

# **‘Swelling the Ranks of the Peripatetic Unemployed’: The First Decade of the High Court of Australia**

**John M Williams\***

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Chief Justice, Justices, colleagues, friends, ladies and gentlemen.

It is an honour and privilege to be asked to give the first in the High Court public lecture series. It is one that I share with my colleague and friend Professor Fiona Wheeler from the ANU College of Law. On behalf of Professor Wheeler and myself I thank the Court for the rare opportunity to speak in this space in a non-litigious mode. As one who has spent much of their academic career pondering this institution and its statements of Australian law I am grateful to be invited to address you tonight.

In late October 1919 two men approached each other on the platform at Spencer Street station in Melbourne. For one it was an act of humility and great disappointment to be there. For the other the meeting was laced with some trepidation and surprise.

Edmund Barton, ‘Australia’s noblest son’ was tired and unwell.<sup>1</sup> Yet the powerhouse behind Federation and first Prime Minister of the Commonwealth of Australia had in mind one last prize upon which to

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\* Dean and Professor, Adelaide Law School, University of Adelaide. I would like to acknowledge the support of the Australian Research Council for its funding of research from which this lecture is drawn. I would also like to thank Dr Wendy Riemens and Adam Webster for their comments and suggestions on earlier drafts.

<sup>1</sup> Geoffrey Bolton, *Edmund Barton: The One Man for the Job* (Allen & Unwin, 2000) 329-31.

end his career. However, he was too late in making known this wish to the Governor General, who had acted as an intermediary to Prime Minister Billy Hughes.<sup>2</sup> The position of Chief Justice had already been promised to Adrian Knox.

The meeting at the train station was to make an impression on the new Chief Justice who understood its symbolic importance. As he indicated to Lady Barton

I shall never forget his kindness to me on many occasions during my career and most of all on my appointment as CJ. I doubt if any other man in his position would have gone out of his way as he did to convince me of his gracious feelings towards me. I have never in my life appreciated anything so much as his coming to the train to meet me on my arrival in Melbourne, but it was after all only what anyone who knew him would expect him to do.<sup>3</sup>

But why Knox and *not* Barton? The suitability of any candidate for the High Court will inevitably be the subject of debate. One obvious consideration was age – Barton was 70 and Knox was at 56 in the prime of his working life. But considerations that went beyond legal merit were also in play. The retiring Chief Justice Samuel Griffith had had his way. He had wished to block Isaac Isaacs and this he had temporarily achieved.

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<sup>2</sup> Ibid 331.

<sup>3</sup> Letter from Sir Adrian Knox to Lady Jean Barton, 7 January 1920 in *Barton Papers* (National Library of Australia, Canberra) MS 51/1/1648a <<http://nla.gov.au/nla.ms-ms51-1-1648a>>.

Barton graciously pledged his 'loyal support' to the new Chief Justice.<sup>4</sup> Despite his disappointment Barton put on a brave face. As he told his son Oswald, 'It can't be pleasant to have one's record ignored but enough. I have had a good many knock down blows – and always got up again. So it is now, and no one outside gets a shred of evidence of what I have felt.'<sup>5</sup>

The scene is not remarkable in the life of any institution. The longevity of all institutions is dependent upon the passage of stewardship from one generation to the next. The change may be seamless or it may involve a deliberate break with the past. What is noteworthy of this transition in the life of the High Court of Australia was that it represented the end of an era. The appointment of Knox, the Sydney-born barrister and onetime politician, was the first member of the Court not to have been actively involved in the federation movement. Those, like Barton, who had dedicated much of their adult lives to the union of the colonies were, however reluctantly, giving way to the next generation. The nation was in its second decade, a decade that had been punctuated by the horrors of war. The world had changed. Soon the High Court would itself formalise that change by departing from jurisprudence that had sought to balance the interests of the States and the new Commonwealth.<sup>6</sup> Three months after the meeting on the Melbourne platform Sir Edmund Barton would be dead.

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<sup>4</sup> Letter from Sir Edmond Barton to Lady Jean Barton, 19 October 1919, in *Barton Papers* (National Library of Australia, Canberra) MS 51/1/1639a-40a <<http://nla.gov.au/nla.ms-ms51-1-1639a>>.

<sup>5</sup> Letter from Edmund Barton to Oswald Barton, 24 October 1919, cited in Bolton, above n 1, 334-5.

<sup>6</sup> *Amalgamated Society of Engineers v Adelaide Steamship Co Limited* (1920) 28 CLR 129 ('*Engineers Case*').

The first decade of the High Court of Australia was arguably its most difficult. While each generation faces its challenges the High Court in these formative years was fighting not only for recognition - but respect. It had a tumultuous beginning. It was reduced in size, housed in temporary accommodation and its first Chief Justice was attacked in the Commonwealth Parliament and the Press as being totally unsuitable to hold the office. Its authority had been doubted and its existence resented by many of the State Supreme Courts, and in 1905 it had publicly warred with the Government to the point where two of its members had seriously contemplated resignation.

The first decade of the Court was, in short, a contest over the substance of Australia's law as well as who should have the authority to declare it and the manner in which the jurisdiction of the Court should be exercised.

The lecture that I wish to give tonight examines this difficult decade. I will argue that the Court, and its members, laboured under incredibly difficult circumstances and that Alfred Deakin's vision for the Court was disputed by the actions of many, not least by those who claimed to be acting in the Court's best interests. Notwithstanding these difficulties the Court emerged to take its place as the essential third pillar of Australia's system of government.

While I have highlighted the decade from 1903 until 1913, the starting point for many of the issues I will explore have their origins in the Federation decade from 1891 to 1901. Decisions (and confrontations) during this period would resurface during the first 10 years of the

Court's existence. As such I wish to reflect upon the decade before 1903 to contextualise the events of the first decade.

I would like to commence tonight by examining the origins of the Court.

### **A Vision for an Independent Court**

There was *always* going to be a High Court. Its name, composition, location, jurisdiction, and degree of constitutional entrenchment were predicated largely upon one thing: the ultimate federation of the Australian colonies. Federation was in turn dependent upon a host of factors – not least the need for Australians to think of themselves as one people.<sup>7</sup>

The early administration of justice in colonial Australia was laden with assumptions and tempered by practicalities. It was assumed, for instance, that the laws of England arrived with the colonists and became 'a birthright and an inheritance' of all subjects of the Crown.<sup>8</sup> The place of Aboriginal and Torres Strait Islander peoples in this overarching assumption was less than clear. The protection the law afforded the traditional owners of the land, and indeed their very status within it, was debatable.<sup>9</sup>

From the 1840s onwards the idea of a general Australian Court of Appeal would raise its head. For instance, Earl Gray in 1847 suggested that a 'General Supreme Court' should be established to hear appeals from the

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<sup>7</sup> Helen Irving, *To Constitute a Nation: A Cultural History of Australia's Constitution* (Cambridge University Press, 1999) and John Hirst, *The Sentimental Nation: The Making of the Australian Commonwealth* (Oxford University Press, 2000).

<sup>8</sup> Sir Victor Windeyer, 'A Birthright and Inheritance: The Establishment of the Rule of Law in Australia' (1958-63) 1 *University of Tasmania Law Review* 635, 638.

<sup>9</sup> A C Castles, *An Australian Legal History* (Law Book Co, 1982) 516.

separate provinces. This, like other proposals throughout the remainder of the century, would come to nothing.

When the delegates to the Australasian Federal Convention met in Melbourne in 1890 it was the 34 year-old Alfred Deakin from Victoria who would impress colleagues with his rhetorical skills and clear vision of a united Australia. With Andrew Inglis Clark from Tasmania he shared the distinction of being the only other Australian-born delegate. In addressing the gathering Deakin summarised his hope for the Court. 'In a Federal Judiciary', he told his fellow delegates,

we shall have one of the greatest gains and one of the strongest powers of the federation-not simply by the creation of a Court of Appeal in Australia, which should avoid the necessity of appealing to the Privy Council in London, but by the establishment of a judiciary in which, if we adopted the model of the United States, we should obtain one of the organizations by which the power of its union makes itself felt and obeyed in all portions of its vast dominions.<sup>10</sup>

Deakin would have his supporters, such as Inglis Clark, but his initial observation about replacing the Privy Council would become one of the great clashes within the Federal Conventions. The ensuing debate concentrated around three main arguments.

For some, ending the appeal to the Privy Council was the first step towards ending the relationship with Britain. The debate surrounding the removal of the right to appeal to the Privy Council emphasised the

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<sup>10</sup> *Official Record of the Proceedings and Debates of the Australasian Federation Conference*, Melbourne, 10 February 1890, 25 (Alfred Deakin).

importance of the link to, in the words of the Victorian Premier James Munro, 'the mother country'.<sup>11</sup> This suggestion gave George Dibbs, the New South Wales delegate and Henry Parkes' long time tormentor, the opportunity to display his republican tendencies. 'Cutting the first strand of the painter!', he interjected.<sup>12</sup> 'I think so', came the response from Munro.<sup>13</sup>

By contrast the most enthusiastic supporter of Privy Council appeals was Henry Wrixon from Victoria. He eloquently argued that to take away the appeal would be a 'great sacrifice for a very small gain'.<sup>14</sup> The link, he argued, 'is one of the noblest characteristics of our empire that over the whole of its vast area, every subject, whether he be black or white, has a right of appeal to his Sovereign for justice.'<sup>15</sup>

For others the need for a final Court of Appeal in Australia was based on a constitutional nationalism. Edmund Barton made the not unreasonable point that if Australians had the capacity to draft the Constitution it was not beyond their wit to interpret it.

While high principle was involved in many of the arguments about the future of the High Court, the Conventions were gatherings of political leaders. Warming to the task, many approached the debate by not only praising the prospects of an Australian High Court, but by stepping into the standards of the current Privy Council. Charles Kingston from South Australia concluded that the Privy Council as a 'bond of union' was

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<sup>11</sup> *Official Report of the National Australasian Convention Debates*, Sydney, 5 March 1891, 52 (James Munro).

<sup>12</sup> *Ibid* (George Dibbs).

<sup>13</sup> *Ibid* (James Munro).

<sup>14</sup> *Ibid*, 10 March 1891, 216 (Henry Wrixon).

<sup>15</sup> *Ibid*.

‘productive of considerable irritation and annoyance’.<sup>16</sup> Inglis Clark’s views of the Privy Council had been informed by firsthand experience. In early 1891 he had represented the Tasmanian Government in the *Main Line Railway v The Queen* and travelled to England for the appeal. He was confronted by ‘old fossils sitting on the bench ... Only one of the judges was awake, and the other three were all dozing.’<sup>17</sup>

There was, however, one last argument that resonated in Australia as well as in London. Justice Richmond of the Supreme Court of New Zealand had written to Henry Parkes during the 1891 convention. In his memorandum on the topic Richmond listed nine objections to ending appeals to the Privy Council. The ‘first and obvious one’, he noted, was the possible flight of ‘British capital’ if it could not appeal to an Imperial tribunal.<sup>18</sup>

As is well known the debate would drag on through the 1890s Conventions. There would be other missteps upon the way to an independent Australian judiciary. For instance, in Sydney in 1891, the Drafting Committee set sail on the Queensland Steamer, the *Lucinda*, and remodelled the judicial clauses to remove the entrenchment of the High Court allowing the Parliament, and not the Constitution, to establish the Court.<sup>19</sup>

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<sup>16</sup> Ibid, 9 March 1891, 163 (Charles Kingston).

<sup>17</sup> ‘Parliament of Tasmania’ *Mercury* (Hobart), 12 August 1897, 4.

<sup>18</sup> Letter from Justice Richmond to Sir Henry Parkes, 11 March 1891 reproduced in John M Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005) 352.

<sup>19</sup> See JA La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 66 and Frank Neasey, ‘Andrew Inglis Clark Senior and Australian Federation’ (1969) 15 *The Australian Journal of Politics and History* 1, 7.



During the later conventions the debate sharpened between the delegates about the independence of the High Court and the exchanges lost their diplomatic pretence. By far the most dogmatic advocate for the ending of the appeals to the Privy Council was Josiah Symon from South Australia. Whatever his reasons, he had by 1897 decided to confront all opponents to an independent High Court with ridicule. To give but one example he decided that an unflattering anecdote was the best means to illicit support and distract his opponents:

I will relate a story told by Lord Westbury to illustrate the point. Lord Westbury met the late Sir William Erle, a distinguished Chief Justice of the Court of Common Pleas, and he said, 'How is it you never come and sit with us in the Privy Council?' 'Well,' was the reply, 'I am old and deaf and stupid.' 'Oh!' said Westbury, 'that's nothing. Chelmsford and I are very old, Napier is very deaf, and Colville is very stupid, but we make a very good Court of Appeal nevertheless.' Except that I am supported by so distinguished an authority as Lord Westbury, I would not venture to insinuate any opinion of that kind against a court I esteem in its proper place, and when it is right, for it has been admitted that it is sometimes wrong. But when we hear these extravagant eulogies passed upon the Privy Council in comparison with this High Court of Australia, which we intend to make strong and able and respected, I think it is doing a great injustice, and perpetrating a gross calumny on both the bench and bar of this country.<sup>20</sup>

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<sup>20</sup> *Official Report of the National Australasian Convention Debates*, Adelaide, 20 April 1897, 981 (Josiah Symon).

As the Australian debate drew to a close the compromise was that the Privy Council would have a restricted jurisdiction in the terms of section 74.<sup>21</sup>

After the successful referendum campaign in Australia a delegation of the colonies was dispatched to London to shepherd the Constitution Bill through the Imperial Parliament. There they faced considerable opposition from the Secretary of the Colonies, Joseph Chamberlain. Chamberlain resisted the Australians and commenced protracted negotiations with Barton, Deakin, J R Dickson (from Queensland), Kingston, and Fysh (from Tasmania) in 1900.

The Australian position was straight forward. There was to be no amendment of the Bill given that it had been drafted in Australia and that the Australian people had endorsed it at two referendums. Notwithstanding this hope the delegation found Chamberlain in no mood to accede to their opening position. His wish to maintain an Imperial oversight of Australia's court was now being ably assisted by representations coming from Australia. As well as a number of chambers of commerce, the Chief Justices of the Supreme Courts were intervening to support the Privy Council. Central in this group were Sir Samuel Griffith from Queensland and Sir Samuel Way from South Australia. Sir Samuel Griffith, using his position as Lieutenant Governor and influence on the Queensland Governor, wrote directly to Chamberlain. In October

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<sup>21</sup> At the end of the Melbourne Convention in 1897 section 74 was expressed in these terms: 'No appeal shall be permitted to the Queen in Council in any matter involving the interpretation of this Constitution or of the Constitution of a State, unless the public interests of some part of Her Majesty's Dominions, other than the Commonwealth or a State, are involved': see *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 16 March 1896, 2536.

1899 he told Chamberlain 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.'<sup>22</sup>

These interventions would not be quickly forgotten by Kingston.

Ultimately a compromise would be made, but not before the Court's jurisdiction had been seemingly reduced. Significantly the Privy Council remained within the legal hierarchy.

The celebration of the inauguration of the Commonwealth on 1 January 1901 gave reason to pause and look optimistically to the future. Prior to the swearing in of the first Government there had been considerable jockeying amongst the would-be Ministers.<sup>23</sup>

Alfred Deakin, as Attorney-General, had been pondering the establishment of the High Court and had already sounded out Barton about its first appointments. Deakin was convinced that Griffith would need to lead the Court (and in all likelihood should be in the Barton Government). While Griffith undoubtedly agreed with Deakin that he should hold high office his actions were not helping his cause. Prior to the commissioning of Barton, Griffith had seriously considered taking the position of Attorney-General in the William Lyne 'Government'. As he recorded in his diary on Christmas Eve 1900 he had been made the offer of 'Atty Generalship with promise of C.J Ship'.<sup>24</sup>

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<sup>22</sup> R B Joyce, *Samuel Walker Griffith* (University of Queensland Press, 1984) 208.

<sup>23</sup> JA La Nauze, *The Hopetoun Blunder: The Appointment of the First Prime Minister of the Commonwealth of Australia, December 1900*, (Melbourne University Press, 1957).

<sup>24</sup> R B Joyce, above n 22, 256.

Griffith, who was the Chief Justice of Queensland, indicated to Deakin that his financial situation meant that he could not afford to 'throw up the present position except for a certainty'.<sup>25</sup> Deakin rightly surmised in a letter to Barton that:

This means that he is willing to accept office in a Federal Ministry i.e. say the Attorney Generalship with a reversionary claim to the Federal Bench and probably the Chief Justiceship.<sup>26</sup>

Barton was unmoved. 'On Griffith' he replied:

I am not sure that any such arrangements should be made as Griffith seems to look for. A bare 'understanding' which would mean that in certain events a judicial office is to be conferred, is a thing which I could not bring myself to hold out to a man as the virtual price of his taking a course, which the mere existence or hint of would deprive of all elements of public spirit or sacrifice. As others have made great sacrifices and are prepared to make many more, and we make no terms. Griffith left the cause, despite my entreaties, years ago. The real struggle has been waged since then. And before he becomes an Australian Statesman again, he expects to be 'provided for' – is not that now the customary term? Is there not too much of the Gospel of 'where do I come in' about all this?<sup>27</sup>

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<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> Letter from Edmond Barton to Alfred Deakin, 5 November 1900 in *Deakin Papers* (National Library of Australia, Canberra) MS 1540/14/6 <<http://www.nla.gov.au/apps/cdview?pi=nla.ms-ms1540-14-6>>.

Having spoken to O'Connor, Barton cautioned Deakin not to approach Griffith 'at close quarters' with any offer. He concluded the issue by stating that 'it is not good to begin with bargains about great offices.'<sup>28</sup>

The Barton Government set about establishing the instrumentalities of the new Commonwealth. Towards the top of the list was the High Court. However, the issue of the membership of the Court appeared not to be discussed in Government until such time as the legislative necessities were in place.

### **Making the Selection**

Deakin's Second Reading Speech for the Judicature Bill in 1901 has become a charter for the role and function of the Court. Senator Richard O'Connor - who was seated in the public Gallery – assessed the speech in a hand written note to Deakin: '*Magnificent* - The finest speech I have ever heard'.<sup>29</sup> In a speech that went for over three hours Deakin outlined his vision for the Court. For Deakin

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.<sup>30</sup>

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<sup>28</sup> Ibid.

<sup>29</sup> Letter from Richard O'Connor to Alfred Deakin, 18 March 1902 in *Deakin Papers* (National Library of Australia, Canberra) MS 1540/14/1035 < <http://www.nla.gov.au/apps/cdview?pi=nla.ms-ms1540-14-1035>>.

<sup>30</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 10964 (Alfred Deakin).

It would be, famously, 'the keystone of the federal arch.'<sup>31</sup>

Returning to his theme of judicial nationalism Deakin told Members that the Court would be 'strictly Australian and national, created for Australian and national purposes'.<sup>32</sup> The highest function of the Court, he continued, would be in 'unfolding the Constitution itself'.<sup>33</sup> It would determine the boundaries between the Commonwealth and the States in accordance with the compacts between the people of the States and the Commonwealth. The Court would 'affect the present and future privileges of the people'.<sup>34</sup>

Notwithstanding the hope for an early passage of the Bill, the Court's establishment would be delayed for two years. It would be held up by other legislative measures and the fragility of the Government's hold on office. Moreover, the Court itself became a focus of the Opposition's concerns over the budget and the cost of running the new Commonwealth. Led by George Reid the Opposition described the Court as a luxury and cautioned delay. Sir Samuel Way, ever eager to cast a critical eye over the developments in relation to the High Court, summed up the situation in his letter to Dr FW Pennefather in March 1903. Way noted that in publicly taking up the fight against clause 74 of the draft Constitution he 'was destroying any hope of my being made Chief Justice of the Federal Court'.<sup>35</sup> He did console himself with the

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<sup>31</sup> Ibid 10967.

<sup>32</sup> Ibid 10965.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> Letter from Sir Samuel Way to FW Pennefather, 18 March 1903 in *Way Papers* (State Library of South Australia, Adelaide) PRG 30/5.

belief that the Barton Government was beholden to the Labour party and that

They no more want the High Court than they want a fifth wheel to a coach, but there is a determination, which everyone recognises, to create as many places as possible for the patriots who have honoured us by entering the first Federal Parliament.’<sup>36</sup>

History must thank Sir Samuel Way for his meticulous interest in the Court and the unvarnished letters he wrote to colleagues about the Court’s progress. His account of the fortunes of the various candidates for the Court underscores the seemingly endless combinations of factors and personalities that went into the selection. Even before the passage of the Bill many individuals were being suggested as potential appointees to the Court. As well as Griffith and O’Connor, Inglis Clark, Sir John Downer, Josiah Symon, Isaac Isaacs, Justice Henry Hodge (from Victoria) and Bernhard Wise (from New South Wales) were all mentioned in the Press.

By far the most diffident potential appointee was Barton. The transition from the Parliament to the Bench clearly was an unsettling decision for him to make.

As the time for the appointments dragged on Sir Samuel Way calculated the likely Bench. He speculated that Symon might be appointed as a means of the Government ‘to get rid of a troublesome opponent’. As to the other South Australian candidate: ‘Sir John Downer has Barton’s very strong support but he is constantly [inked out - but probably drunk] it is

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<sup>36</sup> Letter from Sir Samuel Way to Rev HW Horwill, 7 July 1903 in *Way Papers* (State Library of South Australia, Adelaide) PRG 30/5.

questionable if any Government would dare to appoint him. Sir Samuel Griffith is strongly favoured in the Eastern colonies for the Chief Justiceship and I think his appointment would leave nothing to be desired.' With a likely Eastern States complement Way mused 'What chance would South Australia have in any litigation to prevent the waters of the Murray being diverted, with a majority of NSW and Victorian Judges on the Bench?'<sup>37</sup>

The final announcement of the first Bench was made on Thursday 24 September 1903 at 2:30pm by Alfred Deakin. He informed the House of the resignation of the Prime Minister and that the first Deakin Government that would be sworn in by the Governor-General later in the day. He further confirmed what the papers had speculated upon for days: that Griffith had accepted the offer of the Chief Justiceship and that the new Ministry had offered to Barton and O'Connor the other two seats on the Court. Both had accepted.<sup>38</sup>

In light of the developments Deakin moved that the House should adjourn and William McMillan, the leader of the Opposition, took the opportunity to warmly congratulate Barton, Griffith and O'Connor on their appointments.<sup>39</sup> Kingston, who immediately followed McMillan, was in a less generous mood. While he 'heartily congratulated' his old colleagues Barton and O'Connor he had but 'one regret' - that one of them should have been appointed Chief Justice. While not wanting to discuss the fitness of Griffith to hold the office he paused to declare it 'a

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<sup>37</sup> Sir Samuel Way to Admiral Sir Cyprian Bridge, 22 April 1903 in *Way Papers* (State Library of South Australia, Adelaide) PRG 30/5.

<sup>38</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 24 September 1903, 5463 (Alfred Deakin).

<sup>39</sup> *Ibid* 5463-4 (William McMillan).



most fatal mistake' that he was appointed Chief Justice. No one, he declared, had done more to prevent the will of the Australian people being enacted than Griffith, 'who is now selected for the post of Chief Justice'. He believed that a large section of the House shared his sentiments.<sup>40</sup>

In the other place Senator John Keating was even more critical. He declared that Griffith's 'friendship for Australia and for Australian Federation existed while it suited him'. His actions in 1900 were 'reprehensible in the extreme'.<sup>41</sup>

Both the Kingston and Keating comments were reported in the newspapers, however, they were overwhelmed with the magnitude of the events of the day. The *Bulletin* speculated as to the likely approach of the High Court and other possible appointees. As well as Griffith, Barton and O'Connor it listed Isaacs, Downer, Higgins, Symon, Wise and Inglis Clark as suitably qualified individuals. Ideologically it concluded that:

Griffith, Barton and O'Connor are Tory and pro-English; Clark and Higgins are democratic and pro-Australian; Wise democratic and pro-English; Symon Tory and pro-Australian.<sup>42</sup>

The *Bulletin* declined to pass judgment on Sir John Downer.

In Adelaide, Way's assessment was surprisingly favourable. Writing to T F Buxton on 29 September 1903 he confessed that he 'did not think it

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<sup>40</sup> Ibid 5464 (Charles Kingston).

<sup>41</sup> Commonwealth, *Parliamentary Debates*, Senate, 23 September 1903, 5372 (John Keating).

<sup>42</sup> *The Bulletin*, 1 October 1903 (Sydney) 9.

would be possible to get together a better or stronger Bench than the one which has been appointed'.<sup>43</sup> He continued:

Sir Samuel Griffith's services to Federation have been unsurpassed and there is no better constitutional lawyer in Australia. Moreover he is a moderate man with regard to Federal matters and I don't believe he will attempt to assail State rights...

Barton is in my opinion a man of broader mind, but he is lacking in lucidity or expression. It was an act of rare self-effacement for a Head of the Government to take second place on the Bench. Mr O'Connor is one of the only two men whose reputation has been enhanced by Federation. He is a Roman Catholic, but a man of considerable mental powers and of irreproachable character.<sup>44</sup>

According to Way, Downer was 'very disappointed' given Barton's pledge of a position and Symon, Way reported, 'had not been approached on the matter'.<sup>45</sup> Given that he was a member of the Opposition and the limited number of positions, Symon may have been unduly optimistic. Way gleefully told Pennefather that 'Symon is also very angry and said they might at least have appointed a gentleman!'<sup>46</sup>

When the Court had its first sitting on 6 October 1906 in the Banco Court in Melbourne the newspapers recorded the scene and the importance of

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<sup>43</sup> Letter from Sir Samuel Way to T F Buxton, 29 September 1903 in *Way Papers* (State Library of South Australia, Adelaide) PRG 30/5.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

<sup>46</sup> Letter from Sir Samuel Way to FW Pennefather, 26 September 1903 in *Way Papers* (State Library of South Australia, Adelaide) PRG 30/5.

the day for the new Commonwealth.<sup>47</sup> If the establishment of the Court had been difficult there would be no relief in the following ten years as it attempted to stamp its authority on the judicial landscape.

In 1903 the Court commenced its perambulation around the country. When the Court made its way to Adelaide in November, Samuel Way was ready to record its progress. Even before the Court had arrived he had written to the Reverend F W Bourne of the ‘undignified course’ of the Court ‘travelling from State to State swelling the ranks of the peripatetic unemployed and singing to the song “We have no work to do”’.<sup>48</sup> The Court had its first sitting in Adelaide on 24 November and Way held a dinner at the Adelaide Club in the Court’s honour. He proudly boasted that the Court was met with more ceremony in Adelaide than it had been in New South Wales, Victoria or Queensland.<sup>49</sup> At close quarters he observed the new Court and concluded that Griffith was the strongest of the three and that neither ‘Barton or O’Connor are above average of the Judiciary in the State Courts’.<sup>50</sup>

The Court’s early decisions highlighted the choice that confronts us all when approaching a blank page. As is well known the first constitutional cases saw, in the words of Professor Leslie Zines, a ‘struggle for

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<sup>47</sup> ‘The High Court: Opening Ceremony – Distinguished Gathering – Bench and Bar Speak’, *The Argus*, 7 October 1903, 9; See also ‘The High Court’, *The Register* (Adelaide) 7 October 1903, 4.

<sup>48</sup> Letter from Sir Samuel Way to F W Bourne, 18 November 1903, in *Way Papers* (State Library of South Australia, Adelaide) PRG 30/5.

<sup>49</sup> Letter from Sir Samuel Way to F W Bourne, 30 November 1903, in *Way Papers* (State Library of South Australia, Adelaide) PRG 30/5.

<sup>50</sup> Letter from Sir Samuel Way to Pennefather, undated, in *Way Papers* (State Library of South Australia, Adelaide) PRG 30/5.

standards'.<sup>51</sup> The question of what should be the guiding principles in the interpretation of the Constitution was being articulated.

One issue that confronted the Court in 1903 was the fact that the Supreme Courts had already commenced the task of interpreting the Constitution. During the debate over the Judiciary Bill in 1902, John Quick, the parliamentarian and constitutional scholar, estimated that there were 20 cases involving federal law decided by the State Supreme Courts between 1901 and June 1903.<sup>52</sup>

One of the first cases in which the constitutional position of the States was considered was the *Wollaston case*. The case involved the liability of a Commonwealth employee to pay tax under the *Income Tax Act 1896*. The Victorian Supreme Court (Madden CJ, Williams and a'Beckett JJ) upheld the Victorian Act and rejected submissions based on American precedents.<sup>53</sup> The Chief Justice preferred the reasoning of the Privy Council and its rejection of the American approach. The decision of the Full Court in *Wollaston's case* disturbed not only Dr Wollaston but also a keen observer in Tasmania. Inglis Clark wrote to Deakin:

Since I came home I have read Madden's judgment on Wollaston's case and felt so much irritated that I could not rest until I had relieved myself by writing a criticism of it. a'Beckett's judgment is a sober and respectable performance which deserves attention, although I believe that he has arrived at a wrong conclusion.

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<sup>51</sup> Leslie Zines, *The High Court and the Constitution* (Federation Press, 5<sup>th</sup> ed, 2008) Chapter 1.

<sup>52</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 9 June 1903, 652 (John Quick). Some of this research was published by Quick as 'Commonwealth Legislation and Judicial Interpretation' (1903-4) 1 *Commonwealth Law Review* 62.

<sup>53</sup> *Wollaston's Case* (1902) 28 VLR 357, 363-4.

Madden's production is full of false history, bad political science, bad political economy, bad logic and bad law.<sup>54</sup>

It was not long before Inglis Clark would have his chance to expand on the errors of his Victorian colleagues. Three months after writing to Deakin, the Supreme Court of Tasmania would commence hearing *Pedder v D'Emden*.<sup>55</sup>

When the High Court heard the appeals from the State Courts they overturned their approach. As expected the approach of the High Court in *D'Emden* was not greeted with delirium by the State Supreme Courts. Implicit in the High Court's decision was the conclusion that *Wollaston's case* was wrongly decided by the Victorian Supreme Court. Yet within weeks of *D'Emden* the Supreme Court was applying its own decision and distinguishing *D'Emden*.<sup>56</sup> In a calculated aside the Supreme Court highlighted the uncertainty as to which court, the High Court or the Privy Council, was the ultimate authority for Australia.<sup>57</sup> This could be read as a direct challenge to the High Court. Griffith's response suggests it was.

When *Income Tax Cases* came before the Court in October 1904 Griffith summarised the Supreme Court's decision and their 'intimation' that 'they did not consider themselves bound by the reasoning contained in the judgment of this Court in *D'Emden v. Pedder*, although they agreed in the conclusion'.<sup>58</sup> This, he lectured, was 'a somewhat novel mode of

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<sup>54</sup> Letter from Inglis Clark to Alfred Deakin, 4 March 1903 in *Deakin Papers* (National Library of Australia, Canberra) MS 1540/1/850.

<sup>55</sup> *Pedder v D'Emden* (1903) 2 TLR 146.

<sup>56</sup> *In re The Income Tax Acts (No. 4) Deakin's and Lyne's Cases* (1904) 29 VLR 478.

<sup>57</sup> *In re The Income Tax Acts (No. 4) Deakin's and Lyne's Cases* (1904) 29 VLR 478, 764.

<sup>58</sup> *Deakin v Webb* (1904) 1 CLR 585.

dealing with a judgment of a Court of final appeal'.<sup>59</sup> After again expounding the reasoning in *D'Emden* the Court refused to certify, as the Constitution required, an appeal to the Privy Council against the High Court's decision.

This assertion of independence and authority was most keenly felt by the State Supreme Courts. Griffith's unrestrained comments in *Deakin v Webb* indicates there was some resistance as well as resentment generated by the arrival of the federal judiciary. Again we can look no further than the Chief Justice of South Australia for confirmation. Way wrote to his British judicial colleague Sir William Grantham in early 1905 that the High Court had 'sat down like a solid crab in Sydney and reversed 10 out of 14 of their [the NSW Wales Supreme Court] judgments. I cannot think the New South Wales Bench could have been so often wrong. Nevertheless, Sir Samuel Griffith does very well as Chief Justice, and *he* is the Court.'<sup>60</sup> Way attempted to console his fellow Chief Justice, Sir Frederick Darley, by sharing his outrage.

I am as indignant as you can possibly be at the unceremonious treatment which is being dealt out to the State Courts by the High Court. It certainly looks as if the High Court approaches the judgments of the State Courts with the supposition that they are wrong. But quite apart from personal considerations I consider a very fatal stab has been given to the administration of justice. A litigious spirit will be encouraged by the confident expectation that however

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<sup>59</sup> *Deakin v Webb* (1904) 1 CLR 585.

<sup>60</sup> Sir Samuel Way to Sir William Grantham, 21 February 1905 in *Way Papers* (State Library of South Australia, Adelaide) PRG 30/5/9 Box 2.

right the judgments of the State Courts may be, they are sure to be reversed in the Court of Appeal.<sup>61</sup>

Despite the ill-feeling amongst some of the Supreme Courts the High Court had confidently walked onto the stage and commenced to articulate its understanding of Australian law. However, that address was about to become sidetracked as the Court became involved in yet another test of wills.

### **On Strike**

By far the most dramatic event of the first decade of the Court occurred in 1905. Again at stake was the authority of the Court and its struggle to be viewed as an independent arm of the State in its own right.

In late July 1904 Henry Higgins, the Attorney-General in the Watson Government, had written to Griffith suggesting that the current expenditures for the travel of the Associates may not be in strict accordance with section 47 of the *Judiciary Act 1903* (Cth).<sup>62</sup> Barton responded noting that his colleague had not yet had the opportunity to consider the issue. However, for his part he felt that a 15s per diem would be at times inadequate, lest the Associate stay in an 'inferior' hotel which would be 'unseemly'.<sup>63</sup>

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<sup>61</sup> Sir Samuel Way to Sir Frederick Darley, 31 March 1905, in *Way Papers* (State Library of South Australia, Adelaide) PRG 30/5/9 Box 3.

<sup>62</sup> Letter from the Henry Higgins to the Justices of the High Court, 29 July 1904 in Commonwealth, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 1. Section 47 provided that there shall be paid to each Justices of the High Court 'on account of his expenses in travelling to discharge the duties of his office'.

<sup>63</sup> Letter from Justice Barton to Henry Higgins, 2 August 1904 in Commonwealth, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 2.

Upon accepting the appointment to the Court, Griffith had tried to maintain his permanent home in Queensland. Having trialled this for a year he and his wife had come to the conclusion that it was 'absurd and impossible' to keep up a permanent home in Brisbane.<sup>64</sup> He thus decided to relocate to Sydney and join Barton and O'Connor. The move meant that Griffith would need more space and requested that the Commonwealth provide him 'with chambers of sufficient size to hold my library which of course I must have with me'. Griffith suggested one additional benefit in moving the Court to Sydney: it could escape the 'Melbourne Press which has essayed to brow-beat the Judges, as they have been accustomed to do to members of Parliament.'<sup>65</sup>

Reid duly passed on Griffith's request to his Attorney-General, Symon.<sup>66</sup> In December Griffith wrote to Symon outlining the plan to move to Sydney and requesting that Symon 'be good enough to move the proper authorities to give directions to have my chambers fitted with proper and sufficient shelves, to be ready to receive my library'.<sup>67</sup> Griffith helpfully calculated that he would require about 300 feet of shelving.

The shelving proved to be more of a tinderbox than office equipment. When the dispute was finally brought to a close there would be over 100 letters and telegrams in circulation between the judges and members of the Executive. In February 1905 Deakin, who was being sent copies of

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<sup>64</sup> Sir Samuel Griffith to George Reid, 12 November 1904 in *Symon Papers* (National Library of Australia, Canberra) MS 1736/11/146.

<sup>65</sup> Ibid

<sup>66</sup> Letter from George Reid to Josiah Symon, 16 November 1904 in *Symon Papers* (National Library of Australia, Canberra) MS 1736/11/147.

<sup>67</sup> Letter from Sir Samuel Griffith to Josiah Symon, 2 December 1904 in *Commonwealth, Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 2-3.



the exchanges, pleaded with Griffith that '*this correspondence ought to be destroyed* – It must not be possible to exhume it'.<sup>68</sup> History must record its thanks to Griffith and others for not following this advice.

When Symon responded to Griffith he came straight to the point. The magnitude of the Court's travelling expenses, which amounted to £2,885 in the fifteen months, had attracted 'sharp criticism' in the Parliament and the Press. It was a criticism that Symon confessed he sympathized with. Symon further reminded the Chief Justice that the principle seat of the Court was in Melbourne and that an 'ambulatory Court of Appeal' was without precedent. As part of his planned austerity measures he determined that from 1 January 1905 the travelling expenses of the Justices (and their Associates) should be set at 3 guineas but more importantly they would be calculated from Melbourne and 'not the place of residence of the Justice'.

The early exchanges of letters between the Attorney-General and the Chief Justice had obviously reached Prime Minister Reid over Christmas. On New Year's Day 1905 he took time out from his holiday in Serrento to write to Symon. After wishing Symon and 'Lady Symon every good wish for the coming year' he wanted to be reassured that

There is no truth in a suggestion made to me that you are going to centralise the High Ct in Melbourne, the true seat of govt is NSW although Parl is specially provided for, at least that is my view But

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<sup>68</sup> Letter from Alfred Deakin to Sir Samuel Griffith, 28 February 1905 in *Griffith Papers* (Dixon Library, State Library of New South Wales, Sydney) cited in La Nauze, *Deakin* (Melbourne University Press, 1965) 384.

Sydney is the place where the most work is. Don't add to the soreness of NSW! & the troubles of.<sup>69</sup>

Symon responded that he was sorry that 'anyone' should have been 'so meddling or ill-natured' as to have interrupted Reid vacation with these issues.<sup>70</sup>

The Court challenged the Attorney-General to have the Parliament expressly change the Rules of Court to limit circuits. They correctly judged that the Reid-McLean Ministry was not anxious to test itself on this issue in Parliament. As to the travelling allowances from Sydney they had an agreement with the Deakin Government which they believed was binding on the Executive.<sup>71</sup>

Dramatically Symon now changed tact. He instructed the Secretary of his department, Robert Garran, to return to each Judge their travel reimbursements asking them to disaggregate the expenses incurred travelling to and from Melbourne. Symon was now implementing the new policy of not paying the travel costs from the judges' residences in Sydney to the seat of the High Court in Melbourne.<sup>72</sup> The Judges returned their receipts to Garran without answering his request. Symon further attempted to drive the judges to Melbourne by limiting the

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<sup>69</sup> Letter from George Reid to Josiah Symon, 1 January 1905 in *Symon Papers* (National Library of Australia, Canberra) MS 1736/11/161.

<sup>70</sup> Letter from Josiah Symon to George Reid, 7 January 1905 in *Symon Papers* (National Library of Australia, Canberra) MS 1736/11/161.

<sup>71</sup> Letters from the Justices of the High Court to Josiah Symon, 14 and 16 February 1905, in Commonwealth, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 10-13.

<sup>72</sup> Letter from Robert Garran to EPT Griffith (Associate to the Chief Justice), 14 April 1905; Letter from Robert Garran to EA Barton (Associate to Justice Barton), 14 April 1905; and Letter from Robert Garran to HE Manning (Associate to Justice O'Connor), 14 April 1905, in Commonwealth, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 20-1.

Court's overall travelling expenses. The Commonwealth would only fund the travel of one tipstaff and one associate for the full court sitting in Brisbane in May 1905. The sins of the fathers were now actively being visited upon the sons. Griffith and Barton had by this time employed both their sons as their associates. Symon had four of the five telephones at the Darlinghurst chambers disconnected as well as ending the Commonwealth funding of the telephones in the Barton and O'Connor Sydney residences.

Griffith, Barton and O'Connor decided that they would now make a dramatic gesture of their own in order to force Symon, and most likely, Reid's hand. They did so with a degree of ineptitude that is surprising of three former politicians. Motivated by Symon's intransigence on the travelling expenses and his displeasure at their determination to continue to sit in the other capitals they took the decision to 'strike' at a meeting in Sydney on Saturday 29 April 1905. They determined that sittings in Melbourne set down for Tuesday 2 May should be postponed for a week. This was announced from the Bench, but in deference to Reid they did not outline their reasons for taking this action.<sup>73</sup> Following a series of miscommunications a public notice cancelling the sittings was not published and litigants arrived to find the Court closed.

Sensing that things were spiralling out of control Reid intervened attempting to find a compromise by contacting Griffith. Symon was incensed by Press reports that Reid's 'tactful intervention' had brought about mutual concessions between Griffith and Symon. Not for the first

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<sup>73</sup> 'High Court Deadlock', *Sydney Morning Herald* (Sydney) 24 May 1905, 8.

time he accused Reid of being 'literally in league' with the Judges.<sup>74</sup> The tone of these exchanges threatened to end this friendship. Symon berated Reid for his 'unpardonable' dealings with the Judges behind his back. 'To have given way to the Justices last week as you implored me to do, whilst they were literally 'on strike' would have covered the administration with shame' Symon told Reid.<sup>75</sup>

Symon was becoming unhinged by the whole dispute.

The Court now decided to put an ultimatum to Reid. On 23 May Griffith telegraphed him at Armidale stating that the Government had to reinstate the previous travelling expenses. The Court made good on its threat and on 23 May Griffith read on behalf of his brethren a lengthy statement from the Bench outlining the history of the dispute and the request made by Reid not to make the issue public on 29 April and the subsequent refusal by Symon to reconsider the issue. The address was accompanied with the details of the letters that had passed between the Court and the Attorney-General and Prime Minister. Griffith ended this unprecedented address with a hint that the Brisbane sittings may need to be postponed as funds may not be available for the Associates and Tipstaff to accompany the Judges.<sup>76</sup>

As the political temperature continued to rise Reid believed he had found a compromise only to find that Symon undermined any solution. Symon proposed on 16 June to reduce the salary of the Associates by

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<sup>74</sup> Letters from Josiah Symon to George Reid, 9 and 11 May 1905, cited in WG McMinn, 'The High Court Imbroglio and the Fall of the Reid-McLean government' (1978) 64 *Journal of the Royal Australian Historical Society* 14, 24.

<sup>75</sup> Letter from Josiah Symon to George Reid, 9 May 1905 in *Symon Papers* (National Library of Australia, Canberra) MS 1176/11/395.

<sup>76</sup> 'High Court Deadlock - Brisbane sitting may be postponed', *Sydney Morning Herald* (Sydney) 24 May 1905, 8.

£50 per annum and to abolish the office of Tipstaff to be replaced by one court officer to be designated the 'High Court Usher'.<sup>77</sup> Barton had had about enough. Sick of being 'degraded and humiliated by this unspeakable scoundrel' Barton laid out his future to Deakin:

My wife urged me to resign rather than submit to any further indignity: but at least I shall wait to see whether Parliament adopts, or condones, the outrages we have suffered, of which every day brings a new one in the shape of an insulting letter.<sup>78</sup>

O'Connor, who was also contemplating resignation, was keeping Deakin abreast of developments.<sup>79</sup> On 19 June he told Deakin of the most recent 'petty annoyance' – 'our official telephones were disconnected today'.<sup>80</sup> He had come to the conclusion that Reid had given Symon 'a free hand to wreak as far as possible the High Court'. A further consequence of Symon's decision to replace the Tipstaff with a Court Usher who would not travel with the Court was that 'we shall when we leave Sydney be at the mercy of any yoboo of a court attendant picked up casually to get authorities from the library or papers from our Chambers while argument is going on.'<sup>81</sup>

By late June Deakin moved on Reid, and with the support of Watson, was able to set in train the downfall of the Government. On 5 July the

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<sup>77</sup> Letter from Josiah Symon to Sir Samuel Griffith, 16 June 1905 in Commonwealth, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 30-1.

<sup>78</sup> Ibid.

<sup>79</sup> Letter from Sir Samuel Griffith to Alfred Deakin, 23 June 1905 in *Deakin Papers* (National Library of Australia, Canberra) MS 1540/16/411.

<sup>80</sup> Letter from Justice Richard O'Connor to Alfred Deakin, 19 June 1905 in *Deakin Papers* (National Library of Australia) MS 1540/16/378.

<sup>81</sup> Letter from Justice Richard O'Connor to Alfred Deakin, 20 June 1905 in *Deakin Papers* (National Library of Australia, Canberra) MS 1540/16/384.

second Deakin Ministry was sworn in. Isaac Isaacs became the new Attorney-General. Even on the day that his commission was being terminated Symon was still writing to Griffith reaffirming his decision that only one Associate and Tipstaff would be funded for the Brisbane sitting.<sup>82</sup> On 12 July Isaacs wrote to Griffith noting the numerous requests to his predecessor for additional furnishings for his Sydney Chambers. He had the honour to inform Griffith that ‘the shelves will be provided as required’.<sup>83</sup> The dispute was at an end.

By the midpoint of the decade there had been tension with the State Supreme Courts and a major dispute with the Government. In 1906 a further challenge of the Court’s authority was posed by the Privy Council. The Victorian Government took advantage of the unsatisfactory compromise in Section 74 of Constitution to appeal directly from the Victorian Supreme Court to the Privy Council in the case of *Webb v Outtrim*, regarding the liability of Commonwealth officials to pay State income tax.<sup>84</sup> The Privy Council rejected the doctrine of implied immunity on the grounds that it was not necessary given the express constitutional provisions, and adding gratuitously, that the Royal authority could be invoked to resolve conflicts of legislation. Griffith and Barton were furious. ‘Old man Halsbury’s judgment’, fumed Barton, ‘deserves no better description than that it is fatuous and beneath consideration. But the old pig wants to hurt the new Federation and

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<sup>82</sup> Letter from Josiah Symon to Sir Samuel Griffith, 5 July 1905 in Commonwealth, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 39.

<sup>83</sup> Letter from Isaac Isaacs to Sir Samuel Griffith, 12 July 1905 in Commonwealth, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 40.

<sup>84</sup> [1907] AC 81.

does not much care how he does it.’<sup>85</sup> Griffith was more measured but equally dismissive. In its subsequent judgments the High Court largely ignored the Privy Council’s decision.<sup>86</sup> Moreover, they unanimously refused to grant a certificate of appeal to the Privy Council.

Despite the unanimity on the authority of the High Court the way forward in terms of constitutional interpretation was not so clear. The appointment of Isaac Isaacs and HB Higgins in October 1906 opened up a division between members of the Court as to the guiding principles in interpreting the Constitution. With the premature death of O’Connor in 1912 and the appointment of Sir Frank Gavan Duffy, Sir Charles Powers and Sir George Rich in 1913, the outlook of the Court was changing. The years between 1906 and 1913 were dominated by the Court’s forensic unpicking of the ‘New Protectionism’ legislation. The Commonwealth’s policy attempted to use tariff concessions to protect industry, prevent monopolies and ensure fair wages and prices.<sup>87</sup> As Leslie Zines has written the decade saw the ‘judicial defeat’ of the main policies of the liberal protectionists and Labor members of parliament.<sup>88</sup>

### Conclusion

Unlike the first sitting of the Court in 1903, 6 October 1913, the day that marked the first decade, passed without fanfare. The Court was sitting in Melbourne hearing an appeal in the Broken Hill Junction North Silver

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<sup>85</sup> Edmund Barton to Thomas Bavin, 26 January 1908 in Bavin Papers (National Library of Australia, Canberra) MLA 560/1/47.

<sup>86</sup> *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 and *Flint v Webb* (1907) 4 CLR 1178.

<sup>87</sup> G Sawyer, *Australian Federal Politics and Law 1901-1929* (Melbourne University Press, 1956) 40.

<sup>88</sup> Leslie Zines, ‘Social Conflict and Constitutional Interpretation (1996) 22 *Monash University Law Review* 195, 195.

Mining Company case.<sup>89</sup> The previous day Mr Justice Barton had informed the parties that he was ‘convinced that the case was one which an amicable settlement was advisable’.<sup>90</sup> The parties resisted this suggestion and judgment was delivered three days later. Less than a month before the *Brisbane Courier* editorialised about what it described as ‘High Court Uncertainties’. The paper agonised over the fact that the High Court was now overturning its previous decisions and had now developed ‘a fixed legal discrimination for the Commonwealth’ against the States. The paper lamented that this manifestation of change was the result of the appointment of ‘labour-socialist members to the bench’ and that now ‘legal interpretation by the High Court is to be subject to alteration every time vacancies occur on the bench’.<sup>91</sup>

Notwithstanding the glib reporting of the Brisbane paper, what was not in doubt was the authority of the Court. In the space of a decade the Court had asserted itself as an independent and authoritative voice of Australian law. It was well on the way to fulfilling Deakin's vision of the Court.

I have always maintained that it is possible to trace the history of Australia through the pages of the *Commonwealth Law Reports*. All of the momentous events in the life of the nation have, to some degree, found themselves with the Court: The clash between labour and capital, the ownership and regulation of public and private assets, native title, the care for the environment, and the suppression of communism and

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<sup>89</sup> *Broken Hill Junction North Silver Mining Co v Broken Hill Junction Lead Mining Co* (1913) 17 CLR 335.

<sup>90</sup> ‘Mining Companies at Law – A Question of Ventilation’ *The Advertiser* (Adelaide), 6 October 1913, 16.

<sup>91</sup> ‘High Court Uncertainties’, *The Brisbane Courier* (Brisbane), 10 September 1913, 4.



terrorism are (in their legal manifestations) to be found in those volumes. But more than the 'history from above' – it is a story of *individuals*. It is a story of a people and their law. And long may it be so.