this appears to beg the question, and to dispense with the need for proof at all if the issue over which proof is required, as to whether the matters do fall within power, can be so predetermined. McTiernan A-C.J. took in effect a similar view in relation to section 233B(1B) to those of Gibbs and Mason JJ., but denied any necessity for reliance on *Williamson* v. *Ah On*. Jacobs J. commented that this defence would presumably be available even in the absence of its express enactment. This seems somewhat of a contradiction in the judgment of Jacobs J., in view of his previous finding that section 233B(1)(ca) would be a valid enactment without the support of section 233B(1B) since on that basis an offence would arise upon the prosecution showing the existence of a reasonable suspicion in relation to the goods. The only defences to such an offence would appear to have been that either such a suspicion was not in fact reasonable, or that it was not in fact held. The fact of importation would not seem to be an issue in relation to such an offence, and thus the offence could involve non-imported goods.

While the consequences of this decision in relation to the particular legislation involved are possibly not great, its precedent value may be significant if it is seen to approve legislation which may encompass matters beyond the scope of constitutional powers. There are serious objections to the Commonwealth assuming power over such matters (with or without a reversal of the onus of proof), and then requiring a subject to either submit thereto or to prove that he is in fact outside the valid scope of the legislation. It is submitted that the maxim *ei incumbit probatio qui dicit, non qui negat* cannot be discarded for the convenience of the Commonwealth, and that the Commonwealth should be constrained within the limits of its constitutional powers, notwithstanding that those powers may extend over a wide incidental area.

JOANNA FEATHERSTON*

ATTORNEY-GENERAL FOR AUSTRALIA (AT THE RELATION OF McKINLAY) AND OTHERS v. THE COMMONWEALTH AND OTHERS[1]

Constitutional law — Electoral distributions — Constitution ss. 24-30 — Commonwealth Electoral Act 1918-1975 (Cth) — Representation Act 1905-1973 (Cth) — Relevance of U.S. Supreme Court interpretation of Article 1 Section 2 of the U.S. Constitution.

In *McKinlay's* case three actions were consolidated into one. In the first of these, the Attorney-General for Australia (at the relation of McKinlay) sought against the Commonwealth and the Chief Electoral

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[1] (1975) 7 A.L.R. 593. High Court of Australia; Barwick C.J., McTiernan, Gibbs, Stephen, Mason, Jacobs and Murphy JJ.

Officer a declaration that the boundaries of the electoral division in which McKinlay was enrolled (Diamond Valley in Victoria) were not fixed according to law; a declaration that various provisions of the Commonwealth Electoral Act 1918-1975 (Cth) (the Electoral Act) were invalid; a declaration that, until those sections were amended, Victoria and the other States were each to be one electorate for any elections held for the House of Representatives; and an injunction to prevent the defendants conducting an election for the House of Representatives on the then existing electoral boundaries. All of this relief was based on the proposition that section 24 of the Constitution required that electorates contain equal numbers of people or (in the alternative) equal numbers of electors. The second suit was brought by one Lawlor who was enrolled in the division of MacPherson in Queensland and who sought similar relief, except that she also challenged the provisions of the Representation Act 1905-1973 (Cth) (the Representation Act) which based electorate sizes on the returns from censuses held under the Census and Statistics Act 1905-1973 (Cth). The third suit was brought by the State of South Australia, its Attorney-General and one Goodchild who was enrolled in the division of Bonython. They sought the same relief as the second plaintiffs but added the Divisional Returning Officer for Bonython as a defendant.

The Relator Action

As a preliminary point it is worth noting the novelty of the Commonwealth Attorney-General granting a fiat to a person to challenge the validity of Commonwealth legislation. A parallel is to be found in the *Shipping Board Case*[2] where a fiat was given to challenge the validity of an action by the Board on the ground that it was beyond the powers conferred by the Commonwealth Shipping Act 1923 (Cth) which set up the Board. The High Court in that case held that the Act was invalid.

Standing

Standing could, in other circumstances, easily have been the crucial issue in this case. The plaintiffs in the first two actions were private citizens, as was one of the plaintiffs in the third. The Commonwealth, however, did not put the standing of the plaintiffs in issue and five of the judges did not discuss it at all. The point is of some importance, however, and there is value in discussing here what was said on the subject by Barwick C.J. and Murphy J. and in considering some of the relevant cases.

It is a well established doctrine that when a person's right to vote is threatened he has standing to raise the issue in a court: *Ashby* v. *White*.[3] In two recent Australian cases this has been extended to give a person standing in matters involving a redistribution. In *McDonald* v. *Cain*[4] the

[2] *The Commonwealth* v. *Australian Commonwealth Shipping Board* (1926) 39 C.L.R. 1.

[3] (1703) 2 Ld. Raym. 938, 92 E.R. 126.

[4] [1953] V.L.R. 411, 420 *per* Gavan Duffy J., 427 *per* Martin J., 438-439 *per* O'Bryan J.

Full Court of the Supreme Court of Victoria was persuaded that the plaintiffs had standing on the basis that electors had a right to vote in particular electorates and that this would be threatened by a redistribution. In *Tonkin* v. *Brand*[5] the Western Australian Full Supreme Court held that the plaintiffs had standing on the simple basis that they were electors.

The last two decisions were not, as a matter of logic, compelled by the earlier decision in *Ashby* v. *White*. A threat to the right to vote is different from a threat to the value of a vote,[6] although the distinction may not be clear cut in that a provision which devalues the importance of a person's vote must ultimately impinge on his right to vote. However, these decisions have an obvious authoritative weight.

It is also important to note that different problems arise in relation to standing to challenge the different Acts. The challenge to the Electoral Act related to the weight of the vote of the individual electors, and it is in this area that *McDonald* v. *Cain* and *Tonkin* v. *Brand* have a direct relevance. The challenge to the Representation Act involved consideration of its provisions in so far as they related to the number of members of the House of Representatives to be elected from each State and therefore those cases are not directly relevant.

In *McKinlay* Murphy J. directed his attention primarily to the question of standing under the Electoral Act. He relied on the cases cited above and on conclusions reached in an Article in an earlier edition of this Review written by Mr Lindell[7] and said:

> A member of the Parliament, a candidate, an elector, or any one of the people of the Commonwealth has standing to challenge the validity or operation of legislative or administrative measures on the ground that they adversely affect his or her right to vote, to represent, or to be represented. . . . Enforcement of constitutional political rights does not have to be justified by characterizing them as rights of property. This degrades the political right. The exaltation of property rights over civic and political rights is a reflection of the values of a bygone era.[8]

Indeed a clarion call!

Barwick C.J. dealt with the question of standing to challenge the Representation Act. He said:

> it seems to me that the court should decide that the individual citizen has no standing to challenge the validity of the Representation Act.
>
> First, as to the plaintiff, Lawlor. This plaintiff has no particular damage or inconvenience accruing to her as distinct from and beyond any disadvantage or injury which may be caused to members of the public generally by the operation of the Act. If the Act

[5] [1962] W.A.R. 2, 14 *per* Wolff C.J., 19 *per* Jackson S.P.J., 21 *per* Hale J.

[6] This is pointed out by Beasley, "A Constitutional Extravaganza" (1962) 5 University of Western Australia Law Review 591, 601.

[7] Lindell, "Judicial Review and the Composition of the House of Representatives" (1974) 6 F.L. Rev. 84.

[8] (1975) 7 A.L.R. 593, 648.

> is to be challenged where there is no such individual consequence, in my opinion, it must be by the Attorney-General of the State in his capacity as *parens patriae*.[9]

There is nothing in Barwick C.J.'s judgment to extend these remarks to the question of standing to challenge the Electoral Act. His judgment is, of course, consistent with the view he took in *Logan Downs Pty Ltd* v. *Federal Commissioner of Taxation*[10] and with cases such as *Anderson* v. *The Commonwealth*.[11] However it is not entirely consistent with *Cooney* v. *Ku-ring-gai Corporation*.[12] This last case was distinguishable from *McKinlay*, but it does act as a qualification to the absolute doctrine that requires "particular damage" to be shown before a plaintiff has standing. Perhaps it would have been appropriate to distinguish *Cooney* and limit his expression of the absolute doctrine in *McKinlay* if reliance was to be placed on the doctrine in that case.

Justiciability

There was a general consensus that the issues raised were "justiciable". The most detailed exposition of this view occurs in the joint judgment of McTiernan and Jacobs JJ.[13] Whilst this is not clearly spelt out, the word "justiciable" as it is used in this case appears to refer to an issue on which the Court is prepared to pronounce judgment as opposed to one in which to decide would be to step outside the judicial function and into the legislative one.[14]

The Electoral Act

The basic argument of the various plaintiffs was that section 24 of the Constitution requires that when a State is distributed into single member electorates, each electorate shall contain an equal number of people or, in the alternative, an equal number of electors. They argued that the following sections of the Electoral Act would be invalid in so far as they operated to derogate from this proposed principle of equality of voting power: section 18 (which defines a "quota" as the number of electors ascertained by dividing the total number of electors in a State by the number of members of the House of Representatives to be chosen from it); section 19 (which requires the Distribution Commissioners to determine proposed divisions so that their size does not exceed or fall short of the quota by more than one fifth, having regard to a number of considerations set out in section 19(2) including the "community of interests within the Division", the "means of communication and travel within the Division", "the trend of population changes within the State"

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[9] *Id.* 607.

[10] (1965) 112 C.L.R. 177, 188 *per* Barwick C.J., Kitto, Taylor, Menzies and Windeyer JJ.

[11] (1932) 47 C.L.R. 50.

[12] (1963) 114 C.L.R. 582. See also *British Medical Association* v. *The Commonwealth* (1949) 79 C.L.R. 201; *Attorney-General for N.S.W.* v. *Brewery Employees Union of N.S.W.* (1908) 6 C.L.R. 469; and note by Lane, (1968) 42 A.L.J. 139.

[13] (1975) 7 A.L.R. 593, 620-621.

[14] In Campbell, "Suits between the Governments of a Federation" (1971) 6 Sydney Law Review 309, the learned author says, with understatement, "The terms "justiciable" and "non-justiciable" are not terms of art."

and matters relating to the physical nature of the Division); and sections 18A, 23, 23A and 24 (which provide for procedural steps to give effect to the Act, including the need for both Houses of Parliament to approve the proposed divisions).

The words of section 24 of the Constitution said to establish the proposition of equality contended for were: "The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth". The section also provides that the number of such members shall be (as nearly as may be) twice the number of senators and that, subject to the requirement that no original State shall have less than five representatives, the numbers from each State shall be in proportion to its population. Section 29 provides that, until the Commonwealth Parliament otherwise determines, the States shall make laws for the determination of divisions: it further provides that a division shall not be formed out of the parts of more than one State; and that, in the absence of any other provision, each State shall be treated as one electorate. The principal thrust of the argument was that the words "chosen by the people" could only be given effect if interpreted to mean "chosen by the people so that each has a vote of equal value". This contention was rejected by the Court, Murphy J. dissenting.

The primary difficulty facing the plaintiffs was, as Mason J. put it, that "The submission finds no support in the language itself".[15] To overcome this, the plaintiffs turned to a series of United States decisions, commencing with *Wesberry* v. *Sanders*,[16] which decided that the expression in Article 1 Section 2 of the United States Constitution—which requires that members of the (U.S.) House of Representatives shall be "chosen every second year by the People of the several States"—amounted to a constitutional guarantee that each vote should be of equal value.

Barwick C.J. started from the proposition that the Constitution was a "legal document" and that problems raised by it could not be solved "by resort to slogans or to political catch-cries or to vague and imprecise expressions of political philosophy".[17] He agreed with the famous statement of Sir Owen Dixon in his address on becoming Chief Justice: "there is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism". Applying these doctrines he said that the expression "the people" of the States could not be read as the "population" of the States so as to give each child and teenager a vote. If it was read as referring to "the electors" then the language was not sufficient to guarantee even adult suffrage.[18] Indeed, the other provisions of Chapter 1 Part III of the Constitution reflected, if anything, the opposite intention. Section 30 stated that the franchise, until other provision was made, was

[15] (1975) 7 A.L.R. 593, 636.

[16] (1964) 376 U.S. 1. See also *Wells* v. *Rockefeller* (1969) 394 U.S. 542; *Kirkpatrick* v. *Preisler* (1969) 394 U.S. 526 and *White* v. *Weiser* (1973) 412 U.S. 783. These cases were all preceded by *Baker* v. *Carr* (1962) 369 U.S. 186 which dealt only with the distribution in one State for the State legislature.

[17] (1975) 7 A.L.R. 593, 600.

[18] *Id.* 601.

to be the same as that applying in the most numerous House of the State legislature. In 1900 only South Australia even approached adult suffrage. His Honour pointed out that there was nothing to make section 30 subject to section 24 and concluded:

> If adult suffrage had been intended, bearing in mind the various colonial franchises to which I have referred, it is unthinkable that express provision in that behalf should not have been made.[19]

The plaintiffs, however, were not alleging an improper franchise but an improper distribution. But, as His Honour pointed out, the same arguments as he had used with respect to sections 24 and 30 would also apply to sections 24 and 29: in that section 29 dealt, *inter alia*, with distribution in almost identical terms to section 30 (although the latter dealt with the franchise). In 1900 the States had widely differing systems of distribution,[20] hence, in his view, all that section 24 required was a direct election (as opposed to an indirect one, an example of which would be an electoral college) and that elections should be resolved by popular vote.[21]

The Chief Justice then felt it necessary to deal with the U.S. authority. He took the view that the somewhat belated assertion of the principle of equal voting power in the U.S. Supreme Court was founded on a particular view of American history and the constitutional conventions. Evidence can be found for this, both in the majority judgments of that Court which set out this view, and in the dissents which based their arguments on a different view of that history and those debates. His Honour had only to point out that the relevant Australian history was different, which he did, to effectively distinguish the U.S. cases. As an afterthought he added a further ground for distinction, namely that Chapter 1 Part III of the Australian Constitution[22] had no equivalent in the U.S. Constitution. However, this may be incorrect in so far as Article 1, Section 4, Clause 1 of the latter does have some similarity to Chapter 1 Part III of the former.[23]

His Honour then proceeded to discuss the authority of U.S. constitutional cases as precedents in Australian courts in a more general manner. He argued that whilst the Australian system of government should be seen as having been developed from the British one and therefore being in harmony with it, the American system was founded on a revolt against the British system and could therefore be regarded as antipathetic to it. Furthermore, as the U.S. Constitution would not have been accepted but for the promise of a Bill of Rights, constitutional guarantees were to be more readily read into it. He also felt that as the

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[19] *Id.* 602.

[20] *Ibid.*

[21] *Id.* 603.

[22] *Id.* 606. Evidently, in the light of his earlier comments he is referring to ss. 29-31 of the Constitution.

[23] Article 1, Section 4, Clause 1 provides that "The Times Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of Chusing Senators."

U.S. legislature was to be seen as merely one arm of government, an interpretation which allowed the other arms of government to restrict its powers was to be more readily implied than in Australia. In his opinion, therefore, reliance in Australia on U.S. constitutional decisions is frequently "inapt".[24] The type of reasoning that preceded this conclusion, proceeding as it does from a basis of perceived distinctions between the constitutional background of two countries, where the distinctions perceived are not supported by any resort to authority, must always be suspect. Illustrations of the weakness of the approach can be found in *Webb* v. *Outtrim*[25] and in the *Engineers' Case*.[26]

In any event, the Chief Justice felt that Parliament had made a zealous endeavour to give each vote an equal value. "I am unable to accept the view that mere equality of numbers of people in a division provides equality of voting value".[27] To demonstrate this proposition he referred to the possibility of a large number of (non-voting) children residing in an electorate. The example is, of course, quite justified. However, with respect, his subsequent conclusion that section 19 of the Electoral Act is an attempt to provide for equality of voting power "grounded" on "long parliamentary experience"[28] is not justified, and supporting this conclusion by the reference in the section to the "community of interests within the Division", if anything, goes against the conclusion. It may be possible to see section 19 as providing for "fair" or "just" electoral boundaries but, given the one fifth variation on either side of the average allowed for in electorate sizes, it is difficult to see how section 19 can be regarded as any sort of attempt to secure equal voting power for individuals.

The position adopted by McTiernan and Jacobs JJ. on this issue was essentially the same as that of the Chief Justice. After pointing out that the words of section 24 of the Constitution did not support the contention of the plaintiffs, they said: "The people is the body of subjects of the Crown inhabiting the Commonwealth regarded collectively as a unity or whole, and the sum of those subjects regarded individually".[29] "People" is a wider expression than "electors" but section 24 does not mean that each of the "people" has a vote: babies and young children do not. However the phase "chosen by the people" has a different interpretation in different circumstances.[30] Currently:

> the long established universal adult suffrage may now be recognized as a fact, and as a result it is doubtful whether, subject to the particular provision in s 30, anything less than this could now be described as a choice by the people.[31]

In its application to electorate sizes, their Honours (supported by statements from Stephen and Mason JJ.[32]) said that there may be

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[24] (1975) 7 A.L.R. 593, 605-606. [25] (1906) 4 C.L.R. 356, 358-359.

[26] *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd* (1920) 28 C.L.R. 129, 146. Both of these cases rely on the mystique of "responsible government" for the basis of a distinction between the U.S. and the Australian constitutions.

[27] (1975) 7 A.L.R. 593, 606. [30] *Id.* 616.

[28] *Id.* 607. [31] *Ibid.*

[29] *Id.* 615. [32] *Id.* 633 *per* Stephen J., 636 *per* Mason J.

circumstances in which inequality of electorate sizes had led to a breach of the requirements of section 24. This would be "a question of degree" and could not be "decided in the abstract". However, there was nothing in Australian history or the development of the nation that required the strict guarantee of voting equality that the plaintiffs sought to derive from section 24.

The practical application of their Honours comments on electoral sizes was the proposition that there could be circumstances in which the challenged provisions of the Electoral Act were invalid.[33] In particular, should either House of Parliament fail to approve a proposed distribution, so that the old boundaries remained and the population distribution within those boundaries had altered significantly, the population of electorate sizes might be in breach of section 24. They then said that in such a case the Electoral Act would become invalid because of the change of circumstances, although it was valid at the date of *McKinlay's* case. The doctrine that a law that can operate validly and invalidly is invalid was distinguished, as the Electoral Act, in the circumstances existing at the date of hearing, was only capable of operating validly. They used the analogy of the doctrine of the changing content of the defence power, which varies in changing circumstances, to justify the validity of the Electoral Act.[34] The analogy is not precise, for in the area of the defence power the relevant process can be described as a change in circumstances leading to a change in content of the defence power, and thus to invalidity (or validity) of legislation; whereas in *McKinlay's* case, their Honours described the process as a change in circumstances leading directly to invalidity (or validity) of legislation. The distinction may not be important, but when it is added to the difficulties which the approach of regarding the Electoral Act as becoming invalid in certain circumstances creates (such difficulties include the problem of what happens to legislation passed by a House of Representatives elected under an invalid Electoral Act) one cannot but wonder whether a more analytically satisfactory approach could have been found. It may be that a better approach would be to say that if electoral boundaries were such as to breach section 24, the body elected on such boundaries was not the House of Representatives established by the Constitution.[35] This would solve the two problems referred to above.

There is only a brief excursion in the joint judgment of McTiernan and Jacobs JJ. into the effect of the U.S. authority. It was suggested that those decisions may, at least in part, result from the Fourteenth Amendment to the U.S. Constitution.[36] This amendment, however, is basically aimed at the States, and as their Honours were not more specific in their reference to it, it is not clear what they meant by this statement.[37]

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[33] *Id.* 617.

[34] *Ibid.*

[35] This is the assumption upon which Lindell proceeds, *op. cit.* 104-106.

[36] (1975) 7 A.L.R. 593, 618.

[37] The Fourteenth Amendment is divided into five parts, the last three of which are obviously not relevant. Section 1, aimed at the States, deals with citizenship, privileges and immunities, due process and equal protection. Section 2 deals with the apportionment of Representatives between the States. The amendment was a

The judgment of Gibbs J. was consistent with the other judgments. His method of dealing with the U.S. authority was probably more convincing than that of his brethren. He confined himself to pointing out that those cases rely heavily on a particular view of American (and British) history, and quoted the dissent of Harlan J. in *Wesberry* v. *Sanders*[38] to emphasise the somewhat spurious nature of the alleged history.[39] In any event, as he said, Australian courts are more limited than their U.S. counterparts in the material to which they can have regard and, even if historical sources were available, they would reveal that Australian history is different to American history. He had "carefully considered" the U.S. authority, but found that it did not dislodge the arguments against the interpretation of section 24 sought by the plaintiffs.[40]

Stephen and Mason JJ. briefly agreed with the majority.

The only dissenting voice on the question of the Electoral Act was that of Murphy J. His basic proposition was that there were only three possible interpretations of the relevant part of section 24 open to him: (a) that it required, so far as practicable, numerical equality of electorates; (b) that it required absolute equality; or (c) that it required nothing at all with respect to electorate sizes.[41] He did not explain why, in his opinion, the view expressed by McTiernan, Jacobs, Stephen and Mason JJ. (that section 24 did provide for some limitation on electorate sizes, but as the distribution in 1975 did not offend these limits there was no need to too closely define the limitations) was not an available interpretation. Faced with this choice he chose the second view (that section 24 required absolute numerical equality of electorates). He gave a large number of reasons for this choice but space forbids a detailed examination of them. Suffice it to say that His Honour did not deal with the arguments accepted by the majority and that, when he chose to follow the U.S. decisions, he did not refer to the reasons given by the other members of the Court for not doing so.[42]

The Representation Act[43]

The final issue raised was the validity of certain sections of the Representation Act. These provided that the number of people in each State was to be determined on the basis of a census of the people of the

post Civil War measure connected with the abolition of slavery and ensuring that the States gave their citizens equal rights. Section 2 reflected the decision to count former slaves as members of the population in the distribution of seats between States.

[38] (1964) 376 U.S. 1, 20-49; cited at (1975) 7 A.L.R. 593, 624.

[39] In many ways this is best pointed out in the powerful dissent of Frankfurter J. in *Baker* v. *Carr* (1962) 369 U.S. 186, 302-318.

[40] (1975) 7 A.L.R. 593, 625.

[41] *Id.* 643.

[42] *Id.* 644-645.

[43] The issues raised here were discussed by Paterson in "Federal Electorates and Proportionate Distribution" (1968) 42 A.L.J. 127. At 133 he predicted that "[t]he quinquennial census may be the harbinger of serious constitutional headaches for the Commonwealth Parliament in the years ahead".

Commonwealth.[44] Under section 8 of the Census and Statistics Act 1905-1973 (Cth) a census must be taken not less than once in every ten years. As a matter of practice there is one in every five. The Representation Act provides that where an alteration to the number of members to be chosen for a State is required as a result of the census, this requirement shall not affect "any election held before the State has been redistributed into electoral divisions".[45] Moreover, the Electoral Act provides for a redistribution only when it is "directed by the Governor-General by proclamation".[46] Such a proclamation "may be made" when an alteration in the number of members from any State is required.[47] This, as Gibbs J. pointed out, gives the Governor-General a discretion as to whether and when a proclamation shall be made.[48] In addition, before a redistribution comes into operation, both Houses of the Parliament must approve it. The plaintiffs argued that these provisions, when read together, violated the injunction in the second paragraph of section 24 that "the number of members chosen in the several States shall be in proportion to the respective numbers of their people . . ." in that inaction by the Governor-General or either House could bring about a situation where one State was under or over represented.

This contention was upheld by Barwick C.J., Gibbs, Stephen and Mason JJ. Gibbs J. pointed out that section 24 made reference to "the latest statistics of the Commonwealth", which is wider than census returns. He said that section 24 required the requisite proportions to exist at the time of each election and said:

> It appears to me that laws made by the Parliament to provide the manner in which the number of members chosen in the several States shall be determined cannot validly permit of any evasion of the requirement that a determination must be made within a reasonable time before each election. That means that when the House continues for its normal term, a determination must be made during the period of three years or less for which it continues.[49]

Gibbs J. therefore held that sections 2 and 3 of the Representation Act were invalid. He also held that section 12(a) was invalid, although he would have upheld it if it had provided for a procedure to ensure that a redistribution would take place with due diligence when required. He did not feel that a redistribution was required for a by-election.[50]

Gibbs J.'s conclusion with respect to the consequences of this invalidity are of interest. He said that "there is an overriding constitutional duty to hold elections in certain circumstances"[51] but a failure to ensure that each State is represented according to its population "does not invalidate

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[44] Representation Act, s. 4.
[45] S. 12(a).
[46] Electoral Act, s. 25(1).
[47] S. 25(2).
[48] (1975) 7 A.L.R. 593, 626.
[49] *Id.* 628.
[50] *Id.* 629.
[51] *Ibid.*

an election held otherwise in compliance with the Constitution".[52] He declined to rule on what would happen if the Act was not amended as, "no doubt, the Parliament will act to give effect to the requirements of s 24 now that they have been pointed out".[53]

Barwick C.J. took a similar course. He noted that there was a difficulty in interpretation caused by the fact that the method for determining the number of members for each State was expressed to be "until the Parliament otherwise provides". This was met by saying that these words (even when read with section 51(xxxvi)) do not give Parliament power to alter the requirement that the number of members for each State be in proportion to the population.[54] When dealing with the consequence of invalidity he said that, in respect of the second and subsequent elections held after a redistribution, the Executive would be under a duty to determine the number of members for each State using section 24 as if Parliament had not otherwise determined.[55] He did not comment on the effect of any failure by the Executive to so act.

Stephen and Mason JJ. delivered judgments which are similar in effect and approach to that of Gibbs J.

McTiernan and Jacobs JJ. were of the opinion that the challenged provisions of the Representation Act were valid. Their approach was similar to, and bears comparison with, their approach to the validity of the Electoral Act. They said that Parliament could determine how often the necessary statistics could be compiled although "such a provision is subject to the constitutional requirement that the proportion be maintained".[56] Their Honours felt that this must be given "a practical operation" and that once in every five years was an adequate frequency for the compilation of statistics and for distributions based on those statistics. As no allegation of an actual breach of section 24 of the Constitution had been admitted,[57] no relief was required other than to say that, should section 12 of the Representation Act have the effect of leading to a breach of the requirements of the Constitution, it "could not so operate constitutionally".[58]

Murphy J. did not deal with this matter in great detail. He said:

> By s 12(a) of the Representation Act the alteration in the number of members to be chosen in the several States shall not affect any election held before the State has been redistributed. Under the legislative scheme the redistribution need never occur. This plainly enables the command in s 24 of the Constitution to be circumvented. I would declare s 12(a) invalid.[59]

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[52] *Ibid.*

[53] *Id.* 629-630.

[54] *Id.* 608.

[55] *Id.* 609-610. He appears to have relied on section 61 of the Constitution (the executive power) to support this conclusion.

[56] *Id.* 619.

[57] Apparently an unsuccessful attempt was made to amend the pleadings to allege an actual breach: see (1976) 50 A.L.J. 185, 188.

[58] *Id.* 620.

[59] *Id.* 650.

His Honour did not refer to the frequency of redistribution that was required by section 24.

Comment

In its consideration of whether section 24 of the Constitution required each person's vote to be of equal value, the High Court referred to cases on the subject decided by the U.S. Supreme Court. The contrasts, both in result and in style, between the two Courts was thus highlighted. The Supreme Court sought to find guarantees of individual rights, and the feeling that a Congress elected on an unequal distribution was not an effective instrument to ensure that no injustice was done to those who were prejudiced by the distribution was evident in the judgments. The High Court could find no such guarantees and displayed a general faith in parliamentary institutions. The Supreme Court had regard to a wide range of source documents whereas the High Court was limited in the sources that it used. Above all, the Supreme Court concerned itself with the wider social implications of its decision. The High Court on the other hand, reached its decision on strictly legal principles, or at least professed to do so. The strengths and weaknesses of both Courts were on display and this comparison is one of the most interesting aspects of *McKinlay*.

Given the framework within which the High Court was operating, the result in relation to the Electoral Act is not surprising. If anything was surprising it was the statements of McTiernan, Jacobs, Stephen and Mason JJ. that there are circumstances in which there is some limit on permissible disparities in electorate sizes. However, this does seem to be a common sense middle view. On the other hand, the majority view on the need for a determination of population once in every three years does seem somewhat pedantic. Elections can and (as recent experience has shown) do often occur more frequently than this and, even when they do not, by-elections can be held within that time period. Thus the High Court, without ensuring that each election held takes place on the basis of a proper distribution, has substituted its own judgment on the frequency of determinations for that of the Parliament in order to achieve a result which looks, in the light of the precise words of section 24, a trifle strained.

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