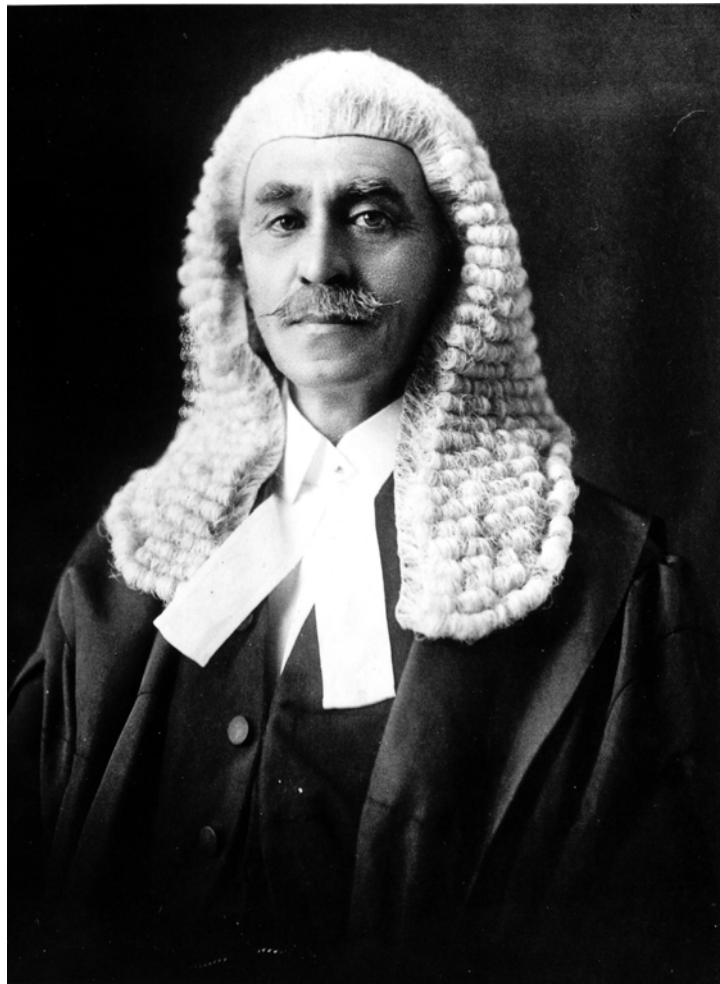


**WESLEY COLLEGE MELBOURNE**  
**THE SAMUEL ALEXANDER LECTURE**  
**THURSDAY 4 AUGUST 2005**

**ISAAC ISAACS – A SESQUICENTENARY REFLECTION**

**The Hon. Justice Michael Kirby AC CMG\***



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\* Justice of the High Court of Australia. The author acknowledges the assistance of Lorraine van der Ende, Legal Research Officer in the Library of the High Court of Australia.

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I dedicate this Reflection to the honour of Sir Zelman and Lady Cowen who on 24 July 2005, in Melbourne, celebrated the eightieth birthday of Lady Anna Cowen and the sixtieth anniversary of their happy and fruitful marriage – like Sir Isaac and Lady Isaacs, faithful servants of the People of the Commonwealth.

Sir Isaac Isaacs, the sesquicentenary of whose birth falls on 6 August 2005, was a great Australian. His story has been described as:

“... the Australian version of from Log Cabin to White House.”<sup>1</sup>

As a colonial parliamentarian he played an important role in the 1897-1898 Constitutional Convention and the move towards Australian federation. He was one of the original federal parliamentarians, and was described by Sir Robert Garran as one of the most brilliant federal Attorneys-General he had worked with.<sup>2</sup> During his time as a Justice and, later Chief Justice, of the High Court of Australia, he made a most significant contribution to the development of the law. In particular, he helped shape the development of the Australian Constitution in its earliest years. As the first Australian-born Governor-General, his term of

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<sup>1</sup> *The Age* quoted in Z Cowen, *Isaac Isaacs* (1967), at p. 257.

<sup>2</sup> Quoted in: M Gordon, *Sir Isaac Isaacs: A Life of Service* (1963), at p. 113.

service has been described as one of the most important in the history of that office.<sup>3</sup>

Throughout his lifetime of public service, Isaacs made a tangible contribution to the development of Australia. Equally important was what he stood for. The child of an immigrant family, with neither material advantages nor professional connections, Isaacs made his mark by force of his natural abilities. In doing so, he set an example for all Australians. We must preserve, as a feature of Australia, the ability of the poor, minorities and immigrants and their children to aspire to the highest offices in the land. And not only to aspire to them. To achieve them.

A sesquicentenary is an appropriate moment to look back on the contribution that Sir Isaac Isaacs made and to consider lasting aspects of his legacy. His contribution to Australian history has been recognized in a number of concrete memorials. These include a suburb in Canberra, a federal electorate in Victoria, and a Chair of Law in Monash University, all named in his honour. In a young country such as Australia it is important to remember and understand our history. We can take pride in many aspects of that story. We can learn from its mistakes. Isaacs affords an example of what can be achieved in Australia by ability, imagination determination, foresight and hard work.

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<sup>3</sup> D. Smith, "On the Road from Yarralumla" (June 2002) *Quadrant*, vol. XLVI, no. 6, at p. 20.

His sesquicentenary affords a moment for citizens to reflect upon his life and its meaning. We can note his foibles and vanities. And draw lessons for our own lives and times.

### **FAMILY BACKGROUND**

Isaac Alfred Isaacs was born in Melbourne on 6 August 1855 in a shop-dwelling on Elizabeth Street, in part of what is now the central business district. He was the first child of Alfred Isaacs, a tailor born in Russian Poland, and his wife Rebecca Isaacs, *née* Abrahams. The couple had arrived in Victoria from England a year before Isaacs was born. The marriage produced six children, although only four survived childhood.

For most of Isaacs's early life the family lived in north-eastern Victoria, in Yackandandah. In 1869 they moved to Beechworth, where Isaacs attended the Beechworth Grammar School. In *The Federal Story* Alfred Deakin noted:

“The son of a struggling tailor in an up-country town, Isaacs had as unpromising an outset as could be imagined for such a career as his proved.”<sup>4</sup>

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<sup>4</sup> A Deakin, *The Federal Story: The Inner History of the Federal Cause* (1944), at p. 67.

Isaacs's intense devotion to his family was well-known. Years later, when he was created a Knight Grand Cross of the Order of the Bath, a friend asked what he considered to be the greatest thing in life. He reportedly replied: "Love and service".<sup>5</sup> Both of these virtues were reflected in his dedication to his family. Once he had achieved sufficient success at the Bar to provide for them, he arranged for his parents and siblings to move back to Melbourne. After his own marriage, he continued to have daily contact with his parents, an attention not always observed today. Love and service are precious words to conjure with.

The bond between Isaacs and his mother was particularly strong. Until her death in 1912 she was his primary confidant and greatest supporter. Correspondence between them shows that she exerted a powerful influence over Isaacs. His daily contact with his mother was a routine that he maintained after his appointment to the High Court of Australia in October 1906. It was his mother who chose the wig that he wore at the ceremony in the High Court in which he took his oaths of office. She thereby fulfilled a promise she had made 24 years earlier when purchasing Isaacs's first barrister's wig. Rebecca Isaacs had then informed the wig-maker that she would be back at a later date to purchase a judge's wig for her son.<sup>6</sup> Her belief in his talents was

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<sup>5</sup> M Gordon, *Sir Isaac Isaacs: A Life of Service* (1963), at p. 210.

<sup>6</sup> T Blackshield, M Coper and G Williams (eds), *The Oxford Companion to the High Court of Australia* (2001), at p. 360.

undoubtedly a source of great strength for Isaacs. Her judgment proved well founded.

Perhaps unsurprisingly, the intense relationship between Isaacs and his mother placed strains upon his marriage in its earliest years. Isaacs married Deborah Jacobs, commonly known as Daisy, on 18 July 1888. Their marriage lasted sixty years at the time of Isaacs's death.<sup>7</sup> They had two children; Marjorie, born in December, 1890, and Nancy, born in January, 1892. Daisy Jacobs was 18 years of age when she married Isaacs. He was 32 years of age at the time. Over the years of their relationship – and often left to her own devices – she developed a distinct identity:

“... a woman of dignified appearance, strong personality and considerable style, who enjoyed her public positions.”<sup>8</sup>

### **EARLY COLONIAL CAREER**

Isaacs's abilities were displayed from the very beginning. Before he had finished school he was already unofficially employed as a pupil teacher. After graduating as dux of the Beechworth Grammar School and passing the teachers examination, he was employed by the

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<sup>7</sup> Daisy Isaacs died in June 1960, surviving her husband by over twelve years.

<sup>8</sup> Z Cowen, *Isaac Isaacs* (1967), at p. 22.

Victorian education authority. It was this first engagement that resulted in Isaacs's first appearance before a court of law. He sued the Department for fees that he claimed were owed to him for teaching extra subjects. The claim was dismissed. Soon after, in February 1875, Isaacs left his teaching position. He secured employment as a clerk in the Prothonotary's Office of the Crown Law Department in Melbourne. Apparently his reversal in court had not put him off the law. Soon he was in the thick of it.

He enrolled in the Faculty of Law at the University of Melbourne. He combined part-time studies with full-time work and graduated Bachelor of Laws with first class honours in 1880. This was followed with the degree of Master of Laws in 1883. Isaacs was a hardworking student. He was already known for his photographic memory. The citation of cases, and of the law reports in which they could be found, were so accurate that, after completing his Bar examination, the examiners reportedly questioned whether Isaacs had had access to a notebook or other references during the examination.<sup>9</sup> He did not. He was just one of those rare lawyers with a memory that ran in that direction.

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<sup>9</sup> Z Cowen, *Isaac Isaacs* (1967), at p. 6; G Fricke, *Judges of the High Court* (1986), at p. 41; R Garran, *Prosper the Commonwealth* (1958), at p. 157; M Gordon, *Sir Isaac Isaacs: A Life of Service* (1963), at p. 30.

At 27 years of age Isaacs was admitted to the Victorian Bar. He took chambers in Temple Court, where he would remain until he retired from legal practice in 1906 to assume his judicial post. He had no outside advantages in the sense of professional connections or financial backing. Yet he quickly developed a busy practice by relying upon his intellectual abilities, thorough preparation and indefatigable zest for hard work. Nevertheless, in his first two years at the Victorian Bar, Isaacs made only four recorded appearances. He supplemented his professional income by reporting law cases for the Melbourne newspapers. By 1890 his practice had grown, to the extent that he appeared on 19 reported occasions before the Full Court of the Supreme Court of Victoria. In all, his name appears in 57 cases reported in the *Victorian Law Reports* at that time.<sup>10</sup> His ability as an advocate was recognised by his appointment as Queen's Counsel in 1899. By this time he was one of the leading figures at the Victorian Bar. By the time of his appointment to the High Court of Australia, Isaacs had appeared before that Court in 27 reported cases.<sup>11</sup>

Isaacs's entry into Victorian colonial politics came in 1892 with his election to the seat of Bogong. In reflecting on the election one writer remarked that:

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<sup>10</sup> Z Cowen, *Isaac Isaacs* (1967), at p. 16; G Fricke, *Judges of the High Court* (1986), at p. 41.

<sup>11</sup> T Blackshield, M Coper and G Williams (eds), *The Oxford Companion to the High Court of Australia* (2001), at p. 165.



“Among the new Members elected to the Legislative Assembly, there is no more promising young man than Mr. Isaac Isaacs M.L.A. ... There can be no doubt that he will, in a very short time, make his mark in politics. It can be safely predicted that at no distant date, he will be included in the Ministry – probably as Law Officer of the Crown, and no one who knows him will deem it extravagance to say that he will one day wear the scarlet and ermine of the Supreme Court, although this cannot happen until some distant time.”<sup>12</sup>

After only eight months in the Victorian Parliament, Isaacs accepted the office of Solicitor-General for the conservative Patterson Ministry. However, he resigned that office shortly afterwards over a dispute with the Attorney-General regarding the prosecutions arising from the collapse of the Mercantile Bank. Isaacs insisted that he had independent authority to commence the prosecutions. When the Government refused to proceed in that way he resigned as Solicitor-General on the demand of the Premier and the Cabinet. Sir Owen Dixon later claimed that the Mercantile Bank issue was a source of the unpopularity and deep distrust felt towards Isaacs for many years by his contemporaries.<sup>13</sup> Yet his principled stance on the issue of prosecutorial independence won him media support and public popularity. He was re-elected to the Victorian Parliament soon after, without opposition, as the Member for Bogong.

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<sup>12</sup> Quoted M Gordon, *Sir Isaac Isaacs: A Life of Service* (1963), at pp. 55-56.

<sup>13</sup> Z Cowen, *Sir Isaac Isaacs (Daniel Mannix Memorial Lecture)* (1979), p. 22.

With the election of the Turner Government in 1894 Isaacs, described by *The Bulletin* as Turner's "brilliant henchman",<sup>14</sup> was appointed Attorney-General for Victoria. He held that office until 1899, and then again from 1900 until his transition to federal politics in 1901. During this period he took a particular interest in advancing reforms to company law. He assumed responsibility for the parliamentary passage of significant Bills involving important social policy, including the introduction of aged pensions and anti-sweating factory legislation. He was active in many policy areas, supporting wages board legislation, speaking in favour of controls on gambling, promoting insolvency reform and advocating women's suffrage.

At the close of the nineteenth century Isaacs was clearly one of the leading figures in Victorian colonial politics. Sidney and Beatrice Webb, during their 1898 tour of the Australian colonies, wrote, after observing the Victorian Parliament, that:

"There is in fact only one man of talent in the Ministry – Isaacs, the Attorney-General. He is a typical clever young Jew, a good lawyer with an active well-informed mind ... He is the only man we met in the colonies who has an international mind determined to make use of international experience ... [He will] have to rid himself of the outer manifestations of a childish vanity. But he will rise."<sup>15</sup>

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<sup>14</sup> Z Cowen, *Isaac Isaacs* (1967), at p. 41.

<sup>15</sup> Quoted in: Z Cowen, *Isaac Isaacs* (1967), at p. 45; G Fricke, *Judges of the High Court* (1986), at p. 40.

Yet despite his obvious talent and public popularity Isaacs was not popular amongst his peers. As Alfred Deakin put it:

“His will was indomitable, his courage inexhaustible, and his ambition immeasurable. But his egotism was too marked and his ambition too ruthless to render him popular.”<sup>16</sup>

### THE FEDERATION MOVEMENT

Isaacs's involvement in the Federation movement increasingly consumed his energies as Australia moved fitfully towards the Commonwealth. His introduction to the movement came when Deakin nominated him for membership to the Prahran Branch of the Australian Natives' Association, an association actively involved in debates surrounding the question of federal union. Isaacs himself was a firm believer in the importance of an Australian federation, and of the need to enshrine democratic principles in the proposed federal constitution. Although both the 1890 Federal Conference and the 1891 Constitutional Convention preceded his involvement in politics, he was elected to the Constitutional Conventions of 1897-1898 as the fifth of ten Victorian delegates.

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<sup>16</sup> A Deakin, *The Federal Story: The Inner History of the Federal Cause* (1944), at p. 68.

The 1897-1898 Conventions met in three sessions, held successively in Adelaide, Sydney and Melbourne. Isaacs played a prominent role at each of those meetings. So much so that Deakin wrote:

“At the close of the convention, without assigning their precise individual order even in their colonies, it may be said that the first men of influence at the final sitting when staying power had asserted itself consisted of Barton, O’Connor, Reid, Wise, Kingston, Holder, Turner, Isaacs and Forrest.”<sup>17</sup>

Mirroring the experience of the Victorian Parliament, Isaacs did not enjoy great popularity amongst his fellow delegates. It is said that he wearied them with his lengthy interventions, frequent references to other federal systems (notably the United States of America and Canada), and minute technical criticisms. He had little interest in the social activities of the Convention. Accordingly his:

“... untiring, almost ruthless concentration on the work of drafting the constitution ... kept him from popularity at the Convention.”<sup>18</sup>

This unpopularity was demonstrated by Isaacs’s failure to be elected to an official position on the drafting committee. This rejection

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<sup>17</sup> A Deakin, *The Federal Story: The Inner History of the Federal Cause* (1944), at p. 88.

<sup>18</sup> M Gordon, *Sir Isaac Isaacs: A Life of Service* (1963), at p. 89.

“had an injurious effect on Isaacs”.<sup>19</sup> Despite this “painful incident”<sup>20</sup> the significance of Isaacs’s contribution to the Convention has been recognised, with some even viewing him, in terms of practical impact, as the unofficial leader of the Victorian delegation.<sup>21</sup>

During the Convention, Isaacs adopted strong positions on a number of issues. His views were consistently reflected both in his voting record in the Federal Parliament and, more significantly, in his later interpretation of the Constitution during his service on the High Court. Isaacs’s ardent nationalism could be seen in his support, at the Convention, for the establishment of a High Court of Australia as a judicial body distinct in membership from the State Supreme Courts. It was also reflected in his arguments in favour of restricting appeals to the Privy Council and his insistence that the arrangements for national elections and the national parliament be administered entirely at a national level. Recent experience in the United States of America shows how particularly wise he was in this last-mentioned respect.

Isaacs’s nationalism was also reflected in his belief in the need for the constitution to confer on the new Federal Parliament a

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<sup>19</sup> A Deakin, *The Federal Story: The Inner History of the Federal Cause* (1944), at p. 79.

<sup>20</sup> *Ibid*, at p. 78.

<sup>21</sup> M Gordon, *Sir Isaac Isaacs: A Life of Service* (1963), at p. 81.

comprehensive range of national powers. This centrist position became the strongest legacy of his later constitutional decisions in the High Court. He was a firm supporter of the inclusion in the constitution of a federal power with respect to industrial arbitration. He also argued in favour of including a federal power to provide for aged pensions.

Isaacs was a strong advocate of the need to enshrine general democratic principles into the new constitution. His opposition to the principle of equal representation for each State in the Senate was based, partly, on his belief that the former colonies had no role to play in national issues. More importantly, it derived from his view that State equality in the Senate involved an undemocratic principle, contrary to the idea of responsible Cabinet Government. He feared that it would allow the will of the people to be effectively thwarted on important decisions. Thus, he described equal representation for the States in the Senate as a:

“... vicious principle, indefensible on the grounds of reason and logic and ... branded with the disapprobation of history.”<sup>22</sup>

For similar reasons he was opposed to the proposal that the Senate be granted equal powers with the House of Representatives over money bills. He argued against the use of parliamentary joint sittings as

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<sup>22</sup> L F Crisp, *Federation Fathers* (1990), at p. 207.

a device for the resolution of parliamentary deadlocks, preferring instead to see the people directly resolve any such deadlocks through the use of constitutional referendums.

Despite these strongly held views, rooted in his constitutional principles, Isaacs demonstrated that he was prepared to compromise in order to secure the primary goal of Australian federation. Thus, he recognised that equal representation of the States in the Senate was a necessary concession to ensure the participation of the smaller colonies. For this reason the provision of equal Senate representation for all States "... under the circumstances was politically and morally justifiable"<sup>23</sup>, although he stressed that this was acceptable only "... as a concession but not a right."<sup>24</sup>

At the close of the Sydney session of the Constitutional Convention on 17 March 1898, Isaacs spoke of there being "no dearer hope of my heart than to see a federated Australia".<sup>25</sup> Yet he expressed a number of doubts about the constitutional Bill which the Convention ultimately approved. These included doubts about the mechanism for the resolution of deadlocks and, reflecting his protectionist views, concerns about tariffs and the control of river and railways concessions

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<sup>23</sup> Ibid, at p. 207.

<sup>24</sup> Ibid, at p. 207.

<sup>25</sup> Z Cowen, *Isaac Isaacs* (1967), at p. 70.

on the borders, which he saw as disadvantaging Victoria's economic interests. These concerns, and possibly also the early opposition of the influential *Age* newspaper, led Isaacs initially to urge caution about the draft Constitution. He spoke against the adoption of the draft at the 1899 annual meeting of the Australian Natives' Association in Bendigo. However, clearly he had misjudged the mood of his audience. They enthusiastically cheered other speakers, such as Deakin, who spoke of their support for the document. Isaacs watched and learned.

After this initial dalliance with opposition to the Constitution Bill, Isaacs changed course, reflecting the changed resolve at the same time of both the Turner Ministry and the *Age* newspaper. Isaacs began to speak publicly and energetically in support of the draft Constitution. An autographed statement of Isaacs's, that was published during the Federation campaign, contained the statement:

"Every vote for the Bill is a brick that will help to raise the edifice of the Nation."<sup>26</sup>

It fell to Isaacs as Acting Premier of Victoria (Turner being abroad) to introduce the Bill for the proposed Constitution to the Victorian Legislative Assembly. His introductory speech lasted over four hours. Consistently with the style that characterised him in public speaking, it was reported that:

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<sup>26</sup> Ibid, at p. 74.



“... he was not fluent or flowery in his exposition ... He was much better ... clear, precise, and accurate almost to the degree of painful exertion.”<sup>27</sup>

Isaacs's commitment to the Federation movement, and his role in the Constitutional Convention, contributed in no small way to the adoption of the Australian federal system that remains in place today. It is claimed that Isaacs once stated that he awaited the day of Federation, for then he could say 'I am an Australian'.<sup>28</sup> He was there at the creation. Thereafter he gave a life-time of public service towards the development of the Australian nation. At the time of his death Sir Isaac Isaacs was the last surviving member of the Constitutional Convention of 1897-1898. He lived long enough to see the new nation strengthen and flourish. He contributed to its success in many ways.

### FEDERAL POLITICS

The first Federal Ministry of the Commonwealth of Australia was an interim one formed in advance of the initial federal elections. Sir George Turner, former Premier of Victoria, became Federal Treasurer in the first Barton Ministry. Isaacs was spoken of at this time as Turner's

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<sup>27</sup> M Gordon, *Sir Isaac Isaacs: A Life of Service* (1963), at p. 84.

<sup>28</sup> M Cathcart and K Darian-Smith (eds), *Stirring Australian Speeches: The definitive collection from Botany Bay to Bali* (2004), at p. 104.

logical successor as Victorian Premier. Indeed, on 17 January 1901, Turner announced that the Victorian Cabinet had agreed unanimously that Isaacs would be their choice as Premier, if he decided to remain in State politics.<sup>29</sup>

Several days later, Isaacs announced that he would “fulfil the federal pledges that he gave to [his] constituents”<sup>30</sup> by standing for the seat of Indi in the first federal elections. His reputation as a leading protectionist provoked the President of the Free Trade Association of Victoria, Mr. Thomas R. Ashworth, to stand as a candidate against him. Isaacs was elected by 3,888 votes against 2,061 votes for Ashworth.<sup>31</sup> Supporters in Beechworth hosted a reception to celebrate his success in the election. A friend of his father Alfred Isaacs prophesized that night that:

“... the day is not far distant when we will greet young Isaac Isaacs as Chief Justice of Australia.”<sup>32</sup>

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<sup>29</sup> M Gordon, *Sir Isaac Isaacs: A Life of Service* (1963), at p. 97.

<sup>30</sup> *Ibid*, at p. 97.

<sup>31</sup> Z Cowen, *Isaac Isaacs* (1967), at p. 79; M Gordon, *Sir Isaac Isaacs: A Life of Service* (1963), at p. 100.

<sup>32</sup> M Gordon, *Sir Isaac Isaacs: A Life of Service* (1963), at p. 101.

Isaacs took his seat in the House of Representatives of the first Federal Parliament on 5 June 1901. He was not a member of the Ministry. Yet whilst a private member he:

“... played an active part in the politics of those early years of the Commonwealth, and his legal knowledge and experience were used to much advantage in the debates on the important bills which went before the federal Parliament in those years.”<sup>33</sup>

Isaacs spoke strongly in favour of the Conciliation and Arbitration Bill to create a federal court to resolve inter-state industrial disputes. He also supported the Judiciary Bill, to provide for the establishment of the High Court of Australia. In speaking in favour of the latter Bill, Isaacs spoke of his vision for the High Court as:

“... the great bulwark of our Constitution and laws. It would be so high above political interference as to be free from the faintest breath of suspicion, and yet so close to the common life of our people as to feel the pulse-beat of their daily life.”<sup>34</sup>

On 5 July 1905 Isaacs was appointed Federal Attorney-General in the second Deakin Administration. One of his first acts was to write to Chief Justice Griffith in an endeavour to secure a compromise solution to the High Court's 'Strike of 1905'. The difference with the Justices

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<sup>33</sup> Z Cowen, *Great Australians: Isaac Isaacs* (1962), at p. 13.

<sup>34</sup> *Ibid*, at p. 13.

concerned their conditions and entitlements in the new Court. With Isaacs's intervention, the issue was successfully resolved. His 15 months as Attorney-General was characterised by the extraordinary energy and commitment that Isaacs brought to all of his public duties. Sir Robert Garran, who was the inaugural secretary of the Attorney-General's Department, later wrote of Isaacs's remarkable work ethic:

"He sometimes slept, I must believe, though I could never discover when. I once left him at the office at midnight, and on my way home took to the printer a draft Bill that was to be ready in the morning. Coming to the office early I found on my table an envelope from the government Printer, containing an entirely different draft, which, in some wonderment I took in to the Attorney. He confessed that in the small hours he had had a new inspiration, had recovered the draft from the printer, and had reshaped it, lock, stock, and barrel ..."<sup>35</sup>

Throughout his time as a member of parliament, both at the colonial and national level, and as Federal Attorney-General and, earlier, as Victorian Attorney-General and Solicitor-General, Isaacs continued to practise law privately. For example, whilst he was Federal Attorney-General, Isaacs made a number of appearances before the High Court of Australia. He did not represent the Commonwealth on any of these occasions, appearing instead either for private litigants or for Victoria. He was subject to criticism for this, but:

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<sup>35</sup> R Garran, *Prosper the Commonwealth* (1958), at p. 157.

“... it is a measure of Isaac’s enormous endurance and capacity for work that he was able to do both jobs effectively.”<sup>36</sup>

Isaacs’s time as an elected parliamentarian was marked by his involvement in the Federation movement and the establishment of the essential institutions of the federal Government during its formative years. He exhibited a determination to do his duty by the people who had elected him. He displayed a keen interest in the social impact of legislative policy. Although initially serving for a short period in a conservative Ministry in Victorian politics and being said in later years to be a support of the Australian Labor Party, Isaacs never actually belonged to any political party. His political views probably identified him more readily with the radical side of politics. Indeed, in his fundamental values he remained remarkably consistent in the views that he expressed throughout his political and judicial careers, and beyond into his retirement.

### JUSTICE OF THE HIGH COURT

The protectionist Deakin Government appointed Isaacs as Australia’s fourth High Court Justice on 12 October 1906. He was sworn into office three days later, together with the other new appointee, Mr. Justice H. B. Higgins. A newspaper account of the ceremony noted that:

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<sup>36</sup> Z Cowen, *Great Australians: Isaac Isaacs* (1962), at p. 5.

“Mr. Justice Isaacs wore a look of more austere judicial gravity than Mr. Justice Higgins, but the ladies in the Court noticed that the wig of Mr. Justice Higgins was much better fitting than the wig of Mr. Justice Isaacs.”<sup>37</sup>

Initially Isaacs and Higgins found themselves in the minority in the constitutional cases coming before the Court. Their appointments disrupted the harmony of views amongst the foundation Justices that had characterised the first years of the High Court. The early Court was characterised by a restrictive view of federal constitutional powers, protecting the State sphere by the invocation of the related doctrines of reserved States’ powers and implied immunity of instrumentalities. The new appointees did not hide their differences of opinion with the foundation Justices. Isaacs is considered by some as the High Court’s first ‘great dissenter’.<sup>38</sup> The strong differences of opinions expressed at that time, particularly as between Griffith and Isaacs, “delighted the law students, if they scandalized the public.”<sup>39</sup>

As the membership of the High Court changed over the years the opinions of Isaacs gradually began to prevail. This is often the reward of the judicial dissenter who lasts long enough to witness the impact of

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<sup>37</sup> “New High Court Judges: Swearing-in Ceremony”, *The Argus*, 16 October 1906, p. 4.

<sup>38</sup> T Blackshield, M Coper and G Williams (eds), *The Oxford Companion to the High Court of Australia* (2001), at p. 217.

<sup>39</sup> H V Evatt, *Australian Labour Leader: The Story of W. A. Holman and the Labour Movement* (1954), p. 116.

dissenting ideas. Certainly, Isaacs was the dominant personality on the Court by the early years of the Knox Court in the 1920s. And, it is in the field of constitutional interpretation that Isaacs's most significant contribution to the development of the law of Australia was made. Once again, this is unsurprising. The approach of judges to constitutional interpretation affects the outcome of many important cases. Theories about how the Constitution should be interpreted tend to be of profound importance. They are recognised as such by the Justices of the High Court themselves. This is why they lead to sharp and even heated expressions of differences.<sup>40</sup>

Consistent with the views he had expressed at the earlier Constitutional Conventions, Isaacs was firm in declaring it to be the duty of the Court, when interpreting the constitution, to affirm "the pre-eminence of the constitution over any attempted legislation unauthorized."<sup>41</sup>

The most enduring of Isaacs's constitutional legacies gave effect to this view. It happened in 1920, in the *Engineers Case*<sup>42</sup>. Isaacs

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<sup>40</sup> For a recent example see *Al-Kateb v Godwin* (2003) 78 ALJR 1099 at 1112 [62] ff per McHugh J; at 1128 [152] ff of my own reasons.

<sup>41</sup> *R v Hibble & Ors; ex parte The Broken Hill Proprietary Company Ltd* (1920) 28 CLR 456, per Isaacs and Rich JJ at 469.

<sup>42</sup> *The Amalgamated Society of Engineers v The Adelaide Steamship Co Ltd and Ors* (1920) 28 CLR 129.

delivered the majority decision of the High Court, with Chief Justice Knox, Justice Starke, and Justice Rich concurring. Justice Higgins substantially agreed with the majority, although delivering separate reasons of his own. The sole dissenting reasons in the case were delivered by Justice Gavan Duffy – the only exponent of the superseded view of the foundation Justices. The enduring importance of the *Engineers Case* is reflected in the comments of Chief Justice Barwick on the occasion of his retirement from the High Court. He said that later generations of judges and citizens:

“... need to be very wary that the triumph of the *Engineers’ Case* is never tarnished.”<sup>43</sup>

The central question in the case was "whether the Commonwealth Arbitration Court has power under the Constitution to fix the wages and conditions of labour of certain employees of the State Government of Western Australia."<sup>44</sup> The short answer, given by the majority of the Court, was that it did. The High Court upheld the extension of the federal industrial power to allow the Federal Parliament to make laws with respect to conciliation and arbitration that were binding on the

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<sup>43</sup> *Retirement of Chief Justice Sir Garfield Barwick* (1981) 148 CLR v, at p. x.

<sup>44</sup> M D Kirby, "Famous Case Remembered" (November 1990) *Australian Law News*, vol. 25, no. 10, at pp. 7-11. See also K Booker and A Glass, "The Engineers Case" in H P Lee and G Winterton, *Australian Constitutional Landmarks* (2003), at p. 34.



States. What marks this case as being “a judgment of momentous importance”<sup>45</sup> is the far-reaching reasoning of the majority reasons.

The case might have been decided on a narrow principle, as had occurred in earlier decisions such as the *Engine-Drivers Case*<sup>46</sup> or *Municipalities Case*<sup>47</sup>. Instead, the majority fundamentally rejected the doctrines of implied intergovernmental immunities and reserved State powers and said so in plain terms. The majority reasons clearly reflect the reasoning that Isaacs had urged upon the High Court as counsel in cases such as *Deakin v Webb*<sup>48</sup> and the *Railway Servants Case*<sup>49</sup>, and that he had developed as a judge in a series of dissenting reasons, such as *The King v Barger*<sup>50</sup> and the *Union Label Case*<sup>51</sup>.

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<sup>45</sup> *The Argus*, 1 September 1920. Quoted in M D Kirby, “Famous Case Remembered” (November 1990) *Australian Law News*, vol. 25, no. 10, at pp. 7-11.

<sup>46</sup> *Federated Engine-Drivers and Firemen’s Association of Australia & Ors v The Broken Hill Proprietary Company Limited and Ors* (1913) 16 CLR 245.

<sup>47</sup> *The Federated Municipal and Shire Council Employees’ Union of Australia v The Lord Mayor, Aldermen, Councillors and Citizens of the City of Melbourne & Ors* (1918-1919) 26 CLR 508.

<sup>48</sup> *Deakin v Webb* (1904) 1 CLR 585, 592-600.

<sup>49</sup> *Federated Amalgamated Government Railway and Tramway Service Association v New South Wales Railway Traffic Employees’ Association* (1906) 4 CLR 488.

<sup>50</sup> *The King v Barger* (1908) 6 CLR 4.

The *Engineers* decision, although it has been criticised for its exposition and style,<sup>52</sup> constitutes one of the most influential decisions of the High Court of Australia in its first hundred years. Without question, it is a foundational case in Australian constitutional law. There are two main reasons for this. The first is that the case signified a move towards greater literalism in constitutional interpretation, with the primacy of the constitutional text being asserted by the majority. This approach requires that effect be given to the express words of the Constitution:

“... which should not be qualified by vague implications derived from extraneous political theory.”<sup>53</sup>

There continues to be much discussion and debate regarding this approach to constitutional interpretation<sup>54</sup>. However, there is no

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<sup>51</sup> *The Attorney-General for the State of New South Wales v The Brewery Employees Union of New South Wales* (1908) 6 CLR 469.

<sup>52</sup> G Sawyer, *Australian Federalism in the Courts* (1967), at p. 130; L Zines, *The High Court and the Constitution* (1997), p. 10; A Mason, “The High Court of Australia: A Personal Impression of Its First 100 Years” (2003) 27 *Melbourne University Law Review* 864, at p. 873.

<sup>53</sup> M Coper and G Williams (eds), *How Many Cheers for Engineers?* (1997), at p. xiv.

<sup>54</sup> For example: M D Kirby, “Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?” (2000) 24 *Melbourne University Law Review* 1; A Mason, “The Interpretation of a Constitution in a Modern Liberal Democracy” in C Sampford and K Preston (eds), *Interpreting Constitutions: Theories, Principles and*

doubting the significance of the *Engineers Case*, for it quickly became the source of countless decisions the effect of which was to enhance federal constitutional power. In a sense it was curious that the chief proponent of this viewpoint was Isaacs, of all the early Justices the one most interested in legal policy. Such policy might, it seems, be identified and given weight. But in the matter of constitutional interpretation, no implied policy to protect the federal character of government or the intended powers of the States could be imputed to the language of the constitutional text. Isaacs was, in a way, the least 'legalistic' of the early Justices of the High Court. But on the issue of federal legislative power, he invoked a legal doctrine and applied it with uncompromising rigour.

The second legacy of the *Engineers Case* was the practical impact the decision had on federal constitutional power. By rejecting the implied intergovernmental immunities and reserved State powers doctrines, the majority in *Engineers* expanded the powers of Federal Parliament. This represented a fundamental shift in the Court's attitude towards the distribution of powers between federal and State legislatures. The resulting tilt in the balance in favour of federal powers was entirely in keeping with the nationalism and centralist tendencies

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*Institutions* (1996); M McHugh, "The Constitutional Jurisprudence of the High Court: 1989-2004", *Inaugural Sir Anthony Mason Lecture in Constitutional Law* (26 November 2004); B M Selway, "Methodologies of constitutional interpretation in the High Court of Australia" (2003) 14 *Public Law Review* 234.

that characterised Isaacs's approach to the nature of the federation created in the Australian Commonwealth.

Isaacs's nationalism is reflected in the majority reasons in the *Engineers Case*. Indeed, the decision should itself be seen as an important step in the development of Australian nationhood. Justice Windeyer made this point in his reasons in the *Payroll Tax Case*:<sup>55</sup>

“[I]n 1920 the Constitution was read in a new light, a light reflected from events that had, over twenty years, led to a growing realization that Australians were now one people and Australia one country and that National laws might meet National needs. ... As I see it the *Engineers' Case* looked at as an event in legal and constitutional history, was a consequence of developments that had occurred outside the law courts as well as a cause of further developments there.”

Of all of the judges appointed to the High Court of Australia in its first century, saving perhaps Justice Lionel Murphy, Sir Isaac Isaacs is probably the one who held the most expansive views about the powers of the Commonwealth. It was his formulation of “doctrines that facilitated the developing centralism of the young federation”<sup>56</sup> that some have claimed was his major and lasting contribution to Australian law. Isaacs consistently interpreted the constitution so as to provide greater powers

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<sup>55</sup> *The State of Victoria v The Commonwealth of Australia (Payroll Tax Case)* (1971) 122 CLR 353, per Windeyer J at 396.

<sup>56</sup> G Fricke, *Judges of the High Court* (1986), at p. 50.

for the centre. His judicial reasons burned with “the flame of an aggressive nationalism”.<sup>57</sup> A presumption in favour of federal power is evident in his writing. This could, for example, be seen in his expansive approach towards the federal industrial power<sup>58</sup>, in his approach to interpreting section 92 of the Constitution to confine its operation to the States,<sup>59</sup> and in his decision in favour of the Commonwealth in *Victoria v The Commonwealth*<sup>60</sup>, concerned with the validity of imposing conditions on federal financial grants to the States under section 96 of the

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<sup>57</sup> R Else-Mitchell (ed.), *Essays on the Australian Constitution* (1961), at p. 97.

<sup>58</sup> Examples include Isaacs J’s reasons in: *The Australian Insurance Staffs’ Federation v The Accident Underwriters Association & Ors (Insurance Staffs and Bank Officials’ Case)* (1923) 33 CLR 517; *Burwood Cinema Ltd & Ors v The Australian Theatrical and Amusement Employees’ Association* (1925) 35 CLR 528; *R v Commonwealth Court of Conciliation and Arbitration; ex parte Engineers* (1927) 38 CLR 563; *The Federated State School Teachers’ Association of Australia v The State of Victoria & Ors* (1928) 41 CLR 569.

<sup>59</sup> Examples include Isaacs J’s reasons in: *W & A McArthur Ltd v The State of Queensland & Ors (McArthur’s Case)* (1920) 28 CLR 530; *The Commonwealth v The State of South Australia* (1926) 38 CLR 408; *Ex parte Nelson [No. 1]* (1928) 42 CLR 209. The overruling of the Court’s decision in *McArthur’s Case* by the Privy Council in *James v Commonwealth* (1936) A.C. 578 provoked a strong reaction from Isaacs, with his views on this matter being clearly set out in his pamphlet *Australian Democracy and Our Constitutional System* (1939).

<sup>60</sup> *The State of Victoria & Ors v The Commonwealth* (1926) 38 CLR 399.

Constitution which intruded into what had hitherto been seen as State prerogatives.

The fundamental view underlying this preference for expanding federal powers was the need, as perceived by Isaacs, to ensure that:

“... the Commonwealth as a whole is empowered to deal with its most momentous social problems on its own broad scale unimpeded by the sectional policies of particular States.”<sup>61</sup>

The support for central law-making authority, combined with Isaacs’s national patriotism, appeared most prominently in his broad interpretation of the defence power granted by section 51(vi) of the Constitution. In cases such as *Farey v Burvett*<sup>62</sup> he spoke of the defence power as the “*ultima ratio* of the nation”<sup>63</sup> and a paramount source of power for the nation during times of war. In Isaacs’s view the defence power expanded in times of war to provide almost unlimited authority to the Federal Parliament and Government to regulate wide areas of Australian life in the name of national defence. The scope of the power was delimited by the requirements of self-preservation.

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<sup>61</sup> *Clyde Engineering Company Ltd v Cowburn (Cowburn’s Case)* (1926) 37 CLR 466, per Isaacs J at 479.

<sup>62</sup> *Farey v Burvett* (1916) 21 CLR 433.

<sup>63</sup> *Farey v Burvett* (1916) 21 CLR 433, per Isaacs J at 453.

Isaacs's preference for expansive national powers was also reflected in his interpretation of section 109 of the Constitution. It was Isaacs who provided the first clear expression of the 'cover the field' test of inconsistency in *Clyde Engineering v Cowburn*.<sup>64</sup> That test was later developed by Justice Dixon in *Ex parte McLean*,<sup>65</sup> with Isaacs concurring in separate reasons. It has proved of great influence in and beyond Australia. In India, a more recent federation, the Supreme Court has applied the 'covering the field' metaphor for the delineation of Union as against State legislative powers.<sup>66</sup>

One aspect of Isaacs's nationalism that would be viewed in a somewhat different light today was his ardent support of the White Australia policy. That support was reflected in his judicial approach to questions of immigration. His approach is particularly interesting given that his own parents had immigrated to Australia shortly before his birth. As a parliamentarian, Isaacs had argued that the White Australia policy would allow the nation to develop free "for all time from the

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<sup>64</sup> *Clyde Engineering Company Ltd v Cowburn (Cowburn's Case)* (1926) 37 CLR 466, per Isaacs J at 491-492.

<sup>65</sup> *Ex parte McLean* (1930) 43 CLR 472, per Dixon J at 483.

<sup>66</sup> *Zaverbhai v State of Bombay* AIR 1954 SC 752 at 757; (1955) 1 SCR 799, per Venkatarama Iyer, J. See also *B C Mills v State of Punjab* AIR 1967 SC 1616; (1967) 3 SCR 577. The borrowing from Isaacs J is acknowledged in Indian texts. See *V N Shukla's Constitution of India* (9<sup>th</sup> ed; M P Singh), 1996, at p. 687.

contaminating and degrading influence of inferior races.”<sup>67</sup> These values were also reflected in his judicial reasons, such as the reference in *Williamson v Ah On* to illegal migrants as “loathsome hotbeds of disease” who conspire to “defy and injure the entire people of a continent.”<sup>68</sup> Isaacs adopted an expansive view of the immigration power under s. 51(xxvii) of the Constitution and of the right of the Federal Parliament to impose broad and continuing conditions on immigrants, whether of a temporary or even permanent nature. This was reflected in his statement, that does not now constitute the law of Australia, that:

“Once an immigrant, always an immigrant.”<sup>69</sup>

Isaacs must be regarded as the Justice of the High Court most hostile to non white migration. He included in his inhospitable views “... an Italian ... or a Hindoo.”<sup>70</sup> Contemporary readers may be shocked by

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<sup>67</sup> Quoted in T Stephens, “The High Cost of Whitewash”, *Sydney Morning Herald*, 27 September 2003. Accessed at: <<http://www.smh.com.au/articles/2003/09/26/1064083186575.html>>

<sup>68</sup> *Williamson v Ah On* (1926) 39 CLR 95, per Isaacs JJ at 104.

<sup>69</sup> *R v Macfarlane & Ors; ex parte O’Flanagan & O’Kelly (Irish Envoys Case)* (1923) 32 CLR 518, per Isaacs J at 555. See also *Potter v Minahan* (1908) 7 CLR. 277; *Ex parte Walsh; In re Yates* (1925) 37 CLR 36.

<sup>70</sup> *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36, per Isaacs J at pp. 85-86.



such attitudes. However, these were probably shared by the majority of Australians at the time. Indeed, they endured well into my adult lifetime. Isaacs's emotional appeal to the suggested dangers of "... activities designed to establish anarchical and *terroristic* or treasonable societies"<sup>71</sup> can perhaps help contemporary Australians to understand at least the feelings that led Isaacs to his unrelenting conclusions on the issue. The mixture of fear and a sense of superiority affords a potent alchemy.

Although Isaacs is primarily remembered as a judge for ushering in an era of literal legalism in the majority decision in the *Engineers Case*, he was also one of the first Australian judges to place importance on the social implications of a decision, and to consider such factors expressly in his reasons. Courts, in his view, should be the "living organs of a progressive community."<sup>72</sup> He spoke of the "duty of the judiciary to recognize the development of the nation and to apply established principles to the new positions which the nation in its progress from time to time assumes."<sup>73</sup> Examples of this awareness can be seen most clearly in many of his decisions, such as *Fremlin v*

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<sup>71</sup> *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36, per Isaacs J at p. 86.

<sup>72</sup> *Wright v Cedzich* (1930) 43 CLR 493, per Isaacs J at 515.

<sup>73</sup> *The Commonwealth and the Central Wool Committee v The Colonial Combing, Spinning and Weaving Company Ltd* (1922) 31 CLR 421, per Isaacs J at 438.

*Fremlin*<sup>74</sup>, *Cofield v The Waterloo Case Company Ltd*<sup>75</sup>, *Bourke v Butterfield and Lewis Ltd*<sup>76</sup> and *Wright v Cedzich*<sup>77</sup>.

Isaacs's concern for the outcomes of his judicial decisions, and a strong desire to ensure that justice was ultimately done, was reflected in his approach to judicial precedents. Isaacs placed great weight on the judicial oath that he had taken 'to do right to all manner of people according to law'. In his view, the logical extension of this promise was that each judge was bound to give effect to his own present understanding of the law. It would be violating this oath if he placed adherence to past precedent above the correct interpretation of the law as he saw it:

"A prior decision does not constitute the law, but is only a judicial declaration as to what the law is ... [If] we find the law to be plainly in conflict with what we or any of our predecessors erroneously thought it to be, we have, as I conceive, no right to choose between giving effect to the law and maintaining an incorrect interpretation. It is not, in my opinion, better that the Court should be persistently wrong than that it should ultimately be right."<sup>78</sup>

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<sup>74</sup> *Fremlin v Fremlin* (1913) 16 CLR 212.

<sup>75</sup> *Cofield v The Waterloo Case Company Ltd* (1924) 34 CLR 363.

<sup>76</sup> *Bourke v Butterfield and Lewis Ltd* (1926) 38 CLR 354.

<sup>77</sup> *Wright v Cedzich* (1930) 43 CLR 493

<sup>78</sup> *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261, per Isaacs J at 278.

This last statement, with its vivid aphorism, has been cited with approval many times, especially in relation to constitutional interpretation. Notable cases include *Queensland v The Commonwealth*<sup>79</sup> and more recently *Coleman v Power*.<sup>80</sup>

Ensuring that justice is given priority over legal technicalities is a theme that also runs through the reasons written by Isaacs in criminal matters. In such cases he consistently emphasized the need to ensure the protection of individual rights and the avoidance of miscarriages of justice. He insisted that legal technicalities should not be used to prevent leave to appeal being granted in criminal cases. This approach was highlighted in his dissenting opinion in *Hope v The King*. In that case he said:

“I think that, where it is a case of life or death, nothing in the shape of a technicality should stand in the way of giving a person sentenced to death an opportunity of preserving his life.”<sup>81</sup>

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<sup>79</sup> *Queensland v The Commonwealth* (1977) 139 CLR 585, per Barwick CJ at 593-594.

<sup>80</sup> *Coleman v Power* (2004) 78 ALJR 1166, per Callinan J at 1221-1222.

<sup>81</sup> *Hope v The King* (1909) 9 CLR 257, per Isaacs J at p. 259. See also *Ross v The King* (1922) 30 CLR 246.

It will be obvious that, whether as a parliamentarian or as a judge, Isaacs was a man of strong convictions matched by strong expression of them. He approached his role as a Justice of the High Court with the same energy, strength of mind and passion that was displayed throughout his entire life. As with his earlier experiences in both colonial and federal politics, however, his somewhat dogmatic nature and self-assuredness led to tensions in personal relations with his colleagues. There appeared to be little friendship, and even distrust, felt towards Isaacs by Griffith and Barton in particular. This is evident in the private correspondence and reported conversations between Griffith and Barton, which includes the suggestion that Isaacs was actively positioning himself to become Chief Justice – an office he eventually attained. Barton, reflecting his own version of early Australian ethnic prejudice, is recorded as saying:

“I don’t think there is the least bit of sincerity in the Jew boy’s attitude.”<sup>82</sup>

This criticism appears as unfair as it was indecorous. Isaacs may be criticised for his insensitivity, vanity and terrifying certainty. But, in his values, he was remarkably consistent and apparently sincere. Barton was entitled to criticise him – but the chosen ground of the criticism seems singularly ill chosen.

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<sup>82</sup> R. B. Joyce, *Samuel Walker Griffith* (1984), p. 301.

A number of Isaacs's legal colleagues expressed their admiration for his abilities. Sir Owen Dixon, for example, wrote that he:

"... found it difficult to think of him except as the greatly talented occupant of the office to which he had gone at his maturity, that of a Judge of the High Court of Australia, an office to which he had devoted himself with an energy, a learning, a concentration of mind and an intellectual resourcefulness which can seldom have been equalled ... His industry was enormous and it was by unstinting work that he obtained a mastery of the facts of a heavy case and the law which appertained thereto."<sup>83</sup>

Isaacs was therefore a figure capable of inspiring very strong reactions. His difficult personality sometimes created tensions in personal relations. But his obvious abilities commanded respect, even if it was sometimes reluctantly accorded.

The foregoing facets of Isaacs's personality are apparent throughout many of his High Court reasons. His writing style has been criticised as being excessively verbose and dogmatic. On the other hand, it is Isaacs's vivid use of language, the broad scope of both legal and other references employed in his opinions, the persuasive power of his rhetoric, and the humanity expressed in many of his judgments that has ensured that his contribution to the development of the law has been an enduring one. Isaacs is a judge who is still quoted. His writing is still called on to help solve legal problems a century after he wrote the cited

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<sup>83</sup> *Foreword* by Sir Owen Dixon in M Gordon, *Sir Isaac Isaacs: A Life of Service* (1963).

passage. This is because of his ability to say things vividly and powerfully. When the surrounding passages are hacked away or ignored, the contemporary judicial explorer still often finds brilliant passages of legal and constitutional exposition. Perhaps it is because my own values often coincide with his, but in my experience Isaacs is more relevant to the High Court's work today than any other Justice in the first half century, apart from Dixon.

Isaacs himself was aware of the criticisms levelled at his judicial opinions. In a letter to his daughter Marjorie in 1934 he responded that:

“Mother sometimes thinks my letters are long. Some of my old colleagues used to suggest my judgments were long. But my view in both cases turned out to be right. I never say anything for the purpose of saying something, but I never omit saying anything that I think deserves for its own sake to be said.”<sup>84</sup>

Similar criticisms were made of Isaacs's contribution during oral hearings before the High Court. It was said of him that:

“His combative qualities were more conducive to advocacy than to the discharge of judicial functions. He was a talking judge who frequently interrupted counsel, and sometimes his colleagues ... Once he had formed a point of view, it was difficult to persuade him to change his mind.”<sup>85</sup>

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<sup>84</sup> Z Cowen, *Isaac Isaacs* (1967), at p. 141.

<sup>85</sup> G Fricke, *Judges of the High Court* (1986), at p. 49.

Yet such criticisms are largely a matter of perspective and personal empathy. Thus Sir Owen Dixon expressed a contrary view:

“To argue as counsel against a view he had formed was an exercise amounting almost to a forensic education. Always courteous, never overbearing or assertive, he met you point by point with answers drawn by a most powerful and yet ingenious mind from an almost complete mastery of the facts and the law of the case. This sounds unjudicial and one sometimes felt it was: and yet, if you were able to bring to his mind an aspect of the case or an argument which he had not seen and struck his mind as new to him and as having substance he would give it due consideration and sometimes change his mind entirely.”<sup>86</sup>

During his time as a High Court Justice, Isaacs received many honours in recognition of his public service. He was appointed a Privy Councillor in 1921. In 1927 he was created a Knight Commander of the Order of St. Michael and St. George.

Even by the unsympathetic Isaacs has been judged as having one of the most “penetrating minds in Australian history”<sup>87</sup>. He has been

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<sup>86</sup> Foreword by Sir Owen Dixon in M Gordon, *Sir Isaac Isaacs: A Life of Service* (1963).

<sup>87</sup> G Craven, “The Founding Fathers: Constitutional Kings or Colonial Knaves?” in Department of the Senate, *Parliament and the Constitution: Some Issues of Interest (Papers on Parliament No. 21)* (December 1993), at p. 122.

called one of the most influential Justices to sit on the High Court.<sup>88</sup> When considering such a life and his many achievements, Sir Zelman Cowen concluded that his 23 years as a Justice of the Court:

“... was the period of his greatest achievement, and it is for his work as a judge that he is best remembered. His massive knowledge and enthusiasm for the law, and his great endurance and capacity for work all contributed to make him one of the greatest of Australian judges.”<sup>89</sup>

### APPOINTMENT AS CHIEF JUSTICE

The announcement on 2 April 1930 that Isaacs was to succeed Sir Adrian Knox as the Chief Justice of Australia seemed a natural progression in his judicial service. He was then the senior Justice of the High Court. His appointment fulfilled the prophecy that had been made by his father’s friend at the turn of the century. Isaacs held the office of Chief Justice for 42 weeks only. This is the shortest period of service of any Chief Justice of Australia. His time in the office was largely eclipsed by an ongoing controversy as to whether he would be appointed Governor-General. Further, Isaacs was ill for some part of this period. There are only twenty reported cases in which Isaacs delivered his

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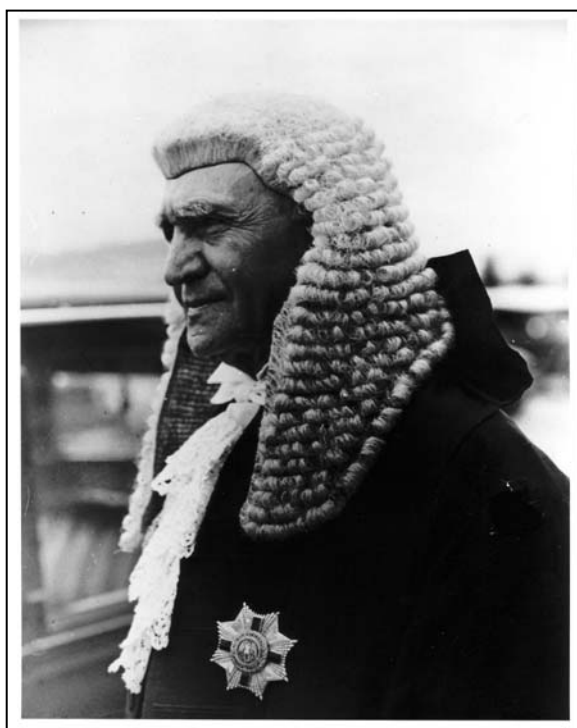
<sup>88</sup> A F Mason, “The High Court of Australia: A Personal Impression of Its First 100 Years” (2003) 27 *Melbourne University Law Review* 864, at p. 872.

<sup>89</sup> Z Cowen, *Great Australians: Isaac Isaacs* (1962), at p. 17.



reasons as the Chief Justice. His appointment to the position is evidence of his considerable legal reputation. However:

“... in such a short period, it was not possible for him to place a distinctive mark on the Chief Justiceship.”<sup>90</sup>



### A NATIVE-BORN GOVERNOR-GENERAL

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<sup>90</sup> T Blackshield, M Coper and G Williams (eds), *The Oxford Companion to the High Court of Australia* (2001), at p. 361.

Sir Isaac Isaacs entered a new phase of his public service when, on 22 January 1931, he was sworn as Governor-General. The appointment was significant not only because it was the first time that an Australian had held this highest office, but also because it was the first time that a Governor-General had been appointed on the basis of a recommendation made to the monarch by a dominion Prime Minister.<sup>91</sup>

The announcement that the Scullin Government intended to recommend Isaacs for this office created considerable controversy. Opponents of the appointment repeatedly said that their opposition had nothing to do with Isaacs personally. In some cases, that assurance can be doubted. For some, he was just too radical, too centralist minded and he was a member of a minority religion and culture. The main given arguments against the appointment were that Isaacs, then in his mid-seventies, was too old for the position; that the appointment of a native-born Australia would inevitably mean that the Governor-General would have personal relationships which could cloud his ability to function as a neutral constitutional umpire; and that such an appointment would weaken Australia's bonds with the 'mother country'.

King George V was known to be opposed to the appointment for these reasons, and also because of the failure of the Scullin

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<sup>91</sup> The usual practice had been for a British Minister formally to make the recommendation to the monarch.

Government to consult him before it made its recommendation known. The King also complained that Isaacs was personally unknown to him. The constitutional position was not entirely clear in terms of who had the authority to provide advice to the King regarding the appointment of a Governor-General. However, in a move that reflected the gradual evolution of the British Empire to a new phase of its history, it was resolved by the Imperial Conference, gathered in London in 1930, that such an appointment should be made following the advice of the relevant dominion Government. It was recorded that such Government should nonetheless informally consult the King before offering such advice. As in most decisions of international conferences, there was something in this resolution for both sides.

Scullin had an audience with the King on 29 November 1930 to discuss this question. The King's diary entry relating to that meeting records that he:

“Received Mr. Scullin, and he told me he wished to appoint Sir Isaac Isaacs as the new Governor-General of Australia. He argued with me for some time – and with great reluctance I had to approve of the appointment. I should think it would be very unpopular in Australia.”<sup>92</sup>

To the contrary, upon Isaacs's retirement as Governor-General it was judged that:

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<sup>92</sup> M Gordon, *Sir Isaac Isaacs: A Life of Service* (1963), at p. 155.

“... by his wisdom and dignity, he adorned the office, and was one of the most successful and popular Governor-Generals Australia had to that time.”<sup>93</sup>

During his service as Governor-General Isaacs was required to respond to a number of issues demanding the exercise of his constitutional functions. The first was a Senate petition to the Governor-General to refuse his approval to certain disallowed Transport Worker Regulations, re-issued after the adjournment of the Senate. A second example was Scullin’s request for the early dissolution of the Parliament following his defeat on a motion that he interpreted as a motion of no confidence in his Government. In each case, Isaacs prepared a lengthy written reply explaining his decision. In both cases his conclusion, that it was his duty to follow the advice of his elected ministers, appeared entirely appropriate. It reinforced the growing culture surrounding the Crown’s representatives in Australia that they had functions to encourage, to warn and to be consulted. But in a modern democracy their duty was ultimately to conform to lawful advice tendered by the Government enjoying support in the popularly elected house of parliament.

Although known for holding strong political views, particularly in relation to issues of constitutional reform, Sir Isaac Isaacs stands as a

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<sup>93</sup> Ibid, at p. 162.

model for the restraint required in the exercise of the office of Governor-General when it comes to daily issues of partisan politics. There was particular concern that the election to government, during his service, of the United Australia Party, many of whose members had opposed his appointment, might lead to difficulties. Such concerns never materialized. This was primarily because of:

“Isaacs’s meticulous approach to his duties, and in particular his scrupulous avoidance of political comment as Governor-General guaranteed a steady course.”<sup>94</sup>

The essential discipline, experience and understanding of the constitutional conventions of Isaacs were clearly displayed during his five year term as Governor-General. He served during the Great Depression. His personal example of sensitivity and restraint, in refusing to accept his judicial pension whilst holding his new office and in accepting the reduction of his salary by one-quarter, were met with broad public approval. His reputation for frugality was further emphasised by his decision to reside permanently in the then somewhat rustic Government House in Canberra, and to decline the official residences in both Melbourne and Sydney. He was the first Governor-

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<sup>94</sup> *Address by His Excellency Major General Michael Jeffery, Governor-General of the Commonwealth of Australia, Opening of the Sir Isaac Isaacs Exhibition (20 March 2005). Accessed at: <<http://www.gg.gov.au/speeches/html/speeches/2005/050320.html>>*

General to take this course. His decision reflected a view that he had first expressed in a speech he gave in the Federal Parliament in 1902.

The final days of his term as Governor-General were overshadowed by the death of King George V. The successful way in which he had performed his duties as Governor-General was reflected in a cable he received on 22 January 1936 from King, Edward VIII. It read:

“My father, had he been spared, intended to send you a message thanking you for your valuable services as his personal representative in Australia. I am therefore doing this in his name, and add the hope that you and Lady Isaacs may enjoy many years of happiness and leisure.”<sup>95</sup>

#### RETIREMENT FROM PUBLIC OFFICE

Of all of the words available, ‘leisure’ is probably not the one that springs to mind when describing the retirement of Sir Isaac Isaacs. In his retirement he was a frequent reader at the Melbourne Public Library to the surprise of hapless students who came upon him there. He devoted considerable time to studying biblical and religious subjects, amongst other pursuits. After retiring to Melbourne he continued to be engaged in society. After completing his term as Governor-General he felt able to join cautiously in some aspects of political debate, most notably in the area of constitutional reform.

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<sup>95</sup> Z Cowen, *Isaac Isaacs* (1967), at p. 216.

During this period Isaacs wrote numerous articles and pamphlets.<sup>96</sup> He made many speeches and broadcasts arguing in favour of the need for constitutional change. Specifically, he suggested that the Constitution had failed to develop sufficiently to meet the new challenges facing the nation. He urged that wider federal constitutional powers were necessary. Isaacs was an active campaigner in the constitutional referendums held during these years. He continued to promote the constitutional vision he had been advocating since first becoming involved in the Federation movement half a century before.

Further honours were heaped upon Isaacs in his later years. In 1932 he was elevated to be a Knight Grand Cross of the Order of St. Michael and St. George, an honour usual to vice-regal appointees. In the 1938 Coronation Honours List of King George VI, he was named a Knight Grand Cross of the Order of the Bath. It was hard to conceive of any other civil honour, normal at that time, that could have come his way.

Isaacs remained active virtually right to his death. He died in his sleep, at home, on the morning of 11 February 1948. His death was marked by many tributes. He was recognized by R G Menzies as “one

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<sup>96</sup> Including *Australian Democracy and Our Constitutional System* (1939) and *Referendum Powers: A Stepping-Stone to Greater Freedoms* (1946).

of the most remarkable men in the history of Australia".<sup>97</sup> A State funeral was held. It observed Jewish rites. The only other Governor-General of Australia of Jewish ethnicity and faith, Sir Zelman Cowen, was a keen student of Isaacs. He had met him as a youth when he received at his hands a prize for Jewish students. Sir Zelman did much in his writings to explain this complex man and to evaluate his place in history as a federationist, a judge and as the Australian whose appointment as Governor-General demonstrated the final national control of Australia over appointments to the highest office under the Constitution.<sup>98</sup>

#### ROLE IN THE JEWISH COMMUNITY

There is a postlude that must be added to this story. Prior to his death, Isaacs generated much controversy by his writings attacking what he called "political Zionism". Isaacs was a student of Judaism. He had supported the Jewish community in earlier years by coaching Jewish students, by serving as honorary secretary of the Melbourne Jewish Young Men's Russian Relief Fund, and by serving as President of the United Jewish Education Board. He remains the only Justice and Chief Justice of the High Court of Jewish religion. His direct involvement in

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<sup>97</sup> R G Menzies (then Leader of the Opposition) quoted in: Z Cowen, *Isaac Isaacs* (1967), at p. 257.

<sup>98</sup> See eg. Z Cowen, "Isaac Alfred Isaacs" in T Blackshield, M Coper and G Williams (eds), *The Oxford Companion to the High Court of Australia* (2001), at p. 359.



the Jewish community and religion waned to some degree in his later years. But it was revived in his retirement by his criticism of political Zionism. He was not an orthodox follower of the Jewish religion. Whilst in office, as one observer put it:

“... he never permitted his religion to impede what he perceived to be his manifest duty.”<sup>99</sup>

Yet Isaacs was still unmistakably Jewish. That fact had a deep impact on his values and opinions.

Between 1942-1944 Isaacs contributed a series of letters, entitled ‘Political Zionism’ to the *Hebrew Standard*. The letters outlined the reasons for his opposition to Zionism. They expressed the view that Jewish identity was not, as such, a national or ethnic identity. It was rather, in his view, a religious one. His opposition to the idea of establishing a Jewish State in Palestine and support for the British Government policy, under the 1939 White Paper, of restricting Jewish immigration to Palestine, placed him in sharp disagreement with much of the Australian Jewish community at the time. Isaacs was not alone in his views, including amongst Jewish observers in Australia. Some were anxious about the dangers, including to Jewish people themselves, of

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<sup>99</sup> G S Lee, “The Battle of the Scholars – the debate between Sir Isaac Isaacs and Julius Stone over Zionism during World War II” (1985) 31 *Australian Journal of Politics and History* 128.

establishing a modern Jewish State in the midst of a long standing Arab majority population. But most Australian Jews were fearful of the Nazis and, later, traumatised by the revelations of the Holocaust. They felt betrayed by Isaacs, hurt by his opinions and puzzled by what they saw as the disloyalty of a favoured son.

The opinions expressed by Isaacs were publicly challenged by Professor Julius Stone, then recently appointed Challis Professor of Jurisprudence and International Law in the University of Sydney. He wrote a series of open letters to Isaacs.<sup>100</sup> They too were published in the *Hebrew Standard*. The exchange of letters in this journal became known as the 'Battle of the Scholars'. It had a significant impact both in the Jewish community and beyond. As G.S. Lee noted:

"The dimensions of the controversy were such that it reverberated beyond the confines of the Jewish community, causing its members considerable anguish and soul-searching, particularly related to the issue of dual loyalty.

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<sup>100</sup> L Star, *Julius Stone: An Intellectual Life* (1990), at pp. 190-197. Stone, soon after he arrived in Australia, had joined the United Emergency Committee for the Rescue of European Jewry. Stone was shocked that Isaacs should write that he could "see considerable force in what [Hitler] says about the political Zionists. Ironically Cardozo, in the 1930s, wrote that his colleague, Justice Louis Brandeis should pay for a statue of Hitler for what he had done for Zionism. See A L Kaufman, *Cardozo* (1998), at p. 478.

Ultimately, the disputation focused on Isaacs and Stone as each sought to promote and defend his standpoint.”<sup>101</sup>

The responses that Isaacs published have been described as intemperate and dogmatic, with an attack extending beyond the argument itself to Professor Stone personally. Eventually, Stone responded in kind. Sir Zelman Cowen, in reflecting on this controversy, has concluded that the dispute did not reflect well on Sir Isaac Isaacs, but rather that:

“What Isaacs did was very painful and deeply divisive; both his writings and his actions were extravagant. I believe that I was right in saying that his part in this controversy left a blemish on his reputation in the Australian Jewish community which had taken pride in the splendour of his career even while it had regretted his remoteness from its life and activities.”<sup>102</sup>

It would be wrong to portray Isaacs as completely isolated or peculiar in his views about Zionism and Israel. Other leading Jewish intellectuals took a similar view at that time, although usually expressed in much more temperate language. For example, Benjamin Cardozo, Isaacs’s great contemporary in the United States judiciary, was

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<sup>101</sup> G S Lee, “The Battle of the Scholars – the debate between Sir Isaac Isaacs and Julius Stone over Zionism during World War II” (1985) 31 *Australian Journal of Politics and History* 128.

<sup>102</sup> Z Cowen, *Sir Isaac Isaacs (Daniel Mannix Memorial Lecture)* (1979), p. 29.

unsympathetic to Zionism.<sup>103</sup> Sir John Monash, Isaacs's contemporary in Australian public life, was a very late convert to support of Zionism.<sup>104</sup> What was significant about Isaacs was that he adopted the role of the polemicist. As in some of his political and judicial writing, he went in boots and all. It cost him friends.

It is well past time for these animosities to be put aside. Isaacs was a great Jewish Australian and conscious of his Jewishness. His sometimes emotional expression was because he felt deeply about issues. His feelings sometimes got the better of prudence. With him, it is necessary to look at the full picture. That picture was, amongst other things, unmistakably Jewish. It is time to revive in Australian Jewish circles the memory of this most distinguished man and to celebrate his life. The fact that he attained so many high offices made it easier, and more natural, for Jews and other minorities in Australia that have followed to do so. Heterodoxy was not to be a badge of dishonour in Australia. It is not necessary to agree with everything that such a person did or said to rejoice in that person's life and to remember its manifold contributions.

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<sup>103</sup> A L Kaufman, *Cardozo* (1998), at p. 478. In this Cardozo's view contrasted with that of the other Jewish member of the United States Supreme Court, Louis Brandeis. See L Star, *Julius Stone: An Intellectual Life* (1990), at p. 198.

<sup>104</sup> R Perry, "Monash – The Outsider who Won a War: a biography of Australia's greatest military commander" (2004), reviewed in *The Review* (July 2005), at p. 25.

## INTELLECTUAL JOURNEY & ITS LESSONS

What are the chief lessons to be derived from the intellectual journey of Isaac Isaacs? Is there instruction here for contemporary Australians in the values he embraced and the methods he deployed?

Of course, Isaacs was a fine technical lawyer. He knew that, in the law, the devil is always in the detail. He realised that cases are often pure exercises in technical skill. Some are relatively values-free. It is hard to eke values out of some provisions of the *Judiciary Act 1903 (Cth)*, although some other provisions reflect values of federalism. Many are simply procedural and require accurate deployment of lawyerly skills in securing legally correct outcomes. In such cases, Isaacs was up there with the best. First and foremost, he was a very knowledgeable and clever lawyer. Such skills remain at the forefront of judicial and legal work. Isaacs's skills and knowledge are a reason why he is still often read today and his opinions considered a century after he expressed them for their contemporary instruction.

Secondly, in advance of most members of his generation, he perceived instinctively what Roscoe Pound was teaching at Harvard during the early years of the twentieth century. Much law is far from value free. Much of it involves the application of judicial choices. This

requires consideration of the impact of law and the way the particular case fits into a wider canvas.<sup>105</sup> Because of Isaacs's relatively humble origins, he was interested in the social consequences of his decisions. He was clear-sighted about such consequences and he often argued for them. We may now question some of those that he sought to pursue. But his recognition of law and judging as a social exercise is now broadly accepted. In this, Isaacs was a leader. His lessons are still relevant for there are still some lawyers who live in denial.

Thirdly, chief amongst the values Isaacs pursued, before and after he attained judicial office, was Australian nationalism. Its high point in his decisions was his judgment in the *Engineers' Case*. He was consistently for a strong Commonwealth. The constitutional text, and certainly the expectations of the Founders (including the first three Justices of the High Court) was for a rather weaker centre and stronger States. Although views differ on the outcome that the *Engineers* decision stamped on the Australian Commonwealth,<sup>106</sup> the resulting nation has been better able to cope with the surrounding world as a consequence of it. Isaacs did not foresee the disappearance of the

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<sup>105</sup> Ironically, this was something taught mid century by Julius Stone to generations of Sydney law students: M D Kirby, *Judiciary Activism – Authority, Principle and Policy in the Judicial Method* (Hamlyn Lectures, 2004), at pp. 3, 27.

<sup>106</sup> See eg. G Craven, *Conversations with the Constitution* (2004), at pp. 78-79, 157-158, for a critical view.

British Empire. He was fiercely loyal to the Crown. Indeed, his values of nationalism and loyalty were probably the product of his immigrant origins. He associated with British Australia for it gave him his national, cultural and professional identity. It rewarded him with success and recognition.

Contemporary generations recognise that nationalism is not enough. The wars and suffering of the twentieth century were commonly the product of nationalism. Isaacs's Australian nationalism now looks a little naïve and old fashioned, judged by today's values. In an age of globalism and regionalism, too much concentration on one's own backyard can shrink the mind and the heart. Of course, the British Empire gave Isaacs a kind of globalism. The Webbs had noticed an international element in his mind as early as 1898. But his fierce nationalism, whilst apt for his time, now seems dated – a narrow satisfaction. Today, I would suggest, judges, lawyers and politicians, like economists and scientists, must engage with the global world of ideas and its realities. If Isaacs were alive today, I do not doubt that his fertile mind would be doing so.

Fourthly, as a result of his nationalism, Isaacs (like most of his contemporaries in Australia) had racial views that we would now regard as misguided, even wrong. But if great scientists like Francis Galton and

Charles Darwin could entertain “scientific” ideas of ethnic superiority,<sup>107</sup> we must excuse Isaacs for reflecting them. White Australia was one of the dominant values of the Australian Commonwealth right up to the 1960s. The strident language in which Isaacs supported it, in his expositions of the immigration and aliens power in the constitution, is read by contemporary Australians with discomfort and embarrassment.

Isaacs was simply the most honest and forthright judicial exponent of opinions concerning Kanakas, “Hindoos” and other “lesser breeds outside the law”. It was particularly ironic that the Anglo-Celtic Australians of the time exhibited similar racist views about Isaacs himself, describing him as a “Jew-boy”. Words of a similar kind were used by Billy Hughes about Sir John Monash. The embrace of the nation's evident racism was, in a sense, Isaacs's attempt to join the Australian caravan. So indeed may have been some of his opposition to Zionism. He tended to look on the notion of a Jewish State from the viewpoint of the British mandate administrators in Palestine. Whilst loyal to his religion, he was in this respect even more loyal to the Empire, the Crown and Australia.

Fifthly, his imperial perspectives now seem out of date. But he was living and writing in the heyday of British global power. The

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<sup>107</sup> R Williams, “The reality of ‘absolute’ truth”, *Sydney Morning Herald*, 20 July 2005, at p. 17. Darwin wrote that women and “Negroes” had inferior brains and thinking capacity.



perspectives of Australia as part of that powerful world entity survived Isaacs. Even today, many Australians cannot feel comfortable without a great and powerful overseas friend. Only in the most recent times, has a true engagement occurred with Australia's geographical neighbours. This is not so surprising. In Isaacs's day, most of them were ruled by European Empires. The law, with its lifeline to the Privy Council in London, reinforced notions of cultural superiority. Australians were privileged to be special, foundation members of the Imperial Club. The cultural and professional links to Britain and the Commonwealth of Nations remain. But contemporary Australians look for values in a wider field. If they are judges and lawyers they read the decisions of the European Court of Human Rights. They study international law and international tribunals. The British link is still important; but it is also not enough.

The ultimate lesson of a study of Isaacs' values is the unsurprising conclusion that they reflected his experience and world. They were also sometimes contradictory. Untrammelled federal power sat uncomfortably with a fertile mind that saw implications and policy consequences in most legal choices. So why exclude entirely the implication of federalism? Expressions of racial superiority and indifference to "coloured" people sat ill with the son of a Jewish family finding refuge from Russian Poland. They suggest a lack of self-examination and thoroughgoing introspection. Support for the British Empire and its universal values stands awkwardly with denigration of British subjects who did not happen to be 'white'. That such a clever and

insightful judge, lawyer and human being could be victim to these inconsistencies is a lesson for later generations. What are our own inconsistencies? Do they exist in the way we still treat Aboriginals, women, people with disabilities and homosexuals? Can they be seen in our treatment of refugees? Of migrants? Of the mentally ill? Of drug users? Of sex workers? Of people living with HIV/AIDS or those who live in poverty in far away countries outside our concerns?

Isaacs was a towering figure and one of the sharpest minds in the history of Australia. If he could be shaped by contradictions and inconsistency, so can we, his successors. The basic lesson of his intellectual life is that values do not stand still. Each decade must re-examine the values it inherits. The new reality requires a capacity to see change. Our own experiences should always make us attentive to the experiences of others. The values of others, and their needs, will often have lessons for ourselves.

In the law, as in society, things are constantly changing. They are in flux. Leaders must see the changes. They must engage with them and explain them – not deny them. In Isaacs's day it was a world of British power and superiority, of Australian nationhood and confident law. Today it is a world of far changing values, of values in conflict – where we should uphold human rights, fundamental freedoms and the rule of law although others do not. In our courts, in our society and in our minds we need to keep pace with such changes so that those who come later do not have cause to criticise us (however clever we may be)

for inconsistency, lack of self perception and a failure to see the way the world is moving and the way that it should move.

## CONCLUSION

Sir Isaac Isaacs was a complex character. His difficult personality led men such as Deakin and Garran to comment that, whilst his abilities were admired, this did not always translate into personal friendships. At the same time, as Sir Zelman Cowen has said:

“There is ... another side to the story. There are many who knew him, who worked for him, who were his friends and correspondents, who had contact with him in one way or another, who speak with the greatest warmth of his kindness and generosity.”<sup>108</sup>

For somebody who came from extremely humble beginnings and with few material advantages his achievements are astonishing. Of course, as it always the case, they depended in part on luck. But he seized every opportunity that came his way. He turned fortune to advantage. He made a lasting contribution to Australia by the application of his abilities and his ferocious capacity for hard work. We do well to remember the sesquicentenary of his birth.

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<sup>108</sup> Ibid, at p. 24.

Sir Zelman Cowen should have the last word. Few are better placed to assess this most brilliant and controversial of Australia's sons - one of the two greatest of Australian lawyers to have derived from Victoria and one of the five greatest Australian judges:

“He was a master lawyer and one of the greatest judges in our federal history, and he brought to his work and to the whole of his public life an unflagging and almost inexhaustible energy and a mind of great strength, power and range. He was big in his qualities, and it is unfortunate that some have dwelt so strongly on the defects. For it is certain that he ranks as a major figure in the history of the Australian nation.”<sup>109</sup>

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<sup>109</sup> Z Cowen, *Isaac Isaacs* (1967), at p. 261.

**WESLEY COLLEGE MELBOURNE**

**THE SAMUEL ALEXANDER LECTURE**

**THURSDAY 4 AUGUST 2005**

**ISAAC ISAACS – A SESQUICENTENARY REFLECTION**

**The Hon. Justice Michael Kirby AC CMG**