

The Right Honourable Sir Isaac Isaacs GCB, GCMG, KC

(b. 6.8.1855 d. 11.2.1948) (Chief Justice from
1930-1931)



Amongst the memorable band of democratic nationalists in the 1897-98 Convention, Isaac Isaacs's legal and historical knowledge and insights, his instinct for the essentially democratic and soundly national, gave him a special place in the front rank. Outnumbered by the well-entrenched provincialists and conservatives, and those who early fell in step with them, he never admitted defeat. Until his death half a century later he fought unrelentingly to have written or read into the Constitution as many as possible of the details and principles he and like-minded colleagues had failed to have adopted in 1897-98 and enacted in 1900. Whilst life remained, into his tenth decade, he never gave up the struggle.
By L.F Crisp 1981

Isaac Isaacs was born in Melbourne in 1855 when the new fledgling city was only 20 years old. Only three years before his birth had Victoria become its own colony. His Father was a Russian-Polish tailor who had married his English mother before they migrated to Australia. He grew up in the small towns of Yackandandah and Beechworth, an area



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that would later become Kelly country.

He worked as a school teacher from the age of 15 and studied law part-time at the University of Melbourne. He was admitted to the bar in 1882 and took silk in 1899. In 1892 he was elected to the Victorian Parliament where he was appointed Solicitor-General. In this role he aggressively pursued the people associated with the Mercantile Bank for conspiracy to defraud. In 1894 he was elected again and became the Victorian Attorney-General.

He was elected to the 1897-98 Federation Convention for Victoria. As one of the writers of our Constitution he opposed a broad range of appeals being able to be sent to the Privy Council. He was also opposed to equal membership of the Senate for the States and wished to elevate the House of Representatives above the Senate. He did not wish to see a Bill of Rights being inserted into the Constitution. He was also vehemently opposed to Section 92 of the Constitution which required that interstate trade be absolutely free, believing it was unnecessary and dangerously wide. He was Jewish, at a time when anti-Semitism was common, and could speak Russian, French, German, Italian and Greek.

He was elected to the new Commonwealth Parliament as a Protectionist in 1901 and became Attorney-General in 1905. He left this position a year later when he was appointed to the High Court, having already appeared 27 times as counsel in the Court. During his early years on the bench, he was often in dissent in constitutional cases, but over time, his views proved influential, most notably in the Engineer's case and in relation to his approach to the reach of Commonwealth power. His views on Section 92 prevailed for a short time between 1920 and 1936, until they were overruled by the Privy Council.

Labor Prime Minister James Scullin appointed Isaacs as Chief Justice in 1930. He was in that role for less than one year before he was appointed as the first Australian born Governor-General. He remained in that role until 1936. When he died on 11 February 1948, at the age of 92 he was given a State Funeral. Isaacs has been honoured with an

electoral division named after him in Melbourne. On his death, then Chief Justice Latham noted the passing of a "leading member and the last survivor of the Federal Convention which framed the Commonwealth Constitution, which he afterwards did so much to interpret and apply."

Chief Justice Isaacs quotes in constitutional decisions that encapsulate the vision of him as Chief Justice

1. In 1915, Isaacs J referred in *State of New South Wales v Commonwealth* [1915] HCA 17; 20 CLR 54 (at 88) to the:

fundamental principle of the separation of powers as marked out in the Australian Constitution.

(Principle: separation of powers)

2. His Honour later developed this idea in *R v Hibble* [1920] HCA 83; 28 CLR 456, stating in a joint judgment with Rich J that (at 469):

Beyond controversy, the Constitution controls Parliament. But it also controls this Court; and it controls this Court in various ways. First, it is unquestionably our duty, where occasion strictly calls for it, to declare regardless of consequences the pre-eminence of the Constitution over any attempted legislation unauthorized. But it is equally the duty of the Court where its judicial action is invoked, to respect and, if necessary, to enforce the directions of Parliament as the sole interpreter of the national will unless such directions are upon due occasion and argument solemnly adjudged to be invalid. And further it is the duty of this Court, whatever be the validity or invalidity of any Parliamentary enactment, not to interfere unless the Constitution either directly or through the authority of Parliament confers, in the particular instance, the power and the duty upon the Court to interfere.

(Principle: separation of powers)

3. In *Ex parte Walsh; Re Yates* [1925] HCA 53; 37 CLR 36, Isaacs J referred to the continuing importance of the Magna Carta as the "groundwork" of the Constitution (at 79):

It is essential ... even at this advanced stage of our political development, and perhaps none the less because of that development, to bear constantly in mind certain fundamental

principles which form the base of the social structure of every British community. ... The principles themselves cannot be found in express terms in any written Constitution of Australia, but they are inscribed in that great confirmatory instrument, seven hundred years old, which is the groundwork of all our Constitutions – Magna Carta.

(Principle: democracy) (Key word: Magna Carta)

4. In *Commonwealth v South Australia* [1926] HCA 47; (1926) 38 CLR 408, Isaacs J stated that (at 429):

Constitutions are made, not for the moment of their enactment but for the future; and it is the great and enlightened principle of interpretation enunciated by the present Chief Justice of America, applied wherever consistent with the words of the document, that can alone maintain our own or any Constitution as a living instrument capable of fulfilling its high purpose of accompanying and aiding the national growth and progress of the people for whom it has been made.

(Principle: nationhood) (Key word: interpretation)

5. Similarly, in *Commonwealth v Kreglinger and Fernau Limited* [1926] HCA 8; 37 CLR 393, Isaacs J stated (at 413) that Constitutions are made:

not for a single occasion, but for the continued life and progress of the community
55. In the same case, Isaacs J also noted (at 413) that the principle of "responsible government" is: part of the fabric on which the written words of the Constitution are superimposed

(Key words: responsible government)

6. On declaring legislation invalid, Isaacs J noted in *Federal Commissioner of Taxation v Munro* [1926] HCA 8; 37 CLR 153 (at 180) that:

It is always a serious and responsible duty to declare invalid, regardless of consequences, what the national Parliament, representing the whole people of Australia, has considered necessary or desirable for the public welfare. The Court charged with the guardianship of the fundamental law of the Constitution may find that duty inescapable..... There is always an initial presumption that Parliament did not intend to pass beyond constitutional bounds. If the language of a statute is not so intractable as to be incapable of being consistent with this presumption, the presumption should prevail.

(Principle: the rule of law)

