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JUSTICES OF THE HIGH COURT OF AUSTRALIA

DURING THE CURRENCY OF THIS VOLUME

THE HONOURABLE ANTHONY MURRAY GLEESON, AC,
CHIEF JUSTICE

THE HONOURABLE MICHAEL HUDSON MCHUGH, AC

THE HONOURABLE WILLIAM MONTAGUE CHARLES
GUMMOW, AC

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ATTORNEY-GENERAL

THE HONOURABLE PHILIP MAXWELL RUDDOCK, MP

CENTENARY OF THE HIGH COURT OF AUSTRALIA

On Monday, 6 October 2003, a special sitting of the High Court of Australia was held in the Banco Court of the Supreme Court of Victoria at Melbourne to mark the centenary of the opening of the Court. The sitting was held in the presence of the Governor-General of the Commonwealth of Australia, His Excellency Major-General P M Jeffery AC, CVO, MC, and Mrs Jeffery, and was attended by the Prime Minister of the Commonwealth, the Chief Justices of Federal, State and Territory Courts of Australia, the Chief Justice of the Supreme Court of New Zealand, the President of the Court of Appeal of the State of New South Wales, former Chief Justices and Justices of the High Court and a number of judges of Federal and State Courts and members of the bars and the solicitors' profession of Australia.

The Court was addressed by the Prime Minister (The Hon J W Howard MP), the Attorney-General for the State of Victoria (The Hon R J Hulls MP), the President of the Law Council of Australia (R W Gotterson QC) and the President of the Australian Bar Association (A J Glynn SC).

In reply GLEESON CJ said:-

Your Excellencies, Prime Minister, Mr Attorney, President of the Law Council of Australia, President of the Australian Bar Association, and all who have joined us to mark this anniversary of the first sitting of the High Court of Australia.

My colleagues and I are honoured by your presence. We value the expressions of confidence and goodwill that we have heard. The role of the Court is sustained, not by force, but by public confidence. The statements of the Prime Minister on behalf of the Commonwealth of Australia, the Attorney-General on behalf of the States and Territories, and leaders of the legal profession, reflect the confidence which this Court has earned by its work over the past one hundred years.

One of the most important speeches in Australian parliamentary history was made in March 1902 by the Attorney-General, Alfred Deakin, in support of a Bill for the establishment of this Court. He pointed out that the Constitution required Parliament to create "a Federal Supreme Court, to be called the High Court of Australia", and explained why that was so. The Court, he said, was "the necessary and essential complement of a federal Constitution". Its highest function would be "exercised in unfolding the Constitution itself". He said that its task would be to lay down, for all to see, the boundary lines of governmental power so that "citizens may transact their business in security, without the hazard of finding themselves within the domain of some power upon whose ... authority they did not calculate". The founders understood that a federal constitution would necessarily give rise to disputes between citizens and governments, and between governments, as to the boundaries of authority. Following the model of the United States, they drafted a Constitution upon the premise that the ultimate resolution of those disputes would be

committed to a Federal Supreme Court. They departed from the United States model by also giving the Federal Supreme Court a general jurisdiction to hear appeals from State Supreme Courts and such other federal courts as Parliament may create. These were the two primary functions of the new Court: to act as a constitutional court, and as a court of appeal. At the time, Australia was a part of the British Empire, and those functions were subject to the role of the Privy Council. A century later, that qualification is no longer relevant. The High Court is now the nation's court of final appeal. It maintains the Constitution, declares the common law of Australia, and interprets and applies the statutes of the Federal, State and Territory Parliaments.

At the time of Federation, much emphasis was placed upon the need for a constitutional court to be independent of the legislative and executive branches of government, and to conduct itself in a manner detached from political partisanship. At the Adelaide Convention in 1897, Edmund Barton described the proposed court as: “[A] body which shall decide in the peaceful and calm atmosphere of a court, not under surrounding of perturbed imagination or of infuriated party politics, those questions of dispute which arise, and which must arise, under a Federal Constitution.”

Lawyers will have their own ideas about the peaceful and calm atmosphere that prevails in the Court; and judges may think they see at the Bar table some occasional examples of perturbed imagination. Even so, the Court has generally succeeded in leaving infuriated party politics to others. As a member of this Court, Mr Justice Barton returned to his theme of judicial detachment. In paying tribute to Mr Justice O'Connor on his death in 1912, he referred to “his ripe judgment, his keen discrimination, his deep learning, his resolute adherence to the principles of law and the ethics of judicial decision, and his calm disregard of the political point of view”.

That is not to say that the Court, or its members, have ever been free from controversy or political criticism. In this courtroom one hundred years ago, when he was sworn in as the first Chief Justice, Sir Samuel Griffith felt obliged to mention, and deflect, attacks that had been made upon him in Parliament when his appointment was announced. His fitness for office was challenged by Mr Kingston, a former Premier of South Australia, and by Senator Keating, a protege of Andrew Inglis Clark of Tasmania, who was one of the original architects of Federation, and who himself had been regarded as a leading candidate for appointment to the Court. The animosity probably resulted from Sir Samuel's involvement, when Chief Justice of Queensland, in the difficulties with the Imperial Parliament over s 74 of the proposed Constitution, and the continuing role of the Privy Council. In the early years of Federation some observers noted that the first three members of the Court, and, when its size was increased to five, the next two, had all been prominent

politicians. Chief Justice Griffith had been Premier of Queensland; Mr Justice Barton had been Australia's first Prime Minister; and Mr Justice O'Connor had been a Senator. People wondered whether this would set the pattern for the future. As things turned out, it did not; although a career in politics has never been regarded as a disqualifying factor.

The constitutional work of the Court continues as it was from the beginning, although the nature of the disputes varies from time to time. In the early years, the work of industrial tribunals occupied much of the Court's attention. In the middle years of the twentieth century, s 92 was a fruitful source of litigation. Now, relatively few industrial cases reach the Court, and the only s 92 case to come before the Court in the last five years had nothing to do with trade or commerce. Refugee cases are now a major area of constitutional litigation, especially in the application of s 75(v). Judicial review of the lawfulness of action by officers of the Commonwealth was regarded, at Federation, as an essential protection of the rights of citizens and of the States. In the Convention debates, Mr Barton referred to the necessity of providing for the issue of constitutional writs to public officers "so that the High Court may exercise its function of protecting the subject against any violation of the Constitution, or of any law made under the Constitution".

The capacity of citizens to challenge, and of courts to judge, the validity of legislation, and the lawfulness of administrative action, means that the judiciary must remain at arm's length from the legislative and executive branches of government. In Alfred Deakin's speech to Parliament in support of the Judiciary Bill, he quoted Edmund Burke, who said: "Whatever is supreme in the State . . . ought to give a security to its justice against its power. It ought to make its judicature, as it were, something exterior to the State." Burke made that statement in criticising the lack of independence of tribunals set up by the revolutionaries in France. The idea that power and justice are distinct, and separate, aspects of sovereignty still struggles for acceptance in many places. It came early to Australia. It is embedded in our Constitution. It goes to the essence of the role of this Court.

Independence of government, and of all forms of external power and influence, is as important to the appellate, as to the constitutional, work of the Court. Modern governments and their agencies are regular litigants in civil cases. Most criminal cases are conducted as contests between a government and a citizen. Both the appearance and the reality of impartiality in the administration of civil and criminal justice depend upon manifest judicial independence. This Court ought to be a model of independence for the whole of the Australian judiciary.

The Court depends greatly upon the assistance of the legal profession. In all Australian jurisdictions there is a vigorous, skilful and independent profession. In our common law tradition, the relationship between Bench and Bar is vital. The conduct of litigation is the defining service provided

by the legal profession. That service is provided to courts as well as clients, and is subject to the authority and discipline of the courts. The role of the courts both as consumers and as regulators of legal professional services is sometimes overlooked. We welcome the presence today of so many members of the profession.

I should make particular acknowledgment of the presence today of former Justices of the Court, including all of the living former Chief Justices, and of my colleagues of the Council of Chief Justices of Australia and New Zealand. The Court is honoured and delighted by their attendance.

In conclusion, I should express the Court's thanks to the Chief Justice and judges of the Supreme Court of Victoria for making this courtroom available to us, as they made it available to our predecessors a century ago. There were only three of them then, and now we are seven. That brings us together in circumstances of unaccustomed intimacy; but for a brief time only. The hospitality extended to us has made it possible to mark, in a suitable fashion, this important occasion in the life of the Court.

The Court will adjourn until a quarter past ten tomorrow in Canberra.

**The mode of citation of this volume of
the Commonwealth Law Reports will be as follows:
218 CLR**

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CORRIGENDUM

216 CLR 254, headnote, line 14: For “might by so” read “might be so”.

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