

‘ . . . keystone of the federal arch.’

# Establishing the High Court

**ALFRED DEAKIN**, Attorney-General, 18 March 1902

*Alfred Deakin’s speech on the Judiciary Bill 1902, which established the High Court, lasted over three hours.<sup>1</sup> Senator Richard O’Connor, one of the High Court’s first justices, wrote to Deakin saying, ‘Magnificent. The finest speech I have ever heard.’<sup>2</sup>*

*The speech was ‘long remembered by his contemporaries’ as a ‘celebrated example of the best parliamentary speaking of his generation’.<sup>3</sup>*

. . . the Bill is of the utmost importance. It will complete so radical a reform of the legal relations of the people of these States to each other that it might fairly be termed a revolution. At the same time it is a revolution accomplished not by destruction, but by construction, not by the taking away to any considerable extent of powers that exist, but by their being focussed in a new centre from which they may be radiated to the greater advantage of the whole of this community.

It will define and determine the powers of the Commonwealth itself, the powers of the States, which subsist within it, and the validity of the legislation flowing from them. All these have to be defined by this new court. Its first and highest functions as an Australian court—not its first in point of time, but its first in point of importance—will be exercised in unfolding the Constitution itself. That Constitution was drawn, and inevitably so, on large and simple lines, and its provisions were embodied in general language, because it was felt to be an instrument not to be lightly altered, and indeed incapable of being readily altered; and, at the same time, was designed to remain in force for more years than any of us can foretell, and to apply under circumstances probably differing most widely from the expectations now cherished by any of us.

Consequently, drawn as it of necessity was on simple and large lines, it opens an immense field for exact definition and interpretation. Our Constitution must depend largely for the exact form and shape which it will hereafter take upon the interpretations accorded to its various provisions. This court is created to undertake that interpretation. In addition, the Constitution involves a series of compacts—compacts between the different States, studious of the interests of their own people, compacts which affect the present and future privileges of the people, compacts which affect the Treasuries of the States, and compacts which relate to the kinds of legislation to be undertaken by the Commonwealth. These compacts between State and State, and between the Commonwealth and its people as a whole, dealing with all classes and interests, are to be interpreted and safeguarded by this court . . .

The federation is constituted by distribution of powers, and it is this court which decides the orbit and boundary of every power. Consequently, when we say that there are three fundamental conditions involved in federation, we really mean that there is one which is more essential than the others—the competent tribunal which is able to protect the Constitution, and to oversee its agencies. That body is the High Court. It is properly termed the “keystone of the federal arch.” “The legislature,” as Marshall puts it, “makes, the executive executes, and the judiciary declares the law.” What the legislature may make, and what the executive may do, the judiciary in the last resort declares; so that the ties which unite the judiciary to the legislature—the Australian High Court to the Australian Parliament—are those of mutual association and dependence in the accomplishment of a common task.

The High Court exists to protect the Constitution against assaults. It exists because our Constitution, although an Imperial Act, has a dual parentage. It proceeds from the people of the whole continent. It is one of the institutions which the people of Australia, when they accepted the Constitution, required to be established for the purpose of insuring that there should not be a departure from the bond into which they thereby entered for themselves and for posterity. This Constitution is not the creation of our State Parliaments only, neither is it the creation of the Imperial Parliament only. It draws its authority directly from the electors of the Commonwealth, and it is as their chosen and declared agent that the High Court finds its place in the Constitution which they accepted.

To put this part of the case in a nutshell, I would say that our written Constitution, large and elastic as it is, is necessarily limited by the ideas and circumstances which obtained in the year 1900. It was necessarily precise in parts, as well as vague in other parts. That Constitution remains verbally unalterable except by the process of amendment. Amendment is not nearly so difficult in our case as it is in the United States, but still it remains difficult . . . In the meantime, the statute stands and will stand on the statute-book just as in the hour in which it was assented to. But the nation lives, grows, and expands. Its circumstances change, its needs alter, and its problems present themselves with new faces.

The organ of the national life which preserving the union is yet able from time to time to transfuse into it the fresh blood of the living present, is the Judiciary High Court of Australia or the Supreme Court in the United States. It is as one of the organs of Government which enables the Constitution to grow and to be adapted to the changeful necessities and circumstances of generation after generation that the High Court operates. Amendments achieve direct and sweeping changes, but the court moves by gradual, often indirect, cautious, well considered steps, that enable the past to join the future, without undue collision and strife in the present.

MR CONROY: But we cannot read into the Constitution something which is not there.

MR DEAKIN: Perfectly true. Yet if he takes the doctrine of implied powers as developed by the Supreme Court of the United States, I will undertake to say that the ablest of its earliest lawyers—even Hamilton or Madison—could not have discovered the faintest evidence of the existence of a power which now authorises many of the greatest operations of its Government, and which has been of incalculable advantage to the United States. Why? Because the law, when in the hands of men like Marshall or those trained in his school, or of the great jurists of the mother country, becomes no longer a dead weight. Its script is read with the full intelligence of the time, and interpreted in accordance with the needs of the time. That task, of course, can be undertaken only by men of profound ability and long training. It is to secure such men that we desire the establishment of a High Court in Australia . . .

One of its [the Constitution's] features which most struck its critics at home, and most amazed foreigners abroad was the fact that the Imperial Parliament had so lavish and absolute a trust in the people of this Commonwealth, that it had under its own hand and seal endowed them with the power and the means of amending their Constitution, although that Constitution is in itself an Imperial Act. There is yet a further consideration. The Commonwealth Constitution stands apart from all other measures upon the statute-book of the Imperial Parliament, and, so far as I know, upon any statute-book. Certainly no Act of the United States or of Canada can show an equivalent authority to that under which our Constitution was drawn and passed. Its preamble sets out in simple terms the statement of a fact whose transcendent importance has yet to be understood and exhausted . . .

For the first time in British history the special and express sanction of the people appears in the preamble of an Imperial Act in addition to the sanction given by the Imperial Parliament and by the Crown. That of itself is sufficient to distinguish our Constitution from every other Act upon the Imperial statute-book, including the British North America Act. It is desirable and necessary that these distinctions should be drawn. They will hereafter require to be interpreted in support of special sections or of the whole of the Constitution. The wording and the character of our Constitution, coupled with the power of amendment contained within it, and the peculiar sanction given in its preamble, make it more essentially and absolutely a

The Justices of the first High Court of Australia—Justice Edmund Barton, Chief Justice Samuel Griffith and Justice Richard O'Connor with two associates, 1903.

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charter of entire self-government than any other Act to which the British Parliament has assented . . .

I trust then that this Bill will be considered in the light of history, and of federal principles, that it will be regarded as a fulfilment of the Constitution; that we shall create in it a tribunal worthy of the people for whom it will act, and of their forefathers whose practical genius has been demonstrated in their capacity to adapt their institutions and forms of government so as to fulfil the will of the people, and, while giving that will the fullest and freest course, impart to it the solemn sanction of the law.<sup>4</sup>



**Alfred Deakin** (1856–1919), Protectionist Party 1901–10, Liberal Party 1910–13, Member for Ballarat 1901–13.

*Positions held:* Attorney-General 1901–03, Prime Minister 1903–04, 1905–08, 1909–10, Minister for External Affairs 1903–04, 1905–08, Leader of the Opposition 1909, 1910–13.



*While the Bill had been accorded a high priority by the Barton Government, it was not even debated during the 1902 session. Deakin reintroduced it with a short speech in June 1903 and it received assent at the end of August.*

*One of Australia's leading constitutional experts, Professor Greg Craven, commented on the significance of Deakin's speech:*

*Deakin demonstrated yet again his mastery of the constitutional spirit of Federation, as well as its legal technicalities. He understood perfectly that the Constitution without a proud, separate, independent Federal judiciary would be a mere husk. Ironically, the very vividness of his oratory probably increased the opposition of those fearful of an over-mighty Court, such as William Morris Hughes and Patrick McMahon Glynn.<sup>5</sup>*

*Sir Samuel Griffith became the first Chief Justice of the High Court, supported by Edmund Barton and Richard O'Connor. Barton ceded the prime ministership to Deakin to take up his High Court post and O'Connor retired from his role as Leader of the Government in the Senate to do likewise.*