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**FOREWORD**

**THE HON JUSTICE MICHAEL KIRBY AC CMG**

**THE LIVING LAW**

**5th Edition 1996**

## FOREWORD

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### THE LIVING LAW

#### LAW IN CHANGING TIMES

This is the fifth edition of a popular work. I wrote the Foreword to the first edition more than a decade ago. The remarks on that occasion reflected my then still recent experience as the first Chairman of the Australian Law Reform Commission (ALRC). Since then the book has changed. My experience has changed. The law of Australia has certainly changed. This is basically a new work. It is published as the world approaches a new millennium and as the Australian people contemplate the centenary of the operation of their Federal Constitution.

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Originally, this book was written for use in schools. When I was in the Law Reform Commission, schools were one of my main targets. I set out to promote teaching about our legal institutions and basic legal rules in the schools of Australia. It is difficult now to remember the vehemence of the opposition which this idea attracted in the 1970s and early 1980s. Many members of the legal profession attacked it as an attempt to produce a nation of half-baked "bush lawyers". The educational establishment disliked the idea because it added yet another new subject to the school curriculum. My efforts were looked upon as those of yet another special interest group, advancing its own particular obsessions. Many teachers were also fearful of the idea. Virtually none of them had been trained in the law. There was a lack of available materials. The teachers were concerned about their competence to give instruction in a highly complex discipline, even when confined to its rudimentary outline. Some citizens opposed the notion with those well-worn incantations to get back to the "three Rs". Here was a push to add a fourth "R" - "Rules". The rules by which we live together in comparative peace and security, justice and lawfulness, in Australian society.

Nevertheless, the efforts to promote the teaching of legal studies in schools had a number of valiant supporters. Amongst them were some of the leading judges and lawyers of Australia. They understood that it was scarcely just to presume that everyone knew the law yet to do precious little to inform the

citizens about even the broad outlines of what the law was. A committed band of teachers in every State of Australia saw the potential interest, and fascination, of legal studies as a curriculum topic. They understood its utility to future citizens. Leading citizens, concerned about civic ignorance, began to add their weight to the movement. Eventually the educational bureaucracy succumbed.

One of the advantages of a federation, such as Australia, is that ideas can be tried in one State. When they are seen to succeed, they can be adopted elsewhere. This is what happened to legal studies in schools. It was tried in Victoria. Its enormous success there, and its ready popularity with teachers and pupils alike, guaranteed its eventual extension to the other States. Now it is one of the most popular and sought after courses in the schools of our country.

A byproduct of this has been an increasing number of schoolchildren who are visiting law courts and watching the human dramas unfold every day, just as we, the judges do. In the High Court of Australia, busloads of students file into Court peering up at the seven Justices who constitute the Federal Supreme Court of their country. I look from the Bench at their young faces, listening attentively to the lawyers at work. I wonder what they think about the scene they are witnessing. About the judges in their robes? About the ceremonies, the courtesies and the studied politeness? The fact that the

opponent in a bitter contest is invariably described as "my learned friend"? Of how a judge, thought to have missed the point, is every so gently corrected by the words "with the greatest of respect" - which often signals exactly the opposite sentiment. In conversations with pupils and their teachers, I am generally relieved to hear that their impressions are not all bad. If they see people striving to do justice according to law, that is what normally goes on in an Australian courtroom.

Now this book is targeted at a somewhat different audience. It is addressed to colleges and universities where legal studies and related courses are now increasingly taught. Perhaps this development is itself the product of enlivening the minds of secondary students with courses in legal studies. It is a good thing that increasing numbers of our citizens are observing the law as a discipline, not necessarily preparatory to legal practice. They looking at it as a social phenomenon of control and justice worthy of study as such.

Necessarily, the change of focus has led to some alteration in the presence of the book. One of the perils of writing a book of this character is the speed with which statute and judge-made law of Australia are changing in a time of rapid social development. Even between the 4th edition, which effected this change, and the present, 5th, edition, there has been a need to rewrite significant sections of the book. The publisher hopes that the book will continue to be used in schools. But now there

is a wider readership. Perhaps it is one more critical of the law, its institutions and personnel.

Criticism is a feature of Australian society today. Things long settled are suddenly coming unstuck. The notion that the Crown is the "font of justice" has been questioned in some circles by those who advocate a republican constitution. In advance of the people's consideration of this topic, the Governor of New South Wales has been turned out of Government House. The appointment of leading barristers as Queen's Counsel has been terminated in two States (although hastily succeeded by the appointment of "Senior Counsel"). Wigs and gowns, those perennial old favourites, have come under review. When I moved from the New South Wales Court of Appeal to the High Court, I left behind my crimson and ermine robe and wig. In the nation's highest Court, and in the Federal Court of Australia, wigs are a thing of the past. So these are changing times for the law and its institutions. No wonder this is the 5th edition of this book in little more than a decade.

#### REFORM OF THE LAW

I applaud the fact that, through the various editions of this book, the authors have retained a questioning stance about the content of law and of its institutions. This is not to say that the basic features of Australia as a law-abiding and constitutional society should be cast aside. I have no doubt that, as we

approach the centenary of the Constitution, we will, as a people, give more attention to the blessings it has afforded us (as well as its suggested defects). Amongst the blessings must be counted the national unity and stability which the Constitution has secured. Ours is certainly a society governed by the rule of law, not by men with guns or a powerful and corrupted elite. Our democracy has endured. We have regularly changed our governments. Our civil service is not corrupted. Our armed forces obey civilian power and play no part in politics. We have legal and even constitutional protections for free expression. Although we have been reluctant to amend the formal text of the Constitution, thanks to the High Court, the understanding of its meaning has adapted with changing times. We have preserved a land of substantial freedom. When that freedom has occasionally been threatened, the courts have usually made decisions protective of basic rights as the High Court did in the *Communist Party Case*.

Yet these institutional strengths of Australia do not relieve us of the obligation constantly to study the laws and the Constitution, the judiciary and the legal profession to see whether there is scope for improvement. In the passage of time between the 1st and the 5th editions of this book, some important reforms have been achieved. Some have come about by judicial decision. Most have been enacted by the parliaments.

Parliaments are often distracted by political disputation. Helping parliaments to enact reformed laws is an important work of the Law Reform Commission of this country. Some of the tasks upon which I laboured in the Australian Law Reform Commission in the 1970s have helped to produce laws which are more just and appropriate to modern Australia. Take the following areas mentioned in this book:

[Set out the extracts on Aboriginal customary laws, sentencing, evidence, criminal investigation, fair trial and class actions in earlier editions. After the section on Aboriginal customary laws, add: "The High Court's decision has been followed by the enactment by the Federal Parliament of the *Native Title Act*. In the entry on evidence, delete "legislation on this subject is pending at the time this edition goes to press" and insert "legislation on this subject has been enacted by the Federal and New South Wales Parliaments"].

#### A TIME OF CHANGE

I have said that the centenary of our Constitution will afford us the opportunity to consider its blessings. Doubtless the Australian people understand, intuitively, the strengths of their Constitution. Certainly, they have proved most reluctant to approve formal amendment of it under s 128. Caution in



amending such a basic text has sometimes been vindicated. The clearest case in point was in 1951, when an attempt was made to amend the Constitution to permit the banning of communists. The people of Australia rejected the proposal. The Constitution remained a living protection for communists as for other minorities. The real test for human rights occurs in the way a society defends the human dignity of minorities, including those who are stigmatised and hated. Nevertheless, the approaching centenary of the Constitution will require of the Australian people that they consider afresh the federal compact. Should we have specific provisions to promote reconciliation with the Aboriginal and other indigenous peoples of Australia? Should we become a republic? Should we redistribute the powers enjoyed by the Federal and State Parliaments? Should we adopt a Bill of Rights? Should we recognise in the Constitution, the vital part played by local government? Should we recognise and control the growing influence on our law of international treaties? Should appointments to the federal judiciary, as in the United States, have the scrutiny of Federal Parliament, out of recognition of the power which judges have to interpret the Constitution and develop the law? Should we reform the amendment procedure of the Constitution, so that change and development in the future regularly involves the people and does not have to be left to unelected judges?

As this book teaches, Australians at least live in a country where they can ask these questions. They can also contribute to

the answers. It is more likely that they will do so if they understand something about the role of law, its institutions and personnel and if they have reflected both on its strengths as well as its weaknesses. The law does not belong to judges and lawyers. It belongs to every citizen. Only when the people of Australia are more aware of their legal system will they feel a sense of responsibility about its content and capacity to chart its future directions.

Michael Kirby  
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15 November 1996