



1472

HIGH COURT OF AUSTRALIA

SPECIAL SITTING

WELCOME TO

THE HONOURABLE JUSTICE KIRBY, AC, CMG

AND

THE HONOURABLE JUSTICE KENNETH MADISON HAYNE

AT

PERTH

ON

MONDAY, 20 OCTOBER 1997, AT 2.00 PM

**Coram:**

KIRBY J  
HAYNE J

**Speakers:**

Mr J.G. Syminton, President of the Law Society of Western Australia

Mr W.S. Martin, QC, President of the Western Australian Bar  
Association

**TRANSCRIPT OF PROCEEDINGS**

**KIRBY J:** Mr Syminton.

**MR SYMINTON:** May it please the Court. It is with pleasure that I appear on behalf of the Law Society of Western Australia to welcome to Western Australia Your Honour Justice Kirby and Your Honour Justice Hayne following your appointment to the Court. Your Honours' appointments are the fortieth and forty-first appointments to the Court respectively and indicates the stability and continuity governing the Court in its ninety-six year history, which is a source of great pride to the profession.

Your Honour Justice Kirby is well known to West Australians for an enduring and effective interest in human rights. Your Honour has shown in this area an outstanding commitment to the dignity of the individual and to fundamental rights, which is reflected in Your Honour's efforts to assist the human rights of communities around the globe and, in particular, your work in Cambodia; your interest in bio ethics and morality; and the rights of persons with AIDS. Your Honour's commitment and effort was recognised by the award of the 1991 Australian Human Rights Medal and Your Honour's appointments as Special Representative of the Secretary General of the United Nations on Human Rights in Cambodia and President of the International Commission of Jurists.

Your Honour is also remembered as a member of the Law Reform Commission with an abiding interest in improving public understanding of the law and its institutions.

Less well known has been Your Honour's contribution to legal education for judges and legal practitioners in this country and internationally.

Your Honour has served distinguished terms as a member of the Conciliation and Arbitration Commission and for nearly 12 years as President of the New South Wales Court of Appeal.

In summary, Your Honour brings to the Court many important attributes, not the least of which is Your Honour's knowledge and understanding of human rights.

Your Honour Justice Hayne has enjoyed an outstanding academic and legal career, including three judicial appointments in the past five years. Your Honour brings to the High Court almost 21 years

of practice at the Victorian Bar and experience as a first instance and appellate judge with the Supreme Court of Victoria and Court of Appeal of Victoria.

Prior to judicial appointment, Your Honour had a substantial practice in equity, company law, insurance law, and public law.

Among other things, Your Honour appeared in a number of commissions of enquires, including the enquiry by the National Companies and Securities Commission into certain transactions relating to the Broken Hill Proprietary Company and Elders-IXL. Your Honour also appeared in enquires into the meat industry and newspaper ownership. Your Honour has also appeared in a number of appeals in this Court - including appeals relating to trade practices, corporations law, private international law, industrial law, as well as constitutional law.

Importantly, in the context of contemporary policy development Your Honour acted as Chairman of the Victorian Attorney General's Taskforce into the reform of Civil Justice.

Your Honour has a reputation for hard work and intellectual rigour and efficiently delivering judgments. In addition, Your Honour also found time to contribute to the legal profession through your significant contribution to the Victorian Bar and legal education.

In summary, Your Honour brings many important attributes to the Court, not the least being Your Honour's reputation for intellectual rigour, hard work and efficient delivery of judgments.

In conclusion, on behalf of the Law Society of Western Australia, I extend the hope that each of you will enjoy your period of office, will find it satisfying and fulfilling, and, we look forward to many future visits by Your Honours to Western Australia. May it please the Court.

**KIRBY J:** Mr Martin.

**MR MARTIN:** If it please the Court. On behalf of the Council and members of the WA Bar Association it gives me very great pleasure to welcome each of Your Honours to Western Australia on the first occasion upon which you sit as members of the Court in this State.

The pleasure is enhanced very much by the fact that each of Your Honours is well known to the profession in this State. Although

neither of Your Honours has had first hand experience of the benefits to be derived from the practice of the law in this State, each of Your Honours has gone to some lengths to mitigate the effect of that significant disadvantage.

In the case of Your Honour Justice Kirby, Your Honour's continuing associations with many members of the profession and the judiciary in this State have been augmented by visits to this State and occasional public addresses. I believe Your Honour is continuing in that tradition on Wednesday night when Your Honour is addressing the University of Murdoch Law Students' Association.

Your Honour Justice Hayne, on the other hand, has gone so far as to marry somebody who practised as a solicitor in this State for a number of years before her head was turned, perhaps in more ways than one, by the prospect of practice at the Victorian Bar.

The qualifications and experience of each of Your Honours preceding your appointment to this Court, and your many personal virtues justifying your appointment, have been extolled publicly many times, most recently by my learned friend, Mr Syminton. They are such that I can assure Your Honours that news of your respective appointments to this Court was welcomed as warmly in this State as it was in the other States and Territories of the Commonwealth that now fall within your jurisdiction.

The limited time available to us today provides my excuse for not attempting the daunting task of canvassing the range of qualifications and qualities which so thoroughly justify the appointment of each of your Honours. Rather, I will touch upon only one common aspect of Your Honours' careers, and that concerns your involvement in law reform.

Your Honour Justice Kirby was, of course, the inaugural Chairman of the Australian Law Reform Commission and Your Honour's time as Chair of that Commission was characterised by prodigious output and by the intellectual rigour of the many talented persons whom Your Honour was able to attract to that Commission. Perhaps even more significant, though, was the very important role which Your Honour played as a public presenter of the law and its principles to the broader Australian community. Your Honour's willingness to speak on a wide range of public occasions and on a wide range of topics and to the broad spectrum of printed and electronic media in terms which rendered the law comprehensible to the average

Australian significantly enhanced the community's understanding and comprehension of the law by which it is governed.

I, myself, was privileged to observe Your Honour's capacities in this regard first hand, when I served the Administrative Review Council of which Your Honour was then a prominent member. The Council was then, of course, chaired by Chief Justice Brennan, who was then President of the Administrative Appeals Tribunal. It was 1978, and the Parliament had passed the *Administrative Decisions (Judicial Review) Act*, but the Act had not been proclaimed into force. The Council was charged with the duty of advising Government on the class of administrative decisions that should be exempted from the operation of the Act and Your Honour assumed the formidable task of negotiating with the permanent heads of the major Commonwealth Departments the precise range of exemptions that should be made to the operation of the Act. Your Honour's skills in encouraging, persuading, cajoling and reassuring senior bureaucrats who started from a firm conviction that judicial review was the end of civilisation as they knew it, was such that the range of exemptions ultimately granted were very limited. Can I venture to suggest that since 1978 a new generation of bureaucrats has, however, emerged who could benefit from a short pep talk from Your Honour on that subject.

Your Honour Justice Hayne, as has been mentioned, recently served as Chairman of the Victorian Attorney-General's project on the Reform of Civil Justice. The importance of that project is amply demonstrated by the many inquiries that have been commissioned on that topic in recent years. The Commonwealth Government has, of course, published a major report on access to justice some years ago, and there are major references on the justice system pending before the Australian Law Reform Commission and the Western Australian Law Reform Commission. Public disquiet with the cost, complexity and delay in our legal system has reached epidemic proportions. It presents a major challenge to the judiciary, the profession and to Government. Your Honour Justice Hayne's personal involvement in the consideration of these issues in the past will be of considerable assistance when these issues confront the Court. Of course, Your Honour Justice Kirby has already canvassed a number of these principles in your decision earlier this year in *State of Queensland v J.L. Holdings Pty Ltd*.

The brief reference I have made to the involvement of each of Your Honours in law reform might be seen as a convenient introduction to a debate upon the, perhaps, more controversial topic of the extent to which this Court should involve itself in the reform of the

law. I will, however, eschew the temptation to embark upon that topic on this occasion. It is sufficient to observe that no sensible person would dispute that it is the function of this Court to, at least, declare what the Common Law of Australia is. In the appointment of Your Honours, the profession and the community can be confident that all relevant considerations, both legal and social, will be taken into account in the performance of that vital function.

In conclusion, can I turn to another subject and take this opportunity to emphasise to Your Honours the importance of the peripatetic visits of the Court to the profession and the public in the outlying States. It is trite to observe that justice must not only be done but must also be seen to be done. The visit of the Court provides the profession and the public of this State with visible evidence of the workings of the Court and of the disciplined intellectual debate which characterises the proceedings of the Court. As the Court seems to be passing through perhaps one of the more controversial phases in its existence, it is important that the public manifestations of the working of the Court are maintained in all parts of the Commonwealth. Can I digress briefly to observe that the ready availability of the transcript of argument before the Court on the internet has been a very significant step in the right direction.

Finally, the visit of the Court also provides the opportunity for less formal interaction between Bench and Bar and I personally look forward to the opportunity of extending to each of Your Honours a personal welcome on a less formal occasion later in the week.

May it please the Court.

**KIRBY J:** Mr Syminton, Mr Martin, Solicitor-General and ladies and gentlemen. I am very grateful for the words that have been expressed today and I express my sincere thanks for them. I am also glad to share this occasion with Justice Hayne. The fresh bloom of his appointment is still in full flower. Mine has seen the frost of two winters and a large number of reserve judgments. I do not really feel that I am entitled to a special welcome, feeling, as I already do, to be a rather old servant of the Court.

I remember very clearly my first visit to Perth. It was in the year 1962. It was soon after I had been engaged in a university moot competition, in which Mr Solicitor took part. I was sent recently the signed menu of the dinner of that occasion which was addressed by Sir Garfield Barwick, then the Foreign Minister. The

Solicitor's signature appears on it as does mine. I am glad to see him here today.

The purpose of my visit to Perth in 1962 was to take part in a meeting of what was then called the National Union of Australia University Students. I remember very vividly that the representatives of the Guild of Undergraduates of the University of Western Australia were Mr Rob Holmes a Court and Mr Daryl Williams. Mr Holmes a Court, alas, is no more with us. However, Mr Williams, as Federal Attorney-General, continues his important contributions to our society.

One of the most memorable things that occurred during that visit to Perth in 1962, when I was 22 years of age, was that I slipped away on occasions when I should not have to the Winthrop Hall where a great choir was in mid-rehearsal of the Passion of Our Lord According to St John by J.S. Bach. It was my first encounter with that great work. In the inner recesses of my mind, I always associate Perth with the great Johann Sebastian Bach; not a bad combination.

I returned to Perth in 1975 when, as has been mentioned, I was appointed the first Chairman of the Australian Law Reform Commission. It is interesting to reflect upon the composition of the Supreme Court of Western Australia at that time. The Chief Justice was Sir Lawrence Jackson who, as it happened, had come originally from Sydney and, indeed, was an old boy of Fort Street High School, as was I. He did mention to me rather quietly that another person in his class at the time was a Mr Leonard McPherson, a person who went on to fame in the law which I do not think it is appropriate to dwell upon on an occasion such as this. The other judges of the Supreme Court at the time were Justice Virtue, Justice Burt, Justice Lavan, Justice Wickham, Justice Wallace, Justice Jones and Justice Wright. This is, I think, an indication of the time it was and how long ago. It is 23 years ago since I first came in an official capacity to this State.

I was also given a welcome on that occasion. I can remember it quite clearly. Those present included Mr Ronald Wilson, who was then, I think, the Solicitor-General, Mr Parker the Crown Solicitor, a young barrister named David Malcolm, Associate Professor Richard Harding, Charles Ogilvy, Eric Freeman, with whom I worked in law reform, and Daryl Williams and a young Secretary General of the Law Council of Australia, Mr Robert Nicholson, whom I am very pleased to see present and who, I regret to say, I have expelled temporarily from his chambers during the week that the High Court is here.



I have been blessed with many friendships in Western Australia over the years. I am glad to see many of those friends here today.

On the long journey over to Perth I read *Jesting Pilate*, for there are many gems in that book of Sir Owen Dixon's speeches. One of them is his speech on 2 September 1952 on his first sitting in Western Australia as Chief Justice of the High Court of Australia. If you look at that speech and compare what is said there with the times we are living in, there are some differences, but many things are still the same.

The differences include the fact that Chief Justice Dixon began his address with the words "Gentlemen of the Bar". I think we can now say that the Bar is not quite so monochrome as once it was. However, I look to the occasion when there will be more ladies as well as gentlemen of the Bar and of the Bench. Life appointment is a significant change from those times, because Sir Owen was venturing upon his service as Chief Justice, in which he served for 11 more years, already well advanced into his sixties. He complained about the burden of cases on the Court, a complaint which judges are wont to make. However, he was resistant to further restriction on appeals as of right. He said that "We would pursue unto another generation any relief from that burden". And so it proved.

Some things do remain the same. First, the visits of the Court to Perth. Sir Owen Dixon said that save for a period in the Depression and for a period in the Second World War, the Court has always come here, so long as there is enough business to bring it here. That is a course which I strongly support. I entirely endorse what has been said from the Bar table about how important it is for the Court to come and to meet the members of the profession and members of other branches of society when it comes to Perth and to other cities of this continental nation.

Secondly, Sir Owen said that the Court relied very heavily on the legal profession and that certainly remains the same. He did, I think, fall slightly into exaggeration or hyperbole when he declared that there was not a single case on which he had sat in which he had not had the assistance of the legal profession to throw light upon the problem before the Court. Would that I could say with complete honesty before you today that that had been my experience. However, certainly, normally and in the great majority of cases, it has been my experience. I trust that it will continue to be so.

But the third and final matter on which he made an observation is, I think, relevant to the times that we are living in. He said this:

“It is of great importance in Australia, I think, that the prestige and authority of the judiciary should be maintained. Primarily, it is the function of the judges to maintain the prestige of the courts and their authority but they are not alone concerned. The governments of the Commonwealth and the States are also concerned in this task, which is not a task of the moment but a task of time, one of sustaining the position, authority and prestige of the organs of government which enforce law and decide upon the justice of the cases before them according to law.”

The duty of the Court to maintain its authority and prestige is unquestioned. The Court strives every day to do so. But the duty of governments of the Commonwealth and the States is not, I think, always fully appreciated. The words of Sir Owen Dixon, spoken 45 years in the past, in 1952, in September of that year in this city, remain as true today as they were when they were said by him.

I could speak for a long time about my recollections of times past, and reflections on times present and times to come. However, I am not unconscious of the fact that most of you present may be here for the ensuing special leave list which is to follow and not for the ceremony in which we are now so happily engaged. I would not delay you a moment more than necessary from the pleasures which are to follow.

I want to thank both Mr Syminton and Mr Martin for their words, and all of you present for being here today to share this very happy occasion with me and with Justice Hayne.

**HAYNE J:** Mr Syminton, Mr Martin, ladies and gentlemen. One of the joys of being the junior member of a court is that there are times when you can say, “I agree with all that has been said by the other members of the Court and there is nothing I can usefully add.” Recent experience, however, suggests that the profession may expect more from this Court (and that, whether or not it is assisted by the expression of another view). For this, if no other reason then, not only do I join with what Justice Kirby has said, I say for myself how grateful I am that you have taken the time and the trouble to attend this sitting today.

For my part, one of the most significant changes that affected the legal profession during my time at the Bar was the increase in the

amount of work that each State's profession did outside the confines of their own State. When I started at the Bar in Victoria in 1971, very few practitioners worked other than in the courts of their own State. One or two very senior silks might travel to other States to appear in the courts of that State but such visits were rare. By the time I left the Bar in 1992, the situation was very different. Many, perhaps most, practitioners were admitted to practise in more than one State. Interstate work, fostered no doubt by the establishment of the Federal Court, but work in both State and federal jurisdictions, was the norm for many practitioners.

The advantages to all branches of the legal profession throughout Australia of this development are obvious. All of us benefit from being exposed to different ways of dealing with similar issues, especially when they are difficult. I know how much I enjoyed, and how much I learned, from my trips to this State when I was at the Bar, few as they were. Professional contact of that kind between practitioners of the various States is, I think, very important and it is for similar reasons that I, too, am of the view that it is every bit as important that this Court make its regular journey to Perth. I am delighted to be here.

Thank you for your welcome.

**KIRBY J:** The Court will now adjourn in order to be reconstituted for the Full Court which will sit shortly.

**AT 2.22 PM THE COURT ADJOURNED**