

ESSAY

SIR ISAAC ISAACS — A SESQUICENTENARY REFLECTION

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[Sir Isaac Isaacs stares at us from his photograph taken a century ago. In the sesquicentenary of his birth, we remember him as one of the most brilliant graduates of the Melbourne Law School; a highly successful barrister and law officer; and a Justice of the High Court of Australia. He went on briefly to become Chief Justice and the first Australian-born Governor-General. His later years were clouded by a dispute in the Jewish community over his opposition to Zionism. But his legal legacy is huge — especially in constitutional law, where his decisions are still of great influence and authority. This biographical article reminds us of Isaacs' extraordinary career — from humble origins to positions of great power. He had failings and vanities that are not glossed over. Indeed, his faults carry lessons. If such a clever and insightful lawyer could fall victim to attitudes of racism and cultural superiority, how can contemporary lawyers avoid analogous errors of their own era to which they are blind?]

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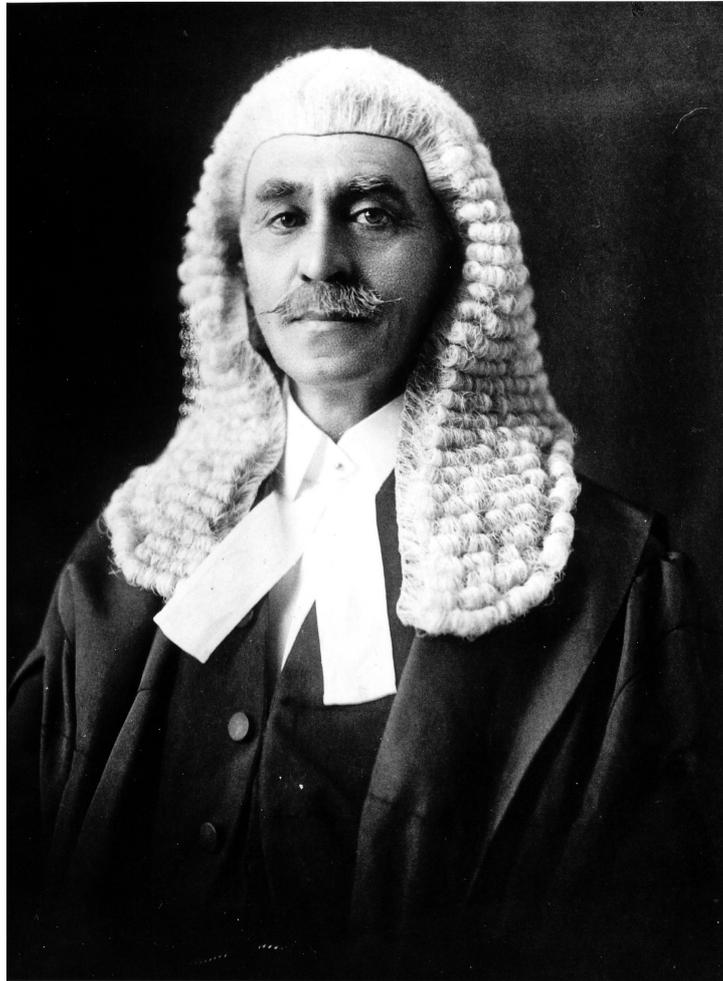


Figure 1: Isaac Isaacs in 1906

I INTRODUCTION

The sesquicentenary of the birth of Sir Isaac Isaacs occurred on 6 August 2005. He was a great Australian. His story has been described as ‘the Australian version of from Log Cabin to White House.’¹

A sesquicentenary is an appropriate moment to look back on the contribution that this significant lawyer and judge made to Australia, and especially to its *Constitution*. We can consider the lasting aspects of his legacy and we can learn from his mistakes. We can note his foibles and vanities. Isaacs affords an

¹ Zelman Cowen, *Isaac Isaacs* (1967) 257.

example of what can be achieved in Australia by ability, imagination, determination, foresight, hard work and luck. We can draw lessons from his life for our own lives and times.

II FAMILY BACKGROUND

Isaac Alfred Isaacs was born in Melbourne on 6 August 1855 in a shop-dwelling on Elizabeth Street. 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, though only four survived childhood.

For most of Isaacs' early life the family lived in north-eastern Victoria, in Yackandandah. In 1869 they moved to Beechworth, where Isaacs attended Beechworth Grammar School. In *The Federal Story*, Alfred Deakin noted: 'The son of a struggling tailor in an up-country town, he had as unpromising an outlook as could well be imagined for such a career as his proved.'²

Isaacs' intense devotion to his family was well known. Years later, when he was made 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'.³ 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 he married, he continued to have daily contact with his parents.

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 even after his appointment to the High Court of Australia in October 1906. It was his mother who chose the wig that he wore during the ceremony at 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' first barrister's wig. Rebecca Isaacs had then informed the wigmaker that she would be back at a later date to purchase a judge's wig for her son.⁴ Her belief in his talents was a source of strength for Isaacs. Her judgement proved to be well founded.

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 60 years, until Isaacs' death.⁵ 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

² Alfred Deakin, *The Federal Story: The Inner History of the Federal Cause* (1944) 67.

³ Max Gordon, *Sir Isaac Isaacs: A Life of Service* (1963) 210.

⁴ Zelman Cowen, 'Isaacs, Isaac Alfred' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 359, 360.

⁵ Daisy Isaacs died in June 1960, surviving her husband by over 12 years.

identity as ‘a woman of dignified appearance, strong personality and considerable style, who enjoyed her public position.’⁶

III EARLY COLONIAL CAREER

Before he finished school, Isaacs was already unofficially employed as a pupil teacher. After graduating as dux of Beechworth Grammar School and passing the teachers’ examination, he was employed by the Victorian Education Authority. Indeed, it was this engagement that resulted in Isaacs’ first appearance before a court of law. He sued the headmaster of the local common school at which he was teaching for fees that he claimed were owed to him for teaching extra subjects. The claim was dismissed.⁷ Soon after, in February 1875, Isaacs 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, combining 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 who quickly became known for his photographic memory. His citation of cases, and of the law reports in which they could be found, was 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.⁸ He did not. He was just one of those rare lawyers with a memory that ran in that direction.

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 take up 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 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.⁹ 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.¹⁰

⁶ Cowen, *Isaac Isaacs*, above n 1, 22.

⁷ *Ibid* 4–5.

⁸ Sir Robert Garran, *Prosper the Commonwealth* (1958) 157; Cowen, *Isaac Isaacs*, above n 1, 6; Graham Fricke, *Judges of the High Court* (1986) 41; Gordon, above n 3, 30.

⁹ Cowen, *Isaac Isaacs*, above n 1, 16; Fricke, above n 8, 41.

¹⁰ Tony Blackshield et al, ‘Counsel, Notable’ in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 160, 165.

Isaacs' entry into Victorian colonial politics came in 1892. In reflecting on the election one writer remarked that:

Among the new Members elected to the Legislative Assembly, there is no more promising young man than Mr Isaac Isaacs MLA ... 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.¹¹

Following only eight months in the Victorian Parliament, Isaacs accepted the office of Solicitor-General for the conservative Patterson Ministry. However, he soon resigned that office over a dispute with the Attorney-General regarding 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. 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.¹² Yet his stance on the issue of prosecutorial independence won him media support and public popularity.¹³ He was re-elected to the Victorian Parliament soon after, without opposition, as the Member for Bogong.

With the election of the Turner government in 1894, Isaacs, described by *The Bulletin* as Turner's 'brilliant henchman',¹⁴ 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 19th century, Isaacs was clearly one of the leading figures in Victorian colonial politics. Sidney and Beatrice Webb, during an 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 acute 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.¹⁵

¹¹ Cited in Gordon, above n 3, 55–6.

¹² Zelman Cowen, *Sir Isaac Isaacs* (1979) 22.

¹³ Cowen, *Isaac Isaacs*, above n 1, 35.

¹⁴ *Ibid* 41.

¹⁵ Cited *ibid* 45; Fricke, above n 8, 40.

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.¹⁶

IV THE FEDERATION MOVEMENT

Isaacs' involvement in the Federation movement increasingly consumed his energies as Australia moved towards becoming 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 1897–98 as the fifth of 10 Victorian delegates.

The 1897–98 Conventions met in three sessions, held successively in Adelaide, Sydney and Melbourne. Isaacs played a prominent role at each — 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 rank of 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.¹⁷

Mirroring his experience in the Victorian Parliament, Isaacs did not enjoy great popularity amongst his fellow delegates. 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 social activities. Accordingly, his 'untiring, almost ruthless, concentration on the work of drafting the *Constitution* ... kept him from popularity in the Convention'.¹⁸

Isaacs failed to be elected to an official position on the drafting committee. This rejection 'had an injurious effect upon Isaacs'.¹⁹ Despite this 'painful incident'²⁰ the significance of Isaacs' contribution to the Convention was recognised. Some even viewed him, in terms of practical impact, as the unofficial leader of the Victorian delegation.²¹

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

¹⁶ Deakin, above n 2, 68.

¹⁷ *Ibid* 88.

¹⁸ Gordon, above n 3, 89.

¹⁹ Deakin, above n 2, 79.

²⁰ *Ibid* 78.

²¹ Gordon, above n 3, 81.

Parliament and, more significantly, in his later interpretation of the *Constitution* during his service on the High Court. Isaacs' nationalism could be seen in his support 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.

Isaacs' nationalism was also reflected in his belief in the need for the *Constitution* to confer on the new federal Parliament a comprehensive range of national powers. This centralist 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 for including a federal power to provide for aged pensions.

Isaacs was a strong advocate of the need to enshrine general democratic principles in the *Constitution*. His opposition to the principle of equal representation of each state in the Senate was partly based on his belief that the former colonies had no role to play in national issues. It also 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 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.'²²

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 a device for the resolution of parliamentary deadlocks. He preferred instead to see the people directly resolve any such deadlocks through the use of constitutional referenda.

Despite these strongly-held views, Isaacs demonstrated that he was prepared to compromise in order to secure the primary goal of Australian federation. 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',²³ although he stressed that this was acceptable only 'as a concession but not a right.'²⁴

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'.²⁵ Yet he expressed a number of doubts about the constitutional Bill which the Convention had 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

²² *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 10 September 1897, 304.

²³ L F Crisp, *Federation Fathers* (1990) 207.

²⁴ *Ibid* 206–7.

²⁵ Cowen, *Isaac Isaacs*, above n 1, 70.

on the borders, which he saw as disadvantaging Victoria's economic interests.²⁶ These concerns, and possibly also the early opposition of the influential newspaper, *The Age*, led Isaacs initially to argue a cautious approach towards the draft *Constitution*. He spoke against the adoption of the draft at the 1899 annual meeting of the Australian Natives' Association in Bendigo.²⁷ 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 Commonwealth of Australia Constitution Bill, Isaacs changed course, reflecting the changed resolve at the same time of both the Turner Ministry and *The Age*. He began to speak publicly in support of the draft *Constitution*. An autographed statement by Isaacs 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.'²⁸

As Acting Premier of Victoria (Turner being abroad) it fell to Isaacs 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 his public speaking, it was reported that 'he was not fluent or flowery in his exposition ... He was much better ... clear, precise, and accurate almost to the degree of painful exertion.'²⁹

Isaacs' 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'.³⁰ He was there at the creation. At the time of his death, Sir Isaac Isaacs was the last surviving member of the Constitutional Convention of 1897–98.

V 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 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.³¹

Several days later, Isaacs announced that he would 'fulfil the federal pledges that he gave to his constituents'³² by standing for the seat of Indi in the first

²⁶ Ibid.

²⁷ Ibid 72.

²⁸ Ibid 74.

²⁹ Gordon, above n 3, 84.

³⁰ See Isaac Isaacs, 'Federation and States Rights' in Michael Cathcart and Kate Darian-Smith (eds), *Stirring Australian Speeches: The Definitive Collection from Botany to Bali* (2004) 103, 104.

³¹ Gordon, above n 3, 97.

³² Ibid.

federal elections. His reputation as a leading protectionist provoked the President of the Free Trade Association of Victoria, Thomas R Ashworth, to stand as a candidate against him. Isaacs was elected by 3888 votes against 2061 votes for Ashworth.³³ Supporters in Beechworth hosted a reception to celebrate his success in the election. A friend of his father Alfred Isaacs prophesied that night that ‘the day is not far distant when we will greet young Isaac Isaacs as Chief Justice of Australia.’³⁴

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.³⁵

Isaacs spoke strongly in favour of the Conciliation and Arbitration Bill 1903 (Cth) to create a federal court to resolve interstate industrial disputes. He also supported the Judiciary Bill 1903 (Cth), providing for the establishment of the High Court of Australia. Speaking in favour of the latter Bill, Isaacs described 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.³⁶

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 to secure a compromise solution to the High Court’s ‘strike of 1905’. The dispute with the Justices concerned their conditions and entitlements in the new Court. With Isaacs’ intervention, the issue was successfully resolved. His 15 months as Attorney-General were characterised by the extraordinary energy and commitment that Isaacs brought to all his public duties. Sir Robert Garran, who was the inaugural secretary of the Attorney-General’s Department, later wrote of Isaacs’ 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 ...³⁷

³³ Cowen, *Isaac Isaacs*, above n 1, 79.

³⁴ Gordon, above n 3, 101.

³⁵ Zelman Cowen, *Great Australians: Isaac Isaacs* (1962) 13.

³⁶ *Ibid.*

³⁷ Garran, above n 8, 157.

Throughout his time as a Member of Parliament, both at the colonial and national level; as federal Attorney-General; and, earlier, as Victorian Attorney-General and Solicitor-General, Isaacs continued to practise law on his own account. For example, whilst he was federal Attorney-General, Isaacs made a number of appearances before the High Court of Australia.³⁸ Yet 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 ‘it is a measure of Isaacs’ enormous endurance and capacity for work that he was able to do both jobs effectively.’³⁹

Isaacs 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 sympathetic to the Australian Labor Party, Isaacs never 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.

VI 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, Justice H B Higgins. A newspaper account of the ceremony noted that: ‘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.’⁴⁰

Initially Isaacs and Higgins JJ 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 held a restrictive view of federal constitutional powers, protecting the state sphere by the invocation of the related doctrines of reserved state powers and implied immunity of instrumentalities. The new appointees did not hide their differences of opinion with the foundation Justices. Isaacs J is considered by some as the High Court’s ‘first great dissenter’.⁴¹ The strong differences of opinion expressed at that time, particularly as between Griffith CJ and Isaacs J, ‘delighted the law students, if they scandalized the public.’⁴²

As the membership of the High Court changed over the years, the opinions of Isaacs gradually prevailed. This is often the reward of the judicial dissenter.

³⁸ Blackshield et al, above n 10; Cowen, *Isaac Isaacs*, above n 1, 98–100.

³⁹ Cowen, *Great Australians*, above n 35, 5.

⁴⁰ ‘New High Court Judges: Swearing-in Ceremony’, *The Argus* (Melbourne), 16 October 1906, 4.

⁴¹ Andrew Lynch, ‘Dissenting Judgments’ in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 216, 217.

⁴² H V Evatt, *Australian Labour Leader: The Story of W A Holman and the Labour Movement* (1954) 116.

Certainly, Isaacs was the dominant personality on the Court by the early years of the Knox Court in the 1920s. It is in the field of constitutional interpretation that Isaacs' 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 such issues lead to sharp and even heated expressions of differences.⁴³

Consistent with the views he had expressed at the earlier Constitutional Conventions, Isaacs J 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.'⁴⁴ The most enduring of Isaacs' constitutional legacies gave effect to this view.

In 1920, in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*,⁴⁵ Isaacs J delivered the majority decision of the High Court, with Knox CJ, Starke and Rich JJ concurring.⁴⁶ Higgins J substantially agreed with the majority, but delivered separate reasons of his own.⁴⁷ The sole dissenting reasons in the case were delivered by Gavan Duffy J,⁴⁸ 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'.⁴⁹

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.'⁵⁰ 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 states.⁵¹ What marks this case as '[a] judgment of momentous importance'⁵² is the far-reaching reasoning of the majority decision.

The case might have been decided on a narrow principle, as had occurred in earlier decisions such as *Federated Engine-Drivers and Firemen's Association of Australasia v Broken Hill Pty Co Ltd*⁵³ and *Federated Municipal and Shire*

⁴³ For a recent example, see *Al-Kateb v Godwin* (2004) 219 CLR 562, 589 (McHugh J), 617 (Kirby J).

⁴⁴ *R v Hibble; Ex parte Broken Hill Pty Co Ltd* (1920) 28 CLR 456, 469 (Isaacs and Rich JJ).

⁴⁵ (1920) 28 CLR 129 ('*Engineers Case*').

⁴⁶ *Ibid* 140.

⁴⁷ *Ibid* 171.

⁴⁸ *Ibid*.

⁴⁹ 'Retirement of Chief Justice Sir Garfield Barwick' (1981) 148 CLR v, x.

⁵⁰ Justice Michael Kirby, 'Famous Case Remembered' (1990) 25(10) *Australian Law News* 7, 7. See also Kevin Booker and Arthur Glass, 'The *Engineers Case*' in H P Lee and George Winter-ton (eds), *Australian Constitutional Landmarks* (2003) 34.

⁵¹ *Engineers Case* (1920) 28 CLR 129, 155 (Knox CJ, Isaacs, Rich and Starke JJ), 171 (Higgins J).

⁵² *The Argus* (Melbourne), 1 September 1920, 8, cited in Kirby, above n 50, 7.

⁵³ (1912) 16 CLR 245.

Council Employees' Union of Australia v City of Melbourne.⁵⁴ Instead, the majority judges rejected the doctrines of implied intergovernmental immunities and reserved state powers, and said so in plain terms.⁵⁵ Their reasons clearly reflect the reasoning that Isaacs had urged upon the High Court as counsel in cases such as *Deakin v Webb*⁵⁶ and *Federated Amalgamated Government Railway & Tramway Service Association v New South Wales Railway Traffic Employees Association*,⁵⁷ and that he had developed as a judge in a series of dissenting reasons, such as *R v Barger*⁵⁸ and *Attorney-General (NSW) v Brewery Employés' Union of New South Wales*.⁵⁹

The *Engineers Case*, although it has been criticised for its exposition and style,⁶⁰ constitutes one of the most influential decisions of the High Court of Australia in its first 100 years. 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.'⁶¹

There continues to be much discussion and debate regarding this approach to constitutional interpretation.⁶² However, there is no 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.⁶³

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 the *Engineers Case* expanded the powers of the 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

⁵⁴ (1919) 26 CLR 508.

⁵⁵ *Engineers Case* (1920) 28 CLR 129, 155 (Knox CJ, Isaacs, Rich and Starke JJ), 171 (Higgins J).

⁵⁶ (1904) 1 CLR 585, 592–600.

⁵⁷ (1906) 4 CLR 488.

⁵⁸ (1908) 6 CLR 4.

⁵⁹ (1908) 6 CLR 469.

⁶⁰ Geoffrey Sawer, *Australian Federalism in the Courts* (1967) 130; Leslie Zines, *The High Court and the Constitution* (1997) 10; Sir Anthony Mason, 'The High Court of Australia: A Personal Impression of Its First 100 Years' (2003) 27 *Melbourne University Law Review* 864, 873.

⁶¹ Michael Coper and George Williams (eds), *How Many Cheers for Engineers?* (1997) xiv.

⁶² See, eg, Justice Michael Kirby, 'Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?' (2000) 24 *Melbourne University Law Review* 1; Sir Anthony Mason, 'The Interpretation of a Constitution in a Modern Liberal Democracy' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996); Justice Michael McHugh, 'The Constitutional Jurisprudence of the High Court: 1989–2004' (Speech delivered at the Inaugural Sir Anthony Mason Lecture in Constitutional Law, Sydney, 26 November 2004); Justice B M Selway, 'Methodologies of Constitutional Interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234.

⁶³ See, eg, *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31; *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192; *Richardson v Forestry Commission* (1988) 164 CLR 261; *Victoria v Commonwealth* (1971) 122 CLR 353 ('Payroll Tax Case'); *Western Australia v Commonwealth* (1995) 183 CLR 373; *Re Australian Education Union*; *Ex parte Victoria* (1995) 184 CLR 188; *Austin v Commonwealth* (2003) 215 CLR 185.

powers was entirely in keeping with the nationalist and centralist tendencies that characterised Isaacs' approach to the nature of the federation created in the Australian Commonwealth.

Isaacs' 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. Windeyer J made this point in his reasons in the *Payroll Tax Case*:

in 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.⁶⁴

Of all of the judges appointed to the High Court of Australia in its first century, saving perhaps Justice Lionel Murphy, Isaacs J 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'⁶⁵ that some have claimed was his major and lasting contribution to Australian law. Isaacs consistently interpreted the *Constitution* so as to provide greater powers for the Commonwealth. His judicial reasons burned with 'the flame of an aggressive nationalism'.⁶⁶ 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,⁶⁷ in his approach to interpreting s 92 of the *Constitution* to confine its operation to the states,⁶⁸ and in his decision in favour of the Commonwealth in *Victoria v Commonwealth*.⁶⁹ That case concerned the validity of imposing conditions on federal financial grants to the states under s 96 of the *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 problem on its own broad scale unimpeded by the sectional policies of particular States.'⁷⁰

⁶⁴ (1971) 122 CLR 353, 396 (citations omitted).

⁶⁵ Fricke, above n 8, 50.

⁶⁶ Ross Anderson, 'The States and Relations with the Commonwealth' in R Else-Mitchell (ed), *Essays on the Australian Constitution* (2nd ed, 1961) 93, 97.

⁶⁷ See, eg, Isaacs J's reasons in: *Australian Insurance Staffs' Federation v Accident Underwriters' Association* (1923) 33 CLR 517; *Burwood Cinema Ltd v Australian Theatrical and Amusement Employees' Association* (1925) 35 CLR 528; *R v Commonwealth Court of Conciliation and Arbitration*; *Ex parte Engineers etc (State) Conciliation Committee* (1926) 38 CLR 563; *Federated State School Teachers' Association of Australia v Victoria* (1929) 41 CLR 569.

⁶⁸ See, eg, Isaacs J's reasons in: *W & A McArthur Ltd v Queensland* (1920) 28 CLR 530 ('*McArthur's Case*'); *Commonwealth v 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) 55 CLR 1 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) 42–5.

⁶⁹ (1926) 38 CLR 399 ('*Federal Roads Case*').

⁷⁰ *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466, 479 ('*Cowburn's Case*').

The support for central law-making authority, combined with Isaacs' patriotism, appeared most prominently in his broad interpretation of the defence power in s 51(vi) of the *Constitution*. In *Farey v Burvett*, he spoke of the defence power as the 'ultima ratio of the nation'⁷¹ and a paramount source of power for the nation during times of war. In Isaacs' 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.⁷² The scope of the power was delimited by the requirements of self-preservation.⁷³

Isaacs' preference for expansive national powers was also reflected in his interpretation of s 109 of the *Constitution*. It was Isaacs J who provided the first clear expression of the 'covering the field' test of inconsistency in *Cowburn's Case*.⁷⁴ That test was later developed by Dixon J in *Ex parte McLean*,⁷⁵ with Isaacs J concurring in separate reasons.⁷⁶ It has proved of great influence in and beyond Australia. For example in India, a more recent federation, the Supreme Court has applied the 'covering the field' metaphor to the delineation of union as against state legislative powers.⁷⁷

One aspect of Isaacs' 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 surprising to contemporary observers, given that his own parents had emigrated 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 contaminating and degrading influence of inferior races'.⁷⁸ 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'.⁷⁹ 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, which does not now constitute the law of Australia, that: 'Once an immigrant, always an immigrant.'⁸⁰

⁷¹ (1916) 21 CLR 433, 453.

⁷² *Ibid* 455.

⁷³ *Ibid*.

⁷⁴ (1926) 37 CLR 466, 491–2.

⁷⁵ (1930) 43 CLR 472, 483.

⁷⁶ *Ibid* 479.

⁷⁷ *Zaverbhai v State of Bombay* AIR 1954 SC 752, 757 (Venkatarama Iyer J). See also *Bhawani Cotton Mills Ltd v State of Punjab* AIR 1967 SC 1616. The borrowing from Isaacs J is acknowledged in Indian texts: see Mahendra P Singh, *V N Shukla's Constitution of India* (9th ed, 1996) 687.

⁷⁸ Cited in Tony Stephens, 'The High Cost of Whitewash', *The Sydney Morning Herald* (Sydney), 27 September 2003, 35.

⁷⁹ (1926) 39 CLR 95, 104.

⁸⁰ *R v Macfarlane; Ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518, 555. See also *Potter v Minahan* (1908) 7 CLR 277; *Ex parte Walsh; Re Yates* (1925) 37 CLR 36.

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’.⁸¹ Today’s readers may be shocked by such attitudes. However, these were probably shared by the majority of Australians at the time. Indeed, they endured well into my adult lifetime. Isaacs’ emotional appeal to the suggested dangers of ‘activities designed to establish anarchical and *terroristic* or treasonable societies’⁸² can perhaps help contemporary Australians to understand 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 interpretation of federal powers in the *Engineers Case*, he was also one of the first Australian judges to emphasise 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.’⁸³ 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.’⁸⁴ Examples of this awareness can be seen in many decisions, such as *Fremlin v Fremlin*,⁸⁵ *Cofield v Waterloo Case Co Ltd*,⁸⁶ *Bourke v Butterfield & Lewis Ltd*⁸⁷ and *Wright v Cedzich*.⁸⁸

Isaacs’ approach to judicial precedents also reflected his concern about the outcomes of his judicial decisions and his strong desire to ensure that justice was ultimately done. He placed much weight on the judicial oath ‘to do right to all manner of people according to law’. In his view, this promise meant that each judge was bound to give effect to his own understanding of the law. It would be violating this oath if he placed adherence to past precedent above a 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.⁸⁹

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 Commonwealth*⁹⁰ and more recently *Coleman v Power*.⁹¹

⁸¹ *Ex parte Walsh; Re Yates* (1925) 37 CLR 36, 85–6.

⁸² *Ibid* 86 (emphasis added).

⁸³ *Wright v Cedzich* (1930) 43 CLR 493, 515.

⁸⁴ *Commonwealth & Central Wool Committee v Colonial Combing, Spinning & Weaving Co Ltd* (1922) 31 CLR 421, 438.

⁸⁵ (1913) 16 CLR 212.

⁸⁶ (1924) 34 CLR 363.

⁸⁷ (1926) 38 CLR 354.

⁸⁸ (1930) 43 CLR 493.

⁸⁹ *Australian Agricultural Co v Federated Engine-Drivers and Firemen’s Association of Australasia* (1913) 17 CLR 261, 275–8.

⁹⁰ (1977) 139 CLR 585, 593–4 (Barwick CJ) (*‘Second Territory Senators Case’*).

Ensuring that justice is given priority over legal technicalities is a theme that also runs through the reasons of Isaacs in criminal matters. In such cases, he emphasised 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.’⁹²

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, towards Isaacs by Griffith CJ and Barton J in particular. This is evident in the private correspondence and reported conversations between Griffith and Barton, which included the suggestion that Isaacs was 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.’⁹³

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, truthful and apparently sincere. Barton was entitled to criticise him, but the chosen ground seems singularly ill-chosen.

A number of Isaacs’ 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 unstinted work that he obtained a mastery of the facts of a heavy case and the law which appertained thereto.⁹⁴

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.

The foregoing facets of Isaacs’ personality are apparent in many of his High Court opinions. His writing style has been criticised as excessively verbose and dogmatic.⁹⁵ On the other hand, it is Isaacs’ vivid use of language, the broad

⁹¹ (2004) 209 ALR 182, 258 (Callinan J).

⁹² (1909) 9 CLR 257, 259. See also *Ross v The King* (1922) 30 CLR 246.

⁹³ R B Joyce, *Samuel Walker Griffith* (1984) 301.

⁹⁴ Sir Owen Dixon, ‘Foreword’ in Max Gordon, *Sir Isaac Isaacs: A Life of Service* (1963).

⁹⁵ Sawyer, above n 60, 130.

scope of both legal and other references employed in his opinions, the power of his rhetoric, and the humanity expressed in his reasons 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 passages.

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.⁹⁶

Similar criticisms were made of Isaacs' 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.⁹⁷

Yet such criticisms are largely a matter of perspective. 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 opinion entirely.⁹⁸

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 made a Knight Commander of the Order of St Michael and St George.

Even by his critics, Isaacs has been judged as having 'one of the most penetrating minds in Australian history.'⁹⁹ He was undoubtedly one of the most influential Justices to sit on the High Court.¹⁰⁰ When considering his life and 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

⁹⁶ Cowen, *Isaac Isaacs*, above n 1, 141.

⁹⁷ Fricke, above n 8, 49.

⁹⁸ Gordon, above n 3, 155.

⁹⁹ G Craven, 'The Founding Fathers: Constitutional Kings or Colonial Knaves?' in *Commonwealth, Parliament and the Constitution: Some Issues of Interest*, Parl Paper No 21 (1993) 126.

¹⁰⁰ Mason, 'The High Court of Australia', above n 60, 872.

his great endurance and capacity for work all contributed to make him one of the greatest of Australian judges.¹⁰¹

VII APPOINTMENT AS CHIEF JUSTICE

The announcement on 2 April 1930 that Isaacs was to succeed Sir Adrian Knox as the Chief Justice of Australia was a natural progression in his judicial service. He was then the senior Justice of the High Court. His appointment fulfilled the prophecy made by his father's friend at the turn of the century. However, 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 a controversy as to whether he would be appointed Governor-General. Isaacs was ill for some part of this period. There are only 20 reported cases in which Isaacs delivered reasons as the Chief Justice. His appointment to the position reflected his considerable legal reputation. However, '[i]n such a short period, it was not possible for him to place a distinctive mark on the Chief Justiceship.'¹⁰²



Figure 2: Isaacs as Chief Justice

¹⁰¹ Cowen, *Great Australians*, above n 35, 17.

¹⁰² Cowen, 'Isaacs, Isaac Alfred', above n 4, 361.

VIII A NATIVE-BORN GOVERNOR-GENERAL

On 22 January 1931, Sir Isaac Isaacs entered a new phase of his public service when he took his oaths of office 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.¹⁰³

The announcement that the Scullin government intended to recommend Isaacs for this office created considerable controversy.¹⁰⁴ Opponents of the appointment said that their opposition had nothing to do with Isaacs personally.¹⁰⁵ 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.

King George V was known to be opposed to the appointment for these reasons, and also because of the failure of the Scullin government to consult him before it made its recommendation known. The King complained that Isaacs was personally unknown to him.¹⁰⁶ The constitutional position with regard to who had the authority to provide advice to the King concerning the appointment of a Governor-General was unclear. 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 in London in 1930 that such an appointment should be made following the advice of the relevant dominion government.¹⁰⁷ It was recorded that such government should nonetheless informally consult the King before offering such advice.¹⁰⁸ 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.¹⁰⁹

To the contrary, upon Isaacs' retirement as Governor-General it was judged that '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.'¹¹⁰

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, reissued after the adjournment of the Senate. A

¹⁰³ The usual practice had been for a British Minister to make the formal recommendation to the monarch.

¹⁰⁴ Cowen, *Isaac Isaacs*, above n 1, 191.

¹⁰⁵ *Ibid* 191–3.

¹⁰⁶ *Ibid* 198–9.

¹⁰⁷ *Ibid* 197–8.

¹⁰⁸ *Ibid* 198.

¹⁰⁹ Gordon, above n 3, 155.

¹¹⁰ *Ibid* 162.

second example was Scullin's request for the early dissolution of the Parliament following the government's defeat on a motion that Scullin interpreted as a motion of no confidence. 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.

Although known for holding strong political views, particularly in relation to issues of constitutional reform, Sir Isaac Isaacs stands as a model for the restraint to be observed in the exercise of the office of Governor-General when it comes to daily issues of partisan politics. There was a 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 materialised. This was primarily because 'Isaacs's meticulous approach to his duties, and in particular his scrupulous avoidance of political comment as Governor-General guaranteed a steady course.'¹¹¹

Discipline, experience and understanding of the constitutional conventions were clearly displayed during Isaacs' five-year term as Governor-General. He served during the Great Depression. His reputation for frugality was 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-General to take this course.

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 service 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.¹¹²

IX RETIREMENT FROM PUBLIC OFFICE

Of all 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. He devoted considerable time to studying biblical and religious subjects. 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.

During this period Isaacs wrote numerous articles and pamphlets.¹¹³ He made many speeches and broadcasts arguing in favour of the need for constitutional change. Further honours were heaped upon him in his later years. In 1932 he was

¹¹¹ His Excellency Major General Michael Jeffrey, Governor-General of the Commonwealth of Australia (Speech delivered at the opening of the Sir Isaac Isaacs Exhibition, Melbourne Hebrew Synagogue, 20 March 2005).

¹¹² Cowen, *Isaac Isaacs*, above n 1, 216.

¹¹³ See, eg. *Australian Democracy and Our Constitutional System* (1939) and *Referendum Powers: A Stepping-Stone to Greater Freedoms* (1946).

elevated to be a Knight Grand Cross of the Order of St Michael and St George, an honour then usual for 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. There were many tributes. He was recognised by R G Menzies as ‘one of the most remarkable men in the history of Australia’.¹¹⁴ 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 Isaacs 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.¹¹⁵

X ROLE IN THE JEWISH COMMUNITY

There is a postlude that must be added to this story. Before 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, serving as Honorary Secretary of the Melbourne Jewish Young Men’s Russian Relief Fund, and serving as President of the United Jewish Education Board. He remains the only Justice and Chief Justice of the High Court of Jewish religion. Yet ‘he never permitted his religion to impede what he perceived to be his manifest duty.’¹¹⁶

Isaacs was still unmistakably Jewish. That fact had a deep impact on his values and opinions. Between 1942 and 1944, Isaacs contributed a series of letters entitled ‘Political Zionism’ to the *Hebrew Standard*.¹¹⁷ The letters outlined the reasons for his opposition to Zionism. They expressed the opinion that Jewish identity was not, as such, a national or ethnic identity. It was rather 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 McDonald White Paper, of restricting Jewish immigration to Palestine, placed him in sharp disagreement with much of the Australian Jewish community at the time.

The opinions expressed by Isaacs were publicly challenged by Professor Julius Stone, then recently appointed Challis Professor of Jurisprudence and International Law at the University of Sydney. He wrote a series of open letters to Isaacs.¹¹⁸ They too were published in the *Hebrew Standard*. As G S Lee noted:

¹¹⁴ Cited in Cowen, *Isaac Isaacs*, above n 1, 257.

¹¹⁵ Cowen, ‘Isaacs, Isaac Alfred’, above n 4, 359.

¹¹⁶ 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, 128.

¹¹⁷ Cowen, *Isaac Isaacs*, above n 1, 218.

¹¹⁸ Leonie Star, *Julius Stone: An Intellectual Life* (1990) 190–7. 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’: at 191. Ironically, Justice Benjamin 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 Andrew L Kaufman, *Cardozo* (1998) 478.

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. Ultimately, the disputation focused on Isaacs and Stone as each sought to promote and defend his standpoint.¹¹⁹

The responses that Isaacs published have been described as intemperate and dogmatic, with an attack extending beyond the argument itself to Professor Stone personally.¹²⁰ Eventually, Stone responded in kind.¹²¹ Sir Zelman Cowen concluded that the dispute did not reflect well on Isaacs.¹²²

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' great contemporary in the United States judiciary, was unsympathetic to Zionism.¹²³ Sir John Monash, Isaacs' contemporary in Australian public life, was a very late convert to the support of Zionism.¹²⁴ 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 past time for these animosities to be put aside. Isaacs was a great Jewish Australian and conscious of his Jewishness. His sometimes emotional expression occurred because he felt deeply about issues. His feelings sometimes overcame prudence. With Isaacs, it is necessary to look at the full picture. That picture was, amongst other things, unmistakably Jewish.

XI INTELLECTUAL JOURNEY AND ITS LESSONS

What are the chief lessons to be derived from the intellectual journey of Sir Isaac Isaacs? Is there instruction here for contemporary Australians?

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 simply require accurate deployment of lawyerly skills in securing legally-correct outcomes. In such cases, Isaacs was up there with the best. His legal talent and knowledge are reasons why he is still often read today, and his opinions considered a century after he expressed them.

Second, in advance of most Australian lawyers of his generation, Isaacs perceived instinctively what Roscoe Pound was teaching at Harvard during the early years of the 20th century. Much law is far from being value free. Much of it involves the application of judicial choices. This requires consideration of the

¹¹⁹ Lee, above n 116, 128.

¹²⁰ Cowen, *Isaac Isaacs*, above n 1, 236.

¹²¹ *Ibid* 237–9.

¹²² Cowen, *Sir Isaac Isaacs*, above n 12, 29.

¹²³ Kaufman, above n 118, 478. In this, Justice Cardozo's view contrasted with that of the other Jewish member of the United States Supreme Court at that time, Justice Louis Brandeis. See also Star, above n 118, 198.

¹²⁴ Roland Perry, *Monash: The Outsider who Won a War: A Biography of Australia's Greatest Military Commander* (2004) 25.

impact of the law and the way the particular case fits into a wider canvas.¹²⁵ Isaacs was interested in the social consequences of his decisions. He was clear-sighted about such consequences and he often argued for them. 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 because there remain some lawyers who live in denial about the sometimes creative nature of judicial adjudication.

Third, 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 in favour of 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 Case* stamped on the Australian Commonwealth,¹²⁶ 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 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 20th century were commonly the products of nationalism. Isaacs' Australian nationalism now looks 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. The British Empire gave Isaacs a kind of globalism. The Webbs had noticed an international tendency of his mind as early as 1898. But his fierce nationalism, whilst apt enough for his time, now seems dated — a narrow satisfaction. Today, 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.

Fourth, as a result of his nationalism, Isaacs (like most of his contemporaries in Australia) had racial views that now appear misguided, even wrong. But if great scientists like Francis Galton and Charles Darwin could entertain 'scientific' ideas of ethnic superiority,¹²⁷ we can 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 most contemporary Australians with discomfort and embarrassment.

¹²⁵ Ironically, this was something taught mid-century by Julius Stone to generations of Sydney law students: M D Kirby, *Judicial Activism: Authority, Principle and Policy in the Judicial Method* (2004) 3, 27.

¹²⁶ For a critical view, see, eg, Greg Craven, *Conversations with the Constitution: Not Just a Piece of Paper* (2004) 78–9, 157–8.

¹²⁷ 'Darwin ... wrote that women and "Negroes" had inferior brains and thinking capacity': Robyn Williams, 'The Reality of "Absolute" Truth', *The Sydney Morning Herald* (Sydney), 20 July 2005, 17.

The embrace of the nation's evident racism was, in a sense, Isaacs' attempt to join the Australian caravan. So indeed may have been some of his opposition to Zionism. He looked 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.

Fifth, his imperial perspectives now seem out of date, but he was living and writing in the heyday of British global power. The perspectives of Australia as part of that powerful world entity survived Isaacs. Even today, many Australians do not 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' day, most of them were ruled by European Empires. The law, with its lifeline to the Privy Council in London, reinforced notions of British cultural superiority. 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 the work of 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. Expansive 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 critical 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 fall 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 faraway 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.

In the law, as in society, things are constantly changing. Leaders must see the changes. They must engage with them and explain them — not deny them. In Isaacs' day it was a world of British power and superiority, of Australian nationhood and confident law. Today it is a world of rapidly-changing and often conflicting values, in which we should uphold human rights, fundamental freedoms and the rule of law, even though others do not.¹²⁸ In our courts, in our society and in our minds we need to keep pace with such changes so that those

¹²⁸ Ronald Inglehart and Pippa Norris, 'The True Clash of Civilizations' (March/April 2003) *Foreign Policy* 63.

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 in which it should move.

XII CONCLUSIONS

Sir Isaac Isaacs was a complex character. For somebody who came from extremely humble beginnings and with few material advantages, his achievements were astonishing. 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.

In my view, Isaacs was one of the two greatest of Australian lawyers to have derived from Victoria, and one of the five greatest Australian judges. Sir Zelman Cowen should have the last word:

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.¹²⁹

¹²⁹ Cowen, *Isaac Isaacs*, above n 1, 261.