

THE OXFORD
COMPANION
— • TO THE • —

HIGH COURT OF AUSTRALIA

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the steadily expanding role of the State in recent decades provides increasing occasion for the individual citizen to feel aggrieved as the result of administrative action with a consequent need to ensure that the principles of administrative law relating to judicial review of such action remain sufficiently flexible to meet the requirements of justice without imposing unreasonable restraints on the freedom of government action.

Apart from the general principle stated by Stephen, the significance of the decision lies in the manner in which the Justices disposed of the justifications for judicial deference stated in the older case law.

A major influence had been the view that the scope for judicial review of decisions by ministers or by the Crown was qualified. Isaacs had declared in *Williamson v Ah On* (1926) that 'responsible Government is the constitutional check on arbitrary administration'. In the *Communist Party Case*, Williams had said that, generally speaking, an unfettered discretion vested in a minister was 'a matter with which the courts are not concerned at all'. The Court rejected this premise of the older cases. Mason declared:

the doctrine of ministerial responsibility is not in itself an adequate safeguard for the citizen whose rights are affected. This is now generally accepted and its acceptance underlies the comprehensive system of judicial review of administrative action which now prevails in Australia.

This reasoning may illustrate the occasionally symbiotic relationship between legislative and judicial reform of the common law. Mason's comment alludes to the reforms to Commonwealth administrative law made by the legislation creating the Ombudsman, the Administrative Appeals Tribunal, and the jurisdiction of the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Mason had, prior to judicial appointment, played a role in such developments, and may well have been aware of the substantial progress made, by 1981, towards the enactment of a freedom of information law. One may speculate that some of the Justices were, without saying so, employing reasoning often summed up by the notion of the 'equity of a statute' to reform the common law. On the other hand, the reform of the case law achieved in *Sankey v Whitlam* (1978) had been a fillip to Parliament's progress on the freedom of information law.

Sankey v Whitlam was taken by the Court as reason to reject another premise of the case law overruled in *Northern Land Council*. Dixon had justified Crown immunity by saying (in the *Communist Party Case*) that 'the counsels of the Crown are secret'. Rejecting this, Mason said that 'the old rule does not conform to the modern notions of freedom of information and secrecy'. This reference to freedom of information was a signal, at least from Mason, that this notion, so opposed to the long tradition of government secrecy, was henceforth to be taken more seriously.

A third ground of justification for the older case law was that 'the courts should not substitute their views for those of the executive on matters of policy'. Gibbs said that while this was true, it did 'not mean that the courts cannot ensure that a statutory power is exercised only for the purpose for which

it is granted'. Wilson accepted that 'it is not for the courts to assume any responsibility for oversight of the policy expressed through the decisions of the executive government'. The Justices did not indicate, however, how a court was to draw the relevant line. Mason said that the question was whether 'the particular exercise of power is not susceptible of the review sought'. This restates the question, although it does suggest a factor to address in answering it. After the reform of the common law built on *Northern Land Council*, the question of the limits of judicial review remains to be adequately addressed by the High Court.

Murphy emphatically disagreed with the majority approach. He affirmed the older cases to the extent that 'inquiry by the judicial branch into the misuse of legislative powers (at least except where authorised by Parliament) is inconsistent with the separation of legislative and judicial powers'. He foresaw challenge to 'a multitude of laws so as to extend greatly the possibilities of conflict between the judicial and legislative branches'. It was preferable that 'misuse of legislative power may be dealt with by Parliament or by the electorate'. He did agree with the majority result, but on narrower statutory grounds. In *FAI Insurances v Winneke* (1982) and *Bread Manufacturers v Evans* (1981), he spelt out more clearly the difficulty with judicial review of decisions made collectively by politicians, and sought to have the Court take more seriously the role of ministers in administrative decision making. There is no doubt a reflection here of Murphy's experience as a minister and parliamentarian.

His general approach has not, however, been a significant influence on the Court. On the basis of the *Northern Land Council Case*, and the two companion cases just mentioned, the scope for judicial review of administrative action was transformed over the last decades of the twentieth century.

PETER BAYNE

Number of Justices. Section 71 of the Constitution provides that the High Court 'shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes'. When the *Judiciary Act* (Cth) came into force in 1903, it made provision for the smallest Bench possible: three Justices. The government had originally intended that the Court comprise five Justices, but it yielded to opponents in Parliament who voiced concerns about the Court's cost and, indeed, whether there was yet a need for the Court at all (see *Establishment of Court*). The first appointments were made in October 1903: Griffith as Chief Justice, Barton and O'Connor as puisne Justices.

In 1906, the Justices made representations to Parliament to increase their number. The increase was said to be necessary because of the Court's heavy workload and its extensive itinerary. The number was increased to five in response to these concerns, but, as Prime Minister Alfred Deakin wrote anonymously in an English newspaper, 'above all things to add to [the Court's] dominance in constitutional questions and all interpretations of the Constitution'. Two additional appointments, Isaacs and Higgins, were made in October that year.

When O'Connor died in November 1912, Attorney-General WM Hughes rushed amending legislation through the Parliament to increase the number of Justices to seven,

allowing the government to make three appointments to the Court in its last few months of office. As had been done six years earlier, Hughes pointed to the Court's workload and its itinerary—which had taken it to 'every part of the continent' in that year—as reasons for appointing more Justices. He also argued that the Court 'should not be less numerous than the Courts appealed from' and the Supreme Court of NSW, he said, had six Justices (in fact, it had eight—and if this argument were applied today, the High Court would need more than 40 Justices). Further, Hughes pointed out, 'with seven Justices, it will be practicable for business of minor importance to hold two Full Court sittings at the same time in the different capitals'. The legislation was passed in 1912, and the three vacant positions were filled early the following year: Gavan Duffy, Powers, Piddington (briefly), and then Rich.

Powers retired from the Bench in July 1929; Knox retired in March 1930, and was replaced as Chief Justice by the senior puisne Justice (Isaacs). For reasons of economy, and because the Court's workload had decreased with the start of the Depression, these two positions were not immediately filled. They were filled only in December 1930, when Evatt and McTiernan were appointed at the instigation of the Labor caucus, despite the opposition of Prime Minister James Scullin and Attorney-General Frank Brennan, who were overseas at the time (see *Appointments that might have been*). When Isaacs retired one month later and the senior puisne Justice (Gavan Duffy) was made Chief Justice, the resulting vacancy was not filled. It remained unfilled and the Judiciary Act was amended in 1933, formally reducing the number of Justices to six.

The Court comprised six Justices until 1946, when the number provided in the Judiciary Act was changed back to seven and an additional appointment, Webb, was made. Cabinet had wanted to increase the size of the Court to nine, but Evatt, then Attorney-General, persuaded Cabinet to make it seven—an increase that was said to be justified by an increased workload and problems caused by decisions in which the Court was equally divided (see *Tied vote*). In 1980, provision for the number of Justices was removed from the Judiciary Act and made, instead, in the *High Court of Australia Act 1979* (Cth).

The Court has comprised seven Justices since 1946. There have, however, been several gaps between appointments during that period—gaps of more than four months on two occasions: between Dixon's elevation to Chief Justice (upon the retirement of Latham) and Taylor's appointment in 1952, and between Owen's death and Mason's appointment in 1972.

The Advisory Committee on the Australian Judicial System, in its 1987 report to the Constitutional Commission, noted that the desirable number of Justices had been variously put at seven, eight, nine, and eleven. The Committee took the view that seven was satisfactory because 'the greater the number of Justices the greater would be the scope for divergence of views and the greater the difficulty in reaching a consensus'. This assumes the continuation of the practice of all available Justices sitting on important cases, particularly constitutional cases—a practice that is not strictly required. All that is required is that a sufficient number sit to comply with existing legislative requirements (assuming those requirements to be constitutionally valid: see *Separation of powers*). These requirements include section 23 of the Judiciary Act, which provides that at least three Justices must concur in a decision on a question affecting the constitutional powers of the Commonwealth, and section 21, which provides that appeals from Full Courts of state Supreme Courts must be heard by no fewer than three Justices (though in practice, that jurisdiction is usually exercised by five or more Justices). Section 21 also provides that applications for special leave to appeal may be heard by a single Justice or a Full Court; in practice, these are generally heard by either two or three Justices (see *Bench, composition of*).

The possibility of nine Justices (as in the United States Supreme Court) was allowed for in the design of the Court's building in Canberra. Increasing the total number of Justices to nine would increase the scope for several Benches to sit simultaneously so as to deal with an increased workload. However, the Court has defended its practice of assigning all available Justices to important cases on the ground that unsuccessful litigants should not be able to speculate that they might have fared better had the Bench been differently constituted.

JAMES POPPLE