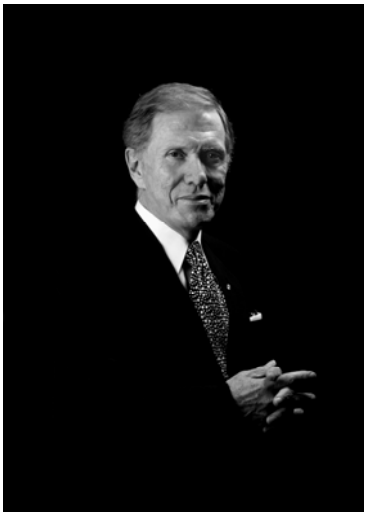
LAWFEST

LEGAL STUDIES CONFERENCE

HOBART, TASMANIA, 22 AUGUST 2008

Q AND A



The Hon Justice Michael Kirby
Justice of the High Court of Australia

I regret missing the Lawfest conference. I was looking forward to my participation, especially as it was my last chance to be there whilst in office as a Justice of the High Court of Australia.

From the very beginning, I was a supporter of teaching legal studies in schools in Australia. At first, there were many opponents. Most fell away over time. Now legal studies is a popular curriculum subject throughout Australia. It is also popular with parents and citizens. It is basically unjust for the law to presume that people know the law but to do nothing about familiarising them with its basic rules and characteristics.

As the next best thing to my presence in Hobart, I set out some answers to the five questions that have been sent to me. With these answers, I send best wishes to the teachers, other staff and students who will be taking part in Lawfest 08.

Q: ***What are the two or three most pivotal High Court decisions that have ensured the due process of the law and natural justice?***

A: There are many such decisions and it is difficult to select a small number. But I would nominate:

- *Dietrich v The Queen* (1992) 177 CLR 292. That was the case that held, in effect, that all persons facing serious criminal charges before courts in Australia are entitled (if they cannot otherwise afford to pay) to be provided by the State with competent legal representation. Otherwise, the courts may stay the prosecution until such representation is provided. This was not the pre-existing rule. One has only to think of the terrible predicament of representing oneself in

a complex criminal trial without a skilled and independent lawyer, to realise how important *Dietrich* was for upholding due process of law for specially vulnerable people;

- *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1. This was the decision that held that the federal legislation to ban the Australian Communist Party and to impose civil penalties on its members was unconstitutional. An attempt at referendum to overturn the decision was rejected by the Australian people in 1951. These two decisions showed great wisdom on the part of the Court. The law matters most when it is called in aid by minorities and unpopular people. It is relatively easy for the law to protect the majority and the popular. This was a point made by Chief Justice Latham in *Adelaide Jehovah's Witnesses v The Commonwealth* (1943) 67 CLR 116 at 124.

Q: ***What are the two or three most pivotal cases that have changed State/Federal relationships and why?***

A: I would name:

- *Adelaide Steamship Co Ltd v Amalgamated Society of Engineers* (1920) 28 CLR 129; 29 CLR 406 (the *Engineers Case*). In this case, the High Court adopted a highly literalistic approach to the understanding of the specific heads of federal power stated in the Constitution. It rejected an earlier interpretive theory that such federal heads of power had to be read down to be compatible with

the overall division of powers within the federation and the abiding role and functions of the States.

- *Australian Workers' Union v The Commonwealth* (2006) 229 CLR 1 (*Work Choices Case*). This is the recent decision that took the principle in the *Engineers' Case* to its extreme (some would say ultimate logic). It upheld the power of the Federal Parliament to enact wide-ranging laws on corporations (ie companies). The flaw in the logic seemed to me to be that if this was what the Constitution meant, there was virtually no need for the special and highly particular legislative power with respect to industrial relations disputes contained in s 51(xxxv) of the Constitution. Effectively, the *Work Choices Case* shifts a huge potential of lawmaking from State regulation to federal regulation, so long as the law can be expressed in terms of regulating corporations. Accepting that most economic and social activity today is performed by corporations, this, in turn, shifts a huge mass of regulatory power from the States to the Commonwealth. Australians need to rediscover the protective virtues and innovative potential of the federal system of government whilst continuing to build, in appropriate areas, a strong central lawmaking power.

Q: ***Should the role of the judge be modified so that they have a more active role in the adversary system?***

A: Over recent decades judges have been taking a greater part, in countries like Australia, in the control of court proceedings. They do so in pre-hearing directions; in greater time management during the trial; and in procedures such as mediation and arbitration prior to judgment. However, there is a limit. It arises especially in criminal proceedings. It is very important to understand that in our system, criminal proceedings are accusatorial. That means that, normally, the accused does not have to prove anything, least of all their innocence. It is for the Crown (or State) to prove the guilt of the accused. This is a beneficial system of our administration of criminal justice. It keeps the State in check. It restricts the State's intervention in our lives. It is an important protection for individual liberty. The spectre of a judge in court as a partisan or on a bandwagon, enthusiastic to search our the truth of every proposition, is not one which has found favour in the English legal tradition that we have generally followed in Australia. It is, in fact, the procedure of the Star Chamber which was so oppressive that it greatly influenced later procedures over the ensuing centuries.

This is not to say that judges cannot take an active role to move cases along; to limit pointless questioning; to keep lawyers to timetables; and generally to control procedures - especially in civil trials. But even here, it is important to realise that the ultimate function of courts in our tradition is to secure outcomes that are just and according to law. This means that, where there are defaults, because they are usually defaults of the lawyer rather

than the litigant, courts may look behind the court rules and make sure that no substantive injustice is being done in the name of efficiency. Sometimes law and justice are not particularly efficient. But they have other virtues and it is the duty of judges to uphold them. See eg *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 167-173.

One of the big questions in the future will be the shift of case decision-making from open courts and independent judges to closed negotiations and mediators acting behind closed doors. In court, litigants should, in the theory of the law, be equal in power. Yet in private negotiation, the power balances may be quite different. We have to keep our eye on the haemorrhage of decision-making from courts into private dispute resolution.

Q: ***What are the highlights of the High Court since Justice Kirby was appointed?***

A: I regard every day as a highlight. Cases do not tend to come to the High Court unless they are important or debatable. That is what the system of special leave ensures.

Within the High Court one innovation of the past ten years has been the increased discussion amongst the Justices about cases, both during the hearing and after each sitting of the Court. This has enhanced the meeting of minds and, so far as possible, agreement or at least identification of the critical areas of dispute.

There have been large cases and important principles established during the past thirteen years of my service on the Court.

Amongst the decisions I would mention the *Wik* case (1996) 187 CLR 1 (which extended the principle of the *Mabo* decision (1992) 175 CLR 1 and upheld the right of indigenous people in Australia to enjoy limited legal rights to their traditional lands. Another important decision was *Plaintiff S 157/2002 v The Commonwealth* (2003) 211 CLR 476 at 513 [103]. This upheld the constitutional centrality of the power of judicial review contained in the Constitution itself, s 75(v). The constitutional writs cannot ultimately be overridden or qualified by parliamentary legislation. This is an important entrenched guarantee for the rule of law in Australia. There have been disappointments, amongst which I would include the *Work Choices* case (above); *Combet v The Commonwealth* (2005) 224 CLR 494 (the Electoral Advertising case); and *White v Director of Military Prosecutions* (2007) 81 ALJR 1259 (military justice). On the other hand, there have been decisions that I regard as good, and wise and forward-looking. Amongst these I would certainly include *Roach v Electoral Commission* (2007) 81 ALJR 1830 (upholding the right of short-term prisoners to vote in federal elections).

Q: ***What advice would you give students who are dreaming about becoming a judge?***

A: When I was in 4th class at school, at the age of 8, a careers adviser asked what I wanted to be when I grew up. I said "Either a judge or a bishop". One way or other, I was determined to get into fancy dress. To aspire to be a judge is a worthy goal. To be

a member of a court that is uncorrupted, fiercely independent, learned, industrious and widely respected, is a great vocation. Everyone has to have a dream. However, not everyone would be suited for judicial life. It involves years of devoted study; long hours of relentless concentration; great patience; an inbuilt sense of courtesy; devotion to the law and to finding just outcomes wherever possible. Judicial decision-makers work in Local Courts as magistrates; in District Courts; in State Supreme Courts; in Federal Courts and in the High Court of Australia. There are also now many tribunals and increasing numbers of Australians take part in courts and tribunals overseas. To have the power and responsibility of decision-making is often a burden, but an uplifting one. I have greatly enjoyed my years as a judge. I will leave my post as the longest serving judge in Australia. To those students who are dreaming of pursuing a similar life, I send a message of encouragement. It is a noble aspiration, a great responsibility, intensely interesting but hugely demanding. If you think you are up to those demands, study hard, strive to be successful and you too could possibly work for part of your life as a judge. But do not leave your commonsense behind. Keep your feet on the ground. And remember that a successful life means more than success at work.

I send greetings and best wishes to you all.

Justice Michael Kirby
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