HIGH COURT OF AUSTRALIA

SPECIAL SITTING

WELCOME TO

THE HONOURABLE JUSTICE KIRBY, AC, CMG

AT

MELBOURNE

ON

TUESDAY, 16 APRIL 1996, AT 9.15 AM

KIRBY J

The following Judges were present on the Bench:

Federal Court

Black CJ
Northrop J
Gray J
Olney J
Heerey J
North J
Merkel J

Supreme Court

Phillips CJ
Brooking JA
Coldrey J

Family Court

Brown J
Dessau J
Morgan J

Speakers:

Mr J. Middleton, QC, Chairman, Bar Council of Victoria

Mr M. Woods, President, Law Institute of Victoria

TRANSCRIPT OF PROCEEDINGS

KIRBY J: Mr Middleton?

MR MIDDLETON: If the Court pleases, I appear with some trepidation today on behalf of the Victorian bar, to welcome your Honour to your first sitting in Melbourne as a Justice of the High Court of Australia.

I say trepidation, as your Honour has already, at your swearing in to the Court in February, expressed rather scathing views of speeches of welcome to new judges, describing "the flattery, portentous words and only occasional wise counsel at these jubilees of the profession" and being hopeful that "none of these utterances can ever be remembered once the ceremony is over".

May I assure your Honour that this trembling speech maker at least has remembered your Honour's utterances on that occasion. I will engage in no flattery, although a little inadvertent adoration may creep in. I will avoid portentous words at all cost, although a little harmless prediction or two might be made, I hope, with safety. And I will offer no wise counsel, other than to trust that your Honour may find those counsel here who appear before you today in their applications to be wise, and if not wise, at least very brief.

Your Honour's speech made at your swearing in was destined to be remembered in other respects, having produced a certain lack of comity amongst constitutional lawyers, some of whom were alarmed, others of whom were relaxed, but all of whom who were interviewed at length as to what your Honour meant. It was a prototype High Court judgment if ever there was.

Your Honour is very welcome indeed to Melbourne. In your new capacity as a Justice of the High Court of Australia, in your longstanding capacity and experience in respect of jurists, but also as a man who has shown unswervable dedication to the concept and practice of justice in this country and to human rights wherever they have been infringed. Your Who's Who entry describes your recreational activity as "work", and indeed your extra-judicial achievements of themselves represent a significant body of work.

Your Honour, it is hoped, will find your new position relatively relaxing. Apparently you have shown an increasing tendency to "lighten up" in recent years, even switching from Mahler, as your composer of choice, to Bach, because Mahler was too depressing. Although, to paraphrase John Mortimer - the music of Mahler, like that of Wagner, is not

as bad as it sounds. Personally I would recommend a Tina Arena CD after a long day in court.

On behalf of the Victorian Bar, I wish your Honour a long and satisfying career on the High Court of Australia and assure you of a very warm welcome whenever you are in Melbourne. If the Court pleases.

HIS HONOUR: Thank you, Mr Middleton. Mr Woods?

MR WOODS: May it please the Court.

I am delighted to appear today on behalf of the Law Institute of Victoria, and the State's solicitors, to formally welcome your Honour to the Bench of Australia's highest court.

For the reasons that were outlined by my learned friend, I am reminded of Macbeth as he contemplated the murder of Duncan: "twere well if it were done quickly" in deciding how much to say.

This brief has been made easier by the fact that several have spoken before me, not only here this morning but of course in Canberra at your Honour's welcome in February, at which your Honour's achievements on the Australian Law Reform Commission and the Supreme Court of New South Wales were well outlined.

I have to say, your Honour, that you were the subject of some discussion and conversation at the New Zealand Law Society Conference last week. Your Honour's appointment, which as I indicated was the subject of some comment, was so in the context of the New Zealand Attorney-General's determination to abolish appeals to Privy Council. All agreed that, whether or not that would be a successful move, would be determined by who was appointed to the High Court of New Zealand if it ultimately became the final Court of Appeal.

During the course of a cup of tea after a discussion about the New Zealand Bill of Rights, I was informed by a district court judge in that country that appeals to the Privy Council should be abolished and that he was confident that there would be some excellent appointments to the High Court of New Zealand, "such as that Kirby fellow you have got in Australia". I have to tell your Honour, however, that at 1.30 in the morning after the Bar dinner there was another expression of opinion by yet another New Zealand district court judge who said that "God forbid the Attorney-General should abolish appeals to the Privy Council because we might get someone like that bloody Kirby in Australia". So the view of the New

Zealand profession on your Honour's appointment, I can say, is at least even-handed.

Your Honour's knowledge of the law, notwithstanding the view of that lone Kiwi judge, and respect for its traditions are well known, as is your commitment to judicial creativity founded on those traditions. In a recent interview published in the Law Institute Journal, your Honour said that the common law had periodic bursts of creativity as it adapted itself to changes in society, and that it was in the middle of such a burst now. Faced with the challenges of new technologies, especially in the fields of communication and biology, new and still changing social values and a world in which traditional notions of national sovereignty are becoming redundant, such judicial creativity will be more important that ever.

In your Honour, the High Court has gained a legal mind ideally suited with respect to finding solutions to the problems, and to articulating the answers arrived at clearly and intelligibly. I am obliged to my learned friend for setting the scene for this story about your Honour's capacity for hard work and this was likewise one which was related in New Zealand. The Chief Justice Sir Gerard Brennan once decided to play a practical joke on your Honour and he rang your chambers on Christmas Day, intending to leave a message berating your Honour for not being at work. His Honour was startled, indeed, when your Honour answered the telephone and demanded to know what he wanted.

Your Honour has observed that before the links between the Australian and British legal systems were formally severed, the duty of an Australian lawyer was to get into the mind of the judges sitting on the Privy Council. These days, of course, the duty of Australian lawyers is to discern the law as it is decided by the High Court. I suspect I can speak for the whole of the profession when I say that this profession has the utmost faith and confidence that your Honour will make an immense contribution to the body of law which we in Australia are now making for ourselves.

On behalf of the solicitors of this State, I likewise welcome your Honour to Melbourne and assure you of our co-operation and support.

If your Honour pleases.

KIRBY J: Thank you very much, Mr Woods.

KIRBY J: Mr Middleton, Mr Woods, Chief Justice Black, Chief Justice Phillips, your Honours, members of the legal profession of Victoria, ladies and gentlemen.

In *Jesting Pilate*, that marvellous collection of the speeches, essays and other contributions of the quintessential Victorian practitioner and judge, Sir Owen Dixon, three speeches on occasions such as this are recorded. One of them is the speech on Chief Justice Dixon's first sitting in Melbourne as Chief Justice of the High Court of Australia in May 1952. Another is on his first sitting as Chief Justice in Perth in September of that year. The third is the speech on his last sitting in Melbourne as Chief Justice in 1964, when Sir Robert Menzies spoke at the Bar table to farewell a great Chief Justice.

In his address in 1952, on his first sitting in Melbourne as Chief Justice, Sir Owen Dixon said this:

> "It is probably too long ago to remember exactly why I left the Bar for the Bench. I was then at the age of forty-two and I probably regarded that as approaching the sere and yellow, although at this vantage point I regard it as extremely youthful for a judge."

In his farewell address, he said:

> "There is, I would like to say, a great tendency in any one of my age, and with my great length of service, to indulge in retrospect and I am going to do a little, not much. Retrospect is not very interesting to the young - their life is in prospect - but retrospect does amuse and interest the old, and I have joined those ranks."

Having in recent weeks now faced three occasions of this kind, and having been reminded thrice of my earlier service, I feel a kindred sympathy for Sir Owen Dixon's words. I certainly feel that I have joined the ranks of the old. On occasions such as this, my mind goes back to the times when, as a young legal practitioner in this building, I worked busily at the practice of the law. This is the building in which, in the Commonwealth Industrial Court and in the Australian Conciliation and Arbitration Commission, I did much work. I must say that the decor seems to have changed a little since those days, not wholly for the better.

It was in Melbourne that I was first invited to accept judicial appointment. I remember the circumstances vividly. It happened in this building. I was invited by Sir John Moore, the President of the Arbitration Commission, to come to see him. He then asked me whether I would

respond with favour to an invitation to join the Arbitration Commission as a presidential member. The prospect of then sitting with Sir John Moore, who was a great judge, and with other judges of that tribunal, including Justice Mary Gaudron, who was a deputy president, filled me with awe, pleasure, inspiration. I was 35 years of age. I walked out into the streets of Melbourne. I walked down Collins Street in the sunshine, as I vividly remember. I went to Henry Bucks where I immediately purchased an extremely expensive hat, thinking that that was the sort of thing that a person of my age - or any age - about to enter upon what was equivalent to a federal judicial office, should do. Needless to say, when I took the hat to Sydney and subsequently to industrial inspections, it was soon consigned to a safe memorial. It was rarely used.

My last case as a barrister was in Melbourne. Indeed, it was in this building. It was in this very court room. I was briefed by Bernard Gaynor, who was a solicitor on the industrial side. He was a paragon of solicitors - for he was loyal to his counsel and always very quick to pay their accounts. That last case involved the SECV. Mr Gaynor had cobbled together a group of unions - from the extreme right-wing remnant of the old days of the Democratic Labor Party, to a union of the other persuasion whose chief officer was Mr Halfpenny. As a result of my heroic labours in this building, the lights went on again in Victoria. I hope that you remember with gratitude these things. I trust that, in the years to come, I may occasionally cast the light of the law in Victoria as well.

Shortly afterwards I was appointed to the Law Reform Commission. It was not a case that I had been appointed to the Arbitration Commission in order to give me the judicial title for that office. The second position followed unexpectedly, and by accident. A majority of the foundation commissioners were from Victoria: Gareth Evans, then a young law lecturer but later to be a distinguished federal Minister; Professor Alex Castles, who taught law in Adelaide but derived from Melbourne; John Cain, then lately the President of the Law Institute of Victoria - he was soon to become the Premier of this State: There was also Professor Gordon Hawkins from Sydney and a young and up-and-coming and most promising silk from Brisbane, Mr F.G. Brennan, QC. These were the members of the Commission. My work in law reform often brought me to Melbourne. I laboured closely, over a decade, with leading Victorian judges and with members of the Victorian legal profession.

At first, I was treated, shall I say, with a degree of caution by the Victorian profession back in those days, in 1975. Not, I have to say, by the leaders of the profession. I will never forget the warm welcome that I was given by Sir Oliver Gillard, who was then the Chairman of the

Chief Justice's Law Reform Committee. He invited me to Melbourne to speak on the subject "Law Reform - Why?" He organised a large meeting for that purpose. My speech is recorded in the 1976 *Australian Law Journal*. Sir Oliver, as a fine judge, respected office. He welcomed me as the holder of an office. So did Justice Clifford Menhennitt, a wonderful spirit of the law and a judge of great distinction whose opinions are always read with advantage. Sir Murray McInerney, whom I got to know very well. I remember, vividly, sitting with him in Shepparton, and his telling me of the capital cases in which, as a barrister, he had appeared in his youth. It is awful and moving to think of the pressures that are on counsel today. But the pressures that were then imposed on young counsel in capital cases are difficult even to imagine. The Honourable Tom Smith, who was the distinguished Victorian Law Reform Commissioner: Sir George Lush, with whom I shared University links: Sir John Starke, who shared with me an interest in libraries. There were many others. I count them as mentors. I learned from them all.

And then in the Australian Law Reform Commission we had many distinguished lawyers from Victoria. Sir Zelman Cowen, before his appointment as Governor-General; Brian Shaw, QC; John Karkar, QC; Tim Smith, later to become a Justice of the Supreme Court of Victoria; Kevin O'Connor, who is now the Privacy Commissioner; Professor David Kelly, who taught me so much, now practising in this city; and Mr George Brouwer, the first Secretary and Director of Research and later head of Department of Premier and Cabinet. Victorian judges and legal practitioners contributed disproportionately to the vital work of institutional law reform.

My appointment to the Federal Court in 1983 gave me an occasion to sit again in Melbourne, as I was reminded last night by Justice Callaway who appeared as counsel before me. I sat with Sir Reginald Smithers, a great judge and a great humanist, who taught me much. And with Justice Charles Sweeney and Justice Raymond Northrop, whom I am happy to see is with me again on this occasion. I sat across the road in what was the old High Court building. I walked around the chambers there. I tried to imbibe the spirits, the great spirits of the past. How many of those spirits were Victorian practitioners: O'Connor, Isaacs, Higgins, Duffy, Latham, Dixon, the earlier Starke, Fullagar, Menzies, Stephen, Aickin. Some of the greatest justices of the High Court of Australia fashioned their skills in the legal profession of Victoria and in Victoria's courts..

In the New South Wales Court of Appeal after 1984 we had the great benefit from time to time of appearances of counsel from Victoria - some of whom I see here today. Regularly, I appointed associates who came from

Victoria, including my current associate (Mr Nicholas James) who was appointed when I was President of the Court of Appeal of New South Wales. Tenderly, he urged me not to get killed in Cambodia in January when I went on my last mission as Special Representative of the Secretary-General of the United Nations for Human Rights. I like to think that that was a gentle concern for my fate. But I am inclined to the view that it was rather so that he could return to Melbourne today and be in his own city with the High Court of Australia.

Yesterday, after I had completed the reading of the application books that are to come before us later this day, when we will have so much pleasure dealing with the special leave applications, and formed a view, ever so tentative, about the fate of those applications, I picked up a book by the Dean of Law at Yale University, Professor Anthony Kronman. The book is called "*The Lost Lawyer - Failing Ideals of the Legal Profession*". Yale is now probably the greatest Law School in the United States. A book reflecting on our profession by its Dean of Law is something we should take closely to our hearts. Much that happens in the United States repeats itself here, in Australia, a decade or so later.

Professor Kronman's thesis is that our profession, in the United States, has lost its way. Attorneys are the members of the mega firms. Their lives are ruled by time charging and loss of interest in law reform and pro bono work. They have lost the idealism of the legal practitioners of the past. Advocates have lost the spirit of honesty that so motivated advocates in the past. Under the pressure of severe time limits, they can often not now get into the mind of the judge for persuasion. But Kronman's chief criticism is reserved for the judges who, he says, are now all too often, at least in appellate courts, mere editors - editors of the works being written by their clerks. Very rare are the judges, he says, in the appellate courts in the United States, who still prepare all of their own opinions. The result is that the appellate courts are clerk driven. They have lost what he calls their "horse sense" and the wisdom - as well as the perception of principle and inclination to brevity and self-confidence - that comes with an experienced legal practitioner and judge.

These are warnings to us, I believe. We must, of course, adapt to change, including as a response to the great pressures on our courts. But we must hold fast to the good. That is the obligation of our profession and the challenge now before it - including the judges.

In taking my oath in Canberra I said that I believed that the claim to nobility of our profession rested ultimately in its quest for justice - justice according to law, but justice. As I reflected on Kronman's book, I came to

the view which I wish to share with you on this occasion. Our profession's claim to nobility also rests upon our honesty with each other, on our idealism and optimism about the cause of justice, on our integrity as professionals and on our courtesy to clients and to each other. Courtesy to clients and to each other has always, in my experience, been a hallmark of the Victorian profession. I learned much from the Victorian profession in that regard. I hope I will be acquitted of any offence on that score when I lay down this obligation in years to come. I hope that all of us will avoid the gloomy criticisms and predictions of Professor Kronman.

I express thanks to you, Mr Middleton, for your words: And you, Mr Woods, for your words. I express thanks to all the distinguished judges who have accompanied me on this journey today, and all of you who are present, not all of whom are here for the special leave applications that will now follow. Your presence, I realise, is not just a compliment to me. But to the Federal Supreme Court of our country which cherishes its relationship with the Australian legal profession. Not least in Melbourne. Not least in Victoria.

The Court will now adjourn in order to be reconstituted.

AT 9.40 AM THE COURT ADJOURNED