Chapter 14

The Centenary of the High Court: Lessons from History*

On 14 September 1900, Alfred Deakin, recording that Australian Federation appeared to him "to have been secured by a series of miracles", said that "[a]ll History takes on the appearance of inevitableness after the event".[1]

The Parliament of the newly created Commonwealth was required by s 71 of the Constitution to establish "a Federal Supreme Court, to be called the High Court of Australia". That requirement was fulfilled by the enactment of the *Judiciary Act 1903* (Cth). On 6 October 1903, in this courtroom, the first three members of the Court were sworn in. One hundred years later, the creation and constitution of the Court, and some of its subsequent history, may have taken on the appearance of inevitability. Yet the story of the High Court is part of the story of our nation; and it has much to teach us.

Some of what we know about the Court's establishment and later activity is of mainly historical interest. For example, although s 71 of the Constitution did not merely empower the Parliament to set up the High Court, but mandated its establishment, the drafting took some surprising turns. Andrew Inglis Clark was the founder most familiar with the United States Constitution. His draft Bill, which was influential at the 1891 Convention, in the Part headed "Federal Judicatory", provided that "[t]he Judicial power of the Federal Dominion of Australasia shall be vested in one Supreme Court, and in such Inferior Courts as the Federal Parliament may from time to time create and establish". Clark saw the Supreme Court as an integral part of the Constitution. To his annoyance, the drafting Committee on the *Lucinda*, led by Griffith, altered the clauses relating to the judicature. He said they "messed it".[2] They proposed to make the creation of the Court permissive rather than mandatory. The matter was rectified at the 1897-1898 Convention, but it is curious that Griffith and Barton approved the earlier change.[3]

Section 74 of the Constitution, concerning appeals to the Privy Council, is now a dead letter. Its subject matter was the last obstacle in the path to Federation. Its presence reminds us that the Constitution enacted by the Imperial Parliament was not in all respects the same as that drafted in the colonies, and approved by their parliaments,

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* An address to the Australian Institute of Judicial Administration, Banco Court, Supreme Court of Victoria, Melbourne, 3 October 2003.

1 Deakin, Alfred (with an introduction by Stuart Macintyre), *"And Be One People": Alfred Deakin's Federal Story*, 3rd ed (Melbourne: Melbourne University Press, 1995) pp 172-173.

2 Neasey, FM and LJ Neasey, *Andrew Inglis Clark* (Hobart: University of Tasmania Law Press, 2001) p 171.

3 The drafting history is traced in La Nauze, JA, *The Making of the Australian Constitution* (Melbourne: Melbourne University Press, 1972) pp 25, 35, 36, 67, 114, 137, 189.