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LEGAL ACTION GROUP

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AUSTRALIA: WHERE TO NEXT?



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THE HON JUSTICE MICHAEL KIRBY CMG
PRESIDENT OF THE COURT OF APPEAL OF NEW SOUTH WALES

Look up my people
The dawn is breaking
The world is waking
To a new bright day
Where none defame us
No restriction tame us
No colour shame us
Nor sneer dismay

The Bicentenary of European settlement in Australia provides us with the opportunity, and the obligation, to reflect upon the achievements and failures of the past 200 years.

I am writing this contribution in July 1988. It is exactly 200 years ago this month that the first civil case was decided in Australia in a court in some ways similar to those now found throughout the country.

The case bears some instruction for the future. It was a suit brought by two convicts (Mr and Mrs Cable) against Duncan Sinclair, the Master of the ship "Alexander". The ship was one of the vessels of the First Fleet. The Cables were

convicts. Before their departure from England, wellwishers had deposited with the Captain a number of goods to be handed over to them on their arrival in Botany Bay. The goods had been lost or stolen. The Cables brought their action claiming recovery of the goods or their value. The Civil Court, allowed for in the Instructions issued to Governor Phillip, convened for the first time, on 1 July 1788. The circumstances were rustic. Any skilled lawyer would have pleaded misprison of felony as a complete defence to the action by the Cables.

As Darcy Dugan was to discover nearly 190 years later, no convicted felons (as the Cables almost certainly were because of their transportation) could bring a suit upon a civil claim in a court of law. Perhaps in recognition of this fact, the description of the Cables by their previous occupations, was removed from the court record where it had first been written. Captain Sinclair was not, apparently, well advised. He did not plead misprison. The Judge Advocate found for the Cables. He awarded them £20 in damages. The record does not reveal whether Captain Sinclair paid up.

This case has been criticised by various legal commentators. It has been said to demonstrate the faults of a primitive legal system which did not attend to the relevant and applicable legal principles.

However, Sir Victor Windeyer, in an essay in the University of Tasmania Law Review suggests the contrary. He points out that misprison of felony might not have been thought apt for application in the primitive circumstances of

the infant colony at Farm Cove. He also claims that this first case demonstrates the transplantation of the Rule of Law to Australia with the convicts. Certainly, it shows that the "underdog" could bring a case and win. It also shows a degree of independence in the Civil Court, so that the seemingly powerful Master of one of the vessels of the First Fleet could lose and could be ordered to pay compensation to a convict. £20 in those days would have been a very substantial sum. The very bringing of the action also shows that Mr and Mrs Cable had sufficient confidence in the fairness of the Tribunal, and in the fact that they would not be victimised for making their claim - that they should bring an action. It is an instructive case. From it, and from the outcome, we can derive some satisfaction and encouragement.

Since that far away day, courts have been established, the legal profession has grown and flourished, legislatures have developed, the colonies have been federated, many wrongs have been done - but much good has been done also. Ours is still a society in which governments can be peacefully changed. Judges are independent. Bureaucrats are accountable. Reform of the law is an ideal almost universally accepted.

This is not to say that we can be self-satisfied about the past 200 years. If we were to list the priorities for lawyers and citizens of the years immediately ahead, they would certainly include:

- * Attention to the removal of the great peril of nuclear catastrophe and the need to bring the

powerful weapons of annihilation under effective international control.

- * The need in Australia to reform and modernise the Constitution and to devise means so that that process can involve the people regularly in referenda and not depend (as it has so heavily in the past) on the chancy work of unelected judges construing the language of the document of 1901.
- * There is also a need to breathe more life into the parliamentary institution so that it becomes, as the ideal envisages, a true assembly of the representatives of the people: and not a rubber stamp of decisions made elsewhere.
- * There is a need in Australia to improve educational retention, to encourage the development of new institutions of learning and to promote and encourage greater education, particularly in science and technology.
- * There is also a need, in Australia, to encourage greater diversity in the ownership of the media. Ownership of the print media is now more heavily concentrated than in virtually any other comparable country. Three or four groups have power over the information distributed to the people of Australia and this, despite the technology which should promote diversity of media outlets.
- * The ideal of multiculturalism is preached but not

always practised. We must build on this ideal for if it cannot succeed in a country such as Australia, the hope for peace in the world must be a flimsy one.

* Above all, in Australia, it is essential that we reach an appropriate accommodation with the indigenous people of this land - and their descendants.

If the Bicentenary has done nothing else, it has focused our attention on the plight of Aboriginal Australia. In education, housing and public health, the Aboriginal people present challenges which our country should be able to solve. In the criminal justice system every lawyer must be aware of the failure of our society signalled by the gross disproportion in the number of Aborigines before criminal courts and in prisons. Aboriginal deaths in custody represent just the tip of the iceberg of the interaction between Australian criminal law and the Aboriginal people. This is an area of special responsibility for lawyers. It represents a challenge to us. It cannot be wished away. It cannot be remedied by a few slick reforms of the law let alone speeches. The economic and social causes must be tackled. Lawyers as the educated leaders of Australia must be in the vanguard of Australians with a social conscience to repair this special wrong of the last 200 years.

See plain the promise
Dark freedom lover
Night's nearly over
And though long the climb

New rights will greet us
New mateship meet us
And joy complete us
In the new dreamtime
To our fathers' fathers
The pain, the sorrow.
To our children's children
The glad tomorrow.

Oodgeroo, formerly Kath Walker.
