

THE HIGH COURT

Change and Decay or Change and Renewal¹The Hon Justice Michael Kirby AC CMG²

In the following article Justice Kirby reflects on the role and functioning of the High Court of Australia – in particular, the economic consequences of decision-making and various aspects of judicial methodology – and identifies a number of matters of judicial administration which need to be considered. He suggests that the judiciary should be willing to think boldly and to take every opportunity for renewal.

¹ This article is an updated version of an address, entitled "Change and Decay or Change and Renewal", that was delivered at the Australian National University Centre for International and Public Law Annual Dinner on 5 November 1997.

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I wish to offer some thoughts on a few particular problems that concern judicial administration in our country. In dealing with them I offer, of course, no more than my personal opinions which might not be shared by my colleagues. Indeed I may be in lonely dissent in some of them - not an entirely novel experience for me. In tackling them we should bring to bear not only the time-honoured judicial virtues inherited from the past, but also the professional imagination, willingness to think boldly and readiness to embrace new technology that one sees in any hospital or scientific facility. A doctor or scientist of the last century who entered a facility of his or her discipline today would be astonished and overwhelmed with the change. A lawyer of the nineteenth century who entered a modern Australian courtroom would feel immediately at home. Perhaps that is not a good thing.

The economics of decision-making

One feature of service in the highest court which is soon brought home to any Justice is the inevitable consequence of decisions in terms of economic costs, not only to litigants but to a broader range of people affected by the decision. This may be the inescapable consequence of a judicial body which establishes legal principles that may apply as law throughout the country. But whereas the Parliament and the Executive Government would nowadays usually have a mass of economic data to assist them in their decisions, such

data is ordinarily missing from the arguments of the parties in courts of law.

It is obvious that decisions such as those of the Court in *Mabo*¹ and *Wik*² have very large economic consequences. So have many constitutional decisions, such as that of the Court in *Ha v New South Wales*³. But quite apart from these large cases, which are of the most obvious significance to the nation as a whole, even decisions in private litigation may have a substantial economic impact.

Take for example, the decision of the Court in relation to the claims to refugee status of persons fleeing China in response to that country's one-child policy;⁴ or take a more recent case where the issue concerned the obligation of a landlord for the removal of electrical faults from leased premises⁵. In a sense, every negligence action raises an economic question as to how far the law will impose upon persons in a relationship of proximity a duty of care to protect

1 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

2 *The Wik Peoples and Thayorre People v Queensland* (1996) 187 CLR 1.

3 (1997) 71 ALJR 1080.

4 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 71 ALJR 381.

5 *Northern Sandblasting Pty Ltd v Harris* (1997) 71 ALJR 1428; see especially 1476.

others from damage⁶ Each case may turn on its own facts, as we are wont to say. But I have recently suggested the need for a more candid consideration of the economic implications of decision-making in the courts, particularly the ultimate court⁷.

To some extent, this issue is bound up in the question of procedural reform. Should courts, especially the ultimate court, facilitate interventions or the provision of *amicus curiae* briefs to assist them in considering issues (including economic issues) that the parties may have no interest or knowledge to pursue⁸? Should a different rule be adopted in relation to the costs of public interest litigation than that applied to ordinary proceedings *inter partes*⁹? Of course, a court must always be focussed primarily on the resolution of the dispute of parties. To some extent, this is constitutionally required, in the case of the High Court, by the jurisdiction conferred upon it which is to hear and determine appeals from judgments, decrees, orders and

6 See, for example, the discussion in *Cekan v Haines* (1990) 21 NSWLR 296 (CA) at 306-307.

7 M D Kirby, "Law and Economics. Is There Hope?" in M Richardson and G Hadfield (eds), *The Second Wave of Law and Economics*, 1988, The Federation Press, Sydney (forthcoming).

8 See the differing views expressed in *Levy v Victoria* (1997) 71 ALJR 837 by Brennan CJ and by the author.

9 cf *Richmond River Council v Oshlack* (1996) 39 NSWLR 622; *Oshlack v Richmond River Council* [1998] HCA 11.

sentences¹⁰ and, in its original jurisdiction, to determine defined "matters"¹¹. In the performance of establishing a rule in the particular case, courts should not allow their procedures to be converted into those appropriate to a parliamentary committee, lest the line be crossed between the judicial function and the functions of the other branches of government.

Nevertheless, alerting courts to the economic consequences of their decisions may be a challenge for the future as the declaratory function of the judiciary is increasingly questioned and new principles are sought to guide and control judicial law-making in the limited, but real, areas where it remains legitimate.

Judicial methodology

Innovations

The High Court in recent years has been remarkably innovative in several areas that, I feel, deserve wider recognition and acknowledgement. They include the video links which bring the Court

¹⁰ Australian Constitution, s 73.

¹¹ Australian Constitution s 75. See *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at 612 per Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ, 643 per McHugh J and 665-668 per Kirby J.

to the far reaches of our continental country. Also the text of High Court judgments which is available on the Internet within minutes of delivery. The Court's records of the numbers of "hits" at the website and praise of the High Court's Homepage show the great utility of these facilities. The Court has led Australia in the use of media neutral citations. Each judgment is now assigned a neutral designation ([1998] HCA 00) and each paragraph is numbered consecutively. Other innovations are in the pipeline. I pay tribute to Chief Justice Brennan for his leadership in these matters. As with any institution that has a century of continuous operation, there are further changes which affect the methodology of the Court that might, in time, need to be considered.

Judgment writing

In many cases the Justices proceed to write their own opinions, giving individual reasons for the orders which they propose. In this, I am no different from the others.

In the Court of Appeal, I inherited from my predecessor, Justice Moffitt, the President's entitlement to assign the obligation to write the first draft of a reserved decision or to give the first reasons in an *ex tempore* decision. It was the President's duty to share the work around. Interesting cases and boring ones. Routine cases and challenging ones. Cases where judges had expertise and cases where new insights might be valuable. Big cases and small ones. Cases involving equitable principles and criminal or other common law cases. The assignment system worked well. It was accepted by

all of the judges. It tended to share the burden and, to some extent, to discourage needless repetition in reasons. Of course, any judge could write separately. But the system discouraged unnecessary separate opinions. Where they came, they often accepted the statement of the facts given in the primary draft. They then went directly to the points of difference. The sheer pressure of business in the Court of Appeal encouraged this system.

In the Supreme Court of the United States of America (and, I believe, in the Supreme Court of Canada) a formal decision is taken after each week's arguments. If the Chief Justice is in the majority as then tentatively expressed, he has the privilege to assign the duty to write the opinion of the Court. If the Chief Justice is in the minority, this privilege falls to the senior Justice in the majority. A duty to write for the Court has a tendency to reduce idiosyncratic writing. Instead, it tends to produce an opinion that will express the consensus of all or most in the majority. The High Court of Australia may come to embrace some variant on these techniques, although since 1903 they have not been part of the methodology of the Court. I do not necessarily endorse every element of the profession's repeated criticism of multiple judicial opinions. Each Justice is duty bound, ultimately, to express his or her true opinion. To some extent, the provision of differing opinions is the way by which the law develops, particularly in ultimate appellate courts. On the other hand, repetition and restatement in different terms of the same facts and issues could sometimes, possibly, be reduced without undue risk to the development of the law. A new judicial methodology may be needed

to this end. Perhaps it will come during my time. Who could not have some sympathy for those who have to struggle through the nuances of multiple decisions¹²? The future might also see the provision in all Australian superior courts of summaries which state the essence of the holding of the Court and of the principal points of dissent, where these exist.

In effect, the need, wherever possible, for a "Court" opinion is a consequence of a recognition of the Court's legitimate function in law-making. It would be unthinkable that an Act of Parliament would be expressed in four, or possibly seven, different versions, each slightly differing from the other. I have heard it said that, once it was accepted that the High Court of Australia had functions to express rules of law applicable throughout the nation, it became the duty of the Court to find a methodology which would establish the rule that is laid down by the Court so that those who are bound by it are left in no doubt¹³. But this could only be achieved consistent with the real

12 *The Wik Peoples and Thatorre People v Queensland* (1996) 187 CLR 1 and *Re Residential Tenancies Tribunal of New South Wales, ex parte Defence Housing Authority* (1997) 71 ALJR 1254 are notable recent examples.

13 See, for example, *The Wik Peoples and Thatorre People v Queensland* (1996) 187 CLR 1 at 132-133 where, in a "postscript", Toohey J, with the authority of Gaudron, Gummow JJ and myself, expressed the essential common ground of the judges in the majority in that case.

opinions of the Justices. And on many complex questions, simple or common solutions are elusive.

Other areas of judicial methodology

There may be other issues of judicial administration which need to be considered. For example, should oral hearings be continued in special leave applications? In the United States of America the equivalent decisions, having regard to their great number, are made on the papers, reputedly on the advice of law clerks. Should academic opinions influence judicial decisions and, if they do, should they be acknowledged in the discussion of judicial policy¹⁴? In that regard, it should be noted that for at least the last sixty years in the High Court of Australia weight has been given to the academic writings of the living as well as the dead. The lead was given first by Sir Owen Dixon and by Justice Evatt¹⁵. Should the judicial hearing be redesigned so that it becomes an opportunity for the parties to criticise a draft opinion, perhaps prepared by a court secretariat for consideration by the Justices? Would such a radical alteration in

¹⁴ cf *Hunter v Canary Wharf Ltd* [1997] 2 WLR 684 (HL) at 697 where Lord Goff of Chieveley criticised the use of academic writings by Lord Cooke of Thorndon in support of his speech; cf D Cane, "What a Nuisance!" (1997) 113 LQR 515 at 518-519.

¹⁵ *Cowell v Rosehill Racecourse Co Ltd* (1937) 56 CLR 605 at 637-638, 650-652; *Mills v Mills* (1938) 60 CLR 150 at 181-182.

current procedures be constitutionally valid in Australia? Would it be a means of ensuring that more people have real access to the decision-making of their country's ultimate court by procedural reforms which spare the judges of that court some of the tedious, but currently necessary, routine work involved in the preparation of opinions?

When, at a legal convention nearly two decades ago, drawing on my experience with discussion papers in the Australian Law Reform Commission, I proposed the circulation of draft judicial opinions for comment and criticism before finalisation, the idea was denounced as complete heresy. Now, under the pressure of the need to adapt judicial methodology to new times and heavier burdens, when such ideas are put forward they can no longer so easily be dismissed. To the extent that the Constitution permits, all appellate judges should be open minded about radical reform of the judicial method. Anything which helps a real increase in access to the courts and an improvement of their efficiency, without reducing their quality, should in my view, be on the table.

THE NEED FOR CHANGE AND RENEWAL

In times of great social change, it is inevitable that the courts too will change. The High Court of Australia will not be exempt. Nevertheless, the Court will continue to serve the Constitution and the people of Australia and to uphold the rule of law in this much

blessed country as it enters the second century of the Constitution and a new millennium. But is there a sufficient sense of urgency in the current pace of change in judicial administration in Australia? That is a question which all judicial officers, and not only the Justices of the High Court, must ask themselves.