KEYSTONE OF THE FEDERAL ARCH
Origins of the High Court of Australia

As the 19th century was drawing to a close the colonies of Australia were preparing to form a new nation. To lay the foundations for this emerging nation a new Constitution would need to be drafted. The delegates, who gathered, first in Melbourne, then in Sydney, to undertake the challenge of creating the Constitution also knew that a new court would be needed. As a matter of fact, the idea of an Australian appellate court had been considered as early as 1840. It was an idea which had been revisited many times before that first Federal Convention.

In 1891, the delegates elected from the various States and New Zealand met in Sydney to work and to consider draft Constitutions. Presided over by Sir Henry Parkes, the grand old man of Federation, the Convention appointed a drafting committee to take the issues raised in debate and construct a blueprint for a new country, a new parliament and a new court.

Some of those present – Griffith, Barton and Deakin – were to play a large part in the creation of the new court some 12 years later. Among those appointed to draft the new Constitution were the Tasmanian Attorney-General, Andrew Inglis Clark, Sir Charles Kingston, the Premier of South Australia and the Premier of Queensland, Sir Samuel Griffith.

From the debates which took place, and using their knowledge of the United States and Canadian Constitutions, they produced a series of drafts which dealt with the matters thought to be necessary. In each of the drafts, judicial power was invested some kind of federal Supreme Court. This was to remain a central feature to all future discussions of Federation.

Much of the important drafting, including major changes to the parts concerning the Court, was done on board the Queensland Government yacht, *Lucinda*. Griffith saw this as an advantage. He wrote to a friend:

> *"The best part of it all was that I had the Lucinda in Sydney and was able to entertain the other delegates on board of her occasionally. She was very much admired. All the hard revision work was done on board, far away from Sydney."*

Not everyone agreed with Griffith about the value of drafting on board the *Lucinda*. Inglis Clark, who fell ill and could not attend, later told the Tasmanian Parliament:

"The Easter holidays intervened while the Convention was sitting and, unfortunately, I spent those days in bed with a dose of influenza. The Drafting Committee of the Convention went for a picnic in the pleasure yacht, Lucinda, and while enjoying themselves they took it into their heads to tinker with the Bill and altered all the clauses relating to the judicature and messed it."

Far from enjoying themselves, Griffith, Kingston, and Edmund Barton, Clark's last-minute replacement, worked solidly over the Easter weekend in the smoking room of the *Lucinda*. In a letter to his wife, Griffith told her of his experience:

"I have had a very hard time since you left. On Friday, we went to the Hawkesbury. There was too much swell on the outside for work. We did not get into smooth water till lunch time, and then we anchored in a most lovely place called Refuge Bay, where there is a waterfall on the bank which is a natural shower. I did not take it myself.

On Saturday, I was at work with Mr Barton and Mr Kingston from 10 in the morning till 11 at night. Sunday morning we came back to Sydney Harbour before breakfast. I was hard at work from 11 o'clock to 6. On Saturday, I got a bad attack of influenza from which I am now recovering, but I was very ill on Sunday and on Monday. On Monday, I was at work in the Committee from 10.30 to 11 at night."

Despite the illnesses and rough waters, the work of those aboard the *Lucinda*, and that of other committees, produced a document which closely resembles the Constitution of today, but it took another 10 years before the final version would take effect.

Griffith returned to the Convention to present the draft. It had not been subjected to any radical rewriting. The hard work had gone into clarity, consistency and precision:

"I have only to say that we have given it our best attention; we have endeavoured, with what success it is for others to say, to form a plan which, so far as regards simplicity of structure and language, will not be unworthy of the English tongue;"

Chapter III, the chapter containing the provisions for the judicature was all but complete. Griffith recognised that for that chapter the most controversial issue to be reconciled was the role the Privy Council should play. It would remain the Convention's most contentious issue, right up to the eve of Federation. When Griffith returned to the Convention to present

the draft Constitution, he was well aware of the different views then held. The draft he presented allowed appeals to the Privy Council, but with restrictions:

> *"These cases are few in number, and I know that many members of the Convention think that even this exception should not be included. Others, again, are of opinion that there should be a provision expressly giving the right of appeal to her Majesty in all cases."*

There were those completely opposed to the idea of an appeal court. The anti-federalist, Sir George Dibbs, was adamant:

> *"I think the proposal to establish an appeal court within these colonies is a mistake, as far as the suitors are concerned, and that the proposal is more the outcome of sentiment than of practical necessity.*
>
> *I maintain that it will be absolutely cheaper to take cases to the Privy Council and settle them there at once, with all the respect due to that great court of appeal, than to establish an appellate court here."*

Dibbs was not alone in his view, but it was a minority view.

> *"To the extent that there were doubts about the utility of the Court in the period leading up to its establishment, inevitably they were resolved pretty quickly. After all, the Court was, as a matter of law, the final Court of Appeal within Australia from courts right around the country. So matters inevitably went to the Court and the Court dealt with them.*
>
> *I am sure that as a matter of cultural reality there might have been still lingering doubts in the minds of existing Supreme Court judges and perhaps members of the legal profession, perhaps even some State politicians, so that the Court needed to establish itself politically and culturally as an institution that was a respected institution, which it did very quickly."*
> ***(Professor Cheryl Saunders AO)***

The attempt to remove the federal Supreme Court was defeated and the Bill for a new Constitution was approved. The Bill was not altered until the next Convention when delegates met during 1897 and 1898 to reignite the federal cause. By this time, Parkes was dead, and Griffith, having been appointed Chief Justice of Queensland, could not attend, but the Convention was attended by some who were to feature prominently in the new nation

and the new Court. The Convention again considered the creation of a Court, and Barton declared that it would be:

> *"a body which shall decide in the peaceful and calm atmosphere of a court, not under surroundings of perturbed imagination or of infuriated party politics, those questions of dispute which arise, and which must arise, under a Federal Constitution."*

At this stage, the need for a High Court was scarcely questioned. Now the disagreements arose on the staffing of the Court and the extent of its judicial power. Chapter III was redrafted and presented to the Convention. Griffith, even though now a State Chief Justice, was critical of the new version, saying that its new style of drafting was not compatible with the dignity of a great instrument of government. He went further, suggesting that there may not be enough work for the Court and that it might be wise to have the Court made up of judges from State courts. This suggestion, made in the name of economy, was rejected. Isaac Isaacs, who was to be appointed to the Court in 1906, said:

> *"Economy can be very expensive, and in the administration of justice, it is altogether too expensive."*

The issue of Privy Council appeals re-emerged as one of the most difficult issues of the Convention and one that nearly derailed the passage of the Bill. Influential sections of the mercantile community petitioned delegates to retain the right of appeal, arguing that:

> *". . . trade and investment benefited from a substantial uniformity of law and that this would be best guaranteed by having one Court of Appeal for the whole empire."*
>
> *"We are bound to the empire by personal and corporate loyalty - loyalty to the traditions, loyalty to the future, of the empire of which we are proud to form a part. But I cannot bring myself to believe that the links which bind us to the empire are in any way formed by a lawyer's bill of costs. I ask that we should have confidence in ourselves and in that High Court which we hope to establish - confidence not only in its impartiality, but also in its ability."*

As with many of the provisions of the Constitution, the eventual clause 74, regarding appeals to the Privy Council, was a matter of careful compromise and was changed many times during the course of the Conventions. The final draft allowed for a right of private litigants to appeal to the Privy Council, but the High Court was to have the final word in nearly all cases of constitutional interpretation:

"I believe if there is one thing on which we should retain the supreme power of decision by any court which we constitute it is the power of deciding finally what our own Constitution means, because as the Australian people are the makers of this Constitution it is only fit that authorities who represent the Australian people should decide what it means if there is any doubt about what it means."

The final draft was adopted. Endorsed by the people, the Constitution arrived at the final hurdle, enactment by the British Parliament. Joseph Chamberlain, Secretary of State for the Colonies, proposed several amendments, but it was soon obvious that the issue of appeals to the Privy Council was the primary problem. A delegation was sent to London to ensure that the Bill passed without amendment. Edmund Barton, leader of the delegation, wrote:

"Our mission here has had the good result of preventing the introduction into the Commonwealth Bill of some amendments which the Imperial Government had in contemplation. But there is still the danger that part of the appeal provisions may be edited or nullified, and it is difficult to bring home to the minds of many public men and journalists here that any alteration of substance in the people's federal agreement would be deeply resented in Australia."

The stage was set for a tense standoff between the Colonial Office and the delegation. In Australia, support for the Colonial Office's position was growing in strength. Judge Boucaut of South Australia had already written to the various Chief Justices of the colonies to enlist support:

"It seems to me, that in heated times, embittered politicians can be more prone to yield implicitly to the Privy Council than to a Supreme Court, however able, constituted of Judges from perhaps vehemently opposing colonies, especially if their opinions should run in line with their respective colonies. My learned colleague, Chief Justice Way, feels much more strongly in favour of reserving the powers of the Privy Council even than I do."

Griffith, the primary architect of the 1891 draft, was in agreement. He wrote to the Chief Justice of South Australia, Sir Samuel Way:

"Although I have never publicly expressed any opinion on the point, I have made no secret of being in entire accord with yours. I hope Mr Chamberlain will not give way to the point."

Dickson, Queensland's delegate in London, actively supported an enlarged right of appeal. A private telegram from Barton in May of 1900 warned of the growing dissention in the delegation:

> *"Private. Dickson dissatisfied and threatening disturbance agreement and further amendments. Be careful therefore of relations with Queensland. You might possibly think it well to similarly warn Victoria, South Australia and Tasmania."*

The crisis deepened, and it appeared that the Bill might not be passed at all. On the night of the introduction of the Bill to Parliament without clause 74, Chamberlain suggested a surprising compromise. There would be no appeals from constitutional cases of distinctly Australian interest, but appeals to the Privy Council would be allowed when imperial interests were concerned.

Barton set to drafting a suitable clause, and this was sent to each of the Premiers. It provided for the consent of the Commonwealth and the States to an appeal over the interpretation of the Constitution. Telegrams pelted backwards and forwards between London and the colonies, but finally an acceptable compromise was reached. The High Court would be able to grant leave to appeal to the Privy Council in limited cases. At last the Bill was passed. Federation was assured, but the High Court was not yet a reality.

The newly passed Constitution did not provide for the creation of the High Court directly. Instead it gave the power to Parliament to create it. Parliament, however, did not appear to see it as a priority. Indeed, for many, the High Court could wait. In March 1902, Alfred Deakin, by now Attorney-General, was convinced of the necessity to establish the Court and introduced the Judiciary Bill. During the Parliamentary Debates he explained the need for it:

> *"The High Court, in its sphere, and the Parliament, in its sphere, are both expressions of the union of the Australian people. That union cannot be completed on the judicial side without the establishment of this Court any more than on the political side it could have been completed or even commenced without this Parliament."*

But still there was a great deal of opposition. Parliament, press and the public protested vigorously at what was repeatedly called a waste of taxpayers' money. Sir Samuel Way proclaimed that the Court was as much needed as "the fifth wheel to a coach", and forecast that the judges would traverse the Australian capitals like tramps crying, "We have no work to do".

"With hindsight we can see that there were some very unusual features of the Court which have made it important in the development of Australian law and Australian nationhood. In particular, the Australian decision to establish the High Court, not just as a final Court of Appeal in Commonwealth law, and not just the interpreter of the Constitution, but the final Court of Appeal also in matters of State law, has been very defining in the way in which Australian law has evolved. In particular, it has made possible the concept of a single Australian common law."
(Professor Cheryl Saunders AO)

Deakin was convinced and argued hard for his cherished measure. The Court was vital to the operation of the Constitution and the success of the Commonwealth. The economic situation worsened and opposition intensified. Deakin had to fight all the way in the House of Representatives arguing the need for a court.

"The Federation is constituted by distribution of powers, and it is this Court which decides the orbit and boundary of every power."

Higgins, who was to be appointed to the Court some four years later, opposed Deakin, although he did confess:

"I felt like a wicked man to think that I could possibly say a word against a proposal put forward in such a nice manner and in such a nice temper."

Deakin was successful. The difficulty he faced was reflected in the anonymous article he wrote for the *Morning Post*:

"No measure yet launched in the Federal Parliament was so often imperilled, skirted so many quicksands, or scraped so many rocks on its very uncertain passage."

Even so, the Act which emerged was much reduced. The bench had shrunk from five to three, and provisions for judicial pensions were abandoned. Finally, in August 1903, the Bill became law. But who was to constitute the Court? The change in conditions had made the positions less attractive, but there was little doubt in the minds of most that Griffith should become the first Chief Justice, even if the Prime Minister had to fish for an appointee. Much correspondence changed hands quickly. Barton, in an attempt to maintain secrecy, even resorted to sending telegrams to Griffith in a curious mix of Latin and code words:

"Sir Samuel Griffith came to the Court with a high reputation and great experience. He had been Chief Justice of Queensland and

before that Premier of the State. He immediately established the authority of the High Court and was one of the truly great judges of Australia."
(The Rt Hon Sir Harry Gibbs GCMG, AC, KBE)

Barton, who might, as Prime Minister, have had the Chief Justiceship for himself, was appointed the next senior Justice.

"He was a master of constitutional law and of the principles of the common law. He has been underrated as a statesman and a judge."
(The Rt Hon Sir Harry Gibbs GCMG, AC, KBE)

Richard O'Connor was appointed as the third member of the bench.

"Sir Samuel Griffith remarked that if he had any fault it was his long suffering in the face of tedious and irrelevant argument, and that was due to the kindness of his heart."
(The Rt Hon Sir Harry Gibbs GCMG, AC, KBE)

On 6 October 1903, the three Justices entered the Banco Court in Melbourne and took their oaths of office. The Keystone of the Federal Arch was in place.