

Speech to Compo Judges - Keynote address

18 June 1994.

001157

KEY NOTE ADDRESS

THE HONOURABLE JUSTICE M D KIRBY, AC, CMG
PRESIDENT OF THE COURT OF APPEAL

THE CHIEF JUDGE

It would be odious of me to introduce the President to this gathering and therefore I will not. I am sure that at some later stage in the evening, somebody here, will leap spontaneously to his or her feet and deliver a spontaneous vote of thanks from the depths of his or her heart, not thought of before but in fact nicely put together in rhyming pentameters, or whatever it is that rhyme.

But I would like just to make one observation. In reading the ALJ, I saw a reference to our guest. It observed that in addition to being, as we all know he is, the Chairman of the Executive Council of the International Commission of Jurists centred in Geneva, he was the convenor of the constitutional convention in Malawi, asked both by the government and the opposition, on the recommendation of the United Nations. That he did. I checked carefully and from what he tells me, it was a very much easier and more successful exercise than Judge Maguire's hosting of our interest matter this afternoon. But nonetheless, you can imagine what that involved.

Further, apart from being on the international jury for the selection of the prize for the teacher of human rights, for UNESCO, he also has been, as you all will have read in the Press, the Secretary General of the United Nations Special Representative to Cambodia for human rights. There are only 20 of such Special Representatives in the world, and the President was the first Australian ever to hold such an office.

Now, all those things I say to you and I realise you all know them. But the thought that struck me as I read it set out in print in the ALJ is how remarkable it is and how fortunate it is that he has the time, the effort and the energy, and the interest, not only to remain a member of the Court of Appeal, who unquestionably knows more and takes more interest in the field of law in which we work than any other, but also to come here on a weekend in which he would have spent writing judgments, hence my subliminal reference to that the other day, that he would come here - not the depths of Africa or the depths of Asia, but the depths of the bottom of the southern Highlands to talk to us.

And whilst I put that thought badly, I think we ought to bear it all quite firmly in mind whilst we listen to what the President has to say to us.

Well, Chief Judge and Judges, Senior Commissioner, Commissioners and officers of the court, I could not but come when I was invited, because I may be this and I may be that, but as far as I'm concerned I'm not all that far from the person who walked up those steps at number 60 Hunter Street as articulated clerk to Ray Burke on the first day of my professional life, and it was in Judge Rainbow's court. I remember that Adrian Cook, who was a very suave operator in those days, was standing there clinking his coins in his pocket, as he did terrible, grievous and ultimately mortal damage to the worker whom I'd accompanied to the Commission. And I went there during this week. I thought, "I shall prepare myself emotionally for the address tonight." And I walked down from an extremely expensive lunch at the cost of the Commonwealth in Tower Number 41, or 41 Restaurant, a most wonderful view of our marvellous city for a visiting Chinese journalist. And so on my way back to the court I thought, "I shall divert and go down Hunter Street, walk up those stairs that we all know so well from our dark past." Diana mightn't have known it, maybe Chris may not have known it, but most of us old fogies will have known number 60 Hunter Street.

And I stood outside the building. It is actually quite a good example of art deco, and it has a most heart-rending scene above the steps of the City Mutual Building of father, mother and child in arms, cuddling and cosseting them. "Come unto me," it was saying, "up these steps into the court, and you will receive justice." And you remember the black marble on the floor, black and white, very vivid. And I walked into the chamber. I'd never been into the chamber beyond. How many of you have gone into that chamber? It's empty at the moment. And it's a most marvellous room. They must have had an awful lot of money. It was built in the Depression, I see. It was opened in, I think, 1936; so says the sign above the door. And here are all these wonderful columns. It's really a most elaborate and beautiful building. And it was a beautiful building for me. Not just for the money, but for the good that was done for many a working person who was injured.

And so I took the lift up. I took it up to level nine, and nothing, nothing is there now. I did so a few years ago, and it had been untouched, it was completely the same. But now it has a rather vulgar affluence about it, a sort of carpeting, and they've turned it into little offices. Now there are some solicitors there, there are tourist operations. I was looking for the room where counsel used to meet with the solicitors, a tiny little room down the back. All gone.

And so when I went down, I went back into the chamber and I walked to the back, and at the back there are lifts. I'd forgotten that there was a set of lifts at the back of the Compensation Court up in Hunter Street. And so it was that I saw this building where so many of the battles that prepared me for my life as a lawyer took place.

Then last night I went to the American Club for the Criminal Law Journal, and there was the other building where I, with the rest of the Commission, transferred and so many battles were done there with new judges, more judges. It's amazing to think, isn't it, how stable it all was; it didn't ever seem to change. Maybe when you are younger things seem to last longer and as you get older time is telescoped. But there they were, Theo Conybeare, Alf Rainbow, Bill Dignam, and that lovely man, Coleman Wall. A small unit. You knew your judges. A lot depended on who you drew in the lucky dip. That can happen in the Court of Appeal, too, and I suppose occasionally it might even happen in the Compensation Court.

And yesterday when I was on the 13th level of the Law Courts, I was sitting in the Banco Court. I looked out and I saw this large building rising, and rising, and rising, in the distance, your third building. And I said to the Chief Justice: "Is that the new District Court building?" And he said: "Yes, alas, and the Compensation Court, too." Because he must have heard the stories I've heard tonight.

What a shocking thing that they didn't even bother to consult the people who were most important and who were going to be working there. They didn't consult us about the Supreme Court either, you know. I mean the building - the windows are locked. Who are these architects? Bring back the architect of the City Mutual Building, I say, because these architects who lock us into buildings which are uncongenial and unsuitable really do a terrible mischief.

It's true I was working there today. I fell asleep in the car coming down. When I left I put my head into Handley's room to say goodbye to him, and he was asleep at his desk. This is the life of a judge today. It's not the same as the life of a judge when we were growing up. I'd venture to say it's not the same as the life that the judges of the Compensation Commission back in my youth lived. We all work under tremendous pressure.

I did look through the papers of your conference, and it's really a bit surprising to me because of the pressure of work that we go through and the number of cases, and the variety of work we get, to see how many are the cases that have come up, even in cases where I've been sitting, that have been of relevance and importance to the work you are doing. You are about 11 or 12 per cent of the work of the Court of Appeal. So it's very important work and, to me, inevitably very interesting work. And I see in the papers the comment, sometimes I think quite justified, of the differences that occur, depending upon the constitution of the court, in the Court of Appeal.

Now, we sit normally two courts, two divisions of the Court of Appeal, virtually every day, and if we could we would sit three. Our backlog is rising. Somehow we've got to find new techniques to deal with that. To some extent we've tried to grapple with it by the Running List, and you know that we now

have a Compensation Running List. They got through a Running List about two weeks ago with Justice Mahoney presiding, in which on the Friday all cases were settled, and it is true, I think, that if you have a Running List, you can get the parties together, they tend to get the same counsel, and there is a greater pressure for settlement. So, we're working on that aspect of a more efficient throughput of the appeals. And in the tremendously arduous work that John O'Meally and Peter Johns are doing in the Dust Diseases Tribunal, a tribunal whose work should not be underestimated, could not be underestimated. I heard tonight that John started work the other day at seven a.m. and he was going to 11.30 at night. I wonder how many people in our community - this is truly heroic work.

Well I think people should be told of this sort of effort. And in the Court of Appeal we are not unconscious of the problem of diversity of opinion. And, of course, there is a limit to the extent, whether it's the judges of your court striving to reach the Jenolan Caves Agreement, or whether it's the judges of the Court of Appeal striving to get concordance in their general approach. There is a limit, isn't there? In the end each of us is a precious individual, and each of us is sworn, some of us are deemed to be sworn as judges, to make our own decisions, and I have to say to you that there are some things on which I would certainly not accept any decision of a majority or even a unanimous opinion of all my colleagues, because each of us has that private obligation of our conscious and the law.

But we meet every fortnight in the Court of Appeal. We start at 8.30 - this is something that started with my reign. Before I came, President Moffitt used to send around a little note if an appeal had stood for judgment for six months, and that was the only follow-up of decisions. Well, what we now do is we sit down there and we are there until 10 o'clock, and we are going through all of the reserved judgments, and it is a tremendous pressure, peer pressure, on each of us to deliver the judgments, and we discuss the case, each case that is standing for judgment, we say what it is, the one who has the star or the double star says what it is, explains the delay, and whoever is in delay has to say why he's in delay. And in discussing the case we reveal the nature of the issue. So that there is, in a sense, an alert. If the case hasn't gone to an extemporary judgment, there is a point which we put into our minds, and then if there is something which is common to a number of cases, there will be a conference if the judges see the point, and if they remember it. It doesn't always happen. And I know that there's a case that's gone to the High Court where it didn't happen, even though in that case there was a judge who was common to inconsistent decisions.

But I think it is true that in your life and in my life, things are not what they were back in 1959 and 1960 when I first ventured into the profession. There's tremendous pressure on you, there's tremendous pressure on the Court of Appeal.

We try to cope with the pressure by various efficiency mechanisms, and I have to pay a tribute to Ken Handley in this respect. He's really very interested in trying to bring down our backlog and to organise Running Lists and monitoring;

he monitors every notice of appeal that comes in. And he puts into his mind the links, and he alerts the Registrar and alerts me and the other judges. And we now have the research officer of the Court of Appeal who monitors the cases that are coming up in ordinary to try to alert the judges of cases with common themes.

But I have to say to you that the pressure we work under, with judges falling asleep at their desk on a Saturday afternoon, instead of being there in the garden or going out to sport, things will slip through the net. And that's just a feature of human justice.

The Chief Judge referred to my work in Malawi and Cambodia, and whenever I despair about the problems that we have in the Court of Appeal or justice generally in this State, I have to say that I take some comfort from the tremendous problems under which judges work in countries like that.

When I chaired the Independence Conference, or the conference of the Independent Conference in Malawi, the Chief Justice and the Judges came in, and seeing the ministers and those who had been in control of that country for 30 years, naturally, in a sense, gravitated to them, and the opposition was all about to walk out, and I suggested that they might like to sit in the middle between the government and the opposition. Things that we would do, as it were, instinctively, they have to relearn in Malawi.

And in Cambodia the problem is one of land mines, of the irritations of 30 years of death and destruction and revolutions. The judges are paid \$US20 per month, which is completely inadequate. They receive gifts from litigants, because that's the only way in which they say they can survive. So when I look at the problems of Malawi, Cambodia and other countries, I realise how many blessings we have in this country.

But there is a matter which has concerned Compensation Court judges in the last year, which highlights, I think, a problem which you should be concerned about, and that I am concerned about, and it relates to the issue of judicial independence. I was put in mind of this because during the week I received the pleadings of the judges of the Compensation Tribunal of Victoria who, as you know, were all removed from office by what has become known as either the Venturini expedient or the Staples expedient. George Venturini was appointed by the Whitlam Government to the Trade Practices Commission, and upon the accession of the Fraser Government, he was effectively removed by the abolition of the old Commission, the creation of a new Commission, and the appointment of all but Dr Venturini to the new Commission. Venturini had written a report in the old Commission in which he condemned what he saw as a cartel, and it was a very scathing and critical report, and it was a very unpopular report in some circles. And Venturini was removed in that way. There wasn't a lot of fuss about it at the time. He was a rather difficult man

in some ways. He wasn't a judge. He was a Commissioner, but he'd been guaranteed by the Federal Parliament the same sort of protection against removal that we enjoy.

And then came the Staples case, which you know, all of you, well enough about, how Jim Staples, something of a maverick, as we all know, but promised on his appointment the same protections against removal as we enjoy. And then he was removed by the simple expedient of abolishing the old Arbitration Commission, to which I'd been appointed, creating the new Industrial Relations Commission appointing all the judges and all the members except Staples.

I was thinking of this as I was reading Allen Bishop's paper about the industry Commission's suggestion about a national compensation system, and a level playing field, and getting some sort of national approach. I see in that portents and less constitutional protections are firmly and irrevocably put in place which might simply be yet another bad precedent. And we've had an awful lot of bad precedents in the last year.

In Western Australia Judge Gotsamanis, who I was grateful that you agreed, or some of you agreed to see when he was here, was, in effect, removed by the Staples expedient.

In South Australia, I received a letter last week from the Law Society which said: Look, we've got a real problem here, because the Industrial Court and Industrial Commission are being abolished by statute, and there is provision in the Act that judges of the Industrial Court may be appointed by the Governor to either the new court or to equivalent judicial office. And Commissioners of the old Industrial Commission may be appointed by the Governor to the new Commission. There's no mention about equivalent judicial office. And the letter that I received said: "It's very hard for us in South Australia to say anything about this. But we can't get anybody in Australia to pay the slightest interest to what's happening in this State." The same as Judge Gotsamanis - he could get very little attention elsewhere in our country.

In Victoria there have been a number of truly shocking examples, quite apart from the case involving the Compensation Tribunal judges. They've abolished the Industrial Tribunal in Victoria. They offered the President, Allen Bolton, the position of President of the new Industrial Commission, but he declined; he just went on with his work in the Federal Industrial Commission. He had a dual commission, so he just refused. And they invited applications from the old members to indicate that they wished to apply to be members of the new Industrial Commission, and of I think its 10 Commissioners, something like six put in applications, and of the six, three were appointed. And they appointed three new members, all of them from the employers' side. And the people who were not re-appointed were not all Labor Party appointees; they came from the Chamber of Manufactures, they came from employer organisations, so that it

is simply the Executive Government deciding that they will have these and they won't have those. And again, the Victorian Bar and the Victorian Law Institute protested saying: What sort of independence of office-holders can you expect if people are appointed and can be removed in this sort of way? What signal does that send out in our country for independent office-holders?

We haven't been pure in New South Wales either, as you know from the case of McCrae v Quinn.

And in Queensland this week I got an invitation to go to a function for Justice Vaster, who you know is the only judge in this country who's been removed this century by Parliament. Vaster was charged, and the misconduct alleged against him related to a number of matters, but the Gibbs' enquiry recommended that his costs of appearing before it and defending himself in the Commission of Inquiry be paid by the government, but the Government of Queensland refused to pay the costs. And again that sends out the signal to judicial officers, that if you are under enquiry, if anything is alleged against you and you are submitted to this, you are on your own. That's effectively the signal that's sent out.

This isn't, of course, something new. I was reading last week the new book by Nick O'Neill on human rights; it's a very good book. But it has the tale of the 1688 Bill of Rights which, I suppose, Dr Currie taught me and most of you, about which I'd forgotten, of how when James II ascended the throne, he took a stand which many of us today would think was a stand for religious tolerance. He himself was an Anglican. His wife was a Catholic. Under the Cromwellian Commonwealth, a number of laws had been passed by the Commons, Lords of England, which we would now regard as completely contrary to the principles of the freedom of religion. And James invited the six bishops of England, Anglican bishops, to come and meet him, and he gave them a passage to be read from every pulpit throughout the kingdom in which, in a sense, they were to declare the importance of private conscience. And the bishops of England, mindful of their part in the legality and their establishment, said: "We will not do it because it is contrary to the laws of the Commons of England." The king immediately threw them into gaol. And then they took out a writ in the King's Bench to challenge King James II's order. The King's Bench in England at the time was no stronger than the equivalent court in Cambodia today. The King's Bench said: "If the king puts you in gaol, that's it." So don't forget, the King's judges were removed at the King's pleasure. And so ultimately, the issue went for trial as to whether the six bishops should be released, and the jury acquitted the bishops, and they were released to enormous uproar in the city, over-whelmingly if not entirely on their side, because the people didn't want to go back, they weren't concerned with freedom of religion, they didn't want to go back to wars of religion. The result was, as you know, James was driven from the kingdom, threw the Great Seal of England into the Thames, and never returned.

And it was then that a magical thing happened, which was a key to our liberties: the Commons invited Mary, who was next in line, to come and there became a sort of a bargain. She wouldn't come if William, her husband, was simply to be a gentlemen escort, as it was put. She would only come if he was to be a joint sovereign. And the Commons said: "Well, that's your bargain. Our bargain is you will only be invited if you submit to the laws of England, to the order of succession, and to the principle that judges will hold their office during good behaviour and only be removed by an address from both Houses of Parliament." And the bargain was struck, and the sovereign accepted it, came, and that is the source of the idea of judicial independence, which is important for people like me, you, and people like Staples, and people like Gotsamanis, and people like the judges of the Industrial Commission of South Australia and the Industrial Commission and Accident Compensation Tribunal of Victoria, that they should be independent because they enjoy tenure and cannot be easily removed from office.

And unfortunately, this lesson is being lost, and who is making a fuss about it? Who is pointing to these many examples? Who is reminding people of these basic principles? I see very little movement. People are frightened. The Law Society and people in South Australia won't speak up. They write to me, a judge from another jurisdiction. This isn't a good aspect of our policy.

And we in New South Wales think: Well, maybe we are safe from this. There's now an amendment which, subject to referendum, will protect us from removal, and therefore it can't happen to us.

I think the lesson of the last few years is that there are many in our Commonwealth who have forgotten the glorious revolution, and the pact with the people, and the principle of judicial independence, and who would not respect your independence and would not respect any more my independence. And who look on judges as if they are a judicial officer, and I include the commissioners, as if they are what they were before James II: just another member of the bureaucracy.

It's evident in the way you were not consulted about your building; it's evident in so many of the aspects of judicial life today, and I think it's a bad thing, and it's important that we the judges who temporarily hold this office should ensure that we lift our voices and protest about it and make a point about it. And when our colleagues in other States are under this sort of conduct, that we join, as ultimately the judges of Australia did over the Victorian Accident Compensation Court.

I received also during the week a judgment of the Supreme Court of India, which shows that in India the judges have taken a stand because they have been suffering much the same sort of attack by the Executive Government, but their constitution says: Judges shall only be appointed in consultation with the Chief

Justice of India. They have now determined that that means in consultation with and by consent of the Chief Justice of India, and whether that's a good or a bad thing, it's a sign that around the world people are becoming more alert, judges are becoming more alert to the assaults on the independence that's necessary for them to do brave, strong things.

So that's basically what I came down to say to you tonight. Rather a sombre tale, but it's a sombre moment, I think, in what's been happening to judges around our country, and we should be aware about it, and we should do something in response.

I congratulate all of you for the tremendous work that you do in the Compensation Court. I congratulate the new Chief Judge with whom I sat many times in the Court of Criminal Appeal, and who has been a colleague of mine for such a long time, and who always as a judge, and I can say this from my own observation, set a high standard for himself and for the profession. I know virtually all of you as, I believe, colleagues and friends. I suppose I have known Ray Burke for the longest time because I was his articled clerk, and I know John O'Meally because when we were law students, I nominated him for the Board of Sydney University Union from Enugu in Nigeria on an earlier African visitation. I handed out election pamphlets for one of you who, of course, is now above all political past, and I have had connections in various ways with virtually all of you. So I regard myself, if I can, as a sort of somewhat lost but still happy member of the club.

I always feel happy when I have a compensation case. I'm always delighted at the wit and talent that I see while working under pressure. I congratulate you on the very important work that you do. I'm very grateful that you've invited me tonight to come down and share this lovely meal, this good company and good wine with you.

I'm still the same person who walked up the steps of number 60 Hunter Street, walked in that lift that went up to Rainbows' court, who saw Adrian Cook irritatingly jangling his fee in his pocket. I'm still the same person, and I'm very glad always to be in the company of judges and commissioners and officers of the Compensation Court.

CHIEF JUDGE

I shall remember the observation the President has made about still being the same person as when he walked up there, the next time he overturns one of my judgments. It will be about as accurate as that event. Well, as it happens, Di Truss is about to leap spontaneously to her feet and deliver, I think in rhyming couplets, a vote of thanks to the President.

TRUSS J:

Mr President, Chief Judge, brother and sister judges, Senior Commissioner, commissioners and officers of the court. Today has been a day of much reminiscing, both in the context of Judge Moroney's paper, and also discussions around the table tonight, and then the President's address. I've probably had less contact with the President than anybody. My contact essentially being limited to appearing in his court over the last 10 or so years as a solicitor. I therefore don't have any stories, amusing or embarrassing or otherwise, of shared experiences to relate tonight.

I thought, perhaps, that I may have been asked to propose the vote of thanks on the grounds that being the most junior judge I would probably have the least number of judgments awaiting scrutiny by the President's court. However, it transpires that if that was the basis, Judge Bishop is the person who should actually be doing this, in that he has somehow managed to survive since the beginning of September without one appeal. He rather modestly attributes this to the fact that no one's read his judgments, rather than the fact that he's got it right.

Before I actually took up my appointment, I came down to the Compensation Court for the farewell ceremony for Judge Thompson, and stayed for the cup of tea and chat afterwards, and I was given quite a lot of helpful brotherly advice about the position I was about to take up, and it included from at least three of my brothers-to-be, advice along the lines of: Now, you just get in there and do your job. Don't worry about what the Court of Appeal is going to say about you. If you start worrying about being criticised and what the court's going to say, your life will be a misery. And then, I couldn't help but noticing the significant part of the rest of the conversation was about what the Court of Appeal had said or done. And there were various expressions of pleasure at being upheld and absolute outrage at being overturned and criticised. So I walked back up Macquarie Street to my office thinking: Well, maybe they do care after all.

I was looking forward to your address tonight, and I was expecting it to be interesting and entertaining. It certainly was. I must say that I did not expect that you would have had the time to read the papers that were prepared for the conference this weekend, quite voluminous as they are, and it's quite obvious from the discussions that you've not just read them quickly, you've read them in some detail. I must say I was very impressed by that.

The Chief Judge has already said and I repeat, how honoured we are to have you here tonight, and to thank you for finding the time to come here and address us, particularly bearing in mind all of your commitments.

I must say, as someone who for the last six months has been struggling with the 1987 amendments in the Evidence Act, I'm just quite overwhelmed at what else you manage to do, apart from being a judge.

I don't think there's really much else that I can say. Some of the things I was going to say, the Chief Judge has said. Again, I would just like to say, thank you very much. We're very honoured and very pleased to have you here.