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# Keynote Lecture

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## ENGINEERS: THE DRAMA OF ITS DAY IN THE CLIMATE OF ITS ERA

Stephen Gageler AC\*

*Who were the heroes of the Engineers' Case? This speech is based on a public lecture in which Justice Gageler reflects on the people behind the landmark decision. There was the young Robert Menzies, counsel for the successful party, who was permitted by the High Court to challenge its earlier decisions. There was Frank Leverrier KC, who appeared for the Commonwealth and ably supported Menzies' argument. Most prominently, there were Samuel Griffith and Isaac Isaacs, who stood on either side of a debate about the federal compact that culminated in the Court's decision. But Griffith and Isaacs were as committed to the resolution of their debate by an Australian High Court as they were to their own views. By the time of the decision, Griffith had foreseen the need for old doctrines to be revised, and the new era of post-war Australia provided the conditions for Isaacs' view to prevail over Griffith's.*

The title of this lecture was inspired by a recent biopic in which our hero, Ruth Bader Ginsberg, embarks on a quest to have the Supreme Court of the United States recognise discrimination “on the basis of sex” as a violation of the due process clauses of the Fifth and Fourteenth Amendments to the *United States Constitution*.<sup>1</sup> The climax is a courtroom scene in which the earnest young Ginsberg manages to convince a sceptical but well-disposed middle-aged all-male Bench of the Tenth Circuit Court of Appeals to take the necessary first step.<sup>2</sup> A notable refrain in the film is a line attributed to a great American constitutional scholar of the mid-20<sup>th</sup> century, Professor Paul Freund, who had taught Ginsberg at Harvard Law School: “The Court should never be influenced by the weather of the day”, Freund is reported by Ginsberg to have said, “but inevitably, it will be influenced by the climate of the era”.<sup>3</sup>

Twenty-five years ago, I participated in a seminar to mark the 75th anniversary of *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers' Case)*.<sup>4</sup> The seminar was at University House in Canberra. It was organised by the late Professor Michael Coper and the now Professor George Williams.<sup>5</sup> One of the speakers was the late Professor Leslie Zines, who had taught me constitutional law as an undergraduate at the Australian National University 15 years before, and who, 25 years before that, had himself been a student of Freund at Harvard. Zines' masterful book, *The High Court and the Constitution*, was then in its third edition.<sup>6</sup> The first chapter of the book contained the clearest and most comprehensive exposition that had until then been written of the *Engineers' Case* and its place in our constitutional history. Nothing published since has eclipsed it. Another of the speakers was the evergreen Professor Tony Blackshield. He commenced by confessing to having been “troubled” all day by what he poetically described as “a nameless anxiety”<sup>7</sup> fuelled by the fear that there was nothing that could be said about the *Engineers' Case* that had not already been said by distinguished lawyers over the preceding 75 years.

Preeminent among the eminent speakers at that seminar 25 years ago was Sir Gerard Brennan, then Chief Justice of the High Court. He commenced with the observation that “whenever there is a case to

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\* Justice of the High Court of Australia. Thanks to Geoff Lindell for his comments and to Hannah Canham and Duncan Wallace for their assistance. This speech is based on a public lecture presented at 2019 Allen Hope Southey Memorial Lecture, Melbourne Law School, 25 July 2019.

<sup>1</sup> *On the Basis of Sex* (Directed by Mimi Leder, Focus Features, 2018).

<sup>2</sup> *Moritz v Commissioner of Internal Revenue*, 469 F 2d 466 (1972).

<sup>3</sup> See Jonathan Robert Faust, “Law in a Changing Society: A Conversation with Justice Ruth Bader Ginsburg” (Stanford Politics, 8 February 2017) <<https://medium.com/stanfordpolitics/law-in-a-changing-society-a-conversation-with-justice-ruth-bader-ginsburg-9abeceaf4981>>.

<sup>4</sup> *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers' Case)* (1920) 28 CLR 129.

<sup>5</sup> See Michael Coper and George Williams (eds), *How Many Cheers for Engineers?* (Federation Press, 1997).

<sup>6</sup> Leslie Zines, *The High Court and the Constitution* (Federation Press, 3<sup>rd</sup> ed, 1992).

<sup>7</sup> Tony Blackshield, “Engineers and Implied Immunities” in Coper and Williams, n 5, 92.

celebrate, there is a kind of legal champion to praise”.<sup>8</sup> Who was the hero of the *Engineers’ Case*, he asked. Was it counsel for the successful party, the precocious 25-year-old Robert Menzies – then in his second year of legal practice at the Victorian Bar, having just completed his pupillage under the tutelage of the Victorian Bar’s most fashionable junior, the 34-year-old rising star, Owen Dixon, appearing on his own in his first big case in the High Court, prevailing over more numerous and more senior adversaries who included Sir Edward Mitchell KC, the undisputed leader of the Victorian Bar, leading the 42-year-old John Latham, and who included as well George Flannery KC of the New South Wales Bar, who led the 26-year-old Herbert Vere Evatt? Was it the author of the principal judgment, Sir Isaac Isaacs – then 65 years of age, finding himself after 14 years on the High Court in continuous dissent triumphantly in command of a majority of four, having won the support of the newly-appointed Chief Justice Sir Adrian Knox and of the newly-appointed Sir Hayden Starke along with that of Sir George Rich, with Henry Bournes Higgins in agreement, leaving Sir Frank Gavan Duffy alone in dissent? Others identified by Brennan as potential contenders for hero of the *Engineers’ Case*, on the Bench and at the Bar, were Starke, who might be portrayed as having played a pivotal role in the argument, and Frank Leverrier KC, who appeared with Henry Manning for the Commonwealth. Among them, Brennan diplomatically declined to make a choice.

Approaching the centenary of the *Engineers’ Case*, I share Blackshield’s anxiety as to whether there is anything that can now be said about the *Engineers’ Case* that has not already been said as I seek to give an answer to a modified version of Brennan’s question. Who were the heroes of the *Engineers’ Case*?

Implicit in Brennan’s framing, and in my reframing, of the question is acknowledgment that the *Engineers’ Case* involved a struggle of epic proportions.

The conduct of the case certainly had the air of a courtroom drama.<sup>9</sup> In it the young Menzies was thrust, not unreluctantly, into the role of a leading man. We owe to Menzies himself the colourful description of the dramatic first day of the argument. Menzies gave a flavour of that first day in his inaugural Allen Hope Southey lecture, given 40 years after the event, at a time when he was Prime Minister.<sup>10</sup> He gave a fuller account to an American audience six years after that, shortly after his retirement.<sup>11</sup>

The first day of argument was in Melbourne on 24 May 1920. Menzies was appearing before the Full Court of the High Court to argue on behalf of the Amalgamated Society of Engineers that the Minister for Trading Concerns of Western Australia could be a party to an “industrial dispute” so as to be subject to the jurisdiction conferred by the Commonwealth Parliament on the Commonwealth Court of Conciliation and Arbitration under the *Commonwealth Conciliation and Arbitration Act 1904* (Cth). The only other person at the Bar table on that day was another junior but more seasoned counsel at the Victorian Bar, the 36-year-old returned serviceman Wilbur Ham, who Menzies described as “a master of polished profanity”.<sup>12</sup> Ham appeared for the Minister for Trading Concerns.

The case law that had developed in the High Court since its establishment in 1903 tended against the argument that the Minister for Trading Concerns could be a party to an “industrial dispute”, but not implacably so. The case law was generally to the effect that a State instrumentality was immune from Commonwealth legislative control. There were, however, exceptions. And it was at least arguable on the basis of the existing case law that there was or should be an exception for State trading enterprises.

As the story of that first day of the hearing was told by Menzies to his American audience some 46 years later (with perhaps just a little embellishment), that is precisely the argument Menzies was attempting to make with no great enthusiasm when he was interrupted by the newly-appointed Starke. Menzies described Starke as “a very distinguished common lawyer ... whose blunt habits of expression made no

<sup>8</sup> Sir Gerard Brennan, “Three Cheers for Engineers” in Coper and Williams, n 5, 145.

<sup>9</sup> See generally Gerard Carney, “Reassessment of Robert Menzies’ Contribution in the Engineers Case” (2015) 89 ALJ 331.

<sup>10</sup> Robert Gordon Menzies, “The Challenge to Federalism” (1960) 3 *Melbourne University Law Review* 1, 7–8.

<sup>11</sup> Sir Robert Menzies, *Central Power in the Australian Commonwealth: An Examination of the Growth of Commonwealth Power in the Australian Federation* (Cassell, 1967) 38–39.

<sup>12</sup> Sir Robert Gordon Menzies, *The Measure of the Years* (Cassell, 1970) 233.

exception in favour of a very young man". According to Menzies, Starke looked at him "in a grumbling way" and said: "This argument is a lot of nonsense!" In the words of the older Menzies:

[W]hen Starke said "This argument is a lot of nonsense", I, in what I later realized to be an inspired moment, replied: "Sir, I quite agree". 'Well', intervened the Chief Justice, Chief Justice Knox, never the most genial of interrogators, "why are you putting an argument which you admit is nonsense?" "Because", said the young Menzies (the old Menzies would not have dared to do this) "I am compelled by earlier decisions of this Court. If your Honours will permit me to question all or any of these earlier decisions, I will undertake to advance a sensible argument". I waited for the heavens to fall. Instead, the Chief Justice said: "The Court will retire for a few minutes". And when they came back, he said, "This case will be adjourned for argument in Sydney. Each government will be notified so that it may apply to intervene. Counsel will be at liberty to challenge any earlier decision of this Court!"<sup>13</sup>

The High Court duly reassembled in Sydney, roughly two months later. The restart date was 26 July 1920. All of the States with the exception of Queensland were then represented, as was the Commonwealth. Menzies and Ham continued to appear on their own for the active parties. Mitchell and Latham appeared for the States of Victoria, South Australia and Tasmania. Flannery and Evatt appeared for the State of New South Wales. The scene was set for the commencement of what all participants must have understood to be a significant battle.

Menzies took advantage of the permission he had been granted to argue that the earlier case law affording State instrumentalities immunity from Commonwealth legislative control should be overturned. He no longer needed to rely on the exception if he could overturn the rule. He was supported in that endeavour by Leverrier and Manning for the Commonwealth, whose able argument is summarised in the *Commonwealth Law Reports*.<sup>14</sup> The old Menzies had evidently forgotten that support when he described the young Menzies as having found himself at the resumed hearing in Sydney at a "thickly populated" and, from his "lonely point of view", "hostile Bar table".<sup>15</sup>

Argument in the *Engineers' Case* then proceeded in Sydney over six hearing days, concluding on 2 August 1920. It was immediately followed by argument in another case,<sup>16</sup> in which the same counsel other than Mitchell argued essentially the same issues over another five hearing days, concluding on 9 August 1920.

Judgment was reserved, but not for long. Written judgments in both cases were delivered barely three weeks later, on 31 August 1920. The judgment of the plurality in the *Engineers' Case*, which was delivered first, appeared in the unusual form of the judgment of Knox CJ, Isaacs, Rich and Starke JJ "(delivered by Isaacs J)".<sup>17</sup> From that description, but also from its style and content, no one has ever doubted that it was written by Isaacs.<sup>18</sup> The judgment of the same plurality in the companion case commenced with the explanation that "[i]n this case the Court has to apply the principles of law enunciated in the *Western Australian Trading Concerns Case*, just decided".<sup>19</sup>

In the *Engineers' Case* – as the *Western Australian Trading Concerns Case* soon came to be branded – as every student of Australian constitutional law now knows, Menzies won the day. The express power of the Commonwealth Parliament 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<sup>20</sup> was held to authorise a law binding any instrumentality of a State. In so holding, in one fell swoop the newly-formed majority

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<sup>13</sup> Menzies, n 11, 38–39.

<sup>14</sup> *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers' Case)* (1920) 28 CLR 129, 139–140.

<sup>15</sup> *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers' Case)* (1920) 28 CLR 129, 39.

<sup>16</sup> *Merchant Service Guild of Australasia v Commonwealth Steamship Owners' Association (No 2)* (1920) 28 CLR 436.

<sup>17</sup> *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers' Case)* (1920) 28 CLR 129, 140.

<sup>18</sup> Anne Twomey, "The Knox Court" in Rosalind Dixon and George Williams (eds), *The High Court, the Constitution and Australian Politics* (CUP, 2015) 98, 104.

<sup>19</sup> *Merchant Service Guild of Australasia v Commonwealth Steamship Owners' Association (No 2)* (1920) 28 CLR 436, 447 (footnote omitted).

<sup>20</sup> *Constitution* s 51(xxxv).

of the recently reconstituted High Court put an end to elaborately crafted doctrines of constitutional construction that operated to constrain the scope of both Commonwealth and State legislative power, which had commanded the assent of a previous majority of the Court throughout the previous 17 years of its existence. Those doctrines, Isaacs then wrote for the plurality, which were grouped under the heading of “implied prohibitions”, had proven unworkable in practice.<sup>21</sup> They were unworkable in practice, he wrote, because they were unsound in theory in that they were fundamentally at odds with the nature of the Australian polity.<sup>22</sup> Henceforth, in the language of Isaacs writing for the plurality, the *Australian Constitution* was to be construed by reference to “ordinary principles of construction”.<sup>23</sup> Once interpreted according to those ordinary rules of construction, the amplitude of a legislative power expressly conferred on the Commonwealth Parliament was not to be cut back by reference to any notion that it was a function of a court to constrain the scope of a legislative power in order to protect the States from the potential for its abuse.

The older Menzies described the method of interpreting Commonwealth legislative powers adopted in the *Engineers’ Case* as “revolutionary”.<sup>24</sup> As did Richard Thomas Edwin Latham<sup>25</sup> and Sir Robert Garran<sup>26</sup> before him. Menzies and Garran used the adjective in a positive sense; although the ever-moderate Garran used it in a way that displayed an appreciation of the danger of hyperbole.

I do not disagree with the description of the *Engineers’ Case* as “revolutionary”. Indeed, I have argued quite recently that, together with the High Court’s decision 68 years later in *Cole v Whitfield*,<sup>27</sup> the decision in the *Engineers’ Case* conformed to the characteristics identified in 1983 by the great scholar of the Western legal tradition, Professor Harold Berman, as the standard characteristics of a legal revolution:<sup>28</sup> both decisions marked a fundamental change from that which had existed before; both sought legitimacy for the change in what can be described in the language of Berman as a “remote past” and an “apocalyptic vision”,<sup>29</sup> or in what can be described more modestly as an original understanding; both provided the foundation for the subsequent development of a new body of law; both were transformative of the legal tradition within which they occurred while remaining within that tradition; and both were, in the words of Sir Victor Windeyer (which have raised the ire of Goldsworthy),<sup>30</sup> “a demonstration that in a country which has inherited the common law its essential characteristic, a capacity to grow and develop as ... needs ... change, can govern fundamental law, even the concepts that a written constitution embodies”.<sup>31</sup>

To adopt the description of the *Engineers’ Case* as “revolutionary”, however, is not to suggest that the case can be understood as a one-off event. Much less is it to suggest that the judgment delivered on 31 August 1920 is to be explained as the product of an intense three weeks of deliberation by six judges of the High Court on the basis solely of the 10 days of argument that had occurred during the preceding month. Much less still is it to countenance the idea that the judgment then delivered can be attributed to the cleverness of the arguments presented by any one or more of the very learned counsel who had appeared on those days. Not unlike the fall of Homeric Troy after the decade-long Hellenic

<sup>21</sup> *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers’ Case)* (1920) 28 CLR 129, 141–142.

<sup>22</sup> *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers’ Case)* (1920) 28 CLR 129, 150–151.

<sup>23</sup> *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers’ Case)* (1920) 28 CLR 129, 155.

<sup>24</sup> Menzies, n 11, 48.

<sup>25</sup> RTE Latham, “The Law and the Commonwealth” in WK Hancock (ed), *Survey of British Commonwealth Affairs: Problems of Nationality 1918–1936* (OUP, 1937) Vol 1, 510, 563.

<sup>26</sup> Sir Robert Randolph Garran, *Prosper the Commonwealth* (Angus and Robertson, 1958) 180, 182.

<sup>27</sup> *Cole v Whitfield* (1988) 165 CLR 360.

<sup>28</sup> Stephen Gageler, “Small Steps and Giant Leaps: Patterns in Australian Constitutional Adjudication” (2019) 19 *Macquarie Law Journal* 15, referring to Harold J Berman, *Law and Revolution: The Formation of Western Legal Tradition* (Harvard University Press, 1983).

<sup>29</sup> Berman, n 28, 19.

<sup>30</sup> Jeffrey Goldsworthy, “Justice Windeyer on the Engineers’ Case” (2009) 37 *Federal Law Review* 363.

<sup>31</sup> Sir Victor Windeyer, “Some Aspects of Australian Constitutional Law” (JA Weir Memorial Lecture, Edmonton, 13–14 March 1972) 36.

siege depicted in the *Iliad*, the emphatic rejection of the old doctrine of “implied prohibitions” that was the *Engineers’ Case* revolution can only be understood as the denouement of an epic struggle in which heroes were to be found among the vanquished as much as among the victors.

The struggle that occurred during the early history of the High Court and was brought to an end by the decision in the *Engineers’ Case* was aptly referred to by Zines as a “struggle for standards”.<sup>32</sup> Another description of it might be as a contest of ideas, or even as a contest of ideals. The champions on both sides were lions of the law and statesmen of the highest order. On one side was Griffith, who had been appointed the first Chief Justice of the High Court when it was created in 1903, along with the first two other judges, Sir Edmund Barton and Richard O’Connor. On the other side was Isaacs, who joined the Court with Higgins in 1906. All of those first five judges had been intimately involved in the movement to Federation. All but Griffith had served in the first Commonwealth Parliament.

In the case of Griffith, his involvement in the Federation movement had been primarily as a delegate to the Australasian Federal Convention in 1891, where on the steamship *Lucinda* on the Hawkesbury River during a weekend break in the proceedings he took charge of the writing of the draft of the *Constitution* that was to emerge from that Convention. His appointment as Chief Justice of Queensland in 1893 necessitated him taking a less active role in the later stages of the movement. In the case of Isaacs, his involvement had been primarily as a popularly elected delegate to the Convention of 1897 and 1898 in debating the final draft of the *Constitution* that was to emerge from that Convention, which went on to be endorsed in referenda by a majority of electors in each of the Australian colonies that were to become States, and which was then transmitted to London for enactment into law by the Imperial Parliament in 1900.

Griffith and Isaacs held strong and deep differences of opinion about the fundamental nature of the federal compact they and their early judicial colleagues had contributed to creating, and correspondingly about the demarcation of the appropriate role for the High Court in maintaining that compact. Although any summarisation runs the risk of oversimplification, their competing perspectives can be summed up as follows.

Griffith’s understanding of the nature of the federal compact, with which Barton and O’Connor were for the most part content to concur, was essentially that of a compact between polities comprising the federating colonies that had become the States and the newly created Commonwealth. The role of the High Court was akin to that of a contractual arbitrator, maintaining the polities as potential antagonists within their designated spheres. The understanding was closely aligned with the first of the principles of Federation proposed by Sir Henry Parkes and adopted by the Convention of 1891 to the effect that:

[I]n order to establish and secure an enduring foundation for the structure of a federal government ... the powers and privileges and territorial rights of the several existing colonies shall remain intact, except in respect to such surrenders as may be agreed upon as necessary and incidental to the power and authority of the National Federal Government.<sup>33</sup>

Isaacs’ competing understanding of the federal compact, from which the understanding of Higgins was not substantially different, was essentially that of a compact between people – the people of the colonies who voted for those colonies to become States and who also became, on Federation, the people of the newly created Commonwealth. The Commonwealth and the States were not contracting parties but functional representatives of the same unified people. The High Court had no role in policing the exercise of power by the people’s representatives beyond that which the people themselves, in the nationwide referenda adopting the *Constitution*, had clearly committed to the Court by the terms of the *Constitution*. For the Court to attempt to carve out for itself a more extensive role was unnecessary, because the people acting electorally could be expected to look after themselves. For the Court to attempt to do so was also improper, because to do so involved an overreaching by the judicial arm of government into the political arena where it had neither the skill set nor the mandate to interfere. Whereas Griffith’s understanding was closely aligned with the first of the principles of Federation adopted by the Convention of 1891, Isaacs’

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<sup>32</sup> Zines, n 6, Ch 1.

<sup>33</sup> *Official Report of the National Australasian Convention Debates*, Sydney, 4 March 1891, 23 (Sir Henry Parkes).

understanding aligned more closely with the first of the revised principles of Federation proposed to and adopted by the Convention of 1897 and 1898, to the effect that:

[I]n order to enlarge the powers of self-government of the people of Australia ... the powers ... of the several existing colonies shall remain intact, except in respect of such surrenders as may be agreed upon to secure uniformity of law and administration in matters of common concern.<sup>34</sup>

Writing for the plurality in the *Engineers' Case*, Isaacs announced the ascendancy of his understanding over that of Griffith's when he emphasised floridly and repeatedly that the fundamental problem with the old doctrine of "implied prohibitions" that Griffith had until then caused to prevail was that it was founded on a notion of "necessity" for judicial intervention in the relationship between the Commonwealth and the States that gave insufficient attention to the role of the people. "[E]xtravagant use of the granted powers in the actual working of the Constitution", he wrote, "is a matter to be guarded against by the constituencies and not by the Courts":

When the people of Australia, to use the words of the Constitution itself, "united in a Federal Commonwealth", they took power to control by ordinary constitutional means any attempt on the part of the national Parliament to misuse its powers. If it be conceivable that the representatives of the people of Australia as a whole would ever proceed to use their national powers to injure the people of Australia considered sectionally, it is certainly within the power of the people themselves to resent and reverse what may be done.<sup>35</sup>

No protection of the High Court in such a case, Isaacs went on, was "either necessary or proper".<sup>36</sup>

Thus emerged from the fray a new doctrine of the High Court. The doctrine was new but the perspective was not. Isaacs had adhered to it unwaveringly since the time of his appointment as a judge in 1906, and he had espoused versions of it not only in submissions as counsel during the five years of Federation that preceded that appointment<sup>37</sup> but in his contributions to the Convention debates of 1897.<sup>38</sup>

What was different by 1920 was that Isaacs' understanding of the federal compact rather than Griffith's had come to be more in keeping with an altered national mood. In the language, again, of Windeyer:

In 1901 many men and women in Australia felt strong ties with the Colony to which they belonged. They had not begun to think of themselves as belonging to the Commonwealth. But by 1920 a new generation had arisen who thought of themselves as Australians and of Australia, not a State, as the country to which they belonged. That public law, whether given by courts or by legislators, should be responsive to public sentiment is not surprising. And since an entrenched constitution is not easily altered as other statutes are, it is not surprising that developing case law puts an ever growing body on its bones which may come to be seen in unexpected new dimensions.<sup>39</sup>

In the language of Freund, a new era had dawned. The climate had changed.

Much of the change that had occurred within Australian society was attributable to the experience of the First World War.<sup>40</sup> With the coming of the War, as Dixon later put it, "the power of the federal legislature over naval and military defence leaped into the foreground of the scene of constitutional controversy" where it "overpowered other questions". Not only did it "reduce[] in the public eye the stature of the States" but it "accustomed the [High] Court itself to the exercise by the central government of an ample and all-pervading power".<sup>41</sup>

<sup>34</sup> *Official Report of the National Australasian Convention Debates*, Adelaide, 23 March 1897, 17 (Edmund Barton).

<sup>35</sup> *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers' Case)* (1920) 28 CLR 129, 151–152.

<sup>36</sup> *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers' Case)* (1920) 28 CLR 129, 152.

<sup>37</sup> See, eg, *Re Income Tax Acts (No 4) (Wollaston's Case)* (1902) 28 VLR 357, 360–361; *Re Income Tax Acts (Vic) (Deakin's and Lyne's Cases)* (1904) 29 VLR 748, 750; *Deakin v Webb* (1904) 1 CLR 585, 596–600.

<sup>38</sup> John M Williams, "The Griffith Court" in Rosalind Dixon and George Williams (eds), *The High Court, the Constitution and Australian Politics* (CUP, 2015) 77, 81.

<sup>39</sup> Windeyer, n 31, 36–37.

<sup>40</sup> Geoff Lindell, "The Australian Constitution: Growth, Adaptation and Conflict – Reflections about Some Major Cases and Events" (1999) 25 *Monash University Law Review* 257, 265.

<sup>41</sup> Sir Owen Dixon, "Aspects of Australian Federalism" in Susan Crennan and William Gumtow, *Jesting Pilate: And Other Papers and Addresses* (William S Hein & Co, 2<sup>nd</sup> ed, 1965) 113, 116.

The High Court itself had not been shielded from the ravages of that War. Three of its sitting members, Rich, Higgins and Gavan Duffy, had lost sons in the conflict.<sup>42</sup> Griffith himself is reported to have said that he found it hard to do “ordinary work in such anxious times”.<sup>43</sup>

When the War ended on 11 November 1918, Griffith called an extraordinary formal sitting of the High Court two days later. There he went on record as acknowledging that the world was no longer the place that it had been. “The task before the nation”, he then said, “involves the recasting of conditions and the revision of doctrines that have long been regarded by multitudes as axiomatic and fundamental”. What appeared to him to be “the matter most urgently calling for treatment” was “the question of the mutual relations of the people of a State to one another”. “The old deeply rooted idea of division into classes, who are natural enemies, and whose destiny and duty are to prey upon each other”, he said, “must give place to the sense of equality and of the paramount duty of every man to bear his part of the load of his neighbours’ burdens as well as of his own”. A “radical change of mental attitude, not in one part only of the community”, he said, was “essential to a wise performance of this task” but that he did “not despair of the result”.<sup>44</sup>

Less than a year after he made those remarks, at the age of 74, Griffith was forced by ill health to tender his resignation. His resignation was accepted with effect from 17 October 1919, making way for the appointment of Knox as his replacement. O’Connor had died in office in 1912, his death leading to the appointment of Gavan Duffy. Barton then died in office at the beginning of 1920. Barton’s death led to the appointment of Starke. Not only had the climate of the era changed, but the composition of the High Court had changed with it. As fate would have it, Griffith died on 9 August 1920, between the conclusion of the hearing of and the delivery of judgment in the *Engineers’ Case*.

Quite what Griffith would have made of the judgment in the *Engineers’ Case* we can only speculate. No doubt, he would have felt the disappointment of anyone who has harboured deep convictions that have come to be rejected by others. He would likely have been offended by the critical language Isaacs chose to use. But in light of the openness he had expressed just two years before to the revision of doctrines long regarded as fundamental, it seems unlikely that he would have been wholly resistant to change. There is reason to doubt that his reaction would have matched that of his successor, Sir Garfield Barwick, to his own long-held constitutional views being overtaken by the judgment in *Cole v Whitfield* – “really laughable”, “terrible tosh”, Barwick is fabled to have said.<sup>45</sup> Of the *Engineers’ Case*, in contrast, Barwick solemnly warned his successors in office “to be very wary” that its “triumph” is “never tarnished”.<sup>46</sup>

What Griffith would certainly have known of and appreciated in his lifetime were remarks made by Isaacs at a ceremonial sitting to mark Griffith’s retirement, which Griffith was too ill to attend. Speaking for himself and other members of the High Court, Isaacs said that he bore “willing testimony to the great learning and ability, and the fearlessness and the wholeheartedness, which Sir Samuel Griffith brought to the performance of the duties of his great office”. He went on to acknowledge that “whatever status [the] High Court [then held] in the confidence of the Australian people [was] due in no small measure to the wisdom and capacity of its illustrious head”.<sup>47</sup>

As Isaacs’ remarks indicate, there is more to the heroism of Griffith in defeat than his valiant pursuit of a doomed cause, just as there is more to the heroism of Isaacs in victory than his persistence and longevity. Stronger than the differences in the perspectives on Federation that divided Isaacs and Griffith was the institutional commitment that united them to those differences being resolved within Australia by an Australian High Court attuned to contemporary Australian conditions. As the more senior of the two, it fell primarily to Griffith to establish and defend that united position.

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<sup>42</sup> Tony Cunneen, “‘Judges’ Sons Make the Final Sacrifice’: The Story of the Australian Judicial Community in the First World War” (2017) 91 ALJ 302, 307, 309–310, 312.

<sup>43</sup> Roger B Joyce, *Samuel Walker Griffith* (University of Queensland Press, 1984) 347.

<sup>44</sup> Samuel Griffith, “The Armistice” (1918) 25 CLR v, vi.

<sup>45</sup> Tom Molomby and Paul Donoghue, “Bar News Interviews Sir Garfield Barwick GCMG” [1989] (Summer) *Bar News* 9, 17.

<sup>46</sup> “Retirement of Chief Justice Sir Garfield Barwick” (1981) 148 CLR v, x.

<sup>47</sup> “Retirement of the Chief Justice” (1919) 26 CLR at v, vii.

Griffith is credited with having devised the compromise reflected in s 74 of the *Constitution* that no appeal was to be permitted to the Privy Council from a decision of the High Court on “any question ... as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States” unless the High Court was satisfied that “for any special reason” a certificate should be granted to permit such an appeal.<sup>48</sup> It was then Griffith as Chief Justice who stared down the Privy Council and State Supreme Courts alike during the first four years of the High Court’s existence firmly to establish the High Court’s authority ultimately to resolve the competing perspectives on which he and Isaacs were divided.

In *Deakin v Webb*,<sup>49</sup> writing for himself, Barton and O’Connor, Griffith overturned a decision of the Supreme Court of Victoria that had chosen to follow that Court’s own previously expressed view<sup>50</sup> of a pre-Federation Privy Council case<sup>51</sup> pertaining to the *Canadian Constitution* in preference to the doctrine recently laid down by the High Court in *D’Emden v Pedder*<sup>52</sup> as pertaining to the *Australian Constitution*. With the support of Barton and O’Connor, Griffith went on in *Deakin v Webb* to refuse to grant a certificate permitting an appeal to the Privy Council. The responsibility the *Australian Constitution* cast on the High Court, Griffith then said, was to determine for itself any question as to the limits inter se of the constitutional powers of the Commonwealth and the States. The High Court would be guilty of dereliction of duty tantamount to a breach of the trust that had been confided in it by the Australian people were it to “decline to accept that responsibility unless [it] were in a position to say in intelligible language that there was some special reason, capable of being formulated, why the Privy Council was, and why [it was] not, the proper ultimate judges of the question”.<sup>53</sup> No special reason then existed.

When in *Webb v Outtrim*<sup>54</sup> the Privy Council, having chosen to entertain a direct appeal from another decision of the Supreme Court of Victoria, purported to overrule *D’Emden v Pedder* and *Deakin v Webb*, Griffith refused to budge. In *Baxter v Commissioners of Taxation (NSW)*,<sup>55</sup> with the support of all other of the then five members of the High Court, Griffith held that the Privy Council’s decision in *Webb v Outtrim* was beyond jurisdiction. With the support of three of those five members, he held that *D’Emden v Pedder* and *Deakin v Webb* should continue to be followed. And again with the unanimous support of his colleagues, he held that a certificate permitting an appeal to the Privy Council from its own decision should not be granted.

In *Flint v Webb*,<sup>56</sup> decided the very day after *Baxter*, Griffith again led a unanimous High Court in refusing to grant a certificate to permit an appeal to the Privy Council from a decision in which the majority applied *D’Emden v Pedder* and *Deakin v Webb*, making clear that the existence of the contrary decision of the Privy Council in *Webb v Outtrim* did not amount to a “special reason” for granting a certificate. “We might disagree strongly with each other about the fundamental nature of the Australian federal system”, the first five members of the High Court were in effect saying, “but none of us have any doubt at all that it is our collective duty to the Australian people to work out the problem for ourselves”.

Between *Baxter* in 1907 and the *Engineers’ Case* in 1920, a certificate permitting an appeal to the Privy Council was granted under s 74 of the *Constitution* in only one case.<sup>57</sup> The “special reason” in that case was found in the High Court, constituted by only four judges, being evenly divided.

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<sup>48</sup> Alfred Deakin, *The Federal Story: The Inner History of the Federal Cause* (Robertson & Mullens, 1944) 156; Joyce, n 43, 208, 210–215.

<sup>49</sup> *Deakin v Webb* (1904) 1 CLR 585, 604–611.

<sup>50</sup> *Re Income Tax Acts (No 4) (Wollaston’s Case)* (1902) 28 VLR 357, 385–388.

<sup>51</sup> *Bank of Toronto v Lambe* (1887) 12 App Cas 575, 587.

<sup>52</sup> *D’Emden v Pedder* (1904) 1 CLR 91, 109–113.

<sup>53</sup> *Deakin v Webb* (1904) 1 CLR 585, 622.

<sup>54</sup> *Webb v Outtrim* (1906) 4 CLR 356.

<sup>55</sup> *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087, 1118, 1120–1122.

<sup>56</sup> *Flint v Webb* (1907) 4 CLR 1178.

<sup>57</sup> *Colonial Sugar Refining Co Ltd v A-G (Cth)* (1912) 15 CLR 182.

Nearly a year after judgment was given in the *Engineers' Case*, Mitchell, then leading Dixon and appearing on behalf of the Minister for Trading Concerns as well as for New South Wales, Victoria, Tasmania, South Australia and Western Australia intervening, applied to the High Court for certificates permitting appeal to the Privy Council from the judgments in the *Engineers' Case* and its companion case. The applications were opposed by Menzies and Leverrier, each relying on *Deakin v Webb* and *Flint v Webb*. The applications were refused without reasons being given.<sup>58</sup>

In a last-ditch counter-revolutionary manoeuvre, Dixon, by then newly-appointed a KC, was dispatched to London to attempt on behalf of the Minister for Trading Concerns to petition the Privy Council for leave to appeal from the judgments of the High Court notwithstanding the absence of a certificate under s 74 of the *Constitution*.<sup>59</sup> Even if Dixon had somehow been able to overcome the jurisdictional difficulty, his argument on the merits was a very big ask. As Garran later explained it, Dixon “essayed the ambitious task of convincing the Privy Council that when the two Courts had originally been in disagreement, the Privy Council had been wrong and the High Court right; and that now that the High Court had come round to the Privy Council’s view, they were both wrong”. The outcome, again in the words of Garran, was that:

The Privy Council gave no indication of being impressed by the argument; but they refused the leave on the ground, which from the Australian point of view was even more important, that the questions involved were clearly questions of constitutional power which, under the Constitution, the Privy Council had no jurisdiction to entertain without a certificate from the High Court — which, in this case, was not forthcoming.<sup>60</sup>

So it was concluded. Twomey has noted that the conclusion was not uncontroversial in its day, prompting one newspaper to go so far as to declare that the High Court had become the *Constitution* and that the way to change the *Constitution* had become to change the composition of the High Court.<sup>61</sup> Mitchell, among other senior legal practitioners, gave evidence before the Royal Commission on the *Constitution* in 1929 to the effect that the stability of Australian constitutional law would be enhanced were s 74 of the *Constitution* to be amended to remove the restriction on appeals to the Privy Council. The suggestion fell flat. “Australian sentiment”, reported the Royal Commission, was then, as it was claimed to have been in 1900, “in favour of confining the right of interpreting the Constitution to the High Court of Australia”.<sup>62</sup> Never again did the High Court grant a certificate under s 74 of the *Constitution*. Appeals to the Privy Council from Australian Courts were in due course abolished in their entirety by the *Australia Act 1986* (Cth).

Who then were the heroes of the *Engineers' Case*? Menzies certainly deserves to appear in the credits. So does Leverrier. Extrapolating from Irving’s observation that where there are “founding fathers” there must also be “founding mothers”,<sup>63</sup> I acknowledge that there are many others whose significant contributions were behind the scenes and who may never receive the credit they are due.

Top, and equal, billing I suggest must nevertheless go to Isaacs and Griffith. Looking back on the revolution that was the *Engineers' Case*, Isaacs to what was decided and Griffith to who decided it, each would be entitled to invoke the words of the poet Virgil with which Isaacs chose to end his tribute on the occasion of Griffith’s retirement: “*Quorum pars magna fui*” – “it is something in which I played a great part”.<sup>64</sup>

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<sup>58</sup> *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1921) 29 CLR 406, 413.

<sup>59</sup> *Minister for Trading Concerns (WA) v Amalgamated Society of Engineers* [1923] AC 170.

<sup>60</sup> Sir Robert Garran, “The Development of the Australian Constitution” (1924) 40 *Law Quarterly Review* 202, 216.

<sup>61</sup> Twomey, n 18, 104–105.

<sup>62</sup> *Report of the Royal Commission on the Constitution* (Govt Printer, 1929) 253.

<sup>63</sup> Helen Irving, “Fair Federalists and Founding Mothers” in Helen Irving (ed), *A Woman’s Constitution? Gender & History in the Australian Commonwealth* (Hale & Iremonger, 1996) 1, 1.

<sup>64</sup> “Retirement of the Chief Justice” (1919) 26 CLR v, vii.