

### **. . . to be called the High Court of Australia**

On the first day of the 20th century, the Commonwealth of Australia came into existence. This new country had a new Constitution. That document set out the powers of the new Parliament and it allowed for the creation of a new court to oversee the exercise of those powers.

*“The judicial power of the Commonwealth shall be vested in a federal Supreme Court, to be called the High Court of Australia.”*

The Court commenced operating in 1903 when the Governor-General appointed the Court’s first three members, Sir Samuel Griffith as the Chief Justice, and Sir Edmund Barton and Richard O’Connor as the other Justices. Each of them had been heavily involved in the Constitutional Conventions in the late 19th century.

Today, the High Court of Australia sits at the apex of Australia’s justice system. The Court derives its authority directly from the Constitution and has two main functions: first, to interpret the Australian Constitution and, secondly, to sit as the final Court of Appeal on all matters arising in Federal, State and Territory courts.

For the first 80 years of its life the Court was without a home of its own. It sat mostly in Sydney and Melbourne. When it travelled to other State capitals, it used the court rooms, offices and libraries of the State Supreme Courts. On 26 May 1980 the High Court building was opened and Australia’s highest Court had a permanent new home. While the Court does most of its public work in Canberra, it still travels and usually sits once a year in each State capital, apart from Sydney and Melbourne, where it sits on several occasions each year.

Only cases of major importance are heard by the High Court. To be granted what is called “special leave to appeal to the High Court” a case will usually have to raise new points of law; be deemed to be of high public importance; be likely to involve many future cases; involve questions of law that have been decided in inconsistent ways by two or more lower courts; or involve the interests of the administration of justice, such that they require consideration by the High Court.

Nearly all cases for which leave to appeal is sought have already been to trial and then an appeal and a large amount of evidence and legal argument has already been heard by other courts. Many of the applications for special leave are heard by video link with the Justices in one city and the barristers in another. This reduces cost and allows the Court to hear more

applications. Before the hearing all parties have to file a summary of their argument and oral submissions are limited to 20 minutes.

The workload of the Court is enormous. The Court will deal with about 800 applications for special leave every year, about 20 per cent of them criminal matters. In a typical year the High Court will hear about 70 full appeals and constitutional cases and will deliver about 80 written judgments, some running to 100 pages or more.

Some matters, about 200 a year, are heard before a single Justice of the Court, often dealing with contested procedural matters. The High Court Justices have the transcripts of the earlier court proceedings well before the appeal. Evidence is not presented in a High Court case. Instead the case is almost exclusively confined to legal argument and usually to some well-defined issues which are argued exhaustively. Much of the legal argument has been outlined in written submissions before an appeal is heard. The Justices will have read these and the material from the courts below before they come into Court. During a hearing it is quite common for the Justices to ask questions of the barristers and to test the legal propositions being argued.

You will often hear of the high-profile criminal cases, but they form only a small portion of the Court's work. The vast majority are civil cases involving claims about personal injury or breach of contract or business matters, and many deal with matters that will affect our daily lives.

There are a number of areas where the High Court can be called on to decide cases that will have an impact on everyday life in society. Once the High Court decides a case its reasoning is binding on every court throughout Australia. The Court's decisions set the precedents that will be considered by thousands of lawyers across the country when advising clients on their prospects of success or whether they should settle or abandon a matter rather than take it to court.

The other, and perhaps more important function of the High Court, is to interpret the Constitution. The Constitution divides power between the Commonwealth, on the one hand, and the States, on the other. It also divides power among the Executive Government, the legislature, or Parliament and the judiciary. The Parliament passes laws which apply universally. The Executive Government implements those laws through ministers and public servants. The judiciary determines the constitutionality of the laws and whether the Executive Government has implemented them properly.

*“The ultimate responsibility of the High Court is to maintain the rule of law. No government and no citizen is above the law. Australia's*

*basic law is the Constitution. In order to uphold the rule of law the judiciary has to be independent. Judges decide disputes between citizens or between citizens and governments, and sometimes between State and Federal Governments. They decide according to law and free from the influence of any government or any other source of power. The Court has to be independent if it is to fulfil its roles as a constitutional Court and a court of final appeal.”*  
**(Murray Gleeson, Chief Justice)**

Since Federation, the High Court has decided a number of crucial cases on the limits of Commonwealth power. For example, in 1942, it decided that the Commonwealth’s legislative power over taxation would enable it to take over the States’ income tax bureaucracy. In a 1948 landmark decision, the Court held that it was beyond the Commonwealth’s power to nationalise the banks, thus preventing the government then in power from undertaking any nationalisation. In 1951, the Court ruled that Commonwealth legislation dissolving the Communist Party was not supported by the defence power and was, therefore, invalid. Cases like this are of great national importance. They are usually heard by all seven Justices in the No 1 Courtroom.

The Court has also decided cases profoundly affecting human rights in Australia. In 1992, the Court held that the common law of Australia recognises native title. The Court has, on occasions, restrained the Federal Government from deporting refugees and long-term migrants. It has laid down requirements for legal representation in criminal matters. It has also laid down requirements for procedural fairness by ministers and tribunals when dealing with citizens.

The Court is open to the public. If your visit coincides with a sitting time you can go into the public gallery and listen. In major cases in the No 1 Courtroom, all seven Justices usually sit. The Chief Justice sits in the middle. On his right is the next most senior judge, with the others arranged by seniority, according to appointment date.

In most cases a party is represented by two barristers, senior and junior counsel, and a firm of solicitors. Barristers presenting a case to the High Court are frequently closely questioned by the Justices during argument. In a special leave application argument is quite brief. In a full appeal, however, argument can be anything from an hour to several days. The record is 39 days for the *Bank Nationalisation Case* in 1948. Most appeals finish within one day and the Court nearly always reserves its decision. Each Justice is required to consider each case upon which he or she sits.

Most of the work of the Court is done away from the courtroom, when the Justices meet to discuss what they have heard in Court. The Justices then spend long hours working on their reasons for the Court's decisions and it can take some months for them to prepare their judgments. Sometimes two or more Justices might join in a single judgment. Sometimes all those who heard a case will deliver a single joint decision. Each case is decided according to the majority.

The Constitution provides that Justices are appointed by the Governor-General. In effect, this means the government of the day decides. The *High Court of Australia Act* requires the government to consult the States. In practice, the federal Attorney-General will also consult the legal profession in the States and Territories on who should be appointed.

The High Court enjoys an unimpeachable reputation in Australia and around the world. Its decisions are referred to in the courts of many other countries and it has frequently led the way in the development of the law. The confidence of Australia's founders in establishing this Court has been more than justified as it looks forward to its second century as an essential part of Australia's constitutional framework.