when the Court's decision on other issues has rendered the question hypothetical or moot. Thus, in the *Waanyi Case* (1996), the Court declined to deal with the effect upon **native title** of pastoral leases, considering that to do so would be to deliver an advisory opinion, given that the Court had already decided for other reasons to set aside the order of the **Federal Court**. A similar restrictive approach to answering questions with no agreed facts was taken in *Bass v Permanent Trustee Co* (1999). This approach has not always been unanimous. **Kirby** in particular has expressed the view that the judicial function is not frozen in time, and provision of assistance to parties by answering questions that arise incidentally to the determination of an appeal ought not to be viewed as going beyond the appropriate judicial role.

The requirement that there be a 'matter' has also led to disagreement as to what cases can be brought on appeal to the High Court from state courts, which are not constrained in the same way as federal courts in relation to the cases they can hear. This has been particularly an issue when a case is stated for a Court of Criminal Appeal in order to clarify the law after a trial and acquittal. A willingness to hear an appeal in such a case was shown in *Mellifont v A-G (Qld)* (1991), which overturned more restrictive earlier decisions. In *DPP v B* (1998), the relationship between the question reserved and the factual issues at the trial was regarded as critical to establishing jurisdiction. Where questions are reserved in general terms unrelated to facts, there is unlikely to be a 'matter'.

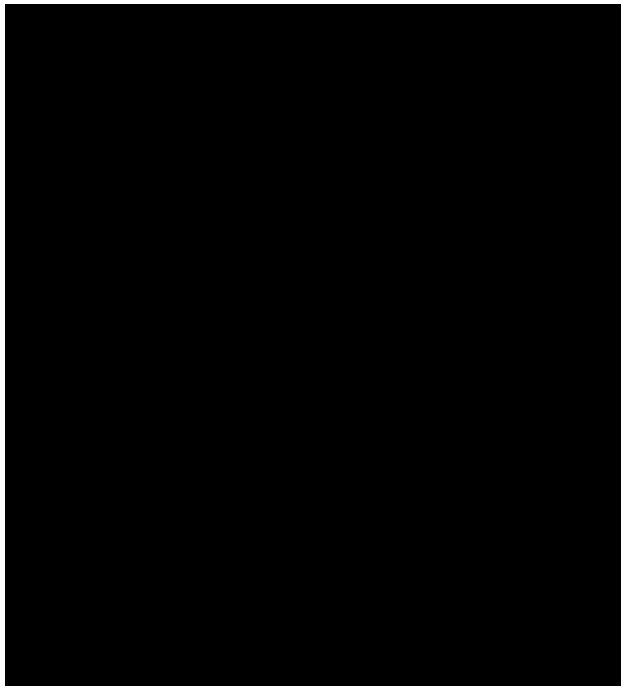
In relation to standing, the Court has acknowledged the link between the interest relied on by the plaintiff and the existence of a matter. This is reflected in cases such as *Croome v Tasmania* (1997), where a generous approach to standing was taken but in the context that there was a concrete dispute capable of judicial resolution concerning the validity of state laws. Where issues concerning compliance with international obligations or the legality of particular foreign policy decisions are raised, the Court will often use the absence of a 'matter' as the basis for rejecting the claim without needing to rely directly on grounds such as standing or justiciability.

Henry Burmester

Further Reading

Henry Burmester, 'Limitations on Federal Adjudication' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 227

McHugh, Michael Hudson (*b* 1 November 1935; Justice since 1989) was the product of a strong working-class tradition. His father had felt the bite of the **Depression** and valued loyalty to his friends, family, and fellow workers. The son of Jim and Moira McHugh, McHugh was born in Cooks Hill, a suburb of Newcastle. In 1942, his family moved to Collinsville, in North Queensland, where his father was employed as a miner. When McHugh was 13 years old, his family returned to Newcastle, where his father worked as a steelworker with BHP. Jim McHugh was a physically strong and confident man and an avid reader. He had the legacy of an Irish Catholic upbringing, which resulted in a firm adherence to his principles. In his son, Jim McHugh's sometimes rigid adherence to rules was balanced by a respect for **civil liberties**. This balance permeates McHugh's view of the law and his application of legal principle.



Michael McHugh, Justice since 1989

McHugh went to school at Marist Brothers in Newcastle, where he played rugby league for the Marist Brothers premiership teams. Although he excelled academically, the young McHugh profoundly disappointed his father by leaving school at the age of 15 without attaining his Leaving Certificate. He worked in a variety of jobs, including labourer, telegram boy, crane chaser, sawmill worker, and clerk. In 1957, at the age of 22, he enrolled in evening classes for the Leaving Certificate at Hamilton Public School, and in 1958 he began the study of law through the Barristers' Admission Board. In July 1960, he married Jeanette Goffet, who later became the Labor Party member for Phillip in the House of Representatives and Minister for Consumer Affairs. For the duration of his studies with the Barristers' Admission Board, McHugh was in full-time employment as a clerk with BHP. Nevertheless, he completed the course in three years, and was called to the Bar on 28 July 1961.

After McHugh's admission to the Bar, he and Jeanette moved to Sydney, where McHugh read with JM Williams and John Kearney. Although he appeared as junior **counsel** in the High Court before the year was over, as a newcomer to Sydney he took time to establish a successful practice.

In 1962, with a young family to support, McHugh decided to return to Newcastle. There, he caught the eye of Jack Smyth, who was renowned for his formidable cross-examination and tactical skills. Thereafter, McHugh was regularly retained as a junior to that legendary advocate, from whom he learnt through observation. In the same year, he appeared before the **Dixon Court** as a junior to JM Williams and FJ Gormly for the defendants in the ***Cigamatic Case*** (1962), a leading authority on **intergovernmental immunities** and the Crown's right to priority in payment of debts. In 1965, with

the encouragement of Smyth, McHugh returned to Sydney and took a room in University Chambers, which he shared with John Nader. Initially, McHugh commuted weekly between Newcastle and Sydney. Eventually, however, the family decided to move permanently to Sydney.

In 1966, with Harold Glass, McHugh co-wrote the standard work *The Liability of Employers in Damages for Personal Injury*. In undertaking this enterprise, and through an enduring professional relationship with Glass, McHugh was a beneficiary of Glass's profound understanding of legal principle and argument, which was always given clear and cogent expression in his written texts. When Glass wrote as a novelist (under the pen name 'Benjamin Sidney'), his fictional protagonist, Paul Sherman, was based in part on McHugh.

As a junior, McHugh's practice was extremely broad, encompassing **tort law**, intellectual property law, **criminal law**, **labour relations law**, and the law of landlord and tenant, and eventually including a formidable **defamation** practice. As an advocate in defamation proceedings, McHugh was influenced by Clive Evatt, with whom he frequently appeared as a junior on behalf of plaintiffs. At his peak, Evatt's superb oratorical skills and tactical ability gave him a commanding presence over a jury.

In 1973, McHugh was appointed QC. From 1977 to 1984 he served on the NSW Bar Council, becoming President of the NSW Bar Association (1982–83) and President of the Australian Bar Association (1983–84). He was one of the recognised leaders of the NSW Bar, and his appearances during this period attest to his versatility and skill. In 1983, he appeared as counsel for the Commonwealth government in the Hope Royal Commission on the Australian Security Intelligence Organisation. He also acted for Lindy and Michael Chamberlain in their appeals to the **Federal Court** and the High Court against their respective convictions as principal and accessory in the murder of their daughter Azaria (see ***Chamberlain Case*** (1983)). In the same year, he appeared in *Hospital Products v US Surgical Corporation* (1983), which became a leading authority on **fiduciary obligations**.

On 30 October 1984, McHugh was appointed a Judge of Appeal of the NSW Court of Appeal, where he quickly established a reputation for soundly reasoned judgments and a readiness to challenge established doctrine. His influence on the development of the **common law** has been exhibited in a number of cases. For instance, in *Trident General Insurance v McNiece* (1987), McHugh (with whom Justices Robert Hope and LJ Priestley agreed), in a judgment affirmed by the High Court in 1988, expressly recognised the injustice of a rigid application of the doctrine of privity of **contract**, and held that a third party was entitled to enforce a contract with no need to establish the existence of a **trust**. In *Bus v Sydney County Council* (1988)—in a **dissenting judgment** which the High Court upheld on appeal (*Bus v Sydney County Council* (1989))—McHugh held that the defendant had a duty to protect an experienced tradesman against risks that were part of his daily work, even where the tradesman had the skills to identify those risks. In *Bropho v WA* (1990), the High Court approved McHugh's reasoning in *Kingston v Keprose* (1987), where McHugh, again in dissent, expounded what has become the contemporary approach to **statutory interpretation**, with its emphasis on legislative purpose.

On 14 February 1989, McHugh was sworn in as a Justice of the High Court upon the **retirement** of **Wilson**. As a Justice of the High Court, he has shown a willingness to address issues where change is seen by him to be required, tempered by a conservative or cautious approach in application. His judgments characteristically reveal clarity of expression, together with a clear exposition of principle. Throughout his judgments there is a dichotomy between two clearly discernible strands: a recognition of the rights of the individual, but also a consciousness of the need for certainty and predictability in the law, and hence for adherence to, and application of, binding rules.

In ***Mabo*** (1992), the High Court, by majority, recognised the existence of **native title**. McHugh was among this majority, and agreed with the leading judgment of **Brennan**. In a speech delivered in London in 1998, he said that the recognition of native title in *Mabo* was 'merely a belated recognition in this country of an interest long recognised by the common law of England and other countries'. However, in ***Wik*** (1996), he again agreed with the reasoning of Brennan, this time in dissent—holding that the common law recognition of native title did not extend to the grant of pastoral leases, and that such leases conferred grants of exclusive possession on the grantees.

In the ***Free Speech Cases*** (1992), a majority of the High Court held that the system of **representative government** established by the Constitution implied constitutional protection for freedom of **political communication**. McHugh's view—narrower than that of the other majority Justices—was that such implications must be closely tied to specific constitutional provisions. Accordingly, in *Theophanous v Herald & Weekly Times* (1994) and *Stephens v WA Newspapers* (1994), McHugh, together with Brennan and **Dawson**, dissented from the majority view that the constitutional protection of freedom of political discourse extended to actions for defamation. In McHugh's view, the implied freedom of political discourse existed only to protect a narrow concept of representative government—namely, the direct election of the federal Parliament by the people. He insisted that the Constitution 'does not adopt or guarantee the maintenance of the institution of representative government or representative **democracy**' as such: those ideas were not available as independent starting-points for **judicial reasoning**, but only as tools for explicating the electoral processes directly required by the constitutional text. There could therefore be no foundation for a constitutional defence to actions for defamation.

In *Stephens*, the majority based its conclusion not on a constitutional defence but on the common law defence of qualified privilege, which arises where a potentially defamatory communication is both made and received in pursuit of a legitimate interest or duty. While denying that this common law defence was available at all on the particular facts in *Stephens*, McHugh emphasised that, under modern conditions, 'the general public has a legitimate interest in receiving information concerning … the exercise of public functions and powers vested in public representatives and officials'; and that this legitimate interest should, in principle, be regarded as sufficient to found a defence of qualified privilege. Thus, his refusal to adopt a constitutional defence in *Theophanous* and *Stephens* was combined, in *Stephens*, with an apparent willingness to extend the common law protection to political

communication in the media—utilising the capacity of the common law to implement change by an incremental approach, and acknowledging the importance of the open discussion of public affairs. In a powerful passage adopted by the whole Court in *Lange v ABC* (1997), he emphasised that the concern of the common law is for the 'quality of life and freedom of the ordinary individual', which he identified as 'highly dependent on the exercise of functions and powers vested in public representatives and officials by a vast legal and bureaucratic apparatus funded by public moneys'.

The protection of civil liberties at many levels and in the legal process itself is an enduring theme of McHugh's judgments. In *Kable v DPP* (1996), McHugh recognised the need to protect the judicial system created by Chapter III of the Constitution from legislative or executive interference. In ***Dietrich v The Queen*** (1992), the High Court declared that a trial court has power to stay criminal proceedings where a lack of legal representation would jeopardise a fair trial—the right to which was stated by Mason and McHugh to be a 'central pillar of our legal system'. In *Brisbane South Regional Health Authority v Taylor* (1996), McHugh addressed with compelling clarity the dangers of prejudice to the right to a fair trial arising from the effluxion of time, a danger that may be avoided by the strict application of limitation provisions. In such circumstances, the strict application of the rules may protect the rights of the individual.

McHugh's desire to protect civil liberties has, however, been accompanied by a clear acknowledgment of the necessity of judicial adherence to decided principle. For example, in his judgment in ***Burnie Port Authority v General Jones*** (1994), in which he defended the *Rylands v Fletcher* rule of prima facie **strict liability**, McHugh distinguished the **law-making** function of the Court from that of the legislature, and cautioned against a too-ready willingness to depart from settled rules of common law.

This insistence on adherence to legal principle and caution against change can be seen as a conservative approach to judicial law-making, yet many of the cases in which this approach has been applied reveal a liberal concern with the welfare of the individual. McHugh's decision in *Burnie Port Authority* reflected a recognition of the vulnerability of the average person to exposure to toxic substances in modern times; his reluctance in *Hill v Van Erp* (1997) to broaden the law of torts in the area of economic loss reflected a concern to avoid increasing costs to the legal profession that would be passed on to the ordinary consumer; and he warned in *Perre v Apand* (1999) that the increased cost of litigation would be a bar to the average person's access to justice. The duality of McHugh's conservative approach to legal method and his liberal recognition of the rights of the individual is one of the most interesting facets of his judicial decision-making, and, when properly understood, challenges the observation sometimes made that McHugh, as a Justice of the High Court, has adopted a more circumspect view of the judicial role than he has expressed in his extra-judicial writings.

Kate Guilfoyle

Further Reading

Michael McHugh, 'The Law-Making Function of the Judicial Process.' (1988) 62 *ALJ* 15 (Part 1), 116 (Part 2)
Michael McHugh, 'The Law-Making Function of the Judicial Process. Part 2' (1988) 62 *ALJ* 116
Michael McHugh, 'The Judicial Method' (1999) 73 *ALJ* 37

McTiernan, Edward Aloysius (*b* 16 February 1892; *d* 9 January 1990; Justice 1930–76), the longest serving Justice (46 years), was the second of three children of Irish immigrants Patrick McTiernan and Isabella Diamond. Born in Glen Innes, NSW, in humble circumstances, he grew up in a strict Catholic household. He spent his early childhood in Metz, a small NSW goldmining town, and attended the local public school at Glen Innes.

At age seven, McTiernan fell off the verandah of his family's home and suffered a severe injury to his left arm. The injury may have saved his life, since it later exempted him from service in **World War I**, for which he had volunteered. It also made possible his appointment as **associate** to **Rich**, who had insisted on employing only someone who had volunteered for military service and been rejected. At the time, the fall was also one of the reasons why the family moved from the goldmining town to Leichhardt, an inner suburb of Sydney.

Settled in Leichhardt, McTiernan attended the Christian Brothers School at Lewisham and Marist Brothers School, Darlinghurst. He matriculated in 1908. With no financial support for attending university, and with sectarian prejudice pervading employment in the commercial houses of Sydney, McTiernan decided to follow his father's advice and work in the new federal public service. His father had predicted that the federal service would grow in size and importance. McTiernan would later help to realise his father's forecasts through his judgments in such cases as the ***Uniform Tax Cases*** (1942 and 1957) and the ***AAP Case*** (1975).

Employed as a clerk, McTiernan used his small wages to study Arts part time at the University of Sydney. He achieved excellent results. He was also selected to be a member of the University debating team that was sent to England. After completing his BA, he resigned from the public service in order to enter the legal profession. He worked part time as a junior clerk at a firm of solicitors—a position he discovered quite by chance—and studied law after office hours. He applied himself diligently, and graduated in 1915 from the University of Sydney with first-class honours.

In 1916, during his service as associate to Rich, McTiernan was admitted to the NSW Bar. Having joined the political Labor League in 1911, he stood for parliament at the 1920 NSW state election. Aged 28, he became a member of the NSW Legislative Assembly and retained his seat until 1927, holding the posts of Attorney-General and Minister of Justice under Premiers James Dooley (1920–22) and Jack Lang (1925–27). Lang's biographer Bede Nairn records that McTiernan was 'the most effective reformer in an active cabinet', one 'whose social conscience and great knowledge of the law were indispensable to all ministers'. In 1926, he played a leading role in Lang's attempt to abolish the NSW Legislative Council—to the extent of travelling to London to persuade the Secretary of State for the Colonies, LS Amery, that Governor Dudley de Chair must accept his ministers' advice on the matter.