

SIR ISAAC ISAACS AND THE WORKINGS OF THE AUSTRALIAN CONSTITUTION

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On March 2 1891, a National Australasian Convention met in Sydney and on April 9 it adopted the draft of a Bill to constitute the Commonwealth of Australia. This done, its work was completed. The delegates to the Convention were representatives of the parliaments of the six Australian colonies and there were three representatives from New Zealand. In terms of the Australia of that time, it was a distinguished body; and Sir Samuel Griffith, the Premier of Queensland, and a very able lawyer and draftsman, established himself as its leader. He offered the *Lucinda*, the Queensland Government yacht which had brought him and his delegation to Sydney, for use by the drafting committee of the Convention.

The *Lucinda* sailed from Sydney on Good Friday 1891 and made its way to Broken Bay and the Hawkesbury where two nights were spent. One of those on board gave an account of distractions: 'the occasional missing of the happiest turn of phrase by the distinguished draftsmen may have been due to seasickness, which followed the surreptitious heading of the steamer out to sea, and the rise of a wind before she could return to harbour'. Whether or not the quality of their work was affected by this affliction, the draft was considered by the Convention and adopted.

For want of better planning, definition and prior agreement on the steps to be taken, the 1891 draft fell from sight and the adoption of the Constitution had to await further action. A Second Convention met in 1897-98 successively in Adelaide, Sydney and Melbourne. Its draft Constitution was approved by referenda in Australia and was enacted, with some modifications of the text, by the Imperial Parliament, and the Constitution of the Commonwealth of Australia came into operation on January 1, 1901. In this way the *Lucinda* played its part in Australia's Constitutional history.

I am honoured by the invitation to deliver the *Lucinda* Lecture for 2002 and I have taken as my subject, '*Sir Isaac Isaacs and the Workings of the Australian Constitution*'.

Isaacs was born in central Melbourne on August 6, 1855. His father Alfred, a Jew born in Russian Poland and his mother Rebecca (Abrahams) migrated to Melbourne from England in 1854. Alfred Isaacs was a tailor and the conditions of poor migrants finding their way in a Melbourne swollen by the gold rush must have been very uncomfortable. There were, in all, six children of the marriage, two of whom died early. The family moved to Yackandandah in north eastern Victoria, a mixed farming and small gold mining town, where Isaac Isaacs first

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went to school. In 1867 the family moved to the larger town of Beechworth where Isaacs completed his school studies and became a teacher. In 1875 he secured a post in the Crown Law Office in Melbourne and while in this employment, began his law studies at Melbourne University in 1876. He graduated with distinction in 1880 and went to the Bar in 1882. He had no connections, but within a comparatively short space of time he established a substantial practice. In 1886 he acquired a house property in Auburn, a Melbourne suburb, and brought his parents and siblings to settle there. In 1888 he married Deborah (Daisy), daughter of Isaac Jacobs who was then a substantial and respected merchant. There were two children of the marriage; Marjorie, born in 1890, and Nancy, born in 1892. Marjorie married David Cohen and had one child Tom, who was Isaac's only grandchild. Nancy married Sefton Cullen. Lady Isaacs survived her husband and died aged ninety in 1960.

Isaacs prospered professionally; he was appointed QC in 1899 and remained in active practice until he was appointed to the High Court Bench in October 1906. He embarked on his political career when he was elected to the Victorian parliament as member for Bogong in North Eastern Victoria in 1892. His abilities were recognised early; in 1893 he was offered appointment as Solicitor-General and accepted, but shortly thereafter, in consequence of a dispute within the Ministry, he resigned. In 1894, in the Turner Ministry, he was appointed Attorney-General. He held that office, with one interruption in 1899, until he resigned to contest the first federal election. He was elected to the first federal House of Representatives in 1901.

In the events of the last decade of the 19th century, which was the period in which the federal movement gathered strength, Isaacs played a significant part. He was elected in 1897 as a Victorian delegate to the Federal Convention, which met successively in Adelaide, Sydney and Melbourne, and debated and adopted the federal constitution which was submitted for approval by referenda in the six colonies. In the Convention, Isaacs played a prominent part. Though he was not a popular member and wearied members with his speeches and his long and frequent interventions, he often displayed great knowledge of other federal systems, notably the United States. He spoke in the Convention as a Victorian with that colony's interests at heart, but after a brief period of uncertainty, he became a supporter of the Constitution Bill. He was in England when the Constitution was adopted by vote of the British Parliament.

In company with other leading Australian politicians, he chose to move from state into federal politics and he was elected as member for Indi in 1901. It is said that he began his first address to the electors of Beechworth with the words, 'Men of Beechworth and ladies of the town'. If it is so, it was an accident of florid speech; he really was not a humorous man, certainly in his public utterance. He remained an active private member in the early ministries and he was active in manoeuvres which revealed some sympathy for the Labor Party and its policies. When Alfred Deakin was returned to office in 1905, Isaacs was appointed Attorney-General. He held that office until he was appointed (together with HB Higgins) as a Justice

of the High Court of Australia in October 1906, at a time when the Court was expanded from three to five judges. As Attorney-General he had been very active: he was responsible for major legislation and throughout this period he maintained a large private practice. This was a matter of parliamentary criticism, and Isaacs defended his conduct with characteristic vehemence. Sir Robert Garran, then Secretary to the Attorney-General's Department, wrote in his autobiography of Isaacs' extraordinary talents and energy: 'Isaacs' capacity for work was amazing. By day he carried on the biggest practice of the Victorian Bar, by night he did full justice to the duties of the Attorney-General.' Garran tells of his endurance, of how Isaacs would work on the drafts of legislation, which Garran would find in the morning redone, after he had taken an earlier draft at midnight to the Government Printer on his (Garran's) way home for a short night's sleep. Isaacs, having had second thoughts, would have recovered the Bill from the printer's office and redone it.

Isaacs' long membership of the High Court Bench endured from the end of 1906 until he resigned to become Governor-General at the beginning of 1931. For the last few months he was Chief Justice, in succession to Sir Adrian Knox who resigned in 1930. Frank Brennan, Attorney-General of the Commonwealth, in welcoming Isaacs as Chief Justice said of him that 'among distinguished brethren on the Bench you have been among the most distinguished.' This period of almost a quarter century as a judge was, without doubt, the great period of Isaacs' life. He brought to the judicial office a mastery of the law, unflagging energy and great intellectual capacity. As a politician he had fought for what he believed to be an appropriate structure for the High Court. Under the Constitution, that Court, unlike its great counterpart, the Supreme Court of the United States, has a general appellate jurisdiction over State Courts as well as a jurisdiction in federal and in particular in constitutional matters. This is technical stuff, but it is important in understanding the Court's work and character. As a court of appeal from State Courts the matters which came before it ranged over wide areas of the law; this meant that, to be well qualified, the judges of the Court had to possess capacity to deal with wide ranging areas of private law as well as with the great constitutional issues which were and are a quite small part of the Court's work. The first five judges of the Court were all constitutional founding fathers, while later appointments brought forth judges without this background and political experience. Sir Owen Dixon, a judge and later Chief Justice of the High Court spoke of Isaacs' quality and distinction as a judge. He

found it difficult [he said] 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 equaled ... His industry was enormous and it was by unstinting work that he obtained a mastery of the facts of a heavy case and the law which appertained thereto.

Isaacs was one of the earliest of Australian judges to give explicit recognition to

the social implications of decision making. He spelled out social (and where appropriate) economic policies, often in considerable detail in his judgments. He spoke of the needs for the courts to be 'living organs of a progressive community', and he illustrated this in such areas as family and divorce law, the fields of factory legislation and legislation designed to protect employees. As a politician he had shown a lively interest in social conditions and problems. His political creed, in the context of his times, was radical; he showed sympathy with various aspects of Labor Party policy without being a supporter of socialism. He supported provision for fair and reasonable working conditions, for machinery to secure just wages and for anti-sweating laws. He viewed gambling as an evil which struck primarily at the welfare of the working man and his family. In the 1890s, he had been a strong advocate of company law reform when deficiencies in the law were exposed in the bust of the 1890s which followed the boom of the 1880s. He carried this into his judging. He demonstrated that he had read widely in social and economic literature and he supported his judgments with general citations from his reading as well as by copious citation of legal authority, which he mustered as a formidable artillery in support of his decisions.

It has been fairly said that Isaacs' instinct for justice was sound; as politician and as a judge his inclinations, his sympathies, his efforts, were directed towards the amelioration of social misery and the uplifting of mankind.

What was not so appealing was his technique and style. The style of his writing and of his judgments was often rhetorical and verbose; worse was his dogmatic certainty, his unshakeable conviction of the rightness of his opinions and an utter and complete inability to see merit in any other view. This comes out strongly in his judgments; it is also reflected in his speeches and his polemical and controversial writings in later years. When, after he retired from the Governor-Generalship, he engaged in voluminous writing about what he called political Zionism, the disagreement of those who opposed him, and conspicuously that voiced by Professor Julius Stone, was seen by Isaacs as personally offensive, even outrageous. And so it emerged in judgments, whether in constitutional or non-constitutional cases; a view contrary to his own was unimaginable or untenable. Sometimes the rhetoric produced absurdity of statement. There was also an unwillingness to confess error in those cases in which he simply had to reverse course and to withdraw from a position which had been dogmatically stated and was wrong. He would not admit error; he swept the earlier proposition aside as if it had never been stated by him. There was at times the sense that the result had been achieved by a trick. He was a very able, learned and widely read lawyer and judge, but he never ceased to be a committed advocate; the achievement of the desired result justified too much.

In his constitutional judgments he came to a position of strong, almost undeviating support for the exercise of national, that is to say central power: the late Ross Anderson spoke of an aggressive nationalism burning through his judgments. In one of the cases concerned with the scope of the federal arbitration power he put it that the issue was whether the Commonwealth as a whole is

empowered to deal with its most momentous social problems on its own broad scale, unimpeded by the sectional problems of particular States. The statement dictated the answer.

For almost a decade and a half he found himself in a minority position in significant constitutional cases, but with the passing from the scene of some of the older judges, he was able to establish his view as the prevailing one. He persisted in his support for national power long beyond his term as a judge. In retirement, he wrote and spoke of the need for constitutional reform to rid the Constitution of interpretative error and of the need to assure to the Commonwealth, the central government, a broad sweep of power to reinforce the nation against the depredations of state and sectional interests. It is surely the case that there has never been on the Australian High Court a 'nationalist' quite like him.

Differences in doctrine and in readings of the law were translated into strong personal antagonisms on the Bench. The personal relationships with his colleagues on the Bench, particularly with the first Chief Justice Griffith and with Sir Edmund Barton, were not good. Sir John Barry contrasts him with the first Chief Justice:

Griffith was a man of decisive mind who dominated the Court. He was as positive in his beliefs as Isaacs and it was inevitable that they should disagree. Each was skilled in intrigue and relentless in pursuing his viewpoint, but while Griffith was masculine and at times brutal in his forthrightness, there was an element of the feminine about Isaacs' approach and methods. Their dislikes and their differences were barely concealed. Isaacs was an intensely proud and emotional man, but he had schooled himself in massive self-control. When he thought himself slighted, the signs of inward anger, the quivering nostrils, the tautened mouth and the darkened expression were rarely followed by an impulsive utterance, but his resentments were disclosed in the polemical language of his judgments.

Among his peers, though with significant exceptions, there is evidence of dislike and distrust of Isaacs. In the pages of Alfred Deakin's *Federal Story* written at the time of the coming of federation, it was said that Isaacs was unpopular; Deakin in his vignette says that Isaacs 'was not trusted or liked in the Victorian House. His will was indomitable, his courage inexhaustible and his ambition immeasurable.' This dislike was an element in Isaacs' failure to secure election to key committee positions in the Federal Convention, notably the drafting committee. Sir Robert Garran, who served him when he was Attorney-General, wrote that

Isaacs had a remarkably keen brain but it was apt to be sometimes too subtle for my liking. When we were drafting a bill whose constitutionality was not beyond doubt, his devices to conceal any possible want of power were sometimes so ingenious as to raise rather than evade suspicion.

Unsympathetic stories about Isaacs were told as part of the oral tradition of the

Bar long after he had gone. Sir John Barry, in the essay on Isaacs to which I have referred, said that it was the case that while he possessed great talents and pursued his aims with relentless and unflagging energy, his egocentric personality and his dogmatism throughout his career exasperated and repelled men who were closely associated with him at the Bar, in politics and on the Bench, and denied him the trust and the affection that were readily given to others of far lesser abilities but more generous outlooks.

It is the case, however, that to many people Isaacs appeared very differently. There are many who knew him, who worked for him, who were friends and correspondents, who spoke with the greatest warmth of his kindness and generosity. In the end, it is difficult to assess the man and Sir John Barry says, I think rightly, that he remains an enigmatic figure; that it is not possible really to penetrate the mystery of his personality.

Let me now turn to the story of Isaacs and the Office of Governor-General, an office which he occupied for five years from early 1931. Early in 1930, when approaching his retirement, the Governor-General, Lord Stonehaven intimated to the Australian Prime Minister, Mr J H Scullin, that the British government would welcome an indication from Australian sources of an appropriate successor. The Constitution provides that a Governor-General appointed by the Queen shall be Her Majesty's representative in the Commonwealth and shall have and may exercise in the Commonwealth during the Queen's pleasure, but subject to this Constitution, such powers and functions of the Queen as Her Majesty may be pleased to assign to him. Up to the time of Stonehaven he was appointed on the advice of British Ministers, and had been invariably a person of the United Kingdom. The Governor-General might have, up to this time, been seen as discharging a two-fold role: in one aspect in performing constitutional duties in accordance with the Constitution and on behalf of the Queen; in another as custodian of British and imperial interests, acting in this respect on behalf of the British government.

Over a period of time, there were increasing pressures from Australian governments for a voice in the choice of a Governor-General. After the First World War, with a stirring national consciousness, there were pressures to redefine the Governor-Generalship in particular aspects. So it was that in 1926, in Stonehaven's time, it was agreed at the Imperial Conference held in London in that year, Governors-General should stand in relation to their governments in the same relationship as did the monarch in relation to the United Kingdom government. The clear implication was that the Governor-General should not be the representative of the British government. This meant that British interests in Australia should properly be the concern of a separate diplomatic agent, who came to be known as the High Commissioner.

The response of the Australian government to Lord Stonehaven's enquiry was to resolve to propose an Australian as Governor-General and the choice fell on Isaacs. Sir Robert Garran, an eminent and informed civil servant says, in his autobiography, that the government had a final short list of two: Isaacs and

Monash, and chose Isaacs. This, however, is rejected by Geoffrey Serle in his authoritative biography of Monash. Other names are said to have been considered, but Isaacs was the final choice. Having regard to his history, he was an entirely appropriate one, save perhaps for age, since he was 75, though he was certainly vigorous in mind and body. The issue was highly controversial in England as in Australia. Sixty years on, it may seem surprising that there should be such passionate opposition to the appointment of Isaacs on the part of so many, including such men as Sir John Latham, who at the time led the federal opposition. There was a formidable problem in that the King, George V, was strongly opposed to the appointment on three stated grounds: that it was undesirable to appoint a local man; that Isaacs was too old; and that he failed to measure as his personal representative as Isaacs was not personally known to him. The King was, moreover, said to have a preferred nominee: Lord Birdwood, who had commanded Australian troops in the First World War.

The constitutional position was uncertain in that it was not clearly established where the constitutional advice for the appointment of a Governor-General should originate. The Imperial Conference of 1926 had not expressly said that the source of advice should be the government of the Commonwealth country concerned. That was settled in 1930; at that time an Imperial Conference was in session, and on a reference of the matter to it, resolved that the source of advice should be the government of the country concerned, and more specifically the Prime Minister, who should formally recommend after informal consultation with the monarch. Following the 1930 Imperial Conference, King George V acceded to Mr Scullin's unyielding advice and Isaacs was appointed.

The appointment of Isaacs as Governor-General was historic in the sense that it set the modern office in place, and all subsequent appointments have been made in accordance with the procedures then followed. This means that the appointment is made on the advice of the Prime Minister of the country concerned, and the Prime Minister consults as he sees fit. At this distant point from 1930, the controversy over the appointment of a local, an Australian, is as dead as the dodo; though it was vehement and exhausting when Isaacs lived through it. What was not established by the 1930 case was that only an Australian should be appointed. Between Isaacs in 1931 and Casey in 1965 there were five non-Australians and only one Australian. I believe that Hasluck is right when he says that the pattern has now been clearly laid down for appointing Australians as Governor-General.

Isaacs was the first Governor-General to make his permanent residence in Canberra at Yarralumla. When I first published my biography of him in 1967, and wrote about these events and of Isaacs' life and work in the Office, I did not remotely imagine that I should in 1977 follow him into the Office. I recall how when the Prime Minister, Mr Malcolm Fraser, first proposed to me that I might be nominated by him to the Office, among the crowded thoughts which came into my head was the one that it was extraordinary that I should have been a biographer of Isaacs. When as Governor-General I worked in the place in which

he had worked, I thought of many things: how did he manage his household and his office in those depression days of the 1930s, in the early years of a small Canberra in a small much more isolated Australia? What sort of programs did he follow and how were they planned? We know that he engaged in a wide range of activities and did so with zest. Family letters tell of these over the years in Office in the course of which he celebrated his eightieth birthday. In many respects - from the standpoint of a successor - there is a readily recognisable pattern of work followed by us both. To be sure, by my time the jet aircraft had replaced train and ship, making possible a range of activities and the acceptance of invitations, which Isaacs could not have undertaken at all, or certainly not so easily in his time. I have little doubt that he would have undertaken them and enjoyed them had the means been available to him, and in this respect I do not think that we would have been very different in our approaches to these tasks of the Office. As I said in the introduction to the reprint of my book which was published in 1993, when I spoke at citizenship ceremonies, as Governor-General, I would recount at times the story of Isaacs, the son of poor immigrants who had arrived in Australia only a year before his birth. I could reflect that my own story, while quite different in some respects, was not so very different and I said that I believed that this should convey a message to those who were participants in such ceremonies and who could see the evidences of great opportunity in such life stories. We have reason to be very proud of a country which makes this possible.

Isaacs' case established that the source of appointment of an Australian Governor-General was Australian; the Australian Prime Minister. It was not until later that it was established that the Governor-General should be an Australian. The evolution of the monarchical institution has established that the powers of the Queen are exercised not by her, but by the Governor-General. The exception, appropriately, is the exercise of the power to appoint a successor.

Isaacs retired from the Office of Governor-General early in 1936 and he lived on until February 1948. For most of the long period of his retirement Isaacs was physically active and intellectually vigorous. Once the constraints of Office were no longer imposed upon him, he engaged in controversial writing on a variety of subjects. He wrote on constitutional reform; he was critical of constitutional decisions and practice which displeased him, he criticized the actions of Prime Ministers, Ministers and Judges. In the *James case*, the Privy Council received a full blast for its reading of s 92.

In the early 1940s he wrote copiously on political Zionism as he described it. I have told this story in my book and it is set down at length there. It is a very unhappy story and allowing for Isaacs' great age (I have to be more and more careful about that) I have to say that it does not reflect creditably upon him. Sir John Barry, whose judgment on this may be more dispassionate than my own, says that Isaacs' denunciations were intemperate and that his inflexible dogmatism, and his insensitive attitude to the beliefs of others, and his utter incapacity to concede the possibility that any other view than his could be right, made his writings on the subject painful utterance. When Julius Stone, then

Professor of Law in Sydney opposed him cogently in writing, Isaacs reacted in great anger not only to the argument, but against Stone personally. He threatened a body of Melbourne Jews that if they proceeded with a public protest meeting against the implementation of British policy in Palestine, he would publicly denounce them on the ground that 'our simple duty is to our King and country in this hour of trial', and he did so. Britain was then the mandatory power in Palestine and the implementation of a policy announced in 1939 would have virtually brought Jewish migration into Palestine to an end by early 1944. At this time, the Holocaust was underway and this gave a special dimension of urgency to the need for escape and resettlement, particularly in Palestine. What Isaacs did was deeply divisive; his writings and his actions were extravagant and intemperate. I believe that I was right in saying that his part in this controversy left a blemish on his reputation in the Australian Jewish community which had taken pride in the splendour of his career, even though it had regretted his remoteness from its life and activities. If one seeks for a better understanding of Isaacs in this context, it is to be found in his view that Australian Jews were simply Australians who were British subjects and of Jewish faith and he saw the actions of protestors in this case as profoundly destabilising and as threatening to that position. It was the genius of British institutions that had made it possible for such men as him to reach the great heights he attained in the Australian community; it followed that it afforded like opportunity to other Australians who, whatever their religious faiths and whatever their circumstances, shared a common bond of citizenship.

As a law student I had read the judgments he had delivered as a Justice of the High Court in many areas of the law and they were familiar to me as a teacher. I saw him from time to time in Melbourne places and on one occasion I talked briefly with him, if talk be the appropriate word to describe what took place between an awestruck boy and an eminence whom the boy viewed as a colossus. As an Australian Jew, I had a special interest in the life and work of a fellow Jew who, with no assistance beyond his own abilities, made for himself a brilliant career in the professional and public life of this country. Of course I had no idea when I wrote that he and I would be linked as two Australians who occupied the Office of Governor-General. He came to Office amid controversy touching the appropriateness of an Australian to occupy the Office; I came at a time when the Office was the centre of controversy by reason of Sir John Kerr's exercise of the power of dismissal of a government which commanded a majority in the lower House.

One day, perhaps, our two shades may meet and if by then I have shed the constraints of awe that a boy felt in approaching him, we may compare experience. I can, however, wait a little.

I have not spoken of Isaacs' mother beyond mentioning that she was Rebecca Abrahams who married Alfred Isaacs in London in 1849. She was a powerful personality filled with ambition for him. As late as his middle fifties and then a Justice of the High Court, he wrote extraordinary letters to her, revealing a deep

attachment to her. I, too, had a mother who had strong ambitions for me, though she was not in Mrs Isaacs' league. She, my mother, survived to see me sworn in as Governor-General and she lived throughout my term and for years thereafter. Throughout these years, she was afflicted by a cruel stroke which altogether denied her speech, but allowed expression by body language, but we cannot know what she felt about the Governor-Generalship, which certainly lay beyond her wildest imaginings.

I must come to an end of this account. Sir John Barry himself a very unusual man - about whom I have also written - judged that Isaacs, whom he knew, and about whose faults and shortcomings he wrote with at times extraordinary candour, had a career which was without parallel in the nation to which he was devoted. When I brought my own account of Isaacs to an end, I said:

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.

I would not wish to change that judgement.