THE LAW BOOK COMPANY LIMITED

THE LAWS OF AUSTRALIA

LAUNCH FUNCTION 4 AUGUST 1993

GRAND HYATT MELBOURNE

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The Hon. Justice Michael Kirby A.C., C.M.G.*

At the launching of *the Laws of Australia* on 4 August 1993 the President of the New South Wales Court of Appeal, the Honourable Justice Michael Kirby A.C., C.M.G., spoke of the emerging independence of the Australian legal system. His paper is with his kind permission reproduced below.

* President of the Court of Appeal of New South Wales. Chairman of the Executive Committee of the International Commission of Jurists.

A NEW SERVICE

I AM HONOURED TO PARTICIPATE IN THIS launch of *The Laws of Australia*. By any account it is a bold enterprise of legal publication. Perhaps it is the boldest in our country's history. The Law Book Company, as publisher, and the many editors and authors from all parts of our contintental country, are to be congratulated upon their contributions: some made, some still promised, to this remarkable work.

It is intended that the series will cover, in one publication, all significant areas of Australian law.

Every practising lawyer and judge knows the difficulties which are faced in quickly finding the law, absorbing its principles and requirements and offering advice to the anxious client or a decision to the nervous litigant. Over four hundred Australian lawyers are taking part in this enterprise. They have been chosen with exquisite care to ensure that their contributions will be conceptual. They will take this series beyond the potted versions of decided cases. They will seek to extrapolate the principles from the myriad of instances which always threaten to obscure them. Theirs is the task, on behalf of thousands of fellow lawyers and millions of fellow citizens, to stand back from the topic in hand. To synthesise the emerging rules. And to write with clarity and grace legal prose which will endure in a time of restless change.

My study of the sample chapters which the publisher has put together suggests that the authors have been chosen well. Needless to say, the conviction that this was so was reinforced by noting that, in a sample chapter on error of law in "Administrative Law" under the heading "A useful definition of jurisdiction," a humble effort of my own was presented to assist the reader.[1] The chapter on "Injunctions," included in the sample, deals in a lively way with that ever expanding remedy. The author notes the development of the Mareva injunction. He calls it "a flexible remedy". He has spared readers the calumny heaped upon this Australian adaptation of an English invention by Justice R. P. Meagher of my Court. Those who are interested will find their way to that topic[2] Every time he is called upon to consider the Mareva injunction, Justice Meagher feigns the reluctant duty of a protesting innocent in the manacles of legal authority. Medusa — like he applies the law. But reluctantly. And with endless protest, in the hope that one day reason might prevail and Lord Eldon with his unaltered Equity will return in full splendour to Australian law.

The most creative step of the new series is in line with the effort towards conceptual presentation of the law. The 200 titles of the *Australian Digest*, and the even greater number of sub-headings found in legal indexes and other works, cut the law into tiny fragments. They present the risk that the great mosaic — and even its principal sections — will not be seen in their correct relationships. Instead, this new work adopts 35 titles only. This mode of organisation will help the user to find, in convenient proximity, all or most of the legal principles which have to be considered to solve the problem at hand.

Our marvellous system of law — inherited from England — has many great strengths. It also has weaknesses. Of the weaknesses of substance, the greatest is the propensity which is at once the reason for its success in governing a quarter of the world's people. It is a highly practical system of law derived, still in large measure, by analogous reasoning from the solutions offered in earlier like cases to provide the solutions for new problems in later times. I see in my own Court the difficulty of getting the noses of the lawyers out of the books where they can read passages written long ago on facts only marginally similar to the case in hand. Seeing the immediate legal problem in its conceptual setting remains the greatest challenge of substance which the Common Law system presents to its practitioners.

It is here, I hope, that *The Laws of Australia* will help. By conceptual analysis of the mass of detail and by standing back from the particular cases to perceive the emerging themes, it is hoped that the series will reveal the tapestry of Australian law in all of its variety: displaying strengths, revealing weaknesses.

If this great object is achieved we may see yet another step towards harmonisation of the two enduring international systems of law: derived from the Common Law of England and the Civil Law of France. Already we see the systems moving together as the Common Law judge (in Australia not least) becomes a more active inquisitor in the conduct and management of the case. I have been known to ask a few questions myself in the Court of Appeal. Even more fundamental is the search by the Common Law for the principled concepts that are the strength of the Civil Law and Code systems. I see *The Laws of Australia* as potentially offering an important contribution to that search: lifting the sights of judges and lawyers in this country so that they will see the legal system in more principled terms. And less as a collection of isolated solutions to particular problems which might, one day, come together as if by oversight in a unified legal concept.

Writing a judgment, pleading a case or advising a client it is essential to have the framework of legal principle clearly in mind. It is my hope that *The Laws of Australia* will facilitate this vital process of lawyering. If that hope is fulfilled, the result will be a nation of lawyers who think, speak and write more simply and clearly and whose minds are free from captivation by the thought that "there is a case on this somewhere". Instead, they will think of the principles to which the cases are but the handmaidens.

THE APRON STRINGS

The other idea of this work which is so attractive is the preference which is being given to Australian authority. I am not one of those who is prepared to adopt an anti-English approach to the law (or anything else) because of the current fashion or dimly-perceived and half-remembered slights. It has become all too modish, on both sides of the earth, to challenge the relationship between Australia and Britain. Our Prime Minister was reported as having

disdained the preferred flag of Australia with the instruction: "Give that thing to one of your Pommy mates". On the other hand, the *Daily Telegraph* in London was recently reported (perhaps not wholly in jest) as suggesting that the English would not want Noeline Donaher as a mother, declaring:

"Two hemispheres separate us . . . and that's not a hemisphere too many".[3]

The *Daily Star* in London went a step further, suggesting that *Sylvania Waters* continues to demonstrate that too much sunshine in Australia can "seriously affect your brain".[4]

Such exchanges of pleasantries are not new between Australians and the English. Justice John Bryson recently gave a witty and highly readable account of the ambivalent relationship between our legal system and that of England. He described the mood of it:

"Australian history as taught in pubs seethes with resentment against Britain. A strange feeling against a country which has left our internal affairs to our own devices since about 1855. There is a feeling that Britain did not do enough for us, poorly focused as to when and how, and why anything should have been done at all. Where the relationship is ambiguous, it is not really possible for its effects to be satisfactory; some part of the expectations may lead to disappointment somewhere. Ambiguity was found everywhere in Australia's relationship with Britain for generations. Obviously apart, but in some ways still together. That age has passed."[5]

Considering our many debts (and in particular to the laws of England) we should never forget our precious legacy of constitutional stability, the rule of law, jury trial, and basic liberties. I would have added judicial independence and tenure to that list. But important derogations,[6] most recently and disgracefully in this State, have put that inherited tradition at risk, at least for the State judiciary in Australia.[7]

In considering what we owe to the Common Law of England, we should also remember that our formal link to that system, through the Privy Council, kept our country tied, in its legal infancy, to what was, undoubtedly, one of the foremost legal centres of the world. At times when our own intellectual resources were strictly limited, the link was a mighty stimulus against parochialism. It was a steady and constant reminder of legal basics enjoyed in common by many societies with unmistakable imperfections but important strengths too.[8]

Nevertheless, the time came when it was appropriate to sever the formal links. The exact moment of Australia's complete legal independence is unclear. It was probably some time in the 1930s or early 1940s. In the way of these things, it was completed by the gradual elimination of Privy Council appeals and finally when the Queen came to Canberra to sign into law, as Queen of Australia, the *Australia Acts* 1986. As Justice Bryson laconically observes:

". . . It was a rather quiet affair, poor stuff for legends of independence achieved in struggle".[9]

Lawyers' minds are not so easily released from the habits of a lifetime. Still in my Court (and occasionally even in Australian judgments) we see the English Court of Appeal described, with the definite article, as "The" Court of Appeal. English authority continues to be quoted before Australian authority. English precedents are still given greater weight by many judges and lawyers than New Zealand or Canadian. The reasons for these enduring legacies are easy to see. They include habit and the possession of report series left over from times when Australian law was indeed bound by the Privy Council to the chariot of English authority.

In considering what we owe to the Common Law of England, we should also remember that our formal link to that system, through the Privy Council, kept our country tied, in its legal infancy, to what was, undoubtedly, one of the foremost legal centres of the world.

The High Court of Australia has now nudged the courts of this country to a new independence.[10] It accepts English, like other foreign legal material, as a priceless legal legacy of our membership of the great family of Common Law countries. But with no higher authority than that of any other country. Getting that message through to Australia's judges and lawyers is taking an awfully long time. Perhaps, as one Lord Chancellor said, it takes 20 years (the peak working life of a lawyer) to rid the system of old heresies. Lawyers, being often creatures of habit and not infrequently conservative, remain for too long the captives of their law school notes and the theories of their post-adolescent teachers.

My principal hope for *The Laws of Australia* is that the series will accelerate the perfectly natural and highly desirable process of judicial and legal independence. It is not enough to be independent by statute and on paper bearing the Queen's name. We must also be independent in our minds. Far

from slamming the door on Britain, this means opening the door of the treasure house of Australian law and peering further into the great systems of the Common Law — in Canada, New Zealand, the United States, Ireland, India and other newer countries of the Commonwealth such as Singapore, Malaysia and (whilst it is still with us) Hong Kong.

In Australia, we have all too often looked to England alone. We have been ignorant of the decisions of other States of our own country. The advent of *The Laws of Australia* and the increasing mastery of information technology should reverse this shameful neglect of the legal material systems of our own nation. Whereas in the past we often looked first to *Halsbury's Laws of England* for the encyclopaedic principles of the law, in future we will look to *The Laws of Australia*. Whereas in the past we were so blinded by the legal minds at work on The Strand and in Whitehall, in future we will have a greater sense of comradeship with lawyers in Australia and in other lands, sometimes with societies having closer similarities to our own.

I fear that, for this process to fully succeed, it will be necessary for a generation of lawyers to pass on. In this sense *The Laws of Australia* come none too soon. They appear at an important moment of legal and constitutional reappraisal. It is less astonishing that this mighty work of publication has been put together now than that it has taken two centuries of Australian law for it to come to pass.

CHANGES IN THE WIND

There are many problems which the publisher and editors will have to grapple with as this work proceeds. Its inter-relationship with the new information technology and the cost and inconvenience of updates is clearly one. The avoidance of duplication between *The Laws of Australia* and the *Australian Digest* is another. Maintaining the evenness of the quality of chapters of the work penned by so many hands is yet another. The maintenance of a high standard of expertise with an appropriate level of written simplicity demands great judgment and the avoidance of any endeavour to duplicate the more detailed works of text writers or the scribblings of law review essayists.

The impact of statute law continues to grow. A New Zealand judge recently lamented that such was its erosion of the Common Law that judicial life threatened to become tedious as the judges were increasingly consigned to the mechanical task of verbal interpretation.[11] Much in demand will be the chapter of *The Laws* which deals with "Statutory Interpretation". With the multitude of statutory enactments and the plethora of local variations, it will always be important for lawyers in Australia to check carefully and keep up to date with the doings of their many Parliaments — rapacious as they are of forests of newsprint.

Perhaps the greatest challenge for *The Laws* will be to keep up to date with the changes of fundamental legal principle. In the past two years, since this series was launched, we have seen in Australia a dazzling galaxy of decisions of the High Court which have removed from Australian law things long taken to be settled or found in that law things long taken to be absent — all by judicial decision. I refer, only by way of example, to the following:

- the effective reformulation of the principle of freedom of interstate trade and commerce in *Cole* v. *Whitfield*;[12]
- the reformulation of privity of contract in *Trident General Insurance Co. Ltd.* v. *McNiece Bros Ltd.*;[13]
- the abolition of the presumption of consent by a wife to sexual intercourse (rape) within marriage in *The Queen* v. *L*;[14]
- the explosion of the doctrine of the Common Law that Australia was *terra nullius* when first occupied by European settlers and the declaration of continuing rights to native title in *Mabo* v. *Queensland*;[15]
- the declaration that the rule precluding the recovery of money paid under a mistake of law should no longer be held to form part of the law of Australia in *David Securities Pty Ltd* v. *Commonwealth Bank of Australia*;[16]
- the discovery of implied constitutional freedoms to discuss public and political affairs and to criticise federal institutions necessarily imported into the structure and language of the Australian Constitution, as stated in the *Australian Capital Television case*[17] and reinforced in the *Nationwide News case*;[18]
- the rejection of the Bolam principle for the liability of medical practitioners in *Rogers* v. *Whitaker*;[19] and
- the holding that an accused person, denied legal representation in a criminal trial, may, in some circumstances, suffer such a miscarriage of justice as to require the stay be granted or a conviction to be quashed. See *Dietrich* v. *Queen*.[20]

These decisions have been laced with peppery judicial dissents. Some have produced unusually sharp public commentary. One decision, requiring judicial warnings of the dangers of convicting accused persons on the unrecorded and uncorroborated verbal statements of police,[21] was even expressed to be prospective in its operation. This is something that may lead to occasional injustice[22] and is certainly a novel judicial development with large portents for the future.

Perhaps these changes merely reflect the failure of earlier generations of judges in Australia to look afresh at judge-made law inherited from England and to consider, from an Australian perspective, the

suitability of English legal doctrine for importation into our rather different community. Hitherto there was resistance to such variation.[23] But in the new mood of independence of the legal mind much more is expected of Australian jurists.

The Laws of Australia will therefore have to keep on its toes to remain up to date with the changing fabric of our law. Ours is not the law of the Medes and Persians, set in stone. Our laws are constantly changing, including in fundamentals. This too emphasises the need to replace hard-copy encyclopaedias with loose-leaf editions and electronic updates. Only in this way will lawyers of the future be sure that the advice they are giving is safely accurate.

At a time when it is specially fashionable to curse Australia's lawyers and describe the judges as "pissants" (as one Federal politician did recently) it is as well to put the criticisms — sometimes warranted, often not — in perspective.

RE-DEDICATING TO LEGAL RENEWAL

Within the last fortnight I have visited Malawi and Cambodia. In Malawi, I took part with the judges of that country in the process of reconciliation which, it is hoped, will convert it peacefully from a One-Party State, with a life President, to a true democracy — the balance held by a courageous and independent judiciary. In Cambodia, I was engaged in a course of training of the judiciary. Most of my pupils were teachers. Pol Pot and his regime exterminated the judges and lawyers and destroyed the rule of law.

By the great lake which once we called Nyassa, and stumbling over the ruins of Angkor, I had moments to reflect upon wonderful blessings of our judicial and legal system in Australia. At a time when it is specially fashionable to curse Australia's lawyers and describe the judges as "pissants" (as one Federal politician did recently) it is as well to put the criticisms — sometimes warranted, often not — in perspective. And to remember our many legal blessings. And to rededicate ourselves to legal renewal in our unique country with its happy combination of unbroken legality and multi-cultural challenge for the future.

As we contemplate the next century and the geographical place of Australia in its region and the world, the advantages we enjoy certainly include a dutiful and honest judiciary and a highly-trained and disciplined legal profession. *The Laws of Australia* will, it is hoped, bring the basic principles of our system of law — inherited and locally made — to the fingertips of the judges and lawyers. But also to the aid of other experts and ordinary citizens who need to know in clear terms what the law is.

The fiction that everyone is deemed to know the law may have been abandoned. But we can certainly do much more to bring the law's principles to ready notice. By this venture, the publisher and authors have made an important contribution to the rule of law itself. They will also have contributed to the process of reform and community awareness about the law. These are most worthy objectives. I am therefore particularly glad to be associated with the launch. May this venture contribute to our greater knowledge, throughout the continent, of the treasury of Australian law. May it reinforce our nation's commitment to a government of laws, not of power.

NOTES

1. See Ch. 2.4 *Judicial Review of Judicial Review of Administrative Action [90]* referring to *Reischauer v. Knoblanche* (1987) 10 N.S.W.L.R. 40 (CA).
2. See e.g. *Paterson* v. *BTR Engineering (Aust.) Pty. Ltd. & Ors* (1989) 18 N.S.W.L.R. 319 (CA), 326. See also now *Reid* v. *Howard & Ors*, Court of Appeal (N.S.W.) unreported, 29 July 1993 per Meagher L.A.
3. As quoted H. O'Neill, "Bush Queen Noeline" in *Sydney Morning Herald, The Guide*, 28 July 1993.
4. *Ibid.*
5. J. Bryson, "Australian Law and English Sources" (1993) 10 *Aust Bar Rev.* 93 at 107f.
6. See e.g. *Attorney-General (N.S.W.)* v. *Quin* (1990) 170 C.L.R. 1; Cf. *Macrea* v. *Attorney-General (N.S.W.)* (1987) 9 N.S.W.L.R. 268.
7. See M.D. Kirby, "A disgraceful blow to judical independence". in (1993) 5 J.O.B. 41 Cf. M.D. Kirby, "the Removal of Justice Staples and the Silent Forces of Industrial Relations" [1989] J.I.R. 334.
8. See F.C. Hutley, "The legal traditions of Australia as contrasted with those of the United States" (1981) 55 A.L.J. 63, 69.
9. See J. Bryson, *op. cit.*, n.5, 107.
10. See *Cook* v. *Cook* (1986) 162 C.L.R. 376, 390.
11. See Mr. Justice Williams, "Enlivening the law" [1992] N.Z.L.J. 288.
12. (1988) 165 C.L.R. 360.
13. (1988) 165 C.L.R. 107.
14. (1992) 66 A.L.J.R. 36 (HC).
15. (1992) 175 C.L.R. 1; A.L.J.R. 408 (HC).
16. (1992) 66 A.L.J.R. 768 (HC).
17. (1992) 66 A.L.J.R. 695 (HC).
18. (1992) 66 A.L.J.R. 658 (HC).
19. (1992) 67 A.L.J.R. 44 (HC).
20. (1992) 67 A.L.JR. 1 (HC).
21. *McKinney* v. *The Queen* (1991) 171 C.L.R .468.
22. See e.g. *G. Savvas* v. *The Queen* (1991) 55 A. Crim. R. 241 (N.S.W.CCA).
23. See *State Government Insurance Commission* v. *Trigwell* (1979) C.L.R. 617, 633.