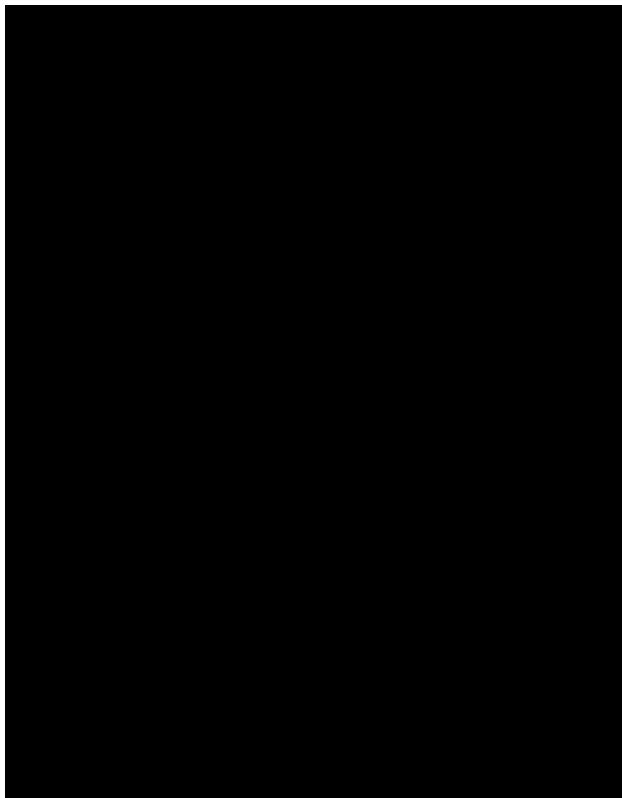


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Jacobs, Kenneth Sydney (*b* 5 October 1917; Justice 1974–79), the elder son of Albert Sydney Jacobs and Sarah Grace Aggs, was born on Sydney's north shore at Gordon, then rural bushland. His childhood centred on his local preparatory school, St John's Anglican church and the cub and scout troops, meeting at the church hall. He was educated at Knox Grammar School and from 1935 at the University of Sydney, residing at St Andrew's College. In 1938, after graduating BA with honours in Latin and Greek, he commenced his LLB and was articled to Duncan Barron.

World War II interrupted his studies. Enlisting in the Australian Imperial Forces in May 1940, he served with the 9th Division in Egypt at the battle of El Alamein in 1942 and in New Guinea in 1943; he was at the landings at Lae and Fin-



Kenneth Jacobs, Justice 1974–79

schhafen. He was then appointed as an intelligence officer. He later said that, after a rather sheltered early life, his army years had enabled him to learn much more about human behaviour, and that this, and the added years, had aided his success at the Bar.

Resuming his law studies in 1945, Jacobs graduated LLB in 1947, with first-class honours and the University Medal. In his last year at law school, he was associate to Justice Leslie Herron, later Chief Justice of NSW. Admitted to the Bar in February 1947 as a pupil of Kenneth Asprey, he quickly developed a general practice, particularly in commercial law, taxation law, and equity, and later in constitutional law. He was junior counsel in the High Court in *Marcus Clark v Commonwealth* (1952), and junior to Barwick before the Privy Council in *Johnson v Commissioner of Stamp Duties* (1956). Thereafter, he appeared increasingly in constitutional cases, mostly as junior to Barwick.

In 1952, he married Eleanor Mary Stewart, née Neal. They had one daughter, Rosemary. Peter Stewart, Jacobs' stepson, was aged six at the time of the marriage.

From 1953 to 1961, Jacobs lectured in equity at the University of Sydney Law School. Even after judicial duties compelled him to relinquish that role, he retained his association with the Law School as patron of the student law society. In 1958, he published his influential work, *The Law of Trusts in NSW* (sixth edition by Roderick Meagher and Gummow, 1997).

As a former student of the Professor of Jurisprudence, Julius Stone, Jacobs had been greatly impressed by Stone's analysis of the doctrine of precedent, which was to influence him throughout his judicial career. In a tribute to Stone's influence, written in 1967, he argued that legal certainty could best be achieved if 'the actual elements which go into the creative choice' were explicitly stated, so that 'the true scope of the decision may be ... directly observed'. His steadfast adherence to this conception, and the tension between the subtlety of his legal reasoning and his unpretentious insistence on 'common sense', were the keys to his judicial method.

In November 1958, Jacobs was appointed a QC and in early 1959 appeared before the Privy Council on briefs returned by Barwick on his appointment as a federal minister. Soon after Jacobs returned from England, the Liberal Party leader in the NSW Parliament asked him to stand for a vacancy in the Legislative Council. The Liberal Party was

divided at the time, and Jacobs failed by one vote to be elected. This was his only foray into politics.

The state Labor government appointed Jacobs as an acting judge of the Supreme Court of NSW in July 1959. In March 1960, he became a judge of that Court, sitting at common law and as an additional Judge in Equity. In 1966, the state Liberal government appointed him to the newly created NSW Court of Appeal, where his colleagues included Walsh and later Mason. Jacobs became its President in 1972.

In 1963, Barwick, as Australia's Minister for External Affairs, had asked Jacobs to accept a three-year appointment as President of the Constitutional Court of Cyprus. The appointment was announced in London, Canberra, and Nicosia—but before it could be implemented, fighting broke out between the Greek and Turkish Cypriots. The constitutional settlement collapsed, and the Constitutional Court never sat again.

Addressing the Australian National University Law Society in May 1968, Jacobs referred ironically to the 'great leap forward' NSW was to make in 1970 by adopting the judicature system of 1875. Questioning the adequacy of that system for 1970, he suggested that this should be the opportunity for 'novel' reforms to aid the pursuit of truth—including the use of expert assessors, procedures compelling parties to provide evidence on oath at an early stage, prior submission of evidence in writing, and limits on cross-examination. He deplored the Australian tendency to treat judges as immune from criticism, suggesting that it reflected 'the "touchiness" of a colonial judiciary rather than the sophistication of a nation grown to nationhood'. The Courts, he said, 'need the full glare of the public spotlight upon them just as parliament and the executive need it, and in a vigorous country one should expect vigorous language.' He also questioned the conventional division of the legal profession, asking why solicitors involved in vast and complex financial transactions and increasing specialisation should still regard the Bar as the 'senior branch' of the profession.

As a Supreme Court judge, Jacobs was best known for his judgments in equity. Among those attracting public attention were his judgment at first instance on the bequest to St Vincent's Hospital from the Resch brewing fortune (*Perpetual Trustee Co v Sisters of Charity* (1966)), and his dissenting judgment in *Barton v Armstrong* (1971), both upheld by the Privy Council (*In re Resch's Will Trusts* (1967); *Barton v Armstrong* (1973)). There were other cases in which his rational and objective approach reflected the more advanced thinking of the day. In *Ex parte McKay; Re Crowe* (1967), his joint judgment with Justice JD Holmes struck down convictions for indecent publications that the High Court later reinstated (*Crowe v Graham* (1968)). In *R v Portolesi* (1973) and *R v Sloane* (1973), Jacobs joined the Chief Justice, John Kerr, in holding that sentencing judges should fix a comparatively short non-parole period, giving the Parole Board the earliest opportunity to consider each case—not so that the period fixed would be automatically accepted, but to permit the body with the best expertise and resources to determine as early as possible whether a prisoner should remain incarcerated, or serve the balance of sentence under supervision outside the prison.

In January 1974, the Whitlam Labor government appointed Jacobs to the High Court. Richard Ackland's article in the

Australian Financial Review of 24 January 1974 was perceptively headed: 'A liberal Liberal fills High Court Bench.'

Upon appointment, Jacobs quickly became involved in the turmoil of litigation surrounding the end of the Whitlam era, including the aftermath of the joint sitting of August 1974 (see *Cormack v Cope* (1974)). In the *PMA Case* (1975), he alone accepted an interpretation of section 57 of the Constitution that would enable the Court to avoid the invidious task of deciding whether the Senate had 'failed to pass a Bill'; in the *Territory Senators Case* (1975), he accepted McTiernan's earlier view that the section 57 procedures were simply not justiciable. Those procedures include an 'expression by the people of their preference in the choice of their elected representatives'; and 'no court in the absence of a clearly conferred power has the right to thwart or interfere with the people's expression of their choice'. His principled yet pragmatic approach to democracy was also evident in his joint judgment with McTiernan in *A-G (Cth); Ex rel McKinlay v Commonwealth* (1975)—agreeing that the words 'chosen by the people' did not require equality in electoral distributions, but insisting that the franchise must be 'wide enough to satisfy the description "popular"'.

In *Viro v The Queen* (1978), he agreed, for his own distinctive reasons, that Privy Council decisions no longer bound the High Court. Where other Justices sought an orderly approach to precedent, Jacobs perceived an anarchic breakdown: 'The law of precedent depends upon ... a hierarchy of courts and now there is no longer a hierarchy.' Similarly, his conclusion that state Supreme Courts should now invariably follow the High Court rested on a subtle conceptual argument about the belated fulfilment of section 73 of the Constitution, proclaiming that 'the High Court is the court of appeal' from those courts.

Though Mason and Jacobs often delivered joint judgments, the *AAP Case* (1975) found them on opposite sides. Jacobs found the impugned appropriation of money valid; Mason did not. Yet their judgments explored the same uncharted areas in an eerily parallel way. Both distinguished a bare appropriation from the actual 'threatened expenditure', the validity of which might be impugned. Both explored a novel range of Commonwealth legislative powers, including the prerogatives encompassed in Commonwealth executive power and the so-called nationhood power. Jacobs added an ingenious but abstruse distinction between the 'incidental power' implied in every grant of legislative power in section 51 of the Constitution (limited to 'incidents of' the primary subject of power), and the 'incidental power' expressly granted by section 51(XXXIX) (extending to what might be done 'incidentally' when legislating on that subject).

In general, his approach to Commonwealth powers reflected a conception of legislative power as 'sovereign' and 'plenary' within its specified areas (see *Berwick v Gray* (1976)). In *Russell v Russell* (1976), he alone would have upheld the challenged provisions of the *Family Law Act* 1975 (Cth) in their entirety. While acknowledging the deep involvement of family law with 'personal and private rights' traditionally left to state law, he countered this with a broad conception of the marriage power in relation to children, bolstered by a sociological understanding of marriage as

primarily concerned with the procreation, nurture, and protection of offspring.

The 1970s witnessed stirrings towards future High Court developments, not only through Murphy's radical challenges to settled understandings, but through the increasing questioning of those understandings by Justices such as Mason, Jacobs, and Stephen. Their gradual, cautious repudiation of Barwick's view of section 92 of the Constitution (see *Interstate trade and commerce*) was both a symptom and a catalyst of change. In the *North Eastern Dairy Case* (1975), Jacobs emphasised that decisions in this area must vary with the 'economic, social and other circumstances' of the community; yet also that such decisions must 'result in a pattern emerging'. He accepted as a unifying thread the distinction between direct and indirect impediments to interstate trade; but argued that a direct impediment would typically involve **discrimination** against interstate trade—sometimes 'gleaned from its express terms', but 'more commonly' from 'its actual operation'. In *Bartter's Farms v Todd* (1978), he identified two factors as crucial: 'the element of discrimination', and the role of section 92 in preventing 'attempts by one unit of a federation ... to give itself and its residents economic advantages over other units of a federation'. The themes of discrimination and protectionism, ultimately to prevail in *Cole v Whitfield* (1988), had clearly been sounded.

Similarly, in *HC Sleigh v SA* (1977), Jacobs sought a coherent pattern in the precedents defining **excise duties** under section 90 of the Constitution. The majority held that a licence fee for retail sales of petrol, calculated by reference to prior sales, was not an 'excise duty', thereby following *Dennis Hotels v Victoria* (1960) and *Dickenson's Arcade v Tasmania* (1974). Jacobs, in a dissenting judgment many found disconcerting at the time but which proved to be prescient, saw those cases as a 'bulge' in the otherwise 'coherent pattern of decision', sending 'a danger signal' of 'strain and distortion'. Unless this tendency was 'curbed', he warned, the Court must face 'the virtual supersession of s90 or a need at some later time to cry halt'.

While stressing that the Court should depart from its own decisions only in response to 'social, economic or political consequences which cannot be tolerated by the nation', he stressed also that 'any case is only authority for what it actually decides'. Later cases may always be decided by *distinguishing* the earlier precedent. He emphasised, in an echo of his tribute to Stone, that the making of such distinctions is a matter of judicial choice, the reasons for which must be explored to clarify the emerging principle. He protested (in language echoed by Deane in *Jaensch v Coffey* (1984) and *SA v O'Shea* (1987)) that his emphasis on judicial choice was not a charter for 'individual predilections ungoverned by authority', since such choices must be guided and limited by 'training, tradition, respect for the opinions of other members of the Court, past and present, and the ordinary intellectual processes of argument'.

Ultimately, Jacobs distinguished *Dennis Hotels* and *Dickenson's Arcade* on the basis later adopted in *Capital Duplicators v ACT (No 2)* (1993) and *Ha v NSW* (1997): namely, that in the original cases 'a concatenation of factors' had allowed the calculation of the licence fee to be treated as 'no more than a

method of quantification of that licence fee and not a tax upon the product dealt with'. That could not be said where the licence was merely 'a mechanism for collection of a tax'.

There was prescience, too, in Jacobs' sensitivity to issues of human rights. His judgment in *R v Quinn; Ex parte Consolidated Foods Corporation* (1977), linking the historical conception of **judicial power** with the basic rights traditionally defended 'by that independent judiciary which is the bulwark of freedom', was a harbinger of the resort to Chapter III of the Constitution for guarantees of **due process** of law. In *Coe v Commonwealth (No 1)* (1979), he foreshadowed the common law argument that ultimately succeeded in *Mabo* (1992); and his exposition of the statutory defence of 'public good' in *Calwell v Ipec Australia* (1975) (see *Defamation law*) foreshadowed the language in which the Court would ultimately discern an implied constitutional freedom of **political communication** (see *Free Speech Cases* (1992)).

Particularly in cases involving trusts (for example, *ANZ Banking Group v National Mutual* (1977); *A-G (Qld); Ex rel Nye v Cathedral Church of Brisbane* (1977)) or land law (see *Commonwealth v Oldfield* (1976); *Housing Commission v San Sebastian* (1978)), Jacobs often gave the leading judgment. In other cases such as *Pigram v A-G (NSW)* (1975), *Equity Trustees Executors & Agency Co v Commissioner of Probate Duties (Vic)* (1976) or *Quadramain v Sevastopol Investments* (1976), his view of equitable principles or commercial realities led him into dissent, and sometimes into sole dissent. Repeatedly in such cases, he appealed to 'a fair and reasonable interpretation' of community experience and business expectations by judges 'representing the community of which they are part' (*Helicopter Sales v Rotor-Work* (1974)), or to 'business sense' and 'substance, not legal form' (*LJ Hooker v WJ Adams Estates* (1977)); or argued that the majority approach was 'unfair and unsatisfactory', whereas his would 'operate more fairly and more in accordance with the business expectations of ordinary men and women' (*Brien v Dwyer* (1978)).

These criteria led him to consistent support for **workers' compensation** claims (see *Dowell Australia v Archdeacon* (1975); *Higgins v Jackson* (1976); *Commonwealth v Muratore* (1978); *Public Trustee v State Energy Commission* (1979))—but also, in taxation cases, to frequent agreement with Barwick in upholding taxpayers' claims (see, for example, *Gauci v FCT* (1975); *FCT v Bidencope* (1978)). Sometimes it was Barwick who agreed with Jacobs (see *Lister Blackstone v FCT* (1976); *Brambles Holdings v FCT* (1977)). Often these results reflected a distinctive approach to **statutory interpretation** and construction of documents, combining scrupulous sensitivity to the nuances of words with insistence on 'rational' or 'common sense' meanings. In *Public Transport Commission v J Murray-More* (1975), where the Court held that an employer liable for workers' compensation could not claim indemnity from another defendant, Jacobs agreed because of 'the impossibility of applying the section coherently' on one construction, and the 'irrationality' of another. In *R v Halton; Ex parte AUS Student Travel* (1978), he rejected a suggested construction because 'it just would not make sense'.

In **tort law**, Jacobs' approach to precedent, and his own long experience in a state jurisdiction, led him to focus scrupulously on the facts of particular cases. In *Caltex Oil v The Dredge 'Willemstad'* (1976), the Court held Caltex enti-

Joint judgments and separate judgments

tled to damages when dredging operations in Botany Bay severed the underwater pipeline from the Caltex refinery to its terminal. Jacobs based the liability on the precise physical circumstances: the severing of the pipeline was a direct physical effect on the plaintiff's property, and all of the consequences arose from the 'physical propinquity' of the terminal and the refinery.

In 1979, it seemed that Jacobs' health would not permit him to sit regularly on the Court for some months. Although he was urged to take leave, his experience as President of the Court of Appeal had made him deeply conscious of the burden placed on other judges when a member of a court is unable to bear his share of the work. Rather than continue as a less than fully effective member of the Court, he retired on 6 April 1979.

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Further Reading

KS Jacobs, 'Lawyers' Reasonings: Some Extra-Judicial Reflections'
(1967) 5 *Syd LR* 425

Jehovah's Witnesses Case (1943). On 17 January 1941, as World War II was being fought overseas, the Governor-General declared the Jehovah's Witnesses, who claimed that 'all organised political bodies were agents of Satan' and who opposed involvement in world political affairs or 'wars between nations', to be 'prejudicial to the defence of the Commonwealth' and to the 'efficient prosecution of the war' under the National Security (Subversive Associations) Regulations 1940. On the same day, police officers moved across Australia to occupy premises belonging to the group.

Within hours, these dramatic events captured newspaper headlines. Reports were filed of bungled raids that had resulted in injury to officers and led to charges of assault and grievous bodily harm. The Jehovah's Witnesses responded by stating that accusations of hampering the war effort were 'malicious and entirely unfounded'.

On 4 September 1941, the Adelaide Company of Jehovah's Witnesses sought an injunction in the High Court to restrain the Commonwealth from continuing or repeating the trespass; they also sought damages. In 1943, before five members of the High Court, with Fullagar as their leading counsel, they contended that the regulations contravened section 116 of the Constitution. This section, an express constitutional right, excludes religious discrimination at Commonwealth level in four distinct ways, including a denial of Commonwealth power to enact legislation for prohibiting 'the free exercise of any religion'.

The High Court had examined section 116 on only one prior occasion. In *Krygger v Williams* (1912), it had defined the provision narrowly, holding that compulsory military training did not intrude upon 'the free exercise of any religion'. Krygger had stated: 'I decline to render military service because it is opposed to the word of God ... Attendance at drill is against my conscience and the will of God.' Griffith responded: 'It may be that a law requiring a man to do an act which his religion forbids would be objectionable on moral grounds, but it does not come within the prohibition of sec 116.' Barton reached the same conclusion, stating that

'this objection is as thin as anything of the kind that has come before us.'

In the *Jehovah's Witnesses Case*, the Court unanimously held that the regulations did not infringe section 116. While the concept of 'religion' for the purposes of the guarantee was construed very widely, the protection actually afforded was minimal. Indeed, the latter conclusion flowed naturally from the former. In the leading judgment of the Court, Latham set out some of the practices that during periods of human history have been regarded as religious, including the 'essentially evil and wicked', such as 'human sacrifice or animal sacrifice'. By including these within the scope of section 116, he was able to reason that the protection offered by the section could not be absolute, or even very broad. This reasoning had particular force where the free exercise of religious belief would threaten ordered government under the Constitution.

Latham found that the regulations could be characterised as 'a law to protect the existence of the community' rather than 'a law "for prohibiting the free exercise of any religion"'. The other Justices also held that section 116 was not infringed by a law that enabled the Commonwealth to suppress persons and bodies prejudicial to the defence of the Commonwealth. As Rich put it: 'Freedom of religion may not be invoked to cloak and disseminate subversive opinions or practices and operations dangerous to the common weal.'

Despite these findings on section 116, the Adelaide Company of Jehovah's Witnesses succeeded in arguing that the regulations were invalid on the ground that they exceeded the scope of the Commonwealth's defence power in section 51(vi) of the Constitution. Describing the regulations as 'arbitrary, capricious and oppressive', the Court found they exceeded 'what was reasonably necessary for the protection of the community and ... the interests of social order'.

The High Court has had few opportunities since the *Jehovah's Witnesses Case* to interpret section 116 (see *Church and state; DOGS Case* (1981); *Kruger v Commonwealth* (1997)). This may be due in part to the fact that attempts at reliance upon the provision have invariably failed. The *Jehovah's Witnesses Case* thus stands as central to a line of authorities in which the religious freedom proclaimed by the Constitution has been judicially narrowed.

Importantly, other recent decisions of the Court concerning minority faiths now exist outside the realm of section 116: see for example, *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* (1983). While the Court has adopted a more protective and sensitive approach to religious freedom in such cases, this has not led the Court to re-examine its decision in the *Jehovah's Witnesses Case*.

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Further Reading

Stephen McLeish, 'Making Sense of Religion and the Constitution: A Fresh Start for Section 116' (1992) 18 *Mon LR* 207
James Richardson, 'Minority Religions, Cults and the Law' (1995)
18 *UQLJ* 183

Joint judgments and separate judgments. Courts decide legal disputes between parties. In so doing, they must frame