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IN CONVERSATION WITH
THE HON. MICHAEL KIRBY
AC CMG

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In Conversation with the Honourable Michael Kirby, AC, CMG

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One might have assumed that following his retirement Michael Kirby might have slowed at least from a gallop to a canter, let alone to a trot. However, it appears that life after the High Court has simply afforded him the opportunity to engage in an even broader range of interests and challenges. After such a celebrated and lengthy career as a judicial officer, Michael Kirby reflects in this conversation on the diversity of his experience including a number of issues and matters in the intellectual property realm.

Q: Upon your retirement from the High Court, did you imagine that, after all those years of toil, you might find yourself being able to spend time on pursuits which you had previously had an opportunity to enjoy?

A: So many people who retire then say how busy they are, and that they have never been so busy in their lives. I always used to have great scepticism and profound contempt for such assertions.

Frankly, I did not believe it. I thought that this was the excuse of old people - mostly old gents to indicate the way in which they were filling their sense of relevance - deprivation. However, I have always been busy. I had in my High Court years been very busy in international activities and in universities. What has happened is that they have expanded to fill the time that was once spent on the Court and now I have discovered ADR. That world really grew up during my judicial years.

Do not forget that I was first appointed to a judicial post back in December 1974. ADR was not very big at that time – not big at all. My first judicial post was in the Australian Conciliation and Arbitration Commission and conciliation was part of what was normally performed in a very informal hearing, sitting at a table with a conciliation commissioner, federal or state. This was a kind of mediation in the employment area. So, I had knowledge about and some skills in that area. But the enormous growth of ADR as an adjunct to legal proceedings, strictly so called, the referral out from courts and even as is now suggested in some parts of Australia the compulsory obligation to go through a process of ADR, is something entirely new.

By my election as President of IAMA, I have become much more involved in ADR and I have found first that all of the people who perform work in ADR are very interesting and highly intelligent people, and second, that there are a lot of problems that are arising in ADR which are interesting and puzzling and which I am going to spend a few years of my life, as President of IAMA, tackling and trying to come to grips with.

Q: What might some of those problems be with which you are immediately going to have to deal?

A: One of them is the way in which we do arbitration in Australia. The old method of arbitration, which was largely developed in the common law world in the United Kingdom, was extremely informal, performed by experts and conducted with an absolute minimum of procedural time consuming process. A question has arisen as to whether, in Australia, we have lost our way on arbitration. At conferences that I attend experienced arbitrators, and some solicitors who engage in arbitration, contend that this has happened because of the influx into arbitration of ex-judges. They complain that this has led to arbitration being turned into a sort of curial or judicial process whereas the whole point of arbitration was to be quick, bold and final. So, that is one issue that has to be addressed.

Another issue is the extent to which mediation, which has become such a growth industry, can be tempered by some aspects of the judicial process that are good. First of all, a measure of transparency and where the mediation (or the arbitration for that matter) involves issues of public interest there should be some exceptions that permit a degree of openness at least at some stage of the process. Another consideration is whether in mediation where you remove the independent decision maker who, in the theory of the law, has a commitment to reaching a just solution, you change the balance significantly and substitute market forces.

Q: What other things have you been up to since your retirement from the High Court?

A: First of all, "what are you up to now" rather suggests some criminal or nefarious activity, which, so far at least, I have avoided. I am "up to" three broad activities. First, ten universities have tried to get their hands upon my body and to varying extents they have succeeded. The Australian National University, the University of New South Wales, Deakin University in Victoria, the University of Tasmania and the University of Melbourne are the latest. Just today another one came in, they want me to be involved in lecturing and teaching their students and engaging in public events at the University. I like students and I like universities. I am a university person - always have been. So I am happy to do that as far as my time permits I do it. So, that is the first segment.

The second segment is international activities. I am a member of a number of international bodies. Last week I was in Geneva at the Global Reference Panel of UNAIDS on Human Rights. UNAIDS is the joint United Nations Programme to respond to the HIV Aids epidemic. That program has reached a critical moment because of the need to swing the strategies towards *prevention* rather than *treatment* of patients. In the global financial crisis the world will not be able to afford to continue to treat an ever expanding cohort of people. The latest figures indicate that 2.7 million get infected with HIV every year, so the cohort of infected is constantly

expanding and the challenge of adopting strategies of prevention, such as we did in Australia, is a bigger challenge for many countries. It is very interesting it has a legal component. The legal component is protecting the rights of the vulnerable populations so they get the message of safer sex and safer personal activities to protect themselves and thereby protect society. The third cohort is arbitration and mediation, which I have already mentioned.

Q: In relation to your involvement in international bodies, you spent a number of years as a member of the International Bioethics Committee of UNESCO. In that time, did you reflect on the role of intellectual property rights and whether they are imposing a new form of imperialism in developing nations?

A: My familiarity with this type of debate arose in the context of HIV/AIDS, but also in the context of bioethical considerations. From 1996 to 2005, I was a member of the International Bioethics Committees of UNESCO. That Committee was tasked with preparing a couple of international instruments in the form of declarations, not binding treaties but declarations. One of them was the Universal Declaration on the Human Genome and Human Rights, another was of the Universal Declaration on Bioethics and Human Rights. I chaired the drafting group of the latter.

In the course of the work on those universal declarations of UNESCO, both of which were adopted by the general conference of UNESCO, I was introduced to the debates about the patenting of drugs and the impact this has on third world countries and the controversies that exist within the United Nations family between, on the one hand, the demands of the World Trade Organisation and, on the other hand, the declarations of bodies such as UNESCO. The World Trade Organisation tends to be very protective of intellectual property law rights, UNESCO, being representative of wider family of nations, tends to be more attentive to the rights of developing countries. In our deliberations in the IBC, the Brazilians played an extremely strong part, particularly in the context of intellectual property protection for drugs or treatment of HIV/AIDS. They were assertive of their rights in a national health crisis to resort to generics for the purpose of treating the hundreds of thousands of their citizens who were presenting with HIV/AIDS on the footing that, to pay the full licence fee for the use of those drugs, (the anti-retroviral drugs), would have been so burdensome that it would have either shattered their economy. Or it would have left them in penury for a very long time to developed countries. Or it would have resulted in hundreds of thousands or maybe millions of their citizens dying for want of the anti-retroviral drugs.

In the end, a sort of compromise was reached in this field largely through the intervention of President George W. Bush. He established the Fund for Aids, Tuberculosis and Malaria. That Fund, which is largely supported by monies that were granted by the U.S. Congress, provides for the purchase of anti-retroviral drugs at full licence fees, so in a sense the American public, through the taxes paid into this

Global Fund, have been paying the pharmaceutical companies for the cost of the anti-retroviral drugs. That has palliated the problem that the Brazilian Minister and also Ministers from India and other countries were raising in the international **fora**, particularly in the World Trade Organisation. The palliation is only a temporary reprieve from what is an endemic problem. The endemic problem grows out of the fact that intellectual property laws have been spun out from old precedents in the way lawyers are comfortable in doing. That has happened instead of developing new intellectual property laws that deal with a substantially new social phenomena.

New social phenomena include international pandemic crises that make demands upon drugs which are necessary for life and death of millions of people. But also they require attention to entirely new developments such as computer derived analysis of the use of genomic information, and these scientific phenomena, instead of being dealt with as rationality would suggest by an entirely new international intellectual property regime, are dealt with by applications of an old regime which was fundamentally developed in the age of the steam engine. For example, if one was starting again, one would perhaps give a measure of intellectual property protection for the licensed drugs and also for computer developed extensions of previous intellectual property grants. But one would give it for a very short time and one would pause before giving it upon living matter.

One would also insist perhaps upon a more scrupulous definition of the idea of "invention" so that it was not used in the somewhat broad way in which it has developed in intellectual property law today. We have not gone down that path. This is a point that Lawrence Lessing constantly makes. We have just been hostage to the old law including lore of intellectual property instead of looking afresh. Why is that so? Because looking afresh would require the international community to agree to look afresh. There are some players in the international community who would not agree to that, who insist upon the maintenance of the current state of intellectual property law. So, we have got ourselves into a bind. It is very difficult, in the international community, to alter the intellectual property regime. The technology itself, particularly as the biotechnology and informatics really demand that we have a new regime with much shorter periods of protection and proper exceptions in the case where you are talking about the fundamental human rights of human beings to live and to be given access to the best available health care.

Q: Were you sorry to miss out on sitting on the *Ice TV* case which was heard shortly before your retirement from the High Court?

A: Very much so. But it came on for hearing just at the very last moment. If I had sat in that case, it would have imposed a lot of pressure on the Justices participating to get their reasons out by the 2nd February 2009, when I was due to leave the High Court. So, I weighed up whether that was reasonable to impose that pressure on my colleagues. It was an important case and that would normally require that it take a

little more than two months of sitting time which was all that was left when it was heard. That is why I decided that I would not sit. I could have sat of course. I could have said: "Draw up my chair", as I was then a serving Justice. Had I been an arrogant type of person, that is what I would have done. But I have always been sweetness and light, agreeable to a fault. For that reason I did not force my presences on the Justices. Now that I know they divided three all I have been toying in my mind asking for a recount.

Q: Are you prepared to say how you might have decided the case? Would you have occupied a dissenting chair?

A: I am not saying! That must be left to your legal imagination. (*laughs*)

Q: With respect to trade mark law, you sat on the Bench for the *BP v Woolworths* special leave application in Canberra which related to the fight over the colour green. While special leave was not granted, would you be prepared to reveal anything about your thoughts on whether leave ought to have been granted?

A: I certainly would have granted special leave in that case. I was never backward in saying what I thought if I did not agree, though generally I had to restrain my generosity out of deference for the fact that my colleagues disagreed. You would not want needless disagreement. Still the colour case was I thought a clear matter to grant special leave. In the end, I might well have concluded that the appeal ultimately should be dismissed. It depends a bit on your conception of the role of the final national court to grapple with interesting and important cases.

In the *BP* case the factor that weighed very heavily with me was that placed before the Court on the special leave application. It **involved** the decisions of other final national courts in countries overseas. I think we were told of an Israeli decision and a North European decision, the details of which I do not remember at the moment, where the case had gone the other way. Because I am an internationalist and believe that the law has to finally wake up to its international dimension, that would always be a very important factor in my evaluation. Those who are quite happy to live in the pleasant environment of Australia and its legal system and to regard foreign law, and especially non common law as largely irrelevant may not have the same reaction to a problem. I have no doubt that my general reaction to this issue will be vindicated in due course, because in the law we will all become increasingly international. Trade has done so, telecommunications has forced the technology on us and this is the way of the future. But I was not going to lose any sleep that night. I probably went home and had a large glass of gin and tonic and felt a whole lot better at the end of the day. (*laughs*)

Q: In the course of that hearing, Justice Gummow made the interesting remark questioning why should special leave be granted in circumstances where the colour

being green was one that might be considered synonymous with the environment movement, and why so should an oil company be permitted to have registration of that colour. Was that also the sort of contention which was of interest to you in deciding that special leave should be granted?

A: The more Justice Gummow went on about the reasons why special leave should not be granted the more I thought he was raising interesting questions that I could not wait to get my hands on. I am not really at liberty to disclose what factors outside those which were revealed by the Court in its disposition were reasons that might have warranted to grant a special leave. But the fact that the green movement is claiming the colour green arguably makes it all the more important, it seems to me, that one might want to look at whether or not a colour claimed by a commercial enterprise long before the green movement came on the scene was one that warranted protection under intellectual property law. That is at least arguably an interesting question.

But the factor that most weighed on my mind was that there were decisions going both ways overseas. After all, BP is a multinational corporation. It operates in many, possibly most, countries. This is an issue that is arising in many countries. It was a bit like the *Ritz Hotel* cases – they were out there trying to protect something which they had made a feature of their advertising and their product for a very long time. An argument of counsel which at least seemed attractive to me at first blush was that when a motorist is many kilometres away and sees that friendly beckoning colour green, that is something which triggers in the subconscious mind an association with the product and with the corporation that he or she feels comfortable buying from. And it is not only in petrol. We were told of the purple colours of Cadbury chocolates and other colour coding that exists in products into which corporations pour huge amounts of money to get their subliminal messages into your and my minds.

But, the Court made its decision. I loyally accept the decision. Still at the time, I thought there was a reason why in a Court list, where some decisions we grapple with were not a great commercial moment, it was worth a day's time at the High Court of Australia in hearing time to take on such a case. I also accept that there is no magic in whether you get or are refused special leave. It is partly an intuitive decision. Explanations are given. Many of those explanations are extremely opaque, such as "not attended by sufficient doubt", "would not succeed on the hearing of an appeal", and "not convinced that the court below was in error such as to warrant the grant of special leave". I have to admit that occasionally those formulae left me a little dissatisfied. Perhaps they even occasionally left members of the Bar and members of the public dissatisfied because to some extent they are obviously circular. Why are you refusing special leave? Because it is not attended by sufficient doubt. What is sufficient doubt? Well, of course, sufficient doubt is that which warrants the grant of special leave.

Q: You have written and spoken about the special leave process, its virtues and limitations. Is it a process which you think occupies too much of the High Court's limited time, or is it serving as a satisfactory approach to the selection of cases for the Court's consideration?

A: I tried to explain in a paper that I published the actual processes that went on inside the Court for the consideration of special leave. It is true that a lot of time is spent on them. In my own case, it was about one and a half days a fortnight of the sitting period. That required absorption of a great mass of detail in the appeal books. On the other hand, it is a very important part of the work of the Justices, once the entitlement to appeal as a right disappeared in 1976 and the Court decided its own work. Effectively, it became essential that that should be done by the justice system. There is no way that it should be done by a registrar or by anyone else. It should be done by the Justices with such help from the Court staff and their own personal staff as they consider useful. Different views on methodology existed in different chambers and no doubt still do. Some Justices, like myself, did not require their associates to prepare lengthy memoranda. In my own case, that was because I had a lot of experience with leave questions in the Court of Appeal and I frankly did not think my performance in that area would be marginally increased by the meanderings of the mind of a very junior lawyer. I did not think that I should escape my own personal obligations to make what was, objectively, a very important decision.

So, the hearing of the applications was always a serious business and if you were in the hearing list that meant that you had not been bumped out by the process of hearing on the papers and that there was a chance that you would get special leave. Normally, in a day of twelve applications one, two and sometimes three would be granted. I was famous for my saintly generosity. Some of the Justices were as mean as church mice. Yet it was interesting that we generally did not, in the end, have great differences about the cases that warranted leave. We generally agreed on what those cases were.

After a few years of sitting in the High Court you get the smell of a High Court case and it is partly intuitive but it is partly argumentative. There is no doubt that the mind can be turned by good advocacy and especially by those counsel who can conceptualise the case and show either its legal importance or the differences that exist in authority about the point or some international aspect of it that attracts attention or a suggestion that a serious miscarriage of justice has happened in the particular case. The answer to your question, therefore, is that special leave is a big burden. But it is rightly so and I do not see that it can be escaped, or should you lose too many tears over the work obligations of the High Court Justices. In my last year as President of the Court of Appeal I signed off on about 380 opinions. In the High Court, it was 80 approximately each year. Not all of the 380 were big, difficult cases. Many of them were a routine application of the principles laid down by the High

Court. That is the difference between the final court and an intermediate court. But many of them were very difficult cases. I have a theory that if the High Court decided more cases in a more economical way, there would be more co-operation within the Court. The Court of Appeal of New South Wales was a very collegiate court and still is. That collegiality arose, I think, out of the fact that we were all just so busy that we had to keep our egos in close confinement. We co-operated with each other, recognised the skills of each other and did exclude each other but included each other fully in the work of the Court.

That has not always happened in the High Court of Australia. Maybe if the Court delivered judgment in more cases, there would be a necessity for greater co-operation than existed in my time. Certainly, there was a big difference in my experience between the ethos of the Court of Appeal and of the High Court. I do not think it was confined to my period. It is a feature probably, in part, created by the fact that the Justices come from different parts of the nation and go back there at the end of a sitting. In the Court of Appeal, we are all sitting together and working together. That was a very happy time in my professional career. I hope the years ahead are going to be another happy time.

Q: On the topic of judicial selection, the Sotomayor hearings in the US have provided intriguing recent viewing. Do you think that we might be inching towards this type of process given the Federal and State Governments' introduction of new judicial selection procedures?

A: The Sotomayor hearings are a perfect reason why we should not go down that track. This highly intelligent and experienced Federal Judge has had very long experience and plenty of track record to permit an examination of her real judicial qualities. She has written a number of articles that allow a general examination of her philosophy. Yes she has been subjected to questions which have forced her to deny, in turn, three truths.

First, that her decisions would be affected by her background as a Latina and as a person who grew up on the 'wrong side of the tracks' and who had to work very hard, and her family had to work very hard, to get her where she was. Second, that judges do not simply act on automatic pilot but have choices to make and, therefore, their choices are affected by their values. Third, that in particular cases where it was relevant and useful you could sometimes find wisdom in international law and in the law of other countries.

These three very sensible and truthful positions which she had earlier adopted had to be abandoned by her because to persist with them would lead to the rage of some people who like fairy stories. The problem with parliamentary or congressional hearings of the kind that we have seen in this and earlier cases is that honest judges will be forced into such deception in the hope that they can get the appointment. I

have no objection myself to advertising for people to show an interest in judging. There is no doubt that many would like to be judges and who would be good judges are passed over and never get a chance. That is a sad thing. I have known some such people. On the other hand, I am not much in favour of judicial commissions which will inevitably be made up of powerful and opinionated members of the legal profession, mostly other judges, who will dominate any lay persons who get appointed to them. This is because the lay person will generally have the view that the law is totally objective and that values do not matter and should not matter. We need realism in judicial appointments. The system which we have inherited in Australia from Britain, like many things we inherited from the British legal system, is curious. You perhaps would not invent it. Yet it does tend to work rather well.

Politicians know, certainly in the higher courts, that they cannot embarrass themselves by appointing people who will not be up to it. Very few of our judges in the higher courts and increasingly in the lower courts and in the magistracy, are not up to it. Second, the politicians know that values are crucially important. Far from it being a bad thing that politicians reflect that in the judiciary. My opinion is that it is a good thing because it means that over time, with the changes in the political branches, you get a reflection of differing philosophies. My fear for institutional arrangements, such as are now being talked about, is that it will be a formula for conservatism unalloyed by the occasional injection of liberalism.

Q: In the last few days a report has been released written Terry Janke in support of the establishment of a National Indigenous Cultural Authority. The report seeks to reignite debate on the limitations of intellectual property laws in dealing with issues arising in indigenous culture. What are your thoughts on an idea such as this?

A: In Australia, we have been able to brush aside many issues which New Zealand has always been required to confront in part because of the Treaty of Waitangi. There have been cases, including at least one in the High Court, which has touched upon the extension of intellectual property protection to the Aboriginal people and the necessity of having a broader notion of what can be the subject of intellectual property protection in the case of Aboriginal people. There have been questions that came up in the High Court, for example in *Wurridjal v Commonwealth* which was my very last decision in the High Court. An issue arose concerning the meaning of "property" within the meaning of the constitutional protection against the acquisition of property as it applied to Aboriginal people. (Constitution, S51(xxxi)).

Wurridjal was the challenge to the so called Northern Territory Intervention. I regret to say that I was the only judge in the Court that would have upheld the challenge to the validity of that action, in part because I regarded it as involving an acquisition of property as that expression should be widely understood in the context of our Constitution and as applicable to Aboriginal people. So far as intellectual property protection for Aboriginal people is concerned, I would be in favour of Aboriginal

individuals and communities having proper protections that equated them to the protections of other Australians. On the other hand, because I am not a big one for expanding monopoly rights, I am not sure that that is going to produce a lot of funding for the really essential things we have to do in Australia in the field of health, education and housing which are the core of the deprivations of Aboriginal Australians from the rights that other Australians have.

It is hard to get away from the conclusion that intellectual property law protection is always going to be a very particular rather special and highly individualised source of funds. It is not really going to tackle the big issues that face Aboriginals. What we have to do in respect of intellectual property law is what we eventually did in respect of real property. That is to say remove any impediments that have existed hitherto against Aboriginals enjoying rights that they would enjoy with due adjustment to the nature of their rights and the differences of the rights they are claiming when compared to members of the majority community. But important though this is, it is not one of the greatest issues affecting the Aboriginal people. The issues addressed in the *Mabo* and *Wik* cases of the High Court, *Mabo* before my time and *Wik* in my time, and the issues addressed in the *Wurridjal* case, are, in terms of their impact on the Aboriginal people and their rights and equality under our Constitution and in our law, are rather more important.

In *Wurridjal* I said in my reasons that if any other racial group in the Australian community were selected out; the *Racial Discrimination Act* lifted; the international convention against racism removed from application; policemen and troops marched into their property to take control of their property for a time; control being taken of it in intimate private and personal ways, took control of it without discriminating between those who could manage their property and those that could not, took control of it if they were graduates, intruded into their sacred sites and matters important to their spirituality - if that were done to any other racial group in Australia it would be an outrage. (2009) ALJR 399 at 445 [214]. That was said by Chief Justice French to be a gratuitous comment *Ibid*.408 [14]. But with respect, it was not gratuitous as I pointed out in my reasons. It was at the very heart of my objection to the constitutional validity of the law.

Q: When you talked earlier about your pursuits since retiring from the High Court you omitted to mention anything about your love of music and history. Have you found more time for those interests upon retirement? I seem to recall reading about you in a recent University of Sydney Alumni magazine that you had taken to rapping in a bright orange or yellow jacket – is that so?

A: I would not have used an orange jacket because that might have had a political connotation of Guantanamo Bay and, of course, I must not make any political comment whatsoever. Yes, I rapped recently with Elf Transporter, possibly Australia's best hip hop artist. Please do not make a confusion in your mind between

rapping and hip hop. I was definitely hip hop. I said (or some said I sang) one of the poems of W. B. Yeats. It was said to me later by Elf that I was a natural hip hop artist! That I had a great sense of rhythm. That I had the necessary energy and a sense of humour. And therefore that I had a big future as a hip hop artist if only I would give myself over to it. So far I have resisted. (*laughs*). But that is only part of my world of music.

Today at a function at NSW Parliament House I was speaking about Dame Joan Sutherland who was being celebrated by the committee that supports young opera singers in Australia. Richard Bonyngue was there. I also spoke about Dame Joan Hammond, who was another great Australian soprano whose singing introduced me to opera when I was a boy. This took me to another stream of song and voice which is *Leider* and *Cantatas*. If I have a spare moment in a plane that is the area I resort to. I also spoke of Kathleen Ferrier who was a great English mezzo soprano in the 1950s who died tragically of cancer at the age of 40 at the height of her career. She was a great interpreter of Mahler - curious that a lass from Lancashire should be able to interpret and expound the dark moods of Gustav Mahler and his songs. It was a great day. They are lovely people. People who are gardeners and who like music are generally not too bad – even hip hop artists. (*laughs*) Some were even lawyers!

Q: Finally, what can we expect in your forthcoming biography?

A: Well, it is being produced by Federation Press. It is being written by Professor AJ Brown of Griffith University. It is a biography and, I think it is likely to be more than a thousand pages long. Once published, I should give Australian citizens and lawyers a rest for a time. Don't count on there being many saucy bits.
