

DRAFTING THE AUSTRALIAN CONSTITUTION: THE NEGLECTED DOCUMENTS

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Unfortunately, the various bills, amendments and proposed provisions which constitute the drafting process of the Australian Constitution during the 1890s and 1900 have not been gathered together and published. As a consequence, tracing the origins and evolution of particular sections of the Constitution is not merely difficult but has been haphazard and often inaccurate. In marked contrast is the accessibility of debates in the Constitutional Conventions of 1890, 1891, 1897-98, the colonial parliaments and United Kingdom Parliament! If history has any meaningful role in constitutional interpretation,² greater attention should be devoted to ascertaining and making available the complete sequence of all draft provisions utilized in arriving at the words which constitute the text of the Australian Constitution.

A chronological list of 'Successive Printed Versions of a Bill to constitute the Commonwealth of Australia, 1890-1900' has been published.³ Other relevant documents should be added. In November 1890 Samuel Griffith drafted a detailed division of legislative powers to accommodate a federal, not territorial, separation of Queensland into three districts — Southern, Central and Northern — with a central legislature.⁴ Although not a complete draft constitution, it enumerates a 'distribution of the respective powers and functions of the Legislatures of the United Provinces and the Separate Provinces' and is important for the obvious connections with section 51 of

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¹ For the location of primary material see e.g. La Nauze, J. A., *The Making of the Australian Constitution* (1972) 355-359; Hunt, E. M., *American Precedents in Australian Federation* (1930) 270-274; Crisp, L. F., *The Later Australian Federation Movement 1883-1901* (1979). There is to be published in 1986 a reprint of the Convention Debates 1891-1898 together with Commentaries, Indices and Guide.

² See e.g. Thomson, J., 'Constitutional Interpretation: History and the High Court: A Bibliographical Survey (1982) 5 *U.N.S.W.L.J.* 309.

³ La Nauze, *supra* note 1 at 289-291. For additional locations to those provided by Professor La Nauze, see Thomson, J., 'Altering the Constitution: Some Aspects of Section 128' (1983) 13 *Fed. L. Rev.* 323, 328 n. 19.

⁴ John Macrossan on 17 Oct. 1890 moved a motion for territorial separation of the Northern portion of Queensland: *Qld. Legislative Assembly Debates* (vol. 62, 1890) 984. Griffith's amendment for a provincial scheme (*Ibid.* 996) was passed. *Ibid.*, 1092-3. See generally Doran, C. R., *North Queensland Separatism in the Nineteenth Century* (1981) (Ph. D. thesis, James Cook University) 327-372; Doran, C., *Separatism in Townsville, 1884 to 1894: 'We Should Govern Ourselves'* (1981) 62-66; Joyce, R. B., *Samuel Walker Griffith* (1984) 173-175.

the Australian Constitution.⁵ For example, powers to be assigned to the 'Legislature of the United Provinces' included:

5. External affairs, and the relations of the United Provinces to the United Kingdom and to the other Australasian Colonies or Provinces.
13. Defence and military and naval service.
16. Fisheries.
24. Affairs of people of any race who are not included under the laws applicable to the general community, or with respect to whom it is necessary to make special laws.

Several other powers in this Griffith draft are also remarkably similar to the concurrent legislative powers conferred by section 51 on the Commonwealth Parliament.

An amended version of this 1890 distribution of powers was provided by Griffith in 1891 to the Queensland Legislative Assembly.⁶ The thirty-four heads of power assigned to the proposed United Provinces Legislature in the 1890 proposal became thirty-eight in the 1891 proposal. There were also substantive differences. For example, the race power became:

Affairs of people of any race with respect to whom it is necessary to make special laws not applicable to the general community, but not including the aboriginal native race;⁷

Elaboration of the details of the division of legislative, executive and judicial powers between the proposed new colony — The United Provinces of Queensland — and its northern, central and southern provinces occurred in the Queensland Constitution Bill 1892 drafted by Griffith.⁸ Following a decision to divide Queensland into two, southern and northern, rather than three, provinces,⁹ Griffith introduced in the Legislative Assembly a revised Queensland Constitution Bill 1892.¹⁰ Although neither Bill was passed by the Queensland Parliament, they, together with Griffith's 1890 and 1891 proposals and Federal Council of Australasia Bill 1884,¹¹ are the predecessors, either in exact or similar form, of the draft and final provisions in the Australian

⁵ On 11 Nov. 1890 Griffith gave notice of an addition to his amendment (*supra* note 4) which specified a division of executive and legislative powers: *Old Legislative Assembly Debates* (vol. 62, 1890) 1330-31. This division of powers is also reproduced in *Ibid.* 1518, 1593-4 and *Journals of the Legislative Council of Queensland* (vol. 41, Pt. 1, 1891) 13-15. See also La Nauze, *supra* note 1 at 49, 51-2, 338 n. 35. For debate on this see *Old Legislative Assembly Debates* (vol. 62, 1890) 1509-30, 1593-1617.

⁶ The amended proposal was presented on 15 Sept. 1891 and is reproduced in *Old Legislative Assembly Debates* (vol. 64, 1891) 1045-46, 1057-8, 1101-2. For debate on this proposal see *Ibid.* 1046-52, 1058-90, 1102-26, 1511-22, 1595, 1750-73, 1776-96.

⁷ *Ibid.* 1045. This clause is similar though not identical to the race clause in the 1891 Constitution Bill: *Official Report of the National Australasian Convention Debates* (1891) 953.

⁸ The Queensland Constitution Bill 1892 was introduced on 23 June 1892 and Griffith's second reading speech was on 26 July 1892: *Old Legislative Assembly Debates* (vol. 67, 1892) 458, 786-98. For Debate on the Bill see *Ibid.* 839-63, 868-85, 893-909; *Ibid.* (vol. 68) 912-34, 1016.

⁹ *Ibid.* 934.

¹⁰ A revised Bill (No. 2) — The Queensland Constitution Bill 1892 — was introduced on 18 Aug. 1892: *Ibid.* 1017. Griffith's second reading speech was on 8 Sept. 1892: *Ibid.* 1207-18, 1224-46, 1340-54, 1356-74, 1401-16, 1433-72, 1481-91, 1493-1526, 1543-54. For Debate in the Legislative Council on the revised Bill see *Old Legislative Council Debates* (vol. 66, 1892) 162-88.

¹¹ Griffith drafted and revised the Federal Council of Australasia Bill 1884 which is in *Report of the Proceedings of the Intercolonial Convention* (1883) 17-20. See Joyce, *supra* note 4 at 90. The Bill became the Federal Council of Australasia Act, 48 and 49 Vict. c. 60 (1885).

Constitution.¹² Knowledge of their existence and circumstances in which Griffith drafted these Queensland documents would, therefore, provide a more complete and, perhaps, clearer record of the historical antecedents and meaning of the text of the Australian Constitution.

Other documents containing draft provisions should not be forgotten. Within the 1890s constitutional convention proceedings are reports of committees,¹³ minutes of committee deliberations,¹⁴ and amendments and new clauses proposed when the Conventions were sitting as a Committee of the Whole.¹⁵ Outside that convention framework recourse must be to provisions proposed in and adopted by colonial parliaments,¹⁶ the United Kingdom Parliament¹⁷ and other organizations and individuals.¹⁸

Bringing all of these draft provisions into one publication will be a formidable task. Accomplishment of such a project would, however, contribute to the elucidation of the Framers' intentions and, ultimately, Australian constitutional law.

¹² Professor La Nauze considers that Griffith's 1890 proposal 'is relevant to what ultimately became Sec. 51' of the Constitution and outlines s. 51(xxvi) and (xxix) as direct connections: La Nauze, *supra* note 1 at 49, 51-52. There are others. The 1891 proposal and 1892 Bills were introduced after the 1891 Constitutional Convention.

¹³ See e.g. La Nauze, *supra* note 1 at 289-290, 299-300; 'Report of the Committee Appointed to consider Establishment of a Federal Judiciary; Its Powers and Functions', *Official Record of the Proceedings and Debates of the National Australasian Convention* (1891) clxii-clxiv; 'Report of the Committee Appointed to Consider Provisions Relating to the Establishment of a Federal Judiciary', *Proceedings of the Australasian Federal Convention*, Adelaide (1897) 32-34.

¹⁴ See e.g. the records and minutes of the 1897-98 Judiciary Committee in Australasian Constitutional Convention 1897-98 which are on Australian Archives microfilm — accession number AA 1971/506 — series 8/12, 11/5 and 11/11. See La Nauze, *supra* note 1 at 130-132; Thomson, J. A., *Judicial Review in Australia: The Courts and The Constitution* (1979) (S. J. D. thesis, Harvard Law School) 274-75 (discussing the addition of the phrase — 'or involving its interpretation' — to section 76(i) of the Constitution).

¹⁵ For the debates of the 1891 and 1897-98 Conventions see *supra* note 1. See also e.g. 'Amendments to be proposed by the Drafting Committee on consideration of the Report, 16th March, 1898' (undated) (15 pages) referred to in *Debates of the Australasian Federal Convention*, Melbourne (1898) vol. 2 at 2443 and Bill 20 in La Nauze, *supra* note 1 at 290.

¹⁶ See e.g. 'Tabular Statement of Amendments suggested by the Houses of the Legislatures of New South Wales, Victoria, South Australia, Tasmania, and Western Australia', *Proceedings of the Australasian Federal Convention*, Sydney (1897) 81-153; Bennett, S. (ed.), *Federation* (1975) 228-230.

¹⁷ *Commonwealth of Australia Constitution Bill: Reprint of Debates in Parliament, The Official Correspondence with the Australian Delegates, and Other Papers* (1900).

¹⁸ See e.g. La Nauze, *supra* note 1 at 292-296, 303-304.