

EMBARGOED UNTIL 1PM (EST) MONDAY 2 FEBRUARY 2009

HIGH COURT OF AUSTRALIA

JUDICIAL FAREWELL

**THE HON JUSTICE MICHAEL KIRBY AC CMG
JUSTICE OF THE HIGH COURT OF AUSTRALIA**

Attorney-General, The Hon Robert McClelland MP;
President of the Australian Bar Association, Mr Thomas Bathurst, QC;
President of the Law Council of Australia, Mr John Corcoran;
President of my home Bar, the Bar Association of New South Wales,
Ms Anna Katzmann SC;
The Hon T E F Hughes, AO, QC;
Judicial, Academic and other Colleagues;
Family and Friends:

In this room, where independent judges uphold the law and the Constitution, I start by honouring the people of Australia, in all of their diversity, most of them happily unaware of what we do here today. Fortunate is a land that lives in confidence under the rule of law, with elected parliaments, uncorrupted officials and independent judges.

I honour the indigenous peoples of Australia. So long neglected, it is here, in this very room, before my time, that *Mabo*¹ was decided

¹ *Mabo v Queensland [No 2]* (1992) 175 CLR 1. See also *Wik Peoples v Queensland* (1996) 187 CLR 1.

demanding that we enter into a new relationship. I have tried to be faithful to my understanding of that decision².

I honour the Parliament. I am grateful that busy members of Parliament, past and present, from all major parties have done me the honour of coming here today.

I honour you, Attorney-General. Not just for the high office you hold. But for good things that you have recently done. In my last days of judicial service, you led the Parliament, with virtually no eventual opposition, to remove unjust laws that affected me and my partner. What some said was a discrimination impossible to correct, or not a priority, you and members of the Australian Parliament addressed with justice. I express my thanks to you. I honour the Hon Malcolm Turnbull MP, Leader of the Federal Opposition. As a young cub reporter many years ago, he taught me how to sell law reform to the public. I also honour Senator George Brandis and Senator Bob Brown and others here.

I honour you, Mr Bathurst and the members of the Australian Bar Association. How many times, over the decades, you and your colleagues have appeared before me in courts across our continental country. As Chief Justice Brennan used to say, advocates are ministers of justice, guardians of law and rights. Despite my endeavour in

² See my reasons in *Griffiths v Minister for Lands, Planning and Environment* (2008) 82 ALJR 899; 246 ALR 218; *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 82 ALJR 1099; 248 ALR 195.

*D'Orta-Ekenaike*³ to terminate the legal immunity for work as advocates, which failed, the Bar will honour me tonight with life membership. For their charity and forgiveness, I will cherish that gift.

I honour and thank you, Mr Corcoran, speaking for the universal body of lawyers in our country. Even before I joined the Bar, I was a clerk and solicitor for nearly a decade. On every working day I looked across my desk at anxious clients, their families and friends. I never forgot that, from that moment on, I would be "Mr Kirby, our lawyer".

I honour you, Ms Katzmann. I wish that during my 13 years here, I had heard more women from the central podium. The Honourable Mary Gaudron QC and the Honourable Michael McHugh AC QC, my former colleagues, do me the honour of being here today. They, like me, always knew (as Justice Gaudron used to put it) that talent in the law and advocacy is not found only on the Y chromosome. The additional award of life membership of my home Bar is specially precious to me because I did not have the usual journey at the Bar before becoming a judge. I will always be happy in the company of the Bar.

You, Mr Hughes, were there at my coming in and now at my going out. You have been a great performer in many of the acts of my long drama. Lawyers love ceremonies. It is not just the "vanity" in us. Ceremonies like this help to cement our corporate life and to remind us that we are all but temporary travellers in these parts. Mr Hughes, your

³ *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 68.

presence reminds me of how the Duke of Edinburgh said he felt at his 80th birthday party. He said that he had not expected that his mother-in-law would still be there, aged 101. Back in 1974, neither of us could have predicted today's occasion. I congratulate you, Mr Hughes, on your own anniversary. I promise to be there with you at the next one, when I am 101.

I would also mention, Attorney, the presence of not only your wife, Michelle, but also of your father, the Honourable Doug McClelland AC, former Senator and Minister of the Commonwealth. In Kylie Tennant's biography of Herbert Vere Evatt⁴, part of your father's condolence speech to the Senate is recorded. The thing that your father recounted was not Evatt's mighty achievements as a brilliant scholar, the youngest ever Justice of this Court and President of the General Assembly when it adopted the *Universal Declaration of Human Rights*⁵. Instead, it was his empathy⁵ to ordinary Australians ("little people"). No public official could hope for a prouder badge of honour. By his presence, the Honourable Doug McClelland links us all to Justice Evatt and back to 1929 when he was appointed to this Court. Evatt's memory, that of others and the portraits around us, remind us of the history of the Court and its mighty service to the Constitution and the people for over a century.

⁴ Kylie Tennant, *Evatt, Politics and Justice*, (Angus and Robertson, Famous Australians, 1981), 337-338.

⁵ Ibid, 211. Adopted and proclaimed by the General Assembly, resolution 217A (III) of 10 December 1948.

I am grateful that (for the first time I think) heads of the national cultural institutions have joined us on this occasion: the National Library, the National Archives, the National Museum of Australia, the National Gallery and the new National Portrait Gallery, our neighbour. I cannot understand how anybody would not love Canberra. It is a great pity that the architects placed most of the judicial chambers on level 9 of this building facing the airport. This plants sullen, escapist thoughts in the minds of some Justices. Chief Justices looks out at the Lake, upon which they are reputed to walk. From my windows I have watched the Brindabellas with their changing colours, the trees and the bright stars by night. Walking to and from work in the different seasons has been a special joy of my service here. Best not to be too cut off from reality. A life in Commonwealth cars is not a good look.

I honour my judicial colleagues, including the chief justices and judges, federal and state, who are here to send me off. My friends from the Australian Law Reform Commission and the independent judicial and professional bodies. I thank the Law Officers, past and present, for being here. Perhaps some are checking that I really am going. They can now signal back: 'the Eagle has landed'.

I pay tribute to the faithful staff of the High Court here and in the other cities: the successive chief executives, registrars, librarians, court officers, some of whom are with me today. To my own personal assistant of 20 years, the wonderful Janet Saleh: prudent, feisty and wise. To my many associates from this Court and the Court of Appeal, so many of whom have travelled here. I am proud of every one of them.

To Justice Virginia Bell, my esteemed successor, who does me the honour of attending today, I extend good wishes and encouragement. She will take over my chambers. *She* will now look at the mountains, the changing seasons and the stars. She began *her* journey in the Redfern Legal Centre in Sydney. So she is most unlikely ever to forget the way law is viewed, and affects, Doug McClelland's "little people". But I warn her here and now that, if that unlikely moment ever arrives, the ghosts of William Deane and Michael Kirby that haunt that room will come down and whisper in her ear. The "vibes" of the room are powerful. The Court had the room revarnished last week. But the vibes will remain. They are in the ether and in the lawbooks. They cannot be varnished away.

My father is here today, together with my brothers Donald and David. My sister Diana could not get the day off, nursing colo-rectal patients at Royal Prince Alfred Hospital in Sydney, but Julie, her daughter, is here. I honour my wonderful parents and my family. My father, who is 93 this month, is sharp as ever and still driving. He had to be restrained from driving down here from Sydney. For those of you who have enjoyed this ceremony, and, like President Obama, think it so much fun that it should be repeated, I regret to say that my state funeral is postponed for three decades. But that is not to say that I don't want one in due season.

On past occasions, when I have come to this point, I have referred to my debt to unnamed "loved ones"⁶. My fearless sisters-in-law would always dig my partner Johan van Vloten in the ribs to let him know that this was him. He was on. Well, those times are over. Johan has been a great strength to me during my time on this Court and long before. He has occasionally had to absorb unkind blows without complaint: a steadfast rock throughout all my judicial years. Today, I can thank and praise him publicly. And next week we celebrate 40 years together.

In the interval between my swearing in and now many good things have been achieved in Australia, including sometimes in this place, to improve the position in law of those whom I mentioned at my welcome⁷: Aboriginals, women, homosexuals, Asian Australians, non-English speakers. Challenges remain and there are new injustices to overcome after today. The noble struggle for justice is never completed.

My departure has permitted me to send a lot of papers to the National Archives. At my request, last month, they gave me access to my ASIO file. I combed through the insubstantial records of long-forgotten, trivial activities in student affairs, in the Council of Civil Liberties (Mr Murphy) and other innocuous events far away. And then my eyes fell upon a report of an unidentified agent's conversation with

⁶ See, for example, speeches on departure from the Court of Appeal of New South Wales and on welcome and swearing-in to the High Court, 6 February 1996: (1996) 70 ALJ 274 at 276.

⁷ (1996) 70 ALJ 274 at 276.

my great aunt, Gloria Boes. She was a friend of Jessie Street. She was, what we would now call, a "progressive feminist". She had some communist friends. No doubt that was how she came under surveillance. She died in 1993.

In the conversation, she is reported as having said: "Michael Kirby is very brainy but he [is] a reactionary"⁸. Somehow this did not seem to square at all with all the talk of a "judicial activist", "maverick" and "great dissenter". So I thought about it. Actually, my aunt, who was very intelligent, may have been onto something here. You see, I could never get out of my mind the notion that the law of Australia is basically an instrument of justice. That its invariable tendency is to bend towards equal justice for all. That it would not lightly condone a constitutional interpretation oppressive to the "little people" in Australia⁹. That our law is generally fair and rational. And that where it is not, parliaments or the courts have their responsibility to step in, so far as they can, to make it so. When you analyse them, these are truly very "reactionary" thoughts. They exhibit a naïve and touching faith in Australia's institutions. It is a faith in which I have never wavered these past 35 years.

Tonight at midnight I will put away this black robe. Yet it is a trifle. Nowhere near as grand as the scarlet and ermine robes of earlier days. Those robes will remain, portrayed in oils, in the National Portrait

⁸ National Archives of Australia. File Kirby, Michael Donald, Series A6126; item 1256, "Secret" folio 107/65.

⁹ cf *Al-Kateb v Godwin* (2004) 219 CLR 562 at 624 [174].

Gallery next door, long after I have left this place. I will shed the title of "Justice" that I have carried as a reminder of my vocation these past three decades. I will return to the title of a citizen – "Mister". There is no prouder boast in the world than to be a citizen of Australia. I will leave this building tomorrow. But I know that, in the hands of my colleagues and Justice Bell, the vital work of independent judges will go on. My staff will depart with me. But I will stay in touch with them, as I will with many of you present. The future is an unknown adventure. But I am entirely confident about it.

Taking a taxi late last week, the driver engaged me in conversation:

"Q. I read that you're being forced to retire?

A. Yes, the Constitution requires it at 70.

There was a long pause. I waited for him to say "But you don't look 70". He never did.

Q. How does your father feel [he knows I go there every week]? How does he feel about having a son who's retiring? At 70?

A. Well, actually, he keeps asking me if I've registered yet at Centrelink.

Another pause.

Q. But there's always been a Justice Kirby in Australia [he may have been thinking of Sir Richard Kirby, appointed a judge back in 1948].

A. There still will be [said I, thinking of my brother David].

Q. Well, we're going to miss you.

A. You mean, you'll miss my cab fare. I'll be back taking buses."

After I alighted, the driver drove off very slowly into the distance. I can swear that I saw tears streaming down his cheeks. So it will be with some of you. But not all.

The High Court will offer hospitality for many after the Silks' ceremony at 3:30pm. But for those who can stay only for a short time in the Great Hall, I would like to greet you personally when we rise. I thank everyone for coming today to ease the passing.

And so, for the last time, I give a direction as an Australian judge. Directions, orders, judgments – so many. They seem so natural and familiar. Let the last one hang in the air as three decades roll away and my new life beckons.

Adjourn this occasion to the delivery of judgments by the Full Court of the High Court of Australia at 2.15 this afternoon in this Court.

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MONDAY, 2 FEBRUARY 2009

**COURTROOM NO 1, CANBERRA
AUSTRALIAN CAPITAL TERRITORY**

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