting on 2 March. Clark's memorandum contained a draft Constitution of 96 clauses. All but eight of them are in our Constitution in some form today. Clark greatly admired the United States, and frequently corresponded with Americans. He had both corresponded with and met the famous Mr Justice Holmes. Clark was a republican, but his draft did not depart from the monarchical model.

One of the South Australian delegates was Charles Kingston. His personal life was of a type to be euphemistically described as "untidy". But Kingston was an energetic and capable man. When he received Clark's draft Constitution, he prepared a draft of his own. He was a radical democrat. Though his draft preserved monarchical forms, it provided, for example, for the use of the referendum process to veto federal bills.

On 2 March, the Premiers, together with Clark, attended a meeting in Sir Henry Parkes's office. Parkes propounded some short and general resolutions. Their vagueness disturbed Clark, who suggested to Griffith the need for greater precision.

When the Convention met later that day, Parkes was elected President, and Griffith Vice-President. Parkes's age and his infirmities prevented him playing a major role at the Convention. In all but name, the presidential role was assumed by Griffith. There were many able speeches on the road to federation, from Parkes's Tenterfield speech to Chamberlain's speeches in the House of Commons in the summer of 1900.

One of the ablest was delivered by Griffith on 4 March. He wisely diverted the attention of delegates away from soaring and misty rhetoric, and towards mechanical legal questions. In a tone of mildly pessimistic realism, he reminded delegates of the need to concentrate hard-headedly on the real problems which the Constitution had to solve. What legislative powers should the Federal Government have? What powers should the Senate have in relation to money bills? Should Privy Council appeals be retained? One of his points was that the essential condition of the Constitution should be:

> the separate states are to continue as autonomous bodies, surrendering only so much of their powers as is necessary to the establishment of a general government to do for them collectively what they cannot do individually for themselves, and which they cannot do as a collective body for themselves.[16]

What those powers might be, of course, is a controversial question. Another point was his opposition to Parkes's idea that "the lower house [should] have the sole power of originating and amending all bills appropriating revenue or imposing taxation". Griffith said that that was "quite inconsistent with the independent existence of the senate, as representing the separate states."[17] A third point was his contention that it was not necessary for responsible government that Ministers sit in parliament.[18]

On 18 March, the Convention resolved to set up three committees. One was a

Finance Committee to deal with "finance, trade and trade regulation". A second was a judiciary committee, to deal with the establishment of a federal judiciary. These two committees were to report to a third committee – the "Constitutional Committee", which was to draft the Constitution. On 19 March Griffith was elected Chairman of the Constitutional Committee. It was a strong committee containing four Premiers, three former Premiers and at least four outstandingly able lawyers – Griffith, Edmund Barton, Clark and Deakin. On 23 March, after days of debate, the Constitutional Committee decided to set up a drafting committee – Griffith, Clark and Kingston, to whose number Barton was later added.

A committee is a highly inefficient instrument of drafting unless it has a precise document to concentrate on. Griffith therefore made a wise decision. On the evening of 23 March, he began to draft a Constitution by himself. Apart from earlier decisions of the Constitutional Committee, he had the draft reports of the Finance and Judiciary committees, and the drafts of Clark and Kingston. He appears to have worked principally from Clark's draft. On 24 March, Griffith spent the day in discussions with other delegates, including a formal meeting of the Convention for an hour. He spent the evening in drafting. He sent a draft Constitution to the printer at 11pm. On 25 March, he continued drafting. He met Clark and Kingston for lunch, after which he worked until 11pm. Throughout this process one must visualise messengers from the printer running back and forth to collect Griffith's changes and deliver new proofs.

There is one thing to be stressed. Griffith received a little organisational assistance from the Clerk to the Convention. But there were no focus groups, no research papers, no staffers, no public servants, no secretaries, no proofers, no parliamentary counsel, no research assistants. A determined and able man simply picked up his pen, examined his colleagues' models, and wrote.

On 26 March – Maundy Thursday – Griffith presented the resulting draft to the Constitutional Committee on a basis of confidentiality.

The Queensland Government owned a steam yacht, the *Lucinda*. It had been brought to Sydney for Griffith's use during the Convention. On the morning of Good Friday, 27 March, Griffith, without the influenza-stricken Clark but with Barton, Kingston and others, went on a cruise up the coast to Broken Bay and the Hawkesbury River – still a place of extraordinary and almost unspoiled beauty. They struck bad weather and suffered seasickness. But they nevertheless worked on Saturday 28 March from 10am to 11pm. On 29 March, they returned to Sydney to collect Clark. At 9pm, the result of the weekend's work was sent to the printer.

The document sent to the printer reflects a great deal of redrafting on the *Lucinda*, much of it attributed to Kingston.[19] But there were few major substantive changes. On 30 March, the revised draft of the Constitution was to hand. Griffith, now himself suffering from influenza, began proofreading it.

On the same day, the Constitutional Committee considered the draft from 10am to 10pm. Griffith's marked up copy was then taken to the printer. On 31 March, in the afternoon, Griffith presented the Bill to the Convention, clause by clause, highlighting difficulties and predicting controversies. It was not radically changed during the debates of the ensuing days. Of the Bill, Deakin remarked: "as a whole and in every clause the measure bore the stamp of Sir Samuel Griffith's patient and untiring handiwork, his terse, clear style and force of expression."[20] And Deakin said that Griffith's "demeanour when in charge of the Bill in Committee before the whole

Convention was almost unimpeachable in temper, courtesy and consideration."[21] The Convention approved the 1891 draft on 9 April.

The fundamental characteristics of the 1891 draft survived thereafter. The 1891 draft and all later versions of the Constitution created a compromise between two models. One was the model of a constitutional monarchy involving representative and responsible government formally dependent on Great Britain. The other was the United States model: a federal compact containing an enumerated allocation of legislative powers to the central government. Like both models, the compromise involved a bicameral legislature. In similar fashion to the United States, the system was regulated by the judicial power of the Commonwealth, which gave the courts, in particular the High Court, the power to invalidate unconstitutional action. The Constitution in its final form provided for some individual rights.[22] But it contained no general bill of rights.

It is instructive to go back to the last two points from Griffith's speech of 4 March which were identified earlier. As to the powers of the Senate over money bills, Griffith had abandoned his position by the time of the 24 March draft.[23] There was no material change in the final draft of 1891, or indeed in section 53 of the Constitution itself. Clark's draft had adopted a similar position to that of Griffith in his 4 March speech.[24] Kingston's draft was much more like the present section 53.[25] His may have been the influence which persuaded Griffith to change his mind. As for Ministers sitting in Parliament, the final 1891 draft provided that until Parliament otherwise provided, no more than seven Ministers could sit in Parliament.[26] That reflected Griffith's 24 March 1891 draft.[27] The Constitution itself in section 64 now prevents a Minister from holding office for more than three months unless a member of Parliament. That was the position adopted in Kingston's draft.[28] It was also part of the 1898 draft.[29] These developments reveal two things. They reveal that it is not Griffith and Clark alone who can be said to have framed the Constitution. They also reveal in Griffith a statesmanlike willingness to compromise, or perhaps an acute sense of pragmatism. He was not like the Abbé Sieyès in the French Revolution. He was not dedicated to the theoretical devising of formally elegant but, in fact, fragile systems. Nor did he mulishly seek primacy for his own views. He wanted progress towards a practical consensus.

It would be wearisome on this occasion to trace in detail any further differences between the Clark and Kingston drafts, and Griffith's pre-*Lucinda* draft, or to consider the later drafts, and compare them with the draft which the Convention approved on 9 April 1891. It would also be wearisome to trace the differences between the 1891 draft, the 1897-1898 drafts, and the final version of the Constitution. It is enough tonight to note five major insertions that took place after 1891.

The first two concerned the list of Commonwealth legislative powers in Ch I Pt V cl 52 of the 1891 draft. Clause 52 did not include what became section 51(xxxi) – which empowers the Commonwealth to make laws for the acquisition of property for any purpose in respect of which it has legislative power, but only on just terms. And the 1891 draft did not include what became section 51(xxxv) – which grants to the Commonwealth power to make laws with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State. Section 51(xxxi) is a vital check on federal power. Hayek saw this kind of limit as indispensable to justice. Hayek also saw it as a method of ensuring that

administrators, too prone to addressing short-term advantages only, are made to concentrate on the true cost of particular legislation.[30] Like section 51(xxxi), section 51(xxxv) was inserted in 1898. The origins of the latter provision can be traced to Kingston's draft. In 1898, Richard O'Connor opposed it on the ground that the topic was fitter for State control. On the other hand, H. B. Higgins favoured a wider power, dropping the interstate requirement.[31] Like the field to which it applies – the relations of labour and capital – the placitum itself has been controversial.

The third major insertion was the provision in 1897 for double dissolution elections to resolve deadlocks between the Houses of Parliament. This insertion, as modified by the Premiers' Conference of 1899, became section 57 of the Constitution.

The fourth major insertion was the inclusion by the Premiers' Conference of 1899 of what became section 96 of the Constitution. It concerned grants by the federal legislature of financial assistance to the States. It is, of course, a provision now very commonly acted on.

And the fifth change after 1891 to be noted, probably a change less important than the others, was the development of the provision relating to Privy Council appeals.[32]

Subject to other changes made in 1897-1898, it is true to say, as J. A. La Nauze said, that the "draft of 1891 is the Constitution of 1900, not its father or grandfather."[33] Like Griffith's contemporaries, La Nauze considered that the major force behind the 1891 draft was Griffith. For his own part, Griffith praised Clark's draft as laying the "original groundwork", and praised as well the drafting of Barton and Kingston.[34]

Griffith became Chief Justice of Queensland in 1893. In modern times it is thought right that Chief Justices should abstain from the political fray. Griffith did not act on the view. He still had three main roles to play in the framing of the Constitution.

The first is that he remained a pillar of the federalist movement, displaying near-constant activity in speeches, writing and private influence.[35]

The second concerned the 1897-1898 Convention. He corresponded with many delegates to that Convention. He made detailed drafting suggestions to R. R. Garran, Secretary of the drafting committee. La Nauze had observed: "it is fitting that the final form of the Constitution contains not only much of Griffith's text of 1891, but his lofty corrections of the words of the later and lesser draftsmen of 1897."[36] In June 1897, Griffith published an assessment of the work of the Adelaide Convention: *Notes on the Draft Federal Constitution framed by the Adelaide Convention of 1897*. Of his criticisms and expressions of regret, only those of contemporary significance need be noted. He doubted whether it was wise for Senators to be directly elected, and for each State to be recognised as a single constituency. He preferred the 1891 draft as leaving it open for Ministers not to be members of Parliament. He questioned the formulation of section 92, which required, and requires, that trade, commerce and intercourse between the States should be "absolutely free". He raised this question even though it was his own formulation. It is a sign that he pondered difficult problems, constantly and without complacency.

Griffith's third role took place during the period between despatch to London of the draft Constitution approved by the colonial legislatures and by referenda, and the enactment of it by the Westminster Parliament on 9 July 1900 in slightly different form. On 19 October 1899, Griffith informed Joseph Chamberlain, the Secretary of State for the Colonies, that he "had reason to believe that the people of these Colonies would gratefully welcome any suggestions that may be made by Her Majesty's advisers with

the view of perfecting this most important instrument of government."[37] This showed a certain nerve. As Chief Justice Gleeson remarked to this Society 10 years ago, the "confidential solicitation of suggestions to 'perfect' a Constitution that had been drafted in Australia, approved by the colonial Parliaments, and then agreed to by popular referendum, by someone who had been a leading figure in the federal movement, and who was now outside politics, is worth reflecting upon."[38] Apparently with Griffith's approval, Chamberlain suggested the sending of delegates from the colonies to confer with him and his officials.[39] A Premiers' Conference agreed that each colony should appoint a delegate. Those delegates were instructed to press for the passage of the draft Constitution without amendment. This collided with any moves towards "perfection" by British officials or by august Australians like Griffith. Griffith's principal objective was to amend the version of section 74 sent to London to provide for wider rights of appeal to the Privy Council. Indeed, Griffith advocated rights of appeal which were wider than those in the version of section 74 he had favoured in the 1891 draft. The delegates in London defended the version which had been approved in the colonies. Griffith shifted ground a little. He rallied behind the compromise Chamberlain made with the delegates. And he suggested various drafting changes that are reflected in the final form of section 74.

When Chief Justice Dixon was sworn in in 1952, he referred to the debating style of the Griffith court, in which "arguments were torn to shreds before they were fully admitted to the mind".[40]

Chief Justice Dixon's bitter-sweet retirement speech in 1964 was kinder. He said that Griffith and Clark were "probably the two dominant legal figures" in the 1891 Convention. He also said that "the Constitution owes its shape more to them, probably, than anybody." Speaking as a former barrister with nine years' experience of Chief Justice Griffith as a judge, Sir Owen Dixon said that in court Griffith revealed:

> a dominant legal mind. To my way of thinking, it was a legal mind of the Austinian age, representing the thoughts and learning of a period which had gone, but it was dominant and decisive. His mind clearly was of that calibre: he did not hesitate, he just felt that he knew; and that what he knew was right.[41]

The impression which the first Chief Justice of the High Court gave to the young barrister who became its sixth Chief Justice is an impression also to be gathered from his work in helping to frame the Constitution. In that role, however, he seemed to reveal more tact, patience and suppleness than he later did as Chief Justice. But whatever his methods in developing the Constitution, it was the greatest work of an outstanding lawyer and a formidable personality. No doubt if Griffith had never lived, there would still have been a form of federation among the Australian colonies. But without the urgent impetus of his dominant and decisive mind the federal enterprise of the 1890s might have wallowed listlessly, helplessly and unproductively. It might have turned out very differently.

Endnotes

1. Paul Sayer, "Griffith and his Insolvency Bill" in Michael White and Aladin Rahemtula (eds), *Sir Samuel Griffith: The Law and the Constitution*, Law Book Co, 2002, 85-

109.

2. R. B. Joyce, "Sir Samuel Walker Griffith", in Bede Nairn and Geoffrey Serle (eds), *Australian Dictionary of Biography*, vol 9, Melbourne University Press, 1983, 112-119, 113.

3. Alfred Deakin, "The Federal Council of Australasia", *Review of Reviews*, 1895, 154, 157.

4. Alfred Deakin, "The Federal Council of Australasia", *Review of Reviews*, 1895, 154, 156.

5. Alfred Deakin, *The Federal Story*, Robertson & Mullens, 1944, 10.

6. Alfred Deakin, *The Federal Story*, Robertson & Mullens, Melbourne, 1944, 9.

7. John M. Williams, *The Australian Constitution: A Documentary History*, Melbourne University Press, 2005, 16-21.

8. Alfred Deakin, "The Federal Council of Australasia", *Review of Reviews*, 1895, 154-159, 154.

9. Alfred Deakin, "The Federal Council of Australasia", *Review of Reviews*, 1895, 154-159, 156.

10. Alfred Deakin, "The Federal Council of Australasia", *Review of Reviews*, 1895, 154-159, 155.

11. R. B. Joyce, "Sir Samuel Walker Griffith", in Bede Nairn and Geoffrey Serle (eds), *Australian Dictionary of Biography*, vol 9, Melbourne University Press, 1983, 117.

12. *British North America Act* 1867 (Imp), ss 91 and 92.

13. James Thomas, "Griffith at Work (1893-1903): A Snapshot" in Michael White and Aladin Rahemtula (eds), *Sir Samuel Griffith: The Law and the Constitution*", Law Book Co, 2002, 203-211, 204.

14. They are reprinted in John M. Williams, *The Australian Constitution: A Documentary History*, Melbourne University Press, 2005, 31-458.

15. *Official Report of the National Australasian Convention Debates, Sydney, 2 March to 9 April, 1891*, Government Printer, 1891; reprinted by Legal Books, 1986.

16. *Official Report of the National Australasian Convention Debates, Sydney, 2 March to 9 April, 1891*, Government Printer, 1891; reprinted by Legal Books, 1986, 31.

17. *Official Report of the National Australasian Convention Debates, Sydney, 2 March to 9 April, 1891*, Government Printer, 1891; reprinted by Legal Books, 1986, 32.

18. *Official Report of the National Australasian Convention Debates, Sydney, 2 March to 9 April, 1891*, Government Printer, 1891; reprinted by Legal Books, 1986, 34.

19. John M. Williams, *The Australian Constitution: A Documentary History*, Melbourne University Press, 2005, 164.

20. Alfred Deakin, *The Federal Story*, Robertson & Mullens, 1944, 47.

21. Alfred Deakin, *The Federal Story*, Robertson & Mullens, 1944, 48.

22. For example, ss 51(xxxi), 75(v), 80, 92, 116 and 117.

23. John M. Williams, *The Australian Constitution: A Documentary History*, Melbourne University Press, 2005, 176.

24. John M. Williams, *The Australian Constitution: A Documentary History*, Melbourne University Press, 2005, 87 (cl 52).

25. John M. Williams, *The Australian Constitution: A Documentary History*, Melbourne University Press, 2005, 125.

26. John M. Williams, *The Australian Constitution: A Documentary History*, Melbourne University Press, 2005, 449 (ch II cl 5).

27. John M. Williams, *The Australian Constitution: A Documentary History*, Melbourne University Press, 2005, 149.

28. John M. Williams, *The Australian Constitution: A Documentary History*, Melbourne University Press, 2005, 119.

29. John M. Williams, *The Australian Constitution: A Documentary History*, Melbourne University Press, 2005, 1131.

30. F. A. Hayek, *The Constitution of Liberty*, University of Chicago Press, 1960, 217-218, quoted in *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140, 208 [177].

31. *New South Wales v The Commonwealth (Work Choices Case)* (2006) 229 CLR 1, 277-279 [696].

32. See generally Murray Gleeson, "The Birth, Life and Death of Section 74", *Upholding the Australian Constitution*, vol 14, 2002, xiii-xxxvi.

33. J. A. La Nauze, *The Making of the Australian Constitution*, Melbourne University Press, 1972, 78.

34. J. A. La Nauze, *The Making of the Australian Constitution*, Melbourne University Press, 1972, 76.

35. See John C. Vockler, *Sir Samuel Walker Griffith*, BA thesis, University of Queensland, 1953, 307-310; R. B. Joyce, *Samuel Walker Griffith*, University of Queensland Press, St Lucia, 1984, 204-208.

36. J. A. La Nauze, *The Making of the Australian Constitution*, Melbourne University Press, 1972, 191.

37. Quoted in J. A. La Nauze, *The Making of the Australian Constitution*, Melbourne University Press, 1972, 248.

38. Murray Gleeson, "The Birth, Life and Death of Section 74", *Upholding the Australian Constitution*, vol 14, 2002, xiii-xxxvi, xvii.

39. Murray Gleeson, "The Birth, Life and Death of Section 74", *Upholding the Australian Constitution*, vol 14, 2002, xii-xxxvi, xvii-xviii.

40. (1952) 85 CLR xiii-xvi, xiv.

41. (1964) 110 CLR v-xxiv, xi.