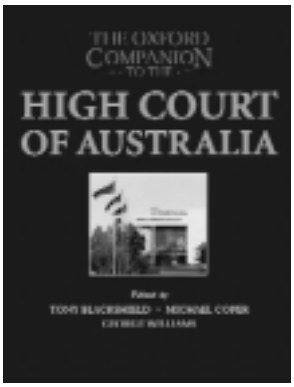
The launch of the Companion

Speech delivered by the Hon Chief Justice A M Gleeson AC at the launch of the Oxford Companion to the High Court on 13 February 2002.

One of the greatest speeches in Australian political history was made in the House of Representatives of the new Commonwealth Parliament on 18 March 1902. Although the subject matter might have appeared dry and technical, it was a passionate, aggressive speech. It was made by the attorney-general, Alfred Deakin, who had a fight on his hands. He was introducing the *Judiciary Bill 1902*, with the principal object of setting up a federal Supreme Court, to be called the High Court of Australia, in accordance with the mandate in sec 71 of the Constitution. But there was resistance to the idea that the Court should be set up so soon; and also to the idea that it should, in its composition, be completely separate from the State supreme courts. Some people thought it should be made up of part-time members; a scratch court of State chief justices sitting as and when available.

Deakin had to persuade Parliament and the public of the importance of this new institution. To do that, he explained to them the nature of federalism. He obviously assumed that most of his audience knew little of federalism. It was not the British system of government; and there were few other examples at that time. The two most prominent were the United States of America and Canada, but in 1902 not many members of Parliament knew much about the detail of how those countries were governed.



Deakin described his proposal as a 'fundamental proposition for a structural creation which is the necessary and essential complement of a federal Constitution'. He said there were three fundamental conditions of a federation: first, a supreme Constitution; next, a distribution of powers under that Constitution; and third, 'an authority reposed in a judiciary to interpret that supreme Constitution and to decide as to the precise distribution of powers'. The people in the federating colonies had been given the guarantee of an 'impartial independent tribunal to interpret the Constitution'. The Court, he said, would 'define and determine the powers of the Commonwealth itself, the powers of the States … and the validity of the legislation flowing from them'. He quoted Dicey's observation that, in a federal system, the stress of the Constitution is cast upon the judiciary. And he also quoted Edmund Burke, described in a revealing phrase as the greatest political philosopher of 'our nation', (Deakin regarded his nationality as British), who said that the judicature must be something exterior to the State, giving justice a security against power.

There was an explanation of the differences between the United States and Canadian systems. Deakin saw the High Court of Australia's constitutional role as more like the Supreme Court of the United States than that of the Canadian Supreme Court. He pointed out that, in Canada, federal issues were less acute. Unlike Australia and the United States, in Canada, the provinces had only specific heads of legislative power, and provincial legislatures were subject to federal veto. Appointments of Provincial officials, including judges, were made by the Federal Government. The distribution of power between State and Federal governments in Australia was more like that of the United States; as was the potential for federal dispute. Deakin noted that the population of Australia at the time of federation was much the same as that of the United States when they federated. Deakin foresaw that the High Court, like the Supreme Court of the United States, and unlike the Supreme Court of Canada, would not give advisory opinions; a difference he regarded as turning upon the special role of the judicature in a strictly federal system.

There was one important respect in which the role of the High Court was to be different from that of the United States Supreme Court.

It was to have a general appellate jurisdiction in civil and criminal cases. Deakin's explanation to Parliament of this subject, naturally, was influenced by the continuing role of the Privy Council. His predictions of the future of that body are interesting, and revealing as to the line then being taken by the Imperial Government in its dealings with Australia.

Deakin's speech contains one aphorism that deserves particular emphasis, in the light of some of the entries in the Oxford Companion. He said: 'federation is legalism'. There is a tendency to refer to legalism as if it were was invented by Sir Owen Dixon in the middle of the twentieth century. Doubts have been expressed about its meaning. There is not much doubt about what Deakin meant by legalism; and there is no doubt at all that he saw it as the key to the integrity of the Court and the stability of the federal union.

Deakin's advocacy was not completely successful. He persuaded Parliament to create the new Supreme Court as required by the Constitution, and to give it a separate and independent membership. But he pressed for five justices, and they would only give him three. He pointed out that the Commonwealth was spending three quarters of a million pounds upon war, and asked why could it not afford £30,000 for justice.

The High Court commenced sitting in October 1903. The *Oxford Companion to the High Court* was completed in the year of the centenary of federation; it is being launched at about the centenary of the introduction into Parliament of the Judiciary Bill; and next year the Court will celebrate its centenary.

It is a great credit to Professors Blackshield, Coper and Williams, to their vision, their professional skill, and their industry, that they have combined to produce this monumental work on the history and role of the Court, the cases it has decided, and the people who have participated in its business. There is a need for a wider and deeper understanding of this institution and the part it plays in the life of the nation. This publication will make a major contribution to such understanding. The work is also testimony to the courage of the editors. The contributors have had a lot to say about many people who are still living, and who are not famous for turning the other cheek. As the editors point out, this publication is in no sense authorised by the Court. Most of us had no opportunity to read what was to be said about us, or to correct any factual errors. Inevitably, in a work of this size, there will be some. But we have been invited to point them out to the editors, so that they may be corrected in the second edition, which I assume is only months away.

According to the introductory material, Professor Michael Coper was the convenor of a group of scholars who, in 1994, first conceived this project. Its scale is remarkable. There have been 225 authors,

writing on an astonishing range of subjects, from judicial appointments to unrepresented litigants; from socialism to sexual preferences. The work of the three editors in defining the tasks of each author, overseeing their contributions, and combining what they produced, commands admiration. I congratulate them on their magnificent achievement. I also congratulate their research assistants, who had a formidable task.

Praise is also due to Oxford University Press, which had the perspicacity to recognise the value of this project, the confidence to participate in it, and the technical skill to produce a very handsome publication.

I was given a copy of the book before Christmas, and I have read much of it. It is not easy to read in bed; and it is not everybody's idea of a thriller. But it contains a lot of information that came as a surprise to me. Much of it, of course, consists of interpretation and evaluation; and some of the interpretation and evaluation differs from my own. But that is to be expected. What is fascinating is the contrast between the approaches of different authors to similar topics. There is a good deal of overlap between the various subjects addressed in the book, and I have enjoyed comparing what different people have had to say about the same, or closely related topic. Some of the authors are law teachers and others are legal practitioners. Some are both. One thing that struck me is the gulf that exists between the view of legal institutions and of the Court from within the universities, and the view from within the practising legal profession. This has often been remarked upon by recent graduates; but it was brought home to me most forcefully by comparing some of the entries in this book. I do not suggest that one point of view is more or less valid than the other. Each side has much to learn from the other. But I wonder if people on either side of the gulf realise how wide and deep it is. It suggests to me the need for some bridge-building.

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The entry 'Background of justices' contains information that will mean different things to different people. Some of it may be taken to mean too much; and some, too little. There is something I would like to add to it. It is something that tells me less about the High Court than about Australian society; and, in particular, social mobility. Of the present justices of the High Court, none comes from a family with a background in the law. In fact, no present member of the Court has a parent who attended University. The six out of seven of us who attended universities all did so with the assistance of Commonwealth Scholarships, without having to pay any tuition fees. We depended upon those scholarships for our ability to receive a tertiary education. We received our educational opportunities during the time of Prime Minister Menzies. The difference between the opportunities made available to us and those that were available to our parents produced far-reaching changes in Australian society during the 1950s and 1960s. Its consequences are reflected in the present composition of the Court. This book contains an interesting and informative entry entitled: 'The Whitlam Era'. An explanation of how six of the present justices of the Court came, unlike their parents, to have the benefit of a tertiary education could perhaps appear in an entry entitled: 'The Menzies Era'.

A challenge confronting readers of this book will be to stand back from the detail, and to draw together pieces of information which, in combination, reveal the changes in the Court and its work that have taken place over a century. Some of those changes reflect changes in Australia itself, and in its relations with other countries, especially the United Kingdom.

I mentioned earlier that, in 1902, Deakin made it clear that he saw himself and Australia, as British. He envisaged that an Imperial appellate court, resulting from a merger of the Judicial Committee of the Privy Council and the judicial members of the House of Lords, would be our ultimate court of appeal; but with a very small number of Australian appeals. And, as things happened, it was not until the 1980s that appeals to the Privy Council finally ended, and the High Court became the final court of appeal. The influence of the existence of the Privy Council upon the jurisprudence of the Court during the twentieth century, upon the method of judicial reasoning, and even upon the style of judgment writing is a subject worthy of further scholarly attention.

The introduction, also late in the twentieth century, of the requirement of special leave to appeal in civil and criminal cases has had a major effect upon the nature of the Court's work. In the days when civil appeals to the Court came as of right, so long as a relatively modest sum was involved, much of the Court's work consisted of dealing with cases that could be decided by the application to the facts of settled principle. Now we have a much greater proportion of cases where the Court is being urged to develop the law. The Court used to get a fair share of relatively easy cases. That does not happen any more. And a court that spends much of its time applying well settled principles is bound to appear more respectful of precedent than a court that spends most of its time dealing with cases in which someone is trying to persuade it to break new ground.

The creation, in 1977, of the Federal Court also had a major impact on this Court's business. The Federal Court was intended to take over most of this Court's first instance work, other than its Constitutional work, and with one notable exception, (refugee cases), it has done so. An understanding of that change is necessary, for example, in considering the statistics set out on pages 164 and 165 of the book. There you will find the number of occasions on which each justice of the Court (except the originals) had appeared as counsel in the Court before appointment. In considering the bare numbers, it is necessary to remember that, since 1977, many cases that previously would have been argued in the High Court, especially tax cases, are now dealt with in the Federal Court. Counsel before 1977 argued many cases in this Court that would later have been conducted in the Federal Court.

There are other changes as well; some superficial, some fundamental. But one thing has remained the same. This is what was stressed by Deakin in 1902. Federation demands that the Constitution, which embodies the terms and conditions upon which it came into being, be interpreted and applied by a judiciary which can be trusted to be independent and free of political association or influence.

Deakin said that the measures he proposed represented a fulfilment of the purposes of the Constitution, and that they were to be judged, not by their detail, but by their ultimate results. The work of the High Court over a century of federation, is to be judged in the same way: not by its details but by its ultimate results.

This publication will assist in making that judgment. It will also be of great value to Australians who want to know more about their public institutions, their Constitution and their government.

I congratulate all who have taken part in its preparation and publication.