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

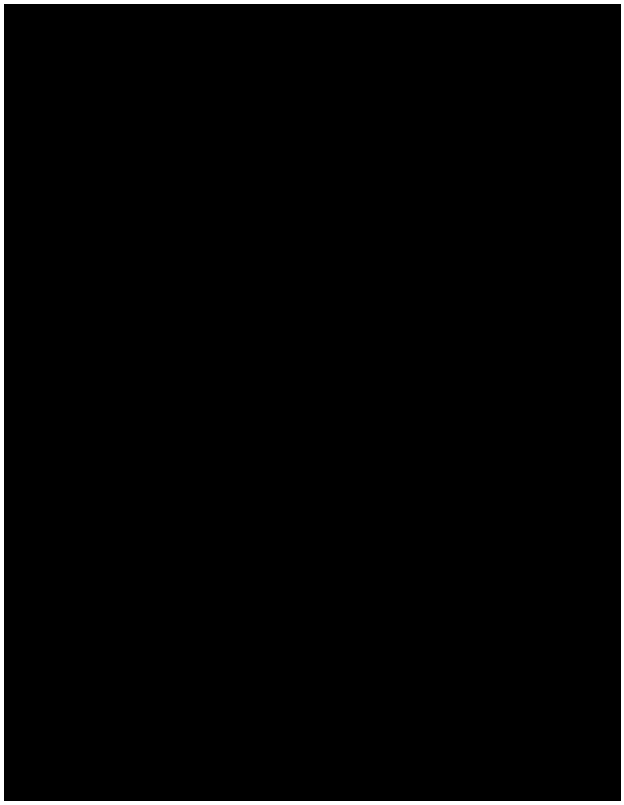
McTiernan, Edward Aloysius (*b* 16 February 1892; *d* 9 January 1990; Justice 1930–76), the longest serving Justice (46 years), was the second of three children of Irish immigrants Patrick McTiernan and Isabella Diamond. Born in Glen Innes, NSW, in humble circumstances, he grew up in a strict Catholic 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.



Edward McTiernan, Justice 1930–76

In the 1927 crisis over the adoption by the Labor Party Conference of the so-called 'Red Rules', McTiernan and his fellow-Catholic, Carlo Lazzarini, previously among Lang's strongest supporters, parted company with him. In the Cabinet reshuffle that followed in May, McTiernan was replaced as Attorney-General by Andrew Lysaght. At the state election in October, McTiernan did not renominate, but returned to full-time practice as a barrister and to lecturing in Roman law at the University of Sydney.

McTiernan resumed his political career in 1929, when he stood for election for the seat of Parkes in the federal House of Representatives. He won the seat handsomely for the Labor Party, and held it until his **appointment** to the High Court in 1930 at the age of 38.

McTiernan was appointed a day after **Evatt**. Some members of caucus would not agree to Evatt's appointment unless it was balanced by the more temperate McTiernan. The appointments were controversial, and made against the wishes of the **Prime Minister** and the **Attorney-General**, who were out of the country at the time. Much of the criticism was directed at McTiernan, who had never taken silk, though the option had been available to him when he was NSW Attorney-General. The thrust of the criticism was that he lacked the distinction to deserve the office and that his only apparent claim to it was his faithful service to the Labor Party. Bar associations and law societies around the country shunned him. **Starke**, also believing that McTiernan's appointment was purely political, was often offensive towards him (see **Personal relations**). Yet throughout the difficult period of the **Latham Court**, McTiernan absorbed the hurts heaped upon him and rarely complained. He was ever a gentleman, in and out of court.

McTiernan restricted his circle of friends to a small number of people of similar **background**, political views, and religion. He was shy and stubborn by nature. He filled his private life with his associations in the Catholic Church. In 1928, before his appointment to the High Court, he had taken an active part in the Eucharistic Congress held in Sydney in that year. He was one of the founders of the Red Mass, which annually opens the Law Term in Sydney. He was also one of the founders of the St Thomas More Society. For his loyalty and devotion to the Church, he was awarded a high papal honour. In the largely Protestant environment of the Court and the legal profession, his visible allegiance to the Catholic Church added to the isolation caused by the circumstances of his appointment and the subsequent severance of his former political friendships.

The early cases in which McTiernan sat saw him quite frequently in concurrence with **Gavan Duffy** and Evatt. The three provided a core of opinion in the Court that promised to advance federal power and respond sympathetically to the concerns of Australian working men and women. Issues of NSW state politics were more divisive, however. In 1929, a conservative state government led by Premier Thomas Bavin had attempted to forestall any future attempt to abolish the Legislative Council by inserting a new section 7A in the *Constitution Act* 1902 (NSW). In *A-G (NSW) v Trethowan* (1931), with Lang again in power and challenging the effectiveness of this new constitutional barrier, Rich, Starke, and **Dixon** held that it was effective. The normal rule that a parliament cannot 'bind its successors' by limiting their future options was satisfied, they held, because section 7A did not exclude the possibility of Legislative Council abolition, but merely prescribed the 'manner and form' by which it must be achieved.

Gavan Duffy and McTiernan dissented. While McTiernan's position recalled his own role in the 1926 attempt to abolish the Legislative Council, his argument that 'manner and form' requirements could not be imposed without a reduction in substantive legislative powers has continued to reverberate in later cases exploring the capacity of a parliament to fetter its subsequent legislative freedom (see, for example, the Supreme Court of SA in *West Lakes v SA* (1980)).

A year later, however, in the *State Garnishee Case* (1932), the High Court held that Part 2 (Enforcement against State Revenue) of the *Financial Agreement Enforcement Act* 1932 (Cth) was valid. The decision had vital financial, constitutional, and political implications for Lang's tenure of office, leading inexorably to his dismissal three weeks later. Evatt joined Gavan Duffy in dissent, but McTiernan decided with the majority. The Commonwealth, he wrote, 'is a Government, not a mere confederation of States, and no State within the Commonwealth is entitled to decline to fulfil … any obligation imposed upon it by the Constitution'. From that day on, Lang, regarding McTiernan's decision as a betrayal, refused to speak to him.

During the 1930s, McTiernan joined in many **joint judgments** with Dixon, whom he greatly admired, although often finding his prose obscure. He also participated, but to a lesser extent, in joint judgments with Evatt. McTiernan and Evatt most commonly agreed in cases concerning **workers'**

compensation and trade unions. McTiernan also adopted a similar approach to that of Evatt in the cases of the 1930s on freedom of **interstate trade**. As Ken Buckley has noted, McTiernan seems to have been sensitive to claims that he was too strongly influenced by Dixon, and maintained that he always thought for himself. Occasionally, the leadership role between Dixon and McTiernan was reversed (see, for example, *Dickson v FCT* (1940)).

Following the outbreak of **World War II**, the Court generally supported the extension of **Commonwealth legislative powers**, a tendency that comfortably accorded with McTiernan's own views. However, when the threat to Australia declined in the mid-1940s, the Court reverted to a narrower interpretation of the federal legislative powers. By now often in dissent, McTiernan was the only Justice to uphold the validity of the *Pharmaceutical Benefits Act* 1944 (Cth) (see the *First Pharmaceutical Benefits Case* (1945)), while he and **Latham** alone supported the validity of the nationalisation measure in the ***Bank Nationalisation Case*** (1948).

McTiernan's support for federal power and his tendency to be in favour of the underdog in litigation were consistent throughout his career. His decisions were the least 'pro-employer' in industrial accident compensation cases. They were the most 'pro-accused' in criminal appeals. They were the least 'pro-*laissez faire*' in cases under section 92 of the Constitution. Next to **Windeyer**, his decisions were the least 'pro-defendant' in road accident cases. Yet in applications to review government decisions by constitutional **writs**, his judgments were the most sympathetic to government and least supportive of the applicant challenging the benevolent state. His judgments were generally shorter than those of his brethren, as he clearly placed more importance on outcomes than on the development of doctrine; yet the results he arrived at were often sound and sometimes prophetic—as in *FCT v Casuarina* (1971), where McTiernan held in sole dissent that the respondent company was engaging in tax evasion and should be assessed to tax. From this perspective, his judicial contribution may have been underrated.

In 1948, McTiernan, aged 56, married Kathleen Lloyd. The marriage took place three years after the death of McTiernan's father, with whom McTiernan maintained almost daily contact. There were no children of the marriage. Instead, McTiernan tended to treat his associates as part of his family. The associate would eat with him in his **chambers**; usually dine at the McTiernan home at least once a week; and discuss politics with him.

McTiernan was not devoid of **humour**. His associates have told of how McTiernan could become animated and have bursts of energy and enthusiasm. But it was generally over history or politics, not the law. He also had a legendary reputation for frugality.

Although McTiernan's strong opposition to communism went back to the days of the 'Red Rules', in 1951 he aligned himself with the majority in striking down the *Communist Party Dissolution Act 1950* (Cth) in the ***Communist Party Case*** (1951). As he told Frank Brennan, he was 'most relieved' when he realised that he would not be alone in declaring the Act invalid. He played an active role in the case to help ensure its result. In the same year, he was appointed a KBE.

While Dixon dominated the Court during the relatively uneventful period of the 1950s and later, there were significant differences in judicial viewpoints between McTiernan and Dixon during this period. Often McTiernan was more concerned with the practical and social effects of the Court's decisions than were other members of the Bench (see, for example, *Mason v NSW* (1959), one of many cases where McTiernan was the sole dissentient). Although he remained personally opposed to Dixon's approach to section 92 of the Constitution, the **Privy Council** decision in *Hughes & Vale v NSW* (1954) constrained him to accept that approach. In the subsequent cases beginning with *Hughes & Vale v NSW (No 2)* (1955), he (like **Webb**) joined in the judgments in which Dixon expounded the effect of the Privy Council decision on the 'transport cases' of the 1930s; but McTiernan attached to the joint *Hughes & Vale* judgment a poignant 'Addendum'—citing his own judgments in the earlier cases as showing that his contrary view had been held 'for many years', but accepting that the Privy Council had found that view 'not to be acceptable … and it is incumbent upon me to work out as best I may the results and implications of the contrary views which commended themselves to their Lordships'. He went on:

> In the joint judgments to which I am a party there is stated, as I believe adequately … what appears to be the true operation of the views which in the past I had found myself unable to share. But perhaps I may be permitted to say that I remain personally far from convinced that the result is one which the **framers** of s 92 either intended or foresaw.

The 'Addendum' becomes even more poignant when the **Dixon diaries** reveal that, in a telephone conversation a week earlier, McTiernan had asked Dixon 'to write a supplementary explanation or apologia for him to deliver, which I did'.

Similarly, when Dixon's broadening view of duties of **excise** had prevailed in *Matthews v Chicory Marketing Board* (1938) and in *Parton v Milk Board* (1949), Latham and McTiernan had dissented. But in ***Dennis Hotels v Victoria*** (1960), McTiernan agreed with Dixon's view that both of the liquor licensing fees involved were excise duties. The only **precedent** he cited was *Parton v Milk Board*, and once again he explained: 'I feel that it would be contrary to the decision of the majority in that case for me to adhere to the opinion which I expressed in that case.'

In *Hughes & Vale (No 2)* and *Dennis Hotels*, McTiernan's personal statements were characterised by gentle understatement. Those close to him detected a similar understatement in *Giltinan v Lynch* (1971), a challenge to the balloting system by which young men were conscripted for service in the Vietnam War. The case was heard on **circuit** in Brisbane. On the second day of the hearing, **Barwick** announced that the Justices had considered the matter overnight and were ready to deliver judgment. In a series of short ***ex tempore*** **judgments**, the challenge was unanimously dismissed. McTiernan agreed that the ballot was 'an appropriate means' of exercising the Commonwealth's executive power, but added meaningfully: 'The question whether it is a moral or ethical means does not arise in these proceedings. I do not pass any opinion on that aspect.'

In 1972, McTiernan took a long journey around the world, which his wife had organised. He insisted on being accompanied by his associate on the journey. While in England, he sat in the Privy Council, of which he had been made a member in 1963 (see *Edwards v The Queen* (1972)).

In the 1960s and 1970s, there were times when McTiernan's enthusiasm and energy seemed to be waning and the number of his **dissenting judgments** fell. But from time to time, his vigour reasserted itself: when **Taylor** died in 1969 and **Kitto** resigned in 1970, McTiernan responded to rumours that he, too, was about to retire by buying a new judicial robe. In some of the cases of the **Whitlam era**, he played an important role—particularly in the first ***Territory Senators Case*** (1975). In the *AAP Case*, the Court revisited the 1945 *Pharmaceutical Benefits Case*: McTiernan was the only member of the Bench to have sat in both cases, and in both of them he held that the Commonwealth scheme under challenge was valid. In ***Cormack v Cope*** (1974) and the *PMA Case* (1975), he maintained that the special legislative procedures prescribed by section 57 of the Constitution were not **justiciable**.

At times during these years, his interventions in oral **argument** were as sharp as ever, though his fine, quavering voice was often difficult for counsel to understand. At other times, especially during a long hearing, he appeared distracted. On one occasion, as Acting **Chief Justice**—an office McTiernan had held on many occasions, having been the senior **puisne Justice** since 1952—he swore in new members of the Senate. The members of Parliament were uniformly shocked at McTiernan's age and apparent feebleness. Bipartisan support for the 1977 amendment of the Constitution imposing a compulsory retirement age for federal judges followed shortly thereafter.

McTiernan would probably have remained on the Bench until his death and served for over 50 years, but for another accident. In 1976, in his room at the Windsor Hotel in Melbourne, he overbalanced while trying to kill a cricket with a rolled-up newspaper, and broke his hip. Chief Justice Barwick, sensing an opportunity to fill McTiernan's post with someone younger and closer to his own world view, is said to have declined to alter the accommodation of the Court to provide for a judge in a wheelchair. He persuaded McTiernan to retire.

In 1990, McTiernan died in Sydney, just short of his ninety-eighth birthday. Legal commentators paid handsome tributes to him. Despite initial adversity, he attained high legal and political office through diligence, luck, and ability.

Michael Kirby

Further Reading

Michael Kirby, 'Sir Edward McTiernan: A Centenary Reflection' (1991) 20 *FL Rev* 165

Media and the Court. In its first two decades, the High Court, as an element in the new institutional structure of the new federation, was the subject of intensive and detailed newspaper reportage, especially in the Melbourne *Argus*. But as the nation matured, media attention to the Court declined. By mid-century, media scrutiny of the Court was fitful and unsophisticated.

It was only when the Court moved to **Canberra** in the early 1980s that any major media organisation regularly reported it, and, even now, although major decisions are reported by senior and qualified journalists, the volume of material coming from the Court has not been thought to justify the assignment of full-time journalists to that beat. During much the same period, with a declining focus on law reform, and with the 1970s activism of the Attorney-General's Department subsiding in the 1980s and 1990s, the idea of combining such a round with Canberra legal commentary has also foundered.

The Court is now reported by journalists who are essentially specialists, but for whom coverage of the Court is only a part of their duties. That their other duties generally include political coverage gives a flavour to their reporting that may tend to accentuate the Court's **role** as the third arm of government: there is a far stronger focus on constitutional than on **common law** matters, and considerable attention is given to the politics, or supposed politics, of the Court, the **appointment** process, and the impact of decisions on government. The disadvantage is that the more routine work of the Court, particularly its common law and general appellate work, gets little attention, unless, as in cases such as ***Mabo*** (1992), there are obvious political consequences. The Court's work in high-profile **criminal law** matters has, of course, always been covered, but more in the tradition of general court reporting, and with much less focus on the Court's reasoning than on results.

That the first three-quarters of a century of the Court saw little specialist coverage was not merely a matter of its want of a base. Cases with a significant **political impact**, such as the ***Bank Nationalisation Case*** (1948) and the ***Communist Party Case*** (1951), were reported—though again with more focus on outcomes than on the Court's reasoning—sometimes directly by journalists, and sometimes by legal academics as direct or quoted **commentators**. Newspapers have been generally conscious of the significance of the Court in the constitutional framework and its role as a referee in disputes between the Commonwealth and the states, or between the state and its citizens in framing rights, and far from unsophisticated in recognising the importance of the Justices' predispositions and **values**. But a number of factors inhibited the development of sustained reporting or deeper analysis.

The peripatetic nature of the Court did not help (see **Circuit system**). Neither did the fact that the Court dealt with a considerable volume of trial work, much of little general interest, nor that, even in relation to the appellate work, there was often little in the way of new law, as much of it came to the Court as of right. The denseness of judgments, the self-conscious **legalism** and legalistic writing style of many of the Justices, and the fact that it was often difficult to discern a governing principle from different judgments in the majority did not assist confident reporting. The Justices made few concessions to reporters, and did not appreciate even respectful **criticism**, which in any event tended to come only from editorials. Deference was, generally, the order of the day. When commentary came, it tended to take decisions, even unexpected ones, as read, or at least as infallible, and was largely the domain of reporters covering that particular