

ARCHIVES, THE AUSTRALIAN HIGH COURT, AND THE 'STRIKE OF 1905'

SUSAN PRIEST*

Finally ... when in Adelaide you ... received a letter from the Chief Justice threatening what you call the "deadlock", but what I term "the strike" ...

Don't you think I should have been informed of the threatened crisis? ... If I was to bear the responsibility of what was threatened surely I was the person entitled to the notice of it.

A-G Josiah Symon to PM George Reid, 22 May 1905¹

I INTRODUCTION

On 1 May 1905, the leader for the Government in the Senate and the Attorney-General of the Reid-McLean ministry, Josiah Symon,² received a brief telegram from Prime Minister George Reid. It indicated there was a pressing need to reach an agreed solution with the Australian High Court in regards to the reimbursement of the Court's travelling costs associated with its operation as a circuit Court.³

Symon was in Adelaide during the parliamentary recess and possibly attending to an important litigation matter in his private legal practice.⁴ It appears he was unaware that on the following day, the High Court, in response to the continued uncertainty surrounding the payment of its running expenses and the number of personnel required to staff the Court, intended to suspend its sittings and go on 'Strike'.⁵

Before the Attorney-General had time to respond to Reid's first telegram another arrived from the Prime Minister. It contained the startling and extraordinary revelation that the 'Judges including O'Connor [would] not hold court [for the] Melbourne fish cases if travelling expenses allowance withheld'.⁶

The Attorney-General's reply to Reid's communication was one of utter disbelief. '[D]o I clearly understand [the] Justices refuse [to] hold sittings at seat of Court Melbourne unless [the] Executive concedes [to] their demand [for] travelling expenses ... was that the reason for adjourning trial fixed for today at great deal expense and inconvenience [to] suitors witnesses jurors counsel ...'.⁷

* Assistant Professor, Faculty of Government, Business and Law, University of Canberra.

¹ The Symon Papers NLA MS 1736/11/591. Letter J Symon to G Reid, 22 May 1905.

² Commonwealth, *Parliamentary Debates*, Senate 24 August 1904, 4284 (J Symon, Senator).

³ NLA Symon Papers MS 1736/11/318. Telegram G Reid to J Symon, 1 May 1905. Section 12 of the *Judiciary Act 1903* (Cth) states: 'Sittings of the High Court shall be held from time to time as may be required as the principal seat of the Court and at each place at which there is a District Registry'.

⁴ NLA Symon Papers MS 1736/11/594. Telegram J Symon to G Reid, 23 May 1905 states that Symon was in the 'middle of heavy Sup Ct argument'.

⁵ George Winterton, *Judicial Remuneration in Australia* (Australian Institute of Judicial Administration Incorporated, 1995) 1-2 provides a brief discussion about judicial strikes both overseas and in Australia. See also above n 2.

⁶ NLA Symon Papers MS 1736/11/323. Telegram G Reid to J Symon, 2 May 1905. For the 'Fish Cases' see *The Age* (Melbourne), 10 May 1905, 10.

⁷ NLA Symon Papers MS 1736/11/328-329. Telegram J Symon to G Reid, 2 May 1905.

Symon also expressed that the High Court's decision to suspend its sittings was something 'which no Government and no country could endure'.⁸ Further, the written exchanges between the Attorney-General and the High Court, which had begun in December 1904,⁹ had, by this time, escalated into a bitter and protracted disagreement. Symon on numerous occasions¹⁰ had unsuccessfully sought the approval from the Bench to reduce what he earlier described as the 'burden imposed upon this Commonwealth for High Court ... expenditure'.¹¹ Now, his priority had been changed. He was seeking an immediate explanation for an unprecedented event in Australian legal history, the temporary weeklong cessation of judicial duties which would make newspaper headlines around the country.¹²

II CORRESPONDENCE: THE HIGH COURT DEADLOCK, MAY 1905 TO JULY 1905

The Attorney-General wrote to Justice O'Connor on 4 May, as the presiding single Judge for the scheduled Melbourne sittings, demanding an urgent clarification:

Referring to the Jury cases in original jurisdiction appointed to be tried before you at seat of the Court in Melbourne last Tuesday, and to the adjournment of the Court without application by the parties or reason given, it is represented to me that great expense and inconvenience had been occasioned to parties, witnesses, jurors, solicitors and counsel; I shall, therefore, be obliged if you will state to me the reason for the adjournment of the Court, and also whether you propose to proceed with the trials next Tuesday, and if not, for what reason, as justice should not be delayed? You will forgive my pointing out the importance of an immediate reply.¹³

O'Connor's response later the same day was brief and to the point. It indicated that 'the sittings appointed to be held before a Justice of the High Court were adjourned by an order of the Court sitting here [Sydney] on Saturday morning last, and then made public. I have handed your telegram to the Chief Justice'.¹⁴

Unsatisfied, because these words seemed to state the 'method of adjournment'¹⁵ and not the 'reason',¹⁶ the Attorney-General sought a further explanation from the Chief Justice. Griffith defended the High Court's action as an imperative reflection of judicial independence. In his telegram he stated, 'We cannot recognise your right to demand the reasons for any judicial action taken by the Court, except such request as may be made by any litigant in open Court',¹⁷ thereby simply refusing to provide the detailed explanation Symon had hoped for.

⁸ NLA Symon Papers MS 1736/11/395. Letter J Symon to G Reid, 9 May 1905.

⁹ NLA Symon Papers MS 1736/11/849-50. Letter S Griffith to J Symon, 2 December 1904.

¹⁰ NLA Symon Papers MS 1736/11/849-868 contains 89 letters identified as correspondence exchanged between the Executive and the Judiciary.

¹¹ NLA Symon Papers MS 1736/11/854. Letter J Symon to S Griffith, 22 February 1905.

¹² 'High Court Friction', *The Argus* (Melbourne), 24 May 1905, 7; 'High Court Dispute', *The Advertiser* (Adelaide), 26 May 1905 in NLA Symon Papers MS 1736/11/14 100; 'The High Court Quarrel', *The Age* (Melbourne), 30 May 1905 in NLA Symon Papers MS 1736/3/14/102; 'High Court Deadlock', *The Sydney Morning Herald* (Sydney), 24 May 1905, 8; 'High Court Difficulty', *The Sydney Morning Herald* (Sydney), 10 June 1905, 11.

¹³ NLA Symon Papers MS 1736/11/859. Telegram J Symon to R O'Connor, 4 May 1905.

¹⁴ NLA Symon Papers MS 1736/11/859. Telegram R O'Connor to J Symon, 4 May 1905.

¹⁵ NLA Symon Papers MS 1736/11/859. Telegram J Symon to R O'Connor, 4 May 1905.

¹⁶ *Ibid.*

¹⁷ NLA Symon Papers MS 1736/11/859. Telegram S Griffith to J Symon, 5 May 1905.

Still refusing to disclose publicly anything about the nature of the dispute between his Attorney-General and the High Court, one of the Melbourne newspapers reported that George Reid's parliamentary colleagues were as 'reticent'¹⁸ to speak about the issue as he was. Nonetheless, despite the end of a parliamentary recess still being six weeks away,¹⁹ the Prime Minister 'called an immediate Cabinet meeting'²⁰ to discuss how the crisis that had brought the administration of justice to a standstill could be resolved.²¹

During that meeting, Reid gained the necessary support of his colleagues for an attempt towards a lasting reconciliation.²² It was agreed that the costs paid to meet the travelling expenses for the Judges be computed from each of their places of residence²³ and that they also be provided with a fixed daily rate of travel at 'three guineas a day including associate'.²⁴ These concessions would override all previous cost cutting measures the Attorney-General had attempted to put into place.

Symon, in a particularly strident piece of correspondence a week earlier, had notified Griffith about his latest incomprehensible reductions.²⁵ The travelling costs for the Court's pending visit to Brisbane in late May would be provided but limited to support the provision of one associate and one tipstaff for the full Court rather than the usual three associates and three tipstaves.²⁶ Moreover, the five telephones used by the Judges in their Sydney chambers would be reduced to one, and Government payment for the telephones in the private residences of the Justices would be discontinued unless the Judges wished to 'continue them at their own expense.'²⁷

Lastly, any additional travelling expenses incurred by the Justices outside the standard use of their Government issued railway passes or 'periodical half-yearly tickets over all lines',²⁸ would no longer be paid by the Commonwealth.²⁹ The Attorney-General also requested that the Court provide him with additional information about the current costs associated with running the Court so all accounts could be dealt with³⁰ and added that, '[t]he official staff necessary for the equipment of the Court has also been under consideration, and it is felt that revision may take place with economy and advantage, and, without in any way impairing such service as may be required or the dignity of the Court'.³¹ The need to provide shelving in the Chief Justices' Sydney Chambers, that had been a matter of contention since December 1904, remained unresolved.³²

¹⁸ 'The High Court. Difficulty. As To Expenses. Cabinet Meeting Today', *The Argus* 6 May 1905 in NLA Symon Papers MS 1736/3/14 93.

¹⁹ NLA Symon Papers MS 1736/11/922. Parliament formally reassembled 28 June 1905; LF Crisp *Federation Fathers* (Melbourne University Press, 1990) 42.

²⁰ Roger Joyce, *Sir Samuel Walker Griffith* (University of Queensland Press, 1984) 265. It is indicated this meeting took place on Saturday 6 May 1905.

²¹ NLA Symon Papers MS 1736/11/387p. In Cabinet 6 May 1905.

²² W.G. McMinn, *George Reid* (Melbourne University Press, 1989) 218.

²³ NLA Symon Papers MS 176/11/865 dated 23 May 1905 Griffith stated: 'It is a well-known fact that all members of the Court at present reside in Sydney ...'

²⁴ This agreement was previously suggested to Symon. See NLA Symon Papers MS 1736/11/318. Telegram G Reid to J Symon, 1 May 1905, above n 7.

²⁵ NLA Symon Papers MS 176/11/858. Letter J Symon to S Griffith, 26 April 1905.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.* This determination was intended to eliminate the need to reimburse the Court for any travel undertaken by steamship.

³⁰ *Ibid.*

³¹ *Ibid.*

³² This issue had been ongoing since Griffith first wrote to Symon in December. See NLA Symon Papers MS 1736/11/849-850. Letter S Griffith to J Symon, 2 December 1904.

The Prime Minister was aware that it was these threatened new measures of economy that had been the impetus for the Judges to decide to suspend their sittings,³³ and followed up on the resolutions made by Cabinet immediately. He wrote directly to the Chief Justice and asked the Court to consider his compromise. He also wrote directly to Symon to let him know that he had been in communication with the Bench but in that letter had emphasised the need for the Chief Justice to write directly to Symon about the matters of economy the Cabinet had decided upon.³⁴

The following day, 8 May 1905, *The Argus*³⁵ was referring to these circumstances as ‘Mr Reid’s tactful intervention’.³⁶ The same article also observed that ‘the mutual concessions made by the Chief Justice ... and Sir Josiah Symon [meant] the tense relations which existed between the High Court judges and the Attorney-General exist no longer [as] it is not anticipated that there will be much difficulty in arriving at a mutually satisfactory understanding’.³⁷

In the meantime, the Justices resumed their duties as a full Court in Sydney.³⁸ The Chief Justice made a decision not to discuss directly with Symon the concessions agreed to at the Cabinet meeting.³⁹

Instead, frustrated by an Attorney-General who proffered no immediate solution to the budgetary uncertainty of the last nine months, Griffith decided to release a long statement to the press explaining the origins and reasons for the ongoing nature of the conflict that had led to the High Court adjourning proceedings on 2 May 1905. It was published in the national newspapers on Wednesday, 24 May 1905.⁴⁰

Disclosing publicly, for the first time, the reasons that had led to the High Court’s postponement of the Melbourne sittings, the Chief Justice made it clear that the delay in releasing the explanation had not been the intention of the Court but rather, ‘at the request of the Prime Minister’.⁴¹ He expressed that it was with deep regret that such an announcement had to take place.⁴²

In explaining the nature of the communications that had led to the development of the circumstances surrounding the dispute that resulted in the Court’s decision to adjourn proceedings for a week on Tuesday 2 May, Griffith was explicit. The ‘contretemps which ha[d] arisen between the Commonwealth Government and the Federal Judiciary over the question of travelling expenses’⁴³ were an ‘intolerable interference with the independence of the bench’.⁴⁴

Further, despite the subsequent correspondence exchanged with the Attorney-General, and his direct appeal to the Prime Minister by a telegram on Monday 22 May, the matter remained unresolved and the ‘reasons which rendered necessary the

³³ Joyce, above n 20, 265; NLA Symon Papers MS 1736/11/865 indicates that over the few days from the 29 April the ‘Chief Justice had several communications with the Prime Minister’ concerning the latest sanctions put forward by the Attorney-General.

³⁴ NLA Symon Papers MS 1736/11/387a. Letter G Reid to J Symon, 7 May 1905. The letter to the Chief Justice cannot be located but Reid discusses it in this letter to Symon.

³⁵ ‘The High Court. Expenses Difficulty Settled’, *The Argus* (Melbourne), 8 May 1905, 4.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ See *Crowley v Glissan* 1905 2 CLR 402-404 9 May 1905.

³⁹ NLA Symon Papers MS 1736/11/859. Letter S Griffith to J Symon, 17 May 1905.

⁴⁰ See for example, ‘The High Court. The Expenses Dispute. The Case For The Judges’, *The Advertiser* (Adelaide) 24 May 1905 in NLA Symon Papers MS 1736/11/879; ‘High Court Judges. The Expenses Question. Statement By The Chief Justice’, *The Age* (Melbourne) 24 May 1905, 8; ‘High Court Deadlock’, *The Sydney Morning Herald* (NSW) 24 May 1905, 8.

⁴¹ *Ibid.* ‘High Court Judges. The Expenses Question. Statement By The Chief Justice’, *The Age* (Melbourne) 24 May 1905, 8.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid.*

postponement of the sittings at Melbourne ... [we]re therefore still in existence'.⁴⁵ The statement concluded with yet another dire intimation from the Chief Justice; if the situation continued, then the Judges had little alternative but to consider 'in consultation whether in the circumstances they should adhere to their previous determination and postpone the Brisbane sittings ...'.⁴⁶ Fortunately, a supplementary statement issued by the Court three days later, indicated that the Brisbane sittings would go ahead before the Bench returned to Sydney.⁴⁷

Symon in an immediate reply, was reported by the press as expressing his 'deep regret'⁴⁸ on reading the statement released by the Chief Justice, but refused outright to enter into further controversy with the Judges by discussing the question of the High Court's expenditure directly with the newspapers.⁴⁹ Instead, he did release some of the earlier correspondence exchanged with the Bench for publication. The telegrams that had been sent to the Court seeking the reasons for the suspension of sittings therefore appeared in the newspapers the day after Griffith had issued the Court's account of the strike.⁵⁰

The Attorney-General also used a brief press release to convey his consternation that justice was unnecessarily delayed at the expense and inconvenience of the 'parties, jurors, witnesses, counsel, and solicitors – all innocent sufferers'.⁵¹ He declared that he could find nothing in the Chief Justice's 'statement which can justify or palliate the refusal of the judges to do their duty'.⁵²

Away from the attention metered out by the newspapers, Symon sent another letter directly to Griffith.⁵³ He firmly believed that after what had occurred, it was his 'duty to place on record his regret and disapproval as the head of the Attorney-General's

Department'.⁵⁴ In his view, as 'Responsible Minister',⁵⁵ he felt 'profound regret that the Justices of the High Court should have initiated so grave a departure from the accustomed traditions of the Bench as to refuse judicial duty and delay justice in order to compel the Executive to concede some pecuniary demand, disputed or not, for travelling allowance, and, in addition, to use the Court as the arena for a public and non-judicial animadversion on the Executive'.⁵⁶

Therefore, not surprisingly, despite additional Cabinet meetings, which reportedly took place towards the end of May and in early June,⁵⁷ no permanent resolution to the

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ 'High Court Expenditure. Reply By The Judges', *The Register* (Adelaide), 27 May 1905 in NLA Symon Papers MS 1736/3/14 101. The Judges commenced the Brisbane sittings on 1 June and concluded on 5 June. See *Down v Attorney-General of Queensland* (1905) 2 CLR 639; *Beetham v Tremearne* (1905) 2 CLR 582 and *Young v Tockassie* (1905) 2 CLR 470.

⁴⁸ 'The High Court. Sir Josiah Symon's Reply To The Judges', *The Advertiser* 25 May 1905, 5.

⁴⁹ Ibid. His exact words were, 'it would not be becoming...to accept the challenge to newspaper controversy'.

⁵⁰ Ibid.

⁵¹ 'High Court Expenditure. Sir Josiah Symon's Reply To Judges. Interesting Correspondence', *The Register* (Adelaide) 25 May 1905 in NLA Symon Papers MS 1736/3/14 99.

⁵² Ibid.

⁵³ NLA Symon Papers MS 1736/11/860-861. Letter J Symon to S Griffith, 9 June 1905.

⁵⁴ Ibid 861.

⁵⁵ Ibid.

⁵⁶ Ibid 860.

⁵⁷ There is nothing in the archives that confirm these Cabinet meetings took place. The newspapers suggest they occurred on 30 May 1905 see 'The High Court Dispute. Wait Till Parliament Meets', *The Advertiser* (Adelaide), 30 May 1905 in NLA Symon Papers MS 1736/3/14 102; Wednesday 31 May see 'High Court Expenditure. Settling The Dispute', *The Register* (Adelaide), 1 June 1905 in NLA Symon Papers MS 1736/3/14 104 and a final

conflict was reached. The end result of these further discussions was that the Prime Minister was unable to announce publicly that any kind of closure had been reached over the High Court dispute because the matters were 'not yet finally settled',⁵⁸ and Symon remained tacit. Any agreement, as far as the Attorney-General was concerned, could not be revealed publicly until the details were decided upon by 'the Justices first'.⁵⁹

So, perhaps at best, a stalemate in negotiations, in which none of the contending parties would yield, also carried with it a strong sense of inevitability of what might or could eventuate. Reid now faced the very real 'prospect of combined action being taken by the whole of the Opposition, and by Mr. Deakin's followers',⁶⁰ a 'parliamentary protest'⁶¹ on the issue when the Parliament reconvened on Wednesday 28 June. With this realisation ahead of him, however, the Prime Minister was not alone.

Renewed protests by some of the barristers from New South Wales over the interference by the Federal Parliament with the High Court Judiciary, particularly the ongoing and persistent attempts by the Government to regulate the sittings of the High Court, began once more to emerge in the newspapers.⁶² In addition, a 'private'⁶³ letter to Symon from the joint leader of the Coalition, Allan McLean, dated 22 May, was politely worded but went straight to the point of seeking an immediate resolution with the Court. It urged the Attorney-General to agree formally to the compromise put forward in the Saturday 6 May Cabinet meeting and put an end to the protracted acrimony before Parliament recommenced at the end of June.

Without desiring in any way to influence your judgement, may I be permitted to mention the impressions I have formed from what I see and hear regarding our relations with the Judges of the High Court.

Unless some satisfactory arrangements are concluded before Parliament opens our colleague ... Mr Deakin and many others, who were responsible for, or concurred in the existing arrangements will find it impossible to condemn their own worth.

I was pleased to gather from your remarks ... that you are prepared to waiver your objections to allowing traveling expenses from Sydney to Melbourne, also that you had no objection to fixing a definite amount as is done in the case of other public officers. If you can see your way to have this amount fixed ... I believe it will do a great deal to remove or obviate possible friction with our own friends, and will not involve any abandonment of principle on your part ...⁶⁴

Cabinet meeting took place on 9 June 1905 see 'The High Court. Travelling Expenses Dispute. Settled By Cabinet', *The Advertiser* (Adelaide), 10 June 1905 in NLA Symon Papers MS 1736/3/14 114.

⁵⁸ 'The High Court. Prime Minister's Statement', *The Sydney Morning Herald* (NSW), 31 May 1905 in NLA Symon Papers MS 1736/3/14 110.

⁵⁹ 'The High Court. Travelling Expenses Dispute. Settled By Cabinet', *The Advertiser* (Adelaide), 10 June 1905 in NLA Symon Papers MS 1736/3/14 114.

⁶⁰ 'A Parliamentary Protest', *The Advertiser* (Adelaide), 31 May 1905 in NLA Symon Papers MS 1736/3/14 102.

⁶¹ *Ibid.*

⁶² 'High Court Friction. Meeting Of Sydney Barristers', *The Argus* (Melbourne), 7 June 1905 in NLA Symon Papers MS 1736/3/14 113; 'High Court Sittings Protest By The State Bar', *The Sydney Morning Herald* (NSW), 7 June 1905 in NLA Symon Papers MS 1736/3/14 113-114.

⁶³ NLA Symon Papers MS 1736/11/586. Letter A McLean to J Symon, 22 May 1905.

⁶⁴ *Ibid.*

Likewise, Symon's close colleague Senator John Singleton Clemons, who had already read some of the 'strictly confidential ... High Court correspondence',⁶⁵ which the Attorney-General had sent to him in the second week of May, urged Symon on 2 June 1905 to 'try to get the whole thing squared up even if you have to cede just a little, by just a little yielding you may win much more'.⁶⁶

Instead, Symon made one final attempt to communicate his cost cutting measures to the Chief Justice. The letter informed Griffith that Symon's latest decisions on the issue had been 'submitted'⁶⁷ to Cabinet and that upon his 'recommendation, the Government [had] decided to meet, as far as possible, the wishes of the Justices as they had been expressed in your telegram'⁶⁸ sent directly to the Prime Minister on 22 May.

The Attorney-General was willing to consider both the concessions offered by the Prime Minister; that of fixed travelling expenses and the issue of computation. Nonetheless, in this latest letter to the Court, the computation concession of payments made for sittings 'in Melbourne in lieu of payments for Sydney sittings'⁶⁹ would remain, but the daily fixed travelling rate agreed to in the immediate aftermath of the strike, was to be reduced from three guineas a day to two guineas for one Justice and five guineas for all the Judges travelling together:

That such amounts or sums shall be at the following daily rates for the time necessarily occupied, in addition to necessary railway or steamer fares, namely:-
2 guineas a day for each Justice travelling singly to take business in original jurisdiction;
5 guineas a day for the three Justices together travelling to take full Court business.
These rates are exclusive of Justice's clerk or Associate.
Each Justice's Clerk or Associate, when necessarily travelling, will receive 17s. 6d. a day, irrespective of the above rates fixed for the Justices.⁷⁰

Days before Parliament was due to resume, Griffith requested that a letter written to Josiah Symon on 22 June 1905 be brought before Cabinet.⁷¹ In his defence of the judicial independence of the Court he used that correspondence to say:

When we accepted our offices we did so with an assurance that the Executive Government of the Commonwealth, not reduced to writing, but carried into effect by Executive Action, that the Government would provide such facilities for the maintenance of the dignity of our office, and the efficient discharge of our duties as are usual in Australia ...

The High Court is not merely an Appellate Court, but a Court of original jurisdiction, and the Justices are called upon to discharge duties in every respect analogous to those of the State Judges ... For this purpose the service of Clerks Associates and Tipstaffs are as necessary to them as to Judges of the State Courts ... If, therefore, the Justices are deprived of this necessary assistance ... so as to be unable to follow the arguments of counsel, they will be seriously hampered in the discharge of their duties, and the determination of causes is likely to be retarded to an indefinite extent.

⁶⁵ NLA Symon Papers MS 1736/11/103. Letter J Symon to J Clemons, 11 May 1905. What correspondence relating to the High Court Clemons received remains unknown.

⁶⁶ NLA Symon Papers MS 1736/11/105. Letter J Clemons to J Symon, 2 June 1905.

⁶⁷ NLA Symon Papers MS 1736/11/861. Letter J Symon to S Griffith, 9 June 1905.

⁶⁸ Ibid.

⁶⁹ W.G. McMinn, 'The High Court Imbroglia and the Fall of the Reid-McLean Government' (1978) 64(1) *Journal of the Royal Australian Historical Society* 14, 26.

⁷⁰ NLA Symon Papers MS 1736/11/861. Letter J Symon to S Griffith, 9 June 1905.

⁷¹ NLA Symon Papers MS 1736/11/864-865. Letter S Griffith to J Symon, 22 June 1905.

We desire to enter our emphatic protest against the manifest injustice of a proposal to deprive our officers of their livelihood at a few days' notice ...

If it is the definite wish of Parliament that the Justices shall be so fettered in the performance of the duties of their high office as to render the efficient discharge of them difficult or impossible, or to place them at a disadvantage as compared with the Justices of the Supreme Court of the States, we can only submit to their decree; but in the meantime, we are reluctant to believe that it is the will of the Commonwealth that the Judiciary, which, by the Constitution is placed on a co-ordinate footing with the Legislature and the Executive Government, should have its dignity diminished, and its efficiency impaired by the action of any officer to the Executive.⁷²

On Wednesday 28 June 1905, a week after Symon received this letter, the second sitting of Parliament commenced. Yet, as JA La Nauze indicates, 'within ten days'⁷³ of Parliament reconvening, the Reid-McLean Government had been defeated. George Reid's resignation had nothing to do with the controversy surrounding the Attorney-General and the early High Court. Instead, the lack of support for his Coalition Party in Parliament had meant he was unable to withstand a challenge from the Opposition with regards to the threat his proposed legislative reform would have for the future of protective tariffs in Australia.⁷⁴

III A SATISFACTORY RESOLUTION

Alfred Deakin was sworn in as Prime Minister, for the second time,⁷⁵ and Isaac Isaacs, who would be appointed to the High Court the following year,⁷⁶ replaced Josiah Symon as the new Attorney-General.

The initial correspondence the Chief Justice received from Isaacs, on Wednesday, 12 July 1905, was what Griffith had anticipated: the first in a series of letters, that would bring with them the prospect that would allow the Justices to perform their duties without any further interference from the Federal Parliament.

While Isaacs had 'not yet had an opportunity of considering the various matters dealt with in correspondence between the Justices of the High Court and Mr. Attorney-General Symon',⁷⁷ he indicated an early concession. Isaacs expressed that no objection would be taken by the new Government to 'the Justices of the High Court continuing to follow the practice, so far as regards their personal staff which has prevailed since their acceptance of office'.⁷⁸ On the same day, another letter arrived. The Chief Justice was notified by the Attorney-General that the shelving for his law library in his Sydney chambers would be 'provided as required'⁷⁹ with completion of the work to be 'expedited as much as possible'.⁸⁰

On Tuesday, 22 August 1905, Isaacs again wrote to the High Court. The aim of his longer and more detailed letter was to 'finally close the correspondence on the various subjects which have been under discussion between the Justices ... and the

⁷² Ibid.

⁷³ JA LA Nauze, *Alfred Deakin A Biography*, (Angus and Robertson, 1970) 385.

⁷⁴ Ibid, Chapter 17.

⁷⁵ W.G. McMinn, above n 70, 14, 27.

⁷⁶ Zelman Cowen, 'Isaacs, Isaac Alfred' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 359-361.

⁷⁷ NLA Symon Papers MS 1736/11/867. Letter I Isaacs to S Griffith, 12 July 1905.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Ibid.

Attorney-General during the last few months, and [to] ... take this opportunity of communicating to their Honours the decisions arrived at by the Government'.⁸¹

With regards to the practice of circuits, the Government was of the 'opinion'⁸² that in keeping with 'the Judiciary Act ... the High Court, not only in original jurisdiction but also in appellate jurisdiction should sit in each State capital "as may be required" – that is, as legal business in the opinion of the Justices, so requires'.⁸³

In relation to Isaacs' discussion about travelling expenses, however, the Court may have been less satisfied with the Government's decision. An Order in Council attached to the letter confirmed that the fixed daily rate canvassed by Symon with the Judges towards the end of December 1904, would remain. Retrospectively from and after the fifth day of August 1905, 'there shall be paid to each Justice of the High Court, on account of the expenses of himself and his Associate, in travelling to discharge the duties of his office, such sums as the Justice certifies under his hand to have been actually expended, not exceeding the average of Three pounds three shillings per travelling day for the financial year (exclusive of fares for conveyance)'.⁸⁴

With reference to other aspects of expenditure, specifically to the cost of travelling by steamers, the new Attorney-General, like his predecessor, made it quite clear that 'railways are, of course, the natural means of transit',⁸⁵ but made the concession that steamer travelling could be used where travelling by train was 'impracticable'.⁸⁶ However, alluding also as his predecessors had done to the need for economy, Isaacs felt the Government could 'safely rely upon the co-operation of the Justices to make the cost of travelling as light as possible in the general interests of the Commonwealth'.⁸⁷

Other previously contentious matters were disposed of quickly. The Government did 'not consider that the interests of the community would be served by the abolition of Associates or Tipstaffs',⁸⁸ so each Judge would retain their usual one Associate and one Tipstaff. Further, contrary to what Symon had unsuccessfully tried to implement, there would be no immediate 'proposal to reduce the salaries'⁸⁹ of the Associates.

Finally, although the telephones for each Justice would remain in their chambers at Darlinghurst in Sydney, former Attorney-General Symon's earlier decision to discontinue paying for the telephones in the Justices' private residences was upheld.⁹⁰

These solutions that Isaacs had proffered on behalf of the Ministry, addressed the main questions 'in controversy'⁹¹ and the Government was certain that the new provisions would in his own words, 'constitute a satisfactory and permanent solution of the matters agitated'.⁹²

Thus, the solution or final outcome was one the Judges had wished for. The Justices were able to hear cases wherever their work required them to be and without persistent interference from the Attorney-General's Department. Griffith was pleased and writing to Isaacs, his tone and intent confirmed the goodwill that had now been restored between the Court and the Attorney-General. '[O]n behalf of my learned

⁸¹ NLA Symon Papers MS 1736/11/868. Letter I Isaacs to S Griffith, 22 August 1905.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ NLA Symon Papers MS 1736/11/867. *Minute Paper for the Executive Council* 16 August 1905.

⁸⁵ NLA Symon Papers MS 1736/11/868. Letter I Isaacs to S Griffith, 22 August 1905.

⁸⁶ Ibid.

⁸⁷ NLA Symon Papers MS 1736/11/868. Letter I Isaacs to S Griffith, 22 August 1905.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Ibid.

colleagues and myself I have pleasure in saying that we concur in the opinion of the Government that the conclusions set out in your letter constitute a satisfactory, and, as we trust, a permanent solution of the matters in question'.⁹³

For former Attorney-General, Josiah Symon, the High Court affair had also taken an enormous toll. In a public demonstration of this, Symon made an important distinction between the contributions he had made to the dual parliamentary roles he had held in the Reid-McLean Ministry. When he resigned his position as Leader of the Senate he made it known to the Chamber that:

In relinquishing this position which I have been proud to hold, and whose duties I have been proud to discharge – I do not mean the official position of Attorney-General, but the position of leader of this great and august assembly – I part company from all my honourable friends here, certainly on my part, with what will always be a constraint of feeling of personal regard, and I am sure that it will be reciprocated by the goodwill of all my friends. I move -

That the Senate at its rising adjourn...⁹⁴

IV A LASTING LEGACY

In the twenty first century it is no longer such an unusual phenomenon for the judiciary to take industrial action, particularly over wages and conditions.⁹⁵ Yet in 1905, the original High Court's decision to adjourn proceedings was an act that remains unique in the legal history of Australia. It serves also to remind us to look beyond the details of the strong personal exchanges and examine the context in which the tumultuous events took place.⁹⁶

Chief Justice Griffiths' extraordinary determination to protect the judicial autonomy of the newly formed High Court laid down a significant foundation for the development of the Commonwealth of Australia as a new political entity. His actions throughout the dispute not only provided a firm basis for the judicial independence of the Court, which it would build upon in years to come⁹⁷ but as well, left a marked contribution towards shaping its future operation, which to a limited extent continues to this day.

His persistence throughout his correspondence with Attorney-General Symon to maintain the staff to assist the Judges as established in 1903 would continue.⁹⁸ Isaac Isaacs, as Symon's successor, declared in writing to the Justices that the 'interests of the community'⁹⁹ would not be served 'by the abolition of Associates or Tipstaffs'.¹⁰⁰ In addition, support personnel, including the employment of two Associates rather than

⁹³ NLA Symon Papers MS 1736/11/868. Letter I Isaacs to S Griffith, 22 August 1905, above n 234.

⁹⁴ Commonwealth *Parliamentary Debates* Senate, 5 July 1905, 134 (JH Symon, Senator).

⁹⁵ Winterton, above n 6, 1-2.

⁹⁶ Murray Gleeson, 'The Constitutional Decisions of the Founding Fathers' (2007) 9 *University of Notre Dame Australia Law review* 1.

⁹⁷ See for example, *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 335; *Attorney-General (Commonwealth) v R; Ex parte Boilermakers' Society of Australia* (1957) 95 CLR 529; *Polyukovich v Commonwealth* (1991) 172 CLR 501 684-685; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 11; M Gaudron, 'Some Reflections on the Boilermakers Case' (1995) (June) *The Journal of Industrial Relations* 306, 308.

⁹⁸ NLA Symon Papers MS 1736/11/864. Letter S Griffith to J Symon 22 June 1905.

⁹⁹ NLA Symon Papers MS 1736/11/868. Letter I Isaacs to S Griffith, 22 August 1905.

¹⁰⁰ *Ibid.*

the original one Associate and one Tipstaff for each of the High Court Judges, remains an integral part of the contemporary staffing arrangements in the twenty-first century for the current High Court Bench.¹⁰¹

With regards to the Court's sitting practice, the Chief Justice also held firmly to his belief that facilitated by section 12 of the *Judiciary Act 1903* (Cth),¹⁰² the High Court was originally created as a circuit Court.¹⁰³ Further, he had found support for his stance throughout the dispute on this issue, not only in the press, but also from another unexpected source.

In the November/December 1905 issue of *The Commonwealth Law Review*,¹⁰⁴ several months after the dispute had ended, replies to a circular from its Editor, Everard Digby, who had sought the opinion of leading lawyers and legal associations Australia wide, as to whether or not they supported 'the proposal to give the High Court a fixed local habitation'¹⁰⁵ were printed. The sense of disquiet the controversy had created about the possibility of curtailing the practices of an ambulatory Court still held apparent concern. Unanimously, the responses to the Editor's question were, as the Chief Justice had demonstrated throughout his months of protest that the practice of the circuit system ought to continue.

G C Gilmore the then Attorney-General of Tasmania,¹⁰⁶ HB Higgins, a former Commonwealth Attorney-General and Symon's predecessor,¹⁰⁷ H Nicholls the late Attorney-General for Tasmania,¹⁰⁸ A Rutledge KC Queensland, whose views on the matter were also cited by the press,¹⁰⁹ the Incorporated Law Institute of New South Wales,¹¹⁰ J Downer KC, the President of the South Australian Law Society¹¹¹ and WF Sayer, the then Acting Attorney-General of West Australia,¹¹² with one accord indicated that the High Court should continue to sit to hear appeals in the State from whose Court the particular appeal was to be heard.¹¹³

To these individuals, the practice of circuits meant more 'expense to the revenue',¹¹⁴ but this was far more preferable than 'expense to suitors'.¹¹⁵ It was also a practice they saw that consolidated the opportunity for litigants to be represented by counsel and practitioners experienced in the laws of the State¹¹⁶ where appeals were heard. Finally, if the time came when the workload became 'too heavy for the

¹⁰¹ Publications 2009-2010 Annual Report Part Nine – Annexure B 89-91.

<www.hcourt.gov.au/publications_01.html>; R Craske and F Jones in 'Tipstaves', above n 64, 673. These authors trace the history of Tipstaves in the Australian High Court including their name changes and eventual replacement by another Associate. They also indicate that each Justice also has a personal assistant but based on this material a reduction in personnel staff to assist the Judges never appears to have occurred.

¹⁰² Section 12 states: 'Sittings of the High Court shall be held from time to time as may be required as the principal seat of the Court and at each place at which there is a District Registry'.

¹⁰³ NLA Symon Papers MS 1736/11/853-854 Letter S Griffith to J Symon, 16 February 1905.

¹⁰⁴ E Digby (ed), 'The Home of the High Court and a High Court Bar' (1905) (November/December) *The Commonwealth Law Review* 49, 49-58.

¹⁰⁵ *Ibid* 49.

¹⁰⁶ *Ibid* 50-52.

¹⁰⁷ *Ibid* 52-53.

¹⁰⁸ *Ibid* 53-54.

¹⁰⁹ *Ibid* 54-56.

¹¹⁰ *Ibid* 56-57.

¹¹¹ *Ibid* 57-58.

¹¹² *Ibid* 58.

¹¹³ *Ibid* 50-58.

¹¹⁴ *Ibid* 52.

¹¹⁵ *Ibid*.

¹¹⁶ *Ibid* 57.

Bench',¹¹⁷ then rather than abolish the practices of an itinerant Court, one response suggested that it would be preferable to increase 'the number of Judges'.¹¹⁸

Of this position, former Justice Michael Kirby in his reflections on the High Court's Centenary, stated:

Some features of the sittings of the High Court of Australia have remained the same. In June, as in Chief Justice Griffith's days, we return to his beloved Brisbane. In August, the Court travels to Adelaide for a week. In October, it is Perth. Chief Justice Barwick, a keen yachtsman, always attempted to visit Hobart for the Regatta Week in March. Now, the Court only travels to Hobart if business permits; and this is comparatively rare ... On the establishment of the seat of Court in Canberra, Chief Justice Barwick attempted to terminate circuits to the outlying cities. This was resisted by the then Justices. Although views differ, most consider (as I do) that it is important for the Court to maintain the circuits. They provide an essential link between the serving Justices and the legal profession and litigants in the outlying States.¹¹⁹

Thus, with the contentious matters of economy fully resolved under the leadership of Australia's fifth Prime Minister Alfred Deakin, the significant principle of judicial independence¹²⁰ was permanently guaranteed. The Justices, under the leadership of Samuel Griffith would continue to establish the foundations of the High Court as they thought it should and would continue: that of attaining 'high standards of integrity, learning, ability and industry.'¹²¹ For these reasons, we remain indebted to the determination and resolution displayed by Chief Justice Samuel Griffith, Edmund Barton and Richard Edward O'Connor when they made the momentous and unprecedented decision to adjourn court proceedings and go on 'strike' in May 1905.

¹¹⁷ Ibid.

¹¹⁸ Ibid 58.

¹¹⁹ Michael Kirby, 'Law at Century's End – A Millennial View from the High Court of Australia' (2001) 1(1) *Macquarie Law Journal* 8.

¹²⁰ H.P. Lee and Enid Campbell, *The Australian Judiciary* (Cambridge University Press, 2nd ed, 2013) 5-7.

¹²¹ Harry Gibbs, 'Griffith Samuel Walker', in Tony Blackshield, Michael Coper and George Williams (eds), above n 76, 310.