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AUSTRALIAN LAW AWARDS

AWARDS FUNCTION WESTIN HOTEL, SYDNEY

7 MARCH 2002

LAW FIRMS AND JUSTICE IN AUSTRALIA

The Hon Justice Michael Kirby AC CMG

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CONTEXT

It is generous of you to invite me to address this awards dinner. I have been waiting quietly for decades to get off my chest my opinions about lawyers and legal firms. But you have not been generous with the allotted time. To assign me 10 minutes for such a monumental task is cruel. I regard it as the revenge of the legal profession upon the High Court's special leave time limits. Even we, out of our great mercy, grant 20 minutes. I shall remember the profession's commitment to 10 minutes. If you can do it to us, we can surely do it to you.

Recently, at the launch of the *Oxford Companion to the High Court of Australia*, Chief Justice Gleeson made the point that not

* Justice of the High Court of Australia.

one of the present Justices of the High Court was the child of a university graduate. We are all children of the Commonwealth Scholarships Scheme. And I am the only one of the seven Justices whose entire education was in public schools.

The awards that will be celebrated tonight recognise lawyers who work in a world utterly different from that in which the present Justices of the High Court grew up. Chief Justice Gleeson completed his articles of clerkship in the Sydney law firm of Murphy and Maloney. There were three partners, three employed solicitors and four articled clerks. As well, there was a managing clerk. The senior partner read every item of correspondence that came into the firm. Every letter that went out was signed by a partner. At the time, that firm would have been regarded as medium sized.

Justice Gaudron worked at first with the Commonwealth Crown Solicitor. But she was sacked. This was because she married. She then secured a job as a registration clerk with Fisher and Law, another small to medium firm. There were two solicitors and an ancient managing clerk, with skin like the parchment of the Old System deeds with which he worked.

My family had no links with the law. But I had excellent academic results. Naively, I wrote to some of the ancestors of the firms that are now the big six. Alas, there was no place at the inn. I would not wish you to think that I harbour any grudges. Perhaps it

was because the "big firms" of those days were also pretty modest. Justice Gummow, who served his articles at Allen Allen & Hemsley, says that there were then 14 partners, 20 employed solicitors and a group of articled clerks. Small fry by today's standards.

Cap in hand, I wrote to many firms. Eventually I obtained articles with Ramon Burke, now a judge of the Compensation Court of New South Wales. M A Simon and Co was a tiny firm by today's standards. Two partners and four articled clerks. After graduation I moved to Hickson, Lakeman and Holcombe before proceeding to the Bar. There were three capital partners. But it was a big firm at that time, with serried rows of solicitors and clerks. I was an early version of in house counsel.

All of the current Justices, learned their law and the highly practical things of a legal life, in close contact with the principals of their firms and with daily consultations with a wide range of clients. A few clients (very few in my case) were rich. Most were people of extremely modest means. Often we knew that the client could not foot the bill at full rates, or at all. They were different days. The ethos of Australia's legal profession was like that of the doctors of old. Smaller scale. More old-fashioned. Many fees waived. Mega-firms did not exist. Our own incomes were small. I started articles on £6 a week.

In that environment it was natural and common for young lawyers to perform work voluntarily for the needy as part of their ordinary duties. After my time as President of the Sydney University Students' Council I acted in Hickson Lakeman as honorary solicitor for the SRC. This was the time of the Vietnam War. The Council for Civil Liberties soon piled onto my desk what we would now call pro bono work, and later on the desk of my brother David. We did it gladly. The cases commonly involved defending causes that seemed just:

- The unrepresented invalid pensioner sent to gaol without a fair hearing¹;
- The students arrested in Wynyard Square, Sydney, protesting against our involvement in Vietnam and the National Service lottery;
- The Aborigines in Moree asserting their right to go upstairs at the cinema. We wheeled out Gordon Samuels for that one. The Bar in those days was ever ready to give support free of charge².

¹ *Ex parte Corbishley; Ex parte Locke* (1967) 67 SR (NSW) 396 (CA).

² See (2002) 76 ALJ 82.

TODAY

Now, much has changed. The top 20 firms in Australia account for 80% of the nation's market for commercial legal services. Two years back their earned fee revenue was in excess of \$2.5 billion³. Now they are said to be intensifying a push into the Asia-Pacific region to boost their revenue base. This move offshore is not explained as bringing high standards, new techniques and justice to other countries. It is explained on the basis that "the top six are punching each other up". Apparently you have to move offshore if you are going to increase market share⁴. Today the major law firms in Australia employ thousands of personnel. The top six each have between 500 and 1,000 lawyers working for them⁵.

It is no use a person like me lamenting the passing of the good old days. The days when the Australian legal profession was not so profit oriented. The days of highly personal involvement with a wide mix of clients of modest means. The days when every lawyer did a range of work and *pro bono* were unknown words because fee waiver was such a common fact of life. The days of modest

³ H Koops, "Should Major Law Firms Have a Social Conscience" (2001) 5 *University of Western Sydney Law Review* 127.

⁴ Cited P Gibbons, "Law: Global Pitch for Fees Growth", *Business Review Weekly*, Vol 23 No 37, 20 February 2002.

⁵ Koops, above n 3, 127.

premises before marble and glass became the norm. Those good old days also had their faults - especially the lack of public legal aid and the unjust state of the law before⁶ the High Court's landmark decision in *Dietrich*⁷ on representation in criminal trials.

Self-evidently, it is desirable that Australian law firms should include in their services a sizeable pro bono component. The advantages of doing so go far beyond salving the "social conscience" of lawyers⁸. It affords a variety of challenges to the highly talented young lawyers who need occasional rotation from a six trolley commercial dispute. It reminds them of the imperative demand for justice that may originally have sparked their interest in the profession of law. The righting of wrongs. The redress of discrimination. The protection of the underdog. Upholding the law against the strong and the powerful. Is this not why we were all, one day long ago, attracted to the law? We must make sure that we do not lose our direction and forget that original impulse.

The big firms will not fade away. Nor should they. In the global economy, Australia's big legal firms are, in any case, small beer. The fees they charge are said to be on average a quarter or a

⁶ *McInnis v The Queen* (1979) 143 CLR 575.

⁷ *Dietrich v The Queen* (1992) 177 CLR 292.

⁸ Koops, above n 3, 127.

third of the levels charged in Britain and the United States⁹. Perhaps this is why some of the big overseas firms will not amalgamate with our local big league. Believe it or not, by world standards, Australian lawyers just do not charge clients enough.

So as a citizen, I applaud pro bono commitment by the legal firms and individual lawyers at the Bar and elsewhere. It is not an answer to systemic faults in the system. But it is the least that lawyers should do to maintain their own credibility and the credibility of the system of justice that they help to deliver. That system depends on the survival of liberal democracies committed to justice for all people¹⁰. Lawyers have a definite interest in its survival.

Nor do I join with those who claim that a few hours pro bono, snipped out of a busy commercial practice, is worthless tokenism. I do not go along with the view that it would be better if the big firms gave the equivalent money to public law centres, neighbourhood advisory bodies or formal legal aid. But it is true that the diversion of so much legal talent into today's huge firms that, of necessity have urgent economic imperatives to make a lot of money to survive, has the potential to alter fundamentally the character of the Australian legal profession. Is this why the number of lawyers in

⁹ Gibbons, above n 4.

¹⁰ Koops, above n 3, 129.

suburban and regional Australia is declining and why those who are there are aging, the old fields of legal work often drying up¹¹?

A tectonic shift is happening in the law. It is not confined to Australia¹². The plates will not move back. Every now and again it is necessary, in the hurly burly of economic competition, for someone to raise their voice. To remind us all that observance of law depends upon acceptance by our fellow citizens. That law must somehow continue serve them - all of them - in acceptable ways. The large and growing army of self-represented litigants before every court of the land, is a daily demonstration that our delivery of legal services is failing in important respects. It is not failing in every case. Some people just prefer to represent themselves. Some have lost faith with lawyers. Some have no case. Yet, despite this, our delivery of legal services is failing in a sufficient number to cause us to be anxious¹³. At least it is enough to cause anxiety for those who, relieved of the economic dynamics, can see the whole panorama of the law, as I can. So I lift my voice.

¹¹ "Lawyers in Country Areas" (2002) 76 ALJ 84.

¹² A T Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (1993). See M D Kirby, "Has the Profession Lost Its Soul", *Through the World's Eye* (2001) 197; K Edwards, "Found! The Lost Lawyer", 70 *Fordham Law Review* 38 (2001).

¹³ cf *Cameron v The Queen* [2002] HCA 6 at [96]-[98].

AWARDS

We live in an age of awards. Oscars. Logies. Emmys. Mardi Gras. Knighthoods are gone. But in egalitarian Australia, awards are in. The Australian Law Awards honour pro bono work by lawyers and best work in particular fields. There is a prize for the "Best Boutique" firm, the best International Law Firm, and the Best Australian Law Firm. I was disappointed to see that there is no prize for "Best Judge". Modesty restrains me from saying why.

If the Australian Law Awards are no more than a pat on the back for a few well heeled lawyers, given at a top hotel by others in the same group, they are part of the problem. Where, some will ask, is the award for the lawyer who has helped to correct a really serious miscarriage of justice this year? Where the award for the lawyer who made the biggest contribution to law reform or legal scholarship? Where, as such, is the award for the lawyer who helped women, Aborigines, children, prisoners, refugees gays or others to overcome discrimination?

But if the awards given tonight reflect the enduring commitment of the Australian legal profession to skilled lawyering, innovative services, assistance to those who are in need of legal advice, steadfast care for the client in peril and an enduring dedication to justice, then they deserve our applause.

The bottom line is that law is not just a business. Never was. Never can be so. It is a special profession. Its only claim to public respect is the commitment of each and every one of us to equal justice under law.

There is an award that every Australian lawyer can aspire to. It is hard to win. It requires long hours of devotion and care. But when it is won, it is special. It is the prize of respect and gratitude of the ordinary client for a job done with skill, courtesy and at no more than proper cost. Every lawyer, every day, should endeavour to win that prize. It does not usually come with a glittering ceremony. But in our hearts we know it is the most precious award of all.

To those who win Australian Law Awards and those who have been nominated, I offer warm felicitations. To those who, day by busy day, strive to win the prize of which I have spoken, I say a citizen's grateful thanks.