FOREWORD – "THE LIVING LAW"

HEILBRONN, KOVACS, LATIMER, NEILSEN AND PAGONE

INTRODUCING THE LAW (5TH EDITION), CCH (1996)

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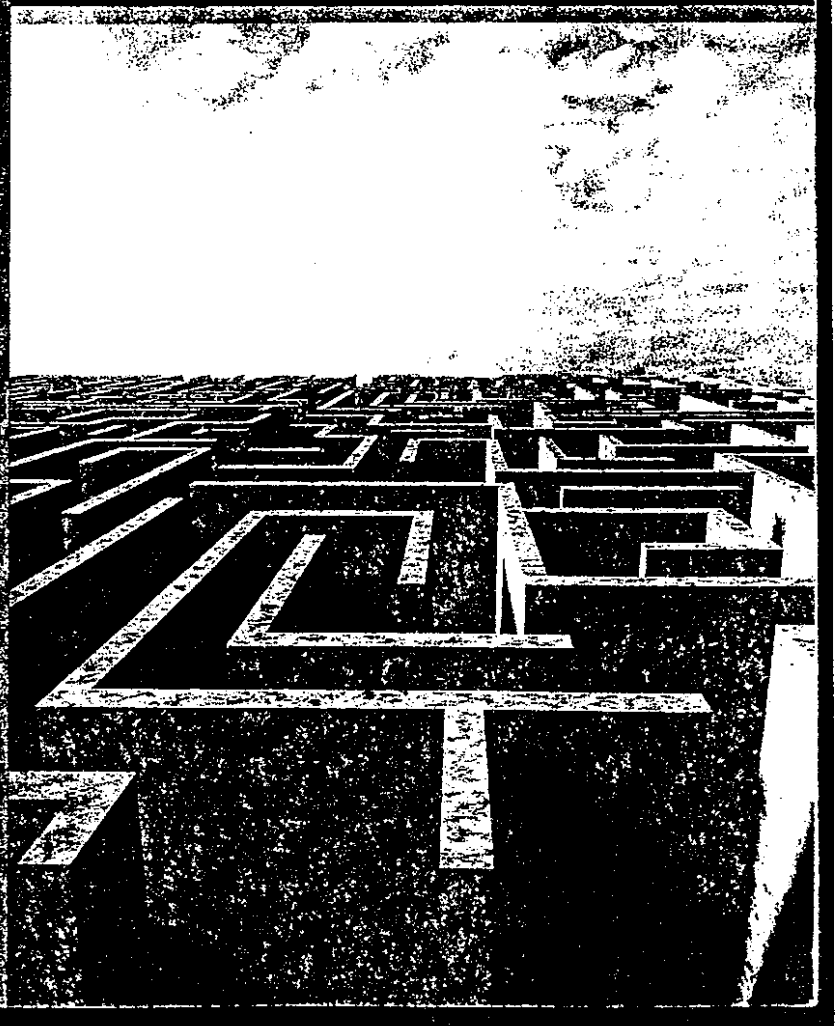
5TH EDITION



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Foreword

THE HON JUSTICE MICHAEL KIRBY AC CMG*

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.

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.

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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 ever 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 are 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 is 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 (¶234). 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 (¶523). 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:

Aboriginal customary laws. The text makes mention of the view taken at the establishment of the settlements in Australia when the country was almost entirely without laws, that the laws of the Aboriginal people, if any, could be ignored (¶1038-¶1039). This rule offended some judges who are actually dealing with Aboriginal Australians. Attempts were therefore made to give recognition to the reality of Aboriginal customs under which, occasionally, Aboriginal Australians accused were liable to be punished twice, both by our law, and by their own communities (¶1041). Judges also developed rules to recognise the serious cultural disadvantages which some Aborigines, at least, faced in our courts. The ALRC reported on ways in which, 200 years after European settlement, a more comprehensive approach could be adopted to the recognition of Aboriginal customary laws in Australia. Most of the Commission's proposals have not yet been implemented. But in *Mabo v Queensland*, the High Court of Australia has exploded the myth that Australia was *terra nullius* before the European settlement. It has accepted that Aboriginal communities may have had established rules on the title to their land which survived the acquisition of Australia by the British Crown. The High Court's decision has been followed by the enactment by the Federal Parliament of the *Native Title Act*.

Sentencing. The discussion of Australia's criminal law contains mention of the option for the sentencing of persons convicted of criminal offences (¶809). The ALRC also conducted a major review of sentencing reforms. It led to some legislation dealing with Federal offenders. In some States of Australia, "Truth in Sentencing" legislation has been enacted. Quite radical reforms of sentencing law have been introduced. Even without legislation, judges have made arrangements for the provision to them, on sentencing, of comparable data to ensure that sentences avoid the "badge of unfairness" inherent in unequal treatment of like offences and offenders.

Evidence. The book also contains a useful discussion of the adversary trial system which Australia has inherited from England (¶114). The influence of the jury on the way in which trials are conducted is examined (¶703-¶715). The ALRC, in concert with State law reform bodies, has suggested major reforms of Australia's evidence laws, to simplify and unify the laws applied in the courts across this continent. Legislation on this subject has been enacted by the Federal and New South Wales Parliaments. But even without legislation, judges have adapted the law of evidence to meet the increased pressure upon the courts, to help them get through their business in an efficient, logical and rational way. In the decline of jury trials, many of the old battles about evidence have been replaced by attention to efficiency and economy of presentation of cases. In general, this represents a good development at a time when lawyers' fees have gone beyond the capacity of most ordinary citizens to pay.

Criminal investigation. One of the first projects of the ALRC concerned the reform of criminal investigation. Important proposals were put forward to reduce the risk of wrongful conviction by unfair procedures adopted by the police. One of these was "verballing", ie false confessions attributed to persons whilst in custody. The ALRC urged the adoption of sound and video recording of confessions to reduce the battles which consume so much time in the courts. Governments and police prevaricated. The legislation was not uniformly enacted. Accordingly, in 1992, the High Court of Australia in the important decision of *The Queen v McKinney* indicated that the courts would wait no longer. For the defence of the integrity of criminal trials, and to prevent wrongful convictions by false or dubious testimony, judges would henceforth be required to give warnings to juries about the dangers of convicting accused persons upon the basis of uncorroborated evidence, including police evidence, which was not recorded mechanically or otherwise confirmed. To this end the judges showed that Parliamentary neglect of reform would bring forth resolute action from the common law of Australia to provide assurances against the injustice of a wrongful conviction.

Fair trial. A special problem of Australian law derives from the multicultural nature of our society. About one in five Australians speak at home a language other than English. This feature of our community is necessarily reflected in our courtrooms (¶1043). However, it is not always reflected in the substantive law. Yet in 1992, in *Dietrich v The Queen*, the High Court of Australia made an important decision protective of the essential fairness of the criminal trial for all people accused. Reversing an earlier decision, it held that, at least in some circumstances, if an accused person is not legally represented at trial, and the trial for that reason is unfair, a conviction will be quashed. This decision has significance beyond legal representation. The same element of unfairness can arise for a want of interpretation to permit a litigant to

understand what is happening in the courtroom and to be understood by magistrate, judge and jury.

Class actions. In the discussion of civil procedure, mention is made of class actions (¶819). As goods and services are nowadays mass produced, it is inevitable that errors and faults can give rise to mass produced legal problems. It is essential that the legal system should adapt its procedures to deliver justice to multiple parties. Some legislation has been enacted as a result of the ALRC report in this regard. But much remains to be done. Court procedure, being largely in the hands of the judges themselves, could be done by the judiciary without the need for legislation.

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 sec 128 (¶231). 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 (¶325)? 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.

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High Court of Australia, Canberra
15 November 1996