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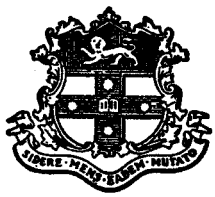

COMMENT

THE HIGH COURT TODAY

*THE RIGHT HONOURABLE SIR HARRY GIBBS**

I shall take the opportunity given to me by the editors of the Sydney Law Review to make a few comments about the present situation of the High Court.

The High Court plays two main parts, each of which is as important as the other — first, to interpret and enforce the Constitution, and secondly to act as a final court of appeal from all courts in Australia. The history of the Court has shown that it has steadily been divested of less important duties, as that has become necessary to enable it to shoulder the constantly increasing burden of work that arises in the performance of its two principal functions. The time is now long past when Justices of the High Court sat also on other tribunals such as the old Court of Conciliation and Arbitration or the Supreme Court of the Australian Capital Territory. More recently, and indeed for a good many of the years which I have spent on the Court, we heard many matters in our original jurisdiction — including taxation and patent cases — that were often lengthy and complex. I now find it hard to understand how the Court was able to cope with the volume of its work before the reforms of 1976 and 1979 relieved it of much of its original jurisdiction. Of course the original jurisdiction given to the Court by s. 75 of the Constitution cannot be taken from it except by referendum. But the power given by s. 44 of the Judiciary Act to remit matters to other courts is now extensively used, so that little original jurisdiction is in fact exercised by the Court. It seems something of a pity that the power given by s. 44 of the Judiciary Act enables the Court to remit matters only to another court "that has jurisdiction with respect to the

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subject-matter and the parties". This means that there are some cases which may be incapable of remitter. Even if that were not so, there seems no valid reason why the High Court should not be entrusted with the power to remit matters to any court in its discretion.

The constitutional functions of the Court are obviously of such importance that the Court must be able to determine every important constitutional question that arises. There are, however, some matters which may be called pseudo-constitutional in character, which the Court is obliged to hear at first instance but which might more appropriately come first before some other court. In particular there are demarcation disputes which arise in the Conciliation and Arbitration Commission. Much of the jurisdiction of that Commission arises as a result of paper disputes. The doctrine by which such disputes satisfy s. 51(xxxv) of the Constitution might almost be described as metaphysical in character and its existence shows that legal fictions did not cease to be of importance in the Middle Ages. But in the application of the doctrine it is necessary that an organization of employees which makes a demand on an employer should, under the rules which prescribe the qualifications of its members, be entitled to represent employees of the class in respect of which the demand is made. In such cases the jurisdiction of the Commission, under the Constitution, depends on the proper construction of the rules of the organization of employees, and the High Court, in deciding whether constitutional jurisdiction exists, is obliged to construe the rules of the organization. Obviously, the performance of such a function is not necessarily so important or difficult as to require it to be entrusted to the High Court at first instance. Power to perform it might with advantage be given to some other court, such as the Federal Court of Australia.

So far as the general appellate jurisdiction of the Court is concerned, it is necessary to keep in mind the distinction that exists between a primary court of appeal and a court which hears appeals at second remove. In principle each litigant ought to have the right to one appeal, on which every question of fact and law is completely open. However, since expedition and finality are important ingredients of justice, in general one appeal should be enough. A second appeal ought to be allowed only where an important question of principle is involved or where for some other reason a serious miscarriage of justice has occurred.

At present (speaking generally) an appeal may be brought as of right from decisions of the Supreme Courts of the States where the amount involved is $20,000 or upwards. A test based on the amount of money at stake is not a satisfactory one for determining the jurisdiction of an ultimate appellate court. However, the obvious alternative — to provide that no appeal shall be brought except by special leave — is not without its own disadvantages. The consideration of applications for special leave to appeal is a burdensome task which itself occupies a considerable amount of the time of the Court. One palliative may be to increase very considerably the appealable amount; it is obviously at present far too low, having regard to the decline in the value of money, and the increased monetary limits of the jurisdiction of District and County Courts. Perhaps it may eventually

be necessary to provide that appeals may be brought only by special leave, unless some more sophisticated method of ensuring that only appropriate cases are heard by the Court can be devised. One way or the other, something must be done to reduce the burden of work in the Court.

It follows from what I have said about the proper functions of an ultimate appellate tribunal that, at least in civil cases, special leave to appeal will usually be granted only where some important question of principle is involved. In criminal cases, special leave will also be granted if it appears that there has been a substantial miscarriage of justice. Experienced counsel are aware that their task on a special leave application is to indicate to the Court, quite shortly, the reason why the matter is special in character and that they should not attempt to argue the matter as though it were an appeal.

The question is often asked whether, now that the Court is established in Canberra, it will continue to sit in the capitals of the States. This is a matter for decision by the majority of the Justices. The present decision is that the Court will sit for one week each in Brisbane, Adelaide, Perth and Hobart, assuming that sufficient work is available to justify the Court's visit. Although, when it travels, the Court sometimes suffers inconvenience by having to share Chambers — of course the host Supreme Court is sometimes put to a similar inconvenience — in my view the visits are worth any sacrifice of time and comfort involved. A considerable saving in costs is effected for the parties in those matters which can be heard in the State of origin. Further, the Court is enabled to maintain some contact with the Bench and Bar outside Canberra. It is perhaps anomalous that no visits are made to Sydney and Melbourne. One reason is that the volume of litigation in those places is such that to sit for a week would make little impression on the lists. There would in my opinion be a great deal to be said for hearing in Sydney and Melbourne the applications for special leave to appeal that arise in those capitals. This, however, could only be done if the Court had suitable court facilities available in those cities, and it has not. However, it should now be possible to hear most Chamber applications which originate in Sydney and Melbourne in those places.

In conclusion I would mention a different aspect of the affairs of the High Court. Under the High Court of Australia Act 1979 the High Court now administers its own affairs. It is, I think, desirable to place in their true perspective the changes which were brought about by that Act. On the one hand, the Court now has a freedom to make administrative decisions of a comparatively minor kind which certainly leads to a greater convenience for the Court. On the other hand, the members of the Court must spend a great deal of time in dealing with matters of comparative insignificance — time which so busy a Court can ill afford. However, what must be recognized is that the independence of the Court is not much strengthened by the new system. The Court must still depend on Parliament for its annual budget, and that means that in practice the Executive can still effectively influence the decision of important matters of administration affecting the Court, such as staff ceilings. I do not mention this by way of complaint.

Under the Westminster system of government the Executive, through its control of Parliament, normally has the last say in matters involving the expenditure of public money, including that spent in providing the system of justice. To invoke American analogies in support of a different view is to misunderstand the constitutional arrangements in the United States, where, although the courts must obtain their funds from Congress, the Congress is not necessarily dominated by the Executive. The independence of the judiciary is maintained by the character of the judges themselves, the support of the legal profession and the sentiments of the community generally. It is an illusion to think that legislation such as the High Court of Australia Act has more than a symbolic significance so far as the independence of the Court is concerned.