Relaunch of National Archives Exhibition on the High Court at the Memory of a Nation Gallery

Chief Justice Robert French

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It is a great pleasure to be invited to launch the new exhibition on the High Court in the 'Memory of a Nation' Gallery at the National Archives of Australia building.

Provision for the creation of the High Court was made in s 71 of the Constitution, which provides:

> The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the parliament prescribes.

The judicial power of the Commonwealth was described by the first Chief Justice, Sir Samuel Griffith in *Huddart, Parker & Co Pty Ltd v Moorehead*[1] in 1909 as:

> the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property.

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[1] (1909) 8 CLR 330 at 357.

Although the Constitution provided, from the outset, for the creation of the High Court, its legislative establishment was not a foregone conclusion. Even before the terms of the Constitution were settled, an important element in the argument against federation was opposition to the creation of the High Court. In the Victorian journal *Tocsin*, which was a principal vehicle for public campaigning against the creation of the Commonwealth, the following commentary appeared in relation to the proposed Chapter III of the Constitution:

> This is perhaps the most dangerous cancer in this diseased Constitution. It places a NOMINEE, IRRESPONSIBLE, IRREMOVABLE FEDERAL SUPREME COURT, composed of men drawn from classes inimical and generally inaccessible to progressive ideas, over parliament and people, Victoria and Australia.

Chapter III was said to deal '… a cowardly blow at Victorian liberties'[2]:

> In spite of all that has been said about the State Constitutions remaining intact, Victoria will emerge with her parliament and people subject, as they are not under their own Constitution, to the whims of a Bartonian high bumbledom.

At the Convention Debates in discussion about s 71, delegates expressed concern about economies and the possibility that the proposed High Court might not have enough work to do. The people were thought not to be enthusiastic about 'a large expenditure on law and lawyers'[3]. It was thought undesirable to 'overload the federal Constitution with judicial machinery'[4].

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2 Anderson (ed), *Tocsin: Radical Arguments Against Federation (1897-1900)* (1977) 128-129.

3 *Official Record of the Debates of the Australasian Federal Convention*, (1986) vol III (Adelaide, 1897) at 938 (Mr Carruthers).

4 *Official Record of the Debates of the Australasian Federal Convention*, (1986) vol IV (Melbourne, 1898) at 268 (Mr Glynn).

Even after Federation, the establishment of the High Court was not without difficulty. On 18 March 1902, Alfred Deakin, the first Attorney-General of the Commonwealth, made the Second Reading Speech for the Judiciary Bill. As Sir Zelman Cowan has written[5]:

> The Bill was not reintroduced until June 1903, and then it had to be fought for every inch of the way in a climate of opinion that had grown steadily more unfavourable towards it. State resentment of Commonwealth powers was increasing; and severe nationwide drought brought new demands for retrenchment and fresh antagonism towards any federal 'luxuries'.

The Bill was opposed by eminent lawyers who argued that existing State courts could carry out the functions to be conferred on the High Court. They contended that the Constitution did not require the creation of the Court. They argued that it would have very little work to do.

When the Bill reached the committee stage it had a majority of only nine. It was amended on the way through and finally passed in the Senate and received Royal Assent on 27 August 1903. Deakin said of it[6]:

> No measure yet launched in the Federal Parliament was so often imperilled, skirted so many quicksands, or scraped so many rocks on its very uncertain passage.

Deakin's stirring Second Reading Speech for the *Judiciary Act* contains a number of memorable statements. In that which is probably most frequently quoted, he said:

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5 Blackshield, Coper and Williams (eds), *The Oxford Companion to the High Court of Australia*, (2001) at 193.

6 Blackshield, Coper and Williams (eds), op cit, at 194.

> 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 (a Constitution; distribution of powers under it; and a judicial authority to interpret it); we really mean that there is one which is more essential than the others – the competent body 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'.

It was he who coined the term 'no common creation' to describe the High Court. It is that term which is the title of this exhibition.

The exhibition highlights the function of the High Court by directing attention to four prominent decisions among the many that have been made since federation. Those many decisions have identified the content and delineated the limits of governmental power as well as dealing with matters arising under the common law of Australia and the statutes of the Commonwealth and the States. The four decisions selected are: the *Engineers Case*[7], the *Communist Party Case*[8], the *Tasmanian Dams Case*[9] and, in the updated exhibition, the *Workchoices Case*[10].

The name of the gallery in which the exhibition is housed is the 'Memory of a Nation Gallery'. That name brings home to us that for nations as well as for individuals, memory is essential for self-awareness and identity.

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7 *Amalgamated Society of Engineers v Adelaide Steamship Company Limited and Ors* (1920-21) 28 CLR 129.

8 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

9 *Commonwealth v Tasmania* (1983) 158 CLR 1.

10 *New South Wales v The Commonwealth* (2006) 229 CLR 1.

This exhibition, as part of the Gallery, contributes to a sense of national self-awareness and identity. People may derive from the exhibition and similar displays an understanding of the origins of our judicial system and of the way in which it helps both to define the limits of public power, and to maintain the rule of law. To that extent the vital infrastructure of our representative democracy is strengthened. The judicial system has been called the weakest branch of government. It depends very much for its effective functioning upon public confidence in what it does[11]. Public confidence requires public understanding; and public understanding is achieved by education of the kind that this exhibition provides.

I am honoured to be able to relaunch the updated exhibition and commend the National Archives for its work in relation to it.

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[11] See the remarks of Gleeson CJ on the occasion of the centenary of the High Court (2003) 218 CLR at v.