CURRENT ISSUES

COMMENTARY BY MR JUSTICE P W YOUNG

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CURRENT ISSUES

MR JUSTICE P W YOUNG

Kirby J (formerly, Kirby P)

The Hon Michael Donald Kirby resigned as the President of the New South Wales Court of Appeal on 5 February 1996 prior to being sworn in as a Justice of the High Court of Australia the following day.

As the Index Volumes to the Journal show, his Honour has probably appeared more often in these columns than any other lawyer starting from a brief reference in (1975) 49 ALJ 43. A further biographical note will appear shortly.

Kirby P's farewell speech in the Supreme Court of New South Wales and his welcome speech in the High Court were both delivered to a large audience. It is appropriate to set them both out in full preceded by the speech of Gleeson CJ at the farewell.

Retirement of Justice Michael Kirby from Court of Appeal (NSW) — 2 February 1996

"The purpose of this occasion is to mark the retirement from the Court of Justice Michael Kirby, who has been President of the Court of Appeal of the Supreme Court of New South Wales since 1984. His Honour is retiring for the purpose of taking up his appointment as a justice of the High Court of Australia.

Justice Kirby and I have known each other, and been friends, since 1956, when we both commenced to study Arts and Law at the University of Sydney. We were, for the purposes of our law studies, close collaborators.

> "It was seen as amusing to nominate one of the most retiring and reticent members of our class as our student representative."

One of the acts for which I expect to be called to account on the last day is having lightheartedly propelled Michael Kirby into the world of student politics. It was seen as amusing to nominate one of the most retiring and reticent members of our class as our student representative. Pushing Michael Kirby into the spotlight turned out to be like pushing Henry VIII into matrimony.

Michael Kirby's career in student politics continued for a number of years after most of the rest of us left the university and went into legal practice. It took on international dimensions. It began a long association both with international affairs, and with universities. For example, his Honour served for many years as Chancellor of Macquarie University.

No doubt partly because of his continuing university studies and activities, which he carried on whilst employed as a solicitor, Michael Kirby did not commence to practise as a barrister until 1967. During his time at law school, whilst he was an articled clerk, he had made me aware of his interest in politics and public affairs, and early in his career he made a number of abiding friendships with persons who have been leaders in Australian public life, some of whom are present today.

In 1975, whilst he was a still a junior counsel,

and aged, I think, only 36, the Whitlam government appointed Michael Kirby to his first judicial office, as a Deputy President of the Australian Conciliation and Arbitration Commission. Soon afterwards, the same government appointed him Chairman of the Australian Law Reform Commission. He remained Chairman of that Commission until he joined this Court in 1984. In the meantime, he spent a period as a member of the Federal Court of Australia.

He has already held judicial office for 21 years. If he serves out his full term on the High Court, he will have been one of Australia's longest-serving judges.

It was in his capacity as Chairman of the Australian Law Reform Commission that Justice Kirby became a public figure. Over the years, and in a number of jurisdictions, distinguished judges and other lawyers have made notable contributions to the important work of law reform. The distinctive contribution of Justice Michael Kirby was to promote public interest in law reform and in the subjects which he believed appropriate for the attention of law reformers. The techniques which he employed to achieve this object, which included skilful use of the media, and outreach to the legal profession and the public generally, were both innovative and highly successful. He was an inspired choice for the position. It is my belief that the choice was made by the late Justice Lionel Murphy whilst Attorney General. He displayed great but fully-justified confidence in a relatively-young man.

During his time with the Law Reform Commission, Justice Kirby's extensive involvement in the affairs of numerous important international organisations developed. That involvement has continued to the present time.

> "His workload was enormous, and the task was both intellectually and physically demanding."

It is his Honour's work since 1984 as President of the Court of Appeal of this Court of which I wish to make particular mention. The people of New South Wales, and the judiciary of this State, owe a great debt to his Honour for his exceptional and dedicated service as President of the Court of Appeal. His workload was enormous, and the task was both intellectually and physically demanding. He was tireless in his devotion to duty.

His Honour was President of the Court of Appeal over a period when the workload of that Court expanded out of all proportion to the judicial resources made available to it. When the Court of Appeal commenced operation in 1966, it consisted of the Chief Justice, the President and six Judges of Appeal. It now consists of the Chief Justice, the President, and eight Judges of Appeal. In 1966, the number of first instance judges in the various State courts from whom appeals lay to the Court of Appeal was forty-eight. Today, the number of first instance judges from whom appeals lie to the Court of Appeal is one hundred and seventeen. In other words, the number of judges from whom appeals lie to the Court of Appeal has increased by 150 per cent, while the size of the Court itself has increased by 20 per cent. The number of appeals that come to the Court of Appeal is in direct proportion to the number of judges from whom appeals lie. Thus, predictably, the number of appeals has increased by about the same percentage as the increase in the number of judges from whom appeals lie.This is something I have been pointing out in Annual Reviews of the Court since I first came here, and the point has been made repeatedly, year after year. Waiting times for appeals in the Court of Appeal are, by both Australian and international standards, grossly excessive. This is the natural and entirely predictable consequence of the alteration that has occurred in the relationship between the number of Judges of Appeal, and the number of judges from whom appeals may be brought. It might be added that the bulk of the increase in the number of first instance judges has occurred since 1984.

The failure to maintain a reasonable relationship between the size of the Court of Appeal and the number of judges from whom it

receives appeals has resulted both in excessive and unacceptable waiting times for appeals, and the imposition of an enormous burden upon the members of the Court of Appeal. I have frequently heard Justice Kirby say that the Court of Appeal of New South Wales is the busiest court in Australia. However, it is not just busy; it is seriously overworked.

Both in his judicial work as a member of the Court of Appeal, and in the discharge of his administrative responsibilities, Justice Kirby has never allowed himself to be crushed by his workload but has, on the contrary, maintained an extraordinarily high level of activity in other fields as well. This, he says, repeatedly and publicly, is because he never does anything except work. In the current jargon used concerning the admissibility of expert evidence, that assertion is not falsifiable. But I am prepared to make an act of faith, and accept it for present purposes.

The members of this Court are deeply conscious of the burden which the President has undertaken during his time on the Court. I personally am grateful for the assistance he has given me in the discharge of my responsibilities. We will all be sorry to lose his companionship. We wish him years of happy and fruitful service on the High Court of Australia."

Farewell speech — 2 February 1996

The Hon Justice M D Kirby AC, CMG
President of the Court of Appeal

"Thank you Chief Justice, Mr Attorney and Mr Lyall for what you have said. And also for what you have left unsaid. So far as I know, no-one has ever been charged with perjury for exaggerations and falsehoods uttered on these occasions. Justice Glass once told me that flattery of judges is never to be stopped, whatever the press of the court's business.

Yet I imagine that we would all have been surprised if the speeches had descended to the style of a rodomontade — we would have been surprised, that is, if we had known what a rodomontade was!

> "Legal practitioners now appear before me who were squawking in swaddling clothes when I first ascended the Bench."

As you have heard, I came to this Bench in 1984. I have served here for 11½ years. Only 10 of the judges of the Supreme Court serving on my appointment remain. Remarkably, the majority of this Bench has appeared before me as counsel in the Court of Appeal. Of this Court as it existed when I was first welcomed to judicial office in December 1974, only Justice Mahoney remains. Legal practitioners now appear before me who were squawking in swaddling clothes when I first ascended the Bench. The advocacy of some has improved in the interim; though not all. Judges and lawyers who were famous names then — full of fight and 'bearded like the pard' — have retired and many have passed on.

These festivals are part of our corporate life by which we note and renew our legal cycle. They remind us of our brief opportunity, by our labours, to leave our profession and our community a better place.

It is natural that, at such a time of transition in my life, I should look back at the failures and successes of my service here and give a brief account of my stewardship. Failures and shortcomings I will leave to others to collect. For that purpose the Bar Common Room at lunch today will be still as good a place to start as any. Judicial farewells tend to be well attended, presumably to make absolutely sure that the departing judge really goes.

So what do I count as important in my time in the Supreme Court and the Court of Appeal?

- First [and this is the work of my colleagues] our Court of Appeal is clearly recognised, under the High Court of Australia, as the outstanding appellate court of this country. Since my appointment, Australia has seen the establishment of permanent appellate courts in

Queensland and Victoria. In the Northern Territory too there is a Court of Appeal to which Justice Priestley makes a notable and regular contribution. I pay tribute to my colleagues and to our predecessors (some of them here) who devoted themselves to the successful establishment of the Court of Appeal of this State. I thank the many judges of the Supreme Court who have acted as additional Judges of Appeal. I have tried to contribute to the Court's institutional success and example.

• Secondly, I sought to strengthen collegiality in the Court of Appeal and within the Supreme Court. My arrival involved a testing transition for me. But I had remarkable and patient teachers. Justice Hope with his noble spirit. Justice Glass with his didactic, daily instruction for me and Justice McHugh. Justice Samuels with his elegant command of our language, now to be deployed again in the service of the State, alas part-time. Justice Mahoney, a great legal technician and guide. I can report that I leave the Court with a strong sense of institutional unity and collegial friendship. It was not always so.

> "On my arrival, the Court of Appeal was sometimes known for matching the sharpness of its mind with the acidity of its tongue."

• Thirdly, I was determined to improve relations with the legal profession. On my arrival, the Court of Appeal was sometimes known for matching the sharpness of its mind with the acidity of its tongue. Grown men and women of the legal profession were known to tremble like leaves in autumn in its presence, some to faint and even cry. A court gets the most out of advocates and parties who are treated with politeness. Our Court daily demonstrates that efficiency and rigour are not incompatible with courtesy.

• Fourthly, I wished to bring to the Court the lessons I had learned in the Law Refon Commission. Of the need for the common la and equity to adapt and develop to rapidl changing times. Of the requirement to concep tualise legal issues and to see the single case i the context of the history and theory of the law Great is my debt to my period in institutiona law reform. Never again would 'academic' b used in the Court of Appeal as a word c derision. On the contrary, the search for lega principle and legal policy [which, with lega authority make up the trinity of the sources o our law] would often be illuminated by aca demic texts, law journals and law reviews. N longer would the Court impose the somewha inconvenient requirement that the authors o such works should die before they could b cited.

• Fifthly, I was insistent that the Court shoulc look beyond the traditional English sources o judge-made law. In an early case I tried this ou on Mr R P Meagher QC, telling him that I hac seen relevant authority in a recent decision o the Supreme Court of Iowa. His immortal response was: 'Your Honour is such a tease.' But nothing is stable in this uncertain world. He has been known of late to cite international human rights norms in support of his opinions. I am now patiently waiting for him to use feminist legal theory to overrule Lord Eldon.

> "Now, elsewhere, I may have a chance to convert heterodoxy into new legal principle."

• Sixthly, the reference to such international norms by me was at first thought heretical. Justice Powell (and doubtless others) still think so. But I comfort myself in the memory of my occasional dissenting opinions during my service in this Court. Now, elsewhere, I may have a chance to convert heterodoxy into new legal principle. This, after all, is the way our

legal system operates — by an appeal to ultimate persuasion.

• Seventhly, I was keen to ensure that the judges of Appeal participated in the vital work of the Court of Criminal Appeal. When I first arrived, they did not. This divide has now been completely ended by Chief Justice Gleeson. The criminal law is the great centrepiece of our legal system. The beneficial involvement of the judges of the Court of Appeal has, incidentally, reinforced and strengthened the relationships between all judges of the Supreme Court which I have constantly sought to enhance. We are all part of the one court. I have also tried to improve contacts with other State and Federal Courts.

• Eighthly, I set out to make the operations of the Court of Appeal more transparent. For the first time, an *Annual Review* was published. It is now included in one published by the Supreme Court itself. The inner workings of the Court have been candidly described to the profession. A monthly summary of all decisions is produced by the Court and widely distributed.

• Ninthly, I tried, however imperfectly, to engage in selected public debate about the work and problems of the Court, of the law and of the administration of justice. My long service in the Law Reform Commission convinced me that this could be done without diminishing public regard for the judges. It is healthy dialogue. The judicial institution will be strengthened by public knowledge of its concerns.

• Finally, with my colleagues, I have lately been engaged in a concerted effort to improve the throughput of the Court of Appeal as it faces ever-growing lists with unchanging resources. Justice Clarke has taken charge of the list and is proposing radical reforms of the Court's procedures which I hope will have the profession's support. Justice Handley monitors every new case and manages many. Justice Sheller determines expedition applications. Justice Cole has brought from the Commercial Division tremendous verve and imagination, as well as computer skills, in the organisation of the Court's business. My immediate colleagues are a wonderful team. The State, and the wider principle of the rule of law in our country, are served by them better than is known.

What has been done by me would not have been possible without the faithful support of my personal staff and of the Court staff. I single out for mention my long-time Executive Assistant Janet Saleh, my last Associates in this Court, Stephanie Smee, Simon Walker, Nicholas James and Peggy Dwyer — the Registry, library, administrative, printing, court reporting, media liaison and other staff of the Supreme Court and Sheriff's officers. My daily work with them will now come to a close. But I will never forget their loyalty and devoted service.

> "some debts are too intense, enduring and private for words on a public occasion such as this."

My family and loved ones sustain me in all that I do. But some debts are too intense, enduring and private for words on a public occasion such as this.

And so, literally, I now lay down this mantle. Never again will I be President. Never again will I sit as a judge under the Royal Coat of Arms, which has reminded me that I shared the residual prerogative of the Sovereign to ensure, if I could, that justice is done in our courts for all people. Never again will I wear the crimson and fur, which remind me of the lineage of the judges of our tradition, stretching back for nearly 800 years — an institution far greater than any of us. Never again will I sit as a judge in this beautiful courtroom watching prisoner and new practitioner alike as they come nervously, expectantly, to their important day before this independent court. Never again will I put on the horsehair wig and the traditional robes which remind me to strive to be larger than my mortal self and which stamp on me the anonymity of institutional service.

> 'When, to the sessions of sweet silent thoughts I summon up remembrance of things past....'

I shall think of this occasion and of all you present and of the privilege I have enjoyed in

your company and with your assistance. I go to my new functions with humility, optimism and fresh objectives. But I shall never forget the precious decade that I have been privileged to serve in this Court.

So let us go our ways in our busy lives in the law. The lingering moment passes. It hangs in the air and I wish it could continue. But it will not. Yet, the institutions and our personal friendships endure. Each one of us must strive to make a contribution. Judge mine in this Court with charity. Look to the future."

Swearing in and welcome speech — 6 February 1996

The Hon Justice Michael Kirby AC, CMG Justice of the High Court of Australia

"I thank you all for the flattering remarks which have been uttered on this occasion. They would be sufficient to persuade a judicial novice that a saintly life in the law had been rewarded, justly, with an ascent into the judicial heaven. Alas I am no novice. In fact, as you have heard, I have served in judicial positions of various kinds for more than 21 years. In this courtroom today, only Sir Robin Cooke and Justice Dennis Mahoney have a longer continuous service.

Today is the 10th time that I have taken the Judicial Oath. I have attended many, many ceremonies such as this. These are the jubilees of the legal profession, marking its continuity and change. I have heard many speeches of praise, welcome and farewell of varying degrees of enthusiasm. By that I mean, in the case of farewells, enthusiasm for the judge, not for his going. Out of delicacy, the latter would, at least normally, be subtly disguised as it was for me on Friday last in Sydney.

It is a sobering thought that virtually none of these utterances can be remembered once the ceremony is over. Portentous words of a newly-sworn judge, or a departing judicial tyro, hang in the air and then evaporate and are gone. So it will be with my words today.

Very occasionally, wise counsel is given. Chief Justice Gleeson at his welcome took his theme from the last words of the great philospher Voltaire. A priest, approa Voltaire with a candle heard him exclaim the flames already'. And when the enjoined the dying man to repent his sin. renounce the devil, Voltaire declared: 'This time to be making enemies.' That is a injunction for a newly-appointed judge. fear it comes too late for me. It would interest to know if it has always been obse by the sweet-natured justices of this C Certainly, once appointed, they have al disguised any flaws of impatience in character.

> "To the qualities for which it has lor been famous have lately been added a accolade of great wisdom and willingness to fashion 'a juster justice"

I am the 40th justice in the history of the F Court of Australia. Forty in almost a centur the Court's existence is not very many. Fo nate is the Court, and lucky is Australia, t those who have served earned for this Cou global reputation for integrity, independe and erudition. I know from my journeys to corners of the world how high this Court sta in reputation and honour. To the qualities which it has long been famous have lately b added an accolade of great wisdom and willingness to fashion 'a juster justice'.[1] I v not be able to say these things after today only say them now because you w understand the trepidation and anxiety whi any Australian lawyer would feel on bei inducted to walk in the footsteps of Griffit Isaacs, Evatt, Latham, Dixon and the great a recent company who provide the intellect and reputational capital of this Court.

I am specially greatful that their Excellenci the Governor-General and Mrs Hayden, as o of their last acts of faithful service, ha attended this ceremony today. And that S Harry Gibbs, Sir Anthony Mason and S

William Deane (shortly to take up his new responsibilities) have come to the Court to be with us. What a privilege it is for me to sit, even momentarily, on the same Bench with them. I have also received the warmest of messages from other past justices and from all my present colleagues and from the court officers. I thank them all from the bottom of my heart. They have quietened some of my apprehensions.

I am particularly grateful for the presence of so many Chief Justices and judges of the Federal Courts and of courts of the Australian States and Territories. Sir Robin Cooke, soon to receive from the Queen the rare honour of a Baronetcy, does me, and this Court, a great compliment by joining us on the Bench to represent the Chief Justice and judiciary of New Zealand. Sir John Muria, Chief Justice of Solomon Islands, also honours us by his presence. These most distinguished jurists signal vividly by their presence today, the belated but growing recognition of the need to fashion the common law of Australia in a way that is attentive to the legal systems of our common law neighbours in the Pacific and Indian Oceans and in near Asia. No longer an historical anachronism or settler or purely European society, Australia and its legal system are now coming to terms with the challenges and opportunities of our geography and our regional destiny.

Two weeks ago, in Honiara, I sat with Sir John Muria in the Court of Appeal of Solomon Islands. Attending a service in the Cathedral of Saint Barnabas, I saw the way in which the people of Solomon Islands have fervently embraced the religion of the missionaries and made it their own. So they, and we, must do with the common law. By chance, the Cathedral service included the anointing of two new deacons. It followed a form not dissimiliar to a judicial welcome such as this. The only difference was that the deacons, before their confirmation, were presented to the people for their acceptance. It is, perhaps, as well that we do not trouble you with such a question in ceremonies of this kind. The results could occasionally be awkward.

> "Australia and its legal system are now coming to terms with the challenges and opportunities of our geography and our regional destiny."

As we assemble today, Australia is in the midst of a federal election to choose the next National Parliament. Peacefully and resolutely, as our Constitution envisages, millions of our fellow citizens will go in a month's time, to schools and church halls across this continent to cast their ballots and thereby to render the federal Parliament and government accountable to the people. We should cherish this feature of our national life. It is far from universal, as my work for the United Nations has often shown me. It is natural that in an election, political candidates should make policy speeches as they vie for popular support. Judges too need the support and understanding of the people. But a quest for personal popularity or a set of specific promises by a new judge would be completely inconsistent to our notion of an independent judiciary deciding cases on their legal merits as argued in open court. The only promise our judges give is in that of the Oath.

Perhaps the sole speech of this kind which is known to every Australian lawyer is that of Sir Owen Dixon on his swearing-in as Chief Justice.[2] It was then, in that little courtroom at Darlinghurst, in Sydney, where I saw Lionel Murphy sworn in in 1975 that Dixon uttered his well known words:

> 'There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism.'[3]

Since that April day in 1952 much has changed. The world, our country and its law have changed. Technology has put our species into Space. Scientists have unravelled the double helix of DNA. Information technology has revolutionised our planet and now reaches towards simple artificial intelligence. But the

abiding judicial duties of neutrality, integrity and the provision of persuasive reasoning remain as strong today as they were in Sir Owen Dixon's time. The termination of Privy Council appeals has finally released Australian law from accountability to the judicial values of England that lasted so long. The slow realisation of this fact, and its implications, in a profession often so resistant to change, presents to this, as to other Australian courts and courts of the region, challenges which are exciting and sometimes difficult.

> "Without a measure of creativity how else would the common law have survived seven centuries, from feudalism to the space-age?"

There will be no returning to the social values of 1952 when Sir Owen Dixon spoke, still less those of 1903 when this Court was established. It falls to each generation of Australian lawyers, led by this Court, to fashion new principles of the Constitution, common law, and of equity, which will contribute wisely to the good governance of the Australian people. There is now a greater public understanding of the limited, but still very real, scope for judicial creativity and legal development. Judges are now more candid about this aspect of their function. Without a measure of creativity how else would the common law have survived seven centuries, from feudalism to the space-age? How else would it have endured in so many lands after the sun had set on the British Empire?

> "Only the quest for justice gives our profession its claim to nobility."

In any case, the 'good old days' were no always so good in the law of Australia including the common law. They were not s good if you happened to be an Australia Aboriginal.[4] Or indeed, a woman.[5] Or an Asia confronted by the White Australia policy.[6] Or homosexual Australian.[7] A conscientious objec tor.[8] A person with heterodox political views.[9] homeless person.[10] A publisher of the mildl erotic.[11] A complainant against official op pression.[12] A person with little English involve in a court case.[13] We in Australia have no taken a confident turn in our legal journe towards enlightenment and justice for all unde the law. But the lesson of our present enlighten ment must be that there are other injustices t which we are still impervious, or indifferent o which we do not yet see clearly. We need t defend our legal institutions and to adhere t time-honoured legal principles. Not blindly And not mechanically. But with ears, minds an hearts always open to the call of justice. Onl the quest for justice gives our profession it claim to nobility.

I pay my tribute publicly to my parents, no in their 80th year. By God's grace, they are wit me to witness this occasion. To my family an loved ones who sustain me and criticise m every day. Everyone, without exception, need such human support and loving correction. T the political leaders, of different parties, some o them present, who have given me opportunitie to serve the people who are the ultimate sourc of authority in our Commonwealth. To m teachers, including those in the Law Refor Commission and universities who instructe me how to conceptualise the law — seeing th unity of its great mosaic. To my judicia colleagues of the past, particularly in the Ne South Wales Court of Appeal. There, for mor than a decade, I have enjoyed intellectua

stimulus, professional comradeship and personal friendship. It has been a rare preparation for the office I now enter upon. To my staff and associates in the courts and bodies I have served. To the members of the legal profession who sustain and support the judges. To the new silks who, like me, begun a great adventure today. To the many community and legal groups with which I have been associated. And to so many personal friends, I say my thanks.

It has been a long journey to this moment. Sometimes, in late years, as I visited Canberra, I would steal a look across the lake at this building. I would see it close, but far. I confess that I would then sometimes think of what might have been. Now, what might have been, is. May I prove to be worthy of the great spirits of the law who have gone before. Of you present who offer me support and friendship. And of the people of Australia and our country's challenging future which beckons us to the new millennium — a millennium of justice for all Australians, without discrimination, under the rule of law."

PHOTOGRAPH BY DAVID COWARD

Endnotes

1 Oogeroo of the Nunuccal (Kath Walker), *Song of Hope*.

2 (1952) 85 CLR xi.

3 Ibid at xiv.

4 As explained in *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1. See also, eg, *Namatjira v Raabe* (1959) 100 CLR 664 and *Stuart v The Queen* (1959) 101 CLR 1.

5 See, eg, *Skinner v The King* (1913) 16 CLR 336; *Yerkey v Jones* (1939) 63 CLR 649 at 685. Compare *Mercantile Mutual Life Insurance Co Ltd v Gosp* (1991) 25 NSWLR 32 (CA) 36.

6 See, eg, *Ling Pack (otherwise An Sing) v Gleeso* (1913) 15 CLR 725 and *Donohoe v Wong Sau* (192 36 CLR 404.

7 See, eg, *R v McDonald* (1878) 1 SCR(NZ) 173 an *R v Kemp* (1949) 50 SR (NSW) 1 (CCA).

8 See, eg, *R v District Court; Ex parte White* (1966) 11 CLR 644.

9 See, eg, *R v Sharkey* (1949) 79 CLR 121 and *Burns Ransley* (1949) 79 CLR 101.

10 See, eg, *Lee Fan v Dempsey* (1907) 5 CLR 310.

11 See, eg, *Crowe v Graham* (1968) 121 CLR 375 o *Guthrie v Herbert* (1970) 122 CLR 527.

12 See, eg, *Hough v Ah Sam* (1912) 15 CLR 452; c *McDermott v The King* (1948) 76 CLR 501 and *McKinney v The Queen* (1991) 171 CLR 468.

13 See, eg, *Gaio v The Queen* (1960) 104 CLR 419 and *Acquilina v Dairy Farmers* (1963) 109 CLR 458 a 464.