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Attorneys-General.

The first Commonwealth Attorney-General was Alfred Deakin, who held office from 1901 to 1903. Since then, the role of Attorney-General has greatly widened and has become more akin to that of a Minister of Justice. The Attorney-General has, however, always had the important responsibility of recommending the appointment of High Court Justices. Because of the demands of the Parliament, the Attorney-General's Department and the electorate, Attorneys-General have made few appearances in person before the Court (apart from ceremonial occasions), even where they have themselves previously been notable counsel. They have made an impact on the Court, however, not only through their role in appointments, but also as sponsors of legislation defining the Court's jurisdiction and as protagonists in disputes coming before or involving the Court. Of the 30 Attorneys-General since federation, a number have gained particular attention in their dealings with the Court.

Deakin was instrumental in the establishment of the Court. Among other things, he pioneered the *Judiciary Act* 1903 (Cth) and the *High Court Procedure Act* 1903 (Cth) required to establish the Court (but see CONSTITUTIONAL BASIS OF COURT); advocated relatively generous remuneration for the Justices; supported the circuit system; and secured the appointment of its foundation Justices, Griffith, Barton and O'Connor. Of all the Attorneys-General, Deakin's impact on the Court was probably the most enduring.

During James Drake's seven months as Attorney-General he represented the Commonwealth in *D'Emden v Pedder* (1904), where the Court upheld the Commonwealth's claim to immunity from a state law levying stamp duty. This outcome caused an uproar in the states, and was seized upon by federation sceptics as a vindication of their fears. Drake's win in that case was built upon soon after by his successor, Higgins, who convinced the Court in *Deakin v Webb* (1904) that Commonwealth officers could not be made liable to income tax under state law (see INTERGOVERNMENTAL IMMUNITIES).

Not long after taking up their appointments, the foundation Justices became embroiled in a bitter dispute with Attorney-General Josiah Symon. Described as the strike of 1905, this feud over the Court's travelling expenses and other costs, accommodation, library, staff, the circuit system and the Court's ‘true’ seat, brought into focus the

relationship between the Court and the executive and represented an early assertion of the Court's independence. Symon had been touted as early as 1898 for a seat on the Court—even as the Court's first Chief Justice—and was on Deakin's list of appropriate appointees had five positions been available. Symon was also a candidate for appointment in 1906, but his role in the dispute of 1905 made his appointment a practical impossibility (see APPOINTMENTS THAT MIGHT HAVE BEEN).

A resolution to the 1905 dispute was brokered by Symon's successor, Isaacs. His term as Attorney-General lasted little over a year but was nonetheless characterised by vigour and enthusiasm. Isaacs made frequent appearances in the Court during his term as Attorney-General, though on none of these occasions did he represent the Commonwealth. Rather, his appearances were made on the behalf of private litigants or, more curiously still, the Crown in right of Victoria. Isaacs' term as Attorney-General ended when he accepted one of the two new seats on the Court—seats he had been instrumental in creating.

In his first term as Attorney-General (1906–08), Littleton Groom oversaw the enforcement of the minimum wage standard proclaimed by Higgins in his landmark 'Harvester judgment' (*Ex parte McKay* (1907). He also represented the Commonwealth in *R v Barger* (1908), a formative case on the doctrine of reserved state powers. During his second term (1921–25), Groom's fear of subversive foreigners became evident in some of the deportation proceedings coming before the Court. He was personally involved in securing the deportation of the 'Irish envoys' in 1923, and his poor handling of *Ex parte Walsh and Johnson; In re Yates* (1925) contributed to his forced resignation.

W M Hughes was perhaps the most colourful Attorney-General—and indeed one of the dominant politicians of the century. Between 1908 and 1941 he held the office of Attorney-General in different ministries over a total of 13 years, often simultaneously with the office of Prime Minister. Hughes gained the grudging respect of many of his detractors when, against his own clear self-interest, he departed from the tradition of appointing politicians to the High Court. Despite these honourable intentions, he was not very successful in his High Court appointments. As well as Piddington, who resigned in controversy, Hughes appointed (while Attorney-General) Rich, Gavan Duffy, Powers, Knox, Starke and Williams. Hughes aroused the Court's displeasure when, in 1910, he sponsored amendments to the Judiciary Act enabling the government to require advisory opinions from the Court concerning the validity of legislation. The Court ultimately declared this provision to be unconstitutional (*In re Judiciary and Navigation Acts* (1921).

Latham's most notable achievement as Attorney-General was his success in persuading Dixon to take a seat on the Court. It appears that he may also have played a role in the retirement of Gavan Duffy from the Court in 1935 as part of a complicated deal between Latham, Gavan Duffy, Robert Menzies, and Joseph Lyons (see **GAVAN DUFFY**). Latham secured the passage of the *Judiciary Act* 1926 (Cth), which made two notable changes to the administration of the Court. The Act conferred upon the Justices pension entitlements that had originally been proposed in, but then deleted from, the Judiciary Bill 1903. It also postponed the commitment in section 10 of the Judiciary Act that the principal seat of the High Court 'shall be at the seat of government'. Addressing the Parliament on 21 May 1926, Latham explained that the amendment was 'necessitated by the impending removal of the seat of government to Canberra':

> At present the arrangements made for the transfer of the seat of government to Canberra do not include any provision for the High Court. It will be quite impossible for the High Court to function at Canberra until proper buildings, including a proper library and other accommodation are provided there, alike for the justices and the staff of the court.

As architect of the *Crimes Act* 1932 (Cth), Latham involved the Court in the government's efforts to stamp out communism. The Act empowered the Attorney-General to seek the Court's declaration that a particular association was seditious and hence unlawful. The first prosecution under the new provisions, which Latham had personally authorised, was overturned by the Court for lack of evidence (*R v Hush; Ex parte Devanny* (1932).

As the Commonwealth's principal Law Officer, Latham played a key role in the dispute with the NSW Labor Premier Jack Lang over the latter's refusal to observe the 1928–29 Financial Agreement. The *Financial Agreement Enforcement*

Acts (Nos 1, 2, 3 and 4) 1932 (Cth) enabled the Attorney-General to apply to the Court for judgment against a defaulting state. The High Court upheld the validity of this scheme in the *State Garnishee Case* (1932). As Attorney-General, Latham was also responsible for the *Conciliation and Arbitration Act* 1904 (Cth) amendments, which became the subject of the landmark *Boilermakers Case* (1956).

Apart from Robert Menzies' instrumental role in securing Latham's appointment as Chief Justice, as Attorney-General Menzies was notable for his continued appearances in the Court representing private litigants. For the Commonwealth, he presented argument in the Privy Council in *Payne v FCT* (1936) and *James v Commonwealth* (1936). In 1936, Menzies provided the driving force in the campaign for constitutional amendment to overcome the Court's decision in *R v Burgess; Ex parte Henry* (1936). Despite Menzies' efforts, that proposal failed at a referendum the following year.

Although Menzies rarely appeared before the Court when he was Attorney-General, he took a great interest in appointments to the Court. As Attorney-General, his only appointment was that of Latham as Chief Justice. As Prime Minister, he was influential in the appointment of Williams, Fullagar, Kitto, Taylor, Douglas Menzies, Windeyer, Owen and Barwick.

Attorneys-General of Australia Throughout

Name	Period in office	Government in office
Alfred Deakin	1/01/01–24/9/03	Protectionist
James Drake	24/9/03–27/4/04	Protectionist
Henry Higgins	27/4/04–17/8/04	ALP
Josiah Symon	18/8/04–5/7/05	Free Trade–Protectionist Coalition
Isaac Isaacs	5/7/05–12/10/06	Protectionist
Littleton Groom	12/10/06–13/11/08	Protectionist
WM Hughes	13/11/08–2/6/09	ALP
Patrick Glynn	2/6/09–29/4/10	Protectionist–Free Trade–Tariff Reform Coalition
WM Hughes	29/4/10–24/6/13	ALP
William Irvine	24/6/13–17/9/14	Liberal

WM Hughes	17/9/14–21/12/21	ALP (17/9/14–14/11/16)
		National Labour/Nationalist (14/11/16–21/12/21)
Littleton Groom	21/12/21–18/12/25	Nationalist (21/12/21–9/2/23)
		Nationalist–CP Coalition (9/2/23–18/12/25)
John Latham	18/12/25–22/10/29	Nationalist–CP Coalition
Frank Brennan	22/10/29–6/1/32	ALP
John Latham	6/1/32–12/10/34	UAP
Name	**Period in office**	**Government in office**
Robert Menzies	12/10/34–20/3/39	UAP/UAP–CP Coalition
WM Hughes	20/3/39–7/10/41	UAP–CP Coalition (20/3/39–7/4/39)
		CP–UAP Coalition (7/4/39–26/4/39)
		UAP (26/4/39–14/3/40)
		UAP–CP Coalition (14/3/40–7/10/41)
Herbert Evatt	7/10/41–19/12/49	ALP
John Spicer	19/12/49–14/8/56	Liberal–CP Coalition
Neil O'Sullivan	15/8/56–10/12/58	Liberal–CP Coalition
Garfield Barwick	10/12/58–4/3/64	Liberal–CP Coalition
Billy Snedden	4/3/64–14/12/66	Liberal–CP Coalition
Nigel Bowen	14/12/66–12/11/69	Liberal–CP Coalition

Tom Hughes	12/11/69–22/3/71	Liberal–CP Coalition
Nigel Bowen	22/3/71–2/8/71	Liberal–CP Coalition
Ivor Greenwood	2/8/71–5/12/72	Liberal–CP Coalition
Gough Whitlam	5/12/72–19/12/72	ALP
Lionel Murphy	19/12/72–10/2/75	ALP
Kep Enderby	10/2/75–11/11/75	ALP
Ivor Greenwood	11/11/75–22/12/75	Liberal–NCP Coalition
Name	**Period in office**	**Government in office**
RJ Ellicott	22/12/75–6/9/77	Liberal–NCP Coalition
Peter Durack	6/9/77–11/3/83	Liberal–NCP/NPA Coalition
Gareth Evans	11/3/83–13/12/84	ALP
Lionel Bowen	13/12/84–4/4/90	ALP
Michael Duffy	4/4/90–24/3/93	ALP
Duncan Kerr	1/4/93–27/4/93	ALP
Michael Lavarch	27/4/93–11/3/96	ALP
Daryl Williams	11/3/96–	Liberal/NPA Coalition

his term as Attorney-General, Evatt also served as External Affairs Minister, with that role absorbing most of his energies during World War II and the immediate post-war years. His most notable achievement as Attorney-General was to secure a constitutional amendment in 1946 adding social security to the Commonwealth's powers. This amendment was pursued after the Court invalidated the Commonwealth's first attempt at a national pharmaceutical benefits scheme (*First Pharmaceutical Benefits Case* (1945). In 1948, he appeared for the Commonwealth in the *Bank Nationalisation*

Case (1948) before the High Court and then before the Privy Council in 1949, his extraordinarily lengthy argument proving unsuccessful in both instances. As Attorney-General, Evatt persuaded Cabinet against increasing the number of Justices to nine, advocating instead the appointment of one Justice only, to restore the number to seven. Evatt was instrumental in the selection of Webb in preference to the well qualified but politically affiliated John Barry (see APPOINTMENTS THAT MIGHT HAVE BEEN).

Barwick's crowning achievement as Attorney-General was the passage of the *Matrimonial Causes Act* 1959 (Cth). In simplifying and standardising the grounds on which a divorce could be sought, the Act stemmed the flow of complex divorce suits coming before the Court in its appellate jurisdiction. Unfortunately for Barwick, that achievement was soon overshadowed by his sponsorship of controversial amendments to the Crimes Act, augmenting Commonwealth power to combat suspected traitors and subversives. Latham considered the proposals so draconian that he attacked the proposals in an open letter to Barwick.

It was Barwick who had, in 1963, secured the enactment of the legislation considered by the Court in *Re Bolton; Ex parte Beane* (1987). Section 19 of the *Defence (Visiting Forces) Act* 1963 (Cth) requires Australian police and armed forces to assist, in Australia, in locating and detaining any deserting members of another country's armed forces. In 1963, Barwick told Parliament that section 19 would apply to any deserter found in Australia, regardless of where the desertion had occurred. In *Ex parte Beane*, the Court disregarded Barwick's statement and found that the provision operated only where desertion had occurred in Australia.

Murphy was undoubtedly the most controversial Commonwealth Attorney-General. Prior to the Whitlam government's swearing-in, Labor had been out of office federally for 23 years. Even allowing for this, Murphy's reform agenda was vast and unrelenting. Murphy's hand-picked Solicitor-General, Maurice Byers, had unprecedented success in defending the government's legislative and other initiatives against the many challenges mounted in the Court (see WHITLAM ERA). Two appointments to the Court were made during Murphy's term as Attorney-General. Jacobs was an appointment championed by Whitlam, though with Murphy's support. The second appointee, also at the urging of Whitlam, was Murphy himself. The announcement sparked outrage within influential sections of the legal profession and ensured that Murphy's departure as Attorney-General was no less controversial than his incumbency.

The controversy was not abated when in several cases, including the *AAP Case* (1975), the *Seas and Submerged Lands Case* (1975) and the *First Territory Senators Case* (1975), he participated as a Justice in the hearing of challenges to legislation with which he himself had been associated as Attorney-General; his participation in the 4:3 decision in the *First Territory Senators Case* was particularly controversial. He took the view, however, that his previous participation in the legislative process merely to the extent of discharging his 'normal advisory functions … [as] the principal Law Officer of the Commonwealth' was not a reason for disqualification. On the other hand, in the *PMA Case* (1975), he did disqualify himself, with Barwick's approval (see (1975) 49 *ALJ* 110). Not only had he advised the Governor-General in April 1974 on the precise issue now to be determined by the Court, but he had himself appeared before the Court to argue the issue in *Cormack v Cope* (1974). He also did not sit in *Russell v Russell* (1976), because of his personal association as Attorney-General with the *Family Law Act* 1975 (Cth) there under challenge.

There have been two Commonwealth Attorneys-General named Bowen. Nigel Bowen held the office of Attorney-General between 1966 and 1969, during which time he appointed Walsh to the Court and argued the Commonwealth's position in relation to its territorial limits in *Bonser v La Macchia* (1969). In 1969, he became Foreign Minister. In 1972, Bowen was considered for appointment to the High Court, but he was probably too valuable for Prime Minister Billy McMahon to lose. Lionel Bowen was the longest-serving Attorney-General in the Hawke government and successfully negotiated the appointment of Gaudron, the first woman to sit on the Court, as well as that of Toohey.

Attorney-General Daryl Williams has held office since 1996 and has made three appointments to the Court. The vacancies were filled by Hayne, Callinan and Gleeson, though Callinan was not Williams' nominated candidate and represented instead the choice of Cabinet. Williams made a controversial speech at Gleeson's swearing in as Chief Justice, urging the Court to increase the frequency of joint judgments. By 2000, Williams had appeared twice before

the High Court as Attorney-General, intervening in *Gould v Brown* (1998) to defend the national cross-vesting scheme and in *Re Patterson; Ex parte Taylor* (2000) to defend the delegation of ministerial decisions to parliamentary secretaries. He also intervened in the Family Court in *B and B: Family Reform Act 1995* (1997).

Since federation there have been six Commonwealth Attorneys-General who have also served on the Court—Higgins, Isaacs, Evatt, Latham, Barwick and Murphy. With the exception of Evatt, all have taken their places on the Court following their respective terms as Attorney-General. Evatt, by contrast, was appointed first to the Court and later resigned from his position to enter politics. However, the appointment of politicians to the Court may now be a thing of the past. There has not been such an appointment since that of Murphy in February 1975. Queensland Supreme Court Justice J B Thomas has suggested that the time has now come 'to recognise that a significant political career should be a barrier to judicial appointment, especially to a position as important and sensitive as that of High Court judge'. Many in the legal profession now share that view.

Peter Durack

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