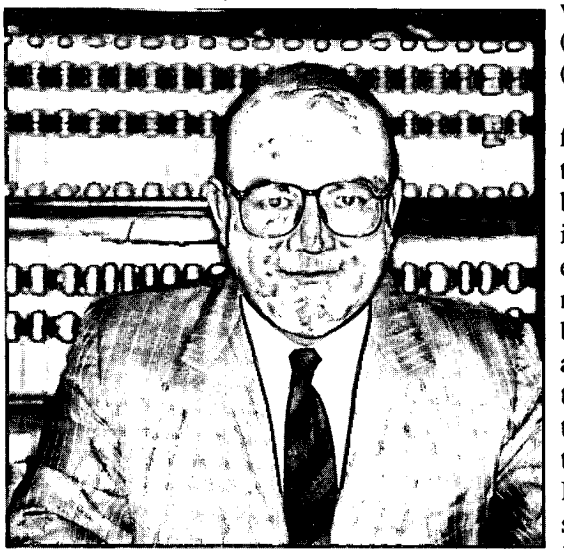
The High Court with McHugh J.

D.F. Jackson Q.C. considers the events which have brought the High Court, which McHugh J. has just joined, to its position as Australia's ultimate appellate court.

I believed, ingenuously in the event, that this was to be a standard "Bar News" article, i.e. (as for Gleeson C.J. [1]) a short taped "interview" [2] with the subject, followed by some (probably insufficient) pruning and sub-editing. But that was not to be. Oral history is suddenly out of fashion, and something more cerebral is required. Hence the turgid prose which follows.

The High Court in 1989

McHugh J. has joined a Court very different from the Court of twenty, or even ten, years ago. Its decisions are no longer subject to any appeal to the Privy Council, and the Privy Council is no longer an alternative avenue of appeal for appeals from the State courts. Nor does there remain any case in which there is an appeal as of right to the High Court. The Justices have power to remit cases to other courts [3] and sit only rarely at first instance. They are also liable to retire on attaining seventy years. Each of these factors has played its part in altering the role of the High Court (and the role of the intermediate appellate courts) and the changed roles are not yet, I think, fully understood. During McHugh J.'s time on the Court, a greater public perception of the changed role will be achieved, albeit gradually.



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I shall discuss now the factors I have mentioned above.

The retiring age

Until s.72 of the Constitution was amended in 1977, the interpretation given to it in 1918 in Waterside Workers' Federal of Australia v. J.W. Alexander Limited [4] was that all judges of federal courts, were appointed for life.

The statistics from the early days of the High Court [5] suggest that the right to hold office for life was treated by some as an obligation to hold on to office for as long as possible. It was the norm for Justices appointed prior to World War II to continue sitting beyond the age of seventy, the exceptions being O'Connor J. (who died), Knox C.J. (resigned to take up an interest in business [6]), Piddington J. (resigned before sitting) and Evatt J. (resigned to go into politics). No doubt in accordance with trends in the community generally, the position was rather reversed in the case of Justices appointed during and after World War II. Of those Justices, only Webb J., Owen J., Windeyer J. and Barwick C.J. continued to sit after attaining seventy, the first three sitting only one or two years thereafter.

During that period, however, there remained on the Court a number of Justices who had been appointed before 1939, and who were Justices for extraordinarily long periods. Rich J. was a Justice from 1913 to 1950, Starke J. from 1920 to 1950, and McTiernan J. from 1929 to 1974. They were well over seventy on retirement, of course. To that was added the fact that three Chief Justices in succession were members of the Court for long periods, and again were well over seventy on retirement (Latham C.J. sat from 1935 to 1952, Dixon C.J., as Justice and as Chief Justice from 1929 to 1964, Barwick C.J. from 1964 to 1981). One can understand the existence in 1977 of a public perception, whether statistically soundly based or not, that the High Court was "too old".

The 1977 amendment provided for retirement at seventy and it is interesting to note that whilst there have been many changes in the composition of the Court since then [7], the only retirement directly in consequence of the amendment to bring about retirement was Gibbs C.J. in 1987. (There have been some other consequences of the amendment [8]). The other vacancies have been the result of death (Aickin J., Murphy J.) or resignation (Jacobs J., Stephen J., Wilson J.)

It is unlikely that in the immediate future there will be much change in the composition of the High Court, but the introduction of the retiring age is likely in the long term to have the effect that its membership changes more frequently. Unless "Grey Power" becomes a dominant political force and turns the clock back, it is unlikely that there will ever again be appointees to the High Court who serve terms of the order of Rich J., McTiernan J. and Dixon C.J. McTiernan J.'s "record" seems safe because to exceed it a Justice would now need to be twenty four or twenty five on appointment. That seems a little precocious, even for the New South Wales Bar. I also think that the Court, because it will not have any members over seventy, is likely to be a little less fixed ("certain", "confirmed"[?]) in its views than it has been in the past. Age can bring with it a liberalisation rather than a firming of views, I know, but I do think that the more prevalent trend with age is to revere the past. In any event, there will be fewer Justices whose continued presence over many, many years gives them an influence which they otherwise might not have.

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1. "Bar News", Summer 1988, p.5.
2. In other words, a dozen "Dorothy Dixers".
3. Judiciary Act 1903, s.44.
4. (1918) 25 C.L.R. 434.
5. See the "Table of the Judges" in Fricke, Judges of the High Court, 1986, pp. 288-231.
6. Fricke, pp.97-98.
7. Mason C.J. is the only member of the Court who was also a member ten years ago.
8. The indirect operation has been that on becoming Chief Justice, Gibbs C.J. and Mason C.J. ceased to the "lifers" and become liable to retire at 70: see the last paragraph of s.72.

Comments have been made that one of the long-term effects of the retiring age will be that appointments to the High Court will be made at a younger age. I doubt this proposition if it means that the "normal" age for appointments - to the extent to which a normal age can be gleaned - will be lower, but I think it has some validity in the sense that it is less likely that persons over, say, sixty will be appointed.

Finally, mandatory retirement at seventy may prevent, to some extent, a retirement being delayed pending the defeat of an existing government. For example it was speculated of Rich J. and Starke J. that they had delayed their retirements until after the defeat of the Labor Government [9] · and the retirement age prevents that. The retirement age, however, does not prevent early retirement to allow an appointment, nor does it prevent a Justice, under seventy, who might otherwise have retired earlier, from staying on until that age to prevent an appointment of a replacement by a government of different political colour. It is sad to have to mention these matters, but quite a few Justices have been active politicians until appointment, and to believe that that will not recur requires an innocence which I have lost.

Abolition of appeals to the Privy Council

The removal of the Privy Council from the Australian judicial system was a slow, perhaps evolutionary, process [10], which was not completed until 1986 [11].

Whilst the Privy Council eventually ceased to hear appeals from the High Court in consequence of the Privy Council (Limitations of Appeals) Act 1968 and the Privy Council (Appeals from the High Court) Act 1975, its continued presence as an alternative avenue of appeal from the States in some cases meant that the Australian judicial system was not entirely autonomous, and that the High Court was not quite the final court of appeal for Australia. Litigants, not unnaturally, would seek to outflank decisions of the High Court adverse to their interest by going to the Privy Council [12]. The situation was unsatisfactory, and always potentially productive of tension [13]. The High Court is now free of that "competition".

Abolition of appeals as of right

The immediate practical result of the abolition of appeals to the High Court as of right has been that the Full Courts/ Courts of Appeal/Courts of Criminal Appeal are the final courts in almost every case. That was always so in criminal cases, but not so in many civil matters. The new function which the intermediate appellate courts perform has given their work greater importance, an importance which I suspect is not always realised by members of the legal profession, and occasionally, I fear, is not fully appreciated by members of those courts, or the governments responsible for them. Intermediate appellate courts are final courts for most purposes and there is a need for judges sitting in those courts to have time to "think about" their decisions and their implications, without working in a pressure-cooker atmosphere. I think it likely, I may say in passing, that the tendency to permanent courts of appeals (de jure or de facto) will manifest itself further [14].

The abolition of appeals as of right has also made a significant change in the role of the High Court. Because that Court now selects the matters which it hears, it selects as a general rule those which are likely to be of public importance. It is possible, but rare, that the Court will entertain an appeal by reason of the way in which a particular case was disposed of, if the case raises no issue of principle. Thus a decision by an intermediate appellate court may involve an error of law, but it does not follow that special leave to appeal will be granted. The case will probably not be of sufficient general importance.

The method of deciding cases in the High Court also has changed with the change in its role. Only a little of the Court's time is taken up now with resolution of questions of fact; in the main the Court is determining, for the future, what is to be the law. Inevitably, that involves a choice between alternatives, and the resolution of those questions involves, to a greater or lesser degree, questions of policy. The High Court is not bound by the decisions of any other court, or by its own prior decisions [15]. Whilst the relative weight of earlier decisions is important, in the end the Court is searching for the proper principle for Australia. One thus sees, more frequently than in the past, that decisions of the High Court discuss much more overtly the advantage of adopting one or other approach. To an extent, of course, this may be said to "politicise" the role of the High Court but the role of an ultimate appellate court is inherently "political" in this sense. It is more so where, as in Australia, constitutional issues are also involved.

It would be surprising if McHugh J. were not aware of all this, and that he is aware was made clear from the remarks which he made at his swearing-in on 14th February 1989 when he said:

> "The principal function of an ultimate appellate court, such as the High Court, is to evolve and settle the law for the benefit of the nation and not to right errors which may

9. Fricke, op. cit., pp.106-107.
10. Constitution s. 74, Privy Council (Limitation of Appeals) Act 1968, Privy Council (Appeals from the High Court) Act 1975.
11. Australia Act 1986 (Cth), Australia Act 1986 (UK), and the Australia (Request and Consent) Act 1985 of the Commonwealth and each State.
12. See e.g. Coast Securities No. 9 Pty. Ltd. v. Bondoukou Pty. Ltd. (1986) 61 A.L.J.R. 285, in which it was sought to "overrule" Chan v. Dainford Ltd. (1985) 155 C.OL.R. 533.
13. As in Beheto Pty. Ltd. v. Sunbird Plaza Pty. Ltd. (1984) 2 Qd. R.9 at 13, where the Privy Council described the construction of the relevant enactment by the High Court in Deming No. 456 Pty. Ltd. v. Brisbane Unit Development Corporation Pty. Ltd. (1983) 155 C.L.R. 129 as a "surprising construction" which it said, was "not surprising corrected" by an amending Act.
14. See Sir Anthony Mason, The State of Australian Judicature (1987) 61 A.L.J. 681 at 685.
15. For a recent discussion see John v. Commissioner of Taxation (1989) 83 ALR 606.

have occurred in the course of trials or in the intermediate appellate courts. When this Court grants special leave to appeal, ordinarily it does not do so on the ground that the rights of a litigant may have been infringed. It does so because in addition to that factor the case raises a question of great general importance. This means that, unlike the position which existed before the amendments to the Judiciary Act in 1984, almost every private law decision made by this Court has great significance for the people in Australia. Moreover, since this Court is not bound by its own or other court's decisions, it can and must examine the functional operation of legal rules and questions of policy to an extent denied to intermediate appellate and trial courts." [16]

Remitter

At earlier stages in the Court's history, Justices sat at first instance in original jurisdiction to try matters instituted in the Court. The power to remit matters conferred by s.44 of the Judiciary Act is now used extensively to remit such cases to the courts where they would ordinarily be heard. In consequence the Justices seldom sit alone, but for practical purposes sit as one of a multi-member court hearing appeals and constitutional matters.

Conclusion

McHugh J. joins a High Court which is an ultimate appellate court in the fullest sense. It is also more than just that in that it has in addition a jurisdiction in constitutional matters. Australia is only now seeing the full effect of the "new" High Court, and McHugh J. will make a significant contribution. He joins it with the advantage of considerable experience in broad general practice as a junior and leader, and with a breadth of experience on the New South Wales Court of Appeal. I think that the Court needed another "generalist", and it now has one.

It will be noted that I have so far said nothing of consequence concerning constitutional matters in the High Court of the future and, in particular nothing concerning the role of McHugh J. The difficulty which I find in that regard is that I really don't know what approach he is likely to take. His observations at his swearing-in, with respect, revealed little:

" It goes without saying that this Court's role as ultimate interpreter of the Constitution places a burden of responsibility on its members which cannot be shared by the members of other courts. The oppression of that burden is increased by my belief that, from time to time in important constitutional cases, competing views concerning the resolution of issues cannot be characterised as simply right or wrong. In the resolution of difficult constitutional questions, sometimes all that a judge can do in the end is to select the solution which seems constitutionally preferable to other possible solutions. Although the proper exercise of the judicial function requires that the choice of the preferred solution be justified by a reasoned decision based on considerations external to the judge's own set of values and not by reference to what Mr. Justice Jacobs once called "individual predilections ungoverned by authority", reason and logic are not always conclusive. As closely split decisions of this Court demonstrate, opposite conclusions are reached because the individual judgments, although logically impeccable, commence with different premises based on different constitutional values, none of which is logically irrelevant or inappropriate to the resolution of the question to be decided."[17]

All I would say, as I have suggested above, is that it was an appropriate time for the appointment of a lawyer whose background had not involved a commitment to any particular cause in constitutional matters. [18] ❑

16. Transcript of Swearing-In of Justice McHugh, 14.2.89
17. Ibid..
18. In 1978 the Attorney General for the Commonwealth gave an undertaking to consult with the States in relation to new appointments to the High Court. That arrangement was followed in relation to the appointment of Wilson J., and was made mandatory by s.6 of the High Court of Australia Act 1979:

"6. Where there is a vacancy in an office of Justice, the Attorney-General shall, before an appointment is made to the vacant office, consult with the Attorney-General of the States in relation to the appointment."

Three of the seven appointments after the Attorney-General's undertaking were of Solicitors-General for the States. There will always be former State Solicitors-General appointed to the High Court, but there does need to be a satisfactory mixture overall.