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Justice Michael Kirby—legal departures

BRIEF **Justice Kirby was appointed the first chairman of the Australian Law Reform Commission in 1974. He is currently the president of the Court of Appeal of the Supreme Court of New South Wales, appointed in 1984 by the NSW Wran government. Justice Kirby is also widely recognised for his international work on human rights. In recognition of his services to the law and law reform, he was appointed a Companion of the Order of St Michael and St George in 1983 and later, in 1991, a Companion of the Order of Australia. Justice Kirby has made a large contribution as a community educator and has endeavoured to open up the law to public scrutiny. Sydney lawyer Bruce Donald spoke to Justice Kirby for Company Director. The following are edited excerpts.**

The Equiticorp case involved the question of the responsibility of a director vis-a-vis a group of companies. As the dissenting judge, do you think you were swimming against the tide which is trying to move away from the High Court's traditional view that each company is a separate entity?

My decision expresses my reasons and I can't get into the detail of the case. But I don't believe that we should get far away from the fundamental principle, which is that each company is a separate entity. If parliament wants to take cognisance of the structure of companies, and it takes into account the fact that there may be a number of companies having associations, let parliament do it.

The company was one of the most brilliant creations of

the English legal system, but it is built upon a price—that each company has directors and the directors owe duties to their shareholders, and that they must be held to the mark in terms of their obligations.

Directors in certain circumstances, particularly as risks of insolvency loom, owe duties to take into account the position of the creditors to the company.

Isn't perhaps the key to resolving this to be more cognisant of the director's obligations even well before insolvency, even in the ordinary course of business, towards the creditors of the group of companies?

Well, certainly I would agree that obligations should be taken into account of the general way of creditors—not only in a group situation but in the case of the stand-alone company. I have some hesitation in tying it down to a day-by-day consideration of the obligations to creditors because the object of the corporation is to make money and to take risks, and we've got to get a nice balance in Australia between the strictures of company law on the one hand and the encouragement of entrepreneurial risk taking on the other. We seem to be ambivalent about the first within the law and we seem to be only partly successful about the second within business.

I think it's the disharmony of these principles—perhaps the failure to rethink the principles which have been around now for 150 years—that lies at the heart of some of the uncertainty within the law and the differences among judges within the law.

Why can't judges be more proactive in the management of cases? Is it time to reconsider the adversarial system?

My understanding is that while that may be a complaint in some places and in some areas of the law, it hasn't typically been the complaint in the corporations area of New South Wales. We've had as judges involved in the commercial division people who are supremely proactive, even to the point of gaining for themselves fearsome reputations in the legal profession.

But we've got to perform this so-called proactive role in harmony with the fact that people come to court not for another corporator or another commercial person, but for a neutral decision maker who's trained in the disciplines of the law and who is striving constantly to be just. That does require a degree of removal from the smell of battle, and not only the actuality but the appearance of justice and the sense of neutrality. The risk of too much proactive involvement by the judge is that the judge may lose the mantle of justice and at least appear in the eyes of the litigants to take the cause of one of the parties.

In the Spedley case we've seen a cutback in inquiry into legal professional privilege and also seen in the Estate Mortgage **investigations the use of power to compel, to gather information which then is subsequently used in civil actions. Are these the essential responses to the debacle of the 1980s or are they matters of serious reduction in the protection to business people?**

Both. They are a reaction to the shocking greed and public loss of faith in the corporation that resulted from the events of the 1980s, which still linger, and also they do involve important departures from fundamental principles in international covenants in civil and political rights—which Australia is a party to—guaranteeing the right of a person against self-incrimination. I must say I'm rather resistant to the erosion of the fundamental right against self-incrimination; I said as much in the case of Yuill. People should not be forced to incriminate themselves out of their own mouth. It's the modern version of torture by the rack.

Incriminating themselves from their own mouths or their own documents? Is there a relevant distinction?

I think there is a relevant distinction. One has an objective life that exists externally to the person, the other is an obligation to impose upon the will, individuality and integrity of the suspect. It's one thing to get at the evidence which pre-exists and it's another to create evidence, and I think there's a valid distinction.

Getting back to the corporate structure. One of the vexing issues is the position of the minority shareholders as corporate rearrangements regularly occupy the corporate world. Generally speaking the policy in our legal system has been that minorities are there to be protected.

The practicalities [of removing minorities] in particular are the tax benefits and the tremendous market advantage. If less than 10 per cent hold out against the company which wishes to acquire them, they are in a marvellous position from the point of view of selling their interest. Judges are not ignorant of these practicalities.

But as to the general position of minority shareholders, I have been sitting here for almost 10 years now and I've seen some pretty terrible cases of oppression against minorities. This is a matter of balancing on the one hand the firm control and direction of corporations against the fact that corporations are mini-democracies and sometimes minority shareholders can be the clarion for honesty and integrity in the dealing with the company's funds.

Such calls can sometimes cause intense irritation to the entrepreneurial directors who want to go about with the minimum possible interference. But companies don't belong to directors, directors belong to companies, and I think the democratic running of companies has been generally speaking beneficial. I'm not at all sure the level of inconvenience that's caused warrants a major change.

Isn't it time to develop a proper structure whereby the courts are much freer to spread the cost burdens across the company?

Costs are at the discretion of judges, but the general expectation is that if you lose you'll bear the costs. I would not myself be averse to the notion that where someone has lost, and the claim has been a good one, contributing to the good governance of the company, that the judge should in the exercise of the discretion, say that this is a proper cost on the governance of the company. I believe that this is sometimes done. However, the mind of judges and lawyers is by and large set in the rule that if you win you get your party-party costs.

One of the huge costs to business is that there are nine legal systems in Australia for a fairly small population. Can the Australian business community keep on affording this?

Well, this can be answered at two levels. At the level of business I think there is a legitimate question, and it's necessary for us

to move to greater uniformity and to the greater use of the undoubted federal power. We have been seeing this and but for the decision of the High Court we may well have seen a total federal takeover by single legislation of the whole area of the corporations law. That foundered on the rock of the constitution with Justice Dean writing a powerful dissent.

There is still a tremendous power in the Commonwealth. A lot is being done for example in the area of seeking to get uniformity in licences and the regulation of business. I applaud that. I think that that is desirable. My work in the Law Reform Commission told me that there is difficulty in getting agreement between jurisdictions in Australia, territorialism is strong and the surrender of jurisdiction is resisted.

When I started out my journey as a law reform commissioner I believed the solution to all problems lay in Canberra. As I have grown older and wiser and gained more experience in the bureaucracy and in the utility of federation, I am not so convinced. Federation allows us to experiment, to demonstrate utility of movement and to take steps cautiously jurisdiction by jurisdiction. So that there is a utility in the federal system as well as in everything else which divides up power, and in the 21st century with the technology and the organisation of concentrated power that is not a bad thing.

I realise of course that it is inconvenient to business. I believe it should be doing more to reduce that inconvenience, including in the court, where I believe there should be greater knowledge of and willingness to work towards uniform decisions between different courts of Australia with the same statute.

But I wouldn't condemn out of hand the federal system—it has utility aiding creativity and advancement of the law which is not always appreciated by Australian lawyers.

The law is siphoning off from the school system the best and the brightest, yet the law doesn't create wealth. It feeds off other people's wealth. So shouldn't it be the other way around—shouldn't we be teaching our best and brightest not to go into the law but to go into creating wealth?

Lawyers provide very important economic products without which society could not operate. Legal training is a very important discipline of the mind. Just as Neville Wran said to me, it's the concentration of great masses of information, digesting it, analysing it and solving problems. So I don't accept the premise that legal services are not adding to wealth, that they are in some way simply riding on the real wealth created by others. Legal services are part of a civilised, efficient and modern community. That is not to say we haven't overly attracted talented young people into the law, but we don't have a manpower policy or a means of forcing people in a free society such as Australia into and out of particular occupations.

But hasn't the cost system in the law maintained by the judiciary allowed a level of return to lawyers which is sustained by work practices not justified at all in the context of its relative lack of creativity of new wealth?

I don't think its fair to blame the judiciary for this. These are market forces. This are a small group highly trained people who are willing in many cases to give their entire lives to legal services. They make big sacrifices. There are relatively few who can command big fees. That's got nothing to do with the judiciary. The judiciary doesn't state the minimum that you must pay a senior counsel. The judiciary moved out of that years ago.

What you should blame is the invisible hand of market forces—you have a small group of highly talented people who can command very high fees. But I certainly agree with you that it's a problem that we now have more people in law schools in Australia than we have fully established trained qualified lawyers at every level and at every age group. That has happened because of the big bucks of the 1980s. The hardest hit are those in their middle years—a swathe has been passed through the legal firms of Sydney, and very large numbers of people in their middle years with mortgages, children, school fees and other obligations have found themselves suddenly out of work—I find them driving taxis.

The market will ultimately correct this. So what we will ultimately have is a lot of people who can't find a place in a legal profession that delivers big bucks. They will move into other areas where their discipline will be useful, such as corporations. Some will linger in the law and by reason of market forces reduce the cost of legal services and deliver the product to more people at lower prices. That won't be such a bad thing. But in the meantime, please don't blame the judges but blame the market forces.

Well, perhaps the 21st century will be the century of GATT if there's a move eventually into services. Do you think what we have just been talking about will be swept away with the need for internationalising the law? Do you think the lawyers are aware of what is about to overwhelm them?

I have been trying for some time to interest lawyers in the utilisation of international law in decision making in courts. But since **Mabo**, when the High Court of Australia declared that the development of our own common law was inevitable and the international covenants on civil and political rights would influence that development, this heresy of mine has become increasingly recognised as an orthodoxy. Increasingly, judges of all levels are looking to the basic principles of international laws to assist in filling the gaps or interpreting ambiguous legislation which is the role of the judge.

My work in this area has been in the field of human rights. But there's no reason why it should be different in trade law and in company law. As we see the increasing integration of the global economy, we can see increasing pressure towards harmonisation of approaches.

We have to look more broadly, and information technology will permit this; it's a question of whether legal education and lawyerly inclinations will move fast enough in this area. They need to be stimulated by tradition. They are certainly stimulated by the Court of Appeal of New South Wales and the High Court of Australia. I hope it's happening elsewhere throughout the country. Australian lawyers are going to Asia to fight cases, and we must be prepared for other lawyers to do likewise in our country. I think as an internationalist that's no bad thing in the age of the jumbo jet, of fast telecommunications, instantaneous fax machines, etc. We've all got to grow up and realise that we are living in a global community and global economy, and that means that lawyers are very much by their training and attitude of mind jurisdiction bound, not just Australia, New South Wales or Phillip Street bound. We've got to lift our sights to the world that we live in. That means thinking big, thinking of the global economy and our place in it. ⊐