Information technology

The Court has come a long way in its use of information technology, or in the old terminology, 'equipment', since 1903. A perusal of correspondence between the District Registrar in NSW and the Principal Registrar in Melbourne reveals that office requisites then included such items as ink wells, steel nibs for wooden pens, chalk (presumably for the drying of ink), and typewriter ribbon.

Court proceedings and the Register of Practitioners were recorded in traditional leather-bound registers. The entries were made in ink, using steel-ribbed pens, until about 1973, when entries by fountain pen or ball point pen were permitted. The Court’s registers were retained until the installation of computer systems in the Registry and in the Justices’ chambers in the early 1980s.

Judgments were typewritten by secretaries, with carbon copies being taken at the same time. The carbon copies gave way to stencils that could be printed on a hand-operated machine that produced any number of printed ink copies. This form of reproduction of judgments continued into the early 1970s, when it was replaced by the photocopy process.

The photocopier was perhaps the first major technology introduced to the Court. It enabled the more efficient distribution of draft judgments between chambers, and a more rapid dissemination of the Court’s judgments to the legal profession, the press, and the general public. The photocopier also relieved the pressure on the library resources of the Court. Copies could be made of authorities, which enabled Justices to work at home without needing to transport bound law reports to their homes or, even more inconveniently, when they went on circuit. As copiers have become more sophisticated, reliance on printed law reports has declined.

The production of judgments was changed from automated typewriters to IBM Magcard machines in the late 1970s. Barwick had seen the machines in England during a visit, and had asked IBM to demonstrate them. The Magcard machine used special cards that were sent from the Justices’ various chambers. The machine collated the cards, enabling the judgment to be produced as a single continuous judgment, rather than as separate judgments stapled together. The Court introduced computerised word processing in the early 1980s, later moving to stand-alone personal computers. The Justices initially resisted the introduction of a linked network because of what they perceived to be a lack of security in respect of their individual judgments while in draft form.

The Court now uses information technology not only to facilitate its internal operations, but as an important part of its interaction with the public. It has a local area network that connects personal computers in its premises in Canberra, Sydney, and Melbourne. The network makes use of ‘thin-client’ technology to provide remote access to networked applications over standard telephone lines. Word processing applications are used for research and in the preparation of judgments. Database applications and web browsers are used to assist in research by Justices’ staff and by the library. Other applications (for example, accounting packages) are used by staff in the management of the Court.

The Court’s Registry uses a purpose-built case management system that tracks matters from the time the first documents are filed until a decision is handed down and (if necessary) costs are taxed. The system also generates standard correspondence from Registry staff to parties, as well as providing statistical data for the Court’s annual reports. The case management system also holds contact information for the firms that represent parties in cases and for litigants in person, and a database of legal practitioners (barristers and solicitors).

Video links, introduced in March 1988, enable counsel to appear in a state capital and have their argument televised live to the Bench sitting in Canberra. After some initial reluctance by counsel, who feared that video links would impact adversely on the style of their oral argument, the video link system has been accepted by both the Justices and counsel, and is used regularly throughout the year for applications for special leave to appeal, chamber matters, and some administrative matters.

In January 1997, the Court launched an Internet home page <www.highcourt.gov.au>. The site has information about the Court and the Justices, including its annual reports and its business lists. There are also links to judgments and transcripts of hearings. The site is hosted by the Australasian Legal Information Institute at <www.austlii.edu.au>; the Institute receives e-mailed copies of judgments from the Court minutes after they are handed down, and transcripts soon after they are prepared; it automatically adds hypertext links to legislation and cases referred to in those decisions and transcripts before making them available on the web.

As a consequence of the increased availability of electronic copies of its judgments, the Court adopted paragraph numbering in its judgments from the beginning of 1998 to facilitate ‘medium neutral’ citation of the Court’s decisions: that is, citation that does not rely on the pagination of a document by a particular word processing or page layout application.

The Court’s case management system has been designed to facilitate future enhancements. If the Court approved it, much of the data held in the system could be regularly published on the Internet. This would allow parties, practitioners, and interested members of the public to follow the progress of cases using a web browser. The system has also been designed with the possibility of the electronic filing of documents in mind. At present, the High Court Rules require that parties file documents in paper form at an office of the Registry. If the Court were to approve a change to those Rules, documents could be submitted electronically (by e-mail or using a web browser), stored in the case management system and, once accepted for filing, made publicly available on the Internet with other information about cases. This would make widely and readily available information that is currently publicly available, but only through examination of the Registry’s paper files.

The principal area of the Court’s activities in which there is still scope for further use of information technology is in the courtrooms themselves. Material that is now handed up to
the Court in paper form could be electronically made available to the Court during the hearing. The bench and the bar table could also have access to databases of legislation, cases, and articles referred to during the hearing—for individual perusal, or to bring to the attention of all present. The appeal book (selected material from the courts below, currently put before the Court in paper form) could also be provided electronically. This would require some standardisation of the electronic document formats used by lower courts, and by the practitioners who appear in them. It would also require a significant change in practice by the Court, whose members have, of course, been used to receiving this material on paper.

FRANK JONES
JAMES POPPLE

Further Reading

Tony de la Fosse, 'The Application of Remote Control Software in a Judicial Environment' (1997) 8 JLIS 320

Inglis Clark, Andrew (b 24 February 1848; d 14 November 1907), 'So you are not to be one of the High Court Judges', wrote William Harrison Moore to Inglis Clark on 12 October 1906. Harrison Moore continued: 'For many reasons I am sorry. But I fear that you could have taken it too hard, and that the want of any permanent settlement, and the break up of your family life would have left you little of joy in the office. Both Isaacs and Higgins will I am sure feel this very much.'

Inglis Clark was born in Hobart, the youngest son of Alexander Russell Clark and Ann, née Inglis. His family were of Scottish stock, emigrating to Australia in 1832. Inglis Clark was a frail child who acquired much of his early education at home from his formidable mother. He completed his secondary education at Hobart High School. Initially, he qualified as an engineer and joined the family business; but at 24, he decided that his interests lay in the law, and was articled to the Solicitor-General, Robert Adams. In 1877, he was called to the Bar.

The 1870s marked an important period in the young lawyer's life. He converted from the family's Baptist heritage to Unitarianism and began to promote his progressive ideas through the pages of his short-lived journal, Quadriateral. He was prominent in a number of clubs and societies and championed progressive ideas on moral and social issues.

In 1878, he decided to enter politics, and stood for the electorate of Norfolk Plains. His nomination was heralded by the Hobart Mercury in less than effusive terms: 'Mr AI Clark will be a candidate as a rising young lawyer—very young, some 17 months standing, and is credited with holding such very ultra-republican, if not revolutionary, ideas that we should hardly think he will prove acceptable to the electors of Norfolk Plains.'

Inglis Clark was elected unopposed. He rejected the Mercury's claim that he was 'one who finds his proper place in a band of Communists', replying that he 'believed in the theory of Government which was propounded by the late A Lincoln—"Government of the people, for the people, and by the people"'.

As a backbencher, in 1880 Inglis Clark introduced a number of private member's Bills in an attempt to reform the Master and Servant Act 1856 (Tas) and Tasmanian criminal law. He lost his seat in Parliament at the 1882 election and was unsuccessful in East Hobart in 1884 and 1886.

Out of Parliament, Inglis Clark established himself at the Bar in a number of criminal and civil matters. His reputation as a reformer continued to expand as he founded the Southern Tasmanian Political Reform Association.

In 1887, he was elected in a by-election to the seat of South Hobart and became Attorney-General in the Phillip Fysh government—a position he held until 1892. He was again Attorney-General to the Braddon government from 1894 to 1897. Consistent with his activities outside the Assembly, he set about implementing a law reform agenda that included amendment of the Master and Servant Act, legalisation of trade unions, and reform of the electoral system (the introduction of the 'Hare–Clark' system). In all, Inglis Clark initiated over 150 ministerial Bills in his short parliamentary career, 'one less than Sir Henry Parkes during his whole career'.

Inglis Clark's interest in federation was theoretical as well as practical. The customs walls that impeded interstate trade would have been evident from the activities of the family business. As a lawyer, he was keenly aware of the limitations associated with a colonial Australia. Writing to Barton in 1889, he noted the obstacles that Parkes had placed in the way of federation. However, he noted, 'his day of authority and obstruction will come to an end like that of other Ministers, and ... I have no doubt that you will then be in a position to effectively assist the cause of Australasian federation'. In the same letter, Inglis Clark raised the failures of colonial administrations to deal with joint stock companies, executor and trustee companies, and deceased estates with property in several colonies, as well as the need for mutual recognition of the orders of other colonial jurisdictions.

Federation was in the air in 1890. Inglis Clark joined the delegates from the other colonies assembled in Melbourne for the Federation Conference. He made a bold push for the American constitutional model, rather than the Canadian model (the British North America Act 1867 (Imp)). In doing so, he was at odds with Griffith, one of two delegates from Queensland.

In 1891, Inglis Clark represented Tasmania in the Privy Council appeal from Main Line Railway v The Queen (1889). The appeal was settled, but gave him an opportunity to observe at first hand the 'grand and august tribunal' where 'only one of the judges was awake and the other three were all dozing'.

Inglis Clark's preference for the USA as a federal template is not surprising. As Alfred Deakin noted, it was 'a country to which in spirit he belonged'. He was consumed by all things American and studied its history, law, and politics. His three visits to the USA established friendship with leading public figures including Oliver Wendell Holmes Jr, with whom he corresponded. It is said that his adulation of Holmes extended to the installation of a window from Holmes' house into the study of Inglis Clark's Battery Point house in Hobart.
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 Windeke* (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
In any event, while Rowell & Muston established that the seat of government must be a ‘place’, the Court has remained unable to determine its precise location, and has usually sidestepped the issue. Though Windeyer agreed in Rowell & Muston that the seat of government is a ‘place, a locality’, he also recalled his earlier view in Spratt v Hermes that it means ‘a capital city’. As such, he said, it ‘has never been taken to mean a precise area of the earth’s surface delineated by metes and bounds, any more than has a seat of learning, meaning a university town, or a place described as the seat of a bishop’. He conceded that ‘a power to make laws with respect to a place, if it be understood as a power to make laws for the conduct of people in that place, does postulate that the place can be precisely defined; but did not see this as a problem—since ‘the seat of government, however it be spatially measured’, would in any event be covered by legislation under section 122. The majority in Svikart noted again that the limits of the seat of government ‘have not been precisely determined by the Parliament’; and that it is neither ‘co-extensive with the Territory in which it is located nor, under s 125, is it intended to be’. In Eastman, this prompted Solicitor-General David Bennett to argue that the phrase ‘seat of government’ is after all ‘non-geographical’, referring only ‘to the national capital, qua capital.’

In Spratt v Hermes, Menzies concluded ‘that if there can be no seat of government of the Commonwealth unless and until some portion of the Australian Capital Territory has been specified as such by the Parliament, then there is at present no seat of government of the Commonwealth’. Given the apparent equanimity with which the Justices have accepted the indeterminate boundaries of the seat of government, and even its uncertain metaphysical status, one might wonder whether this matters. Yet the Court has insisted that the seat of government is important to the federal system. In Spratt v Hermes, after holding that section 52(i) did not extend to ‘laws for the government of the Capital Territory’, Windeyer added: ‘That does not mean that the Capital Territory has not a special position in the polity of Australia. It has, for within it lies the seat of government.’ In R v Smithers; Ex parte Benson (1912), Griffith and Barton saw freedom of movement as an inherent right of citizenship in a federation—in part because, as the United States Supreme Court held in Crandall v Nevada (1868), it includes ‘the right to come to the seat of government’. In Pioneer Express v Hotchkiss (1958), where the Court upheld legislation preventing an interstate bus service from setting down passengers at Canberra, the judgments nevertheless acknowledged the special status of the ACT, and the need for unrestricted access to the federal capital. No one, said Dixon,

would wish to deny that the constitutional place of the Capital Territory in the federal system of government and the provision in the Constitution relating to it necessarily imply the most complete immunity from State interference with all that is involved in its existence as the centre of national government.

Yet the Court agreed that this was not the occasion to explore such a doctrine; judicial acknowledgment of the special position of the seat of government has not in fact had any special effect.

Barwick’s reasoning in Spratt v Hermes—using the application of section 75(v) of the Constitution to decisions taken in the seat of government to exclude the conclusion that Chapter III does not apply in the territories—is perhaps an exception. In August 1999, when motorists passing the Indonesian Embassy repeatedly honked their horns in protest at violence in East Timor, it was suggested that, if prosecuted, they might invoke the constitutional freedom of political communication as a defence; and that idea, too, might gain weight from the fact that such protests are commonly directed to national embassies at the seat of government.

If the seat of government—whether as ‘place’ or as ‘metaphor’—is of special constitutional significance, what is the significance of the directive that the High Court be ‘at’ the seat of government? Advocates of its location there, from Patrick Glynn to Barwick, have stressed its symbolic significance (see Circuit System; Canberra, Court’s move to). The strong insistence on open court, and perhaps the Justices’ general tolerance of litigants in person, might reflect the theme of citizen access to federal institutions sounded in Re Smithers; Ex parte Benson and Pioneer Express v Hotchkiss. Yet the Court’s endorsement of a requirement of special leave to appeal as a restriction on access (see Smith Kline & French Laboratories v Commonwealth (1991)) may point in a different direction.

In any event, the Court’s inability to define ‘the seat of government’ leaves it unclear whether the directive for its own location has been fulfilled. Perhaps the ambiguity reflects the confusion, in a system of responsible government, between ‘parliament’ and ‘government’. The arguments in Eastman assumed that the ‘seat of government’ must at least include the precincts of Parliament House. Yet perhaps, if ‘government’ means ‘executive government’, the focus should be on Government House—the place where the Governor-General, as the Queen’s representative, ‘sits’. In that event, the High Court building may simply be in the wrong place.

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Francesca Dominello

Further Reading
JQ Ewens, ‘Where is the Seat of Government?’ (1951) 25 ALJ 532
Bernard Sugerman, Letter to the Editor (1973) 47 ALJ 344

Seniority. The Chief Justice is the most senior Justice. The High Court of Australia Act 1979 (Cth) provides that the other Justices—the puisne Justices—have seniority according to the dates of their commissions. Where two or more Justices have commissions with the same date, their relative seniorities are set out in their commissions. This was the case when Toohey and Gaudron were appointed on the same day in 1987 (Toohey was senior).

On only one other occasion has more than one puisne Justice been appointed on the same day: when the first appointments were made, in 1903. At that time, the relevant provision (in the Judiciary Act 1903 (Cth)) provided that, where the commissions did not make it clear, the relative seniorities were determined by the order in which the Justices took their judicial oaths. The commissions of the first two puisne Justices (Barton and O’Connor) did not set out their relative seniorities. No doubt it was understood that Barton would be the senior puisne Justice, and he took his oath before O’Connor.
The most senior available Justice acts as Chief Justice during the Chief Justice's absence from Australia, or if the Chief Justice is unable or unavailable to perform the duties of the office, or when a vacancy in the office occurs.

The Justices' seniority has its only substantive application when a Full Court is evenly divided in its opinion (see Tied vote). Normally, the Court's decision is that of the majority of Justices. However, if the Court is equally divided when exercising its original jurisdiction, the Judiciary Act provides that the Court's decision is that of the Chief Justice or, in his or her absence, that of the senior Justice present. (If the Court is equally divided when exercising its appellate jurisdiction, the general rule is that the decision appealed from is affirmed.)

The Chief Justice, or the most senior puisne Justice, presides over hearings and sits at the centre of the Bench. The seating of the other Justices is determined by their seniority (see also Etiquette). The most senior Justice after the presiding Justice sits on his or her right; the next most senior sits on the presiding Justice's left; the next sits two places to the presiding Justice's right; and so on. The recognition of this order of seniority was taken to extreme lengths by the practice of court officers in handing documents up to the bench in a zig-zag fashion, sequentially from the most senior to the most junior. Documents are now distributed in a slightly less complicated way, though it still takes account of seniority: documents are handed first to the Chief Justice (or presiding Justice), then to the next most senior Justice and all Justices on that side of the presiding Justice, and then to the next most senior Justice and all Justices on the other side. When judgments are handed down, the court officer still collects the judgments in the zig-zag way.

If separate reasons for judgment are given, they are published and reported in order of the seniority of the most senior Justice who joined in those reasons. When joint reasons for judgment are given or later referred to, the names of the Justices who joined in those reasons are listed in order of seniority.

Six of the eleven Chief Justices have been appointed from the High Court Bench. Each was the senior puisne Justice at the time of his appointment, though there is no statutory impediment to the appointment of any puisne Justice as Chief Justice, regardless of seniority.

James Popple

Separation of powers. The Australian Constitution incorporates, as one of its basic elements, a separation of federal legislative, executive, and judicial powers. The High Court has held that this doctrine is implied from the text and structure of the Constitution, in particular from the words of sections 1, 61, and 71 and the nature of Chapters I, II, and III. The Court has also elaborated the constitutional constraints that flow from the separation of powers. As a result, the Court has had a profound impact on the functions, and general design, of a number of institutions of federal government. In turn, the separation of powers has played a major role in shaping the functions of the High Court and its Justices.

Despite some earlier references to the separation of powers, the Court, led in this respect by Isaacs, first clearly recognised and applied the doctrine in the Wheat Case (1915). There, it was found that only Chapter III courts (the High Court, federal courts created by Parliament, and courts invested with federal jurisdiction) could validly exercise the judicial power of the Commonwealth. On the facts of the case, this meant that the Inter-State Commission—dealt with in sections 101–104 of the Constitution—could not be empowered to issue an injunction, or other judicial remedy, in aid of its determination that a law of trade or commerce had been breached. Predictably, the Wheat Case hindered the activities of the Commission, contributing to its effective abolition in 1920 after a mere seven years of existence. Three years after the Wheat Case, in Alexander's Case (1918), the Court found that the other major federal tribunal envisaged by the framers—the Commonwealth Court of Conciliation and Arbitration—had not been validly established as a federal court because its President did not have life tenure in accordance with section 72 of the Constitution, as that section (as it then stood prior to its amendment in 1977) was interpreted by a majority. Thus, under the separation doctrine it could not validly discharge the judicial function of enforcing industrial awards.

The effect of these two cases was to ensure that courts, including the High Court, retained control over the exercise of federal judicial power. The proposition that only Chapter III courts can exercise federal judicial power is commonly described as the 'first limb' of the separation of federal judicial power. The 'second limb'—that the Commonwealth Parliament cannot ordinarily invest Chapter III courts with legislative or executive functions—was recognised by the High Court in the Boilermakers Case (1956) in a judgment generally attributed to Dixon. Once again, the institution immediately affected was the Court of Conciliation and Arbitration. In 1926, the Commonwealth had purportedly restructured the Arbitration Court as a federal court with judges appointed for life. It was empowered to exercise judicial and non-judicial functions, and in fact did so for the next 30 years. However, the holding in the Boilermakers Case that these functions had been invalidly combined meant that the Commonwealth was thenceforth required to maintain two separate institutions to administer its system of industrial arbitration: a non-court tribunal to participate in the quasi-legislative function of making industrial awards, and a Chapter III court to enforce those awards. This divided system, which at times has been strongly criticised, remains in place today.

The Wheat Case, Alexander's Case, and the Boilermakers Case indicate that, from its earliest days, the High Court was concerned to ensure that the judicial power of the Commonwealth was exercised independently and impartially by bodies meeting the traditional description of a court. The fact that enforcement of this principle disturbed settled institutional arrangements—or, in the case of the Inter-State Commission, undermined the viability of a body expressly contemplated by the Constitution—was no impediment. Admittedly, the Wheat Case and Alexander's Case also had the effect of protecting the High Court, and Chapter III courts generally, from challenges to their authority posed by rival institutions such as the Inter-State Commission at a time when governments were actively experimenting with quasi-judicial tribunals. However, whether the Court was influenced by these considerations is entirely speculative; there is no reason to suppose that the Court, in recognising...
retained in the legislative overhaul in 1986. The new test, introduced pointedly to negate the High Court’s interpretation in O’Brien, was intended to ensure that a pension would be payable only if there was more than a theoretical connection between disease, injury, or death and service.

As Bushell v Repatriation Commission (1992) indicated, the hoped-for improvement in the standard of proof was not achieved. Allen Bushell’s claim, which involved similar medical issues to those in O’Brien’s case, had earlier been rejected by the Repatriation Commission, the Veterans’ Review Board, the Administrative Appeals Tribunal, and the Full Federal Court. The High Court concluded there must be some evidence if a claim was to meet the ‘reasonable hypothesis’ test. However, in words that served to undo the expected benefits of the new test, the majority added: ‘The case must be rare where it can be said that a hypothesis based on the raised facts, is unreasonable when it is put forward by a medical practitioner who is eminent in the relevant field of knowledge.’

Following Bushell, claims again increased. As the minister commented when introducing the 1994 amendments, if the High Court’s interpretation had been permitted to stand, by the year 2001–02, it was estimated claims would cost $235 to $440 million a year, and the cumulative costs over ten years would be $1.2 to $2.2 billion. The government again responded, with legislation avowedly designed to reverse the effect of the decision in Bushell. A new body, the Repatriation Medical Authority (RMA), comprising a panel of medical experts, was to set out in legislative form the exclusive circumstances in which particular diseases, injuries, or death could be linked to service. If a claim did not fall within the legislative template it failed. The Court has not yet commented on these provisions although, in November 2000, it refused special leave to appeal aspects of the scheme in Repatriation Commission v Keeley.

What is apparent from this chronicle is that the evidentiary provisions in the veterans’ legislation are sacrosanct. Even when a government inquiry in 1994 recommended that the civil standard be substituted and the negative burden of proof on the Commission abandoned, the Parliament, faced with the probable backlash from veterans’ groups, chose a less contentious route, the RMA scheme. The privileged position of its veterans’ community was not to be eroded—at least in any overt fashion. Toohey provided the epitaph for this story in Bushell when he said: ‘Most of the problems have arisen through attempts to provide a scheme for veterans which is beneficial but which, at the same time, excludes claims that are fanciful. This accommodation has proved most difficult where the aetiology of a disease is unknown or uncertain.’

Robin Creyke

Further Reading


Robin Creyke and Peter Sutherland, Veterans’ Entitlements Law (2000)


Vexatious litigants. It is evident from the original High Court Rules that the Justices did not anticipate that there would be a large number of vexatious litigants. It was not until 9 March 1943 that a specific Rule entitled ‘Prevention of Vexatious Proceedings’ was inserted.

This Rule had its genesis in events that began with the issue of a number of writs out of the Hobart District Registry in 1942 by one Angus Dean against Dr EJ Hanly. Hanly was the warden of the Tasman Council responsible for collecting rates in the Hobart area. Dean was later joined in his activities by Horace Benjafield. Dean and Benjafield were members of a group that believed there should be reform of the monetary system. They also contended that war expenditure could and should be met by the issue of the necessary funds by the Commonwealth Bank, and accordingly that war loans with their burden of interest were entirely unnecessary. Their activities led to a Board of Inquiry being established under the National Securities (Inquiries) Legislation.

The Court began to take their activities seriously when writs were issued against Latham, Starke, and McTiernan, and the litigants began writing privately to Starke. A draft of the proposed Rule was circulated by Starke. On 3 September 1942, Latham had a conversation with Evatt, who by then had become Commonwealth Attorney-General, at which he stated his reluctance to suggest any legislation, whether by statute or by Rule of Court, which would be regarded as designed to give some special protection to judges against proceedings directed against them. Evatt thought it might have a salutary effect if a Rule of Court were made empowering a Justice, if the Justice thought fit, to stay proceedings on a writ issued by a person who had failed to pay any costs incurred in litigation previously instituted by that person in the High Court. Starke and Rich did not support Evatt’s proposal. Rich, commenting on the proposal, wrote: ‘I think this cannot or should not be inserted. We are not a debt collecting agency. Action in the Bankruptcy Court is available.’ The Justices had no such inhibition in signing the new proposed order. Curiously, neither Dean nor Benjafield was declared a vexatious litigant by the Court.

On 13 June 1952, Goldsmith Collins became the first person to be declared a vexatious litigant pursuant to an order made by Williams. This did not stop Collins’ activities. He successfully argued that the lodging or giving notice of appeal was not instituting a ‘proceeding’ within the meaning of the order made by Williams. Collins, buoyed by his success, went too far when he issued a writ out of the Supreme Court of Victoria, the endorsement of which alleged that Williams and three other named persons had conspired against him. The Commonwealth Attorney-General obtained an order from Taylor committing Collins to Pentridge Prison for one month for contempt. Collins purged his contempt by apologising unreservedly to the Court and Williams. He subsequently served a number of terms of imprisonment for contempt of the Supreme Court of Victoria.

Constance May Bienvenu was the next person to be declared vexatious by the High Court on 19 August 1971. Bienvenu had taken the Victorian branch of the Royal Society for the Prevention of Cruelty to Animals (RSPCA) to court over its by-laws. She succeeded in the case but, in a curious decision, Starke awarded costs against her. The RSPCA bank-
r upted her in an attempt to obtain its costs. This action set in motion a trail of litigation that had her declared vexatious in the Supreme Court of Victoria. Bienvenu then turned her attention to the High Court. A writ was issued by Frank Jones, then Deputy Registrar at the Principal Registry, on the direction of Barwick, naming Jones and the Principal Registrar, Neil Gamble, as defendants. The alleged cause of action was that they had conspired to deny Bienvenu her constitutional rights by refusing to supply her free of charge with a copy of the Constitution. The matter was heard by way of demurrer before a Full Court, which dismissed the action. Bienvenu continued to issue proceedings, which ultimately led the Commonwealth Crown Solicitor to take the proceedings that led to her being declared a vexatious litigant.

The Court has an inherent power to restrict vexatious applications, but only in proceedings that are already before it. The High Court Rules provide two separate mechanisms for preventing the commencement of vexatious proceedings. First, if a person seeks to file a document that a Registrar considers to be, on its face, 'an abuse of the process of the Court or a frivolous or vexatious proceeding,' the Registrar must seek a direction from a Justice. The Justice can direct that the process be issued (that is, that the document be accepted for filing), or that it not be issued without the leave of a Justice. Secondly, if the Court or a Justice is satisfied that a person 'frequently and without reasonable ground has instituted vexatious legal proceedings,' it may order that the person not be allowed to institute any proceeding without leave. The first mechanism restricts the issuing only of the process that is the subject of the direction; the second restricts the person named in the order from having any process issued without leave.

These mechanisms are not lightly invoked. As McHugh explained in Re Davison's Application (1997), it is only in 'very clear cases' that Registrars approach Justices for directions or that Justices refuse leave to proceed. 'If, on the face of the "process", there is a possibility that it is not frivolous, vexatious or an abuse of the process of the Court, the matter will be left to be dealt with in accordance with the ordinary curial processes of the Court.'

Between 1996 and 1999, an average of only eight applications a year were made for leave to issue process after a direction had been made under the first mechanism. Such applications have usually been unsuccessful, but not always: in Re Davison's Application (No 2) (1997), Gaudron granted the applicant leave to issue a process that Gummow had earlier directed the Registrar not to issue without leave.

Orders under the second mechanism are rarer still. As Toohey explained in Jones v Skyring (1992), the power to make such orders reinforces the Court's power 'to protect its resources and to avoid the loss caused to those who have to face actions which lack any substance.' Because of the nature of such an order (restricting a person's access to the Court), it can be made only in limited circumstances: upon the application of the Commonwealth or a state Attorney-General or Solicitor-General, the Australian Government Solicitor, or the Principal Registrar of the Court.

An order made under the second mechanism in the High Court Rules is the only way the Court can restrict a particular person from commencing any action in the Court. In Commonwealth Trading Bank v Inglis (1974), the Court decided that, although it has an inherent power to exercise control over the making of unwarranted and vexatious applications in actions that are pending in the Court, it has no inherent jurisdiction to make an order 'impeding a particular person in the exercise of the right of access to the court'.

Importantly, as explained in Jones v Skyring, it is not relevant whether the person is acting maliciously or in bad faith. The question is not whether legal proceedings have been instituted vexatiously but whether the proceedings are in fact vexatious. A person who frequently, and without reasonable ground, institutes vexatious legal proceedings can be prohibited from instituting any further proceeding regardless of his or her motives. Strictly speaking, it is the proceedings, not the litigants, that are vexatious.

Frank Jones
James Popple

Victoria Park Racing v Taylor (1937). In this case, a majority of the Court refused to stop a radio station from broadcasting the results of horse races observed from a tower erected on the front lawn of a house across the road from the racecourse. In the process, the Court considered principles of nuisance, copyright, privacy, the nature of property rights, and the role of the Court in developing the common law.

The judgments reflect what Dixon referred to as a distinction between founding liability on the infliction of unjustified damage or on breach of a specific legal duty. Rich and Evatt, in separate dissenting judgments, relied on the former. While they each acknowledged that there was no general right to privacy in Australia, they argued that the general principles of the tort of nuisance encompassed what they considered to be the illegitimate interference with the rights of the property owner in this case. The rights of the property owner should include a right to profitable enjoyment, undiminished by the non-natural use of neighbouring land. Evatt adopted the language of the United States Supreme Court in International News Service v Associated Press (1918) to assert that in endeavouring 'to reap where it has not sown', the broadcasting company was doing more than merely looking over its neighbour's fence. Both Evatt and Rich decided that common law principles such as nuisance could adapt to changing social contexts to provide protection against the broadcaster's actions.

The other three members of the Court—Dixon, Latham, and McTiernan—each rejected the US position and refused to extend the notion of property to prevent the conduct in this case. Any copyright in the racing guide or the results of a race did not protect the information conveyed, but only the original manner in which that information was expressed. To be protected, any compilation of information required some originality beyond the mere presentation of facts. Thus, to draw on the information in the racing guide when describing the running of the races did not constitute an infringement of copyright. Nor was there any property in the spectacle of each race. These Justices emphasised that intellectual property does not protect all the intangible elements of value that flow from the use of ingenuity, knowledge, skill, or labour—an emphasis that has continued to determine the